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KBA SEEKING CANDIDATES FOR DISTRICT 12 BOARD VACANCY

A vacancy for the District 12 representative on the KBA Board of Governors now exists. As such, we are presently seeking interested candidates to serve in this capacity. District 12 is comprised of members who either reside and/or practice out of state (principal office).

The term of office expires in June 2011; however, the successful candidate will be eligible to serve two additional three-year terms pursuant to provisions of the bylaws.

Interested members should send a brief note along with a résumé to Jeffrey Alderman, KBA executive director, at jalderman@ksbar.org. Questions regarding this position can also be directed to this e-mail.

The deadline to apply is 5 p.m. on Tuesday, June 1, 2010.
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.
ETHICS FOR GOOD XI

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Where Does the Money Go?
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Todd LaSala, Stinson Morrison Hecker LLP
Lori Schultz, Shook, Hardy & Bacon LLP

Questions?
Contact Deana Mead, KBA CLE Director, at dmead@ksbar.org or at (785) 234-5696.
Diversity in the Profession

In the August 1999 *KBA Journal*, Zack Reynolds announced in his first President’s column a new KBA initiative aimed at improving diversity in the Kansas Bar: The 2020 Diversity Vision. President Reynolds challenged the Association to increase the number of diverse lawyers and to make sure those lawyers got actively involved in the organization. His stated goal was to have a minority member at every table during the KBA’s Annual Meeting in 2020.

Today, we’ve reached the halfway point in the 2020 plan so it seems like a good time to reflect on the goal and evaluate our work. Thus far, our work has been slow but we are picking up the pace. Twenty years is not a long time to deal with issues as complex and difficult as increasing the diversity of our Association in a state like Kansas that does not have a large minority population.

Some of you no doubt wonder why diversity is important. The recently released report from the ABA’s Presidential Initiative Commission on Diversity (may be found at www.abanet.org/centers/diversity) effectively answers this question. The report identifies four compelling rationales for greater diversity:

**The Democracy Argument:** Lawyers and judges have a unique responsibility for sustaining a political system with broad participation by all if its citizens. A diverse bar and bench create greater trust in the mechanisms of government and the rule of law.

**The Business Argument:** Business entities are rapidly responding to the needs of global customers, suppliers, and competitors by creating work forces from many different backgrounds, perspectives, skill sets, and tastes. Ever more frequently, clients expect, and sometimes demand, lawyers who are culturally and linguistically proficient. [See my caveat below.]

**The Leadership Argument:** Individuals with law degrees often possess the communication and interpersonal skills and the social networks to rise into civic leadership positions, both in and out of politics. Justice Sandra Day O’Connor recognized this when she noted in *Grutter v. Bollinger* that law schools serve as the training ground for such leadership and therefore access to the profession must be broadly inclusive.

**The Demographic Argument:** The United States is becoming diverse along many dimensions and we expect (and hope) that the profile of GLBT lawyers and lawyers with disabilities will increase more rapidly. With respect to the nation’s racial/ethnic populations, the Census Bureau projects that by 2042 the United States will be a “majority minority” country.

My only quarrel would be with the ABA’s articulation of the business argument. The business argument is much more basic; it is about the bottom line. When I was in practice, many and perhaps most, of our major clients insisted upon our firm being diverse and having minority lawyers working on their matters. This is not some altruistic goal. Rather, in-house lawyers recognize that lawyers of diverse backgrounds give a better product because of different life experiences. In-house lawyers value diversity highly. In fact, as Larry Zimmerman noted in his technology column in October 2008, Walmart fired four firms and reassigned $60 million in business for their unwillingness to take diversity seriously. In addition, Microsoft, Walmart, and other large companies have elaborate software to determine whether firms are complying with their mandates. Kansas law firms who want more business from many top companies must make diversity a priority.

I think that each of these arguments alone is sufficient to make the case for diversity. But taken together, they present a compelling argument. So in the past 10 years, what progress has the KBA made? Here is a list of some of what we have accomplished:

1. Funded four diversity scholarships in the early 2000s for minority students from KU and Washburn.
2. Revitalized and reinvigorated the diversity committee, which has now become a major player in our efforts. Many of these achievements are due to their hard work and determination.
3. Started a regular diversity column in this publication.
4. Placed diversity committee members as liaisons on various important KBA committees.
5. Recruited lawyers of color to become involved in committees and other KBA projects.
6. Included minority bar organization leaders in our 2010 Summit.
7. Established the KBA Diversity Award to be given annually.
8. Sent out a survey to try to determine the demographic-makeup of our association.
9. Started a “Diversity CLE” at the annual meeting.
10. Created a position on the KBA Board of Governors for a minority member to increase diversity.

So where do we go from here to achieve the 2020 Diversity Vision that a person who is diverse because of race, ethnicity, gender, sexual orientation, or disability will be sitting at every table at the Annual Meeting 10 years from now?

As to the KBA, we need to develop diversity data. It is critical that we develop a benchmark so that we can measure our efforts to determine, ten years from now, whether we achieved our goals. That is why it is so imperative that as many members as possible respond to the Diversity Committee’s

(Continued on next page)


**Annual Meeting Time**

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

Each year, the Kansas Bar Association hosts its annual meeting in Kansas City, Topeka, or Wichita. Undoubtedly, most of you know about this meeting, as you probably have seen mailers, overheard someone who is going to the meeting, or heard about the accompanying bar show. But not a lot of young lawyers actually attend the annual meeting. This is something that you can change.

All of us can come up with a panoply of reasons why we can't attend. Billable hour requirements. Kids. Conflicts with summer vacation. Yard work. Expense. I'm here to tell you from experience that those reasons aren't good enough.

The reality is that the annual meeting is one of the few (if only) opportunities that a young lawyer can participate in where they can (1) meet the justices of the Kansas Supreme Court and judges of the Court of Appeals; (2) get all 12 hours of the year's CLE requirements with high quality, relevant programming; (3) network with attorneys from around the state; and (4) attend fun social events for yourself and members of your family.

This year, the meeting will be held at the Hyatt Regency in Wichita. For those of you traveling in from around the state, the Hyatt is a lovely venue with high quality rooms and service. The hotel is in walking distance of the independent league baseball stadium and a very short drive to the Old Town district with excellent restaurants, bars, and other entertainment.

**Diversity**

(Continued from Page 6)

Survey, which can be found at www.surveymonkey.com/s/QDG6DM5.

The KBA also needs to adopt a formal diversity plan with measurable goals and timetables to make the kind of progress we need. I hope that the Diversity Committee can draft a plan for the Board’s approval.

Law firms, governmental entities, law schools, and local bar associations can also take steps to improve diversity. The ABA diversity report makes numerous recommendations for each of these groups, and I ask you to look at the report to see if there are recommendations that you or your firm/agency/bar organization could adopt.

Many minority lawyers I talked with when researching this column indicated that they did not think about a career in the law until they had almost graduated from college. Therefore, we need to continue to work on our “pipeline” programs and with the local bars to help all of our youth know and appreciate that they can have a career in the law. These efforts need to start early — by middle school at least. Moreover, mentoring young people, including young lawyers, can pay tremendous dividends. All of us can help in this way.

If we can make progress in these areas, I think the 2020 Diversity Vision goal is attainable. Let’s try to make it happen.

On Wednesday evening of the conference, the Supreme Court and Court of Appeals will host a reception at the Marriott for all attendees to meet them in a setting where they aren’t wearing robes. The Court tried this event out last year for the first time. Every single young lawyer who attended last year’s reception certainly considered it a highlight of the meeting.

In addition, young lawyers have participated in the planning of the CLE this year to work on the “Nuts and Bolts” track to ensure that topics relevant to young lawyers are included in the agenda. These topics include deposition tactics, effective cross-examination, how to handle an ethics complaint, law practice management seminars, and effective contract drafting.

By far one of the most valuable experiences that a young lawyer will gain from their attendance at the annual meeting is coming to know other lawyers from around the state in an informal setting. The connections that lawyers make at these meetings can last for years to come. When you have a case you need to refer to another part of the state, or a question about a local court’s rules or procedure, imagine the ease of calling another lawyer you have already met, as opposed to just making your best guess. This is not to mention the value of knowing an attorney involved with one of your cases. Never underestimate the power of knowing other members of your profession. Bring a large stack of business cards and do your best to hand them all out.

Finally, you should attend the annual meeting because there are numerous fun social opportunities. Grab another lawyer buddy and play golf, shoot skeet, or attend the various receptions hosted by the KBA president and the KBA young lawyers. Grab your spouse and kids and attend the Young Lawyers Section Soiree on Wednesday night. Get dressed up and attend the President’s Reception and KBA Installation & Awards Dinner on Friday night. Tie on your running shoes and participate in the 5K fun run. Go to the bar show, where yours truly will be sporting tap shoes and trying not to make a fool of herself!

So when you think about attending the annual meeting, don’t think about the reasons why you can’t. Think about why you should. Like so many things in life, the annual meeting is what you make of it. If you need CLE, it’s there. If you want to network and promote your practice, that is there. If you want to socialize with fellow lawyers, you can do that too.

Don’t let the obvious reasons keep you from attending what can easily be the most productive non-office hours of your career. Just go to your calendar, right now, and look at the dates June 9-11. Put a hold on those dates, go to the KBA Web site and check out the annual meeting agenda at www.ksbar.org/am2010 or see the center insert of this issue of your *Journal*. See you there!

Jennifer Hill may be reached at (316) 263-5851 or by e-mail at jhill@mtsqh.com.
Consider Participation in the Kansas Bar Foundation as a Fellow

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

The Kansas Bar Foundation (Foundation) was established in 1957. Dedicated professionals understood the need in Kansas for lawyers to have an active role in civic, as well as professional, organizations. The Foundation supports programs providing access to the legal system for low-income Kansans. It also supports advocacy for children in need of care and victims of domestic violence, scholarships for worthy participants, and distributes educational materials and teaching aids for public and private schools about the role of law and lawyers in our society.

The Mission of the Foundation is succinct. That mission is “to serve the citizens of Kansas and 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, by enhancing public opinion of the role of lawyers in our society.”

Your support can make a difference. Through contributions of individuals and law firms who have answered the call for public service, the Foundation has the ability to make a difference in the lives of Kansans. You can support the Foundation individually in several ways. Typically in the spring, the Foundation tries to publicize its Mission and ask members of the Bar to participate in the Foundation as a Fellow. Fellows play a vital role in ensuring that the mission of the Foundation is accomplished. To be a Fellow, individuals must contribute an aggregate total of $1,000 or pledge in writing to contribute at least $1,000 in 10 consecutive $100 payments.

The needs of the Foundation are at an unprecedented level. The request for grants from the Foundation is at an all-time high. The unemployment roles in Kansas and the economic struggles of our citizens are well documented. It is not overstated to hypothesize that the people of our state must have access to and an understanding of our court system in order for it to remain relevant. In that sense, the mission of the Foundation is one of preserving our profession.

The Foundation is something that all lawyers can support. It is not a mission of the plaintiff or defense bar. It is not a mission of a trial lawyer or one with an office practice. It is a mission of all lawyers in Kansas. Charity is a noble goal. In researching this article on the Internet, I find that there are quotes available on the worthiness of philanthropy from almost anyone who ever had a platform from which to give an opinion. The quotes range from people of backgrounds varying from Mother Teresa to Michael Milken. Only an individual knows why generosity exists in their heart. The Bar Foundation and participation as a Fellow is probably the best place for someone whose profession is in the law to express that generosity.

As a final argument on why people should participate as a Fellow, I offer the top 10 list of reasons one should be a Fellow of the Kansas Bar Foundation:

10. It affords you another chance to work with the awesome KBA staff;
9. Participation as a Fellow supports the good works for the benefit of needy Kansans;
8. You get a chance to wear one extra ribbon on your annual meeting name tag;
7. It is an organization you can join without taking an entrance exam;
6. Congress has yet to remove the tax deduction for the privilege of being a Fellow of the Foundation;
5. It looks great on your resume;
4. Clients and potential clients think you have earned the honor;
3. It gives you access to another social option as you are given an invitation to the annual Fellows dinner;
2. It is an organization you can support passionately without fear of being ousted by a mid-major; and
1. Everyone looks like they have more class when wearing a Foundation lapel pin.

Now that everyone knows why they should be a Fellow, I ask all current members to try and recruit one more member to our ranks. If this is successful, our numbers would double as would our ability to do good works for the neediest of Kansans.

For more information on becoming a Fellow of the Foundation, you may contact Meg Wickham, KBA public services manager, at (785) 234-5696 or e-mail mwickham@ksbar.org.

About the Author

John D. Jurcyk, McAnany, Van Cleave & Phillips P.A., Roeland Park, is a longtime member of the Kansas Bar Foundation and became a member of the Kansas Bar Association in 1984.
Celebrating Mexican Heritage on Cinco de Mayo

By Kelly Lynn Anders

Question

Dear Kelly,

I enjoyed reading your February column about celebrating Black History Month, and I thought I would write to you about ideas to celebrate Cinco de Mayo. Unfortunately, I don’t know much about it, except that it takes place on May 5 and it involves something about Mexican culture. I don’t mean to sound clueless, but there must be more to it than having a few margaritas. I would like to do something festive, but professional, to commemorate this occasion. Can you recommend any ideas that also involve the law and lawyers?

Abogado

Answer

Dear Abogado,

A quick check of my Spanish dictionary revealed that “abogado” is the Spanish equivalent of “attorney.” You sound far from clueless; on the contrary, I think you sound very “consciente,” or “aware.” There are many entertaining ways to celebrate Cinco de Mayo besides downing a few cocktails. It just takes a little research and creativity.

Cinco de Mayo is a holiday that commemorates the victory of the Mexican army over the French at the Battle of Puebla. (See more by visiting http://clnet.ucla.edu/cinco.html.) In the United States, events typically include celebrations of Mexican culture; as you’ve mentioned, these events usually include offerings of margaritas, but they also provide opportunities to see dancing, artifacts, and colorful clothing. Events of the more academic variety also include information about Benito Juarez, who was the president of Mexico during the time of the battle. It is relevant to note that Juarez became a lawyer in 1834 and a judge in 1841 (For more, see http://en.wikipedia.org/wiki/Benito_Ju%C3%A1rez.). So, you are correct about there being more to the story.

Ideas for “lawyerly” celebrations include contacting your local chapter of the Hispanic Bar Association to see what they may have planned, possibly picking up a copy of a biography of Benito Juarez from your bookstore or library, or hosting a low-key event at your firm. This firm event could include a combination of the following: speakers who are Hispanic lawyers, professors, or judges; samples of legal publications, such as the HNBA Journal of Law and Policy; and research reports from the National Council of La Raza; background music by Latin jazz artists, such as Poncho Sanchez or Arturo Sandoval; assorted Mexican appetizers; and, yes, a modest supply of margaritas.

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).
Law Students’ Corner

Finding a Niche in the Kansas Legal Community

By Kimberly Honeycutt, Washburn University School of Law

With the majority of graduates from both Kansas law schools entering private practice in Kansas following bar admission, the local legal community is flooded with new, enthusiastic attorneys all vying for clients. These newly minted attorneys join a pool that is already overflowing with more experienced lawyers engaged in full-steam client development, driven by anxiety over the economy. This grand frenzy could be compared to the mad rush of Black Friday shoppers grabbing for the best deals of the season. To successively navigate the madness, one may wish to develop legal expertise in an area not overly saturated in the geographical area. Finding and developing this niche takes effort.

The term “niche” is defined as a place, employment, status, or activity for which a person or thing is best fitted. Obviously, not every person is best suited for the same situation. A “best fit” is drawn from one’s experience, knowledge, motivation, likes, and dislikes, as well as the many other attributes that complete a person. And, like puzzle pieces, some combinations are a better fit than others.

While a niche may set oneself apart from others, it must be something about which the person is passionate. Passion drives you to dig as deep into something as you can, sustaining your desire to trudge forward during the toughest of times. For example, I know that I am not overly passionate about family or criminal law and would jump ship with the first signs of rough patches. I am interested, however, in business, estate, elder, tax, and intellectual property law. But my true passion lies with business law, specifically intellectual property law. Sources of inspiration may come from a past professional or life experience. For example, a former teacher may bring particular talent to an education law practice or someone who has lived through a particularly difficult child custody battle may find a direction for those energies in family practice. After working several years as a research scientist, I am intrinsically driven by the desire to help researchers bring their novel ideas and inventions to the public. Both business and intellectual property law areas are integral in developing a pathway between the research bench and public venues.

Another key component to developing your niche is determining whether you are geographically bound or free to move about. For those able to move about, geography has less of an impact on developing a niche since you can move to where your specialty of interest is in demand. However, those that are geographically bound may have to alter their specialty of interest based on the needs of their location.

The geographical market will determine if your niche will be successful. For example, a specialty in international banking may be very successful in New York City or San Francisco, but not Topeka, where domestic banking is often the greater concern. However, developing a specialty in tribal law may be successful in the Midwest and West but not in the East, as many of the eastern Native American Nations were removed west of the Mississippi.

Even if the current market doesn’t project a favorable climate to develop your niche, there may still be hope. Future returns are not guaranteed by past performance, as the financial industry has recently reminded us. Things change. Economies fluctuate. A new industry may develop geographically where no such industry has been before. By way of example, Manhattan has been selected as the location for construction of the new National Bio and Agro-Defense Facility (NBAF). Currently, Manhattan is home to Kansas State University and a small handful of start-up biotech companies, including NanoScale, PharmCATS, and NutriJoy Inc. NBAF is projected to bring hundreds of jobs to Manhattan and nearly double its current size. More important is the expected transformation of Manhattan into an international leader in the animal health industry, driving bioscience companies to establish a presence near NBAF. These changes in the research and development industry, as well as the demographics, in Manhattan highlight the future need for several areas of law, including, but by no means limited to, intellectual property, corporate business, real estate, biosecurity, and employment law.

If there is not a foreseeable change in the market that will support your desired niche, expanding your desired niche into related practice areas may still help set you apart. For instance, NBAF is estimated to open its doors in 2015. Therefore, I intend to pursue work in business law, administration, and taxation to expand my expertise and make connections that will likely be helpful with future work in intellectual property. Likewise, someone with passion in international banking, but bound to Topeka may build a practice in banking litigation. While her clients may primarily be throughout the Midwest, there may be opportunities to develop a subspecialty in international banking related to the concerns of Midwestern clients.

Developing a niche takes work; it is not just handed out. But, developing a niche in an area of law that you are passionate about, in a location needing the specialty, elevates you to a sought-out position. There is nothing more personally rewarding in your career as being sought out for your expertise and being able to contribute to your community’s needs.

About the Author

Kimberly Honeycutt is a third-year student at Washburn University School of Law and has a Ph.D. in molecular and cellular biology from Baylor College of Medicine. She is a patent agent, molecular biologist, and small business owner. She looks forward to being able to combine her experiences to serve Kansas and may be reached at khoney21@gmail.com.

FOOTNOTES
A Nostalgic Touch of Humor

And Now You Know the Rest of the Story

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

If you’ve ever bought something using a newspaper coupon, you know the significance of fine print. The little disclaimer at the bottom of the ad, printed in size 2 font, that lawyers draft and cashiers enforce. The fine print that quietly removes the large print representing amazing offers to everything storewide. The itty-bitty lettering that says “not applicable to Nike apparel, shoes, pants, shirts, or any other item that you really want to buy.” That stipulation is now standard fare.

But what you may not appreciate is the history for that takeaway. And that, like Paul Harvey proclaimed, is “the rest of the story.” It had its start in where most of my columns begin – Great Bend. Many years ago at Gibson’s Discount Store – or as it was known in the Keenan home – “Gibbies.” Gibbies was Walmart before Sam Walton had his first clue.

Indeed, in the book “In Sam We Trust,” author Bob Ortega noted that in the early ’50s, Gibson’s was the biggest threat to Walton’s concept. Ortega writes: “Walton was worried that his variety stores wouldn’t be able to compete with discount merchandisers – a competition that was already underway. A Texas-based wholesaler, Gibson Products Inc., had begun converting its warehouse houses into discount houses and selling franchises. Herbert R. Gibson, the founder, had decided to open his stores in small cities. Gibson’s credo was ‘buy it low, stack it high, sell it cheap.’” While all of us today know how that competition ended, what most don’t appreciate is how Herbert Gibson sustained his first significant loss.

You see, in the late ’60s, the one thing Gibbies sold in spades was guns – shotguns, pistols, rifles, BB guns. It also had an impressive collection of knives, slingshots, and gun powder. Things that captured the attention of boys who longed to kill wild – or even domesticated – game and blow up things. This was long before there were any rules or red tape on gun ownership. You could walk up, buy what you wanted, take it home, and begin reducing wildlife populations at nearby places like Cheyenne Bottoms. And Gibbie’s biggest customer was one Larry Keenan.

And one day, circa 1970, Gibbies had one of their promotions that appeared in the Great Bend Tribune. One coupon to buy one item at an obscene discount. This was a marketing idea from the gods. Unheard of, unprecedented, and, as I will explain, never to be repeated again. Because there was no fine print, no red tape, no disclaimers. Lawyers didn’t exist back then. At least none whose job was to mislead consumers. You wanted it, you got it. You saved. High-five. Repeat.

And so when that coupon appeared in the paper, Larry nearly had fibrillations. The coupon was bright red, and it made clear in no uncertain terms: 20 percent off any item in the store that day. So Larry planned the Gibbies’ trip and took his entourage with him – all piled in the Chrysler station wagon. Five kids, a couple nephews, and some stragglers as well. Back then, Gibbies was more than a store. It was a social outlet for friends and neighbors. Like a cross between church, the country club, and bridge club. On that day, Larry strutted in, began filling up the cart with various trinkets, all as a ruse to go for the real item he wanted. To Larry, a day at Gibbies was, for most normal adults, the equivalent of playing golf. But he had no time for chasing a tiny white ball in poison ivy. Eventually Larry moved to the Sporting Goods counter. Larry was inspecting a shotgun he didn’t already own. That was no small accomplishment.

I don’t recall the make, the model. It could kill birds; everything else was secondary. Larry began to negotiate the price lower and lower. If memory serves me correctly, at least once, Larry did the patented “walk away” – the bluff that induces the seller to blink. Eyelid batting commenced. And when Larry’s final demand was matched, the deal was done. Or so the salesman thought. That’s when Larry stunned the sporting goods manager by pulling out the blazing-red coupon.

At that moment, there was a disturbance in the force – like in “Star Wars” when the Evil Empire blew up that planet filled with Wookies. That’s what happened to Gibbies’ accountant who at that moment was probably sitting at a desk in El Paso, Texas, or some other god-forbidden city. He experienced chest pains, and a cold wind blew across his desk, tossing papers to the ground. A crow suddenly landed outside his office window and cackled. A cock crowed three times. And Larry got the deal of the century. No doubt heads rolled, stores closed, Lehman Brothers-type layoffs commenced immediately. And Larry sank a hole in one.

So the next year, Gibbies had another promotion. Another red coupon, good for 25 percent off for one item in the store. And along the bottom were two words, EXCLUDES FIREARMS.

(reprinted from the “Great Bend Tribune”)

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

January M. Bailey has joined Eron Law Office P.A., Wichita, as an associate.
S. Jane Bruer has joined Little & Mendelson P.C., Kansas City, Mo., as of counsel.
Amy C. Coppola has joined Crow & Associates, Leavenworth.
Daniel D. Covington has joined Green & Finch Chtd., Ottawa, as a partner. The firm has now become Green, Finch & Covington Chtd.
William P. Denning and Sean M. Sturdivan have been elected to partners with Sanders Warren & Russell LLP, Overland Park.
Kimberly A. Green has been named a member of Depew Gillen Rathbun & McInteer L.C., Wichita.
Katie A. Morgan has joined Bryan Cave LLP, Kansas City, Mo.
Diana C. Toman has joined General Cable Corp., Highland Heights, Ky.
Tanya M. Rodecker Wendt has joined Baty, Holm & Numrich P.C., Kansas City, Mo.

Changing Locations

John C. Davis has started John C. Davis, Attorney at Law, 9393 W. 110th St., Ste. 500, Overland Park, KS 66210.
Lindsey Erickson and Dionne M. Scherff have started the firm of Erickson Scherff LLC, 10990 Quivira, Ste. 200, Overland Park, KS 66210.
Maradeth L. Frederick has started the firm of Frederick Law Office LLC, PO Box 965, Frontenac, KS 66763.
Eric P. Kelly has moved to 9401 Indian Creek Pkwy., Ste. 700, Overland Park, KS 66210.
Melissa D. Ludeman is now at 700 E. 8th St., #700, Kansas City, MO 64106.
David A. Morris P.A. has moved to 3500 N. Rock Road, Bldg. 1100, Wichita, KS 67226.
Pilshaw Law has moved to Marina Point Office Park, 1999 N. Amidon, Ste. 335, Wichita, KS 67203.
Louis J. Purvis has started Purvis Law Office, 205 N. Cedar, PO Box 421, Abilene, KS 67410.
Putnam & Hartmann LLC has moved to 4310 Madison Ave., Kansas City, MO 64111.
Rebecca R. Rookstool has started the Law Office of Rebecca R. Rookstool, 108 N. 2nd, Westmoreland, KS 66549.

Miscellaneous

John E. Angelo, Wichita, was installed as chair of the International Legal Affairs Committee at the Association of Corporate Counsel’s Annual Meeting in Boston.
Douglas L. Longhofer, Wichita, won the downhill skiing competition at the Western Kansas Bar Association’s Annual Ski CLE.
Ward E. Loyd, Garden City, has been appointed to the Kansas Corporation Commission by Gov. Mark Parkinson.
Rachael K. Pirner, Wichita, has been admitted to membership in the American College of Trust and Estate Counsel.

Correction:
In the March 2010 issue of the Journal, it was reported in error that Gilliland & Hayes P.A. opened a second office; they now have five offices. Their offices are located in Hutchinson, Wichita, Overland Park, Lawrence, and Manhattan.

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

John F. Hayes, 90, of Hutchinson, died January 14. He was born in Salina on December 11, 1919, the only child of J. Frank and Helen Dye Hayes. Hayes graduated from Hutchinson High School, Hutchinson Community College, Washburn University, and Washburn University School of Law, where he was a member of the Phi Delta Theta fraternity. He and nine fraternity brothers formed Gnip Gnop, a group that met every year for more than 60 years for golf, tennis, and friendship, and established a scholarship at Washburn Law.

He served as a captain in the U.S. Army with service in the New Hebrides Islands and the Philippines.

Hayes was a founding partner of the Gilliland & Hayes law firm, which has offices in Hutchinson, Wichita, Manhattan, Lawrence, and Overland Park. The firm celebrated its 50th anniversary in December 2009.

In 1952, he served as a delegate to the National Republican Convention and later served six terms in the Kansas House of Representatives, where he was chair of the Insurance and Judiciary committees and was majority floor leader from 1975 to 1977.

Hayes was listed in Who’s Who in America for more than 40 years; a life member of the National Conference of Commissioners on Uniform State Law, serving more than 30 years; and a fellow of the American College of Trial Lawyers and the American Bar Foundation. He also served as president of the Hutchinson Chamber of Commerce, Hutchinson Rotary Club, and Kansas Association of Defense Counsel. He was a member of the American, Kansas, and Reno County bar associations and Kansas Bar Foundation; was a director and district vice president of the Kansas State Chamber of Commerce; and was vice president of the Hutchinson Symphony.

Survivors include his wife, Elizabeth “Betty” Ireton, of the home; son, Carl Hayes, of Joplin, Mo.; daughter, Chandler Moenius, of Prairie Village; and five grandchildren.

Clifford R. Hope Jr.

Clifford R. Hope Jr., 86, of Garden City, died February 11 in the home where he was born. He was born on December 21, 1923, to Clifford Hope Sr. and Pauline Sanders Hope. After the elder Hope was elected to Congress in 1926, the family began spending part of the year in Washington, D.C., where Hope graduated from Woodrow Wilson High School in 1941.

After a year of college at Kemper Military School, Booneville, Mo., he applied for the Enlisted Reserve Corps and was assigned to Fort Bragg, N.C., with the 16th Field Artillery Observation Battalion. Hope’s service during World War II included a year and a half in Europe, from Brittany through the Battle of the Bulge to the Czech border. After the war, he graduated from Harvard College and Washburn University School of Law. He returned to Garden City in 1950, where he practiced law for more than 40 years.

Hope was involved in politics for much of his life and served as a member of the Kansas State Senate from 1957 to 1963; Finney County commissioner from 1983 to 1987; and served as a leader in the Republican Party at the county, district, and state levels. Hope was also on the U.S. State Department Advisory Committee on Voluntary Foreign Aid from 1970 to 1980; and served as president of the Finney County Historical Society in 1970, as well as serving on the long-range planning committee from 1979 to 1980. He was a member of the executive committee of the Kansas State Historical Society, serving as chairman from 1980 to 1990 and was president from 1977 to 1978.

Marion C. Miller

Marion C. Miller, 93, of Hilton Head Island, S.C., died March 25. He was born on October 3, 1916, in Ness City, the son of Claud and Anna Mae Miller. After graduating from Ness City High School in 1934, he received both his Bachelor of Arts and Science degrees from Emporia State University in 1938 and his LL.B. from the University of Kansas School of Law in 1941.

He was admitted to the Kansas Bar in 1941 and engaged in the general practice of law and trial work for the next 57 years in Kansas City, Kan. Miller was also licensed to practice before the U.S. Supreme Court, the U.S. District Court for the District of Kansas, and the
Elk Foundation, endowed the Philip C. Pennington Scholarship, and was a life member of the Rocky Mountain Theatres and recently retired as vice president of legal. Pennington was a life member of the Law School Alumni Association. He was employed by AMC Entertainment, Inc., and was also its first attorney member. He was a charter member of the BPO Elks Lodge No. 1946.

Miller was a charter member of the Breezy Heights Homes Association, past president of The Capital Club Inc., and a charter member of the Johnson County Real Estate Board where he was also its first attorney member. He was also a charter member of the BPO Elks Lodge No. 1946.

Miller is survived by his daughter, Susan Clark Miller Howe, Friendswood, Texas; sons, Steven A. Miller, Hilton Head Island, S.C., and Randy Miller, Montville, N.J.; one granddaughter; and stepchildren and their families. He was married to Dorothy Frances Caul Miller is survived by his daughter, Susan Clark Miller Howe, Friendswood, Texas; sons, Steven A. Miller, Hilton Head Island, S.C., and Randy Miller, Montville, N.J.; one granddaughter; and stepchildren and their families. He was married to Dorothy Frances Caul Miller from 1946 until her death in 1974 and was married to Christine Kindler from 1979 until 1996. He was preceded in death by his parents and his brothers, Victor Laverne Miller and Lawrence Linn Miller.

**Philip C. Pennington**

Philip C. Pennington, 59, of Weatherby Lake, Mo., died February 16. He was born November 30, 1950, to Olivia (Dunham) and James Lindsey Pennington. He earned his bachelor’s degree and master’s degrees in business administration from Texas Christian University, Fort Worth, and his juris doctorate from Washburn University School of Law.

He was currently serving on the board of governors of the Law School Alumni Association. He was employed by AMC Theatres and recently retired as vice president of legal. Pennington was a lifetime member of the Rocky Mountain Elk Foundation, endowed the Philip C. Pennington Law Scholarship, and was a Master Mason and a member of the Shrine.

He was preceded in death by his father. Survivors include his mother, Olivia; brother, Stephen; and aunt, Margaret Canale.

**Frank Saunders Jr.**

Frank Saunders Jr., 78, of Overland Park, died February 9, following complications from Alzheimer’s disease. He was born to Emma and Frank Saunders Sr. in Salem, Mass., on December 23, 1931.

At age 10, his family was interned in a World War II Japanese prison camp near Manila. For nearly three years, he made nightly forays bearing whatever “treasures” his family had to exchange with the Filipinos for whatever food they had. He developed skills at building with bamboo and matting and barred with fellow prisoners for whatever he could get in exchange for erecting cookhouses and additional shelters. The Los Banos Internment Camp was liberated by the 11th Airborne Division on February 23, 1945, and the family returned to the United States, where they settled in Kansas City.

In 1954, he graduated from Ottawa University with his Bachelor of Arts degree. He was drafted during the Korean War and stationed at Darmstadt, Germany, as a radio teletype operator. He returned to the United States in 1956 and received his law degree from the University of Missouri-Kansas City School of Law. In 1961, he commenced a legal career that spanned more than 40 years until he retired in 2000. In 1963, Saunders started the Wallace and Saunders Law Firm, which over the years evolved into Wallace, Saunders, Austin, Brown & Enochs Chrd. Under his leadership, offices were established in Kansas City and Springfield, Mo., Overland Park, and Wichita, employing more than 70 attorneys.

Saunders was a member of the Kansas, Missouri, Kansas City Metropolitan, and Johnson County bar associations; the American Board of Trial Advocates; the Association of Insurance Attorneys; and was past chairman of the KBA Disciplinary Enforcement Committee. He also had a long history of civic involvement and community leadership, having served on the Shawnee Mission Medical Center board of directors; former director of the Shawnee Mission Medical Center Foundation Board and former chairman of the Shawnee Mission Medical Center Board of Professional Affairs; past president of the Overland Park Chamber of Commerce, United Community Services of Johnson County, United Cerebral Palsy Association of Kansas, and Kansas City Council on Crime and Delinquency; and former director of the Johnson County Community College Foundation Board.

He was preceded in death by his wife, Wyna. He is survived by his daughters, Stephanie Smithmyer, of Atlanta, and Stacy Saunders, of Shawnee; and son, Scott Saunders, of Merriam.

(continued on Page 26)
LAW PRACTICE MANAGEMENT TIPS & TRICKS

ABA TECHSHOW Tidbits

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

I

t's a wrap on another successful and informative ABA TECHSHOW in Chicago with Kansas back in the game. We were the “donut hole of the Midwest” with all four neighbor states participating in TECHSHOW as event promoters while Kansas sat on the sidelines, sliding behind. That changed this year with the Kansas Bar Association back as an event promoter providing Kansas attorneys a $150 price break on registration – a welcome stimulus in a tight economy.

LPM is the Killer App

My mantra has been that technology has evolved to the point that virtually everything is possible. After all, we have been to the moon with less computing power than sits in our mobile phone. The heavy lifting in progress is actually deciding what we want to do with technology. Longtime tech guru Jim Calloway pointed out that the TECHSHOW is now less about technology than it is about law practice management. In other words, we have the tools; what is needed is direction and vision.

The calendar is a simple illustration of this notion. Something given away by every bank and car dealer appears simple yet it stymies many practices. The options available with a computerized calendar provide dramatic new capabilities but myriad, confusing choices.

One TECHSHOW attendee wanted her calendar online for clients to schedule their own appointments. Some balked fearing clients would make judgments about the practice if there were a lot of free spots (does the attorney really do any work) or if there were few (will the attorney have time for me). An attorney committed to the client-driven calendar answered the problem to his satisfaction by use of a defined period each week clients could access appointments.

Implementing such capabilities requires careful planning. Successful tech gurus and practice managers come to TECHSHOW to learn how to deploy the same planning skills they honed for litigation or mediation to rolling out new capabilities in their office.

Apps Make a Splash

The big splash at TECHSHOW is that “apps” hope to ease the complexity of deploying big technology initiatives. Most know about apps from Apple’s success with the concept on iPhone but it is an idea that hearkens back to Unix and predecessor devices like the Palm Pilot. The idea is to create a simple program or utility that does one thing very well and make it inexpensive, simple to use, and well supported. The concept allows you to build your own custom toolkit and change out individual parts as your needs change.

Apple’s iPhone, Google’s Android, and BlackBerry all embrace the app concept. Apps on display at the TECHSHOW were:

• Eye Glasses (iPhone) uses the phone camera to magnify items on screen;

• Parking Meter (iPhone) warns before your meter expires;

• Goggles (Android) searches Google for items photographed with the camera; and

• Scan2PDF (Android) photograph a document and save to PDF.

Apps have re-emerged on the desktop also. The all-in-one suites (TimeMatters, Amicus, Tabs) demonstrated apps that allowed quick access to parts of the suite for remote access. There is even some hope that support problems plaguing many vendors can be answered through apps that work around gaps rather than ground-up rewrites.

Intriguing Directions

It is hard imagining bold new directions, but TECHSHOW puts you in touch with others who have done that hard work. If the sessions are any indication, firms are working hard to deploy tools to allow attorneys and staff to work remotely while fully accessible to office, clients, and courts. The tools to enable officing in Diaspora have matured and provide huge benefits for cutting costs, improving disaster readiness, and enticing employees with great flexibility. Another impressive peek at the future pointed toward automated negotiation systems – computer models designed to maximize mediation strength through the mathematics of game theory.

Early use of the automated negotiation tools hints that many attorneys fear being out-of-place in a room full of geeks. One quarter of the 900 attendees at the TECHSHOW overcame their fears to become first-time attendees and gained access to more than 70 hours of courses and 100 vendors. You do not need game theory to recognize that as a winning position. Go ahead and book for the 25th Anniversary TECHSHOW April 11-13, 2011.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
How Can We Help You?

By William K. “Billy” Rork, Rork Law Office, Topeka

Getting into college, getting out of college with the best grades you can. Taking the LSAT, getting into law school. Taking the Bar examination, passing it, and being sworn in. A lot of time, energy, and financial resources go into obtaining our law degrees. Then we seek out employment where available and hopefully an area of law we enjoy.

No matter where we work or what type of employment we are involved with using our legal talents, we face a variety of difficulties that make us more prone to drug addiction, alcoholism, depression, or any combination of those and other diseases. Yes, alcohol and drug addiction is a disease, just like cancer, chronic obstructive pulmonary disease, or heart disease. We wouldn't try to cure ourselves of cancer or heart disease, but until we get down the right path to recovery, we self-medicate and otherwise self-treat our addictions or depression.

Over the years, many local lawyers assistance programs sprang up throughout the state and the Kansas Bar Association established a committee on impaired lawyers to serve the needs of our members prior to establishment of the Kansas Lawyers Assistance Program (KALAP) office. The Kansas Supreme Court established the formal KALAP in 2001, and we have an executive director, two other staff members, and an office in Topeka at 515 S. Kansas Ave., 2nd Fl. We have an 12-member board. We try to obtain members from different geographical areas throughout the state. Our primary objective is to assist attorneys prior to implementation of any disciplinary complaint, whenever possible. We also become involved after disciplinary complaints have come about. We strive to help in any manner that would best assist attorneys in meeting their respective needs, and helping them to retain their practice of law, which all of us worked so long and hard to attain.

We look for ways to be of assistance and not ways to single out any particular person just because they may have been involved in a few minor indiscretions.

We get referrals from people who work around attorneys in the office; we receive information from judges and attorneys all across the state, expressing deep and sincere concern for someone who might be repeatedly missing court dates, appearing in court with alcohol on the breath, or not even showing up for court and exhibiting classic symptoms of depression. Our primary goal and emphasis is to assist the attorney in the best manner possible.

Any contact with us is confidential and we don’t disclose information to the disciplinary administrator or others. There may be a duty on the part of a particular attorney to make such disclosure, which we would certainly reinforce they do so, but any contact and information relayed to us is protected by the strict confidentiality provisions of Rule 206.

Perhaps you know someone who is suffering from alcoholism, drug addiction, depression, or exhibiting signs of possible difficulties in that area. We always make contact with the attorney discussed, and do so without disclosing who may have contacted us, or discussing the information in such a manner that the attorney may put two and two together, and then recognize who may have brought them to our attention.

We just try to make the attorney aware of what we can do by way of referral or otherwise lead them toward objectives that would best meet their particular situation.

The disciplinary administrator, Stan Hazlett, and his staff have a deep and sincere concern for our fellow attorneys, but recognize their role is very different than ours. He works closely with our office and supports our office as the available service benefits every person, including the attorneys and the general public. He openly says, in various speaking engagements across the state, of how often addiction, depression, or some other recognized impairment plays a part in most of the disciplinary proceedings his office pursues. While recognizing he has a different role, he has expressed gratitude and support for KALAP’s function in providing services.

We are always open to suggestions and input from any member of the Bar, and welcome the opportunities which come our way. We need to thank the many attorneys around the state who recognize the need for this type of service, and who volunteer their time. We thank those attorneys who came before us and had a vision, which now finds itself in place. We all need to do everything we can to help out our fellow attorneys as we continue down the path we’ve elected to spend our lives. Feel free to call us at (888) 342-9080 to see how we may be able to help you or an attorney you might be concerned about.

About the Author

William K. “Billy” Rork graduated from Washburn University in 1976 with a Bachelor of Arts in history and his juris doctorate in 1979 from Washburn Law School. He was employed by Attorneys General Curt T. Schneider and Robert T. Stephan. He opened his office for the practice of law, focusing primarily on criminal and DUI defense, in September 1980 with Curt T. Schneider in Topeka. He later spent a few years with his mentor, John C. Humpage. He has primarily remained in the private practice of law.

He has been a member of the Topeka Bar Association Lawyers Assistance Program and the KBA Lawyers Assistance Program. He is the current board chair of the Kansas Lawyers Assistance Program. He has spent the past 23 years assisting attorneys in whatever manner possible as would relate to suggested recovery and other assistance programs. He is a life member of the National Association of Criminal Defense Lawyers and a life and charter member of the Kansas Association of Criminal Defense Lawyers, to name a few of his many affiliations.
Thinking Ethics

“TWEET” THIS: The Ethics of Social Networking

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

Social Networking is Here. While skeptics viewed the initial wave of electronic social networking as a passing fad, the ensuing years have proved them wrong. At this point, the numbers tell the story:

Facebook leads the way, with more than 400 million active users. More than 5 billion pieces of content, including 60 billion photos, are shared among the members each month.¹ MySpace boasts 100 million active users.² Twitter has 75 million users, who post 50 million tweets every day. That is an average of 600 tweets per second.³ LinkedIn “has over 60 million members in over 200 countries and territories around the world.”⁴ YouTube shows videos of every kind and nature. A recent search found more than 120,000 videos, which include the subject “lawyer.”⁵ Of course, these are only some of the more popular examples.⁶

With so much electronic communication and interaction, the user is likely to “get it wrong” once in a while. Further, the narcissistic need to share one’s every thought and action can lead to regrettable posts that cannot be rescinded.⁷ To paraphrase Judge Benjamin N. Cardozo, “[t]he hand once set to a Tweet may not be withdrawn with impunity.”⁸

Social Networking and Lawyer Marketing

Despite reputation and appearances, lawyers do try to keep up with changes in society – though often perhaps a step behind. Many lawyers have today ventured into the realm of social networking in an effort to improve their visibility for marketing purposes.⁹ Indeed, the Kansas Rules of Professional Conduct recognize this obvious reality in the Comment to Rule 7.2 (Advertising):

Similarly, electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.[¹⁰]

According to a 2009 survey by the ABA, 43 percent of the lawyers surveyed have a presence on Facebook, while a surprising 12 percent of law firms have a Facebook page.¹¹ There are so many lawyer- and law firm-blogs that a special site has been set up just to synthesize and present only the perceived “best” of those weblogs.¹²

Advertising through electronic media is certainly permitted, so long as (a) the advertising is not false or misleading and (b) it contains the name of at least one lawyer responsible for its content. The advertising also must not create unjustified expectations about results the lawyer can achieve. As with any advertisements, lawyers should be careful that their Web sites, blogs, and other electronic promotional materials are truthful and otherwise in compliance with the requirements of these rules.

Ethical Risks for Lawyers in Social Networking

While keeping up with the Woodses is considered important for the hip lawyer, keeping up with the Model Rules of Professional Conduct while doing so is even more important. A review of several rules in the context of social network marketing and communication is worthwhile.

Scope of Representation (Rule 1.2)

When exchanging information on a blog or tweet, there is a risk that the recipient of the lawyer’s wisdom may well consider herself a “client” of the lawyer, rely on the “advice” rendered, and then feel slighted when that off-hand advice proves incorrect (probably because the lawyer did not have all the facts, or responded in an off-hand manner without full analysis). Lawyers should refrain from rendering legal advice to nonclients. Lawyers should also make it clear, when exchanging casual communications, that the exchange does not constitute legal advice, and that the lawyer does not represent the recipient.

Confidentiality (Rule 1.6)

Of course, client information remains confidential and should not be disclosed in any setting, including in an informal electronic exchange.¹³

Positional Conflicts (Rule 1.7)

Under the modern Miranda rule, anything one says in a Facebook page can and will be used against you in a court of law.¹⁴ Therefore, it is wise to refrain from making pronounce-

(continued on next page)

FOOTNOTES
3. http://www.computerworld.com/s/article/9148878/Twitter_now_has_75M_users_most_asleep_at_the_mouse
10. Kansas Rules of Professional Conduct (KRPC), found at Rule 226, Rules of the Kansas Supreme Court, at Rule 7.2 (Comment).
ments on legal issues or principles, since the lawyer or his firm may be asked (and paid) to take a contrary position.15

False Statements (Rule 4.1 and Rule 8.4(c))

While such considerations clearly do not appear to restrain many participants in social networking, lawyers should be careful not to make false statements of material fact or law and should not engage in dishonesty, fraud, deceit, or misrepresentation in their posts.

Contact with Represented Party (Rule 4.2) and Unrepresented Party (Rule 4.3)

Care must be taken not to engage in inadvertent (or intentional) communications with persons known to be represented by counsel, at least insofar as such communications would or could relate to “the matter” in which that person is represented. In addition, communications with an unrepresented party cannot be untruthful or misleading.16

Ethical Risks for Clients

The attorney-client privilege is a valuable protection for communications between lawyer and client. However, the privilege belongs to the client, and it can be waived by intentional disclosure of privileged communications. Therefore, clients should be careful not to disclose privileged communications to persons outside the relationship or where there is not an expectation of privacy in the communication.17

Conclusion

When engaging in social networking, lawyers should be careful to be circumspect and thoughtful. Otherwise, a tweet sent in haste may cause the sender to repent at leisure.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park. He is a member of the Kansas Board of Discipline for Attorneys; chairman of the KBA Ethics Advisory Opinion Committee; chairman of the Johnson County (Kansas) Bar Ethics and Grievance Committee; member of the Kansas Judicial Council; and chairman of the Judicial Council’s Civil Code Advisory Committee. Badgerow was also chairman of the KBA Ethics 2000 Commission.


16. Philadelphia Bar Association Ethics Op. 2009-02, found online at http://www.philadelphiabar.org/WebObjects/PBAReadOnly.woa/Contents/WebServerResources/CMSResources/Opinion_2009-2.pdf (lawyer cannot use a third-party to “friend” an unrepresented person on Facebook or MySpace, to obtain information about the person, because failure to disclose the lawyer’s identity as the true inquirer would be deceitful and a violation of Rules 4.3, 4.1, 5.3, and 8.4).


Walk with confidence

When evaluating your malpractice coverage, keep this in mind:

If your malpractice policy isn’t priced appropriately, that price will eventually increase or the carrier won’t remain in the marketplace. The Bar Plan bases rates on actuarial analysis; not market conditions. We have taken a very sound and conservative approach in our investments to ensure financial stability in any economic market.

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The *Twombly* Trilogy: Exploring the New “Plausibility” Standard for Motions to Dismiss in Kansas Federal Courts

By: Michael C. Leitch and Ryan C. Hudson
I. Introduction

For most Kansas practitioners who appeared in federal court during the last half century, a motion to dismiss for failure to state a claim for relief was a predictably short event: it was denied. Until 2007, a motion to dismiss filed under Federal Rule 12(b)(6) was “disfavored” and “could be granted only where it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.”

That lax standard was jettisoned, however, in a string of recent U.S. Supreme Court (Supreme Court/Court) decisions known as the Twombly Trilogy. In Twombly (2007), Erickson (2007),4 and Iqbal (2009),5 the Supreme Court radically raised the bar for surviving a motion to dismiss filed under Federal Rule 12(b)(6). In turn, practitioners in Kansas federal courts must become familiar with – and strategically consider – the new motion to dismiss standard introduced in Twombly, applied in Erickson, and cemented in Iqbal. Because Kansas state courts have traditionally followed federal interpretation of similar federal procedural rules,6 these decisions may also affect state court motion practice.

In the wake of these decisions, a complaint must now include enough factual detail to state a “plausible” claim for relief on its face. This significant change in the Rule 12(b)(6) motion to dismiss standard cannot be overstated. In short, the Twombly Trilogy has been received by lower courts as a decree to dispose of “implausible” cases at the onset, before discovery has commenced. The results speak for themselves: Within only four months after Iqbal was decided, national commentator Tony Mauro observed that motions to dismiss “have become commonplace in federal courts, already producing more than 1,500 district court and 100 appellate court decisions according to a Westlaw search.”

This article begins with a discussion of the notice pleading standard in place since Conley v. Gibson was decided in 1957, as well as the three cases of the Twombly Trilogy that recently imposed the “plausibility” standard in place of Conley. It then examines how the Tenth U.S. Circuit Court of Appeals, in particular, has interpreted the new “plausibility” standard for motions to dismiss. Finally, this article explores some considerations for both plaintiffs and defendants litigating in federal court under the new “plausibility” standard.

II. Background

A. The notice pleading standard under Conley v. Gibson

Under the long-established notice pleading standard of Fed. R. Civ. P. 8(a)(2), a complaint must include “a short and plain statement of the claim showing that the pleader is entitled to relief.” A complaint’s failure to state a claim for relief usually is tested at the motion to dismiss stage, which is controlled by Fed. R. Civ. P. 12(b)(6).

For the last half century, the Supreme Court’s decision in Conley v. Gibson – long-dreaded by civil defendants – made motions to dismiss disfavored. The Conley standard required that under Rule 12(b)(6), “a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim, which would entitle him to relief.”

As a result of this daunting standard, a complaint could be dismissed only if it was legally deficient. As the Tenth Circuit recalls, “a complaint containing only conclusory allegations could withstand a motion to dismiss unless its factual imposibility was apparent from the face of the pleadings – that is, a complaint was immune from dismissal if it left open the possibility that a fact not alleged in the complaint could render the complaint sufficient.” Thus, until recently, a complaint’s lack of specific factual allegations was almost always a non-factor at the motion to dismiss stage.

B. The Twombly Trilogy and the “plausibility” pleading standard

1. Bell Atlantic v. Twombly

Departing from 50 years of precedent, the Supreme Court resurrected the motion to dismiss when it decided Bell Atlantic Corp. v. Twombly in 2007.10 The facts alleged in Twombly were sparse: the plaintiffs (a putative class action) sued four major telecommunications companies for antitrust violations under the Sherman Act.11 The plaintiffs alleged the defendants conspired to not compete and to fix prices in “parallel conduct,” which the plaintiffs alleged, in conclusory fashion, arose through an “agreement.” However, the complaint failed to “set forth a single fact” supporting the allegation that such an agreement among the defendants actually existed.12 To this end, although the complaint alleged a sweeping seven-year span of conduct, it “mentioned no specific time, place, or persons involved in the alleged conspiracies.”13

FOOTNOTES

1. Paulsen v. Gutierrez, 962 F. Supp. 1367, 1369 (D. Kan. 1997) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)); see also 5B CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1357, at 557 (3d ed. 2004) (noting generally that “the motion to dismiss for failure to state a claim was viewed with disfavor and was rarely granted”).


9. Robbins v. Oklahoma, 519 F.3d 1242, 1246 (10th Cir. 2008); see also Sprague v. Kasa Indus. Controls Inc., 250 F.R.D. 630, 631 (D. Kan. 2008) (“Under this standard, a wholly conclusory statement of a claim could survive a motion to dismiss as long as there was the possibility that some undislosed facts would support recovery.”). The facts alleged in Twombly were sparse: the plaintiffs (a putative class action) sued four major telecommunications companies for antitrust violations under the Sherman Act. The plaintiffs alleged the defendants conspired to not compete and to fix prices in “parallel conduct,” which the plaintiffs alleged, in conclusory fashion, arose through an “agreement.” However, the complaint failed to “set forth a single fact” supporting the allegation that such an agreement among the defendants actually existed. To this end, although the complaint alleged a sweeping seven-year span of conduct, it “mentioned no specific time, place, or persons involved in the alleged conspiracies.”13
This dearth of factual detail proved fatal. Facing nothing more than conclusory assertions, the Supreme Court in Twombly held that dismissal was required because “parallel conduct does not suggest conspiracy, and a conclusory allegation of agreement at some unidentified point does not supply facts adequate to show illegality.”

In reaching this holding, the Court also “retired” the “no set of facts” language from Conley, which it concluded “is best forgotten as an incomplete, negative gloss on an accepted pleading standard.”

In its place, the Court devised a new Rule 12(b)(6) standard – plausibility – and held that a complaint must offer enough facts to state a claim for relief that is plausible on its face. The Court explained that this requires “more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do.” In determining how much factual detail is required to reach the plausibility threshold, the Court explained that “[f]actual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact).” Because the plaintiffs in Twombly had “not nudged [their] claims across the line from conceivable to plausible,” the complaint was dismissed.

2. Erickson v. Pardus

While undoubtedly a welcome opinion for antitrust defendants, the reach of Twombly was unclear. Nothing in the majority’s opinion addressed whether the holding was confined to antitrust cases or whether it applied across contexts.

Within months of issuing Twombly, the Supreme Court added even more uncertainty to this question when it handed down Erickson v. Pardus. In contrast to the sweeping allegations of the complaint in Twombly, the allegations in Erickson were simple and specific. A Colorado prisoner asserted a constitutional violation under 42 U.S.C. § 1983 and alleged the facts in detail:

- He contracted hepatitis C while in jail.
- Prison officials withheld his hepatitis C medicine.
- His life was in danger.

The Tenth Circuit affirmed the district court’s dismissal of the prisoner’s complaint as conclusory, but the Supreme Court reversed this decision in its May 2009 opinion. Under Rule 8(a)(2), and quoting Twombly, it held that “[s]pecific facts are not necessary; the statement need only ‘give the defendant fair notice of what the ... claim is and the grounds upon which it rests.’” In addition, the Court pointed out, “when ruling on a defendant’s motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint.” For those reasons, the Court reversed the dismissal and allowed the claim to proceed.

To many, this outcome raised more questions than it answered regarding Twombly. Some viewed the decision in Erickson as a sign – a “two steps forward, one step back” result – that the Supreme Court was tempering its holding in Twombly. Still others dismissed Erickson outright as a non-event. They pointed out that the decision was merely per curiam and that the complaint included such specific facts that it would have survived any pleading standard. The plaintiff also was a pro se prisoner and was therefore entitled to have the complaint liberally construed in his favor. In sum, at the close of 2007, whether Twombly would blossom beyond the realm of antitrust cases remained uncertain.

3. Ashcroft v. Iqbal

In May 2009, when a five-justice majority of the Supreme Court decided Ashcroft v. Iqbal, all doubts about the scope of Twombly evaporated. In Iqbal, the Supreme Court amplified the “plausibility” pleading standard first set forth in Twombly and confirmed that it applies to “all civil actions” in federal court, “whether brought under antitrust laws or otherwise.” The facts in Iqbal involved a Pakistani detainee who sued, among others, former U.S. Attorney General John Ashcroft and former FBI Director Robert Mueller for unlawful and purposeful discrimination in violation of his constitutional rights. Iqbal alleged that Ashcroft and Mueller devised and adopted policies that unconstitutionally discriminated against him while he was housed in a New York City special maximum security housing unit following the terrorist attacks of Sept. 11. The complaint included 21 causes of action and named as defendants “34 current and former federal officials and 19 ‘John Doe’ federal corrections officers” who ranged from jailers all the way to Ashcroft and Mueller, “who were at the highest level of the federal law enforcement hierarchy.”

In holding that the complaint failed to state a claim for relief, the Court explained that “the pleading standard Rule 8 announces does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” The Court reaffirmed the key “plausibility” holdings from Twombly and advised that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” Under Iqbal, “[w]here a complaint pleads facts that are ‘merely consistent with’ a defendant’s liability, it ‘stops short of the line between possibility and plausibility of entitlement to relief.’”

14. Id. at 557.
15. Id. at 563.
16. Id. at 570.
17. Id. at 555.
18. Id.
19. Id. at 570.
20. Id. at 596 (Stevens, J., dissenting) ("Whether the Court’s actions will benefit only defendants in antitrust treble-damages cases, or whether its test for sufficiency of a complaint will injure to the benefit of all civil defendants, is a question that the future will answer.")
22. 551 U.S. at 93-94.
23. 551 U.S. at 93 (quoting Twombly, 550 U.S. at 555 (quoting Conley, 355 U.S. at 47)).
24. Id. at 93-94.
25. Id.
26. Id.
28. Id. at 1954.
29. Id. at 1943.
30. Id. at 1949.
31. Id.
32. Id. (quoting Twombly, 551 U.S. at 557).
The Court also highlighted what it called “[t]wo working principles” from its decision in Twombly. First, it noted, “[t]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” 33 It insisted that “Rule 8 marks a notable and generous departure from the hypertechnical, code-pleading regime of a prior era, but it does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.” 34 Second, the Court explained that “[d]etermining whether a complaint states a plausible claim for relief will ... be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” 35

III. Analysis of the Twombly Trilogy in Kansas Federal Courts

A. The “plausibility” standard

Following the Twombly Trilogy, the Tenth Circuit has issued some guidance on how the “plausibility” standard applies, making clear that “the burden rests on the plaintiffs to provide fair notice of the grounds for the claims made against each of the defendants.” 42 Distilling the most recent guidance in Iqbal, the Tenth Circuit has devised a two-step approach for deciding a Rule 12(b)(6) motion to dismiss.

1. Step one

The Tenth Circuit has instructed that the first step is to identify “the conclusory allegations in the complaint that are not entitled to the assumption of truth.” 37 Echoing Iqbal, it has noted that “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” 38 Of course, distinguishing between factual statements and conclusory allegations can be the dispositive step in this analysis; nevertheless, just exactly how to differentiate facts from conclusions has yet to be resolved. For instance, the five-justice majority in Iqbal found the key allegations in the complaint conclusory, 39 while the four-justice dissent (led by Justice David Souter, who authored Twombly) insisted that these same allegations were plainly factual. 40 Lower courts undoubtedly will be forced to confront the issue of how to distinguish facts from legal conclusions, but for now this pivotal issue remains unresolved.

2. Step two

After the conclusory statements have been removed, a court then analyzes the factual allegations in the complaint “to determine if they plausibly suggest an entitlement to relief.” 41 In making this determination, “[t]he complaint does not need detailed factual allegations, but the factual allegations must be enough to raise a right to relief above the speculative level.” 42 In line with Iqbal, the Tenth Circuit has advised that “[a] claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” 43 As it has observed, “Iqbal stressed that it is not enough for the plaintiff to plead facts ‘merely consistent’ with the defendant’s liability.” 44 Thus, “the mere metaphysical possibility that some plaintiff could prove some set of facts in support of the pleaded claims is insufficient; the complaint must give the court reason to believe that this plaintiff has a reasonable likelihood of mustering factual support for these claims.” 45

B. Strategic considerations for plaintiffs and defendants in Kansas federal courts

1. Continual awareness

To begin, Kansas federal court practitioners must simply be aware of Twombly and Iqbal and know that the Supreme Court “retired” Conley’s “no set of facts” language. At the same time, Twombly and Iqbal also left a litany of unanswered questions. As future cases are decided, the contours of the “plausibility” standard will be further defined and could change dramatically. In addition, this new “plausibility” standard is not set in stone. In fact, some key members of Congress have threatened to dispose of the Twombly Trilogy legislatively. In July 2009, Sen. Arlen Specter introduced the Notice Pleading Restoration Act of 2009, which “seeks to reverse Twombly and Iqbal in favor of a return to the dismissal standard set by Conley, and in effect lower the pleading bar that Twombly and Iqbal have raised.” 46 In November 2009, the Open Access to Courts Act of 2009 was introduced in the House, and it expressly bans consideration of whether a plaintiff’s claims are plausible. 47 Whatever becomes of such legislation, practitioners should continually be informed of what the Supreme Court and the Tenth Circuit have interpreted the motion to dismiss standard to be.

2. What, exactly, does the “plausibility” standard require?

A primary question left unanswered even after Iqbal is what, exactly, does “plausibility” mean? Following Twombly, the Tenth Circuit suggested that “plausibility” is targeted at the scope, not the truth, of the factual allegations in the complaint:

33. Id. at 1949.
34. Id. at 1950.
35. Id.
36. Robbins v. Oklahoma, 519 F.3d 1242, 1250 (10th Cir. 2008).
38. Id. (quoting Iqbal, 129 S. Ct. at 1949).
39. See Iqbal, 129 S. Ct. at 1951 (dismissing the complaint’s allegations as “a formulaic recitation of the elements of a constitutional discrimination claim”).
40. Id. at 1960-61 (Souter, J., dissenting) (insisting that, taken in context, the allegations of the complaint were factual).
41. Hall, 584 F.3d at 863 (quoting Iqbal, 129 S. Ct. at 1951).
42. Id. (quoting Chrity Sports LLC v. Deer Valley Resort Co., 555 F.3d 1188, 1191 (10th Cir. 2009)).
43. Id. (quoting Iqbal, 129 S. Ct. at 1949).
44. Id. (citing Iqbal, 129 S. Ct. at 1949).
45. Robbins, 519 F.3d at 1247 (quoting Ridge at Red Hawk LLC v. Schneider, 493 F.3d 1174, 1177 (10th Cir. 2007)).
47. H.R. 4115, 111th Cong. § 2 (a) (2009).
The most difficult question in interpreting *Twombly* is what the Court means by ‘plausibility.’ The Court states that the complaint must contain ‘enough facts to state a claim to relief that is plausible on its face.’ But it reiterates the bedrock principle that a judge ruling on a motion to dismiss must accept all allegations as true and may not dismiss on the ground that it appears unlikely the allegations can be proven. ... Thus, ‘plausible’ cannot mean ‘likely to be true.’ Rather, ‘plausibility’ in this context must refer to the scope of the allegations in a complaint: if they are so general that they encompass a wide swath of conduct, much of it innocent, then the plaintiffs ‘have not nudged their claims across the line from conceivable to plausible.’

This interpretation of “plausibility” is consistent with the Supreme Court’s later explanation in *Iqbal* that “[w]hen there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”

Ultimately, based on the decisions rendered so far, the factual detail required is proportional to the complexity of the claims alleged. The Tenth Circuit has urged that what is “plausible” is something that “depends on context” and “depends on the type of case.” In an antitrust case, at the complex end of the spectrum, “sufficient facts would tend to include details concerning the conspirators’ actual agreement to fix prices.”

In contrast, at the other end of the spectrum, “[a] simple negligence action based on an automobile accident may require little more than the allegation that the defendant negligently struck the plaintiff with his car while crossing a particular highway on a specified date and time.”

3. Guidance for defendants seeking to dismiss “implausible” claims

The *Twombly* Trilogy creates a new weapon for many civil litigation defendants. For most Kansas practitioners, it will take some adjusting to even consider filing a motion to dismiss in federal court. After all, under the *Conley* “no set of facts” standard, it was axiomatic that a motion to dismiss was “disfavored” and rarely granted by Kansas federal courts. Before *Twombly*, dismissal of insufficient claims could be achieved only at summary judgment – after discovery had exposed the factual gaps of the plaintiff’s allegations.

More than anything else, the transition from *Conley* to *Twombly* is one from law to facts; claims that are factually “implausible” can now be dismissed before discovery has occurred. The Court departed from *Conley*’s bare bones notice pleading standard – and 50 years of precedent – for two fundamental reasons:

The insistence on factual allegations tending to suggest actionable rather than innocent conduct is not mere formalism. Rather, the Supreme Court emphasized that it serves at least two vital purposes – to ensure that a defendant is placed on notice of his or her alleged misconduct sufficient to prepare an appropriate defense, and to avoid ginning up the costly machinery associated with our civil discovery regime on the basis of a ‘largely groundless claim.’

Thus, one approach for defendants filing motions to dismiss under the “plausibility” standard is to emphasize these twin aims of *Twombly*. The first aim, giving a defendant fair notice of the claim, has already been addressed by the Tenth Circuit. In complex cases, the Tenth Circuit has stressed that it is particularly important for the complaint to “make clear exactly who is alleged to have done what to whom, to provide each individual with fair notice as to the basis of the claims against him or her.”

Drawing on *Iqbal*, which involved multiple defendants invoking qualified immunity, the Tenth Circuit has instructed that “complaints in § 1983 cases against individual government actors pose a greater likelihood of failures in notice and plausibility because they typically include complex claims against multiple defendants.” As a result, the ‘plausibility’ standard “may have greater bite” in this context.

The second aim, the extraordinary cost of discovery in complex cases, is a sign of the times and something that the justices who decided *Conley* in 1957 never could have anticipated. The Supreme Court in both *Twombly* and *Iqbal* stressed the crippling cost of discovery as an impetus for the change in the motion to dismiss standard; this reality of complex modern litigation is a critical reason why the Court found that dismissal must occur before discovery has commenced. Similarly, both cases also rejected the argument made by plaintiffs that district judges could control the cost of discovery through limited discovery or careful case management. In *Iqbal*, for instance, the Court held that because the complaint was deficient, the plaintiff was “not entitled to discovery, cabined, or otherwise.”

48. *Robbins*, 519 F.3d at 1247 (internal citations omitted).
55. *In re Urethane Antitrust Litig.*, 663 F.Supp.2d at 1074 (noting these same two fundamental bases behind *Twombly* (citing *Bryson v. Gonzalez*, 534 F.3d 1282, 1286 (10th Cir. 2008)).
56. *Robbins*, 519 F.3d at 1250.
57. Id. at 1249.
58. Id.
59. In *Twombly*, the Court urged that “[i]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive.” 550 U.S. at 546. In *Iqbal*, the Court held that “Rule 8 . . . does not lock the doors of discovery for a plaintiff armed with nothing more than conclusions.” 129 S. Ct. at 1950. It further held, “the question presented by a motion to dismiss a complaint for insufficient pleadings does not turn on the controls placed upon the discovery process.” *Id.* at 1953.
60. *Iqbal*, 129 S. Ct. at 1953-54.
Of course, before filing a motion to dismiss, counsel must first determine whether such a motion is likely to achieve a lasting dismissal. Courts granting a 12(b)(6) motion often give plaintiffs an opportunity to file an amended complaint. Thus, where the gaps in the complaint can likely be filled with details the plaintiff is likely to know or easily find, the motion may be a waste of time. Nevertheless, there can be strategic gains to forcing a plaintiff to show its hand at the onset of the case.

4. Considerations for plaintiffs seeking to plead “plausible” claims

For plaintiffs litigating under the new “plausibility” standard, the most important lesson of the Twombly Trilogy is to include in the complaint as many specific facts as possible. As the Tenth Circuit has noted, “[t]he Twombly Court was particularly critical of complaints that ‘mentioned no specific time, place, or person involved in the alleged conspiracies.’ Given such a complaint, ‘a defendant seeking to respond to plaintiffs’ conclusory allegations ... would have little idea where to begin.’” Instead, plaintiffs should offer the context underlying the case and include concrete facts written in plain language. By avoiding broad or sweeping factual statements, plaintiffs will help prevent a complaint from being something that can be summarily dismissed as “implausible.” If a plaintiff cannot provide sufficient information about the dates, places, or people involved, counsel should be prepared to do some investigating before filing the case. An additional approach is to attach and incorporate documents that can fill these gaps.

As to how much factual detail is required, the Supreme Court’s decision in Erickson – the middle decision in the Twombly Trilogy – is insightful. The dismissal in Erickson was reversed because “[a]lthough the allegations made by the petitioner were general, they were not overly broad.” Also helpful is the Tenth Circuit’s reversal in Christensen v. Park City Municipal Corp., where the Tenth Circuit insisted that “[i]t is not necessary for the complaint to contain factual allegations so detailed that all possible defenses would be obviated. Even after Twombly, the factual allegations need only contain enough allegations of fact ‘to state a claim to relief that is plausible on its face.’” Ultimately, a blanket prohibition of complex or difficult cases cannot be the rule at the motion to dismiss stage. Given the judicial ammunition supplied by Twombly and Iqbal, however, plaintiffs will be forced to convince courts that the merits of a lawsuit are to be decided on the outcome of discovery and the search for truth, not on snap judgments made from the face of the pleadings. In many instances, the cost of discovery likely will be the key factor in predicting whether a court will allow a case to proceed.

On this front, plaintiffs should consider pointing out that Twombly and Iqbal were both exceptional cases. In Twombly, the complaint targeted four major billion dollar telecommunications companies with a series of conclusory allegations that spanned seven years, all the while providing “no specific time, place, or person involved in the alleged conspiracies.” Under those circumstances, the complaint was doomed; the Court described the prospect of discovery in Twombly as “a sprawling, costly, and hugely time-consuming undertaking not easily susceptible to the kind of line drawing and case management that the dissent envisons.”

Dismissal under those extreme circumstances does not mandate the dismissal of ordinary civil cases — especially those that provide at least some factual detail. After all, Twombly itself held that “a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable,” and that, at the motion to dismiss stage, a court must assume “that all the allegations in the complaint are true (even if doubtful in fact).”

Iqbal presented circumstances that were even more uniquely positioned to prompt immediate dismissal. Of particular note, the only two defendants seeking dismissal before the Supreme Court were Ashcroft and Mueller; the other 32 individually named defendants were not able to evade liability at the motion to dismiss stage. As for those two defendants, the Court repeatedly made clear that it was reluctant to pass judgment on two top ranking executive officials who struggled to respond to “a national and international security emergency unprecedented in the history of the American Republic.” Perhaps more importantly, the Court also sought to protect Ashcroft and Mueller from the entanglement of litigation; after all, the petition for certiorari framed the issue for review as whether a “cabinet-level officer or other high-ranking official” could be targeted for conduct that was taken by inferior executive officers.

In cases where the qualified immunity of top government officials is not at issue, however, this same urgency for shielding defendants from litigation simply does not apply. This viewpoint toward the Twombly Trilogy was displayed in a Seventh U.S. Circuit Court of Appeals decision, which suggested that “maybe neither Bell Atlantic [v. Twombly] nor Iqbal governs” in ordinary cases that are neither massively complex (as in Twombly) nor based on qualified immunity (as in Iqbal). Of course, whether this gloss will be applied by the Tenth Circuit remains to be determined. The important point is that plaintiffs should consider ways to distinguish the facts and policy concerns of their cases from the exceptional circumstances that triggered the early dismissals in Twombly and Iqbal.

IV. Conclusion

The Twombly Trilogy probably raised more questions than it
answered regarding motions to dismiss under Federal Rule 12(b)(6). Amidst the many lingering questions regarding “plausible” claims at the motion to dismiss stage, at least one thing is certain: Defendants have a stronger weapon than ever to gain early dismissal from lawsuits and they are going to use it. The ultimate outcome will be more federal motion practice for Kansas attorneys and further refinement of the new “plausibility” standard in Kansas federal courts.

About the Authors

**Michael C. Leitch** is a graduate of the University of Kansas and the University of Texas School of Law. As deputy attorney general, he was head of the civil litigation division for three years and chief counsel for Kansas Attorney General Steve Six. He now practices at the Kansas City, Mo., firm of Spencer Fane Britt & Browne LLP.

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Obituaries

(Continued from Page 14)

**Louis A. Silks Jr.**

Louis A. Silks Jr., 82, of Shawnee, died February 2 at his home. He was born August 15, 1927, in Salina.

He graduated from the University of Kansas with his Bachelor of Arts degree in 1948, his LL.B. in 1950, and his Juris Doctor in 1968. He was a member of the Bounders Fraternity at the University of Kansas City and later a member of the Pi Kappa Alpha fraternity at KU. Silks served in the U.S. Navy from 1944 to 1946 aboard the USS Rigel.

Silks maintained a busy practice in both Kansas and Missouri until his death. He had served as attorney for Shawnee Township and incorporated the Shawnee Township Fire District. He incorporated the city of Merriam in 1951, serving as city attorney, prosecutor for 12 years, and municipal judge for two years; served as pro tem judge and special counsel for Westwood and Westwood Hills; city attorney for Piper for three years; and counsel for the Merriam Drainage District for 40 years. He was a member of the Phi Alpha Delta legal fraternity and the Kansas, Missouri, Johnson County, and Kansas City Metropolitan bar associations.

He is survived by his daughters, Susan Adele Silks DeWitt and Sara Lou Silks Hincks; son, Louis A. Silks III; and five grandchildren.

**Daniel D. Tontz**

Daniel D. Tontz, 92, of Wichita, died February 7. He was born in Dodge City on March 15, 1917, the son of Mary Ellen and Dan Tontz. He received his law degree from Washburn University School of Law. He served in World War II on the USS Bush as assistant communications officer, lieutenant (junior grade). After being discharged from the Navy in 1946, Tontz went to work for U.S. Fidelity & Guaranty Insurance Co. as their claims attorney until his retirement in 1982. After retirement, he became of counsel for the Wichita law firm of Kahrs, Nelson, Fanning, Hite & Kellogg.

He was a member of the Veterans of Foreign Wars, Phi Upsilon Sigma fraternity, American and Kansas bar associations, Wichita State (WSU) and Washburn Law School alumni associations, and a lifetime member of the WSU Presidents Club. He served as past president of the Wichita Claims Association and served on the board of trustees of East Heights United Methodist Church and served on its Building and Grounds Committee for many years.

He was preceded in death by his parents; his wife, Dorothy Nan Tontz; and daughter-in-law, Marilyn Jones Tontz. Survivors include his wife, Esther Maye Mustard Tontz; son, Dan Tontz Jr.; daughter, Kathleen Tontz Ash; three granddaughters; and two great-grandchildren.
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HELD: Court determined that the recommendations of the disciplinary administrator and the panel were appropriate. Court found the evidence before the hearing panel established the charged misconduct of Gentry by clear and convincing evidence and supported the hearing panel’s conclusions of law. Court adopted the hearing panel’s findings and conclusions.

INSURANCE AND
FINANCIAL INSTITUTION CRIME BOND
NATIONAL BANK OF ANDOVER V. KANSAS BANKERS SURETY CO.
BUTLER DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS AFFIRMED IN PART AND
REVERSED IN PART
NO. 95,548 – MARCH 5, 2010

FACTS: National Bank of Andover (Bank) purchased a financial institution crime bond through Kansas Bankers Surety Co. (KBS). From 1999 through the beginning of 2002, Paula Steward paid insufficient funds checks drawn on the accounts of three Bank customers: William Spillman, Dr. John Brooks, and Brooks’ business, Meadowbrook Farms Inc. Steward did not charge the paid amounts against the customers’ accounts and hid the payments. The Bank’s loss was calculated at nearly $900,000. The Bank ultimately submitted its sworn proof of loss statement to KBS seeking coverage for the losses on the three accounts. KBS declared the bond rescinded ab initio claiming the Bank falsely answered a question on the bond renewal application that all accounts be balanced by a second person at least monthly. KBS discovered that Steward was the only Bank employee who had been taught to balance the correspondent accounts, and juror misconduct. A second jury ended with quite different results. The jury returned a verdict in favor of the Bank in the amount of nearly $900,000, plus attorney fees and prejudgment interest. The Court of Appeals reversed and remanded for a third trial finding erroneous jury instructions, motion in limine, and also granted partial judgment.

ISSUES: (1) Insurance and (2) financial institution crime bond
HELD: Court held that the Court of Appeals did not err in holding that KBS may rescind a policy, which expressly allows rescission for conduct less serious than fraudulent misrepresentation by its insured Bank. Trial court erred in failing to honor the agreement between the parties and to instruct the jury consistent with the contract and the error was reversible. Court held that the phrase “Does your Bank require” is related to standards of performance and also
actual performance. Court concluded the actual performance of the Banks’ employees was relevant to the bond rescission and should not have been excluded by the trial court. Court held the Court of Appeals did not err in reversing the trial court’s grant of judgment to the Bank on KBS’ claim that the Bank gave an untrue answer on the bond application concerning whether all employees knew and understood all policy and procedures. Court concluded the trial court incorrectly applied a higher burden of fraudulent misrepresentation. Court held the Court of Appeals did not err in holding that Steward’s actions in honoring the overdrafts, although in violation of the Bank rules and officer instructions, did not prevent the transactions from being loans. Court held the Court of Appeals correctly held that due to the erroneous in limine orders and evidentiary rulings, KBS showed that it was unable to effectively present its case for bond rescission and any defense to the breach of contract action. Court concluded the errors were of such a nature as to affect the outcome of the trial and deny substantial justice reversal is required. On the cross appeal, the Court held the Court of Appeals was correct in refusing to reinstate KBS’s favorable verdict from the first trial because KBS failed to adequately raise or brief this issue on appeal. Court agreed with the Court of Appeals that retrial was necessary to show if Steward was in collusion with any of the parties to the transactions and that it could not grant judgment as a matter of law on the issue. Court held the Court of Appeals erred in failing to reverse the trial court’s judgment against KBS regarding whether the Bank had a planned program requiring segregation of duties. Court concluded that a reasonable jury could find that nothing beyond the Bank’s publication of its planned program had effectively occurred and there was no program actually requiring segregation. Court stated the Court of Appeals incorrectly affirmed the trial court regarding the planned program question in the bond renewal application.

**STATUTES:** K.S.A. 9-1104(a)(3); K.S.A. 17-6104; K.S.A. 20-2101(b), -3018(b); K.S.A 40-2205(C); and K.S.A. 60-250, -256, -261, -401(b), -405

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### CRIMINAL

**STATE V. BONNER**

**MONTGOMERY DISTRICT COURT – AFFIRMED**

**COURT OF APPEALS – AFFIRMED**

**NO. 98,431 – MARCH 5, 2010**

**FACTS:** Bonner convicted in 2005 of forgery. District court denied request for probation and instead imposed prison term pursuant to K.S.A. 2005 Supp. 21-4603(d); because, Bonner committed the offenses while on felony bond. In 2006, Bonner was convicted on drug charge. District court imposed prison term as in the forgery case. In both cases, district court awarded Board of Indigents’ Defense (BIDS) attorney fees and administrative fees. Bonner appealed in each case, claiming district court was required to consider alternative nonprison sanctions such as Labette Correctional Conservation Camp (Labette). She also claimed district court erred in failing to consider her ability to pay BIDS attorney and administrative fees, and in not having a jury determine her criminal history. In unpublished opinion in consolidated appeals, Court of Appeals affirmed on all issues but for BIDS attorney fee award, which it reversed and remanded for compliance with State v. Robinson, 281 Kan. 538 (2006). Bonner’s petition for review was granted on all grounds upheld by the Court of Appeals.

**ISSUES:** (1) Consideration of alternative nonprison sanctions - 2005 case, (2) consideration of alternative nonprison sanctions - 2006 case, (3) BIDS application fee, and (4) Apprendi sentencing.

**HELD:** Under 2005 and 2006 versions of K.S.A. 21-4603d(g), district court required to consider placement at Labette or other established conservation camp, or a community intermediate sanction center, if any of the five listed circumstances in the statute are satisfied. Under first circumstance, alternative nonprison sanction to be considered before imposing a dispositional departure for a defendant whose conviction falls into a “nonprison grid block,” thus a prison sentence must be a dispositional departure. Under facts of Bonner’s forgery conviction, prison was not a dispositional departure; because, forgeries were committed while she was on felony bond. Because Labette had closed, district court’s failure to comply with 21-4603d(g) is not reversible error where no alternative nonprison sanction listed in the statute is available.

**Under facts of case and established case law, no error in district court’s order that Bonner pay BIDS administrative fees.**

**Apprendi** sentencing claim is defeated by controlling Kansas’ cases.

**STATUTES:** K.S.A. 2006 Supp. 21-3301, -4063, -4603d(f), -4603d(g), -4715, -4729; K.S.A. 22-4513, -3602(c), -4529; K.S.A. 65-4160; K.S.A. 2005 Supp. 21-3710, -4603d(f) -4603d(g), -4704; and K.S.A. 60-409, -409(b)(4), -412(d)

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### ELLSWORTH DISTRICT COURT – APPEAL SUSTAINED

**NO. 101,877 – MARCH 19, 2010**

**FACTS:** The state appealed upon the following question reserved: “Does a juvenile respondent charged with a felony have the right to a preliminary hearing under Article 23 of K.S.A. Chapter 38 as of ... Jan. 15, 2009, in light of ... recent appellate decisions?” D.E.R. was charged with felony drug charges. At first appearance, D.E.R. requested a preliminary hearing. The district court granted the request and the state agreed to participate without objection if the district court would certify the above question as a question reserved for appeal.

**ISSUES:** (1) Juvenile proceedings and (2) preliminary hearing

**HELD:** To the extent the state questions whether the statutory procedure for a preliminary examination under the adult criminal code, K.S.A. 22-2902, applies to a proceeding under the Juvenile Code, Court found that it did not. To the extent the state questions whether the Fourth Amendment right to have a judicial determination of probable cause as a prerequisite to an extended restraint of liberty applies to a juvenile, Court found that it does. Court held in a proceeding under the Revised Kansas Juvenile Justice Code, a juvenile respondent does not have a statutory or constitutional right to an adversarial preliminary examination, such as the procedure described in K.S.A. 22-2902 for adult criminal defendants. Court also held that a juvenile respondent possesses the constitutional right to have a judicial determination of probable cause as a prerequisite to an extended restraint of liberty. However, the full panoply of adversary safeguards need not accompany the pretrial custody probable cause determination.

**STATUTES:** K.S.A. 22-2101, -2102, -2902, -3206, -3602(b)(3); and K.S.A. 38-2301, -2331, -2343, -2344(d), -2347, -2357

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### SEDGWICK DISTRICT COURT – AFFIRMED

**NO. 101,036 – MARCH 26, 2010**

**FACTS:** Pursuant to plea agreement, Trevino plead guilty to one count of aggravated indecent liberties with grandchild. Both Trevino and state argued in support of motion for durational departure. Although state argued the degree of harm associated with this crime was less than typical, district court imposed presumptive life sentence with no possibility of parole for 25 years. On appeal, Trevino claimed for first time that the sentence is unconstitutionally cruel
Appellate Practice Reminders . . .

Supreme Court Sets Fees as Annual Attorney Registration Begins

On May 17, the Appellate Clerk’s Office will mail 2010-11 attorney registration forms to the 14,208 attorneys currently registered in Kansas. Fees are due on or before July 1 and a $100 late fee will be imposed on August 1. In 2009, there were 790 attorneys who paid the late fee and 199 who were suspended from the practice of law for failure to pay the fee. Failure of any attorney to receive a statement from the Clerk shall not excuse the attorney from paying the fee. See Supreme Court Rule 208(c) (2009 Kan. Ct. R. Annot. 315).

Fees are set by Supreme Court order. In 2010, active attorneys will pay $175 and inactive attorneys $65. Those who are 66 years of age or older and elect retired status do not pay a fee; only attorneys registered as active may practice law in Kansas.

The completed registration form and the fee must be sent together in the self-addressed envelope provided. Any form that is received without an enclosed fee will be returned to the sender. A check or money order is acceptable. The back of the registration form must be signed or it will be returned as incomplete.

Firms may remit fees for more than one attorney in a single check. The check must be accompanied by (1) a list giving firm name, firm address, name of each attorney, attorney’s registration number, and amount paid for each attorney; and (2) a completed registration form for each attorney listed.

A great deal of communication is now done by e-mail. Inquiries can be addressed to registration@kscourts.org. The registration form includes the attorney’s current e-mail address on file; check to make sure it is accurate.

Remember that registration fees are sent to a bank lockbox. Upon receipt by the bank, fees are deposited, and the forms are sent to the Registration Office for data entry. The bank deposit date is used to credit the attorney's payment. Mail the registration form and fee well before the deadline to avoid the late charge.

For further information about attorney registration or the status of a particular Kansas attorney, call Sally Brown at (785) 296-8409. For other questions related to appellate practice, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts at (785) 296-3229.

Appellate Decisions

and unusual. He also claimed district court abused its discretion by motion for departure.

ISSUES: (1) Constitutionality of K.S.A. 21-3504 and (2) motion for durational departure

HELD: Trevino did not sufficiently raise constitutionality issue and develop the record below to allow appellate court’s consider-


Under facts, no persuasive argument that sentencing judge abused his discretion in denying motion for durational departure.

STATUTES: K.S.A. 21-3504, -3504(a)(3)(A); K.S.A. 22-3601(b) (1); and K.S.A. 2006 Supp. 21-4643, -4643(a)(1)(C), -4643(d), -4643(d)(1)-(6)
CIVIL

ANNEXATION AND STANDING
BD. OF COUNTY COMM’RS OF SUMNER COUNTY V.
CITY OF MULVANE
SUMNER DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 101,975 – MARCH 26, 2010
FACTS: The Sumner County Board of Commissioners (Board) challenged the validity of several ordinances passed by the City of Mulvane (City) with the consent of landowners, which annexed a 100-foot wide, 5-mile-long strip of land connecting the City to a proposed casino site, through a declaratory judgment and quo warranto action. The Board claimed the ordinances were unlawful because the City circumvented K.S.A. 12-520c, which governs “island annexations” or annexations of land not adjoining the City and required Board approval. The Brewers, two of several landowners who consented to the annexation of their land, intervened in the action. Following pretrial discovery, the Board and the City filed cross-motions for summary judgment. The district court concluded the Board had standing to challenge the ordinances and the ordinances were void. The court thus granted the Board’s summary judgment motion and denied the City’s motion.
ISSUES: (1) Annexation and (2) standing
HELD: Court held an action pursuant to K.S.A. 60-1203 challenging the validity of a city annexation ordinance can be prosecuted only by the state acting through one of its proper officers, such as a county attorney, district attorney, or the attorney general. Court held the Board is not an officer of the state and could not bring a quo warranto action pursuant to K.S.A. 60-1203 to challenge the City’s annexation ordinances. Court held the Board is not challenging the City’s action through a quo warranto action filed by the state or one of its proper officers, and the Board cites no statutory authority providing it with standing to directly challenge the City’s annexations. Thus, the Board lacks standing to challenge the City’s annexations and the district court erred in failing to dismiss the Board’s challenge for lack of standing.
STATUTE: K.S.A. 12-519, -520, -538; K.S.A. 60-1202, -1203; K.S.A. 74-8733, -8734(h)(10); and K.S.A. 77-201 Thirteenth

DIVORCE AND LIFE INSURANCE IN RE MARRIAGE OF HALL
JOHNSON DISTRICT COURT – AFFIRMED
NO. 101,834 – MARCH 5, 2010
FACTS: Marc and Susan Hall divorced after 20 years of marriage with two kids reaching the age of majority and one still 12 years old at the time of the divorce. Susan requested that Marc cooperate with her attempts to obtain insurance on his life at her expense in order to ensure support and education for the minor child in case Marc passed away.
ISSUES: (1) Divorce and (2) life insurance
HELD: Court held that in Kansas, consent of the insured is not required in order to obtain life insurance on that person’s life. The only requirement in Kansas for one person to obtain insurance on another person’s life is an insurable interest between the party taking out the insurance policy and the party whose life is insured.
STATUTE: K.S.A. 60-1610(a), (b)

HABEAS CORPUS
RICE V. STATE
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED
NO. 101,534 – MARCH 12, 2010
FACTS: Rice convicted of first-degree murder. Procedural history in case is detailed, including district court’s denial of Rice’s K.S.A. 60-1507 motion on ineffective assistance of counsel claims and denial of Rice’s motion to amend the 1507 motion after limitations period had run. On appeal, Rice claimed district court erred by denying motion to amend because relation-back provision of K.S.A. 60-215(c) applies to 1507 proceedings, and because there was no undue delay in Rice’s request to amend the 1507 motion to include claims of ineffective assistance of appellate counsel, and doctrine of laches did not apply under facts of case.
ISSUES: (1) Relation-back doctrine as applied to K.S.A. 60-1507 proceedings and (2) undue delay and laches
HELD: Pabst v. State, 287 Kan. 1 (2008), is discussed and applied. An amendment to a 1507 motion that asserts a new ground for relief, which is supported by facts that do not differ in time and type from grounds in the original motion relates back to the date of the original motion. Under facts of case, Rice’s amended claims were tied to a common core of operative facts, which supported the original claims in his 1507 motion. District court abused its discretion by determining as matter of law that Rice’s amended claims did not relate back to the original motion.
Under circumstances in this case, district court erred in denying Rice’s amended claims based upon undue delay and laches.
STATUTES: K.S.A. 60-215, -215(a), -215(c); and K.S.A. 60-1507,-1507(f)(1)

HABEAS CORPUS
SPEED V. MCKUNE
LEAVENWORTH DISTRICT COURT
REVERSED AND REMANDED
NO. 103,036 – MARCH 12, 2010
FACTS: Speed filed habeas action to challenge prison disciplinary judgment for unlawfully taking property that was discovered in a locker during shakedown of four-man cell. District court upheld the judgment, finding Speed was responsible for everything in his assigned locker. Speed appealed.
ISSUE: Sufficiency of the evidence for prison discipline
HELD: Applying the "some evidence" standard of review, district court’s judgment is reversed. Under facts of case, record is devoid of evidence to support the offense for which Speed was charged.
STATUTE: K.S.A. 60-1501

MUTUAL MISTAKE AND PROPERTY DEED
UNIFIED GOVERNMENT OF WYANDOTTE COUNTY V.
TRANS WORLD TRANSPORTATION
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 101,732 – MARCH 26, 2010
FACTS: Wyandotte County (County) leased property to Trans World as “One Building and Improved Grounds located at 420 Kindelberger Road, Kansas City, Kan., consisting of a total of 280,962 square feet or 6.45 acres (+/-), with a 27,164 square feet building.” County continued to operate a fire station at 444 Kindelberger Road and Trans World never occupied the fire station property, and it was not part of the leased premises. In 2004, County sued Trans World over a lease dispute. As a settlement, County agreed to sell Trans World the leased property. When County ordered a title insurance commitment it mistakenly referred to the entire tract, not just the lease premises. The error was not caught before the closing, and the deed to Trans World conveyed the entire premises, including the fire...
station property. Trans World refused to acknowledge the mistake was mutual. County sued seeking reformation. The district court granted summary judgment to County and ordered the filing of a deed containing the correct legal description.

ISSUES: (1) Mutual mistake and (2) property deed

HELD: Court held there was overwhelming evidence of the mutual mistake by the parties in delivering and accepting a deed inconsistent with the clear intention expressed in their unambiguous settlement agreement. Court held there was clearly a mutual mistake. Court also held the district court did not err in settling the journal entry by approving the reformed deed. Finally, Court held that to apply the merger doctrine as requested by Trans World would frustrate reformation and prevent the parties from realizing their true intentions.

STATUTE: No statutes cited.

**RAILROADS**

**BITNER V. WATCO COMPANIES INC.**

**CRAWFORD DISTRICT COURT – AFFIRMED**

**NO. 101,916 – MARCH 26, 2010**

FACTS: Bitner filed action against Watco, asserting a reversionary interest in seven lots that had been used for railroad tracks and/or railroad purposes, but now had football field and track. Applying federal law, district court granted summary judgment to Watco because no abandonment order had been issued. Bitner appealed, claiming district court erred in applying federal law instead of Kansas law, and failed to rule on whether Watco had right-of-way or fee-simple absolute interests in the land.

ISSUE: Abandonment of railroad lines and railroad rights-of-way

HELD: K.S.A. 2009 Supp. 66-625, 49 U.S.C. § 10501 (2006), and 49 U.S.C. § 10903 (2006), are analyzed and applied. Kansas and federal laws on abandonment are not inconsistent, thus district court erred in applying federal law. Because both federal and state law require an order of abandonment by the appropriate federal or state authority before a railroad-right-of-way can be abandoned, summary judgment to Watco is affirmed. Since no order of abandonment was entered, Watco has not lost its interest in the land, even if it were to have only right-of-way interests.


**TORTS CLAIMS ACT AND UNDERINSURED LIABILITY INSURANCE SPEER V. FARM BUREAU**

**FORD DISTRICT COURT – AFFIRMED**

**NO. 102,460 – MARCH 26, 2010**

FACTS: Joseph A. Speer, the minor son of Cynthia Speer, lost his life in a tragic vehicle accident while riding on a school bus. The accident was solely caused by the negligence of the school bus driver who at the time of the accident was an employee of a school district. Several other children also suffered injuries giving rise to multiple claims against the school district and the bus driver. The Kansas Tort Claims Act (KTCA), K.S.A. 75-6101 et seq., limited the liability of the district and its driver to a total of $500,000 for all claims arising from the accident. The total claims far exceeded that amount. A judgment in another lawsuit, not a part of this appeal, determined how much each claimant would receive from the $500,000 available from the school district and its insurance company. Speer received a judgment in that case against the school district and its driver for her son’s death in the amount of $84,500, which has been paid. Speer had purchased a standard policy of automobile insurance on their personal vehicle from Farm Bureau Mutual Insurance Co. Inc. (Farm Bureau). That policy provided them statutorily mandated coverage for damages caused by an underinsured motorist. Speer filed suit in the district court against Farm Bureau to recover the portion of her damages arising from the accidental death of her son that exceeded the $84,500 she received from the funds available from the school district and its insurer. The district court found in her favor and awarded judgment to her in the amount of $85,229.06.

ISSUES: (1) KTCA and (2) underinsured liability

HELD: Court held that in light of the Supreme Court’s broad construction of “legally entitled to recover as damages,” the statutory cap of K.S.A. 75-6105 had no effect on Farm Bureau’s underinsured motorist coverage. As a result, since Speer did prove she is legally entitled to recover damages exceeding the amount recovered against the tortfeasors, the district court did not err in granting judgment to Speer against Farm Bureau for those damages as benefits under the uninsured motorist provisions of her policy. Farm Bureau appeals, arguing that Speer’s auto policy only provides underinsured benefits for damages she is legally entitled to recover from the tortfeasors (the school bus driver and the school district) and Speer already received that amount when her judgment against the district and its driver was satisfied. Court concluded that the judgment was capped by the KTCA and that cap does not limit the amount of damages an insured may recover from his or her own policy under the underinsured motorist provisions of the uninsured’s policy.

STATUTES: K.S.A. 40-284 and K.S.A. 75-6101, -6105

**CRIMINAL**

**STATE V. BLIZZARD**

**LYON DISTRICT COURT – AFFIRMED**

**NO. 99,914 – MARCH 12, 2010**

FACTS: Blizzard was charged with various drugs crimes. He was arraigned on May 28, 2004. The district court granted Blizzard’s motion to dismiss based on speedy trial grounds. On Dec. 21, 2005, this court issued a mandate reversing the decision of the district court and ordering reinstatement of all charges against Blizzard. The district court determined that it had until June 19, 2006, to conduct a trial as it had 180 days from the date of mandate. A trial date was set for May 24, 2006, and agreed to by defense counsel. Blizzard filed another motion for dismissal based on speedy trial grounds by computing time from (1) the date he was arraigned to the date the district court dismissed the case and from (2) the date the state filed its notice of appeal (or alternatively, the date the appellate court’s decision was filed) to the date of the current motion (either 644 days or 307 days). The district court denied Blizzard’s motion finding that any delay causing the trial date to be scheduled more than 180 days after arraignment was caused by the actions of defense counsel. A jury found Blizzard guilty of the sale of cocaine with 1,000 feet of a school zone and obstruction.

ISSUES: (1) Speedy trial and (2) sufficient evidence

HELD: Court held Blizzard’s speedy trial calculation started again when, on remand, the district court ordered him to post an appearance bond. Therefore, counting the 55 days the case was pending before the district court dismissed it (arraignment to dismissal) and the state appealed, with the 69 days from the time Blizzard posted bond to May 24, 2006, only 124 days elapsed. Thus, his trial was timely set. Court established that where the district court has dismissed a case it is entitled to recover as damages,” the statutory cap of K.S.A. 75-6105 had no effect on Farm Bureau’s underinsured motorist coverage. As a result, since Speer did prove she is legally entitled to recover damages exceeding the amount recovered against the tortfeasors, the district court did not err in granting judgment to Speer against Farm Bureau for those damages as benefits under the uninsured motorist provisions of her policy. Farm Bureau appeals, arguing that Speer’s auto policy only provides underinsured benefits for damages she is legally entitled to recover from the tortfeasors (the school bus driver and the school district) and Speer already received that amount when her judgment against the district and its driver was satisfied. Court concluded that the judgment was capped by the KTCA and that cap does not limit the amount of damages an insured may recover from his or her own policy under the underinsured motorist provisions of the uninsured’s policy.

STATUTES: K.S.A. 40-284 and K.S.A. 75-6101, -6105
STATE V. MONTGOMERY  
SHAWNEE DISTRICT COURT  
APPEAL DISMISSED AS MOOT  
NO. 102,119 – MARCH 5, 2010

FACTS: Montgomery pled guilty to drugs charges and was sentenced to 11 months in prison and given 18 months of probation. Montgomery’s probation was revoked and he completed his sentence on Sept. 28, 2009. Montgomery appealed the revocation of his probation.

ISSUES: (1) Probation revocation and (2) mootness

HELD: Court held the actual controversy before the court, i.e., whether the district court erred in revoking Montgomery’s probation, had ended. Montgomery has served his entire sentence. Any action the court might take in regards to his probation revocation would be an idle act insofar as Montgomery’s rights in his action are concerned. The case is moot.

STATUTE: No statutes cited.

STATE V. WEILERT  
ROOKS DISTRICT COURT  
REVERSED AND REMANDED  
NO. 102,917 – MARCH 5, 2010

FACTS: Weilert charged with felony driving under the influence (DUI) after refusing consent to blood or breath test. When taken to hospital for medical attention, officer overheard Weilert agree to blood tests for medical purposes and tell medical staff about his consumption of alcohol. State obtained blood-test results under a court order. District court ruled the evidence was inadmissible because (1) once Weilert refused consent to law enforcement for blood or breath test, state could not get other test results, (2) that Weilert had expectation of privacy for medical information provided for treatment, and Health Insurance Portability an Accountability Act (HIPAA) prohibited disclosure of that information, and (3) K.S.A. 60-427(b) limitation on application of physician-patient privilege to felony DUI cases was unconstitutional. State filed interlocutory appeal.

ISSUE: (1) Constitutionality of K.S.A. 60-247(b), (2) admissibility of medical blood-test results, and (3) blood-test results for medical treatment

HELD: District court erroneously ruled Weilert’s statement to medical personnel was inadmissible. K.S.A. 60-247(b), which spells out legal principles traditionally recognized as physician-patient privilege, is constitutional. Histories of physician-patient privilege, and its application to misdemeanor and felony DUI cases, are discussed. HIPAA does not prohibit disclosure of information by court order. Even if it did, Kansas does not apply exclusionary doctrine to exclude evidence obtained in violation of HIPAA.

When a driver refuses consent for law enforcement testing of breath or blood for alcohol but independently obtain a test for medical purposes, the state may introduce the independently obtained test into evidence in a prosecution for driving under the influence of alcohol. Kansas implied-consent statute does not contain any provision that limits admissibility of test results obtained for medical purposes and not at the direction of law enforcement personnel. District court’s judgment is reversed and case is remanded for further proceedings.

STATUTES: K.S.A. Supp. 2009 8-1001(v); K.S.A. 22-3601(A); and K.S.A. 60-407(f), -427, -427(b)

STATE V. PENNINGTON 
WYANDOTTE DISTRICT COURT – AFFIRMED 
NO. 100,278 – MARCH 26, 2010

FACTS: Jury convicted Pennington of second-degree murder. On appeal he claimed statutory speedy trial violation because his waiver of speedy trial rights at the preliminary hearing was given only to secure continuance necessary for preparation of defense. He next claimed trial court abused its discretion and impermissibly impaired Pennington’s right to present a self-defense theory by excluding autopsy results, which showed the victim had marijuana and cocaine in his system when he died. Pennington also claimed trial court erred in failing to instruct jury on lesser-included offense of involuntary manslaughter, and in furnishing jury with deadlock jury instruction before deliberation. Finally, he claimed cumulative error denied him a fair trial.

ISSUES: (1) Speedy trial, (2) exclusion of evidence, (3) jury instruction on lesser-included offense, (4) deadlock jury instruction, and (5) cumulative error

HELD: Under facts of case, Pennington is precluded from asserting statutory speedy trial violation. When he requested a continuance of trial setting to allow new counsel to prepare defense, Pennington waived his statutory speedy trial rights and never objected to new trial setting until 22 days after the 90-day period expired under K.S.A. 22-3402(3). No evidence the waiver was conditional or later revoked.

No abuse of discretion by trial court’s exclusion of autopsy results. No showing the victim was affected or incapacitated by the drugs in his system, and no evidence the victim would act violently after ingesting drugs.

Trial court properly excluded instruction on involuntary manslaughter. Under facts, Pennington’s actions in striking the victim were intentional, and a belief that self-defense was needed would have been unreasonable.

Based on State v. Salts, 288 Kan. 263 (2009), trial court erred in giving deadlock jury instruction before deliberation, but error was harmless under facts of case.

Cumulative error doctrine does not apply where only one error was found.

STATUTES: K.S.A. 21-3211, -3401, -3404(c); K.S.A. 22-3402(1), -3402(2), -3402(3), -3414(3); and K.S.A. 60-401(b)

STATE V. STINSON  
WYANDOTTE DISTRICT COURT  
REVERSED AND REMANDED  
NO. 100,361 – MARCH 26, 2010

FACTS: Stinson convicted of aggravated battery and robbery. On appeal, Stinson claimed in part that trial court committed reversible error when it would not allow defense counsel to impeach victim with his prior inconsistent statements, and repeatedly refused to allow defense counsel to make proffer of the excluded statements.

ISSUE: Exclusion of victim’s prior inconsistent statements

HELD: Trial court abused its discretion by applying erroneous legal standard in determining the victim could not be impeached with his prior inconsistent statements, and in determining victim’s memory could not be refreshed by his prior statements. Trial court also erred in not allowing defense counsel to complete proffer of excluded statements. Under facts, credibility of victim key to this case. Because defense was prevented from fully and adequately testing victim’s credibility, trial court’s error in excluding victim’s prior inconsistent statements constituted reversible error.

STATUTES: K.S.A. 21-3414, -3427; and K.S.A. 60-261, -401(b), -405, -407(b), -420, -421, -422, -422(a), -422(b)

Amendments to Supreme Court Rule 208, relating to attorney registration, have been proposed to require registered attorneys to certify on the annual registration form that they are in good standing with the Kansas Department of Revenue regarding the payment of state taxes. Failure to be in good standing could result in suspension from the practice of law. The Court is accepting comments on the proposed rule changes until Tuesday, June 1, 2010. Comments on the proposed rule change may be addressed to Gayle B. Larkin, Kansas Board for Discipline of Attorneys, 701 SW Jackson, 1st Fl., Topeka, KS 66603, or to Rule208comments@kscourts.org. Following is Supreme Court Rule 208 showing the proposed changes in boldface:


(a) All attorneys, including justices and judges, admitted to the practice of law before the Supreme Court of the State of Kansas shall annually, on or before the first day of July, register with the Clerk of the Appellate Courts upon such forms as the Clerk shall prescribe; provided that in the year of an attorney’s admission to the bar, the attorney shall register within thirty days after the date of admission. At the time of each registration, each registrant shall pay an annual fee in such amount as the Supreme Court shall order. Attorneys may register as: active; inactive; retired; or disabled due to mental or physical disabilities. Only attorneys registered as active may practice law in Kansas.

(b) No registration fee shall be charged to (1) any attorney newly admitted to the practice of law in Kansas until the first regular registration date following admission, (2) any attorney who has retired from the practice of law and is over age 65, or (3) any attorney who is on disabled status due to physical or mental disability.

(c) On or before June 1 of each year the Clerk of the Appellate Courts shall mail to each individual attorney then registered in this state, at his or her last known address, a statement of the amount of the registration fee to be paid for the next year. Failure of any attorney to receive a statement from the Clerk shall not excuse the attorney from paying the required fee. Every registrant shall within thirty days after any change of address notify the Clerk of such change.

(d) Attorneys must be in good standing with the Kansas State Department of Revenue regarding the payment of state taxes.

(1) On the annual attorney registration form, each attorney shall certify whether he or she is in good standing with the Kansas State Department of Revenue regarding the payment of state taxes.

(2) An attorney is in good standing with the Kansas State Department of Revenue regarding the payment of state taxes if the attorney has:

(a) paid all taxes due to the State of Kansas;
(b) entered into and is in compliance with an agreement with the Kansas State Department of Revenue for becoming current on all unpaid tax obligations;
(c) a pending appeal of the claim that he or she has unpaid tax obligations;
(d) a pending request with the Kansas State Department of Revenue for the abatement of the unpaid tax obligations for good cause; or
(e) a pending court challenge to the claim that he or she has unpaid tax obligations.

(3) If an attorney certifies that he or she is not in good standing with the Kansas State Department of Revenue regarding the payment of state taxes, the Kansas Supreme Court shall issue an order to show cause why the attorney’s license should not be suspended.

(4) If an attorney certifies that he or she is in good standing with the Kansas State Department of Revenue regarding the payment of state taxes when the attorney is not in good standing, the Kansas Supreme Court shall issue an order to show cause why the attorney’s license should not be suspended.

(5) If the court determines that the attorney is not in good standing with the Kansas State Department of Revenue regarding the payment of state taxes, the Court shall suspend the attorney's license to practice law until such time as the attorney returns to good standing with the Kansas State Department of Revenue regarding the payment of state taxes.

(continued on next page)
Any attorney who fails to pay the registration fee by August 1 of each year may be suspended from the practice of law in this state as prescribed in subsection (e). It shall be the duty of each member of the judiciary of this state to prohibit any attorney who has been suspended from the practice of law from appearing or practicing in any court, and it shall be the duty of each member of the bar and judiciary to report to the Disciplinary Administrator any attempt by an attorney to practice law after his or her suspension.

The Clerk of the Appellate Courts shall mail a notice to any attorney who has failed to comply with subsection (a) that the right to practice law will be summarily suspended thirty days following the mailing of notice if such registration fee is not paid within that time. The notice shall be mailed to the attorney's last known address by certified mail, return receipt requested. The Clerk shall certify to the Supreme Court the names of attorneys who fail to register and pay the fee within the stated period of time. Thereupon, the Court shall issue an order suspending those attorneys from the practice of law in this state and the Clerk shall mail a copy of the order to the administrative judge of the attorney's district. No notice shall be mailed and no order of suspension issued to any attorney who is retired or who is on disabled status due to mental or physical disability.

An attorney who has registered as retired, or has registered as disabled due to mental or physical disabilities, or has been transferred to disability inactive status by the Court under Rule 220 shall thereafter be relieved from the annual registration process and shall not be eligible to practice law in this state. A retired or disabled attorney may make written application to be reinstated to active status. The Supreme Court may impose appropriate conditions, costs, and registration fees before or upon granting reinstatement.

An attorney whose authority to practice law ceased because of registration as an inactive attorney may become registered as an active attorney by paying a $25.00 reinstatement fee and the current annual registration fee. Any attorney whose inactive status has extended for a period in excess of five years shall be reinstated only upon full compliance with any conditions imposed by the Supreme Court for reinstatement.

An attorney whose authority to practice law in this state has ceased because of failure to register and pay the annual registration fee or who has been otherwise administratively suspended may be reinstated by the Supreme Court upon application and the payment of all delinquent registration fees (which may be waived, in whole or in part, for good cause shown), and payment of any additional amount ordered by the Court.

Attorney registration fees received in the Office of the Clerk of the Appellate Courts on or after August 1 of the year in which due shall be accompanied by a $100 late payment fee. Applications for reinstatement to practice law, after suspension for nonpayment of the annual attorney registration fee or other administrative suspension, shall be accompanied by a $100 reinstatement fee in addition to the $100 late payment fee, if applicable, and all delinquent registration fees. Late payment and reinstatement fees may be waived or reduced by the Court for good cause shown.

A $20 service fee shall be assessed and paid prior to registration or reinstatement for each check tendered in satisfaction of the requirements of this Rule which later is returned unpaid.

The Clerk of the Appellate Courts shall issue to each attorney duly registered as active hereunder a registration card, in a form approved by the Supreme Court, evidencing such annual registration.

All moneys collected as registration fees hereunder shall be deposited by the Clerk of the Appellate Courts in the bar disciplinary fee fund and the client protection fund as directed by the Supreme Court. Disbursements from such funds shall be made only upon vouchers signed by a member of the Supreme Court or by some person or persons duly authorized by the Court. Disbursements shall be made to administer the registration process established hereunder; to support the work of the Judicial Council, as approved by the Supreme Court; and to defray the cost and expense of the disciplinary procedures, the client protection measures, and the impaired judges and lawyers assistance programs adopted pursuant to the Rules and Orders of the Supreme Court.

An attorney appearing in any action or proceeding in this state solely in accordance with the provisions of Supreme Court Rules 116 or 1.01(f) shall not be subject to registration hereunder.

No registration card shall be issued pursuant to subsection (g) to any attorney who has not paid the annual CLE fee, and any applicable late payment fee, established pursuant to Rule 11 of the Continuing Legal Education Commission. Payment of the annual CLE fee and any applicable late payment fee shall be a prerequisite to completing registration as an active attorney.
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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 CDs; 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 terrysemessick@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.

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MAY

* Pending CLE Credit approval

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, Salinemex,
Sonnenschein Nath & Rosenthal LLP, Hovey Williams LLP, Shook,
Hardy & Bacon LLP, Erickson Kernelle Derusseal & 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

Tuesday, May 18, Noon – 1 p.m.
Padilla v. Commonwealth of Kentucky (New U.S.
Supreme Court decision issued March 31, 2010) *
Michael Sharma-Crawford, Sharma-Crawford
Attorneys at Law LLC, Overland Park
Telephone CLE

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

Wednesday, May 19, 4 – 6 p.m.
Young Lawyers & Law Students CLE & Reception – The
Three Roles of the Ethical Lawyer *
Hon. Stephen D. Hill, Kansas Court of Appeals, Topeka
Kansas Law Center, Topeka

MAY (CON’T)

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

JUNE

*Pending CLE credit approval

Friday, June 18, 8:25 a.m. – 12:25 p.m. (Session I):
1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Debut *
(Featuring the 2010 Kansas Annual Survey as seminar materials)
Lenexa, Topeka, and Wichita

Tuesday, June 22 through Wednesday, June 30
(excluding Monday, June 28)
Video Replay Week – Brown Bag Ethics, Special Needs
Children, and Legislative & Case Law Institute *
Multiple sites statewide

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**2010 Tenth Circuit Bench & Bar Conference**

Who: Members of the Tenth Circuit Bench and Bar
What: 2010 Tenth Circuit Bench & Bar Conference
Where: The Broadmoor in Colorado Springs, Colorado
When: August 26 - 28, 2010
Why: Education, Collegiality, Networking and CLE’s

Mark your calendars and plan on attending this very exciting 2010 Tenth Circuit Bench & Bar Conference! Distinguished guests will include Supreme Court Justices Ruth Bader Ginsburg and Sonia Sotomayor, Lord Igor Judge, Chief Justice of England and Wales; and Chief Justice Beverly McLachlin, Canadian Supreme Court.

Conference and hotel reservations will not be open until early May, but you may want to bookmark the website: http://www.ca10.uscourts.gov/judconf/. In the mean-time, if you have any questions, call the Judicial Resources Team at 303.355.2067 or e-mail them at CA10_JudicialConference@ca10.uscourts.gov.
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