KBA Visa®
Rewards Card

Carry the Card of Distinction and get Rewards, Benefits, and Value!

PLUS: Show your support for the Kansas Bar Association.

Apply today to receive these exclusive member benefits:
- A low introductory APR* on Purchases and Balance Transfers for the first six months, and then a competitive variable rate
- Rewards! Accumulate points and use them for reward items of your choice
- No annual fee!
- Enhanced Visa benefits and privileges

Additional Member Benefits:
- Zero Liability Coverage**
- $300,000 Travel Accident Insurance
- 25 day interest free period on all purchases
- and more

Apply in Convenience:
Visit commercebank.com/kba or call our Customer Service Center at 1-800-453-2265

Disclosures:
* Benefits are subject to change without prior notice.
** For full rate information see important disclosures at commercebank.com/kba.
** Customer must notify Commerce Bank within 60 days of receiving statement with unauthorized account activity.
Focus

Paradigm Shifts in Search and Suppression Law
By Kathryn Gardner

Traffic Stops and Normal Incidents Thereto
By John J. Knoll

Items of Interest

8 2010 KBA Officers and Board of Governors Elections

12 KBA LRE Committee Debuts “The Short Story of Sam Snead’s Search at School: A 4th Amendment Adventure”

19 Lawyers in Need

20 KBA Committees and Sections Seek Volunteers

43 Court Closures and Involuntary Unpaid Leave of Nonjudicial Personnel

Regular Features

4 CLE Docket

6 President’s Message

7 Young Lawyers Section News

14 The Diversity Corner

15 Law Students Corner

16 A Nostalgic Touch

17 Members in the News

18 Obituaries

21 Law Practice Management Tips & Tricks

39 Appellate Decisions

42 Appellate Practice Reminder

47 Classifieds
APRIL

Thursday, April 1, Noon – 1 p.m.
Ethical Issues When Working Online
Brown Bag Ethics (lunch included)
  Eric G. Kraft, Duggan Shadwick Doerr & Kurtbaum 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, Forker, Suter & Rose LLC, and Topeka Area Bankruptcy Council Inc.

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

MAY

Friday, May 7, 9 a.m. – 4:20 p.m.
Intellectual Property Institute
  DoubleTree Hotel, Overland Park
  Co-sponsored by R2 Fact, CT Corsearch, KC Legal, Thomson Compumark, Stinson Morrison Hecker LLP, Scitemex, Sonnenschein Nath & Rosenthal LLP, Hovey Williams LLP, Shook, Hardy & Bacon LLP, Erickson Kellner Derusseau & Kleypas LLC, and Lathrop & Gage LLP

Wednesday, May 12, Noon – 1 p.m.
Handling Workers Compensation Cases Under the “Strict Construction” Standard
  Jeffrey W. Deane, Allmayer & Associates P.C., Kansas City, Mo.
  Telephone CLE

Wednesday, May 19, Noon – 1 p.m.
Media Savvy Litigation in the Internet Age
  David Margules, The Margules Communications Group, Dallas
  Ethics Telephone CLE

Wednesday, May 26, Noon – 1 p.m.
Interaction of Common Aspects of Military Law with Civilian Law
  Jason P. Oldham, Kansas Judicial Center, Topeka
  Telephone CLE

Friday, May 28, 9 a.m. – 3:45 p.m.
Criminal Law
  Airport Hilton, Wichita

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

HAVE YOU BEEN RECEIVING YOUR WEEKLY KBA eJOURNAL?

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

If you have not been receiving the eJournal, it may be because we do not have an up-to-date e-mail address for you. Please contact KBA Member Services to update your contact information by phone at (785) 234-5696 or via e-mail at lmontgomery@ksbar.org.
OFFICERS
John D. Jurcyk
Roeland Park
President
James D. Oliver
Overland Park
President-elect
Daniel H. Diepenbrock
Liberal
Secretary-Treasurer
Sarah Bootes Shattuck
Ashland
Immediate Past President

BOARD OF TRUSTEES
Robert M. Collins
Wichita
James C. Dodge
Sublette
Kenneth J. Eland
Hoxie
Joni J. Franklin
Kansas City, Kan.
Terence E. Lesboith
Lawrence
David K. Markham
Pawnee
Edward J. Nazar
Wichita
Randall J. Pankratz
Newton
H. Douglas Pilzgraf
Wilmington
Hon. Bonnie L. Swary
Ellsworth
J. Ronald Vignery
Goodland
Kenneth W. Wasserman
Salina
Hon. Evelyn Z. Wilson
Topeka
Soni M. Hill
Wichita
Young Lawyers Representative
Katherine L. Kirk
Lawrence
Kansas Association for Justice
Representative
Susan G. Saidian
Wichita
Kansas Women Attorneys
Association Representative
Vaughn L. Burkholder
Overland Park
Kansas Association of Defense
counsel Representative
Michael P. Crow
Leavenworth
Kansas Bar Association
Representative
David J. Rebein
Dodge City
Kansas Bar Association
Representative

EXECUTIVE DIRECTOR
Jeffrey J. Alderman
Topeka

MANAGER, PUBLIC SERVICES
Meg Wickham
Topeka

KANSAS BAR FOUNDATION

...serving the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, and by enhancing public opinion of the role of lawyers in our society.

Kansas Law Center
1200 SW Harrison St.
Topeka, Kansas 66612-1806
Telephone: (785) 234-5696
Fax: (785) 234-3813
Web site: www.ksbar.org

OFFICERS
John D. Jurcyk
Roeland Park
President
James D. Oliver
Overland Park
President-elect
Daniel H. Diepenbrock
Liberal
Secretary-Treasurer
Sarah Bootes Shattuck
Ashland
Immediate Past President

BOARD OF TRUSTEES
Robert M. Collins
Wichita
James C. Dodge
Sublette
Kenneth J. Eland
Hoxie
Joni J. Franklin
Kansas City, Kan.
Terence E. Lesboith
Lawrence
David K. Markham
Pawnee
Edward J. Nazar
Wichita
Randall J. Pankratz
Newton
H. Douglas Pilzgraf
Wilmington
Hon. Bonnie L. Swary
Ellsworth
J. Ronald Vignery
Goodland
Kenneth W. Wasserman
Salina
Hon. Evelyn Z. Wilson
Topeka
Soni M. Hill
Wichita
Young Lawyers Representative
Katherine L. Kirk
Lawrence
Kansas Association for Justice
Representative
Susan G. Saidian
Wichita
Kansas Women Attorneys
Association Representative
Vaughn L. Burkholder
Overland Park
Kansas Association of Defense
counsel Representative
Michael P. Crow
Leavenworth
Kansas Bar Association
Representative
David J. Rebein
Dodge City
Kansas Bar Association
Representative

EXECUTIVE DIRECTOR
Jeffrey J. Alderman
Topeka

MANAGER, PUBLIC SERVICES
Meg Wickham
Topeka

The Kansas Bar Association is pleased to announce the creation of the Appellate Law Section. The section’s purpose is to promote and develop CLE programs devoted to appellate law, promote the interaction among Kansas appellate judges and practitioners, and assist attorneys who regularly practice (and judges who preside) in Kansas and federal appellate courts. To join the Appellate Law Section, go to www.ksbar.org/membership/sections or call (785) 234-5696.

For more information, contact Lisa Montgomery, member services director, at lmontgomery@ksbar.org or (785) 234-5696.

KBA Announces New Appellate Law Section

Call for Section Officers and Volunteers

KBA Sections rely heavily on volunteers to help develop legislative proposals, CLE offerings, and even newsletters. Whether you serve as an officer or even an at-large member, we are always on the lookout for individuals willing to share their time, talent, and energy.

For more information about volunteering, see the KBA Committee and Section Call Form on Page 20 or contact Lisa Montgomery, member services director, at lmontgomery@ksbar.org or (785) 234-5696.
Attacks on the Judiciary

We are all obligated to recognize and respond to unfounded attacks on our judges and our justice system. Those attacks, whether motivated by politics or otherwise, come in many forms and are often perceived differently by different people. I have been meeting and corresponding with a number of elected district judges who are understandably proud of the great work they do to find and administer justice. Some took offense to the rhetoric employed by those defending the merit selection system in a recent ballot proposal in Johnson County.

The passion exhibited by those on both sides of that issue – those seeking to retain merit selection and those seeking to move to partisan elections – was high. As in too many political campaigns, the language and symbols used by both sides often included sharp-edged hyperbole and oversimplistic sound bites and images.

Although the Kansas Bar Association (KBA) has long-supported merit selection of judges, we had no involvement in that local campaign. In hindsight, some of the political tactics used by those seeking to keep merit selection in Johnson County could reasonably offend elected judges. That is regrettable and any offense was unintentional.

The KBA has been poised to defend individual judges from unfair attacks. Although as an organization, the KBA had not focused on referendum campaigns like the one in Johnson County, I promise that we will be more sensitive to campaign language used by all sides, whether in retention campaigns, individual election campaigns, or referenda. We will, and should, respond when appropriate to advocate the deserved respect for our excellent Kansas judges, courts, and legal system.

Apparently, we will need to be especially vigilant this year in monitoring a political campaign aimed at unseating one of elected judges in Johnson County. I promise that we will be more sensitive to campaign language used by all sides, whether in retention campaigns, individual election campaigns, or referenda. We will, and should, respond when appropriate to advocate the deserved respect for our excellent Kansas judges, courts, and legal system.

We are all obligated to recognize and respond to unfounded attacks on our judges and our justice system. Those attacks, whether motivated by politics or otherwise, come in many forms and are often perceived differently by different people. I have been meeting and corresponding with a number of elected district judges who are understandably proud of the great work they do to find and administer justice. Some took offense to the rhetoric employed by those defending the merit selection system in a recent ballot proposal in Johnson County.

The passion exhibited by those on both sides of that issue – those seeking to retain merit selection and those seeking to move to partisan elections – was high. As in too many political campaigns, the language and symbols used by both sides often included sharp-edged hyperbole and oversimplistic sound bites and images.

Although the Kansas Bar Association (KBA) has long-supported merit selection of judges, we had no involvement in that local campaign. In hindsight, some of the political tactics used by those seeking to keep merit selection in Johnson County could reasonably offend elected judges. That is regrettable and any offense was unintentional.

The KBA has been poised to defend individual judges from unfair attacks. Although as an organization, the KBA had not focused on referendum campaigns like the one in Johnson County, I promise that we will be more sensitive to campaign language used by all sides, whether in retention campaigns, individual election campaigns, or referenda. We will, and should, respond when appropriate to advocate the deserved respect for our excellent Kansas judges, courts, and legal system.

Apparently, we will need to be especially vigilant this year in monitoring a political campaign aimed at unseating one or more justices of our Supreme Court. We all have the right to exercise our opinions and to cast our individual votes. I believe we have a responsibility, however, as a profession and individual lawyers, to constantly remind our friends and neighbors that judges are bound to follow the law, not the political whims of the day. If there are unfair, misleading, or personal attacks, the KBA will respond.

Work-Life Balance

In her February column, Young Lawyers Section President Jennifer Hill wrote a very nice column titled “Work-Life Balance?” Her focus was on younger lawyers and how technology can make life easier. I agree with several of her observations and conclusions, but think work-life balance has always been an issue. I also believe that while technology is essential these days, it can become its own problem.

About 15 years ago, we asked Judge John Lungstrum if he would mediate a high profile, very difficult commercial case that was ready to go to trial. I will never forget his answer: He was willing to devote as much time in three days as he could, but he would not miss one of his daughter’s sporting activities scheduled the second evening. The first night of the mediation, we worked in the courthouse until about 1 a.m. The second night he gave us homework and left promptly at 5:30 p.m. in order to attend her game. The case settled on the third day. Sometimes the pendulum that Jennifer described moves day-to-day. I learned a good lesson about priorities and how to balance competing interests.

In 1991, our family moved into the house we still occupy. My office in Overland Park was only a mile away and that was on purpose. When my older son was playing baseball throughout his school years, I helped with the team. Baseball season is a long one and between practices and games takes a lot of time. I could easily leave work early for baseball only to return later to finish my work. Times change and because of technology, living close to the office is no longer necessary.

I am writing this column on a plane while heading home after watching my younger son’s KU lacrosse team cap a weekend road trip by beating Baylor. Unfortunately, I had to miss my daughter’s volleyball tournament. However, technology is a wonderful thing. One of the volleyball moms was kind enough to text me scoring updates every couple of points. It was almost as good as being there. Similarly, with my BlackBerry and netbook, I was able to get some office work done as well. At home, I access the office remotely so I don’t have to go back physically.

While technology is a good tool, it is not the ultimate answer. We need to balance between the good use of technology and hyperconnectivity. We all know of people who are always “plugged in” and respond to e-mail within minutes of receipt. In an article published recently in the International HR Journal, the author warns of the need for people to “disconnect from time-to-time” and “turn off and tune out.” This is good advice – we all need time off to recharge. It would be a mistake to allow technology and the ability to work from home to become an impediment to family time. I think, like Jennifer, we all struggle with these choices throughout our careers.

(continued on page 7)
I’m a Partner, Now What?

By Jennifer M. Hill, McDonald, Tinker, Skaer, Quinn & Herrington P.A., Wichita

On December 17, 2009, the directors of my firm held their monthly meeting. And they announced to me shortly afterwards that I would become one of them – a partner! Most young lawyers in private practice have a goal of eventually attaining partnership, and I was certainly no different. Obviously, I called my husband, my parents, and my big brothers to tell them all about it. It’s such an exciting achievement and a wonderful reward after years of hard work.

But as soon as the next day, I started thinking, now what? Obviously, I can’t abandon all of the cases I was previously working on to go pursue my own ventures. I can’t stop working hard. In fact, not a lot changes overnight. But if you aren’t careful, as a young partner, if nothing changes, have you really assumed the leadership role that you have been asked to fulfill?

A Few Items

By the time you read this, I will be three-fourths of the way through my presidency. It has flown by and I have enjoyed working with so many Kansas lawyers and judges on various issues. There is a saying at bar leader meetings: Bar organizations are often president-proof. For the KBA, that is true. This organization is powered by really top quality, enthusiastic volunteers and excellent staff. The work goes on regardless of who happens to have a title. The president can tweak a few things, start some new initiatives and talk about what is happening, but the real work is being done at the committee and section levels, year in and year out. Thanks to all of you who do such a great service for the KBA.

I had the opportunity at the ABA mid-year meeting to attend a workshop titled “Practical Pointers for the New Partner.” This workshop focused on several issues to consider outside of the most obvious pressure of becoming a rainmaker as a partner. The tips were broken down into five larger categories. So for all the young partners out there, consider these recommendations. For those of you working towards partnership, incorporate as many of these ideas as you can into your work. Your bosses will certainly notice the maturity that you bring to the table when it comes time for them to take a vote on you.

1. Have a business plan. If you haven’t already created a business plan for yourself, now is the time. Most associate attorneys are so busy they never take the time to write down their goals, interests, and a long-term plan. Now more than ever, as a young partner, you are committed to a career path. Create defined ascertainable goals for yourself, including where you see yourself in five, 10, and 15 years. If you find that one practice area is more of a calling than another, create a plan as to how you will transition your practice to more work in the desired area. This includes learning how to delegate the less desirable work to the associates and paralegals. In addition, your business plan should also include personal goals for skills you want to achieve and the necessary work you want to do in the community, outside of the law. You are the only one in control of your career.

2. Think like an owner. “Thinking like an owner” means more than just bossing around the associates. You should be strategically looking at opportunities to cross-market within your firm. Sit down with your firm accountant and figure out what the monthly billing reports actually mean. Understand where the money for overhead is spent and research ideas to reduce these costs. Each of us have different gifts and interests, consider what you bring to the table and what you can provide for consultation purposes for the firm.

3. Be Ethical. Chances are, if you have spent the last five to seven years working at a firm and they offer you partnership, you already have a reputation for honesty and an ethical nature. Now more than ever, it is vital that you are ethical in all of your dealings. As a partner, your fellow partners trust you with their clients, their money, and an infinite amount of confidential information. You are now a fiduciary within the business. You can never repair the damage to your reputation if you act in a manner that breaks that trust. If you ever question a decision you are about to make, pause and consult another attorney, preferably one outside your firm. You will never regret taking that extra moment to make sure you stay on the right track.

4. Client Management. Now that you are a partner, you need to recognize that you will have more direct contact with clients. Ask one of the “rainmakers” at the firm if you can shadow them in a few client meetings. Learn what you can from other partners about how to prepare for client meetings.

(Continued from Page 6)

Highs and Lows

Former KU coach, Roy Williams, recently observed that the joy that he experiences is not nearly as high as the lows are low. Lawyers are like that too; perhaps even worse. Unlike basketball coaches, lawyers have to first assess whether they won or lost. With so few trials, favorable decisions on motions are some of our only opportunities to proclaim clear victory. Otherwise, we are always trying to determine whether our efforts were good enough to be counted as a win. This often requires predicting a whole variety of unknowns: How our theory will be received, whether the evidence is admitted, how a jury will react, etc. In negotiations, we are always worried about whether we left money on the table for our clients. Lawyers, in my experience, often tend to be too hard on themselves. Many good results are often tempered with “what ifs.” While I sometimes disagree with him, I think Coach Williams had it right when he concluded that “[y]ou need to appreciate the good times a heck of a lot more than everybody does.” I think we should all try to follow his advice.

Midterm Report Card

By the time you read this, I will be three-fourths of the way through my presidency. It has flown by and I have enjoyed working with so many Kansas lawyers and judges on various issues. There is a saying at bar leader meetings: Bar organizations are often president-proof. For the KBA, that is true. This organization is powered by really top quality, enthusiastic volunteers and excellent staff. The work goes on regardless of who happens to have a title. The president can tweak a few things, start some new initiatives and talk about what is happening, but the real work is being done at the committee and section levels, year in and year out. Thanks to all of you who do such a great service for the KBA.
**Candidates for Kansas Bar Association Officers Positions**

**President:**
Glenn R. Braun

**President-elect:**
Rachael K. Pirner

**Vice President:**
Lee Smithyman

**Secretary/Treasurer:**
Dennis Depew

**Candidates for Kansas Bar Association Board of Governors**

**District One:**
Kip A. Kubin

**District Two:**
Paul T. Davis

**District Seven:**
Holly A. Dyer
J. Michael Kennalley

**District Nine:**
David J. Rebein

---

**Contested Position — District Seven**

**Holly A. Dyer,** of Wichita, is a partner with Foulston Siefkin LLP where she practices in the area of business and commercial litigation. She graduated Order of the Coif from the University of Kansas School of Law in 1994 and received her journalism degree from Wichita State University in 1988. She is a member of Foulston’s recruiting and ethics committees and is one of three attorneys in charge of firm’s Summer Associate program.

Dyer has been active in the Kansas and Wichita bar associations throughout her career. She serves as chair of the 2010 KBA Annual Meeting Planning Task Force and has chaired the KBA Health Law Section. She is currently completing her two-year term on the WBA Board of Governors and chairs the WBA Civil Practice Committee. Dyer has chaired the WBA Law in Education and Professional Diversity committees and is also a member of the WBA’s Ethics and Grievance Committee. In 2007, she received the WBA President’s Award. She also serves on the University of Kansas School of Law Board of Governors.

In her personal time, Dyer shuttles her many children to scout meetings and various sports-related activities, and is also training for a spring marathon. Dyer has recently took on the
very challenging and rewarding job of being her daughter’s Girl Scout troop leader.

Mike Kennalley, of Wichita, is a shareholder in Martin & Churchill Chrd. He graduated from Washburn University School of Law in May 1976, and has been in private practice since then. His areas of practice include commercial litigation, bankruptcy, employment, and health care law.

He served on the Wichita Bar Association (WBA) Board of Governors from 2001 to 2003, was later secretary-treasurer, and is currently completing his term as president.

He serves on the WBA Bar-o-Meter, Bankruptcy, Civil Practice, CLE, Executive, and Lawyers Assistance committees. He has been on the WBA Nominating Committee and is a veteran of eight Wichita Bar Shows.

He has been a member of the Kansas Bar Association (KBA) Paralegals Committee (formerly the Legal Assistants Committee) since its inception. He chaired the committee from 1999 to 2007 and serves on the KBA Paralegal Certification Task Force. He was the principal author of the “Plan for KBA Voluntary Certification of Paralegals,” which is under consideration by the Kansas Supreme Court. He was co-chair of the 2007 KBA Annual Meeting Planning Task Force and is a member of the 2010 Task Force. He is a member of the KBA Bankruptcy and Insolvency and Litigation sections.

Kennalley is a charter member of the Wesley E. Brown American Inn of Court and serves on the Executive and Program committees, a member of Kansas Association of Defense Counsel, and is on the certifying board of National Association of Legal Secretaries. He is secretary and on the board of Make-A-Wish Foundation of Kansas Inc.

Glenn R. Braun, of Hays, is a partner at Glassman, Bird, Braun & Schwartz LLP, where he has practiced law for the past 28 years. He represents plaintiffs in personal injury actions and handles domestic cases, felony criminal defense, and other areas associated with the general practice of law. He serves as the city of Hays prosecutor and was previously elected to two terms as Ellis County attorney.

Braun is the current president-elect of the Kansas Bar Association. He previously served as vice president and currently serves on the association’s executive committee. Prior to being elected an officer, he served two terms as the District 10 Governor.

Braun is a graduate of Kansas State University and received his juris doctorate, with honors, in 1981 from Washburn University School of Law, where he was the Student Bar Association president. He is a member of the Ellis County Bar Association, previously serving as president and secretary/treasurer.

He was twice-selected by the Supreme Court Nominating Commission for a position with the Kansas Court of Appeals. He was appointed to the Kansas Racing & Gaming Commission in 2005 and reappointed in 2008, where he serves as vice chair and chief hearing officer.

Braun currently serves on the State Court Appointed Special Advocates board and is serving his second term as president of the Thomas More Prep School board. He has held a variety of positions within the community, including board of directors for both Big Brothers Big Sisters and St. John’s Rest Home Endowment Association. He is presently chairman of the finance council for Immaculate Heart of Mary Parish in Hays.

He has taught criminal law, criminal procedure, and introduction to law as an adjunct professor at Fort Hays State University and has also participated in numerous presentations dealing with a variety of legal issues.

Rachael K. Pirner, of Wichita, is a member of the Triplett, Woolf & Garretson LLC law firm. Her areas of practice include trust and probate litigation, as well as assisted reproductive law.

She currently serves as vice president of the Kansas Bar Association (KBA) and serves on its executive committee. Pirner has chaired the KBA Litigation Section and has also served on the KBA CLE, Nominating, Long Range Planning, and Fee Dispute Resolution committees.

She is also active with local bar activities. She has been on the Wichita Bar Association’s Legislative, Public Relations, Probate (chair), Diversity, Unauthorized Practice of Law, and Nominating committees.

Pirner has been active in the Wichita Women Attorneys Association (WWAAA) since she graduated from the University of Nebraska School of Law in 1989. She has held all offices
Lee M. Smithyman, of Overland Park, practices corporate and insurance litigation with Smithyman & Zakoura Chtd. He earned his Bachelor of Science from Carnegie Mellon University in 1970. In that year, he also received his master’s degree from Carnegie Mellon’s Tepper School of Business. After serving four years in Germany as an Army officer in the Air Defense Artillery, he returned to Washburn University School of Law, where he graduated cum laude in 1976.

Smithyman is admitted to practice in Kansas, Missouri, the U.S. district courts in Kansas and Missouri, the Tenth U.S. Circuit Court of Appeals, U.S. Tax Court, and the U.S. Supreme Court.

He is a member of the Wyandotte County, Johnson County, and Kansas bar associations.

He is a certified arbitrator and mediator with the American Arbitration Association and is board certified in civil litigation by the National Board of Trial Advocacy. He is a master emeritus with the Earl E. O’Connor American Inn of Court, a Tenth Judicial District Nominating commissioner, and a member of the Johnson County Ethics Committee.

He has received the Missouri & Kansas Super Lawyer designation in business litigation each year since 2005, has been inducted into the American Trial Lawyers Association recognizing recognition as one of the top 100 trial lawyers in the state, and enjoys a Martindale-Hubbell AV rating.

Dennis D. Depew, of Neodesha, has been in private practice with the Depew Law Firm since 1983. His primary practice includes family law, estate planning, real estate, corporate, municipal, and alternative dispute resolution. His family's law firm recently completed its 57th year of service to the southeast Kansas area.

He received his Bachelor of Science in business administration in 1980 and his Juris Doctor in 1983 from the University of Kansas.

Depew is a member of the Wilson County, 31st Judicial District, and Kansas bar associations.

He is admitted to practice with the Kansas Supreme Court, U.S. District Court for the District of Kansas, Tenth U.S. Circuit Court of Appeals, and the U.S. Supreme Court.

Depew has been a member of the Kansas Board of Discipline of Attorneys since being appointed by the Kansas Supreme Court in 1999. He has served on a number of KBA committees, including Interest on Lawyers’ Trust Accounts, Nominating, Family Law, ADR, and CLE committees. He was elected to the KBA Board of Governors in 2005 representing the Southeast Kansas region and is a Kansas Bar Foundation fellow.

He is an approved mediator by the Kansas Supreme Court and an approved domestic case manager in the 11th, 13th, 14th, and 31st Judicial Districts. He is an approved CLE presenter of practical ethics for attorneys.

Depew is a 15-year member and past president of the USD 461 Board of Education. He has been a member of the Kansas Association of School Boards (KASB) board of directors and the Kansas Association of School Attorneys. He has spoken at KASB conventions and seminars on school law and negotiation issues and is a member of the National School Boards Association Federal Relations Network.

Depew is active in local community and civic organizations and was a co-founder of the Neodesha Educational Foundation and the Neodesha Alumni Association Scholarship Fund. He manages the Griffith Foundation scholarship program and is the managing trustee of the Reece Charitable Trust.

Kip A. Kubin, of Kansas City, Mo., is a senior managing member in the law firm of Bottaro, Morefield & Kubin L.C. He has built a successful practice primarily in the areas of workers’ compensation, employment, Native American, administrative, and personal injury law.

Kubin has successfully represented clients through all phases of litigation involving jury and court trials on both the state

SECERTARY-TRESURER

Dennis D. Depew

Lee M. Smithyman
and federal levels in Kansas and Missouri. He has argued cases before the appellate courts in Missouri and Kansas, as well as in the Tenth U.S. Circuit Court of Appeals. He has also handled cases in the administrative courts of Kansas and Missouri, the Bureau of Indian Affairs, the National Indian Gaming Commission, and the NCAA.

He completed his bachelor’s degree at the University of Kansas in 1980. He earned his juris doctorate from the University of Kansas School of Law in 1983.

He has been an active member of the Kansas Bar Association (KBA) since 1983. Kubin has served on the KBA Bench-Bar Committee and has been a member of the KBA Nominating Committee since 1995. He has been actively involved with the National Association of Bar Presidents and has served on the Kansas Workers Compensation Advisory Board.

He is a member of the Johnson County Bar Association, where he served as president from 1993 to 1994.

Kubin speaks frequently at seminars and continuing legal education conferences. As a result of his experience and abilities, he has been selected for the past twelve years by his peers as one of the “Best Lawyers in America,” as well as being named by Kansas City Magazine as one of the 100 Best Lawyers in Kansas City.

**District Two**

**Paul T. Davis**, of Lawrence, is a partner with the law firm of Skepnek Fagan & Davis P.A., Lawrence. He is serving his fourth term in the Kansas House as a representative for the 46th District. Prior to serving with the Kansas Legislature, Davis was the legislative and ethics counsel for the Kansas Bar Association. He also previously served as assistant director for Government Affairs for former Kansas Insurance Commissioner Kathleen Sebelius.

**David J. Rebein**, of Dodge City, is a partner in the firm of Rebein Bangerter P.A. His practice focuses on assisting persons and families of people who have been seriously injured in truck, car, or motorcycle crashes, and commercial litigation.

He has served two terms on the Kansas Bar Association Board of Governors, one term on the Kansas Supreme Court Nominating Commission, and was president of the KBA in 2006.

Rebein is a fellow in the American College of Trial Lawyers and a fellow of the American Bar Foundation. He is a fellow of the Kansas Bar Foundation (KBF) and is a member of the KBF Board of Trustees.

**District Nine**

**Paul T. Davis**

**David J. Rebein**

**I’m a Partner**

(Continued from Page 7)

discuss money matters with clients and get clients in the proper mindset to pay for the firm’s services. Proactively seek out opportunities to meet with clients and discuss their cases with them. Each time you meet with a client, your level of confidence will grow and you will become more likely to develop a rapport that will make clients happy to pay for your work.

5. **Pace Yourself.** Recognize that burnout is a real and serious hazard of the practice. Do not attempt to go from worker bee to the firm’s primary rainmaker overnight. In addition, part of your business plan is to schedule realistic goals out over time, not all at once. Spreading your goals out will help you prioritize those matters that need attention in the immediate future.

Do not get “partner-itis” (commonly known as inflammation of the ego after making partner). If you spend too much time flexing your new muscle, you will not be a long-term success. Remember what got you to your new position in the first place: hard work, dedication to serving your clients’ interests, and your reputation. Your title might change but the core values that make you indispensable to your firm never should.

**Jennifer Hill** may be reached at (316) 263-5851 or by e-mail at jhill@mtsqh.com
The Kansas Bar Association’s Law-Related Education (LRE) committee is thrilled to announce the release date of their latest video project. This Fourth Amendment adventure, will be the fourth law-related education video available on DVD with teaching materials for Kansas middle and high school students.


In “The Short Story of Sam Snead’s Search at School: A 4th Amendment Adventure,” by Kathryn Gardner, KBA LRE committee chairperson, a student witnesses a theft of a teacher’s laptop. The saga centers on the accused student thief, Sam Snead, and his rights when it comes to search and seizure.

The Fourth Amendment to the Constitution says:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

This means the government cannot make unreasonable, warrantless intrusions into areas in which people have legitimate expectations of privacy. Does this right apply to students in school and if so, to what extent?

Bringing the Fourth Amendment to life in a realistic school setting are Topeka students acting out each of the parts including the teachers. Accompanying the video will be a set of teaching aids, including interactive class questions engaging the class in meaningful discussion regarding the Fourth Amendment to the U.S. Constitution.

To reserve your free copy of “The Short Story of Sam Snead’s Search at School: A 4th Amendment Adventure,” contact Meg Wickham, KBA manager of public services at (785) 234-5696 or by e-mail at mwickham@ksbar.org.

Special thanks to the KBA LRE committee, Cair Paravel Latin School, for use of their beautiful facilities; and Drew Roland with Farm Productions for film direction, filming, and production; and our cast:

**Cast:**

- Katelyn Cook (intelligent student)
- Alex Sharp (confused student)
- Kate Cowger (tattling student)
- Madeline Bush (librarian)
- Hannah Gardner (vice principal)
- Nicholas Pohlenz (guard)
- Jackson Swain (stealing student)
“Nick the Kick” Lowery to Make Keynote

By Susan McKaskle, KBA communications director

Naked and Alone with 80,000 people

Like a Hall of Fame kicker in a rowdy, rocking 80,000 seat NFL stadium during a windy playoff game on national television, we all wait on our own sidelines for our moments of truth — sometimes, truly alone, nakedly exposed and vulnerable for our defining moments of destiny. We all know we can bring all the focus we need to whatever we have passion for: use that passion to sharpen your focus to a lazer. If we are ready, and if we are properly focused, we can achieve whatever we prepare ourselves for, no matter how isolating and phenomenically intense that moment may be. All outstanding achievers work through enormous adversity. The key distinction is FOCUS: the kicker in all of us must harness his or her passion with focus for those white-hot, crucial moments. Believe in your purpose, believe your cause is just, for when your passion is great, and your focus is unshakably on its target, you can achieve against all odds.

Nick Lowery, Kansas City Chiefs Hall of Fame

The name Dominic Gerald Lowery may not be familiar, but if you are a football fan, you will probably recognize the name, “Nick the Kick” Lowery. Lowery’s perseverance and self-realization took him to success on the gridiron and in his career after those riotous Sundays.

Prior to his football success leading him to become a record-setter and a member of the Kansas City Chief’s Hall of fame, he was cut by eight NFL teams, 11 times. He did not let those cuts stop him. He persevered and enjoyed success.

Lowery received the NFL Players Association’s most prestigious humanitarian award, The Byron “Whizzer” White Award, in 1993. White was an outstanding player in his three seasons. After World War II, he attended Yale Law School and was appointed to the U.S. Supreme Court by President John F. Kennedy in 1962.

As a young boy, Lowery grew to admire his next door neighbor, Justice White. Coincidentally Lowery, grew up in a neighborhood with a number of other U.S. Supreme Court justices as neighbors. In fact, Justice Scalia’s son delivered the Lowery’s newspaper.

Lowery carried his persistence and self-realization from the NFL to earning his Master of Public Administration from the Harvard Kennedy School of Government. He is the only person to work for both Presidents George H.W. Bush and Bill Clinton in the White House Office of National Service. He also worked for President Ronald Reagan in the White House Office of Drug Abuse Policy and was a legislative aide for two U.S. senators. Lowery worked with former Kansas City, Mo., mayor Richard Berkley and other NFL players on anti-drug programs for young people.

Working with young people became a lifetime commitment for Lowery. His persistence and desire to mentor young people empowered Lowery to succeed with his nationally recognized youth development work. Lowery is the founder of two national programs, Native Vision and Nation Building for Native Youth (NBNY). He is currently the foundation director of the National Fund for Excellence in American Indian Education.

The goal of the NBNY is to help Native American youth learn self-awareness, gain personal confidence, and to become empowered in their life. Lowery promotes and conducts programs to help the youth reach these levels in their lives. With these goals they learn to understand others, which leads to team empowerment. Young people learn coping skills and crystallize their future goals with a look to their educational and vocational futures. These skills will help them become future tribal and community leaders.

In conducting these programs for the NBNY and other youth groups, Lowery uses his personal experiences in the NFL to emphasize setting your goals and never giving them up, keep focused and you will succeed.

He leaves you with hope for the future with great ways to reach your goals like “surround yourself with good people,” learn from rejection,” and be ready for your opportunities as they will come”.

Lowery will bring personal experience and motivation to his keynote presentation, “Naked and Alone with 80,000 People,” at the 2010 Kansas Bar Association (KBA) Annual Meeting. He will speak on Thursday, June 10, after the Opening Session welcomes from KBA President Tim O’Brien and Wichita Bar Association President Mike Kennalley. He will be outside the meeting room to greet meeting attendees.

Lowery will be a member of a foursome at the Wednesday golf tournament and will also attend the welcome reception with the Judiciary at the Marriott on Wednesday from 6-8 p.m. He will be available for photos and autographs at this event.

Don’t miss this opportunity to meet a NFL great, humanitarian, and inspirational speaker.
Political Discussions or Heated Debates
By Kelly Lynn Anders

Dear Kelly,
This question is tangentially related to diversity. It concerns politics. I was sitting with a few colleagues at lunch the other day, and someone raised a topic that made me feel uncomfortable. I'm a Republican, and everyone else around the table began to bash my party. They went as far as accusing all Republicans of being racist, sexist, and homophobic. I am none of those things, but I am fiscally conservative, which is why I have retained this affiliation. I have purposely not disclosed my gender or nationality in this question because I am concerned that it could expose my identity; none of my colleagues knows my affiliation because I feel that it is personal. I was always advised not to discuss politics in the workplace, and I did not expect to have to deal with this during lunch. While they were talking, I didn’t know how to handle it, so I kept quiet. Was this the right thing to do? How could I have addressed this issue without getting mired in a political discussion or revealing my personal political position?

Closet Republican

Dear Republican,
It sounds like you were placed in a very awkward position, and your colleagues probably felt they could speak freely because they assumed you were all in agreement. Regardless, this provides an excellent example of why politics and work don’t mix – unless one works in the state Capitol. Political discussions can easily become heated debates, which can lead to hurt feelings that take a very long time to dissipate. Even if all of you shared the same party affiliation, this would not prevent such disagreements. It’s also disheartening to hear that they expressed such harsh, stereotypical views of what “all” Republicans are like. It must have been difficult to hear such criticisms and fear retribution for defending yourself. Your decision to remain quiet is one way to handle it, but you might also consider providing examples that would encourage them to rethink their assumptions without giving away your personal views. As an example, you might have chimed in to say, “C'mon, guys, let's be fair. Everyone respects Gen. Colin Powell, and he's a Republican who is progressive and open-minded. Would we want Republicans to say Democrats are all a bunch of tree-huggers?” This is just one example of how you might add to the discussion and also keep your views to yourself. Ultimately, there are no easy answers – especially where politics are concerned.

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 at www.surveymonkey.com/s/QDG6DM5.

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).
Journey to My Juris Doctor

By Chadron Patton, University of Kansas School of Law

The final months of my law school career have arrived. It's easy to allow memories of the journey traveled to fade as the final destination comes into view. Arriving at a significant moment in life is reason to pause. Remembering the trials and hardships associated with an accomplishment makes the sacrifices seem worthwhile and brings to light the joy of finally reaching the end.

When I decided that I would apply to law school, it was not as a recent undergraduate. I had been out of college and working for six years when I began to explore the possibilities of returning to school. The financial responsibilities that my wife and I faced did not appear capable of withstanding a three-year period where expenses would greatly exceed any income. We had recently purchased our first home and were adjusting to paying a mortgage. We had also just welcomed our first child and a corresponding loss of income. These concerns, in addition to financing an expensive legal education, were daunting. I needed a law school that offered a strong academic environment but that would not send us spiraling into personal bankruptcy along the way.

Fortunately, we had one in our own backyard. The University of Kansas School of Law was only a half-hour drive from our home. The tuition was reasonable, and I had the prospect of receiving substantial financial aid. The law school possessed a respected reputation throughout the Kansas City legal market, and I was confident that if accepted, I would obtain an exceptional and substantial education. I submitted an application in February and received my acceptance a few weeks later in March. I completed the summer working as a full-time financial advisor, but began reducing my work schedule as the start of my first year approached. I felt primed and positive about my second turn at higher education.

Nonetheless, I was overwhelmed at the very beginning by the difficulties associated with returning to a structured academic environment. First day assignments were a foreign concept to me. Spending eight hours reading before I had even attended my first class left me feeling uneasy about what would greet me when classes officially started. When classes did begin, my colleagues all seemed to grasp seemingly complex legal concepts and appeared confident when called upon to speak. The anxiety of my perceived inability to comprehend the material, combined with the stress of managing my extra-curricular responsibilities, left me questioning my decision to return to school. Fortunately, I found support in my legal writing professor, Laura Bond. She helped me to focus on what was important and made me realize that I was not the only one struggling with the difficulties and uncertainties of law school.

Many of my difficulties and uncertainties pertained to the nature of the first-year curriculum. While I understood that the course requirements were necessary in laying the foundation for my future career in law, I did not feel passionate about the majority of the subjects. However, as the year progressed I found myself enjoying statutory courses and as my interests began to take shape, I realized I was not attracted to litigation. With regard to my background as a financial advisor, I had considered both estate and business planning. Many of the first-year statutory courses seemed to have a business foundation, and when I learned that the law school had certificate programs in tax law and business and commercial law, I felt my legal career path had begun to take shape.

The certificate programs not only provide a gateway into these broad subject areas but also afford students the opportunity to explore specific practice areas. While the Business and Tax Law faculty is outstanding in its entirety, the person that most influenced my career decision was adjunct professor Tom Brous. It was while enrolled in his Pension and Employee Benefits class that I discovered the field where I wanted to center my legal education and career. Because I had enjoyed my work as a financial advisor, I was thrilled to find a practice area that would combine my interests from the financial world with my interests in the legal world. And because of the law school’s distinct commitment to this area, I have been afforded the opportunity to expand my sphere of knowledge through Tom’s other classes in Executive Compensation and Global Issues in Employee Benefits. His practical teaching methods, which focus on current legal issues, have helped to instill self-assurance in my emerging legal skills.

I am now at the close of my three-year journey as a law student and am again faced with a new beginning. A beginning that I cannot imagine would look so exciting had I not had the privilege of attending a school that offers such extensive opportunities. I feel secure in my future of law practice and confident in anticipation of what that future will hold. Throughout these three years sacrifices have been made, hardships have been encountered, and victories have been celebrated. The moments to pause, reflect, and bask in the joys of achievement are brief. As I turn my eyes toward my upcoming life in the world of law practice, I will remember to reach back and hold tight to the experiences and wise instruction that laid this path for me.

About the Author

Chadron Patton grew up in Emporia and graduated with distinction from the University of Kansas in 2001 with a Bachelor of Arts in Spanish. After graduation, he will join the Employee Benefits and Executive Compensation practice group of Spencer Fane Britell & Browne in Overland Park. He lives in Shawnee with his wife, Sarah, and sons, Maddox and Cash.
A Nostalgic Touch

The State of Civility and Professionalism in the Bar: Come Get Your Ethics Credit

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

Fellow bar members – mark your calendars – Thursday morning, June 10, as part of the 2010 Kansas Bar Association Annual Meeting, I am organizing a continuing legal education session. But this will not be a typical CLE – I’m not subjecting the attendees to death by PowerPoint or slogging through an outline that would cure insomnia. Instead, I have assembled a panel of state and federal judges, and private practitioners to discuss a topic that is near and dear to us: The state of professionalism and civility in the Kansas Bar. It will be wide open “give and take” on how our fellow bar members treat each other, and whether recent trends showing a decline of civility is something happening in the Wheat State.

The panelists include Judge John Lungstrum, who has a perspective not just peering down from the bench, but from 20 years trying lawsuits in the Kansas courts. I wanted a state court judge as well, someone from the other side of the state, so I asked Judge Kim Schroeder, of Hutchinson. Sometimes civility gets tested in discovery disputes, so I invited a magistrate who’s seen almost everything. Judge Karen Humphreys is on the panel.

Next we needed an attorney who is a member of the American College of Trial Lawyers – someone who has tried a lot of difficult cases yet has a solid reputation for professionalism and civility – that lead me to C. Stanley Nelson in Salina. A true treasure in our profession, he took his oath to practice in 1951 – when trial by ambush was not a cliché – it was daily practice. State and federal discovery rules were adopted over 10 years later.

A plaintiff’s lawyer was key also – these days of television and Internet advertising suggests to the public that the best plaintiff’s attorney is a difficult one – an aggressive one – someone who considers a pit bull as a favorable role model. Yet, it’s my experience that the most successful plaintiff’s attorneys are not from that school. They treat adversaries, witnesses, and court personnel with respect, and receive that in return. So I thought Mark Hutton would be a great addition.

And finally, this panel needed an attorney who represents the newest generation of advocates – and so Paula Langworthy, of Triplett, Woolf & Garretson, will be there also.

But the most important panel member? You. I need your input, perspective, contributions. For the better part of the hour, I’m going to be channeling Phil Donahue, walking around the audience, getting your views, war stories, contributions.

And by 11:05 a.m. on that Thursday, you’ll have your one hour ethics credit and maybe gained something else in the process. Learned a little, laughed a little, and gained a new perspective about this profession we are all a part of. It’s my hope that, for those 50 minutes, you will not have checked your BlackBerry once. Come join us!

About the Author

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

**Changing Positions**

Lauren P. Allen and James P. Maloney have joined Foland, Wickens, Eisfelder, Roper & Hofer P.C., Kansas City, Mo.

Maggie L. Anderson has joined Reynolds & Carghers LLC, Kansas City, Mo., as an associate.

Brooke B. Aziere, Andrew P. Thengvall, and C. Edward Watson II have become partners with Foulston Siefken LLP.

Cydney D. Boler has joined as special counsel. Matthew W. Bish, Jeremy L. Graber, Joshua T. Hill, Eric M. Pauly, Johnathan A. Rhodes, Bradley D. Serafine, and Justan Shinkle have joined the firm as associates.

Russell Berland has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as of counsel, Maria Macoubrie and Denise L. McNabb have joined as associates, and Karen Garrett as a partner.

Jill K. Best has joined McDowell, Rice, Smith & Buchanan P.C., Kansas City, Mo., as a shareholder.

Jeffrey S. Bloskey has joined McCormick, Gordon, Bloskey & Poirier, Overland Park.

Stacia G. Boden, Michael E. Brown, Trinidad P. Galdean, Eric S. Johnson, and Jay N. Selanders have become partners at Kutak Rock LLP. Jessica L. Garner has joined as an associate in the firm's Wichita office.

Jeffrey O. Ellis and Martha A. Ross have joined Spencer Fane Britt & Broene LLP, Overland Park, as partners. Laura J. Bond has joined the firm as of counsel.

Pedro D. Calderon has joined South & Associates P.C., Overland Park.

Michael A. Comisky has joined Disabilities Advocates, Gladstone, Mo.

James D. Conkright has joined Haden Cowherd & Bullock LLC, Springfield, Mo.

Brian A. Coon has joined the City of Wichita as an ADA coordinator.

Jonathan J. DeJong has joined Koch Companies Services, Wichita.

Jeannie M. DeVeny has joined Littler Mendelson P.C., Kansas City, Mo.

Elizabeth L. Dudley has joined Phillips and Associates, Phoenix.

Brian P. Duncan has joined the Office of the Kansas Attorney General, Kansas City, as an assistant attorney general in the criminal division.

Mark R. Euler has become a shareholder at Halbrook Law Firm P.C., Prairie Village.

Brady W. Keith and Jeremiah J. Luebbe have joined Credit Management Services Inc., Grand Island, Neb.

Anthony E. LaCroix has joined Edgar Law Firm LLC, Kansas City, Mo.

Kathryn A. Lewis, Owen K. Newman, and Jennifer E. Shafer have been promoted as partners at Warden Grier LLP, Kansas City, Mo.

Jason M. Lloyd has joined the Law Offices of Stephanie Warmund, Kansas City, Mo.

Blane R. Markley has joined Forbes Law Group, Lee's Summit, Mo.

Salvatore D. Intagliata has joined Monnat & Spurrer Chdh., Wichita.

Ryan D. D'Oll has joined Douthit Frets Rouse Gentile & Rhodes LLC, Kansas City, Mo.

Miranda K. Owens has become a partner at Goodell, Stratton, Edmonds & Palmer LLP, Topeka.

Richard M. Paul III has been promoted to partner at Stueve Siegel Hanson LLP, Kansas City, Mo.

Robert T. Reader has joined Flint Harvest LLC, Manhattan.

Matthew D. Richards has become a member with Barber Emerson L.C., Lawrence.

John L. Snyder has been named managing partner of Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.

Thomas G. Stoll is now with Dunn & Davison LLC, Kansas City, Mo.

Beverly M. Weber has been named partner with Martin, Leigh, Laws & Fritzlen P.C., Kansas City, Mo.

**Changing Locations**

Robert F. Flynn has started The Flynn Law Firm P.A., 303 E. Poplar St., Olathe, KS 66061.

Jeffrey W. Garrett has started Garrett Law Firm, 110 S. Cherry, Ste. 103, Olathe, KS 66061.

Troy H. Gott has started Gott Law LLC, 2024 N. Woodlawn, Ste. 405, Wichita, KS 67208.


Mark J. Lazzo P.A. has moved to 3500 N. Rock Rd., Ste. 300 B, Wichita, KS 66226.

Lara M. Owens has started The Owens Law Firm LLC, 11115 Ash St., Leawood, KS 66211.

William K. Schmidt has moved to 4912 Mission Rd., Roeland Park, KS 66205.

Tracy M. Vetter has moved to 7300 W. 110th St., Ste. 410, Overland Park, KS 66210.

**Miscellaneous**

Martha Jenkins, Washington, D.C., was elected to a five-year term on the Ecclesiastical Trial Court for the Episcopal Diocese of Washington, D.C.

**LAW OFFICES OF**

**SPETH & KING**

Suite 230 R.I. Garvey Bldg.

300 West Douglas

Wichita, KS 67202

e-mail: slatk@spethking.kscoxmail.com

- 35% Referral Fees

- All Expenses Advanced

- Settlements or Trial

- All types and sizes of cases

- Proven track record of success

**PERSONAL INJURY**

**WRONGFUL DEATH**

(316) 264-3333

1-800-266-3345
Obituaries

Sally H. Harris
Sally H. Harris, 64, of Leawood and most recently of Loch Lloyd, Mo., died January 9. She was born May 14, 1945, to Andrew and Elizabeth Horne. Harris grew up in Saginaw, Mich., and went to the University of Michigan, where she graduated in 1966 with a Bachelor of Science in economics. After graduating, she taught high school math in Michigan and then Ohio. She graduated with her Juris Doctor from the University of Kansas School of Law in 1978.

She went on to work at the Overland Park firm of Wallace, Saunders, Austin, Brown & Enochs, where she was the firm’s first female attorney and was also one of the first female attorneys in Johnson County. In 1983, she became a partner at the firm. Harris was appointed by the Kansas Supreme Court for seven terms to the Kansas Board for the Discipline of Attorneys.

Harris was preceded in death by her father, Andrew Horne. She is survived by her husband, Brad, of Loch Lloyd, Mo.; her mother, Elizabeth Horne, of Longboat Key, Fla.; two children, Brad Williamson, of Mercer Island, Wash., and Sheri Williamson Swartz, of Loch Lloyd, Mo.; three brothers, David Horne, of Laguna Beach, Calif., Doug Horne, of Alpena, Mich., and Dan Horne, of Providence, R.I.; and four grandchildren.

Hon. Gerald L. Houglan
Hon. Gerald L. Houglan, 77, of Olathe, a retired district judge, died February 8. He was born March 19, 1932, in Olathe to Howard and Lois Houglan. He attended Pittsburg State University for one year, then served in the U.S. Army during the Korean War in the counterintelligence corps for two years. He finished college at Washburn University and obtained his law degree from Washburn University School of Law.

Houglan was an assistant criminal prosecutor in the Johnson County District Attorney’s Office from 1960-67. He served two terms as a state representative in the Kansas Legislature from 1970-75, was school attorney for northeast Johnson County from 1960-69, was housing authority attorney for five years from 1970-75, and spent 17 years in the civil and criminal practice of law. He became a district court judge on January 10, 1977, serving primarily in the criminal court of Johnson County. Although officially retiring in 1995, he continued hearing cases until 2001.

He served on the executive committee of the Kansas Association of District Court Judges. Houglan was a member of the American Bar Association; Kansas Bar Association, where he received his 50-year membership in 2009; Johnson County Bar Association; and the American Legion. He was previously active in the Jaycees, Optimist Club, Chamber of Commerce, Johnson County Navy League board of directors, and served six years as a troop committee chairman for the Boy Scouts of America.

He was preceded in death by his parents and a brother, Robert Houglan. His is survived by his wife, Evelyn, of the home; sons, Mike, Steve, and Blaine Houglan, all of Olathe; daughters, Ellen Houglan, of Kansas City, Mo., and Allison Daylong, of Olathe; brothers, Don Houglan, of Leawood, and David Houglan, of Portland, Ore.; and many nieces and nephews.

Mark Andrew Liter
Mark Andrew Liter, 31, of Carl Junction, Mo., formerly of Nevada, died March 5, 2009. He was born July 14, 1977, in Nevada, to Wilson E. Liter and Susan S. Swager Liter.

Liter grew up in Nevada and graduated from Southwest Baptist College, Bolivar, Mo., in 1999. In 2003, he graduated from the University of Missouri School of Law, Columbia, Mo. He worked for the Warten, Fisher, Lee & Brown law firm in Joplin, Mo., since 2003 and became a partner in 2008. He was a member of the Kansas, Missouri, American, and Jasper County bar associations.

Liter is survived by his wife, Amy, of the home; his three children, Anna Claire, Kate Elizabeth, and Jack Andrew Liter, all of the home; his parents, Wilson and Susan Liter, Nevada; and a sister, Holly Liter; of Nashville, Tenn.■

LARGE TRUCK ACCIDENTS
30 years of experience litigating truck accident cases
DOT safety regulations and standards reviewed
Access to accident reconstruction experts
Referral fee honored

Edward J. Hund
Trial Attorney P.A.
316-685-1747
622 E. Douglas
Wichita, KS 67202

JOIN US FOR THREE DAYS OF CLE!
15.0 CLE credit hours, including 4.0 hours professional responsibility credit
June 9 – 11, 2010
www.ksbar.org
Jim called the Kansas Lawyers Assistance Program (KALAP) confidential helpline on a Tuesday. He had just gotten a second DUI. As he shared his story, it became evident that his drinking had already derailed his marriage. He was in solo practice and between the recession and his erratic office hours, his client base was dwindling precipitously. He wasn’t sure how long he’d be able to keep paying rent to maintain his office. We talked about the need to address his drinking problem and ways to do that. Inpatient treatment seemed the best choice, but it also seemed impossible — Jim had dropped all his health insurance a long time ago. He wasn’t a veteran, was too young for Medicare and wasn’t eligible for Medicaid.

Esther called the confidential KALAP helpline on a Friday. She had just gotten a letter from the disciplinary administrator telling her that an ethical complaint had been filed. I offered to meet with her and we set up an appointment. When we met, we talked about her situation: She was divorced, in a small firm, had no medical insurance, and struggling both personally and professionally. I sensed that she was feeling depressed and overwhelmed. I believed she would benefit from an evaluation and treatment by a mental health professional.

With both Jim and Esther, KALAP was able to offer many services:

- Information about community resources like Alcoholics Anonymous groups, local treatment and outpatient facilities, as well as mental health centers;
- Access to the Resiliency Development Group sponsored by KALAP;
- Partnering with a KALAP attorney volunteer who provides support and encouragement; and
- Various books and materials relating to their personal circumstances.

All of the above services are valuable and helpful — but not enough to effectively address the whole of the problem. Each of them needed additional services that they could not afford and KALAP could not offer. Jim needed inpatient treatment for alcohol addiction and Esther needed a mental health screening and probably medication and therapy.

Jim and Esther are composites of real people we have worked with here at the KALAP. Though Jim and Esther are not actual people, their stories and situations are very real and they highlight a need, as yet unmet, for some type of funding that can help pay for these additional services. We at the KALAP plan to begin meeting this need through the establishment of a separate 501(c)(3) foundation.

Many states have a foundation or trust fund under 501(c)(3) provisions, which is separate from the funding for the lawyer assistance program. They are funded by donations from individual lawyers, as well as from other legal foundations and private companies — most often malpractice insurance companies who see the benefit in helping lawyers before there is a claim. Although procedures vary, most programs use the funds for loans or grants for lawyers who have no resources and need additional services.

The advantages to having a separate fund are many but chief among them are flexibility and confidentiality. The state of Kansas has a stringent purchasing code. The purchasing process may require a lengthy bid procedure and transparency, which is proper for the use of government money, but works against the need for promptness and confidentiality in circumstances like those of Jim or Esther. A separate fund would still need measures to ensure accountability but would allow quick action on a referral from KALAP staff.

Members of the current KALAP board are willing to serve in this additional capacity and we will be seeking other members as well for the foundation board. The Kansas Supreme Court is well aware of the need and has been apprised of the plan to establish this separate foundation.

Nonprofit benevolent organizations are having a tough time right now so it may not seem like the best moment to establish the KALAP Foundation. But (thanks to the assistance of the Kansas Bar Association some years ago) one donation has already been received and we are sure that more are out there — lawyers are truly generous and willing to help their own. Jeffrey Alderman, executive director of the Kansas Bar Association, strongly supports this endeavor and is working with us here at the Kansas Lawyers Assistance Program to make it happen. Anyone wishing to make a donation or to obtain more information is welcome to contact Jeff at (785) 234-5696 or by e-mail at jalderman@ksbar.org or me at (785) 368-8275 or by e-mail at mcdonalda@kscourts.org. 

About the Author

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

FOOTNOTE

1. Some states have a separate loan committee, application forms, and promissory notes.
KBA Committees and Sections Seek Volunteers

The KBA relies heavily on members who volunteer their time, talent, and energy to committees, panels, and sections. The KBA's standing committees and panels function throughout the year, along with task forces appointed for specific tasks. In addition, the KBA has 23 sections that focus on specific practice areas and help develop legislative proposals and CLE offerings. This time of year, we collect information from individuals who are willing to serve on committees, panels, or sections.

Below is a volunteer form that you can use to let incoming KBA President Glenn Braun know of your interest as he considers appointments for the coming year. Section volunteer forms will be forwarded to the appropriate section officers.

KBA Committee and Section Call Form

Please designate which committee/panel you are interested in serving on. If indicating more than one committee/panel, please number your choices for first, second, and third preferences.

( ) Access to Justice
( ) Annual Meeting (Topeka 2011)
( ) Annual Survey of Law
( ) Awards
( ) Bench-Bar
( ) Continuing Legal Education
( ) Diversity
( ) Ethics Advisory
( ) Ethics Grievance Panel
( ) Fee Dispute Resolution Panel
( ) Journal Board of Editors
( ) Law-Related Education
( ) Legislative
( ) Media-Bar
( ) Membership
( ) Nominating
( ) Paralegals
( ) Standards for Title Examination
( ) Unauthorized Practice of Law

Please designate the section(s) to which you belong and are interested in serving as an officer or volunteer, e.g., to help with section newsletters, review legislation, develop CLE programming, etc. Please number your choice to indicate first, second, and third preferences.

( ) Administrative Law
( ) Agricultural Law
( ) Alternate Dispute Resolution
( ) Appellate Law
( ) Bankruptcy & Insolvency Law
( ) Construction Law
( ) Corporate Counsel
( ) Corporation, Banking & Business Law
( ) Criminal Law
( ) Elder Law
( ) Employment Law
( ) Family Law
( ) Government Lawyers
( ) Health Law
( ) Insurance Law
( ) Intellectual Property Law
( ) Law Practice Management
( ) Litigation
( ) Oil, Gas & Mineral Law
( ) Real Estate, Probate & Trust Law
( ) Solo & Small Firm
( ) Tax Law
( ) Young Lawyers Section

Name __________________________________________ Telephone __________________________
Address __________________________________________ KBA/Court # ________________________
City __________ State _____ Zip Code __________ E-mail ________________________________

Please return by May 28, 2010, to
KBA Member Services Director
1200 SW Harrison St.
Topeka, KS 66612-1806
Fax: (785) 234-3813
Interim Report Maps Out Hopeful Next Steps for Electronic Filing

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

E-Filing in Kansas: Interim Report Released

The state revenue numbers continue to disappoint and the judicial branch is still staring down a crisis with impacts ranging from shortened courthouse hours to consolidated districts. Regardless, the Supreme Court Electronic Filing Committee has plowed forward and made its interim report on electronic filing available for download at www.kscourts.org. This document is significant to Kansas attorneys and budget wonks for two key reasons. First, it traces the Herculean efforts of the district courts and Office of Judicial Administration to slash costs by migrating toward standardized case management systems, document imaging, and payment systems throughout 29 of 31 judicial districts. Second, the interim report maps out the hopeful next steps in deploying a cost-saving, uniform electronic filing system in the district courts.

Laying Foundations

The case management system (CMS) for the district courts is the core tool for managing all the data associated with a case — everything from bench notes by the judge to payment of fees and costs. “A CMS – FullCourt – was selected by a previous study committee for implementation in the district courts. Grant funding led to the installation of the FullCourt CMS in 29 judicial districts (103 counties) … .” (Interim Report of the Kansas Supreme Court’s Electronic Filing Committee, 2010, p. 3).

A uniform CMS throughout the state provides economies of scale in support and reporting which benefit both local and state governments (lower costs) while providing better analysis and planning capabilities and dramatically improved access to dockets and pleadings for the public (increased services). Standardizing around the FullCourt CMS also aids deployment of document imaging systems and electronic payment systems. All three components are necessary to fully leverage the benefits of electronic filing.

Recommended Next Steps

The proposal before the Electronic Filing Committee sets out guidelines believed to ensure any electronic filing solution implemented provides the best return on investment. The realistic guidelines are drawn directly from the experience of Shawnee County’s electronic filing pilot project, other states’ initiatives, and the federal court’s efforts with PACER and CM/ECF. Some of the more notable proposals are:

- Electronic filing should not be mandatory in the pilot phase, at least;
- Implementation should be tiered to roll out for largest volume caseloads first;
- Both web portal and volume filing mechanisms should be employed with no or little cost to filers for software and equipment; and
- Electronic filing should not be surcharged above paper filing fees. (Interim Report, pp. 7-8.)

There is, however, the unfortunate matter of cost. In a climate where a full-time court house cannot even be guaranteed, there is little appetite for undertaking a project that requires significant initial investment. One of the usual suspects is mentioned for funding — increased docket fees despite the annual increases that have tripled many docket fees since 2000. State general fund, grants, and allocations on attorney licensure fees are also considerations.

One of the more uneasy issues addressed in the report is the discussion of K.S.A. 20-371 prohibiting any fee for electronic access to district court records. This statute was enacted in response to attempts in 2006 to shut down Shawnee and Johnson counties’ free online access and incorporate their records into the fee-based accesskansas.org. Support for 20-371 was broad across the legal spectrum with attorneys, judges, the press, and victims supporting 20-371.

Perhaps the opposition is not necessarily to fees but, instead, to the fee amount charged by accesskansas.org. Searches are $1 with $1 per record viewed and the fee is assessed to all users. This is in dramatic contrast to the federal system, which provides a “free look” to parties and searches and views are $8 cents per page (capped at $2.40 per document). Similar information through private vendors is in line with the PACER model as well.

The Future is Now

The work left ahead to roll out an electronic filing system for Kansas is daunting but efforts continue. Requests for information have gone out and vendors are setting up to discuss their offerings and prices. As is always the case, money is the largest hurdle to overcome. Tough times seldom reward those who retreat, however. There are many opportunities in this market — vendors hungry for contracts and pressure for leaner and more efficient government to name but two. Now is the best time to plant for a strong harvest.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Collection Attorneys Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.

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

It was a blockbuster year for the Fourth Amendment in 2009. Although the language of the Fourth Amendment remains static, recent court decisions have substantially altered several areas of Fourth Amendment law, impacting both civil and criminal practitioners in Kansas. These include the definition of a search, the scope of traditional exceptions to the warrant requirement, a growing number of special needs cases, and a broader good-faith exception to the exclusionary rule, producing a corresponding expansion of qualified immunity. From initial traffic stops, as addressed in “Traffic Stops: Normal and Abnormal Incidents Thereto,” to suppression of illegally seized evidence, the rules have changed, even beyond the realm of vehicle searches.

Traditional exceptions to the warrant requirement have recently been refined under Kansas law in 2009. The U.S. Supreme Court (U.S. Court) and the Kansas Supreme Court (Kansas Court) both narrowed the search incident to arrest exception, although not identically. The emergency doctrine has also undergone substantial change. What are the current exceptions to the warrant and probable cause requirement in Kansas, and are they the same in Kansas state and federal courts?

In a growing number of cases, the Fourth Amendment’s traditional warrant and probable cause requirement is replaced with a test which balances the governmental against the private interests at stake. These special needs cases are sometimes viewed as exceptions to the warrant requirement. What are special needs cases and why are they permitted?

Many of us learned the “fruit of the poisonous tree doctrine,” that evidence obtained as the result of an illegal search is inadmissible and must be suppressed. But in January 2009, the U.S. Court announced what some have called a “new rule on suppression,” which expands the good-faith exception to the exclusionary rule. This article will address these changes in Fourth Amendment law.

II. General Law – Fourth Amendment

The Fourth Amendment provides that “[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated ... .” Although nothing in the amendment’s text suggests a warrant is required, the U.S. Court has created a presumption that a warrant is required, unless infeasible, for a search to be reasonable.

A Fourth Amendment search is traditionally deemed to occur “when the government violates a subjective expectation of privacy that society recognizes as reasonable.” Kansas practitioners must meet “the classic Fourth Amendment test: whether the defendant manifested a subjective expectation of privacy in the area searched and whether society is prepared to recognize that expectation as objectively reasonable.” It used to be fairly simple to determine whether or not a search had occurred. A search typically consisted of a law enforcement officer’s physical entry into the threshold of the house for the purpose of gathering information or evidence. With the advance of technology, however, many less invasive yet more surreptitious means of gaining previously private...
information are becoming common. This complicates the initial determination of whether a Fourth Amendment search has occurred. The U.S. Court has insisted “that the meaning of a Fourth Amendment search must change to keep pace with the march of science.” In such cases, the general rule currently is that a search occurs when sense enhancing technology obtains information that could not otherwise have been obtained without physical intrusion into a constitutionally protected area, at least where “the technology in question is not in general public use.” As the use of global positioning systems and other technology becomes more prevalent, the determination of whether a search has occurred becomes more difficult, as demonstrated by many cases in this area grappling with issues of extrasensory or sense-enhancing technology.

III. Traditional Exceptions to the Warrant Requirement in Kansas

“A warrantless search of a suspect’s premises is unreasonable per se under the Fourth Amendment unless the government shows that the search falls within one of a carefully defined set of exceptions ...” In Kansas, the traditional exceptions to the warrant requirement include consent; search incident to a lawful arrest; stop and frisk; probable cause to search accompanied by exigent circumstances; the emergency doctrine; inventory searches; plain view; plain feel; and administrative searches of closely regulated businesses. Creative efforts to expand this fixed set of traditional exceptions, such as by urging adoption of a prank exception for a mock arrest, have failed.

A. Narrowing of the search incident to arrest exception

Until recently, the scope of the search incident to arrest exception was the same under federal and state law in Kansas. But decisions in 2009 appear to render the scope of the Kansas incident to arrest exception narrower than that of its federal counterpart.

The search incident to arrest exception has long permitted an officer’s warrantless search of an arrestee and the surrounding area, contemporaneously with a lawful arrest. Under Tenth Circuit law, the propriety of a search incident to arrest depends on two factors: (1) whether the arrest was in fact lawful and (2) “whether the search was contemporaneous, both spatially in terms of areas within the defendant’s ‘immediate control’ and temporally in terms of the incidents rendering the arrest permissible.”

Under Kansas law, “the permissible circumstances, purposes, and scope of a search incident to arrest are all controlled by K.S.A. 22–2501.” The Kansas Court in 2009 found this statute “facially unconstitutional” to the extent it permitted a search for the purpose of discovering evidence of “a crime” other than “the crime” for which the person was arrested. The result of this holding is that the elements of this exception are different under federal law than under state law, as discussed below.

Where Kansas law and federal law are not identical, attorneys must base their determination of governing law – and thus their substantive analysis of the case – on the jurisdiction in which the prosecution is brought, rather than presume state law applies since state actors are involved.

[1] In federal prosecutions the test of reasonableness in relation to the Fourth Amendment protected rights must be determined by federal law even though the police actions are those of state police officers. ... Therefore, the fact that the arrest, search, or seizure may have violated state law is irrelevant as long as the standards developed under the federal constitution were not offended.

A short summary of relevant cases demonstrates the current challenges in this area for Kansas practitioners.

1. New York v. Belton

Since the Belton case was decided by the U.S. Court in 1981, a “bright line rule” governed the legality of a search incident to arrest in federal court in the context of a car stop: “When a policeman has made a lawful custodial arrest of the occupant of an automobile, he may, as a contemporaneous incident of that arrest, search the passenger compartment of that automobile.” That rule permitted car searches even when an officer did not act to secure his safety or to preserve evidence related to the crime of arrest. Kansas courts consistently applied Belton to allow an officer to search the passenger compartment of an automobile soon after its occupant was arrested, regardless of whether or not the occupant was within reaching distance of the vehicle. Although the Kansas incident to arrest statute limited the permissible search area to the person arrested and the area within such person’s “immediate presence,” Kansas courts interpreted that area to include the passenger compartment of the vehicle, in accordance with Belton. State and federal law in this area were thus consistent.

2. Arizona v. Gant

In 2009, the U.S. Court in Gant altered Belton’s bright-line rule by holding: “Police may search a vehicle incident to a recent occupant’s arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest.” This grab zone rule represents a substantial change in the established scope of the incident to arrest exception. No longer is a vehicle search valid as incident to a lawful arrest when a defendant is handcuffed in the back of the patrol car at the time of the search. Nor can an officer legally search a vehicle pursuant to this exception if the officer reasonably suspects the vehicle contains evidence of some crime other than the offense for which the person is arrested. In many cases when a person is arrested for a traffic violation, there will be no reasonable basis to believe the vehicle contains evidence relevant to the crime of arrest.

3. State v. Henning

The Kansas Court in 2009 followed Gant in State v. Henning, finding a portion of Kansas’ incident to arrest statute facially unconstitutional. When that statute was enacted in 1970, it provided:

When a lawful arrest is effected a law enforcement officer may reasonably search the person arrested and the area within such person’s immediate presence for the purpose of (a) Protecting the officer from attacks; (b) Preventing the person from escaping; or (c) Discovering the fruits, instrumentalities, or evidence of the crime. (emphasis added)
K.S.A. 22-2501. On July 1, 2006, subsection (c) was changed to read: “Discovering the fruits, instrumentalities, or evidence of a crime.” (emphasis added) That wording permitted search of the designated area incident to a recent occupant’s arrest even if the search was focused on uncovering evidence unrelated to the crime of arrest. In Henning, the Kansas Court found subsection (c) facially unconstitutional under the Fourth Amendment and Section 15 of the Kansas Constitution’s Bill of Rights, holding, “To have a valid search incident to arrest, when there is no purpose to protect law enforcement present, the search must seek evidence to support the crime of arrest, not some other crime ...”30 Additionally, because the Kansas Court no longer applies the Belton rule, the permissible search “area within [the arrestee’s] immediate presence” no longer automatically includes the passenger area of the vehicle and is now limited to the area within the arrestee’s reaching distance at the time of the search.

Under current Kansas law, searches incident to a lawful arrest are thus legal, pursuant to the statute, only under three limited circumstances: (1) if the search is of the area within the person’s immediate presence, i.e., the area that person could reach at the time, and is for the purpose of protecting the officer from attack; (2) if the search is of the area within the person’s immediate presence and is to prevent the person from escaping; or (3) if the search is of the area within the person’s immediate presence and is for the purpose of discovering the fruits, instrumentalities, or evidence of the crime of arrest. Thus Kansas law permits a search incident to arrest for one of the three stated purposes only if the search is within the arrestee’s grab zone.

The Kansas search incident to arrest exception is thus more limited than the federal rule established in Gant, which permits police to search a vehicle incident to a recent occupant’s arrest if the arrestee is within the grab zone or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. Under the latter circumstances, the suspect need not be within reach of the passenger compartment according to Gant, since the basis for the search is evidentiary and not officer safety.

However, Kansas practitioners should not assume that a car search which is no longer justified as incident to arrest is necessarily illegal. Other exceptions may legalize an officer’s search of a car even when its recent occupant is outside reaching distance of the vehicle, “when safety or evidentiary concerns demand.”35 It is foreseeable that post-Gant, the inventory and automobile exceptions may be more frequently asserted.

B. Automobile exception

Evidentiary concerns underlie the automobile exception. Under this exception, the mobility of the vehicle itself provides the exigent circumstance,26 permitting an automobile search as long as officers have probable cause to believe there is evidence of a crime in the automobile.27 An officer has probable cause to search a vehicle if “under the totality of the circumstances there is a fair probability that the car contains contraband or evidence.”28 In determining whether probable cause exists, an officer may draw inferences based on his own experiences and may also rely upon the collective knowledge of all the officers involved.29 One may think that probable cause would be difficult to muster in most automobile stops, but under Kansas and Tenth Circuit law, a dog sniff is not a search for Fourth Amendment purposes, and a positive dog alert gives officers probable cause to search.30 Accordingly, an officer with a drug dog may find probable cause to search an automobile even though the driver is arrested on an offense unrelated to narcotics.

The automobile exception can apply where the incident to arrest exception cannot. For example, in State v. Conn,31 a defendant who had been stopped for a traffic violation was arrested for driving without a valid driver’s license and for failing to provide proof of insurance. Conn provided the arresting officer with a name and date of birth and stated that he had a valid driver’s license issued by the state of Texas. When dispatch reported that there was no record of a license in that name, the officer searched the vehicle for proof of identification and found methamphetamine and drug paraphernalia. The Kansas Court held that the search could not be justified under the incident to arrest exception, but nonetheless upheld the search pursuant to the automobile exception since the officer had probable cause to believe that Conn, by lying to him, had committed the offense of obstruction of official duty.

The automobile exception is broad. It not only allows an officer to search for evidence of offenses other than the offense of arrest, but also permits searches which are broader in scope than searches incident to arrest. Under the automobile exception, an officer with probable cause may search the vehicle even if its recent occupant is no longer within the grab zone, and even if that person was arrested for a crime unrelated to the one for which the officer has probable cause.32 The automobile exception permits officers “to search the entire vehicle, including the trunk and all containers therein that might contain contraband,”33 even if the container is a locked suitcase or briefcase.34 Additionally, the justification to conduct a warrantless search pursuant to this exception does not vanish once the car has been immobilized.35 Lastly, searches pursuant to the automobile exception are not required to occur contemporaneously with its lawful seizure. Instead, “a container in a vehicle may be searched without a warrant within a reasonable time after its removal from the vehicle.”36

Kansas courts have not definitively decided whether to treat computers, cell phones, or other electronic data storage devices found in vehicles identically to other closed containers, or whether to give those types of devices preferred status because of their unique ability to hold vast amounts of diverse personal information.37 Courts “generally have not been inclined to suspend general Fourth Amendment jurisprudence on exceptions to the search warrant, simply because the container is a cellular telephone.”38 The Tenth Circuit has cautioned, however, that “relying on analogies to closed containers ... may lead courts to oversimplify a complex area of Fourth Amendment doctrines and ignore the realities of massive modern computer storage.”39 Nonetheless, the Tenth Circuit, in a 2009 unpublished case, used the container analogy to support its finding that “the permissible scope of a search incident to arrest includes the contents of a cell phone found on the arrestee’s person.”40

Outside the context of automobile searches, the Kansas Court has staunchly protected the privacy right in computers,

(Continued on Page 25)
finding that a computer is “the digital equivalent of its owner’s home, capable of holding a universe of private information.” The Kansas Court of Appeals has extended that rationale to cell phones as well, finding that “a cell phone owner’s expectation of privacy does not differ from the expectation of privacy in the data stored in a computer.” A person in a car, however, has traditionally been found to have a “considerably diminished” expectation of privacy in property transported in cars, and this lesser privacy expectation forms part of the justification for the automobile exception. Striking the proper balance between these two privacy expectations remains to be seen.

C. Inventory exception

The vehicle inventory search exception to the Fourth Amendment warrant requirement serves three purposes: The protection of the owner’s property while it remains in police custody, the protection of the police against claims or disputes over lost or stolen property, and the protection of the police from potential danger. Kansas cases require the following for a valid inventory search: (1) the police must have lawful possession of the vehicle, (2) the search must be conducted in accordance with standard police procedures, and (3) the purpose of the policy must not be primarily for criminal investigation.

The U.S. Court has cautioned that “the purpose inquiry in this context is to be conducted only at the programmatic level and is not an invitation to probe the minds of individual officers acting at the scene.” Although an inventory search must be regulated by “standardized criteria” or “established routine” so as not to “be a ruse for a general rummaging in order to discover incriminating evidence,” that inquiry “has nothing to do with discerning what is in the mind of the individual officer conducting the search.” Accordingly, Kansas practitioners should be prepared to examine the programmatic purpose of the policy to determine whether it primarily furthers community caretaking interests rather than criminal investigatory concerns. As long as the policy or practice governing inventory searches is designed to produce an inventory and the policy does not allow the individual police officer so much latitude that inventory searches are turned into a purposeful and general means of discovering evidence of crime, the officer’s acts will be upheld and his or her subjective motives for the search will be deemed irrelevant under federal law.

D. Changes in the emergency exception

Kansas practitioners who wish to invoke the emergency doctrine must first figure out what the applicable test is. Federal courts have recently made the emergency doctrine easier to invoke by applying a two-part test in lieu of the traditional three-part test. Whether the Kansas courts have done the same is not clear.

The emergency doctrine recognizes that police perform a community caretaking function that involves rendering aid to protect lives and property on an emergency basis, regardless of whether a crime is involved. Until 2006, Kansas courts applied the following three part test to analyze the applicability of the emergency doctrine:

1. The police must have reasonable grounds to believe that there is an emergency at hand and an immediate need for their assistance for the protection of life or property,
2. The search must not be primarily motivated by intent to arrest and seize evidence,
3. There must be some reasonable basis, approximating probable cause, to associate the emergency with the area, or place to be searched.

In 2009, the U.S. Court reaffirmed its 2006 holding in Brigham City, Utah v. Stuart that subjective motives of law enforcement officers, as required by the second prong of the test, are irrelevant to this exception, and have no bearing on whether a particular seizure is unreasonable under the Fourth Amendment. In Brigham City, the U.S. Court upheld a warrantless entry into a home where officers were called about a loud party at 3 a.m. and upon arriving, saw a juvenile inside the home hit an adult. Under this exception, officers may enter a home without a warrant, regardless of the individual officer’s state of mind or the seriousness of any crime being investigated, as long as they have an objectively reasonable basis for believing that a person inside the home needs immediate aid.

The Tenth Circuit followed suit, noting that Brigham City not only “clearly rejected” a consideration of the officer’s subjective motivations, but also obviated the probable cause requirement previously examined in the third element of the traditional test. Its reformulated test thus asks only whether the officers have an objectively reasonable basis to believe there is an immediate need to protect the lives or safety of themselves or others, and whether the manner and scope of the search is reasonable. Federal practitioners can be certain that this two-part test will be applied in cases seeking to apply the emergency doctrine.

State court practitioners do not have the same assurance, however. The Kansas Court has not decided the matter but has continued to apply its long-standing three-part test, even after Brigham City, without discussion of that case. The Kansas Court of Appeals has sent conflicting signals on the matter. One panel has stated in a published opinion, that “the second prong of the emergency doctrine is no longer required under Brigham ...,” and another panel has stated, “Kansas courts now apply a two part test to determine whether the emergency doctrine renders a warrantless search constitutional.” Yet other Kansas Court of Appeals cases post-Brigham City continue to apply the three-part test.

IV. Special Needs Cases

Kansas expressly recognizes that administrative searches of closely regulated businesses are excepted from the warrant and probable cause requirement. Thus, a state trooper’s inspection of a commercial truck needs no warrant or probable cause, and is reviewed only for reasonableness. Motor carriers of property for hire in Kansas are pervasively regulated by the laws of Kansas, triggering the rule that “a regulatory search is justified if the state’s interest in ensuring that a class of regulated persons is obeying the law outweighs the intrusiveness of a program of searches or seizures of those persons.”

This is but one example of a broader category of “special needs” cases in which the reasonableness of a search is not determined by the warrant and probable cause requirement and its recognized exceptions. Instead, a search unsupported...
by either a warrant or probable cause is constitutional “in those exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable cause requirement impracticable.” Special needs situations frequently arise in Kansas. Examples of cases in which courts have applied the special needs analysis include the following: Public schools’ random drug testing of students participating in extracurricular activities, a principal’s warrantless search of a student’s purse for drugs, a public employer’s search of an employee’s desk, a probation officer’s search of a probationer’s home, drug testing of federal railroad employees after major train accidents, drug testing of U.S. Customs Service employees applying for positions involving drug interdiction, a school official’s search of a student’s purse to enforce school discipline, administrative searches of the business premises of “closely regulated industries” and inventory searches of seized items for “caretaking” purposes. The fact that Kansas cases include only “administrative searches of closely regulated businesses” in the standard listing of exceptions to the warrant and probable cause requirement likely does not preclude application of the special needs analysis in other cases as appropriate.

V. Changes in the Exclusionary Rule

Kansas attorneys used to expect that when a warrantless search was found to be unconstitutional, evidence obtained in that search would likely be suppressed. Exclusion seemed to be a necessary consequence of a Fourth Amendment violation. Now, however, a growing number of exceptions to the exclusionary rule may render suppression less likely.

A. Exclusionary rule generally

The rule which excludes from trial all evidence obtained by government officers in violation of the Fourth Amendment is judicially created. Under the “fruit of the poisonous tree” doctrine, the exclusionary prohibition extends to the indirect as well as to the direct products of such invasions, and its sanction applies to any “fruits” of a constitutional violation, such as tangible items seized in an illegal search, words overheard in the course of the unlawful activity, or statements of the accused obtained during an illegal arrest and detention.

B. Standard good-faith exception – United States v. Leon

In Leon, the U.S. Court established the good-faith exception to the exclusionary rule, holding that the “extreme sanction of exclusion” does not apply if police act “in objectively reasonable reliance” on a warrant, which is later declared to be invalid. This rule asks whether a reasonably well trained officer would have known that the search was illegal in light of all of the circumstances. Under that rule, “a defendant challenging a search will lose if either: (1) the warrant issued was supported by probable cause or (2) it was not, but the officers executing it reasonably believed that it was.”

The purpose of the exclusionary rule is to deter police misconduct, not to deter misconduct by other persons. Accordingly, Leon’s exception has been applied where law enforcement officers conducted illegal searches in reasonable reliance on the legislature’s error in enacting a statute which was later declared to be unconstitutional.

The rationale for finding that a court employee’s mistake does not justify exclusion of evidence is threefold: (1) the exclusionary rule was established
to deter police misconduct, not the conduct of court employees; (2) there is no evidence court employees are likely to “ignore or subvert the Fourth Amendment”; and (3) there is no basis for believing application of the exclusionary rule would deter the conduct at issue since court clerks have no stake in the outcome of particular criminal prosecutions.88

**C. New good-faith exception – *Herring v. United States***

In 2009, in *Herring*,89 the U.S. Court, for the first time, extended the exclusionary rule’s good-faith exception to a police officer’s reliance on a negligent mistake of a fellow law enforcement employee. There, an officer had been told by the county’s warrant clerk that there was an outstanding arrest warrant for Herring, so the officer followed Herring in his vehicle, pulled him over, and arrested him. A search incident to arrest revealed methamphetamine in Herring’s pocket, and a pistol in his vehicle.90 The officer later learned that the warrant had been recalled five months earlier. The U.S. Court held that the officer had objectively and reasonably relied on the negligent bookkeeping error by a fellow police employee, so denied suppression of the evidence.

*Herring* teaches some important lessons for Kansas practitioners.

1. The fact that a Fourth Amendment violation occurred, i.e., that a search or arrest was unreasonable, does not necessarily mean that the exclusionary rule applies. In *Herring*, the U.S. Court accepted the assumption that a Fourth Amendment violation had occurred, but did not suppress the evidence. Exclusion is not a necessary consequence of a Fourth Amendment violation, but is a circumstance-specific remedy. Suppression is the court’s “last resort, not [its] first impulse.”91

2. The exclusionary rule is not a personal constitutional right of the individual aggrieved by an illegal search, but is designed to safeguard Fourth Amendment rights generally through its deterrent effect.92 Thus in some cases, a person may have his Fourth Amendment rights violated, may have the evidence obtained in the illegal search admitted at the criminal trial due to application of *Belton, Herring*, or another exception, and may be precluded from any civil remedy by virtue of qualified immunity.

3. In determining whether to apply the exclusionary rule, courts must weigh the benefits of the resulting deterrence against the costs of applying the rule, and will exclude evidence only where it results in “appreciable deterrence.”93 “The principal cost of applying the rule is, of course, letting guilty and possibly dangerous defendants go free – something that offends basic concepts of the criminal justice system.”94 Consequently, “[t]he rule’s costly toll upon truth seeking and law enforcement objectives presents a high obstacle for those urging its application.”95

4. Application of the exclusionary rule depends on the culpability of the law enforcement conduct. Mere negligence of an officer will be insufficient.

To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. As laid out in our cases, the exclusionary rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence.96

Kansas practitioners should be prepared to distinguish between mere negligence, which will not warrant application of the exclusionary rule, and gross negligence, which may, and to determine whether the negligence is the result of a pattern rather than a one-time event.

5. *Herring*’s effect is broad. The Tenth Circuit has held that searches conducted pre-*Gant*, which are no longer justified as incident to arrest, will nonetheless be upheld pursuant to *Herring*’s good-faith exception to the exclusionary rule, where the search was conducted in objectively reasonable reliance upon Tenth Circuit settled case law which was later rendered unconstitutional.97 Kansas practitioners handling searches incident to arrest should therefore determine whether the search occurred before *Gant*, and if so, should analyze the case under the pre *Gant* “settled case law” of the Tenth Circuit, i.e., the *Belton* rule, which is not limited to the grab zone.

6. *Herring*’s rule is subject to interpretation and raises unanswered questions. Read narrowly, *Herring* means only that the exclusionary rule is inapplicable when an officer, in making an arrest, relies on an isolated, computer-generated error regarding the existence of a warrant. Read broadly, it means that the exclusionary rule is inapplicable even where there is a clear constitutional violation, as long as the violation is not deliberate, reckless, grossly negligent, or the product of recurring or systemic negligence. Determining whether negligence is or is not gross may turn on fine distinctions. Similarly, determining whether systemic negligence is present in a given case may prove to be challenging, particularly in criminal cases, which traditionally lack much discovery.

7. *Herring* may have an impact on civil cases through the qualified immunity analysis in § 1983 cases. The same standard of objective reasonableness that applies in the context of a suppression hearing in *Leon* defines the qualified immunity accorded an officer whose request for a warrant allegedly caused an unconstitutional search.98 Just as “the *Leon* doctrine applies not only to suppression issues in criminal cases but [also to] qualified immunity cases,”99 *Herring* will likely influence the scope of what is deemed to be “objectively reasonable” for purposes of the qualified immunity analysis in § 1983 cases.

**D. Other exceptions to the exclusionary rule**

Although exceptions to the warrant requirement are well known, Kansas practitioners may be less familiar with the “growing list”100 of exceptions to the exclusionary rule, other than the good-faith exception.

The “independent source” exception to the exclusionary rule applies if the evidence in question was obtained through a process unconnected with, and untainted by, the illegal search.101 This rule also permits the admission of evidence discovered during an illegal warrantless search that is later “rediscovered” by the same team of investigators during a search
pursuant to a warrant obtained immediately after the illegal search. The independent source doctrine teaches that the interest of society in deterring unlawful police conduct and the public interest in having juries receive all the probative evidence of a crime are properly balanced by putting the police in the same, not a worse, position that they would have been in if no police error or misconduct had occurred.

Closely related to the independent source exception is the “inevitable discovery” exception. If the prosecution can establish by a preponderance of evidence that the information ultimately or inevitably would have been discovered by lawful means, then the deterrence rationale has so little basis that the evidence should be received. The purpose of the inevitable discovery rule is to avoid setting aside convictions that would have been obtained without police misconduct.

Attenuation is a similar concept, permitting admission of evidence that would otherwise be suppressed if the chain of causation proceeding from the unlawful conduct has become so attenuated or has been interrupted by some intervening circumstance that the “taint” imposed upon that evidence by the original illegality is removed. For example, when an initial arrest is not supported by probable cause, if the taint of the illegal arrest is separate enough from the statement or evidence obtained, the evidence can be admitted.

The impeachment exception provides that a defendant’s testimony is subject to rebuttal by contradicting evidence that otherwise would be excluded. This principle applies not only to suppressed physical evidence but also to statements obtained in violation of the law, so long as the statements are voluntary and reliable. The rationale is that a defendant cannot take advantage of the illegal method by which the evidence was obtained by providing himself with a shield against contradiction of his untruths, because that extension “would be a perversion of the Fourth Amendment.”

The exclusionary rule does not apply to knock and talk violations in criminal prosecutions because the social costs of the exclusionary rule are considerable, the deterrence benefit is minimal, and those violations can be adequately deterred by the threat of civil suits. Additionally, the exclusionary rule does not apply to proceedings other than criminal trials, including evidence to establish the defendant’s identity in a criminal prosecution, violations of the Miranda rule, grand jury proceedings, deportation proceedings, federal habeas proceedings, civil tax proceedings, or federal civil cases.

VI. Conclusion

Fourth Amendment decisions in 2009 will have a significant impact upon both criminal cases and § 1983 civil cases, thus Kansas practitioners can no longer assume that the Fourth Amendment rules they learned in law school still apply. Developments in technology continue to redefine the meaning of a search, traditional exceptions to the warrant requirement are being refined over time, special needs cases are becoming more prevalent, and exceptions to the exclusionary rule are expanding. Changes bring challenges. Attorneys must be diligent to determine whether a search incident to arrest occurred pre- or post- Gant, to know whether to apply the traditional warrant and probable cause test instead of the special needs analysis, to understand the extent of the differing analyses of the incident to arrest and emergency exceptions used by the Kansas state and federal courts, to determine whether an officer’s individual motive is relevant, and to decide whether an individual whose Fourth Amendment rights have been violated has any recourse either in the criminal or civil arena.

About the Author

Kathryn Gardner graduated from the University of Kansas School of Law in 1983, then served as a research attorney to a judge with the Kansas Court of Appeals, an assistant attorney general, and a law clerk to the Hon. Sam A. Crow in the U.S. District Court for the District of Kansas. She then litigated cases for 12 years in private practice while working part-time before returning to her present position as a law clerk for Judge Crow.

ENDNOTES

1. Infra P 26. For additional analysis of traffic stops, see Colin Wood, They Didn't Look Right to Me!, 76 J. Kan. Bar Ass'n 16 (Sept. 2007), and James Brown, Miles of Asphalt and the Evolving Rule of Law: Are We There Yet?, 71 J. Kan. Bar Ass'n 21 (May 2002).


4. U.S. Const. amend. IV.


9. Kyllo, 533 U.S. at 34 (finding officers’ use of thermal imaging device from a public street to scan the exterior of a home was an impermissible warrantless search). Compare United States v. Lyons, 510 F.3d 1225, 1241 (10th Cir. 2007) (finding trooper’s use of stethoscope to listen to sound resulting from his hitting a spare tire only revealed information he could otherwise have obtained).

defendant’s vehicle), with State v. Jackson, 150 Wash. 2d 251, 76 P.3d 217 (2003) (holding that the installation of a GPS tracking device constituted a search and seizure, requiring a warrant).


13. Fierschbach v. Southwest Airlines Co., 439 F.3d 1197 (10th Cir. 2006) (rejecting plea for creation of an exception to the warrant or probable cause requirement for pranks when law enforcement officers executed a mock arrest at a workplace, to celebrate the end of a worker’s probationary period).


17. United States v. Mendoza, 468 F.3d 1256, 1260 (10th Cir. 2006), quoting United States v. Le, 173 F.3d 1258, 1261 (10th Cir. 1999) (internal quotation marks, citations, and brackets omitted). See United States v. Sawyer, 441 F.3d 890, 894 (10th Cir. 2006) (federal test for determining validity of consent to search does not require consideration of whether the law enforcement officer has authority under state law to request consent).


24. United States v. Chavez, 534 F.3d 1338, 1345 (10th Cir. 2008) (internal quotation marks omitted); United States v. Vasquez, 555 F.3d 923, 930 (10th Cir. 2009).


27. United States v. Olivas, 363 F.3d 1061, 1068 (10th Cir. 2004).

28. Burgess, 576 F.3d at 1090.


30. United States v. Carey, 172 F.3d 1268, 1275 (10th Cir. 1999) (quotation marks and citation omitted).


32. United States v. Rupnick, 280 Kan. 720, 735, 125 P.3d 541 (2005) (upholding initial seizure of computer from office based on probable cause and exigent circumstances, but finding the same exception inapplicable to its post-seizure search).


35. Conn, 278 Kan. at 395 (stating the automobile exception “may also be justified because the expectation of privacy, with respect to one’s automobile, is significantly less than the privacy expectation relating to one’s home”), citing State ex rel. Love v. One 1967 Chevrolet, 247 Kan. 469, 477 (1990).


38. United States v. Najar, 534 F.3d 1338, 1345 (10th Cir. 2008) (in exigent circumstances, but finding the same exception inapplicable to its post-seizure search).


Legal Article: Paradigm Shifts ...
“patdown” of a driver and any passengers upon reasonable suspicion that they may be armed and dangerous).

70. T.L.O., 469 U.S. at 341.
71. Redding, ___ U.S. at ___, 129 S. Ct. at 2639.
72. T.L.O., 469 U.S. at 342.
73. Redding, ___ U.S. at ___, 129 S. Ct. at 2644.
75. T.L.O., 469 U.S. at 333-340.
82. Leon, 468 U.S. at 922, n. 23.
84. Leon, 468 U.S. at 906.
88. Id. at 14-15.
89. Herring, ___ U.S. ___, 129 S. Ct. at 704.
90. Herring was decided pre-Gant and raised no issue regarding the scope of the search incident to arrest.
91. Herring, ___ U.S. ___, 129 S. Ct. at 700.
94. Id. at 701 (quotations omitted).
95. Id.
96. Id. at 702.
97. United States v. McCane, 573 F.3d 1037 (10th Cir. 2009).
98. United States v. Albert, 579 F.3d 1188, 1192, n.5 (10th Cir. 2009); United States v. Davis, 590 F.3d 847 (10th Cir. 2009).
100. Poolaw v. Marcantel, 565 F.3d 721, 743 (10th Cir. 2009).
101. United States v. Hill, 60 F.3d 672, 678 (10th Cir. 1995).
104. Id. at 701 (quotation omitted).
105. Id. at 702.
106. United States v. Albert, 579 F.3d 1188, 1192, n.5 (10th Cir. 2009).
110. Walder, 347 U.S. at 65.

---

Court Bonds: A step ahead.

When it comes to choosing a reliable source for Court Bonds consider this:

The Bar Plan is an expert in providing Court Bonds to attorneys. We’re dedicated to the legal communities we serve. We offer a broad range of bonds, a 24-hour turnaround time and are staffed with knowledgeable underwriters.

We pride ourselves on the lasting relationships we’ve built by being “diligent and responsive.” Being “easy to deal with” and having an “impressive staff” are just two of the many benefits offered by The Bar Plan.

Every law practice needs reliable business partners. Relax: feel confident about your choice in court bond providers.

“Having a busy private practice, it is very important to us to have well established procedures for obtaining court bonds. I have always been impressed with how responsive the staff at The Bar Plan is.”

John Gunn
The Gunn Law Firm, PC
Insured since 2001

We help lawyers build a better practice.

Lawyers’ Professional Liability Insurance • Court Bonds
Risk Management • Practice Management • Workers’ Compensation
Lawyers’ Business Owner’s Policy • Association Group Term Life Insurance for The Missouri Bar*

*Available to Missouri Bar Members

THE BAR PLAN
Call Our Underwriters
877-553-6376
www.onlinecourtbonds.com
I. Introduction

As pointed out in “Paradigm Shifts in Search and Suppression Law,” recent court decisions have changed several areas of Fourth Amendment law. Perhaps the most significant change has been the growing body of law dealing with traffic stops and police officer activities incidental thereto. While the U.S. Supreme Court’s 2009 *Arizona v. Gant* decision significantly altered the landscape of search of vehicles incident to arrest, Kansas courts have adopted more sweeping changes in the body of law defining when police can stop a car and what activities the Constitution permits thereafter.

Although the legal definition of a Fourth Amendment “seizure” depends upon whether a reasonable person would feel like they were free to leave, does that mean every car stop is an arrest because the driver is not free to go? The answer is a qualified no. The temporary detention of individuals during a car stop by the police, even if only for a brief period and for a limited purpose, constitutes a “seizure” of “persons” and is subject to the constitutional imperative that it not be “unreasonable” under the circumstances. Car stops usually involve a brief, limited detention based on a traffic infraction or misdemeanor committed in the officer’s presence, and are generally governed by the law on *Terry* stops rather than the more exacting probable cause required for an arrest or to obtain a search warrant. In order to be reasonable under the Fourth Amendment, the stop of a moving vehicle must be based on reasonable suspicion, sometimes called reasonable articulable suspicion, of criminal activity. In some instances, however, police can stop a car even absent the suspicion required for a *Terry* stop. Kansas courts have allowed “community caretaking” or “safety stops” in situations where police express concerns that the driver appears to be sleepy or intoxicated, or where officers indicate a vehicle may have a mechanical problem making it unsafe for highway operation.

Police-Citizen encounters in Kansas can be summarized as follows:
II. Traffic Stops

A. Voluntary contacts

In some circumstances, a car “stop” may not be a stop at all, but instead a voluntary encounter for which no constitutional justification is required. Although an officer may be responding to a call of “suspicious activity,” as long as the officer does not involuntarily detain persons or engage in excessive shows of authority, the encounter may be deemed “voluntary” and not restricted by the Fourth Amendment. For example, in State v. McGinnis, an officer responded to a report that a possibly stolen car was partially submerged in the Missouri River, near the mouth of Independence Creek. The officer drove to the area and saw a car pull into a driveway used by fishermen to park near the creek. The officer stopped two or three car lengths behind the vehicle, did not turn on his emergency lights, and approached the driver (McGinnis), who was now standing near the creek looking back at the car. While walking past the car, the officer saw a 12-pack of beer in the front seat, and upon making contact with McGinnis, noticed an odor of an alcoholic beverage and other usual indicators of driving under the influence. In the prosecution of McGinnis for felony driving under the influence and transporting an open container, the Kansas Court of Appeals affirmed denial of a motion to suppress, agreeing that the initial contact between the officer and McGinnis was voluntary.

B. Limited purpose stops

Sometimes police stop cars for eleemosynary purposes – due to a concern for the driver’s safety or the safety of other members of the motoring public who might be damaged or injured by a defective vehicle, for example. It is when these stops transform into a detention that constitutional problems arise. Kansas courts have steadfastly refused to allow community caretaking or safety stops to be transformed into some other kind of detention absent reasonable suspicion of criminal activity. Such stops are very limited in scope and duration. For example, in State v. Gonzales, a trooper stopped a vehicle because the fuel tank door was open and it had a “bouncy” tire. However, rather than checking the tire immediately after the stop, the trooper asked the driver for ownership information and demanded the driver’s licenses from the occupants. After several minutes of questioning, the driver consented to a search of the vehicle which yielded drugs. The Court of Appeals held the drugs should have been suppressed because the officer’s continued questioning exceeded the scope and duration of the limited purpose stop.

In State v. Diaz-Ruiz, a trooper stopped a pickup on Interstate 70 in Geary county because he thought the ladder in the rear of the pickup might be loose and ready to fall out. As the trooper approached the pickup, he tugged on the ladder. Although it moved side to side, the trooper concluded it was secure. Rather than allowing the driver to proceed on his way, the trooper asked the driver for his driver’s license and asked him about his travel plans. The driver did not have a license, and a later check revealed his license was suspended out of New Mexico. The trooper attempted to turn the stop back into a voluntary encounter, and then obtained consent to “check the load.” Under plywood in the rear of the pickup, the trooper found 300 pounds of marijuana. The Kansas Court of Appeals affirmed the district court’s suppression of the marijuana, finding the occupants were illegally detained and their consent was not attenuated from the illegal detention.
Not all safety stops result in suppression of evidence. If the officer quickly develops reasonable suspicion of criminal activity while investigating the safety issue that justified the stop, further detention and investigation is justified. The Court of Appeals recently upheld a stop where a citizen called police to report that a car drove past the dead end of a road near a residential neighborhood. An officer drove to the area, parked about 20 feet behind the defendant’s vehicle, and activated his emergency lights. Upon approaching the car on foot, he smelled the odor of marijuana and saw some on the window frame. A canine alerted on the vehicle, and the police found marijuana inside the vehicle. The court held this was a valid safety stop and upheld denial of the defendant’s motion to suppress.

C. “Normal” Terry stops

As noted above, police stops of a moving vehicle are a seizure under the Fourth Amendment, must be “reasonable” under the circumstances, and are constitutionally justified when supported by the reasonable suspicion standard rather than the more demanding probable cause standard.17

1. Reasonable articulable suspicion and lane change violations

Reasonable articulable suspicion18 sufficient to stop a moving vehicle must be based upon facts known to or observed by the officer prior to the stop.19 Inchoate and unparticularized suspicion or hunches will not suffice.20 Courts examine the “totality of the circumstances” and attempt to determine the issue from the point of view of a reasonable police officer.21 In assessing whether reasonable articulable suspicion exists, Kansas courts sometimes give the impression they do not defer to an officer’s perception of suspicious activity, and in doing so, have blurred the hazy line between reasonable suspicion of criminal activity and probable cause to cite or arrest for a violation.

For example, in State v. Ross22 and State v. Hess,23 the Kansas Court of Appeals held traffic stops were not justified at their inception based on the court’s determination the officer did not have enough evidence to prove a violation of the traffic ordinance for which he or she stopped the vehicle.

In Ross, the officer saw Ross’ car cross the fog line (the solid line at the right edge of the road) once. The officer stopped the car for failure to maintain a single lane of traffic, an alleged violation of K.S.A. 8-1522(a). The driver had a suspended license and had cocaine and paraphernalia on his person. The court suppressed all the evidence, holding the vehicle stop was not justified at its inception.24

In Hess, a deputy stopped a car after observing it traveling close to the lane divider lines. The deputy testified the car would occasionally drive upon or touch the broken lines. The Hess court held that hugging the lines or driving on the lines did not provide reasonable suspicion to stop an automobile without the presence of other indicators of possible intoxication, such as erratic driving or weaving.25

A Court of Appeals panel recently departed from the rationale of Ross,26 but the Kansas Supreme Court reversed, holding that a single crossing of the fog line will not support a stop.27 The language of the relevant statute in each case makes a difference. Compare the “as nearly as practicable” language in K.S.A. 8-1522(a) that was the asserted basis for the stop in Ross, with language in K.S.A. 8-1514 stating that no vehicle shall be driven left of the center line of the highway. This strict liability language in the latter statute will support a stop even for a momentary crossing of the centerline.28

2. Pretextual stops

An officer’s ulterior motive to stop a car and search it for drugs or other contraband does not render the stop illegal. As long as a vehicle stop is based on an observed traffic violation, an officer’s subjective additional motive, such as suspicion of drug trafficking, is irrelevant to the legality of the stop.29 Similarly, if an officer develops reasonable suspicion of criminal activity while attending to the normal incidents of a traffic stop, he or she is entitled to further detain to investigate the suspicion.30 The officer must do so without unnecessary delay.31

D. “Normal incidents” to a stop

When police stop a car, courts generally allow certain activities as “normal incidents” to the stop. Generally, police can check the status of the driver’s license, run a computerized check for warrants, and issue a citation to the driver.32 Normal incidents can include inquiries about travel plans33 and ensuring the driver has a legal right to operate the vehicle.34 Police may also be allowed to engage in certain “suspect control” activities, such as having drivers35 or passengers36 get out of the car, although focusing suspicion on passengers in the vehicle normally will not comply with scope limitations.37 Whenever the police have the requisite reasonable suspicion that an occupant of a vehicle is armed, they may not only frisk his person, but may also look in the vehicle in places where a weapon might reasonably be expected to be found.38 If an officer suspects there may be contraband in the car, he or she may seek consent to search.39 In the absence of consent or some other exception, a search warrant is required.40 Consent to search must be knowing, voluntary and not coerced by the officer. That usually means consent to search must be obtained when a reasonable person in the driver’s shoes would feel free to leave.

E. Turning a detention into a voluntary encounter

Due to limitations on the scope and duration of traffic stops, police legal advisors and drug interdiction instructors have suggested for years that absent reasonable suspicion, officers should attempt to turn the detention back into a voluntary encounter before seeking consent to search.41 Doing so usually requires some kind of signal the detention is over, such as “be safe” or “have a nice day” or “you are free to go,” and perhaps a physical disengagement followed shortly thereafter by a re-engagement in which the officer asks if the driver minds answering some questions. This tactic has been described as the “Colombo gambit” or “Colombo pivot,” or the trooper two-step. In State v. Thompson,42 the court cited commentators referring to the practice as the “Lt. Colombo gambit,” in which the person being questioned thinks the interview is over, but the ever-persistent Lt. Colombo (Peter Falk) turns on his heel and says “one more thing,” and proceeds to elicit incriminating information.43 If the driver does not leave, the officer then usually inquires about the presence of drugs, large amounts of cash, or weapons, and then asks the driver if he or she minds if the officer looks in the vehicle for such items.44 Amazingly enough, a large number of drivers grant consent to search even when they know or have good reason to suspect
the vehicle contains contraband.\textsuperscript{45} The validity of any consent that may be granted will depend on whether there was a valid reason to stop the vehicle and whether the officer's activities have exceeded the scope and duration of a "normal" traffic stop. When police activities result in extending the duration or scope of the normal traffic stop and are not justified by reasonable suspicion to further detain the driver or passengers,\textsuperscript{46} the officer's action may violate the Fourth Amendment.

In the recent past, Kansas appellate courts held that questions put to a passenger unrelated to the purpose of the stop resulted in illegal detention. For example, in \textit{State v. Smith},\textsuperscript{57} the Kansas Supreme Court affirmed suppression of methamphetamine found in a voluntary consent search of the passenger's purse, conducted by a backup officer on a stop for a broken taillight.\textsuperscript{48} Subsequent to the \textit{Smith} decision, however, the U.S. Supreme Court made it clear that questions to passengers unrelated to the purposes of the stop do not necessarily render it an illegal detention provided the questions do not measurably extend the duration of the stop.\textsuperscript{49} Even more recently, the Kansas Supreme Court held that questions directed to a passenger about travel plans and the right to operate the vehicle did not "measurably extend" the duration of a stop.\textsuperscript{50}

\section*{III. Searches}

\subsection*{A. Reasonable suspicion justifying further detention}

If an officer develops reasonable suspicion of criminal activity, either during the detention phase of the stop or after turning the stop back into a voluntary encounter, he or she may continue the detention for a reasonable time to investigate suspicious activity. Such detention can include holding someone until a drug-sniffing canine arrives, or having a driver go to a different location to allow for a more intrusive vehicle inspection. In \textit{United States v. White},\textsuperscript{51} the court approved an eight-mile trip for a dog sniff. The facts in \textit{White} involve a trooper who stopped White's car when he saw it pass another eastbound vehicle in Riley County and then return to the right-hand lane without leaving enough space between the vehicles, an alleged violation of K.S.A. 8-1516(a). White had a valid Indiana driver's license and said he was headed home from Las Vegas after a four-day stay. The rental agreement indicated the car was rented the day before in Las Vegas and due back in Las Vegas the next day, which the trooper described as "bizarre" in view of the driver's story.\textsuperscript{52} Dispatch reported that White had two prior incidents of drug-related charges. After doing a trooper "two-step," the trooper was unable to get consent to further questioning. However, the trooper told White to follow him to a Kansas Department of Transportation office about eight miles further east for a dog sniff.\textsuperscript{53} The dog alerted, and officers found three bundles of marijuana in the trunk and later found four kilograms of cocaine under the hood. The Tenth Circuit ruled the district court correctly refused to suppress the evidence because there was reasonable suspicion for the initial stop, and because further detention was justified by reasonable suspicion based on: Defendants' unusual nervousness, improbable travel plans, one defendant's criminal history, Las Vegas' reputation as a narcotics source, and Indianapolis' reputation as a drug distribution hub.\textsuperscript{54}

\subsection*{B. Automobile searches based on probable cause}

Officers may conduct warrantless searches of vehicles if there is probable cause to believe the vehicle contains contraband. These warrantless searches are deemed reasonable under the Fourth Amendment due to the inherent mobility of an automobile – which can be moved out of the jurisdiction before a warrant can be obtained – and due to a reduced expectation of privacy in an automobile.\textsuperscript{55} For example, if a driver smells of alcohol and shows impairment on field sobriety tests but denies drinking, the officer has probable cause to believe the vehicle may contain an open container of alcohol.\textsuperscript{56} Although the law has viewed the inherent mobility of vehicles as providing their own exigent circumstances since the formulation of the \textit{Carroll} doctrine in 1925,\textsuperscript{57} some confusion still exists.\textsuperscript{58} If probable cause exists to believe a moving vehicle contains contraband, officers can stop and search the vehicle with no further showing of exigent circumstances.\textsuperscript{59}

\subsection*{C. Automobile searches incident to the arrest of the driver}

As noted in the introduction, the 2009 \textit{Gant} decision significantly altered the search of vehicles incident to arrest, but the change was not that significant for Kansas officers. \textit{Gant} essentially returned Kansas to rules in operation since 1996. Although those rules briefly changed from 2006 to 2009,\textsuperscript{60} \textit{Gant} takes Kansas officers back to the familiar rule of \textit{State v. Anderson}.\textsuperscript{61}

\section*{IV. Conclusion}

Kansas appellate courts have adopted significant restrictions governing when a law enforcement officer can stop a vehicle and what activities the officer can engage in incidental to that stop. Where in recent past an officer's testimony that a driver violated or appeared to violate one of the multitude of applicable traffic and equipment regulations was deemed sufficient to support a stop,\textsuperscript{62} Kansas courts now expect clear evidence, preferably on video, that violation of a traffic law has occurred. Once the vehicle is stopped, officer activities deviating from the normal traffic violation that justified the stop may transform the encounter into an illegal detention and result in the suppression of evidence, and possibly civil liability for the officer. Officers and practitioners must remain ever-vigilant to stay abreast of recent developments in this rapidly changing area of case law.

\section*{About the Author}

\textbf{John J. Knoll}, Tecumseh, is a senior assistant city attorney/police legal advisor for the city of Overland Park. He previously served as chief of prosecution and police legal advisor for the city of Topeka for 11 years. He was a part-time police officer for Washburn University for four years. He holds a BBA in accounting & business administration from Eastern New Mexico University, Portales, N.M., and a Juris Doctor from Washburn University School of Law.
ENDNOTES


2. A search for cases involving a “traffic stop” on Casemaker 2.1 conducted on Jan. 26, 2010, yielded 280 hits.


6. United States v. Orduna-Martinez, 561 F.3d 1134 (10th Cir. 2009). Atrooper stopped defendant’s car because his Ohio State Buckeye’s license plate frame was obstructing one of the two-digit year stickers on his license plate. After the stop, the trooper found 25 kilograms of cocaine in the car based on a consent search. The motion to suppress was properly denied because the officer had reasonable suspicion the tag was obstructed in violation of K.S.A. 8-134.


8. Kansas courts have recognized four categories of police-citizen encounters: (1) arrests supported by probable cause; (2) stops made in accordance with Terry, which are supported by reasonable and articulable suspicion of criminal activity; (3) volunteer encounters that are not seizures; and (4) community caretaking functions.

13. In doing so, the court applied a three-part test to judge safety stops:

First, as long as there are objective, specific, and articulable facts from which a law enforcement officer would suspect that a citizen is in need of help or is in peril, the officer has the right to stop and investigate. Second, if the citizen in need of aid, the officer may take appropriate action to render assistance. Third, once the officer is assured that the citizen is not in peril or is no longer in need of assistance, any actions beyond that constitute a seizure, implicating the protections provided by the Fourth Amendment to the U.S. Constitution.

Id. at 456.
28. State v. Chavez-Zbarna, ___ Kan. App. 2d ___, 221 P.3d 606 (2009) WL 4723332 (Kan. App. 2009). A Barton County deputy stopped a vehicle when it crossed the center line on a two-lane highway. The driver turned out to be DUI. The district court held the stop was illegal based on Ross, 37 Kan. App. 2d 126, and suppressed all the evidence. The Court of Appeals reversed, holding that K.S.A. 8-1514 requires driving on the right half of the roadway, that it is a strict liability offense unlike K.S.A. 8-1522, and was a valid reason to stop the vehicle.


30. Morlock, 218 P.3d at 811. See also United States v. Barahona, 996 F.2d 412, 416 (8th Cir. 1993); United States v. Pereina-Manzo, 59 F.3d 788, 791 (8th Cir. 1995) (When officers develop reasonable, articulable suspicion of criminal activity during a traffic stop, they have “justification for a greater intrusion unrelated to the traffic offense” and are “permitted to graduate their responses to the demands of their particular situation.”).

31. See State v. Diaz-Ruiz, 42 Kan. App. 2d 325, 351, 211 P.3d 836 (2009) (When analyzing whether an officer’s actions have exceeded the scope or duration of a traffic stop, the court considers whether the officer diligently pursued a means of investigation that was likely to confirm or dispel the officer’s suspicions quickly, during which time it was necessary to detain the defendant.) (citations and internal quotation marks omitted).


33. Travel questions that do not measurably extend a stop are “permis-sible incidents to a routine traffic stop,” and fit within the provision in K.S.A. 22-2402(1) allowing an officer to demand, inter alia, an explanation of the suspect’s actions. Morlock, 218 P.3d at 811.

34. Id.


37. State v. Jones, 27 Kan. App. 2d 476, 5 P.3d 1012 (2000), affirmed 270 Kan. 526, 17 P.3d 359 (2001). In Jones, the Court of Appeals held that an officer did not violate a passenger’s constitutional rights by asking for identification and running passenger for warrants during a stop for speeding. The court distinguished State v. Damm, 246 Kan. 220, 787 P.2d 1185 (1990) (questions to passengers exceeded scope and duration), and relied upon Maryland v. Wilson in holding that the records check was conducted during the normal scope and duration of traffic stop. The Kansas Supreme Court did not agree with the Court of Appeals’ reasoning, but affirmed, holding that once officers acting in good faith discovered a warrant, they had a right to take the passenger into custody even though he may have been unlawfully detained. Jones, 270 Kan. at 529.

38. Michigan v. Long, 463 U.S. 1032, 103 S. Ct. 3469, 77 L. Ed. 2d 1201 (1983) (officers can order any occupant out of a vehicle and “frisk” the vehicle if they reasonably believe the person is armed and dangerous).

39. United States v. Drayton, 536 U.S. 194, 207, 122 S. Ct. 2105, 153 L. Ed. 2d 242 (2002) (“In a society based on law, the concept of agree-ment and consent should be given a weight and dignity of its own. Police officers act in full accord with the law when they ask citizens for consent. It reinforces the rule of law for the citizen to advise the police of his or her wishes and for the police to act in reliance on that understanding. When this exchange takes place, it dispels inferences of coercion.”).

40. Katz v. United States, 389 U.S. 347, 357, 88 S. Ct. 507, 19 L. Ed. 2d 576 (1967) (“searches conducted outside the judicial process, without prior approval by a judge or magistrate, are per se unreasonable under the Fourth Amendment subject only to a few specifically established and well delineated exceptions.”) (citations omitted).


43. Id. at 778.

44. See, e.g., Ohio v. Robinette, 519 U.S. 33, 117 S. Ct. 417, 136 L. Ed. 2d 347 (1996) (after speeding stop turned back into a voluntary encounter, officer asked about illegal contraband in the car, received consent to search and found drugs).

45. See, e.g., Diaz-Ruiz, 42 Kan. App. 2d at 327 (after getting consent to “inspect his load,” officer found 300 pounds of marijuana under plywood in the back of a pickup); United States v. Orduha Martinez, 561 F.3d 1134 (10th Cir. 2009)(officer found 25 kilograms of cocaine in a hidden compartment after stopping defendant for a partially obstructed license plate; opinion does not indicate if it was a consent search, but applies a brief indication the officer asked to look at tires in the back of the vehicle). See generally, http://www.aclu.org/consent.html (“as many officers have witnessed, an experienced criminal may voluntarily consent to the search of a car, for example, gambling that the officer might not find drugs hidden inside the door panel or under a floorboard.”) (last visited on Jan. 29, 2010).

46. Passengers are necessarily detained when a driver is stopped, so they may have a violation of their own personal Fourth Amendment rights sufficient to confer “standing” on them to object to police activities. Brendlin v. California, 551 U.S. 249, 127 S. Ct. 2400, 168 L. Ed. 2d 132 (2007). Although “standing” is not a favored term in Fourth Amendment jurisprudence, see United States v. Johnson, 584 F.3d 995, 999 n.3 (10th Cir. 2009) (rejecting claim that defendant who rented storage locker with a false identity had an expectation of privacy society would recognize as objectively reasonable), it simply means that a person has suffered or will suffer an injury in fact that is caused by the complained of conduct and that can be redressed by the court. The “injury in fact” must be (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. The asserted harm must constitute more than a generalized grievance shared in substantially equal measure by all or a large class of citizens. See, e.g., Berg v. Obama, 586 F.3d 234 (3d Cir. 2009) and cases cited therein. See also United States v. Parada, 577 F.3d 1275, 1280 (10th Cir. 2009) (denying passenger’s motion to suppress PCP for lack of standing because he did not assert ownership of the cooler where it was found or testify at the suppression hearing that he had an expectation of privacy or a legitimate possessory interest in the cooler).

47. State v. Smith, 286 Kan. 402, 419, 184 P.3d 890, cert. denied 129 S. Ct. 628 (2008) (asking passenger two questions: “how you doing?” and “can I search your purse?” were unrelated to the driver having a broken taillight and rendered consent invalid).

48. Id.

49. Arizona v. Johnson, ___ U.S. ___, 129 S. Ct. 781, 788, 172 L. Ed. 2d 694 (2009) (questioning of passenger who was a suspected gang member about his gang affiliation did not measurably extend a traffic stop). See also United States v. Villa, 589 F.3d 1334, 1340 (10th Cir. 2009) (questions to driver and passenger about their ambiguous travel plans and a suspicious “drive and fly” story did not measurably extend the stop; questioning after a trooper two-step while seated in the patrol car was voluntary, and detention to await a drug-sniffing dog was supported by reasonable suspicion).

50. State v. Morlock, 218 P.3d at 811. See also State v. Murphy, ___ Kan. App. 2d ___, 219 P.3d 1223 (2009). In Murphy, an officer stopped defendant for speeding. The officer wrote the defendant a warning ticket, returned his documents, and told him he was free to go. The defendant shook the officer’s hand, apologized for speeding and began to walk away. After a “Colombo pivot,” the officer said something to the effect “by the way, do you have any illegal contraband, drugs, alcohol, or weapons in the car?” The defendant denied having those things and gave consent to search. The officer found cocaine and paraphernalia in the vehicle.

The defendant claimed his consent was coerced during an illegal detention because the officer did not ask him for permission to ask further questions, and the officer still had his emergency lights on. Rejecting this argument, the majority concluded that a reasonable person would feel free to leave under the circumstances. The following voluntary factors outweighed the detention factors: (1) returning documents, (2) telling the defendant he was free to go, (3) physical disengagement, (4) only one officer present, (5) no display of a weapon or physical touching, and (6) the encounter occurred in a public place.
51. United States v. White, 584 F.3d 935 (10th Cir. 2009), petition for certiorari filed Jan. 19, 2010 (No. 09,8749)).
52. Id. at 942-43.
53. Id. at 943.
54. Id. at 956.
57. Carroll, supra n.55.
58. See, e.g., State v. Sanchez-Loredo, ___ Kan. App. 2d ___, 220 P.3d 374 (2009) (mobility of a vehicle provides exigent circumstances, so only probable cause needs to be shown to stop and search a moving vehicle). In Sanchez-Loredo, police developed probable cause to believe that the defendant was involved in a methamphetamine distribution network and that she was transporting illegal drugs in her car on the date she was stopped. Officers followed her vehicle until she entered their county and then stopped the car. No traffic violations were witnessed. They called a drug-sniffing dog to the scene. It failed to alert on the car. They detained her for slightly more than an hour while they obtained a warrant to search the car. They found one pound of methamphetamine in the car.
59. Maryland v. Dyson, 527 U.S. 465, 467, 119 S. Ct. 2013, 144 L. Ed. 2d 442 (1999) (per curium) (reversing Maryland Supreme Court ruling that despite the existence of probable cause, exigent circumstances must exist to stop a car believed to contain drugs).
62. Compare Marx, supra n.27 with United States v. Botero Ospina, 71 F.3d 783, 787 (10th Cir. 1995) (en banc) (court’s sole inquiry is “whether this particular officer had reasonable suspicion that this particular motorist violated any one of the multitude of applicable traffic and equipment regulations of the jurisdiction.”) (citation and internal quotation marks omitted).
Is it your decision to evaluate the premium-marketing site for your law offices advertising dollar?

Look no more, the ‘BLUE BOOK’ combines statewide advertising exposure and efficient up-to-date resources for your daily office procedures, all in the ‘legal marketplace information provider’.

With over 70 years of publishing expertise the KANSAS LEGAL DIRECTORY offers each and every attorney an opportunity to notably increase your law office’s exposure in the legal profession, while maintaining minimal advertising expenditures.

The Blue Book
the legal marketplace information provider

To order your copy or to be included in the next edition contact us at 1-800-447-5375
In Re Trester
Order of Reinstatement
No. 98,103 – February 16, 2010

On Dec. 7, 2007, the petitioner, Irwin S. Trester, was disciplined by indefinite suspension from the practice of law in Kansas, retroactive to Oct. 26, 2005. The petitioner’s suspension was based upon his conviction of several crimes related to his unauthorized practice of law in the state of California; the petitioner has never practiced law in Kansas. After he filed a request for reinstatement in January 2009, the majority of a disciplinary panel concluded that the petitioner had complied with the requirements of Supreme Court Rule 219 and recommended that the petition for reinstatement be granted conditioned upon the petitioner taking and passing the Kansas bar examination and the Multi-state Professional Responsibility Examination. A dissenting member of the panel recommended that the petition for reinstatement be denied.

Ruling: Court found that after carefully considering the record, it accepted the findings and recommendations of the majority of the panel that petitioner should be reinstated to the practice of law in Kansas; however, Court concluded that reinstatement was conditioned upon the petitioner becoming current in all delinquent continuing legal education requirements, including ethics requirements, retroactive to the date of his indefinite suspension, Oct. 26, 2005.

Civil
Adoption and Burden of Proof
In re Adoption of B.B.M.
Johnson District Court
Reversed and Remanded with Directions
Court of Appeals – Reversed
No. 100,554 – February 26, 2010

Facts: Natural mother separated from her husband for three months, just long enough for natural mother to conceive B.B.M. with the natural father. Natural mother eventually moved back in with her husband. After B.B.M. was born, the adopted parents commenced adoption proceedings claiming father failed to support mother for six months leading up to B.B.M.’s birth. The district court initially ruled in father’s favor finding mother’s interference constituted reasonable cause for father’s failure to support, including mother’s refusal of support and mother’s husband was a threatening “cage fighter” and that adoptive parents did not sustain their burden to prove father’s failed support. The district court denied a motion by the adoptive parents to alter or amend the ruling and made additional findings on the hostile environment in mother’s home, but would not consider the best interests of the child; because it had not been pleaded or argued. However, five days later, the district court, sua sponte, reversed himself and terminated the father’s parental rights finding father failed to prove his financial inability to support the mother. The Court of Appeals reversed the district court finding the adoptive parents failed to carry their burden to prove the father failed to provide necessary support.

Issues: (1) Adoption and (2) burden of proof

Held: A petitioner under K.S.A. 2009 Supp. 59-2136(h)(1)(D), who seeks to terminate a father’s parental rights because the father has failed without reasonable cause to provide support to a child’s mother in the last six months of her pregnancy bears the burden of proof on all elements of the case. Reasonable cause is not a defense on which a father bears the burden of proof. Court held that termination of parental rights will be upheld by an appellate court if, after reviewing all the evidence in the light most favorable to the prevailing party, the district judge’s fact findings are deemed highly probable, i.e., supported by clear and convincing evidence. Court held the district court incorrectly characterized the mother’s interference as a defense and also incorrectly found that father had burden to prove financial wherewithal. Court stated there was precious little evidence of father’s ability to pay and did not constitute clear and convincing evidence. Court reversed both district court and Court of Appeals and remanded for retrial under the appropriate legal standards. Court also held that a party is not required to plead or sponsor direct evidence on the best interests of the child in order to argue that issue and have it considered by the court.

Statutes: K.S.A. 38-2271; and K.S.A. 59-2136(h)(1)(D), (h)(2)(A), (h)(4)

Termination of Parental Rights and Indian Child Welfare Act
In re M.F.
Johnson District Court – Reversed
Court of Appeals – Affirmed
No. 100,845 – February 5, 2010

Facts: In November 2006, child in need of care (CINC) proceedings were filed involving M.F. The state had no knowledge that M.F. had Native American heritage. The state requested temporary custody of M.F. because of S.F.’s homelessness and possible drug use, because S.F. abandoned M.F. at the hospital, and because there was a question of paternity and whether the alleged father could care for M.F. The district court later became aware of M.F.’s possible Native American heritage and sent a notice of the CINC proceedings to the Northern Arapaho Tribe (Tribe). After receiving notice, the Tribe requested to be notified of all hearings and actions in the matter. Because S.F. had not stipulated M.F. was a CINC, the district
court scheduled a hearing to make that determination. The district court found the evidence was clear beyond a reasonable doubt M.F. was in danger and out of home placement was immediately necessary for the child. M.F. was determined to be a CINC. The court held there was good cause to depart from any Indian placement because neither parent could care for the child, no family had come forward, and the Tribe had done nothing but indicate a desire to intervene. Importantly, the district court never issued a journal entry adjudicating M.F. a CINC. Eventually, the state filed a motion to terminate the parental rights of S.F. and D.J. (proven father) or for appointment of a permanent custodian. S.F. filed a motion to transfer jurisdiction to the Tribal Court of the Northern Arapaho Tribe (Tribal Court). The district court denied S.F.'s motion to transfer. At the hearing on the issue of termination of parental rights, S.F. appeared. Before evidence was presented, the district court noted a representative from the Tribe had contacted the district court and requested to participate in the trial by telephone, but the court was unable to arrange for such participation. S.F.’s counsel again argued the district court was not complying with the Indian Child Welfare Act (ICWA). Testimony was taken from Lindsey Howes, a case manager who had been involved in M.F.’s case since M.F. was placed in state custody. Ultimately, the district court entered an order terminating the parental rights of S.F. and D.J. to M.F. The Court of Appeals reversed by finding the district court failed to follow the necessary provision of ICWA.

ISSUES: (1) Termination of parental rights and (2) ICWA

HELD: Court agreed with the Court of Appeals that before an Indian child can be placed in foster care, it must be determined, based on clear and convincing evidence including testimony by a qualified expert witness, that continued custody of the child by the parent “is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(e) (2006). Court held the social workers for M.F. were not qualified experts under the ICWA and their testimony did not satisfy the standards for the ICWA in the CINC and termination proceedings. Court rejected the state’s invitation to hold the error harmless because of the potential of future invalidation of the foster care placement and termination of parental rights.

STATUTE: K.S.A. 38-1501, -1502, -1503, -2201, -2203

---

CRIMINAL

STATE v. COPEs
MONTGOMERY DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS – REVERSED NO. 99,403 – FEBRUARY 26, 2010

FACTS: Copes convicted on plea to fourth DUI offense, and sentenced to jail term with post-release supervision, and to pay $350 Board of Indigents’ Defense Services (BIDS) attorney fees and $2,500 mandatory fine. On appeal, Copes argued district court erred in requiring her to pay BIDS fees and fine without first determining on record whether she had ability to pay. Court of Appeals affirmed in unpublished opinion, finding Copes waived her statutory rights under State v. Robinson, 281 Kan. 538 (2006), when she agreed to pay BIDS attorney fees as part of plea agreement that stated the amount was to be determined, and finding imposition of mandatory fine did not require consideration of Copes’ ability to pay. Petition for review granted on these issues of first impression in Kansas.

ISSUES: (1) BIDS attorney fees and (2) mandatory fine and financial resources

HELD: If there is a knowing, voluntary, and intelligent waiver in plea agreement, district court may order payment of BIDS attorney fees without making findings required by K.S.A. 22-4513(b) and Robinson. However, the recitation of rights and explicit waiver in Copes’ plea agreement made no mention of attorney fees or district court’s obligation to consider Copes’ financial resources or burden the fees would impose. Reversed and remanded to district court for consideration of Copes’ financial resources and burden of paying BIDS fees.

Applying factors in State v. Raschke, 289 Kan. 911 (2009), K.S.A. 8-1567(g) – regarding amount of fine – leaves no room for considering financial resources. District court was required to impose $2,500 fine for fourth DUI conviction and was not required to consider Copes’ financial resources and burden its payment would impose. However, K.S.A. 21-4603(3) applies to K.S.A. 8-1567(j) – regarding method of payment – thus district court must consider whether the defendant must pay a monetary fine or provide community service. Contrary holdings in State v. Wenzel, 39 Kan. App. 2d 194 (2009), State v. Segovia, 19 Kan. App. 2d 493 (1994), and State v. Shuster, 17 Kan. App. 2d 8 (1992), are overruled. District court failed to consider whether community service to offset amount of fine due was an option for Copes. Reversed and remanded for district court’s consideration of Copes’ method of payment of DUI fine.

STATUTES: K.S.A. 2009 Supp. 8-1567, -1567(g), -1567(g)(1), -1567(g); K.S.A. 21-3710(b)(2)-(4), -4607(3); K.S.A. 22-4513, -4513(a); -4513(b); and K.S.A. 2005 Supp. 8-1567(g)

STATE v. HUGHES
SEDGWICK DISTRICT COURT
AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS
AFFIRMED IN PART AND REVERSED IN PART
NO. 98,716 – FEBRUARY 12, 2010

FACTS: Hughes appealed the aggregation of three uncounseled misdemeanor convictions to enhance his sentence, claiming state failed to prove he made a knowing and intelligent waiver of right to counsel in two of those actions where signed waiver form did not include judge’s certification as included in sample waiver form in In re Habeas Application of Gilchrest, 238 Kan. 202 (1985). He also claimed the use of his prior convictions in his criminal history, without submission to a jury, violated Sixth and 14th amendments.

ISSUES: (1) Sample waiver of rights form in Gilchrest, (2) criminal history score, and (3) sentencing

HELD: Post-Gilchrest opinions reviewed. Gilchrest did not require municipal courts to use forms identical to the sample form, only that use of the sample written waiver satisfies constitutional requirement that defendant was advised of rights and waiver of rights was knowing and intelligent. As long as this necessary information is ascertained from other means or waiver forms, Gilchrest requirements are satisfied.

In this case, municipal court waiver form was sufficient to establish what Hughes may have believed his rights to be and a voluntary waiver of those perceived rights, but there was no verification or validation of what he was told – a function the waiver advice Hughes acknowledged receiving was in actuality “proper” or “fully informed” advice, the waiver form utilized, standing alone, does not satisfy Gilchrest. The importance of the judge’s certification in the waiver is emphasized. Here, state failed to meet its burden to show the waiver in Hughes’ two prior misdemeanor convictions was knowing and intelligent. Reversed and remanded for resentencing based on recalculated criminal history score.

Kansas Supreme Court has previously concluded the state does not have to prove criminal history to a jury beyond a reasonable doubt, and this rule applies to prior juvenile adjudications as well. Court does not revisit Hughes’ argument to the contrary.

STATUTE: K.S.A. 21-4711(a), -4715(c)
STATE V. NORTHCUTT  
WYANDOTTE DISTRICT COURT – AFFIRMED  
NO. 99,600 – FEBRUARY 26, 2010  
FACTS: Northcutt convicted of premeditated first-degree murder and conspiracy to commit first-degree murder. On appeal he challenged sufficiency of the evidence for conspiracy conviction, and claimed trial court erred in not instructing jury on voluntary manslaughter as lesser-included offense. Appeal involved preliminary procedural issue of adding audiotapes of Northcutt’s custodial interviews to record on appeal.  
ISSUES: (1) Sufficiency of conspiracy evidence and (2) jury instruction on voluntary manslaughter  
HELD: Evidence viewed in light most favorable to prosecution is sufficient to find Northcutt conspired to commit first-degree murder. Under facts, trial court not required to instruct jury on voluntary manslaughter because no evidence of provocation by victim, much less severe provocation. STATUTES: K.S.A. 21-3302, -3401, -3403(a); and K.S.A. 22-3414(3)  

STATE V. OEHLERT  
SALINE DISTRICT COURT – AFFIRMED  
NO. 101,207 – FEBRUARY 19, 2010  
FACTS: Oehlert convicted on guilty plea to rape charge. Sentence included 60-month prison term with post-release supervision for life. For first time on appeal, Oehlert challenged the post-release supervision for life as cruel or unusual punishment prohibited under U.S. and Kansas’ constitutions.  
ISSUE: Constitutional issue raised for first time on appeal  
HELD: Exceptions for raising constitutional issue for first time on appeal are stated, but because Oehlert did not raise constitutional claim about post-release supervision at any stage before the district court, there are no factual findings regarding factors in State v. Freeman, 223 Kan. 362 (1978), for analyzing whether punishment is cruel and unusual. Oehlert’s argument that lifetime post-release supervision is cruel and unusual cannot be presented for first time on appeal.  

STATE V. RICHARDSON  
WYANDOTTE DISTRICT COURT  
AFFIRMED IN PART AND REVERSED IN PART  
COURT OF APPEALS  
AFFIRMED IN PART AND REVERSED IN PART  
NO. 98,752 – FEBRUARY 19, 2010  
FACTS: Richardson convicted of fleeing or attempting to elude police officer. Court is unable to determine whether jury found Richardson committed at least five moving violations since they were not identified or defined to jury, and unable to know which specific acts jury deemed to be moving violations. The failure to provide jury with instructions specifying and defining at least five underlying moving violations as elements of the fleeing or attempting to elude crime constitutes clear error. Conviction of fleeing or attempting to elude a police officer is reversed. Richardson’s remaining jury instruction issues, and claims of multiplicity and error in the charging document, are thereby moot. Under facts, no abuse of discretion in denying Richardson’s request for new counsel. Nothing in record demonstrates a compelling communications problem or an irreconcilable conflict of such magnitude between Richardson and his fourth attorney to find justifiable dissatisfaction necessarily existed.  
STATE concedes reversible error in district court’s failure to consider Richardson’s ability to pay BIDS attorney fees or the financial burden it would impose. Case remanded for compliance with State v. Robinson, 281 Kan. 538 (2008).  
STATUTES: K.S.A. 8-237(a), -249, -249(a), -255(a), -262, -296(g), -1560c, -1566, -1568, -1568(a), -1568(c)(1), -1568(c)(4), -2004(c), -2118(e); K.S.A. 22-3414(3), -4513, -4513(a); K.S.A. 28-172a(b); and K.S.A. 40-277(c), -277(c)(7)  

STATE V. WRIGHT  
BUTLER DISTRICT COURT – AFFIRMED  
COURT OF APPEALS – AFFIRMED  
NO. 97,013 – FEBRUARY 26, 2010  
FACTS: Wright, a female, was a self-taught masseuse. J.L., also a female, arrived at Wright’s home for a massage. J.L. agreed to a full body massage. J.L. dozed off and when she awoke, Wright was moving her finger in and out of J.L.’s vagina. Wright also asked an undercover police officer whether she wanted a genital massage. Wright was charged with rape. She claimed she was using vegetable oil during J.L.’s massage and her finger may have slipped into J.L.’s vagina. The jury convicted Wright of rape. The Court of Appeals affirmed finding sufficient evidence in her alternative means case and that Wright’s 60-455 claims were not properly preserved at trial.  
ISSUES: (1) Alternative means and (2) other crimes or civil wrongs  
HELD: Court held the evidence was sufficient to find Wright guilty beyond a reasonable doubt of committing rape by force or fear. J.L. testified that she woke to the realization that Wright was digitally penetrating her vagina and was paralyzed with fear. Under Burzyd, it does not matter that the initial penetration by Wright may not have been temporally coincidental with J.L.’s fear; it is enough that the penetration and fear were eventually contemporaneous. There is no error under the Timley alternative means rule here, because the evidence of each means of committing rape – by force or fear or by unconsciousness – was sufficient to uphold a guilty verdict on the rape charge. Court agreed with Court of Appeals that Wright failed to raise a contemporaneous objection to the K.S.A. 60-455 evidence and it would not be considered on appeal.  
STATUTES: K.S.A 21-3501(1), -3502; and K.S.A. 60-404, -455
Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Be Aware of Response Times and How They are Counted

Attorneys are often surprised by the amount of time that must pass before the Supreme Court or Court of Appeals can rule on a motion. The response time for most motions is five days under Rule 5.01 (2009 Kan. Ct. R. Annot. 33). The respective court will count five business days, beginning the day after the motion is filed and then add three calendar days for mailing. The computation of time in the appellate courts follows K.S.A. 60-206(a) and (d). See Rule 1.05(c) (2009 Kan. Ct. R. Annot. 5).

The most common motions that have a five-day response time are, of course, motions for extension of time to file an appellate brief. A motion to take a civil interlocutory appeal also follows the five-day rule. See Rule 4.01 (2009 Kan. Ct. R. Annot. 30-31). A motion for involuntary dismissal, however, has a 10-day response time under Rule 5.05 (2009 Kan. Ct. R. Annot. 35). Count the response time and calendar it accordingly.

If time is of the essence, the attorney can speed the process by requesting that adverse counsel file any objection earlier or submit an agreement to the action requested. If the action requested is an extension of time, the requesting attorney can avoid the response time altogether by requesting up to 20 days, which can be granted by the clerk of the appellate courts or the court without waiting for a response. See Rule 5.01.

The Appellate Clerk’s Office can provide information about when response times will run but cannot move the process forward more quickly. Attorneys who file subsequent motions in an attempt to spur action defeat their purpose. The subsequent motion starts the running of a new response time.

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

Proven STABILITY and INTEGRITY
Exactly What You Need

Your Kansas Bar Association endorsed professional liability program and the legal community’s trusted advisor for over 20 years

ALPS
A Family of Professional Service Companies

FOR YOUR NO-OBLIGATION QUOTE CALL (800) 367-2577 OR VISIT US ONLINE AT WWW.ALPSNET.COM
IN THE SUPREME COURT OF THE STATE OF KANSAS
ADMINISTRATIVE ORDER NO. 241
Re: Court Closures and Involuntary Unpaid Leave of Nonjudicial Personnel

The fiscal year 2010 appropriations for the Kansas Judicial Branch are greatly below the amounts needed to maintain operations at normal levels. Among its efforts to cope with this crisis, the Kansas Supreme Court continued a hiring freeze which had begun in December 2008, eliminated temporary employee positions, instituted an emergency surcharge on filings pursuant to 2009 Senate Bill 66, and reduced expenditures where possible. However, because salaries make up approximately 98% of the Kansas Judicial Branch budget, these steps alone cannot bridge the gap between the amount appropriated and the amount necessary to operate the Kansas Judicial Branch. Accordingly, the Kansas Supreme Court orders:

1. Kansas district and appellate courts will be closed on April 9, 16, 23, and May 7, 2010. These closures apply to all court offices, including the offices of the clerks of the district court, the court services offices, the office of the Clerk of the Appellate Courts, the Reporter of Decisions, the Supreme Court Law Library, the Office of Judicial Administration, the Office of the Disciplinary Administrator, the Kansas Lawyers Assistance Program, the Kansas Continuing Legal Education Commission, and any other offices staffed by Kansas Judicial Branch personnel.

2. All Kansas Judicial Branch personnel (employees paid through the Kansas Judicial Branch except justices and judges) will be on involuntary unpaid leave on the closure dates stated in paragraph 1 unless otherwise approved in advance in writing by the Supreme Court. No employee will be allowed to take paid leave or holiday leave on any designated involuntary unpaid leave date. Employees in positions that are less than 1.0 full time equivalent shall be placed on involuntary unpaid leave for 20% of the hours in their normal work week for each day of unpaid leave imposed on full-time employees. The chief judge of any district may realign the remaining work days of such employee to accommodate court closures.

3. Except as approved in advance in writing by the Kansas Supreme Court, no Kansas Judicial Branch personnel who are on involuntary unpaid leave shall perform any work for the Kansas Judicial Branch on the closure dates stated in paragraph 1.

4. All exempt employees under the Fair Labor Standards Act will be considered hourly employees during any week in which involuntary unpaid leave is imposed. As such, those employees will be required to complete a State of Kansas time and leave document for those periods and will be restricted to working no more than the equivalent of 8 hours per day for the remaining days, e.g., in a week containing 1 involuntary unpaid leave day, the employee is restricted to working no more than 32 hours in the remaining 4 work days.

5. During the periods the courts are closed, the only district court proceedings that may be conducted are those that involve the following critical functions:

**CRIMINAL**
- Determining probable cause for arrests without a warrant
- Conducting first appearances, K.S.A. 22-2901
- Setting appearance bonds and conditions of release pending preliminary examination or trial, K.S.A. 2009 Supp. 22-2802
- Issuing warrants pursuant to K.S.A. 22-2302 (arrest); K.S.A. 2009 Supp. 22-3716 (violations of probation); K.S.A. 22-2502 (searches and seizures); K.S.A. 22-2816 (violation of supervised release program); K.S.A. 22-2805 (holding a material witness); and K.S.A. 20-342, 22-2911, 22-2912 (violation of diversion agreement)
- Issuing orders for wiretaps, K.S.A. 22-2516
- Conducting inquisitions, K.S.A. 22-3101 et seq.

**CHILD IN NEED OF CARE (CINC)/JUVENILE OFFENDER**
- Conducting juvenile detention hearings, K.S.A. 2009 Supp. 38-2343(a)
- Conducting temporary custody hearings, K.S.A. 2009 Supp. 38-2243(b)
- Issuing warrants for juvenile offenders, K.S.A. 2009 Supp. 38-2342
- Issuing ex parte orders for CINC, K.S.A. 2009 Supp. 38-2242(a)
- Issuing ex parte orders for violation of a valid court order in CINC proceedings, K.S.A. 2009 Supp. 38-2260(c)

(Continued on Page 44)
• Conducting preliminary hearings on violation of a valid court order in CINC proceedings, K.S.A. 2009 Supp. 38-2260(d)
• Conducting evidentiary hearings on violation of a valid court order in CINC proceedings, K.S.A. 2009 Supp. 38-2260(e)

CARE AND TREATMENT
• Conducting probable cause hearings regarding the commitment of sexually violent predators, K.S.A. 59-29a05(b)
• Issuing ex parte emergency custody orders, K.S.A. 59-2958 (mental illness) and K.S.A. 59-29b58 (alcohol and substance abuse)
• Issuing temporary custody orders, K.S.A. 59-2959 (mental illness) and K.S.A. 59-29b59 (alcohol and substance abuse)

PROTECTION FROM ABUSE ORDERS
• Issuing protection from abuse emergency orders, K.S.A. 60-3105
• Issuing protection from stalking orders on an emergency basis, K.S.A. 2009 Supp. 60-31a06

MISCELLANEOUS
• Conducting hearings and issuing orders for isolation or quarantine, K.S.A. 2009 Supp. 65-129c(d)(3), (5)
• Considering petitions to waive notice under K.S.A. 65-6705 and Supreme Court Rule 173 (2009 Kan Ct. R. Annot. 249)
• Issuing temporary orders for care and custody in adoption proceedings, K.S.A. 59-2131
• Performing other functions of an emergency nature as approved by the departmental justice

6. The chief judge of each judicial district shall be responsible for implementing this administrative order. Each chief judge shall also:
   a. Ensure judicial coverage for the critical functions listed in paragraph 5;
   b. Notify court users of the court closures, including using the media and Web pages;
   c. Ensure telephones other than those in judges’ chambers are answered with a recorded message notifying the caller of the duration of the court closure;
   d. Notify the bar and law enforcement agencies of how to contact a judge for performance of critical functions and to explain that judges will not process the receipt of any funds;
   e. Ensure the courts’ fax machines are operating and are maintained during the periods the clerks’ offices and court services offices are closed;
   f. Notify the post office to hold mail or make other arrangements for secure mail storage;
   g. Arrange with law enforcement agencies or other entities for supervision of those on house arrest or high-risk supervision;
   h. Discuss procedures for obtaining protection from abuse and protection from stalking orders with community organizations and law enforcement agencies;
   i. Ensure courts are secure during periods of involuntary unpaid leave.

7. In addition to the closure dates stated in paragraph 1 of this order, offices of the clerks of the district courts may be closed to the public for additional time periods to allow staff uninterrupted time in which to process the backlogs resulting from court closures. Any such additional closures must be requested by the chief judge of a district and approved in advance by the Office of Judicial Administration. The chief judge shall ensure the public is notified of the schedule.

BY ORDER OF THE COURT this 12th day of March, 2010.

LAWTON R. NUSS, Justice,
for ROBERT E. DAVIS, Chief Justice
CIVIL

EMPLOYMENT AND STATE AND FEDERAL LAW
BROWN V. FORD STORAGE AND MOVING
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 101,915 – FEBRUARY 12, 2010

FACTS: Brown brought an action on behalf of himself and other similarly situated delivery truck drivers alleging the failure of the defendants Ford Storage and Moving Co. (Ford), and Nebraska Furniture Mart Inc. (Nebraska), to pay overtime wages for hours worked in excess of 46 hours per work week in violation of the Kansas Minimum Wage and Maximum Hours Law (KMWMHL), K.S.A. 44-1201 et seq. Brown claimed that Ford employed him and other drivers to deliver goods for Nebraska and that Nebraska controlled the delivery services of Ford and its drivers to the extent that Ford and Nebraska became joint employers within the meaning of Kansas law. The district court sustained a motion to dismiss the claims against the defendants. The court found that neither Ford nor Nebraska were “employers” under the terms of the KMWMHL, but rather were subject to the Fair Labor Standards Act (FLSA) because of their interstate activities and annual gross sales in excess of $500,000, and therefore were specifically excluded from the KMWMHL by K.S.A. 44-1202(d).

ISSUES: (1) Employment and (2) state and federal law

HELD: Court held that each of the claimed employers is engaged in interstate commerce with annual gross sales of more than $500,000. Although each is exempt from the overtime pay requirements of the FLSA because of the interstate motor carrier exemption found in 29 U.S.C. § 203(s)(1) (2006), as employers satisfying the jurisdictional requirements of the FLSA, each is subject to the minimum wage requirements, gender discrimination prohibitions, underage hiring restrictions, and record retention requirements of the FLSA. Court also held that pursuant to K.S.A. 44-1204(a), only “employers” are required to pay overtime compensation. The definition of “employer” in the KMWMHL excludes those employers “subject to” the FLSA. Because the claimed employers in the case at bar are subject to FLSA regulation, they are not “employers” as that term is used in the KMWMHL. Because they are not “employers” pursuant to the KMWMHL, they owe their employees no duty to pay overtime wages under Kansas law.

STATUTES: K.S.A. 44-1201, -1202(d), -1204(a), (c)(1); and K.S.A. 60-212(b)(6)

TEACHER TERMINATION
HEFLIN V.
KANSAS CITY KANSAS COMMUNITY COLLEGE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 101,891 – FEBRUARY 26, 2010

FACTS: Heflin had been employed as an associate professor of English at Kansas City Kansas Community College (KCKCC) for about 10 years. For the last five years, Heflin had taught primarily on-line courses and also some courses at KCKCC’s Leavenworth campus. Heflin and KCKCC’s dean of human resources argued over payment of Heflin’s request for mileage payment for travel from Leavenworth to KCKCC’s main campus. Heflin eventually received some compensation. In 2006, a new master contract required office hours and Heflin was informed her office location would be the main campus in Kansas City, Kan. Heflin challenged the work destination and office location, but it was denied. Heflin continued to claim her office was at the Leavenworth campus. KCKCC suspended her without pay, pending termination, due to her refusal to comply with expectations and directives of her dean and the provost. Heflin was terminated. A hearing officer found Heflin’s termination was made in good faith, was rational, reasonable, and relevant to the board’s task, was supported by substantial evidence, and constituted good cause for termination.

ISSUE: Teacher termination

HELD: Court held there was substantial evidence to support the hearing officer’s finding of good cause for termination based upon Heflin’s insubordination in refusing to hold five office hours per week at the Kansas City campus during the fall 2007 semester. Court found the provost’s order as to office hours and office location was reasonable, Heflin directly refused to comply with the order and thus constituted insubordination, and the hearing officer’s decision was not arbitrary or capricious.

STATUTE: K.S.A. 72-5436

WORKERS’ COMPENSATION
TYLER V.
GOODYEAR TIRE & RUBBER COMPANY ET AL
WORKERS COMPENSATION BOARD
REVERSED AND REMANDED WITH DIRECTIONS
NO. 102,236 – FEBRUARY 26, 2010

FACTS: Tyler was employed at Goodyear when he was preparing to hoist a tire mold out of the curing vessel when a chain hoist fell from above striking him in the head. He was taken to the hospital for cuts on the top of his head and neck pain. Tyler returned to work the next day but continued to complain of pain and discomfort and an MRI showed bulging disks in Tyler’s neck. Tyler continued his normal work duties. After restructuring, Tyler’s workweek was reduced from seven to five days and his pay fell from $1,654 to $940.57. After Tyler filed for workers’ compensation, an administrative law judge (ALJ) found his functional impairment was 6.5 percent, but that his wage loss was not a result of the disability. The ALJ found Kansas’ law did not require a causal connection between the injury and wage and since Tyler’s wage loss was greater than 10 percent he was entitled to work disability. The Workers Compensation Board disagreed and found Tyler was not eligible for work disability and limited him to his functional impairment.

ISSUE: Workers’ compensation

HELD: Court held that recent Kansas’ case law results in an interpretation of the workers’ compensation statutes that absent a specific statutory provision requiring a nexus between the wage loss and the injury, the appellate courts will not read into the statute such a requirement. Tyler was not limited to functional impairment, but was entitled to full work disability.

STATUTE: K.S.A. 44-510e

CRIMINAL

STATE V. ALEXANDER
FINNEY DISTRICT COURT
AFFIRMED IN PART AND DISMISSED IN PART
NO. 100,566 – FEBRUARY 26, 2010

FACTS: Alexander convicted of aggravated assault and criminal restraint. Probation granted with underlying terms of imprisonment. Probation violation warrant issued in 2005, but Alexander not located and arrested on the outstanding warrant until 2007. He appealed from district court’s denial of motion to dismiss the probation violation based on state’s unreasonable delay in executing the warrant.

ISSUE: (1) Due process and (2) delay in executing warrant
STATE V. GALLARDO
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 101,067 – FEBRUARY 26, 2010
FACTS: Gallardo plead guilty to unlawful sexual relations and two counts of traffic in contraband in a correctional institution. He was originally charged with rape of an inmate at the facility and two counts of traffic in contraband in a correctional institution. He was called to the principal’s office. Two law enforcement officers were present in the office at the time, one was the school resource officer (SRO) and the other an officer in the area that had come by to talk with the SRO. The principal asked Burdette to empty his pockets. Burdette pulled out a money clip and two little baggies. One of the officers asked Burdette what was in the bag and Burdette indicated “weed.” The district court refused to suppress the marijuana finding the school officials, not the deputies were responsible for the search. However, the district court suppressed Burdette’s statement that the baggies contained “weed.” After a bench trial, the court found Burdette guilty of possession of marijuana and possession of drug paraphernalia.

ISSUES: (1) School searches and (2) Fourth Amendment
HELD: Court found no Fourth Amendment violation. Court stated that because, other than their presence, there was no real involvement of law enforcement officers in asking Burdette to empty his pockets, the search was not a law enforcement search needing probable cause. The search was justified from its inception because of Burdette’s abnormal behavior; it was reasonable in scope and not excessively intrusive. Burdett’s drug convictions were affirmed.


STATE V. RALSTON
FRANKLIN DISTRICT COURT – AFFIRMED
NO. 101,440 – FEBRUARY 26, 2010
FACTS: Police informant asked Ralston to deliver drugs to motel room. When Ralston did so, he was arrested. Ralston convicted on drug charges based on marijuana and drug paraphernalia discovered on him when arrested. Ralston filed motion to dismiss, claiming he had agreement with police that charges would be dropped if he provided honest information about drug dealers. District court found no enforceable contract or agreement between Ralston and police. On appeal he claimed district court erred in denying, and in rejecting entrapment defense. Ralston also claimed his convictions for possession of marijuana and possession of drug paraphernalia were multiplicitous.

ISSUES: (1) Contract or agreement with police, (2) entrapment, and (3) multiplicity
HELD: Whether a contract was agreed upon, what the terms might be, and whether there was compliance were highly disputed. No abuse of discretion in district court’s finding of no enforceable contract. Absent prior knowledge and approval of county and district attorneys, law enforcement offices have no authority to enter into immunity agreements. No merit to Ralston’s argument that claimed immunity agreement should operate like a plea agreement. To the extent officers’ unauthorized promise of immunity improperly induced Ralston’s incriminating statements, district court properly remedied Fifth Amendment violation by imposition of exclusionary rule and suppression of those statements.

Entrapment defense discussed. Ralston’s ready compliance when asked to bring marijuana to hotel room showed his predisposition to possess it, thus trial court correctly rejected entrapment defense.

Multiplicity claim not preserved for appellate review, and even if considered, crimes are not multiplicitous. Possession of marijuana and possession of drug paraphernalia require proof of an element not required to prove the other crime.

STATUTES: K.S.A. 21-3102, -3201, -4713; K.S.A. 22-2104, -2202(13), -2202(17), -3415(b); K.S.A. 65-4105(d)(16), -4162(a), -4162(a)(2); and K.S.A. 79-5208

STATE V. LONG
FINNEY DISTRICT COURT
VACATED AND REMANDED
NO. 98,736 – FEBRUARY 26, 2010
FACTS: Long convicted of possession of methamphetamine. District court rejected Long’s argument that three prior uncounseled misdemeanor convictions for which he received a suspended sentence or probation should not be included as a single person felony in criminal history. On appeal, he claimed in part that district court erred in scoring criminal history. Court of Appeals affirmed in unpublished opinion. While Long’s petition for review was pending, Supreme Court decided State v. Youngblood, 288 Kan. 659 (2009), regarding use of prior uncounseled misdemeanor convictions, and remanded Long’s case to Court of Appeals for reconsideration.

ISSUE: Misdemeanor convictions in scoring criminal history
HELD: Constitutional right to counsel in misdemeanor cases is discussed through Youngblood. Based on Youngblood, Long’s prior uncounseled misdemeanor convictions were obtained in violation of his Sixth Amendment right to counsel, and should not have been scored in his criminal history. Long’s sentence is vacated, and case remanded for resentencing without including misdemeanor convictions in criminal history score.

STATUTE: K.S.A. 21-4710 et seq., -4710(d)(11), -4715(b), -4715(c)

STATE V. BURDETTE
SALINE DISTRICT COURT – AFFIRMED
NO. 101,288 – FEBRUARY 19, 2010
FACTS: Burdette was a student at a Salina high school. After a teacher noticed that Burdette was acting noticeably different as if ill or under the influence of something. Burdette was called to the principal’s office. Two law enforcement officers were present in the office at the time, one was the school resource officer (SRO) and the other an officer in the area that had come by to talk with the SRO. The principal asked Burdette to empty his pockets. Burdette pulled out a money clip and two little baggies. One of the officers asked Burdette what was in the bag and Burdette indicated “weed.” The district court refused to suppress the marijuana finding the school officials, not the deputies were responsible for the search. However, the district court suppressed Burdette’s statement that the baggies contained “weed.” After a bench trial, the court found Burdette guilty of possession of marijuana and possession of drug paraphernalia.

ISSUES: (1) School searches and (2) Fourth Amendment
HELD: Court found no Fourth Amendment violation. Court stated that because, other than their presence, there was no real involvement of law enforcement officers in asking Burdette to empty his pockets, the search was not a law enforcement search needing probable cause. The search was justified from its inception because of Burdette’s abnormal behavior; it was reasonable in scope and not excessively intrusive. Burdett’s drug convictions were affirmed.


HELD: State's attempts to find Alexander to execute the probation violation warrant were not perfect, but were more extensive than steps taken in cases where unreasonable delay violated due process and state was deemed to have waived right to proceed. Under facts of case, where warrant was served within two years and state took several steps toward arresting the defendant on the warrant during that time, state’s efforts were reasonable and hearing could be held regarding his alleged probation violations.

STATUTE: K.S.A. 22-3608(c)
ATTORNEY SERVICES

EXPERIENCED LITIGATOR available to help with your cases. 20+ years of experience. Will work by the hour or the job. Can help lighten your heavy case load. Call (816) 518-6093.

CONTRACT BRIEF WRITING Experienced brief writer is willing to take in appellate proceedings for any civil matter. Attorney has briefed approximately 20 cases in the Kansas Courts of Appeals and 10 briefs to the 10th Circuit. Both with excellent results. If you simply don’t have the time to help your clients after the final judgment comes down, call or e-mail to learn more. Jennifer Hill, (316) 263-5851 or e-mail jhill@mtsqh.com.

KANSAS LAWYER has southwest Florida beach house and brand new 3BR/2BA luxury beach condos for rent. See englewoodbeachhouse.com. Attorney discount. Contact Lee Hollis (913) 385-5400 or leehollis@holliislawfirm.com.

CLASSIFIED ADVERTISEMENTS

CREDITOR ATTORNEY. Attorney with at least five years experience in lending, foreclosure and bankruptcy work to join our real estate and business practice. Adams Jones Law Firm concentrates in real estate, business, and estate work. All inquiries will be held in confidence. Send resume to the attention of Roger Hughey of the firm at 1635 N. Waterfront Pkwy., Ste. 200, Wichita, KS 67206, Phone (316) 265-8591. mailto: rhughey@adamsjones.com.

CORRECTION: Phone number and e-mail

LAW OFFICE FOR SALE OR LEASE Anthony, Kan., needs attorneys! The law office is located a half a block from the Harper County Courthouse and across the street from the county attorney. The office is equipped with furniture, computer, and law books ranging from Kansas Reports 1 through 256, Kansas Court of Appeals reports 1-21 with the rest on CD; AmJur books; Vernon forms and many other law books. The attorney who owned the business passed away in July and left a void in the town of Anthony. The office is ready for business for any attorney to meet the town of Anthony, a small town of 2,500 and a county of about 7,500. Please inquire by e-mail at terrysuemessick@att.net or call (620) 842-3723, the office is still open but only to rid files and finish up unfinished business. If you are in Anthony, please stop by 114 N. Jennings Ave.

EXECUTIVE OFFICE SUITES AVAILABLE IN LEAWOOD Full-service executive offices are available in Leawood within one block of College and Nall. Each tenant will be charged a monthly base rent for tenant’s office. Referrals available from other attorneys in the building. Contact Glen Beal at (913) 387-3180 or gbeal@glenbeacl.com.

OFFICE SPACE: Large windowed office with another attorney. Prime location in Johnson County. Perfect for solo practitioner or larger firm desiring to establish a Johnson County presence. Includes reception, conference room, file/admin room, and use of phone system. Fax and high-speed internet available. (913) 706-9336.

OFFICE SPACE in College Boulevard/ Metcalf Corridor. Includes furnished office, support staff, parking, 9th Floor of Commerce Plaza I, immediately West of Overland Park Marriott. Contact Stephanie, at (913) 498-1911 for more information.

OFFICE SPACE AVAILABLE

EXPERIENCED LITIGATOR with 10 years’ experience available for part-time/contract legal work. Experience mainly on secured lending and other financial transactions but willing to do work of almost any kind. Fees and other arrangements flexible. Located in Johnson County but comfortable working remotely. Licensed to practice in Kansas and New York; license in Missouri pending. Please contact James Holt at (917) 328-0498 or holtj@aya.yale.edu.

FOR RENT

Kansas City, Kansas

OFFICE SPACE

EXECUTIVE OFFICE SUITES AVAILABLE

YALE LAW-EDUCATED ATTORNEY with 10 years’ experience available for part-time/contract legal work. Experience mainly on secured lending and other financial transactions but willing to do work of almost any kind. Fees and other arrangements flexible. Located in Johnson County but comfortable working remotely. Licensed to practice in Kansas and New York; license in Missouri pending. Please contact James Holt at (917) 328-0498 or holtj@aya.yale.edu.

FOR RENT

KANSAS LAWYER has southwest Florida beach house and brand new 3BR/2BA luxury beach condos for rent. See englewoodbeachhouse.com. Attorney discount. Contact Lee Hollis (913) 385-5400 or leehollis@holliislawfirm.com.

EXECUTIVE OFFICE SUITES AVAILABLE

FOR SALE

CORRECTION: Phone number and e-mail

LAW OFFICE FOR SALE OR LEASE Anthony, Kan., needs attorneys! The law office is located a half a block from the Harper County Courthouse and across the street from the county attorney. The office is equipped with furniture, computer, and law books ranging from Kansas Reports 1 through 256, Kansas Court of Appeals reports 1-21 with the rest on CD; AmJur books; Vernon forms and many other law books. The attorney who owned the business passed away in July and left a void in the town of Anthony. The office is ready for business for any attorney to meet the town of Anthony, a small town of 2,500 and a county of about 7,500. Please inquire by e-mail at terrysuemessick@att.net or call (620) 842-3723, the office is still open but only to rid files and finish up unfinished business. If you are in Anthony, please stop by 114 N. Jennings Ave.

EXECUTIVE OFFICE SUITES AVAILABLE

YALE LAW-EDUCATED ATTORNEY with 10 years’ experience available for part-time/contract legal work. Experience mainly on secured lending and other financial transactions but willing to do work of almost any kind. Fees and other arrangements flexible. Located in Johnson County but comfortable working remotely. Licensed to practice in Kansas and New York; license in Missouri pending. Please contact James Holt at (917) 328-0498 or holtj@aya.yale.edu.

FOR RENT

KANSAS LAWYER has southwest Florida beach house and brand new 3BR/2BA luxury beach condos for rent. See englewoodbeachhouse.com. Attorney discount. Contact Lee Hollis (913) 385-5400 or leehollis@holliislawfirm.com.

EXECUTIVE OFFICE SUITES AVAILABLE

YALE LAW-EDUCATED ATTORNEY with 10 years’ experience available for part-time/contract legal work. Experience mainly on secured lending and other financial transactions but willing to do work of almost any kind. Fees and other arrangements flexible. Located in Johnson County but comfortable working remotely. Licensed to practice in Kansas and New York; license in Missouri pending. Please contact James Holt at (917) 328-0498 or holtj@aya.yale.edu.

FOR RENT

KANSAS LAWYER has southwest Florida beach house and brand new 3BR/2BA luxury beach condos for rent. See englewoodbeachhouse.com. Attorney discount. Contact Lee Hollis (913) 385-5400 or leehollis@holliislawfirm.com.
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