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2010 Legislative Update
By Joseph N. Molina

Cover photograph by Ryan Purcell
rpurcell@ksbar.org
Does Anybody Read This Stuff?

Prior to my election as president of the Kansas Bar Association, I served on the KBA Board of Governors for a number of years. As I was brainstorming topics for this month’s column, an experience I had with a prior KBA president came to mind. During a Board of Governors meeting many years ago, a former president made some remarks that were completely opposite from statements he made in his KBA Journal column. When the inconsistency was pointed out, he remarked with surprise, “You actually read my columns?”

For those of us who do not consider ourselves strong writers, the task of writing a monthly column for the Journal is particularly daunting. I have been told that one of the most important things a writer should consider is the audience. When your audience is a group of lawyers, professionals trained to critically evaluate issues and problems, the task seems even more intimidating. Talk about a tough crowd.

The best option I could think of was to seek some expert advice on writing this column. The first expert I consulted warned me that the worst thing one can do in their first column as KBA president is to set out an agenda or goals for the coming year. This expert wisely pointed out that the readers of this column are trained to retain information and use it, sometimes against the person who gave the information. I was instead advised to write the column on a subject that I am passionate about and with which I have a unique perspective or special knowledge. For this author, that severely limits the possibilities.

I am passionate about my family and my law practice. Therefore, an introduction seems appropriate. I am a dad, a lawyer, and sometimes, and not often enough, a husband. My wife, Amy, and I have five children: Kyle, Laura, Michael, Zachary, and Sara. Like most parents, I am so very proud of each of them, and they are a reflection of the wonderful job my wife has done raising them.

I practice law with the same firm I started with 29 years ago. Our senior partner, Bob Glassman, passed away a few years ago and is sorely missed. He was truly a great man. My partners, John T. Bird and Greg Schwartz, are two of the best lawyers I know. They are passionate, committed, and accomplished. Carol Park joined our firm as an associate and all three of the partners wondered how we ever got along without her. Our staff is made up of dedicated professionals and any success we experience is due in a large part to their efforts.

The second expert I consulted about writing this column advised me to write about the achievements, goals, and programs I have contemplated for the coming year. In other words, set out an agenda so that the readers will know the direction of the Association for the coming year.

Let’s see, two experts with completely opposite opinions. I wasn’t shocked by this as any attorney practicing in the civil litigation area sees this on a regular basis. However, I still had a dilemma, and I still needed to write a column that would make these two opinions consistent. Well, that was easy considering I am also passionate about the KBA. Although I don’t necessarily have goals, achievements, or an agenda, I do have a few ideas for the coming year. So, here goes.

Some of the best people I know are lawyers. They are leaders of their communities, churches, schools, and civic organizations. The lawyers I know devote countless hours of their time and energy to improving the lives of those around them with little or no recognition. One of my requests of you is if you know a lawyer that deserves recognition, let the KBA staff know. We are going to focus more on promoting the image of lawyers during the coming year.

During my service on the Board of Governors, I was privileged to become acquainted with past presidents of this organization. These women and men have sacrificed their time because of their devotion to our profession and their love of the law. During the coming year, look for some past presidents to contribute to the president’s page as invited guests. This column will give them an opportunity to address issues and dispense wisdom from which we can all benefit.

Finally, I want to invite each of you to become active in the KBA and help enrich this organization, as well as improve the administration of justice in our state. This is your KBA. Past President Tim O’Brien emphasized that the KBA is here to serve you and the best way to accomplish that is through your interaction and participation. This will be an interesting year and with your advice and counsel, a successful one. Hearing from you will also give me a good idea whether any of you actually read this stuff.

Glenn Braun may be reached by e-mail at gbraun@ksbar.org, by phone at (785) 625-6919, or post a note on our Facebook page at www.facebook.com/ksbar.
The Benefits of Inexperience

By Melissa R. Doeblin, Kansas Corporation Commission, Topeka, melissadoeblin@gmail.com

Oscar Wilde once wrote, “In America, the young are always ready to give to those who are older than themselves the full benefits of their inexperience.” I find this never more true than right now, as I write my first article for the Journal of the Kansas Bar Association.

When Susan McKaskle reminded me earlier this year that I would be tasked with writing an article in each issue of the Journal during my year as the president of the Young Lawyers Section (YLS), I honestly thought nothing of it. Writing comes somewhat naturally to me, which is great since a large portion of being an attorney involves writing! But as the time drew near, I realized wow, this would be mailed out to the almost 7,000 attorneys across Kansas, who are no doubt better writers than me.

Before I get to the quote by Oscar Wilde, allow me the opportunity to introduce myself. My name is Melissa Doeblin, and although I was not born in the state, I consider myself a true Kansas girl. I grew up in Wichita and attended Wichita Collegiate School. After graduating high school, I was fortunate to go to the University of Kansas for my undergraduate studies. My major in undergraduate school was nothing that I originally thought would lead me into law school, as I obtained a degree in biodiversity, ecology, and evolutionary biology.

While I was at KU, my mother was wrapping up her law degree at Washburn University School of Law after having stayed at home raising myself and my two siblings before returning to school to finish her degrees. I was given the opportunity to meet several of the professors at Washburn Law, be quizzed by my mom on some “BarBri” questions and talk about her law school experience. I started to debate whether to get a master’s and Ph.D. in biology as I had planned or attend law school, which now grabbed my interest. You obviously know the route I chose or you would not be reading this column today.

I am eager to lead the YLS this year, and it is a great honor to be able to serve the bar association. But with that, as the saying goes, I give the full benefit of my inexperience. This year I want to build on the foundation that past presidents of the YLS have created and continue to strengthen the section. I know I cannot do so without the experience of other young lawyers in the section, and especially without the knowledge and background of all the more mature members of the Kansas Bar Association (KBA).

Now back to Wilde’s quote. While he writes about the inexperience of the young, he implicates the experience of the older generation. It is this experience that I implore other KBA members to give to the younger attorneys in the YLS. By this, I mean for you senior partners (hopefully, you’re still reading) to reach out to the associates in your office and understand their inexperience (you were us once!). With that, I also appeal to the senior members of the Bar to strongly encourage their associates to become active in the KBA, particularly in the YLS. Involvement in the YLS is personally and professionally enriching, and I know I am not the first to say that. I realize the importance of our profession all the more by the relationships I have developed with other young lawyers.

I think the challenges young attorneys face now in meeting billable hours and developing a name and a career, starting their own families, and “trying” to maintain a balance with other activities sometimes prevents them from becoming further involved. So I’m asking you senior partners to get up, walk down the hall to your associates office (with KBA Journal in hand) and encourage him or her to contact me or any of the other YLS board members to find out more about the section. I look forward to hearing from any and all of you, and I am ready to give to those who are older than myself the full benefit of my inexperience!

I may be reached at (785) 271-3186 or by e-mailing me at melissadoeblin@gmail.com. The YLS website may be accessed at www.ksbar.org/yls/.

About the Author

Melissa R. Doeblin attended Washburn University School of Law and graduated in 2005 with certification in natural resources law. She currently serves as advisory counsel for the Kansas Corporation Commission in Topeka.
The Kansas Bar Foundation extends to all Kansas lawyers the invitation to become “Fellows.” This is not a just a gimmick or small and trivial thing. The term “fellow” is often used in academics to describe membership in a group of learned people who work together as peers in the pursuit of knowledge or practice. “Fellow” is also a term of honor for someone who is a peer, an equal, or a comrade united by the same occupation, interests, or profession. Fellowship – genuine, congenial, rewarding friendship, and mutual respect – is enjoyed when fellows work together toward common interests, goals, beliefs, responsibilities, experiences, concerns, and activities. We are happiest, not as just members of a crowd, or isolated individuals, but when we identify our common ideals, chart a course to reach them, and work together with our peers.

If you are looking for more joy and satisfaction out of what you have invested in the pursuit and practice of knowledge of the law, you may find it in the fellowship of the Kansas Bar Foundation (KBF). There are ideals that you want to pursue, things you would like to see happen, and people you would like to see benefit. The KBF could be the vehicle to make it happen and the way to join with colleagues that is just plain fun.

The mission statement of the KBF is broad enough to encompass your best ideas and aspirations. Our mission is:

- to serve the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, by enhancing public opinion of the role of lawyers in our society.
- While it is always tempting to recount things the KBF has done and is doing to support access to justice, law-related education, and improving public appreciation for the role of the rule of law and the value of courts and lawyers, that is not my purpose. The purpose is to invite new challenges and new partnerships with lawyers and law firms to do law-related charitable work. I am satisfied that we do not have all the ideas we should be pursuing and acting upon. Over the years, law firms and individual lawyers and their families have come forward with great ideas and funding for law-related charitable endeavors, notably scholarships for law students. We have only begun to scratch the surface of enabling Kansas lawyers to accomplish the public service and meet the needs they see and experience.

For example, should we:
- Create a state-of-the-art online education page for teachers for programs we produce plus links to the best lesson plans, video, and other resources produced by others?
- Sponsor teachers to attend the Summer Institute for Secondary Teachers presented by the U.S. Supreme Court Historical Society; and have a Kansas Institute, presenting new visions for teaching about the courts and the U.S. and Kansas constitutions, hosted by our Supreme Court?
- Provide more scholarship opportunities and loan forgiveness programs for providing legal services to underserved areas and populations?
- Create and fund partnerships with more organizations across the state to respond to their particular needs, such as helping immigrants understand their rights and responsibilities, helping elderly victims of consumer fraud and other abuse, changing lives of youthful offenders, and protecting abused, neglected, and otherwise disadvantaged children?
- Assure every person in Kansas reasonable access to the justice system regardless of mental or physical condition, economic status, or type of legal problem?
- Help Kansas have the most admired, most emulated achievements in law and justice (and the most respected lawyers and judges) in the country?
- Have fun and fellowship while sharing our best ideas and ideals?

This is just my brainstorming, and I encourage you to think about unmet needs and opportunities – things you would like to do or see done and share them with me and other Board of Trustees members. Law-related causes of access to justice, education, and understanding about the role of law, and giving and serving is worthy of your dream. In New Hampshire (where the population is less than half that of Kansas), the Bar Foundation made grants totaling $1.7 million in 2008 and 2009. The Louisiana Bar Foundation made grants totaling $5 million to 63 organizations in its 2009-10 fiscal year. This level of impact would revolutionize the way Kansans think about law and justice and lawyers and judges. It can be done. Fellows, let’s set our ideals nobly and high and unite to achieve them.

About the Author

James D. Oliver is a partner at the Overland Park office of Foulston Siefkin LLP. He serves as the firm’s lead partner for the appellate practice and the regulatory and administrative practice teams.

Oliver received his Bachelor of Science from Northwest Missouri State University in 1971 and his Juris Doctor, cum laude, in 1975 from Washburn University School of Law, where he served as editor of the Washburn Law Journal.

He is admitted to practice in Kansas, Missouri, the U.S. Courts for the District of Kansas and Western District of Missouri, U.S. Court of Appeals for the Tenth Circuit, and the U.S. Supreme Court.
Thinking Ethics

Trust Account Alert

By Stan Hazlett, Kansas Disciplinary Administrator, shazlett@kscourts.org

Kansas lawyers need to be aware of recent events, which involved significant trust account issues. First, some Kansas lawyers have been victims of a sophisticated scam, which resulted in large overdrafts in the lawyers’ trust accounts; further, client funds were compromised. Second, multiple instances have occurred where nonlawyer assistants have stolen money from trust accounts. Finally, questions regarding Federal Deposit Insurance Corp. (FDIC) coverage of lawyer trust accounts surfaced when a bank failure occurred in Topeka. Understanding the dynamics of these events should assist Kansas lawyers in avoiding monetary loss and answering to a complaint with the Disciplinary Administrator’s office.

The Trust Account Scam

Here is how it works: A Kansas lawyer receives an e-mail or phone call purportedly from an out of state lawyer or a prospective client for the collection of a debt in Kansas. A follow-up e-mail arrives from the supposed debtor. The debtor then sends the Kansas lawyer a check for payment. The Kansas lawyer is then instructed to make a wire transfer of the funds to the client and is told to keep a portion of the funds as payment for his or her attorney fees. The Kansas lawyer deposits the check in his or her trust account and wires the funds to the client. Meanwhile, the check goes through banking channels until it is eventually discovered that the check was bogus. The bank then debits the lawyer’s trust account for the amount of the returned check. To avoid this disaster, the Kansas lawyer should make absolutely certain that his trust account has been credited with the funds from the check (i.e., the check is good). One way to accomplish this is to have your bank send the check for collection.

Trust Account Thefts

On three occasions during the last year, Kansas lawyers had client funds stolen from their trust accounts by employees of the lawyer. The amount of money stolen in each instance was significant, and in one case, the theft of funds was close to $1 million. Ultimately, the lawyer is responsible for safeguarding client funds. It is the responsibility of the lawyer to put procedures in place to protect client funds and property. KRPC 1.15 (Safekeeping Property) requires that client property or money in the possession of a lawyer be “appropriately safeguarded.” KRPC 5.3 (Responsibilities Regarding Nonlawyer Assistants) addresses a lawyer’s responsibilities with respect to nonlawyer employees. Failure to properly supervise a nonlawyer employee by a lawyer can result in a lawyer being disciplined. Each lawyer should review the safeguards in place with respect to the lawyer’s trust account to make sure client property is properly safeguarded. An excellent source for proper trust accounting practices is a publication prepared by the Kansas Bar Foundation, titled “Money of Others.”

Federal Deposit Insurance Corp. Issues

Insurance coverage provided by the FDIC for attorney trust accounts came to the forefront as a result of a bank failure in Topeka in the summer of 2008. At that time, the FDIC provided $1 million of coverage per depositor in a trust account. Each client’s money was treated as a separate deposit. The amount of FDIC coverage has fluctuated since the summer of 2008. Presently, and until January 1, 2011, banks are either providing an unlimited amount of coverage or coverage in the amount of $250,000 per depositor. It is the responsibility of a Kansas lawyer to ascertain the coverage provided by the bank where the lawyer’s trust account is located. The coverage issue will be revisited by the FDIC by January 1, 2011, and it is the lawyer’s responsibility to be aware of any change of FDIC coverage on that date. The information regarding coverage can be obtained by talking to bank officials where the trust account is located or accessing the FDIC website at www.fdic.gov. FDIC coverage only applies if the lawyer’s account is clearly identified as a trust account and only if the lawyer can prove by records kept in the normal course of the lawyer’s business the amount of money belonging to each client.

Along with candor, no issue is more important to a lawyer than the safekeeping of a lawyer’s client’s property. Failure to properly safeguard client property can result in serious lawyer discipline and civil liability for the amount of loss suffered by a client. Take the time to review the procedures to safeguard your client’s property and make whatever changes are necessary. Doing so protects both you and your client.

About the Author

Stanton A. Hazlett, Topeka, received his Bachelor of General Studies from the University of Kansas and his Juris Doctor from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997, he was appointed disciplinary administrator.

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Workers Compensation
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Celebrating and achieving diversity resulted in the Wichita Bar Association’s “Grow Your Own Lawyer” program being awarded the 2010 Diversity Award by the Kansas Bar Association (KBA) at this year’s annual meeting. The Diversity Award, created in 2009, recognizes a law firm, agency, or organization that has significantly advanced diversity by its conduct and by the development and implementation of diversity policies.

Why should attorneys care about diversity and what can be done to increase diversity in our profession? The American Bar Association’s Office of Diversity Initiatives estimates that the legal profession is more than 90 percent white, while the general population is about 70 percent white. The disparity between the legal profession and the general population is increasing. In the next 50 years, the general population is projected to be about 50 percent people of color, but enrollment in American law schools is less than 20 percent students of color.

The KBA’s goal regarding diversity is to increase the diversity within the Kansas legal profession so that the demographics of the legal profession mirror the demographics of the Kansas population in the year 2020.

Diversity is not just numbers. Diversity among the legal profession benefits all members. A diverse bar recognizes and values talent. It eliminates barriers to ensure that all members of the legal profession are treated fairly and have the chance to reach their maximum potential. Lastly, diversity encourages the exchange of ideas, which will help the bar become stronger.

For more than a decade, the “Grow Your Own Lawyer” program has been committed to the education and recruitment of diverse students to foster an interest in the legal profession. Throughout its history, more than 100 students have participated in the program, which exposed these students to the legal system.

“The Grow Your Own Lawyer” program was developed by the Professional Diversity Committee of the Wichita Bar Association in 1996. The program was modeled after the “Grow Your Own Teacher” program. The program was designed to encourage local minority and female students to enter the legal profession, and, eventually, to return to their hometown to practice.

The program focuses on high school students with an interest in the law. Students are matched with lawyers who serve as mentors and meet monthly with their students. The goal is for the student to develop a relationship with the attorney who in turn gives them personal guidance and can have a positive impact on their lives.

The program also provides information on legal education and the legal profession through monthly meetings and off-site trips. Field trips have included trips to the Kansas Judicial Center, including meetings with Supreme Court and Court of Appeals Judges, tours of Washburn and KU law schools, and tours of the Sedgwick County Adult Detention Facility and Juvenile Detention Center. More information about the program can be obtained at www.wichitabar.org/resources.

The “Grow Your Own Lawyer” program is just a small part of the efforts to achieve diversity in the legal profession. The American Bar Association’s Diversity Center is a clearinghouse of information and programs to improve diversity in our profession. The center incorporates the Commission on Racial and Ethnic Diversity in the profession (which focuses on issues in the legal profession), the Coalition on Racial and Ethnic Justice (which focuses on social justice issues), and the Council for Racial and Ethnic Diversity in the Educational Pipeline (which focuses on educational pipeline issues). See www.abanet.org/diversity.

By utilizing these resources and working together, to celebrate accomplishments in diversity, the KBA can reach its diversity goals in 2020.

About the Author

Sharon Dickgrafe is an assistant city attorney for the city of Wichita. She is a member of the KBA Diversity Committee.
Back to the Future

By Tyler Feeney, Washburn University School of Law

I was pretty cocky when I started law school. Although the majority of the student body probably had a better LSAT score and undergraduate GPA than I did, that didn't matter to me because of all my real world experience. Experience like working for a transnational customer service corporation (translation: I spent a couple years in a cubicle at a call center). Or, experience like working for a pawnshop, and all the daily surprises that you can imagine that went along with that. Finally, I sold insurance for a number of years . . . real world contracts with real people. Plus, I had years of training in philosophy and had already been exposed to the Socratic method at Kansas State University. These other kids couldn't touch me. After all, I was an insurance agent.

A semester later, I prepared to log on to the law school’s website to view my grades. I cannot actually recall anything from my first semester, something I'll blame on whatever that psychological phenomenon is where you can't remember traumatic events. My grades appeared on the screen. Suddenly, the room started spinning. I began to sweat profusely. I suddenly had a vision of a flushing toilet (complete with sound effects) that seemed to symbolize my future and all the opportunities I might have had. Suddenly, another vision: I am working in a sandwich shop (the fancy kind that toasts your sandwiches). I am wearing a sweaty and uncomfortable polyester uniform, complete with head visor. Suddenly, some of my fellow students walk in to make an order.

Law Students: “Hey man, haven’t seen you in class lately, how are you doing?”

Me: “Oh fine, guys . . . fantastic.”

Law Students: “So . . . um . . . did you transfer to KU?”

Me: “No, uhh . . . I can’t really talk about it.”

Law Students: “Oh.” (Long uncomfortable silence.) “Well, I guess we’ll have a number six . . . and can you hold the onions on that?”

Me: “Yeah, no problem.” (Looks down at the ground in shame.)

The sandwich shop scenario didn’t happen (at least not yet!), and I’m set to graduate this December, meaning that I will have finished law school in two years and four months. Taking a quick moment to reflect, two things come to mind. First, it’s painfully obvious to me that I came into law school thinking that I knew everything, when in fact I didn’t know anything. The second thing that comes to mind is that the world has been opened up to me in a way that I could have never imagined . . . and I mean that. There are so many dimensions to the law, and all of them are very, very fascinating.

One area that I didn’t see coming was the field of energy law. It is mind blowing to contemplate that natural resources like oil and gas affect all our lives, all the time. The clash between old common law, modern administrative law, and quirks of the physical nature of natural resources is incredible. Who would have thought after millions of years that ancient critters, plants, etc., would turn into something that is potentially worth a vast amount (depending on the market)? If it’s worth money, people will fight over it, and these conflicts can range from lawsuits to wars. Professor David Pierce states it perfectly: “Why there will never be peace . . . under the oil and gas lease.”

Two interesting areas that converge (at least in my opinion) are criminal law and the legislative process. I have no doubt that lots of folks who enter law school are inspired by the countless television shows and films about lawyers, ranging from “Law & Order” to “My Cousin Vinny.” And while the various media outlets bombard us with shocking and sensational crimes, I get the feeling that most courts deal mainly with nonviolent crimes. In fact, I suspect that these minor crimes probably clog up the courts and prevent everyone involved, from judges to law enforcement, from focusing their energies on worthier matters. This is where the entertaining, complex, and occasionally disgusting role of the Legislature comes in. As the national economic situation continues to affect nearly everyone in a negative way, legislators on both a national and state level must focus more on the long-term welfare of our state and nation and less on divisive tactics to gain votes. Maybe if more legislators were lawyers, the world would be a better place!

What will the future hold for me and my fellow law students who are looking forward to getting “back to reality”? The global recession reveals three areas that highlight the current flavor of our social landscape: bankruptcy, divorce, and criminal law. On the rosier and unexpected side, I think that an overlooked specialty could create new opportunities for those of us who weren't exactly on the dean’s list: traditional legal jobs involving languages and translation. If an up and coming attorney had competence in any of the languages from the four “new” world players (Brazil/Latin America, India, China and Russia), new doors would undoubtedly open up. Whatever the future holds, I will commit myself to subscribe to Professor Ron Griffin’s claim that “right now is the greatest time to be alive.” The future is wide open. After all, I was an insurance agent.

About the Author

Tyler Feeney is a fourth generation native Kansan. His interests include politics, libertarian philosophy, U.S. history, and playing bass guitar.
The Judicial Council (Council) met June 4 and considered requests that the Council conduct studies of certain issues. The requests came from individual attorneys, the Supreme Court and the Legislature.

The Council created the Supreme Court Rules Advisory Committee to conduct a study of the Supreme Court Rules relating to the Supreme Court, Court of Appeals, appellate practice, and the district courts. The scope of the study will include substantive and stylistic amendments to conform the rules to newly enacted 2010 HB 2656. HB 2656 was the result of a two-year review of the Kansas Code of Civil Procedure (Code) and brings the Code into conformance with a number of recent changes in the Federal Rules of Civil Procedure. The committee was also assigned to study whether elimination of local court rules in Kansas would be advisable.

The Council also created the Lien Law Advisory Committee to study 2010 SB 469, which relates to remote claim liens on commercial property and establishes a state construction registry. In addition, the committee will undertake a comprehensive review of Kansas lien laws.

The Family Law Advisory Committee was assigned to study 2010 SB 522, relating to factors to consider in weighing whether a parent must consent to a stepparent adoption and factors to consider when terminating a parent’s rights. In addition, the committee will continue its comprehensive review of Kansas domestic relations statutes.

The Probate Law Advisory Committee was assigned to study 2010 HB 2514 and 2010 HB 2568. HB 2514 relates to the capacity of the settlor of revocable trusts. Current law requires that capacity be the same as that required to make a will. The proposed amendment in the bill would change that requirement to the “ability to receive and evaluate information effectively and to communicate decisions to such an extent that the person has the ability to manage such person’s financial resources.” HB 2568 relates to durable powers of attorney and would require that durable powers of attorney be filed and recorded with the registrar of deeds. In addition, the committee was assigned to study issues that arise regarding the interplay between common law marriage and decedent’s estates. The committee will also continue to study asset protection trusts, a proposed amendment to the Uniform Trust Code, relating to insurable interests under irrevocable life insurance trusts, revocation of inheritance rights of ex-spouses upon divorce, and clarification of the Uniform Trust Code creditors claims provisions.

The Juvenile Offender/Child in Need of Care Advisory Committee was assigned a study of 2010 HB 2603, which would allow automatic expungement of juvenile convictions under certain conditions. In addition, the committee will work to develop legislation that will address juvenile jury trial rights and procedures.

The Council assigned a study of lesser-included offenses under felony murder to the Criminal Law Advisory Committee. Currently, felony murder is included as a subparagraph within the first-degree murder statute, K.S.A. 21-3401. The statutory structure has led some to argue that felony murder is actually a lesser-included offense of premeditated murder. The committee will study whether it would be advisable to place felony murder in a separate statute to clarify that it is neither a lesser degree of premeditated murder for purposes of lesser-included offenses, nor is it a greater degree of any other homicide. In addition, the committee was assigned to study 2010 HB 2502, which seeks to protect child witnesses from trial tactics that would be detrimental to their well-being. The committee will continue its study of the issue of involuntary commitment of incompetent defendants. In addition, the committee has added members from the Kansas Criminal Recodification Commission and will address issues that arise with 2010 HB 2668 (criminal code recodification) prior to the bill’s effective date of July 1, 2011.

The advisory committee reports on these newly assigned studies will be considered at the Council’s December 2010 meeting with the exception of the comprehensive study of Kansas lien laws and the Supreme Court rules, which will likely require an additional year to complete. If legislation is proposed as a result of any of the studies, it will be discussed in a future column of the Journal of the Kansas Bar Association. For information about all current projects of the Council, see the Council’s website at www.kansasjudicialcouncil.org, and check each specific advisory committee for that committee’s assigned projects. The Council appreciates suggestions or comments about any matter being studied by the Council or any of its advisory committees, or any other matter that may warrant future study. Readers may contact the Judicial Council by e-mail at judicial.council@ksjc.state.ks.us.
Members in the News

Changing Positions

Jennifer A. Amyx has joined the Sedgwick County District Attorney’s Office, Wichita.

Travis L. Counts has joined Petrohawk Energy Corp., Houston, as associate general counsel.

Christopher M. Crowley, Brooke L. Grant, and Julie C. Pine have been elected as shareholders at McDowell, Rice, Smith & Buchanan P.C., Kansas City, Mo.

Daniel F. Church has become a member/partner with Morrow, Willnauer, and Klosterman LLC, Kansas City, Mo. The firm has now become Morrow, Willnauer, Klosterman, and Church LLC.

Jonathan J. DeJong has joined Koch Industries, Wichita.

Jeffrey F. Dansenbrook and Geri L. Hartley have joined Nicholson Law Office L.C., Paola, as associates.

Kenneth W. Delaughder and Amy L. Turner have joined the Social Security Administration Office of Disability, Wichita.

Veronica L. Dersch has joined Smithyman & Zakoura Chtd., Overland Park.

Bradley L. Farney has joined Stewart Title Guaranty Co., Leawood.

Matthew L. Faul has joined Lathrop & Gage LLP, Kansas City, Mo.

Kenneth G. Gale has been named a U.S. magistrate judge for the U.S. District for the District of Kansas in Wichita.

Bridget M. Guth-Williams has joined the City of Independence, Mo., as an assistant city attorney.

Timothy J. Hayes has joined Bishop & Hayes P.C., Joplin, Mo.

Clayton J. Kaiser has become a law clerk for Hon. Eric F. Melgren, Wichita.

Robert W. Kaplan, Eric W. Lomas, and James A. Thompson have joined Klenda, Mitchell, Austerman & Zuercher LLC, Wichita.

Emily M. Kerstein has joined Adorno & Yoss LLP, Miami.

Anna M. Krstulic, Jennifer K. Vath, and Gregory T. Wolf have joined Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo., as associates.

Karl W. Kuckelman has been elected managing partner at Wallace, Saunders, Austin, Brown, Enochs Chtd., Overland Park.

Erin E. Lary has joined Polsinelli Shughart P.C., Kansas City, Mo., as an associate.

Terence E. Leibold and Cheryl L. Trenholm have joined Petefish Immel & Heeb LLP, Lawrence.

Amy Jo Liebau has joined Laham Development, Wichita.

Melody L. Rayl has joined Spencer Fane Britt & Brown LLP, Overland Park.

Jared L. Reeves has joined the U.S. Air Force, Tampa, Fla., as an assistant staff judge advocate.

Elizabeth D. Rogers has joined Mason & Karbank, Overland Park.

Laura E. Seaton has joined Stevens & Brand LLP, Lawrence.

Seamus P. Smith has joined Will and Trust Center, Leawood.

Jon P. Von Achen has joined Conlee Schmidt Emerson LLP, Wichita, as of counsel.

Mark A. Willkerson has joined Via Christi Health Inc., Wichita.

Changing Locations

Kari D. Coulits has moved to 2552 N. Maize Court, Ste. 100, Wichita, KS 67205.

Leena P. Fry has moved to 601 E. 12th St., Rm. 966, Kansas City, MO 64106.

Joan Hawkins Attorney at Law Ltd. has moved to 123 W. 8th St., Ste. 102, Lawrence, KS 66044.

Roger D. Hudlin has started Hudlin Law Office LLC, 408 Baldwin, Wichita, KS 67213.

Ross D. Keeling has started Keeling Law Office, 4000 W. 6th St., Ste. B #141, Lawrence, KS 66049.

Brian L. Leininger has started Leininger Law Offices, 11115 Ash St., Leawood, KS 66211.

Terence Ryan Merrigan has started Merrigan Law Firm LLC, 8901 State Line Rd., Ste. 250, Kansas City, MO 64114.

Rachel B. Ommerman has moved to 15280 Metcalf Ave., Overland Park, KS 66223.

Constance Peebles has started her own practice, PO Box 225, Yates Center, KS 66783.

Laura B. Shaneyfelt has started her own firm, 322 S. Mosley, Ste. 11, Wichita, KS 67202.

Law Offices of Mandy M. Shell has moved to 1656 Washington St., Ste. 270, Kansas City, MO 64108.

Patricia M. Thomas has moved to 400 State Ave., Kansas City, KS 66101.

Malissa L. Walden has started Walden & Pfannenstiel LLC, 11900 W. 87th St. Pkwy, Ste. 125, Lenexa, KS 66215.


Miscellaneous

Timothy R. Emer, Independence, Kan., has been selected by Gov. Mark Parkinson to join the Kansas Board of Regents.

Timothy G. Givan, Hutchinson, was recently awarded the Certified Corporate Trust Specialist from the Institute of Certified Bankers.

Stephen L. Martino, Ellicott City, Md., has been appointed by Gov. Martin O’Malley as director of the Maryland State Lottery Agency.

Donald P. Schnacke, Topeka, has been re-appointed to the board of directors of Kansas Inc. by Gov. Mark Parkinson.

Trish Voth, Wichita, received the Leukemia & Lymphoma Society’s Women of the Year-Wichita award for raising nearly $38,000 for the society.

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.
Obituaries

Henry N. Dyhouse

Henry N. Dyhouse, 64, of Gladstone, died April 30 following a brief illness. He was born in Lakeland, Fla., in 1945, the second son of Ruel and Ruby Dyhouse. Following graduation from Normandy High School in St. Louis, he earned a degree from the University of Missouri-Columbia, and following active duty in the U.S. Army, he graduated from Loyola University Chicago with both master's and law degrees. After three years at the Securities and Exchange Commission in Chicago, Dyhouse joined the legal department of Farmland Industries in Kansas City, Mo., in 1978. In 1986, he became the associate general counsel of the U.S. Central Credit Union in Lenexa.

He is survived by his wife, Jan Dyhouse, of the home; son, Thomas Dyhouse; two brothers, Roger Dyhouse and George Dyhouse; sister, Peggy Hollingsworth; and two grandchildren.

James R. Roth

James R. Roth, 68, of Wichita, died May 19 at his home. He was born November 4, 1941, in Great Bend, the son of June and Walter Roth and was raised in Ellinwood. Roth was a 1963 graduate of Emporia State University, where he majored in business and was a member of the golf and debate teams and was also a member of the Sigma Phi Epsilon fraternity. He went on to graduate from Washburn University School of Law in 1966.

He practiced law from 1966-1969 and served in the U.S. Army Reserve from 1966-1972. In 1969, he relocated to Wichita, where he would remain in private practice for more than 40 years. In 1992, then-Gov. Joan Finney appointed Roth to the Washburn University Board of Regents, and he would serve on that board for 18 years, including four years as chairman. Roth received the Distinguished Service Award from Washburn Law School in 2005 and from the Washburn University Alumni Association in 2010.

He is survived by his wife, Sally Roth; daughter, Amy Tillery, of Prairie Village; son, Drew Roth, of Denver; three brothers, Tom, of Denver, Randy, of Honolulu; and Kent, of Ellinwood; and one grandson. He was preceded in death by his parents.
Law Practice Management Tips & Tricks

Genie in a Box? Wycom Check Printer

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ksLPM@larryzimmerman.com

When I was still a freshly minted attorney, one of my favorite jobs was signing my name. Raising my right hand in the oath had altered its powers to sign. I signed as a lawyer now and I was happy to scribble my name all day long. (It probably helped that signing my name was one of the few of my new legal skills I trusted.)

The newness of signing mountains of documents each day wore thin quickly and it was soon a dreaded chore. I even plotted my path through the office to avoid the signature tray hoping another attorney would make eye contact with the mountain first. Even as we turned more frequently to electronic signatures on pleadings, the irritation of signing checks continued. The Wycom Check Signer provides a simple, secure solution for signing checks using a “magic box” that sits on the network between your accounting software and printer.

Wycom Check Printer Security

The Wycom device plugs into the network or via parallel port between your computer and printer. It is an industrial-looking box with two key locks and a small status screen. To activate the device and allow it to print and sign checks, two separate keys are required. These are real, physical, metal keys—not some key icon or password. It is a bit like launching missiles from a submarine (in my boyish imagination) where the authority to write and sign checks is vested in two people, both of whom are required to activate the Wycom device. This provides significant security and accountability.

Once both parties have turned their keys, the Wycom device is activated and your check printer will begin printing checks. (I should note that a single Wycom device can support multiple printers across a network.) The good stuff keeps coming though with a host of additional features to improve security and convenience. Additional security features include:

1. Pick up a MICR toner or cartridge for your printer and you can toss preprinted checks in favor of blank check stock. This convenience eliminates the need to secure preprinted checks from theft, eliminates potential downtime if you run out between print runs, and allows on-the-fly changes across multiple accounts or as bank or firm names change.

2. The Wycom device can be programmed to scale its security based on the dollar amount of the check. For example, small checks under $100 could be set to require only the bookkeeper key while larger checks would require both the bookkeeper and attorney keys.

3. An option exists to capture a PDF image of all checks printed through the Wycom device and save to a shared directory. This provides a solid audit trail and does so without any special user intervention.

4. The design of the check includes a “forge-resistant graphic” for the check amount. This graphic makes it virtually impossible to alter the payable amount of the check.

Convenience

I assumed configuration and use of the Wycom device would be a hassle. Speaking with a colleague who uses the “magic box” dispelled those concerns. Unlike a software interface that might provide some of the same security features, the Wycom device is a drop-in hardware solution. It is invisible to your accounting package and requires no special drivers or software. Programming check layout (including any personalized logos), account numbers, and approved signatures are handled at the factory. If there are changes required after factory programming and installation, support at Wycom can reprogram the device remotely over an encrypted connection.

Some might blanche at the price (starting around $2,800) but anyone who has burned up a morning’s worth of billable hours aggravating their carpal tunnel will recognize it as one of those devices destined to pay for itself in short order. The added security features also introduce real value beyond efficiency in this era of easy scams and tough accountability. This is not a paid promotion but I was introduced to the Wycom “magic box” at a national software convention by Tucker Bradley of Progressive Business Systems (tucker@PBSOffice.com). If you want to save your wrist for golf, tennis, etc., give the “magic box” a test run.

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.

www.ksbar.org
Hon. Sam A. Crow makes those around him feel comfortable—offering a firm handshake, warm smile, and a hearty greeting, “I’m Sam Crow.” When asked where he works, his reply is often, “I work for the United States. I work for you.” Most people who meet him would not suspect his passion for the United States and the rule of law.

Crow is a veteran of World War II and the Korean War, and a retired U.S. Army Reserve colonel and Judge Advocate General’s Corps (JAGC) military judge. He graduated from the University of Kansas with his bachelor’s degree in 1949 and graduated from Washburn University School of Law in 1952. Throughout his career, Crow took courses at the Judge Advocate General School, University of Virginia, including the JAGC basic and advanced courses, JAG officer course, and the military judge course.

His legal career began as a law clerk at the Topeka firm of Rooney, Dickinson & Prager in 1952 and became a partner the following year. By 1975, the firm’s name changed to Crow & Skoog and he was a senior partner. In 1973, he began the transition into the judicial arena, serving as a part-time U.S. magistrate judge and became a full-time magistrate judge in 1975. Crow was appointed to the U.S. District Court for the District of Kansas in December 1981 and became a senior judge in November 1996.

Crow, in addition to his time on the bench, travels throughout the state and the nation as a lecturer. He has often lectured at Washburn University School of Law; military law institutes throughout the country, including Fort Riley’s Annual Law Day; and many annual meetings for the Kansas Bar Association, Kansas Association for Justice (KAJ), and American Association for Justice.

He has been a member of many organizations and has served on many boards and committees. He is a past member of the Kansas Bar Foundation Board of Trustees (and current Fellow), numerous federal judiciary committees, and the Washburn Law School Alumni Board of Governors; past president of the KAJ and Topeka Lawyers Club; past chair of numerous Topeka Bar Association (TBA) committees; and is a member of the Kansas and Wichita bar associations and the Attorney Disciplinary Panel for the U.S. District Court for the District of Kansas. Crow has also volunteered his time for the Boy Scouts of America Board of Review, board of directors for both the Riverside Hospital in Wichita and Kansas March of Dimes, Shriners, American Legion, and various law and social fraternities.

Throughout his career, Crow has been honored with many awards, including Who’s Who in America, the 2005 Shri- ner of the Year, the 2000 Distinguished Service Award from Washburn Law School, and the 2000 Distinguished Service Award from the TBA. In 2006, Washburn Law honored Crow with an honorary doctorate.
Rep. Dennis W. Moore is a lifelong Kansan now serving his sixth term in the U.S. House of Representatives. Born in Anthony, he was educated in the Wichita public schools before graduating from the University of Kansas in 1967. He received his law degree from Washburn University School of Law in 1970.

After serving in the U.S. Army and Army Reserve, Moore began his legal career as an assistant Kansas attorney general and would serve in that role until 1973 before entering private practice. In 1976, he was elected Johnson County district attorney and re-elected twice. He earned a reputation as a tough, but fair prosecutor and personally tried more than 25 felony jury trials. Although victim/witness units are commonplace in today’s district attorney offices, Moore started the first one in Kansas in the late 1970s. He was also supportive of groups that helped battered spouses and abused children.

He served as president of the Kansas County and District Attorneys Association. In 1993, he was elected to the Johnson County Community College board of trustees and was re-elected to a second term.

Moore was elected to Congress from the 3rd District of Kansas, primarily representing Johnson and Wyandotte counties, in 1998 and has been re-elected five times. His tenure in office is noteworthy for his ability to work in a bipartisan fashion and his constituent service is legendary. He helped bring the Amber Alert system to the Kansas City metropolitan area; wrote legislation, now law, providing full airfare for soldiers stationed overseas returning home for rest and recuperation, and raising the death gratuity benefit from $12,000 to $100,000 for families of service persons killed in Iraq and Afghanistan; serves as a leading advocate for fiscal responsibility, including the reinstatement of the “Pay as You Go” budget rule requiring that any legislation affecting entitlement spending be revenue neutral; and led the effort giving Medicare negotiating authority to lower drug prices for Medicare beneficiaries. He is a member of the House Financial Services Committee, serving as chair of the Subcommittee on Oversight and Investigations, and is a member of the Small Business Committee; Blue Dog Coalition, a group of moderate to conservative Democrats committed to restoring fiscal responsibility and accountability to the government; and the Center Aisle Caucus, a group formed to bring more civility and bipartisanship to Congress.

After 12 years of public service, he will be retiring from Congress in January 2011.

Hon. Karen M. Humphreys is the chief magistrate judge for the U.S. District Court for the District of Kansas and sits in Wichita. In November 2009, she was reappointed to a third eight-year term. Prior to her initial appointment in 1993, she had served six years as a state trial judge in Wichita.

During her years on the bench, she has been known as being consistently gracious, decisive, and willing to listen to the lawyers and parties who appear before her. She exhibits the hallmarks of professionalism. Her consistent and empathetic demeanor more than likely contributed to her recently being put in charge of the pilot project, KAN-TRAC (Kansas Treatment Re-entry Assistance Court), for the federal district courts. The program is designed to help those released from federal prison to reintegrate into society.

As a magistrate judge, she has often served as a mediator and as a trial judge in civil cases, in addition to regular duties in criminal and civil case management. As a lawyer, Humphreys practiced law in federal and state courts in Wichita, Topeka, and Kansas City, Kan., and her litigation experiences included an eight-year stint as an assistant U.S. attorney in Topeka and Wichita. She graduated from the University of Kansas in 1970 with a bachelor’s degree in history and American studies, and obtained her law degree from the University of Kansas School of Law in 1973.

Humphreys is a Fellow of the American Bar Foundation and also holds memberships in the Kansas and Wichita bar, Kansas Women Attorneys, and the Federal Magistrate Judges associations.

She has served as a presenter for continuing legal education courses and civic organizations. Her professional contributions have been recognized with awards from the Kansas and Wichita women attorneys associations and the Wichita Bar Association. Her current committee and board work includes serving on the University of Kansas Alumni Association National board of directors, chairing the board of Kansas Leadership Center, and serving on a 10th Circuit Committee on Judicial Health and the national Advisory Group for U.S. Magistrate Judges.
Cyd Gilman graduated from the University of Kansas in 1975 and Washburn University School of Law in 1978. For five years she was an attorney with the Legal Aid Society of Wichita before becoming an assistant federal public defender in Wichita. In 2009, she was sworn in as the federal public defender for the District of Kansas, where she directs legal representation of indigent federal criminal defendants in Wichita, Topeka, and Kansas City, Kan.

Gilman is a member of the Bench-Bar Committee for the U.S. District Court for the District of Kansas, the Tenth Circuit Court of Appeals Criminal Justice Act Standing Committee, Wichita Women Attorneys Association and is its 2010 recipient of the Louise Maddox Award of Professional Excellence, and the Kansas and National associations of criminal defense attorneys. She has served as president, president-elect, and vice president of the Wichita Young Lawyers; and secretary-treasurer, two-time member of the Board of Governors, and two-time chair of the Criminal Law Committee of the Wichita Bar Association. She has served as president of the Kansas Legal Services Staff Association, served as an assistant adjunct professor in family law at Wichita State University, and has been a member of the various Kansas Bar Association sections, including Family Law and Young Lawyers.

She has been a speaker at numerous local, state, and national conferences regarding various federal criminal defense topics, at naturalization ceremonies, and various community and student training events.

John A. “Jack” Potucek II is a lifelong Kansan who has dedicated his entire legal career to government services. He spent 39 years serving his local and state government as a county attorney, and later as county counselor. He served his country for four years on active duty in the Air Force, and another 17 years as a reservist. He has served as the Sumner County counselor since 1975 and prior to that, he served two terms as the Sumner County attorney, at which time he attended to the responsibilities now handled by the county counselor. While attending to the duties of the county’s civil counsel, he has maintained his private practice in Wellington, with emphasis on trial work.

Potucek graduated from the University of Kansas in 1964 and was commissioned an officer in the U.S. Air Force. Following active duty, he returned to Kansas and received his Juris Doctor from the University of Kansas School of Law in December 1970.

He has been a member of the Kansas Bar Association since 1971 and is currently a member of the Criminal Law and Real Estate, Probate & Trust Law sections. He served as a member of the Kansas Citizens Justice Initiative, which reviewed the state judicial system in the late 1990s and is currently in his ninth year as a member of the Judicial Nominating Commission of the 30th Judicial District. He has served on multiple occasions as an officer of the Sumner County Bar Association.

While in law school he, Steve Blaylock, and Sheila Reynolds started the state’s first student legal aid program with the coordination of mentoring attorneys. As Sumner County attorney in the early 1970s, he initiated the Prosecutor’s Summer Intern Program, which was enthusiastically supported by both KU and Washburn University law schools.

He served more than 15 years on the Sumner County Board of Health and currently serves on the USD 353 School Foundation Inc. He retired as a lieutenant colonel after 22 years of Air Force/Kansas Air National Guard service. He is active in veterans’ affairs and serves as the head of the Sumner County Veterans Memorial Committee.

Potucek received the distinguished Service Award from the Wellington Chamber of Commerce in 2010.
In the 128 years the Kansas Bar Association has been in existence, only four individuals have been given an Honorary KBA Membership: Jonalou Pimmell, 1984; Marcia Poell Holston, 2000; Bill Kurtis, 2004; and Dr. Howard Schwartz, 2007. This honor is bestowed upon persons who have demonstrated lifelong dedication to the state’s citizens, legal and judicial system, and the Bar Association. This year, Linda Coffee, of the Johnson County Bar Association, and Karin Kirk, of the Wichita Bar Association, receive this honor.

Linda Coffee has been the executive director of the Johnson County Bar Association (JCBA) since 1985 and was appointed executive director of the Johnson County Bar Foundation in 1988. She has been a member of the National Association of Bar Executives (NABE) since 1989 and has chaired several committees within the organization. She is the founding member of NABE’s Administration and Finance Section. Coffee was the recipient of the President’s Award in 2007 in recognition and appreciation for her leadership, dedication, and service to the JCBA.

The Outstanding Service Award is given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the Kansas Bar Association and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA. This year, six recipients have been chosen to receive this award.

The DUI Victim Center of Kansas was established in 1987 by Mary Ann Khoury after a childhood friend, who was three months pregnant, was struck by a repeat offending drunken driver. That friend, and her unborn child, was in a coma for more than two months before dying. After seeing how the Orthodox Christian Church communities came together to support the family of her friend, Khoury, a 1971 drunken driver crash survivor herself, realized there was no support groups to help victims of drunken driving crashes in Wichita. Khoury realized something needed to be done. After countless hours of research and support from the church community, the DUI Victim Center of Kansas (Center) was established. The mission of the Center is to reduce the traumatic effect a drunken driving crash has on victims and their families and increase awareness of the human consequences of drunken driving.

In 1990, the Center developed a DUI Victims Panel as a program to address DUI diversion, juvenile, and adult court-ordered offenders. The program has participants hear from victims of drunken driving accidents and review a video demonstrating the consequences of drunken driving. Other than victim advocacy, the panel program is the most requested service at the Center and is established in Great Bend, McPherson, El Dorado, Wellington, Emporia, and Newton with expansions in the future. In Wichita, this program is offered three times a month in English and four times a year in Spanish; since 2000, more than 18,000 offenders have been ordered to attend this program.

To date, the Center is the only comprehensive program in the Wichita, Sedgwick County area, with programs expanding throughout the state annually providing services to more than 500 victims of DUI crimes and their families.

Lana Knedlik, of Kansas City, Mo., has long been a member and former president of the Kansas Bar Association (KBA) Intellectual Property Law Section. She is a consistent and well-respected speaker on intellectual property law, speaking at annual meetings and other events sponsored by sections and other organizations. Knedlik has worked with the KBA to provide annual continuing legal education seminars on LGBT issues to attorneys in Kansas and Missouri since 2004, has helped to establish and is currently the president of the

(Continued on next page)
Kansas City Lesbian, Gay & Allied Lawyers (KC LEGAL), and is a regular guest on a monthly radio program answering questions related to LGBT legal issues.

Knedlik, a partner at Stinson Morrison Hecker LLP, is a registered patent attorney who practices in all areas of IP law, including patent, trademark, and copyright prosecution, licensing, due diligence, litigation support, and client counseling. Her training in chemical engineering, biology, and pharmacy enables her to address various issues having a technological or scientific component. She is a member of the Association of University Technology Transfer Managers; American Intellectual Property Law Association; American, Missouri, Kansas City Metropolitan, and Kansas bar associations; and KC LEGAL.

She received her bachelor’s degree in chemical engineering, summa cum laude, from Kansas State University in 1993, as well as bachelor’s degrees in biology, summa cum laude, and pharmaceutical science, summa cum laude, from the University of Missouri-Kansas City in 2002 and 2007, respectively. Knedlik received her juris doctorate, Order of the Coif, from the University of Kansas School of Law in 1996.

**Rachael K. Pirner**, of the Wichita law firm Triplet, Woolf & Garretson LLC, represents clients in trust and probate-related litigation and has practiced for more than 20 years, handling many cases in several areas of civil, trust, and probate litigation involving adoption and probate matters. For the past nine years, she has also practiced in the area of assisted reproductive technology, representing clients in contract matters and in establishing parental rights.

Pirner currently serves as president-elect of the Kansas Bar Association, after serving as vice president and two terms as a District 7 governor to the KBA Board of Governors. She is past chair of the KBA Litigation Section and served on the KBA Continuing Legal Education and Nominating committees and the Fee Dispute Resolution Panel. Pirner is also active with the local bar associations, having She has been a member of the Wichita Bar Association’s Legislative, Public Relations, Probate (chair), Diversity, Unauthorized Practice of Law, and Nominating committees; holding all offices of the Wichita Women Attorneys Association (WWAA); and serving as president, vice president, secretary, regional coordinator, and chair of the Public Relations Committee of the Kansas Women Attorneys Association. In 2001, the WWAA awarded Pirner with the Louise Maddox Award of Professional Excellence, which honors persons who have worked to advance opportunities for women in law.

She has long-participated in the Lawyer’s Care Project through Kansas Legal Services, volunteered to represent women seeking protection from abuse orders, and prepared advance directives for indigent persons in hospice care. Pirner has served on the board of directors of both the YWCA and Planned Parenthood, is a member of the board of trustees for KPTS public television, on the boards of IOTLA and Kybele Inc., and as past president of the Community Council for Women’s Studies at Wichita State University.

Pirner earned her law degree from the University of Nebraska School of Law in 1989.

**Wesley F. Smith** is a partner at the Lawrence and Topeka law firm of Stevens & Brand LLP. His practice primarily represents debtors, community banks, and creditors in bankruptcy cases. He is also an adjunct professor of law at the University of Kansas, teaching Commercial Law and is frequently a lecturer on bankruptcy and commercial law for continuing legal education (CLE) seminars.

Smith’s involvement with the Kansas Bar Association started as CLE liaison with the Bankruptcy and Insolvency Law Section in 2004, serving two years in that position and ultimately, served on the committee for five years, including becoming president in 2007. He has been chair of the KBA CLE Committee since 2008 and served as president of the Topeka Area Bankruptcy Council. From 2005-08, he served on the Bench-Bar Committee for the U.S. Bankruptcy Court for the District of Kansas and helped to orchestrate the overhaul of the local bankruptcy rule to coincide with the Bankruptcy Reform Act of 2005. He is the author of the bankruptcy chapter in the Kansas Construction Law Handbook and a co-author of Chapter 12 (farm bankruptcy) of the Kansas Bankruptcy Handbook.

He holds a Bachelor of Science in agricultural economics from Oklahoma State University and a Juris Doctor from the University of Kansas School of Law.

**Molly M. Wood** is a partner at the Lawrence and Topeka law firm of Stevens & Brand LLP, where she focuses her practice primarily on elder law. As a member of the National Academy of Elder Law Attorneys (past president of the Kansas chapter) and the Kansas Bar Association (serves on the CLE Committee as liaison to the Elder Law Section and is chair of the Handbook Subcommittee), she concentrates her practice in Medicaid eligibility for long-term care and division of assets, including federal and state Medicaid litigation, special needs and disability planning, guardianship and conservatorship of adults, including contested matters, and general estate planning.

She is a co-author of the new treatise, “Advising the Elderly Client,” the law school text, “Elder Law: Reading, Cases, and Materials,” and is a coeditor of the Kansas Long-Term Care Handbook.

Wood earned her bachelor’s degree in English and history from the University of Kansas in 1976 and her law degree from the University of Kansas School of Law in 1991.
Larry N. Zimmerman has tirelessly worked to educate his peers on the advantages of and efficiencies inherent in legal technology. He was an early proponent of electronic filing and the Topeka firm of which he is now a partner, Valentine, Zimmerman & Zimmerman P.A., was the first to file a case electronically in Kansas.

As a member of both the Kansas Supreme Court and Shawnee County Electronic Filing committee, he remains actively involved in the issue, serving as president-elect of the KBA Law Practice Management Section, a regular contributor to the Journal of the Kansas Bar Association, a frequent speaker at continuing legal education seminars, and an adjunct professor of law at Washburn University School of Law, teaching Law Practice Technologies. Zimmerman also serves as legislative liaison for the Kansas Credit Attorney Association, an association related to his active bankruptcy practice. He is also a member of the American, Kansas, and Topeka bar associations.

Zimmerman graduated from Emporia State University with his bachelor’s degree in 1993 and graduated from Washburn University School of Law with his juris doctorate in 2000.

Brooks G. Kancel has been an associate at the Wichita law firm of Fleeson, Gooing, Coulson & Kitch LLC since 2005, when she passed the Kansas Bar exam. Born and raised in Kansas City, Kan., she earned her bachelor’s degree in accounting and finance from Kansas State University in 2002 and her juris doctorate from Washburn University School of Law in 2005.

In her professional career, Kancel is active in many professional organizations, including the Wichita Bar Association Young Lawyers Association, serving as president-elect of the KBA Law Practice Management Section, a regular contributor to the Journal of the Kansas Bar Association, a frequent speaker at continuing legal education seminars, and an adjunct professor of law at Washburn University School of Law, teaching Law Practice Technologies. Zimmerman also serves as legislative liaison for the Kansas Credit Attorney Association, an association related to his active bankruptcy practice. He is also a member of the American, Kansas, and Topeka bar associations.

Zimmerman graduated from Emporia State University with his bachelor’s degree in 1993 and graduated from Washburn University School of Law with his juris doctorate in 2000.

The Grow Your Own Lawyer Program was established in 1996 as a subcommittee of the Wichita Bar Association’s Professional Diversity Committee. The goal of the program is to make connections between lawyers and high school students from diverse backgrounds to educate the students about opportunities in the practice of law. Students are matched with a diverse attorney mentor. Each year approximately 20 students participate in the program. Most students come from low-income backgrounds and have no prior exposure to the legal field.

The group takes field trips twice a month to learn different aspects of the legal field. Examples of these field trip visits include the Sedgwick County Juvenile Detention Facility and meeting with a juvenile court judge; the district attorney’s office and meeting with an assistant district attorney; federal court and meeting with sitting federal judges, U.S. attorneys, and federal public defenders; and observing an oral argument; Kansas Judicial Center, having lunch with sitting judges/justices, and observing an oral argument; Brown v. Board of Education site; University of Kansas and Washburn University schools of law; and attending a Law Day banquet.

Carol Boorady and Kellie E. Hogan have coordinated all aspects of the program since 2000. By making connections between students and lawyers, Boorady and Hogan created an environment where diverse students are welcomed into the practice of law. Countless students have participated in the program and are amazed to see that with hard work and determination, they can go on to become the first person in their family to practice law. The program promotes long-term diversity of the Kansas Bar by cultivating diverse students who might not otherwise consider a legal career.
The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus, bringing credit to the legal profession. Past award recipients include a lawyer accepting the representation of a client challenging the application of the Kansas sexual predator law, a judge for his courage in the face of controversy after his decision on state public school funding thrust him into the public eye, and a deputy staff judge advocate for meritorious legal services he often performed while in Iraq, often under fire, attack, or high pressure. This award is only given in those years when it is determined that there is a worthy recipient.

Wichita attorney Kurt P. Kerns trekked through Tanzania, Democratic Republic of Congo, and Burundi looking for witnesses and trying to recount events that occurred more than 15 years prior for the defense of a man in Wichita being accused of genocide in Rwanda of ordering the deaths of hundreds of people. Federal prosecutors said that 83-year-old Lazare Kobagaya is one of the first criminal prosecutions of its kind on U.S. soil. It’s alleged he unlawfully obtained citizenship three years ago in Wichita by lying on government forms about living in Rwanda during the slaughter of more than 500,000 people. This would send Kerns to the other side of the world.

He said that for 15 years Kobagaya was not noticed by anyone until his testimony on behalf of a former neighbor, Francois Bazaramba, being prosecuted in Finland for genocide. Witnesses in genocide cases rarely testify because they have been beaten, harassed, and charged with crimes for their testimony. However, in the past year Kerns has found witnesses who are willing to testify and still reside in United Nations refugee camps in neighboring countries. The problem he faces, however, is bringing them back. The United States has no subpoena powers outside its borders, which was a reason why he asked for the case to be dismissed against Kobagaya. If convicted, he faces deportation.

Kerns is a founding partner at Ariagno, Kerns, Mank & White LLC. He has served on the board of governors for the Kansas Association of Criminal Defense Lawyers and is a life member of the National Association of Criminal Defense Lawyers. He practices before the International War Crime Tribunal at The Hague, where he recently defended Vinko Martinovic, a Croatian commander charged with the torture of Bosnians a decade before. Kerns is one of only 26 American attorneys authorized to appear before the International Criminal Court. He is a frequent lecturer at criminal defense seminars across the nation and has been a featured legal commentator on TruTV and A&E’s “American Justice.”

Kerns earned his law degree from Washburn University School of Law and is a graduate of both the National Criminal Defense College, Macon, Ga., and Gerry Spence’s Trial Lawyers College, Dubois, Wyo.

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

Kathleen O. Coode has been volunteering in the Kansas City, Kan., office of Kansas Legal Services (KLS) on a part-time basis for years. In just 2009 alone, she advised 28 applicants and worked on 20 cases, seven of which she is still actively working on. She has worked on various types of cases, including domestic, landlord/tenant, elder law, bankruptcy, and Social Security disability.

She has accepted clients that KLS would have otherwise had to turn away due to staff or funding constraints. Additionally, she has had a number of cases that have become increasingly difficult as they progress. Coode never runs away from a challenge; she is ready to attack any legal problem head-on, even those requiring significant research and time.

Coode also volunteered eight hours per week representing clients under a Senior Citizens Law Project. She successfully represented clients in a variety of areas, including housing discrimination, Social Security, Medicaid, insurance, debtor/creditor, power of attorney, and transfer on death deed.

For her work, she received the Volunteer of the Year Award from the United Way of Wyandotte County in April 2004, as well as the 2009 Legal Services Corporation Pro Bono Award from KLS.

Coode earned her bachelor’s degree from the University of Kansas in 1989 and her law degree from John Marshall Law School in Chicago in 1997.
In addition to the Pro Bono Award given out each year, the Kansas Bar Association awards a number of Pro Bono Certificates of Appreciation to
lawyers who meet the following criteria:

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

Lynda A. Cleveland has been an active pro bono participant with Kansas Legal Services since 2008. Complimenting her 10-year career as a child and family therapist, Cleveland has handled divorce, custody, guardianship/conservatorship, and guardian ad litem pro bono cases on behalf of KLS.

She graduated from the University of Missouri-Kansas City School of Law in 1999 and attributes her interest in pro bono work to Victoria Battle, a law school classmate, colleague, and friend, who passed away in 2001 and who gave her time to help those less fortunate. Cleveland would like to give a special thanks to Tricia Trovar of Kansas Legal Services for all her support with the pro bono cases.

Drew D. Frackowiak is the only pro bono attorney working with the Kansas Legal Services’ Kansas City, Kan., office that handles bankruptcy cases and has referred possible fee paying clients of his to KLS for assistance through the pro bono program.

Frackowiak is a 1983 graduate of the University of Kansas School of Law. Immediately following graduation, he accepted a position with KLS, where he worked for four years in their Horton and Manhattan offices.

He was a solo practitioner from 1987 to 2001 and for the last nine years, has been in private practice with the firm of Wiesner & Frackowiak LLP in Overland Park, where he practices exclusively in the field of consumer bankruptcies. Frackowiak remains committed to the goal of KLS in providing legal assistance to the economically disadvantaged.

Christine M. Graham has completed six pro bono cases with the Kansas Legal Services’ Kansas City, Kan., office. In addition to handling cases for KLS, she offered to take information about the program to the Johnson County Bar Association (JCBA) members to help recruit more attorneys for the KLS.

She is a shareholder with Polsinelli Shughart P.C., where she has practiced for more than 14 years and practices in the areas of probate and trust litigation and estate planning. She earned her Bachelor of Science in journalism from the University of Kansas in 1991, her Juris Doctor, with honors, from Washburn University School of Law in 1994, and her Master of Law in taxation from the University of Missouri-Kansas City in 1995.

Graham is the immediate past president of the JCBA and is active in the JCBA CLE, Herbert W. Walton Bench-Bar Conference, and Bench-Bar Probate committees. She is also past president of the Eastern Kansas Estate Planning Council and a member of the Children’s Mercy Planned Giving Council. Graham is on the board of directors and the executive committee for SafeHome.

Douglas M. Greenwald has completed 11 pro bono cases with the Kansas City, Kan., office of Kansas Legal Services. He also assisted with the KLS “Legal Outreach Clinic” held in May 2009 that helps individuals with power of attorneys, wills, and transfer on death deeds.

He is a shareholder in McAnany, Van Cleave & Phillips P.A. in Kansas City, Kan., and Roeland Park. Greenwald concentrates his legal work in general civil litigation, appellate practice, insurance coverage, family law, and probate. Along with Anton C. Andersen, of the McAnany firm, he writes the “Workers Compensation” chapter of the Kansas Annual Survey of Law. He is a longtime member of the Kansas and Missouri bar associations.

Greenwald is a member of the board of directors of the Wyandotte County chapter of the American Red Cross and TLC for Children and Families in Olathe.

Karl G. Johnson is a solo practitioner in Fairway with a civil practice, handling domestic law, Social Security disability, and family law mediation and collaborative divorce cases.

Prior to his private practice, Johnson was an attorney with Kansas Legal Services. Initially hired as a staff attorney in the Horton office in 1978, he practiced civil law throughout northeast Kansas, although his primary focus was representing Native Americans in district courts in rural counties and before the Bureau of Indian Affairs. From 1981 to 1984, he practiced in KLS’ Topeka office and focused solely on domestic violence cases and served as legal liaison to the Battered Women’s Shelter; from 1984 to 1988, his practice included tenant’s rights representation in private and public housing, public benefit, and consumer law; from 1988 to 1998, he was the managing attorney in the Olathe office, where he received funding for

(Continued on next page)
**Karl G. Johnson**

Johnson has been a Kansas Supreme Court certified mediator since 1997, primarily doing family law mediations. He received his law degree from Washburn University School of Law.

**Timothy J. Knopp**, of Overland Park, is a member of the Elder Law Hotline, volunteers with Kansas Legal Services, and has participated in various reduced-fee programs for indigent defense and the contempt docket for child support enforcement. His belief is that each attorney has an obligation to “give back” to the community and knows that many in the legal profession also provide free or reduced fee services.

Knopp said, “The joy, relief, and, appreciation I have witnessed from these clients in finding help to navigate through whatever legal matter with which they have been burdened is a special form of compensation for services rendered.”

After graduating from the University of Kansas School of Law in 1983, he worked for several small firms and is now a solo practitioner with a general practice. Knopp is licensed to practice in state and federal courts in Kansas and Missouri and is a longtime member of the Kansas, Missouri, and Johnson County bar associations.

**Keven M.P. O’Grady** is a shareholder at the law firm of Ferree, Bunn, O’Grady & Rundberg Chtd. in Overland Park, practicing in the areas of family, general business law, and civil litigation. He has practiced with the firm since receiving his law degree from the University of Kansas School of Law in 1987.

He credits his partners and family with fostering a commitment to community service and volunteerism. He has completed several pro bono cases through Kansas Legal Services.

O’Grady is an active member of the Kansas and Johnson County (JCBA) bar associations. He has served as president, president-elect, section editor, and as a member of the executive committee of the KBA Family Law Section. He is also a member of the KBA Corporate, Banking & Business Law and Employment Law sections. O’Grady is also an active member of the JCBA’s Family Law Bench-Bar Committee and has served as chair since 1997. He currently serves as a member of the Kansas Supreme Court Self-Representation Study Committee.

He was named attorney of the year in 2005 by CASA of Johnson and Wyandotte counties.

**Stephanie M. Smith** opened her own firm in Prairie Village after practicing law in Nevada and Colorado for 17 years. She practices primarily in the area of estate planning, including wills, trusts, and probate, and is an active volunteer through Kansas Legal Services’ Pro Bono Program. She received her Bachelor of Science in foreign service from Georgetown University in 1977 and her Juris Doctor, cum laude, from the University of Michigan Law School in 1980.

Smith is a member of the National Network of Estate Planning Attorneys, the Eastern Kansas Estate Planning Council, the Mid-America Planned Giving Council board of directors, Kansas Women Attorneys Association, Johnson County Bar Association, the International Relations Council, and the Center for Practical Bioethics.

**Caleb Stegall** assisted the wife of Drew Culberth, one of the missionaries recently held in Haiti. Stegall communicated with the defense team in Haiti and kept Culberth’s family informed of the situation. When Culberth returned to United States, Stegall assisted him with the debriefing and helped the family with the media. His work was done pro bono.

Stegall graduated Order of the Coif from the University of Kansas School of Law in 1999. He clerked for the Hon. Deanell R. Tacha, chief judge of the U.S. Court of Appeals for the Tenth Circuit, and spent four years as an associate with Foulston Siefkin LLP in Topeka. In 2005, he opened a small country practice in Perry before being elected Jefferson County attorney in 2008.

**Shea E. Stevens** has completed nine cases and is working on more for Kansas Legal Services in Kansas City, Kan. She is known to have no fear in accepting more than one case at a time from KLS and is also known to be efficient and prompt with these cases.

Stevens attended Kansas State University, where she received her Bachelor of Science in psychology and women’s studies. She attended the University of Tulsa School of Law, receiving her Juris Doctor in 2004. She originally practiced in the area of business contracts and mergers with Sprint Nextel and NovaStar Mortgage. In 2008, she began to focus her attention on family law and established her own practice, The Law Office of Shea Stevens LLC. Her practice focuses primarily in the areas of matrimonial law; however, Stevens uses her corporate law experience and advises clients in the areas of contracts and simple business entity formation. Stevens has been an active participant in a Johnson County Probate Bar program to assist families of adult disabled children in obtaining guardianships.
Shawn Tracy began his legal volunteer work in Kansas and Missouri after graduating from the University at Buffalo Law School, State University of New York, in 2007. While working as director of a not-for-profit organization in Missouri, Tracy volunteered with Legal Aid of Western Missouri’s Housing and Community Development Unit in Kansas City. In 2008, Tracy began volunteering at Kansas Legal Services and has been part of their pro bono program ever since. Tracy’s caseload with KLS focuses primarily in the areas of family and elder law. Tracy also practices in the areas of real estate, affordable housing, and economic development law.

50 Years of Service to the Legal Community
James M. Barnett, Kansas City, Kan.
Richard L. Bond, Overland Park
David A. Brace, Moline
Hon. William R. Carpenter, Topeka
Jack Focht, Wichita
Franklin D. Gaines, Augusta
Hon. Fred S. Jackson, Topeka
James G. Kahler, Lyons
Hon. Edward Larson, Topeka
Arthur B. McKinley, Sublette
Donald W. Meeker, Overland Park
William J. Mullins Jr., Shawnee Mission
Hon. Jack R. Reed, Kansas City, Mo.
Byron E. Springer, Lawrence

60 Years of Service to the Legal Community
John A. Bausch, Topeka
L.O. Bengtson, Salina

70 Years of Service to the Legal Community
Howard M. Immel, Iola

In Memoriam ... You’ll Be Missed
Hon. Bob L. Abbott, Wichita
Arthur A. Anderson, Lawrence
Richard L. Ankerholz, Lyons
Patricia E. Baker, Topeka
Lloyd C. Bloomer, Osborne
William A. Bonwell Jr., Wichita
Henry N. Dyhouse, Kansas City, Mo.
Hon. Jerry G. Elliott, Topeka
Ronald R. Gooding, Topeka
Sally H. Harris, Belton, Mo.
John F. Hayes, Hutchinson
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Hon. Gerald L. Houglund, Olathe
Hugh D. Mauch, Great Bend
Terry T. Messick, Anthony

Marion C. Miller, Hilton Head Island, S.C.
Hon. Robert H. Miller, Topeka
David W. Norburg, Lenexa
Philip C. Pennington, Kansas City, Mo.
Richard L. Reep, Amarillo, Texas
John E. Shamberg, Overland Park
Louis A. Silks Jr., Merriam
Richard I. Stephenson, Wichita
Kenneth P. Stewart, Wichita
Daniel D. Tontz, Wichita
Jo Ann Ván Meter, Topeka
Prof. James B. Wadley, Topeka
Gerrit H. Wormhoudt, Wichita
M. David Zacharias, Wichita
John J. Ziegelmeyer, Prairie Village
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KBA President
U.S. District Court
District of Kansas

J. Michael Kennalley
Wichita Bar Association
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Golf

Closest to the Pin Contest
Hole #4  Doug Lattimer
Hole #8  Hon. Jeff Jack
Hole #12  Vince Wheeler
Hole #17  Doug Lattimer

Flag Prizes
Hole #3 – Longest Putt
Hon. David Platt
Hole #6 – Longest Drive
Hon. David King
Hole #10 – Longest Putt
Blake Hudson
Hole #11 – Straightest Drive
Hon. Mike Ward

Golf Tournament Winners
1st Place – 1st Flight
Forrest Rhodes
Shannon Wead
Andrew Thengvall
Matt Bish

2nd Place – 1st Flight
Glenn Braun
Scott Johnson
Steve Tilton
Bruce Brumley

1st Place – 2nd Flight
Steve Cavanaugh
Scott Grosskreutz
Vice Cox
Matt Benson

2nd Place – 2nd Flight
Hon. Van Hampton
Hon. Neil Foth
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The beginning of the 2010 legislative session was marred by a bleak fiscal outlook for the state of Kansas. Record revenue shortfalls gouged an already strapped economic system and the rampant political posturing for the 2010 elections increased anxiety levels to the top of the Capitol dome. A sales tax increase was proposed by Gov. Mark Parkinson on the first day of the session, but it took almost 90 days to get that proposal to the governor’s desk.

Parkinson approved the 1 cent tax increase, raising the state sales tax from 5.3 percent to 6.3 percent. This increase will last until FY 2013; thereafter, the tax will be lowered to 5.7 percent to cover obligations for the State Highway Fund. There is no new cigarette tax or sugary drink tax, rather a nursing home bed tax of nearly $2,000. This new tax will bring in $30 million plus the federal government will kick in another $50 million so Medicaid can reimburse nursing homes. Another thing to look for is new primary seat belt law that went into effect July 1. The modest fine for a first-time offense is $5; however, a primary seat belt law has opened the door for additional federal funding.

A sales tax increase has also allowed the Kansas court system to sleep better at night. While not directly affecting the judicial systems budget, the increase will help avoid any further budget cuts. We are all very aware that the courts furloughed all nonjudicial court employees for four Fridays in April and May. If the sales tax had not been approved, the court system was looking at an extended period of mandatory, involuntary employee leave for FY 2011. As it stands now, the court will be able to creep along with its doors open, although a hiring freeze remains in place.

Despite the prolonged budget debate, the Kansas Legislature found time to enact a number of bills that have significant legal ramifications. We hope this information will prove useful to both you and your clients in familiarizing yourself with the new laws that impact your practice. For full text of the bills, please visit the Kansas Legislative Research Department’s website at www.kslegislature.com. All bills were effective July 1, unless indicated otherwise.

**Business Association**

**SB 398 – Indemnifications of Corporate Officers**

The Kansas Bar Association (KBA) introduced SB 398 to amend the Kansas Corporation Code to prohibit a corporation from changing or eliminating the right to indemnification (protection against loss) or the right to advancement of expenses, arising under a provision of the articles of incorporation or the bylaws, after an act or omission has occurred. The bill, however, preserves the authority to change or eliminate the right to indemnification or the right to advancement of expenses after an act or omission has occurred if the articles of incorporation or a bylaw in effect at the time of the occurrence explicitly provides for such change or elimination. This bill has been signed by the governor.

**SB 437 – Limited Liability Partnerships**

SB 437 creates new law regarding limited liability partnerships so that limited liability partnerships have the same requirements regarding resident agents and registered offices as the current law on domestic or foreign limited partnerships.
SB 438 – Business Trust Balance Sheets
SB 438 eliminates the requirement in current law that a domestic or a foreign business trust file a balance sheet with the Kansas Secretary of State’s Office.

SB 440 – Insignia Registration
SB 440 would repeal the statutes regarding the registration of insignias, i.e., a symbol or an emblem, with the secretary of state. The laws are seldom used and an insignia can be filed as a service mark or a trademark under current Kansas law.

SB 441 – Business Entity Transaction Act
SB 441 repeals the Revised Uniform Limited Partnership Act to allow limited partnership mergers to take place under the Business Entity Transaction Act (BETA), enacted with the passage last year of 2009 SB 132. The bill also deletes the provision in BETA that currently excludes limited partnerships so that BETA can apply to limited partnerships. Limited partnerships are required to file a certificate of merger with the secretary of state.

Courts

HB 2364 – Days Courts are not Open for Business
HB 2364 amends the provisions regarding days when courts are open for business. Under the law, Saturday, Sunday, and federal holidays are the only days courts are not open for business, but this bill adds “days on which the office of the clerk of the court is not accessible.” The bill also makes technical amendments to the statute.

Senate Sub. for HB 2476 – Increase in Docket Fees
Senate Sub. for HB 2476 concerns increased docket fees and extends to June 30, 2011, as well as the judicial surcharge the Legislature authorized in 2009 SB 66 to fund nonjudicial personnel. The surcharge is increased from $10 to $17.50 on most court docket fees. Expungement of conviction; expungement of arrest record, marriage license fee, general rule on court procedures; and expungement of juvenile adjudication surcharges are increased more than $10. In addition, a $100 docket fee is added for expungement of an adult conviction or a juvenile adjudication. The bill deletes the provision requiring a $10 surcharge on a person requesting an alias order or writ of execution, an alias order for garnishment, an alias writ or order of sale, an alias order for hearing in aid of execution, and an alias order of attachment. The bill will be effective upon publication in the Kansas Register.

Criminal Law

SB 368 – Effective Date of the Criminal Penalty Provisions
SB 368 amends the effective date of the criminal penalty provisions regarding third and fourth or subsequent convictions for driving under the influence (DUI) that were enacted with the passage of 2009 HB 2096 from July 1, 2010, to July 1, 2011.

Further, the bill amends the administrative penalty provisions for a second alcohol or drug-related conviction to require a one-year suspension of the person’s driving privileges, which may be modified after a 45-day hard suspension and application to the Kansas Division of Motor Vehicles. A person’s driving privileges are restricted for the remainder of one year to driving only a motor vehicle equipped with an ignition interlock device, and restricted to driving to and from work, school, treatment, or to the ignition interlock provider. The person’s driving privilege is further restricted for an additional year to driving only a motor vehicle equipped with an ignition interlock device. The bill is effective upon publication in the Kansas Register.

House Sub. for SB 381 – “Use of Force” in Defense of Self, Others, and Property
House Sub. for SB 381 was introduced in response to the Kansas Supreme Court case, State v. Hendrix, 289 Kan. 859 (2009). In Hendrix, the Supreme Court denied a self-defense instruction because the defendant did not actually “use force.” The Supreme Court ruled that since the statute states “use of force” actual physical force is required in order for a self-defense instruction to be allowed. House Sub. for SB 381 adds a new section to include threats, clarifies that the threat of deadly force is classified as “use of force,” and clarifies that a person does not have to retreat when using force to protect a work place. This bill applies retroactively and becomes effective upon publication of the Kansas Register.

HB 2668 – Kansas Criminal Code Recodification
HB 2668 recodifies the Kansas criminal code by clarifying its statutory language, making it more easy to use, reordering statutes to reduce their number and repeal language no longer in use. This bill goes into effect upon publication in the Kansas Register.

Family Law

SB 372 – Guardianship or Conservatorship
SB 372 requires that orders establishing and governing a guardianship or conservatorship, or both, issued by a court of competent jurisdiction of any other state, regardless of the specific terminology used in that state’s laws, be given full faith and credit within Kansas, except when doing so is in specific violation of any Kansas law.

In addition, the bill requires the petition for guardianship or conservatorship to include information about where a proposed ward or conservatee has lived during the previous five years and contact information for the persons with whom the ward or conservatee lived. The bill also requires the petition to include the name and address of any person or agency having custody or assumed responsibility for a proposed ward or conservatee, and the circumstances under which the proposed ward or conservatee came into the person’s or agency’s care or control.

Litigation

House Sub. for SB 305 – Tort Claims Act and Charitable Health Care Providers
House Sub. for SB 305 amends the Kansas Tort Claims Act by adding mental health practitioners to the definition of a “charitable health care provider so long as they are licensed
by the Behavioral Sciences Regulatory Board.” This bill also replaces the Department of Social and Rehabilitation Services with the Kansas Health Policy Authority as the agency that operates programs for persons receiving medical assistance.

**SB 374 – Kansas Adverse Medical Outcome Transparency Act**

The KBA previously took a neutral position concerning SB 374; however, when the language in SB 374 was stripped and replaced with the Kansas Adverse Medical Transparency Act provisions, the KBA opposed the change. As it stands now, Sub. SB 374 has been referred to the Judicial Council for further study.

**Senate Sub. for Sub. for HB 2509 – Victims of Child Pornography**

Senate Sub. for Sub. for HB 2509 creates a private cause of action for victims of child pornography that may be pursued through private counsel or by the attorney general at the victim’s request. In order to bring a civil action in state court against a producer, promoter, or intentional possessor of child pornography, the plaintiff has to allege and prove that while the person was under the age of 18, he or she was a victim of a sexual offense listed in the bill where such offense resulted in a conviction and any portion of that sexual offense was used in the production of child pornography; and the person suffers personal or psychological injury as a result of the production, promotion, or intentional possession of such child pornography. It is not a defense that the respondent did not know the victim or commit the abuse depicted in the child pornography.

A prevailing plaintiff could recover actual damages and the costs of the suit, including reasonable attorney’s fees. The bill provides for a minimum recovery for actual damages in the amount of $150,000. If the action was pursued by the attorney general, all damages are awarded to the victim but the attorney general may seek reasonable attorney fees and costs.

**HB 2656 – Kansas Code of Civil Procedure**

HB 2656, concerning the filing of affidavits on decedent’s probate estate, amends probate law regarding when a decedent’s will and affidavit may be filed. The bill clarifies that it is the “known” real and personal property in the probate estate that is of concern. Under provisions of the bill, a will and affidavit can be filed if the decedent’s probate estate contains no known real or personal property or the value of the known real and personal property in the decedent’s probate estate is less than the total of all known demands against the estate.

**HCR 5036 – Noneconomic Damages in Personal Injuries Cases**

HCR 5036 is a resolution that would affirm the Legislature’s power to limit recovery of noneconomic damages in certain personal injury cases. This resolution was sponsored by the Kansas Medical Society in an apparent pre-emptive response to the Kansas Supreme Court case, *Miller v. Johnson*. Since the Court has not released an opinion concerning the constitutionality of the $250,000 noneconomic cap, HCR 5036 is a cure without a problem.

(Continued on next page)
**Probate and Trust**

**HB 2455 – Uniform Principal and Income Act**

HB 2455 amends the Uniform Principal and Income Act, which deals with how income and distributions are handled in the administration of trusts and estates. The bill deals with the estate tax marital deduction, which, under the law, does not allow a transfer to a trust that benefits a surviving spouse. Changes enumerated in the bill, however, allow for the administration of funds received by the trust, in accordance with Internal Revenue Service rules, for the estate tax marital deduction. In addition, the bill clarifies how the trustee is to proportion trust income for which a tax must be paid.

**HB 2456 – Affidavits Probate Estate Without “Known” Property**

HB 2456 amends probate law regarding when a decedent’s will and affidavit may be filed. The bill clarifies that it is the “known” real and personal property in the probate estate that is of concern. Under provisions of the bill, a will and affidavit can be filed if the decedent’s probate estate contains no known real or personal property, or the value of the known real and personal property in the decedent’s probate estate is less than the total of all known demands against the estate.

**HB 2557 – Inheritance Taxes**

HB 2557 provides limitations on the liability of estates under the Kansas inheritance tax, which, under the law, is eliminated in tax year 2010. The bill also removes various references to the inheritance tax.

**Property Rights**

**House Sub. for SB 316 – Water Rights-Cause for Nonuse**

House Sub. for SB 316 permits those holding groundwater rights meeting certain criteria to claim due and sufficient cause for nonuse and, therefore, be ineligible to be deemed abandoned by the Division of Water Resources. To meet the due and sufficient cause for nonuse criteria, the water right must have as its local supply an aquifer area that has been closed to new appropriations (by rule, regulation, or order of the chief engineer), and where means of diversion are available to put water to a beneficial use within a reasonable time.

**HB 2472 – Kansas Uniform Common Interest Owner’s Bill of Rights Act**

The KBA opposed the loser pay provision contained within HB 2472. That provision was removed from the bill. The Kansas Uniform Common Interest Owner’s Bill of Rights Act now relates to several local government issues. The bill (1) establishes a new act titled the Kansas Uniform Common Interest Owners Bill of Rights Act, (2) temporarily prohibits a municipality from requiring the installation of a multipurpose sprinkler system in a residential structure, (3) modifies several statutes dealing with rehabilitation of abandoned houses, and (4) expands the authority to establish a county land bank from only Wyandotte County to any county.

**SB 537 – Expedited Liens**

SB 537 creates new law to authorize any person aggrieved by an alleged violation of the statute on expedited determination of validity of liens to bring a civil action against the person who filed or recorded the documents, after the court makes a finding that a lien or claim is fraudulent. The bill specifies, however, that no action may be brought against the filing officer or filing officer. The burden is on the plaintiff to prove, by a preponderance of the evidence, that the defendant knew or should have known that documents filed or recorded were in violation of the statute on expedited determination of validity of liens. The court is required to award cost to the prevailing party and may allow for reasonable attorney fees.

**Transportation and Motor Vehicles**

**HB 2130 – Primary Safety Belt Requirement and Enforcement**

HB 2130 amends state law to require every occupant of a passenger car manufactured with safety belts to wear a safety belt. The bill also allows a law enforcement officer to stop a passenger car for a violation of safety belt requirements by anyone in the front seat or by anyone under age 18.

A citation can be issued for failure to wear a safety belt by an adult passenger in the back seat only if another law has been violated. The bill also retains exceptions to those required to wear safety belts, such as an occupant of a passenger car who possesses a written statement from a licensed physician that such person is unable for medical reasons to wear a safety belt and carriers of U.S. mail while actually engaged in delivery and collection of mail along their specified routes. The bill does not change requirements for children under 14 years of age covered under the Child Passenger Safety Act (K.S.A. 8-1343 et seq.).

The bill sets the fine for violations of safety belt requirements by adults at $5 from June 30, 2010, until July 1, 2011, and at $10 starting July 1, 2011; no additional court costs are to be assessed. (The fine for a violation by someone ages 14 through 17, K.S.A. 2009 Supp. 8-2503(b), continues to be $60, including court costs.) The bill also retains language to provide that no violation is to be reported to the Kansas Department of Revenue.

**Senate Sub. for HB 2226 – Traffic Fine Increases**

Senate Sub. for HB 2226 increases by $15 the fine assessed on traffic infractions that are on the uniform fine schedule.

**Sub. for HB 2432 – Attorney Fees, Negligent Motor Vehicle Operation**

Sub. for HB 2432 amends the statute that authorizes attorney fees to be taxed as costs in certain actions involving negligent motor vehicle operation. The bill increases the cap on the property damage amount from less than $7,500 to less than $15,000.

**Special Notice**

While it may be difficult to think about the 2011 legislative session when the 2010 Legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all proposals be submitted in final form by September 1. Individual members, local bar associations, (Continued on Page 34)
Keynote speaker
Nick “the Kick” Lowery
Kansas City Chiefs Hall of Fame
and renaissance man
Legislative Update

(Continued from Page 31)

committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submitting it to the appropriate section.

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

All proposals should be mailed to: Kansas Bar Association; 1200 SW Harrison St.; Topeka, KS 66612; or e-mailed to Joseph N. Molina at jmolina@ksbar.org.

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, Molina was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act.

Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.
Supreme Court of the United States
Swearing-In Ceremony for
Kansas Bar Association Members

The Kansas Bar Association is offering a threeday excursion to Washington, D.C., for members who desire to be sworn in before the Supreme Court of the United States. Members may enjoy the excitement of our nation’s capital March 6-8, 2011, with the swearing in scheduled for March 7 and a tentative tour of the White House, depending on the availability of the tickets, to be set for March 8.

If you would like to be a part of the group, complete the request form below and return it to the KBA with your payment. For questions, please contact Lisa Montgomery, director of member services, at (785) 234-5696 or at lmontgomery@ksbar.org.

The swearing-in ceremony will be conducted before the justices of the U.S. Supreme Court in the Supreme Court Building at 10 a.m., Monday, March 7. Seating capacity in the courtroom is strictly limited to one guest per admittee. Others may have the opportunity to view the ceremony from the public viewing area.

Total price of $250 includes application fee, group photo, swearing-in reception, and tour of the White House. Hotel and travel accommodations are not included.*

Features of the trip include:

• A block of discounted sleeping rooms reserved at the luxury boutique Hotel Monaco, a historic allmarble building that is a Registered National Landmark.
• Group photos taken in front of the Supreme Court Building.
• Swearing-in reception for all attendees and their guests, with invitations extended to the justices of the U.S. Supreme Court.
• Tour of the White House.

Hotel and travel accommodations:

*Attendees will be responsible for making their own hotel, airfare, and transportation arrangements. Please contact the Hotel Monaco Washington D.C. at (877) 202-5411 and indicate you are registering under the group “Kansas Bar Association” in order to receive the discounted room rate of $329.

In order to receive the discounted room rate and ensure room availability, the deadline for making you hotel reservations is February 2, 2011. A limited number of rooms have also been reserved for March 4 and 5.

Application Request Form
U.S. Supreme Court Swearing-In Ceremony
March 7, 2011

Name: ____________________________

Firm Name: ________________________

Address: ____________________________

City: __________________ Zip: __________

State: ____________ Phone: __________

KBA#: ______________

Please send _____ application(s) for the U.S. Supreme Court swearing-in ceremony and reception, sponsored by the Kansas Bar Association.

Please mail or fax this form with payment to:
Kansas Bar Association
Attn: Lisa Montgomery, Director of Member Services
1200 SW Harrison St.
Topeka, KS 66612-1806

Deadline to return application request form to the KBA office is November 12, 2010.
CARING WHEN A PARENT DOES NOT – THE STATE’S ROLE IN CHILD WELFARE

BY ROBERTA SUE MCKENNA
The history of child welfare has an inglorious past. Its roots in the United States are traceable to Colonial America, where the child—not the parents—could be deemed the culprit in a family conflict and be punished by death. Today, societal goals of protecting children can and do merit government intervention into troubled families. In Kansas, the Revised Kansas Code for Care of Children (the Child in Need of Care or CINC code) provides the statutory basis for such intervention. This article provides a road map for practitioners unfamiliar with the CINC code and related adoption and administrative proceedings.

History of Government/Court Intervention

Around the 1900s, courts and legislatures began supporting government action to protect children from abusive parents. In 1882, Justice David J. Brewer, of the Kansas Supreme Court, wrote that a decision on behalf of a child should result in that child, as an adult, looking back to say, “I thank you.” Justice Brewer may have been the first to ask, “What will be best for the welfare of the child?” He raised the question in determining the welfare of an orphan, not the rights of the parents.

In 1901, the Kansas Legislature took action to provide care for dependent children and in 1905 passed the Juvenile Court Act modeled on a 1899 Illinois act. The broad scope of the Juvenile Court Act included children who were poor, without proper parental care, idle or immoral, begging on the street while under the age of 10, incorrigible, or in violation of the law, and under 16 years of age. In 1925, the U.S. Supreme Court set limits on the unbridled good intentions of the reformers by providing constitutional protection for parents. Before taking action, the government must overcome the presumptions that (1) a parent is acting in a child’s best interest and (2) the parent is best able to know what that child’s best interest might be.

The U.S. Supreme Court in *Prince v. Massachusetts*, 321 U.S. 158 (1944), affirmed the right of the state to intervene in an intact family when necessary to protect children. In 1974, Congress made grant funds available to states for the purpose of protecting children. Federal funds already flowing to families with dependent children began to follow children into foster care by 1980. Both funding streams require the receiving state to demonstrate compliance with federal provisions intended to assure the safety, permanence, and well-being of children. Kansas’ statutes facilitate compliance and express legislative efforts to recognize and balance the complex needs of children, families, and communities.

Physical abuse of children was not widely recognized until publication in 1962 of “The Battered Child Syndrome.” As the public became aware of the reality of physical abuse, the ability to report concerns became a mandate with the enactment of Child Abuse Prevention and Treatment Act. Rescuing children from suspect parents became acceptable, desirable, and soon gave rise to new concerns.

Congress began to hear complaints about the growing number of children who entered the foster care system only to emerge years later as adults who had lost contact with their families and been provided with no replacement parental resource. Called “foster care drift,” the experiences of these former foster children resulted in passage of the Adoption Assistance and Child Welfare Act of 1980 (AACWA). The AACWA required court oversight to assure permanence and stability for children. In 1997, the Adoption and Safe Families Act (ASFA) amended AACWA.

The amendments were in response to concerns that misplaced efforts to preserve families endangered the safety of children. ASFA continues the ongoing effort to balance children’s multiple needs with a focus on safety, permanence, well-being, and, for the system, accountability.

The Kansas Department of Social and Rehabilitation Services (SRS or Secretary) was created in 1973 by consolidating the county departments of social welfare into a single statewide agency to be headed by a secretary appointed by the governor. K.S.A. 39-708c sets out the powers and duties of the Secretary, which include the ability to employ staff or enter into contracts as necessary for the delivery of social services. In 1996, then-Gov. Bill Graves privatized child welfare services.

The initiative continues today. Private not-for-profit corporations, licensed by the Kansas Department of Health and Environment (KDHE), provide most child welfare services in Kansas, including Family Preservation. While SRS remains responsible for the initial receipt and investigation of reported incidents, if a child is removed from parental custody the case is referred to a private contractor for all subsequent services.

In 1982, the Kansas Legislature accepted both the need to address “foster care drift” and the need to distinguish between

(Continued on next page)
children in need of care and juvenile offenders. The juvenile code was bifurcated into one code for care of children and another for juvenile offenders. The bifurcation recognized that good intentions are no substitute for due process and began the current distinction between children in need of care and juvenile offenders.

Thirteen years after requiring court involvement, Congress made grant funds available to state courts in 1993. The grants are intended to improve court handling of child welfare cases. The grants (there are now three: basic, data, and training) enable state courts to assess and plan for systemic improvement. In order to qualify for grant funds, state courts must develop and implement an improvement plan focused on the safety, permanency, and well being of all children in need of care and juvenile offenders under the jurisdiction of the court.

Safety and Procedures

Law enforcement and SRS share responsibility to receive and investigate allegations of suspected child abuse and neglect. A joint investigation is required when there are indications of serious physical harm to a child or sexual abuse of a child such that immediate removal may be necessary to protect the child. Under such circumstances, law enforcement officers are empowered to immediately remove children from the custody of a parent without a court order; SRS has no such power. While the almost complete autonomy of the juvenile court was curtailed with the bifurcation of the code, the court alone determines when a child may be placed in the custody of the Secretary. The court may not act unilaterally but it responds to a petition or an application for an ex parte order of custody. Until a court places a child in the custody of the Secretary, SRS does not have the authority to take physical possession of the child or to determine with whom the child may live. If immediate action is necessary to protect the child, SRS may request law enforcement take the child into protective custody or SRS may request the court issue an ex parte order of protective custody.

SRS may offer services to the family or provide them with information about services available in the community. The family may refuse the services and is not required to follow through on the referrals. SRS must accept the family’s decision or seek court intervention. The family will be informed if the agency intends to request court intervention. A record of the encounter is maintained and is available should there be subsequent concerns about the family or the way SRS handled the concern. It is SRS policy to request that the child be removed from parental care only when SRS deems the child to be unsafe in the home. When necessary to protect the child, SRS staff will request law enforcement intervention or assistance from the county or district attorney. The prosecutor, after reviewing information provided by SRS, may file a petition. The petition need not include a request that the child be removed from parental custody but it serves to bring the family under the jurisdiction of the court. The court has the authority to require that the parents, significant others, and the child take certain actions deemed appropriate by the court, and the court may issue an order restraining any perpetrator. Prosecutors may file a petition based on information from SRS, law enforce-
ment, or other sources when that information indicates the child meets the definition of child in need of care.\textsuperscript{35}

In addition to determining the safety of a particular child who is the subject of the report, SRS staff must determine the safety of other children under the same care.\textsuperscript{36} One reason SRS must determine the safety of such children is to assure that perpetrators of child abuse or neglect do not reside, work or regularly volunteer in a child care facility regulated by the KDHE.\textsuperscript{37} While due process is provided for parents involved in CINC cases, due process for an individual identified as responsible for abuse or neglect is provided pursuant to the Kansas Administrative Procedures Act.\textsuperscript{38}

If an individual identified as responsible for abuse or neglect is also a parent whose child is alleged to be in need of care, due process is provided in each of the two separate actions. A third action may be initiated if criminal charges are warranted. It is possible, then, for one set of facts to give rise to administrative, civil, and criminal proceedings, each of which having due process opportunities. SRS policy makes an effort to distinguish between the civil CINC and the civil administrative proceedings. A child in need of care action is based on a broad assessment of the family's ability to keep their children safe. Identifying an individual as responsible for a specific act of abuse or episode of neglect is narrowly focused on the safety of children being cared for by people unrelated by blood, marriage, or adoption.

When an individual is determined to be responsible for the abuse or neglect of a child, a substantiated finding is made by the investigator in consultation with a supervisor. The finding means that the SRS believes an act or omission meeting its definition\textsuperscript{39} has occurred, the identified individual is responsible, and individual should not be in a child caregiver role. An unsubstantiated finding may mean the incident either did not occur, or that the incident may have occurred but did not meet the SRS definition of abuse or neglect. An unsubstantiated ruling may also mean that the incident occurred and met the definition but the individual responsible does not pose a danger to children and is able to safely work, reside, or volunteer in child care facilities regulated by KDHE.\textsuperscript{40} The distinction arises from the difference between the emotional dynamics within a family and the more controlled behavior possible in less intimate relationships.

The individual alleged to be responsible for abuse or neglect of a child receives a form notice mailed by first-class mail to the known address.\textsuperscript{41} A copy of the notice will also be sent to the local prosecutor and to the Abuse, Neglect, and Exploitation Unit of the Attorney General’s Office.\textsuperscript{42} If a child cannot otherwise be protected, the prosecutor will be asked to consider filing a petition. The form notice includes information about the meaning of and how to challenge the proposed finding. The challenge must be in writing and received by SRS within 30 days.\textsuperscript{43} Failure to timely request review is fatal.\textsuperscript{44} SRS is required to prepare a summary identifying the appellant, summarizing the basis for the appeal, providing a chronology of agency actions, the rationale for those actions, and the legal basis for the agency decision. The summary and a copy of the notice giving rise to the appeal must, within 15 days, be submitted to the Office of Administrative Hearings (OAH), part of the Department of Administration,\textsuperscript{45} and the appellant.\textsuperscript{46}

The assigned presiding officer will respond to appellant (or counsel if an attorney has entered an appearance) and to respondent with instructions, including the deadline for submitting a prehearing questionnaire, and perhaps, setting a prehearing conference. The questionnaire includes identification of witnesses and an opportunity to request additional discovery. K.S.A. 38-2212 prohibits SRS from disclosing information directly. However, the presiding officer routinely issues a discovery order requiring appellant be provided all information supporting the substantiated finding. The order does not usually require identification of the individual whose report triggered the investigation. Both federal and state laws protect the identity of reporters in order to encourage reports when anyone suspects a child has been harmed as the result of abuse or neglect.\textsuperscript{47}

The hearing may be in person at the closest SRS office or by phone. All assigned presiding officers are lawyers with considerable experience. Hearsay is admissible, with the presiding officer looking for clear and convincing evidence that the incident occurred, the definitions set out in statute and regulation are met, and the person alleged to be the perpetrator is responsible. Additionally, there must be clear and convincing evidence that the perpetrator should not work, reside, or volunteer in a child care facility.\textsuperscript{48} This determination is guided by agency policy.\textsuperscript{49}

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The hearing will be followed by a written decision or initial order that may be appealed to the State Appeals Committee (SAC).\(^5\) Review by the SAC requires a transcript of the hearing. The appellant is required to pay for the transcript. Failure to pay for the transcript will probably result in dismissal of the appeal. The SAC is a three-member panel appointed by the Secretary. The Secretary considers the recommendation of the SAC and makes the final agency decision. The final decision may be appealed to the district court pursuant to the Kansas Judicial Review Act.\(^5\)

Should the alleged perpetrator fail to appeal or if the agency's finding is upheld, the individual's name will be entered on the central registry for child abuse neglect (registry). The registry was created to provide the KDHE with a list of individuals determined by SRS to be inappropriate to work, reside, or volunteer in a child care facility regulated by KDHE. K.S.A. 65-516 requires KDHE to check the registry in carrying out its responsibility to monitor child care homes, facilities, and agencies. The registry is part of an SRS information system and available to SRS staff or contract staff when necessary to carry out the agency mission. It may be used for other purposes only with permission of the individual whose name is to be checked.

Once listed on the registry as a perpetrator, the name remains until expunged pursuant to K.A.R. 30-46-17. Expungement is not an opportunity to revisit the original decision but an opportunity to demonstrate that the identified perpetrator is no longer a threat to children and may safely work, reside, or volunteer in child care facilities regulated by KDHE. An application may be made three years after entry of the name in the registry or when new information comes to light. The applicant is asked to complete a questionnaire. The agency staff prepares a recommendation. A three-person panel meets monthly to consider applications. The applicant will be notified of the date and may appear in person or by telephone. It is helpful if the applicant provides documentation in support of changes made that ameliorates the threat to the child.

### Permanence

Permanence, when used in reference to the CINC code, recognizes that children need to grow up within a network of stable long-term relationships. Permanence for children in need of care is primarily achieved through adherence to timelines that recognize the brevity of childhood and respect the child's perception of time.\(^5\) Identifying both parents and notifying them of the CINC action, as well as engaging the extended family, maximizes the likelihood the child will remain connected to family.\(^5\) Due diligence is required to identify and locate parents.\(^6\) The identification and location of parents may be facilitated through collaboration with Child Support Enforcement (CSE), a program under the direction of SRS.\(^\) CSE services are not available when locating a parent for the purpose of terminating rights since the obligation of support is terminated along with the parent's rights. K.S.A. 38-2236(b) requires the grandparents be mailed a copy of the petition. Other relatives identified by the parents will be sent a letter.\(^6\) Law enforcement is required to take a child into custody if the officer handling the matter reasonably believes that the child will be harmed if not taken into protective custody.\(^5\) SRS has no such authority to take a child into protective custody, but SRS may request that the court issue an ex

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Taking the child into custody without notice and hearing is limited to circumstances requiring immediate action to protect the child. If a temporary custody hearing is not held within 72 hours, exclusive of weekends and holidays, the child must be returned to parental custody. If a child continues in out-of-home placement, the court must determine whether the child is one in need of care at an adjudication hearing that must be scheduled within 60 days, and the disposition hearing must be held within another 30 days. The disposition hearing determines the goal of the proceedings and whether the plan to achieve the goal is adequate. Permanency, stability, and maintaining family relationships require planning and court oversight through permanency hearings.

Permanency hearings are required within 12 months of removal from parental custody and every 12 months thereafter. Permanency hearings are intended to assure progress toward the desired goal, that the goal is adequate, and if not, the goal must be redefined. The requirement for permanency hearings recognizes that childhood is short and that a child's sense of time (child time) differs from that of an adult. If the child is not being maintained safely in the care of a parent, the goal is reintegration with one or both parents. The child need not be returned to the same parent. There may be a concurrent plan to achieve an alternative permanency goal. Concurrent planning means working simultaneously toward the goal of reintegration and another option, usually adoption. The purpose of concurrent planning is to assure a goal of some sort is achieved quickly. Alternatives to reintegration in order of desirability are: adoption, permanent custodianship, and last of all, another planned permanent arrangement. The descending order recognizes the ideal of being a full member of a legally recognized family.

Supreme Court Rule 155 (Rule 155) requires the use of specific forms to meet the requirements necessary to maintain federal funding of the Kansas foster care program. The funding is dependent upon accurate documentation of the court's thoughtful oversight. Court oversight is expected to assure children are separated from their parents only when necessary for the child's welfare and that they remain in foster care no longer than necessary.

Once a child is removed from home, there is no way to go back and “fix” an inappropriate removal. Therefore, the first court order authorizing out-of-home placement is given particular attention by federal auditors. The forms document that the court has balanced the potential harm that the child may experience by remaining in the home with the certain harm of removal. The court's decision is documented by checking the appropriate box on the required form. The point of the exercise is to facilitate a thoughtful decision and certify that children are removed from parental care only when absolutely necessary. The court must find both that (1) it is contrary to the child's welfare to remain in the home and (2) that reasonable efforts were made to maintain the child in the home. The requirement for reasonable efforts to maintain the child in the home may be waived if the court finds an emergency required immediate removal preventing such efforts.

Failure to properly document the court's findings of both contrary to the welfare and reasonable efforts at the initial removal proceeding eliminates federal financial participation in the cost of that child's care for the entire stay in care. In such situations, should the child be adopted, any subsidy will be funded entirely with state money. If the child qualifies for federal funds at the initial hearing, federal funding continues throughout the child's stay in foster care as long as the court continues to find reasonable efforts have been made to achieve the case plan goal. If the court finds reasonable efforts have not been made, federal funding ceases until the court finds reasonable efforts are being made.

Parties to the proceeding are the child, the parents, the petitioner, and the state. Additionally, grandparents and others may become interested parties. A Native American nation may intervene when the child is or may be an Indian child. If the Indian Child Welfare Act applies, jurisdiction may be an issue. The Secretary or SRS is not a party to the proceedings any more than law enforcement is a party to a criminal proceeding. Nor is the secretary eligible to become an interested party. SRS and contract staff carry out the Secretary's responsibilities under the code and, unlike parties, have no personal interest at stake.

Grandparents are always given the opportunity to become an interested party. Others may apply and be awarded interested party status. Persons awarded interested party status, like parties, are subject to the jurisdiction of the court. The rights and responsibilities of interested parties are set out at K.S.A. 38-2241.

Among the most challenging and difficult decisions is determining whether it is in the child's best interest to be with the child's own family or if circumstances require continued placement with nonfamily, usually a foster family. The blood

(Continued on next page)
versus bond conflict between relatives and foster parents are among the most contentious and difficult to resolve.

The legislative inclusion of grandparents and others as interested parties expresses clear commitment to maintaining the child’s connection with family. The court is authorized to place the child directly with relatives beginning with the ex parte order of protective custody. When the child is placed in the custody of the Secretary, SRS policy requires consideration of relatives for the initial placement and throughout the child’s stay in foster care. Placement considerations must also include an effort to maintain the child’s connection to siblings, school, and community but primary consideration must be given to placement in close proximity to the parent with whom reintegration is sought.

Once a child is placed, changes in custody are avoided in order to protect the child from more disruption. If the child is placed with a relative or has been in the same placement for six months, SRS is not free to move the child except to live with a parent or to a selected preadoptive home. If an emergency requires immediate action, the court must be notified at the earliest practical time.

If the permanency goal (usually reintegration) has not been achieved within one year of removal, the court must hold a permanency hearing to determine whether there has been sufficient progress to continue toward the same goal. If progress has not been adequate, the court may find that reintegration is no longer a viable goal. If the court determines reintegration is no longer viable, the remaining goals must be considered. If the court finds that either permanent custodianship or adoption may be in the child’s best interests, the county or district attorney is required to file appropriate pleadings. Rule 155 applies and specific forms must be used to document the hearing.

The legislative preference is clear: first consider relatives, and second, those with whom the child already has close emotional ties. Also clear is the difficulty of carrying out this direction. The fact-driven nature of the decision and the need for a fast, rather than perfect, decision have been recognized in recent decisions eliminating review beyond the district court. The district court may, after determining that reasonable efforts have not been made or have resulted in insufficient progress in finding the child an adoptive family, relieve the Secretary of custody and place the child directly with an adoptive family selected by the court.

While the Legislature seeks to preserve a child’s connection to extended family, only the connection between child and parent have been afforded protection by the U.S. Constitution. The legal presumption protecting parents’ right to the care, custody, and management of their children also protects the right of children to live undisturbed within their family. For most children the separation from parents is resolved with the child’s reintegration into the family. Unfortunately, for some children, reintegration with a parent is not a safe option. For most this will mean either adoption or permanent custodianship, but a few children will “age out” of the foster care system. Jurisdiction ends at the request of the young adult or at 18 unless the court fails to approve a transition plan. The transition plan is intended to assure the young adult will receive adequate support. Youth who have been in the custody of the Secretary may be eligible for services, subsidy, and a medical card to assist them as they begin their adult lives.

Termination of parental rights may be necessary when a parent is unable to meet the child’s needs and it is determined that the child’s interest would be served by severing the legal connection. A parent may voluntarily relinquish rights and avoid termination. In order to involuntarily terminate parental rights the state must prove by clear and convincing evidence that the parent is unfit and, further, that it is in the best interest of the child to become a legal orphan. Unfitness is defined on a case-by-case basis.

Subsequent to finding the parent unfit, the court must determine that termination of parental rights is in the child’s best interests. In lieu of terminating parental rights, the court may determine that appointment of a permanent custodian is best for the child. In most cases adoption is preferred because it provides the child with a replacement parent. Like adoption, permanent custodianship is entirely a statutory creation. Unless the parents consent, a permanent custodian may be appointed only after finding the parents unfit. Parental rights may, but need not be, terminated. SRS involvement ends upon appointment of the permanent custodian. If the court retains jurisdiction, the court may impose limitations or conditions upon the rights and responsibilities of the permanent custodian and provide for the parent to retain some rights and responsibilities. Children placed by the Secretary with a permanent custodian may be eligible for a subsidy.

A parent facing a termination proceeding may consent to adoption by an individual or may voluntarily relinquish rights to an agency. Although the parent may consent to adoption, K.S.A. 59-2128 requires the adoptive petitioner to disclose...
“any other proceeding concerning the custody” of the child. Unless both parents consent, K.S.A. 59-2129 requires the consent of the judge presiding over the CINC case to consent to the adoption. Similar provisions require the petitioner to fully inform the court that is considering a motion to appoint a guardian for the child.103 Unless the judge presiding over the CINC case approves the petition for adoption or guardianship, it is unlikely to be successful.

When parental rights are terminated, the loss to the child is incalculable. To ease the trauma the courts look at adoptive adults who appear willing and able to meet the child’s needs. In considering who is best able to take on the role of parent, the court is required to first consider placing the child directly with a relative and, second, with a person with whom the child has close emotional ties. Only if neither option is in the child’s best interest is the court to place the child with the Secretary or another agency with the authority to consent to an adoption.104 The court’s oversight continues105 but is focused on assuring reasonable efforts are made to provide the child with a permanent family.106 Children placed for adoption by the Secretary may be eligible for an adoption subsidy.107 It is agency policy to place with relatives or those with whom the child has close emotional ties. The extent of and amount of the subsidy is negotiated between the prospective adoptive parent and SRS.108

When the court relieves the Secretary of custody and places the child directly with a permanent custodian or adoptive parent, the child is not eligible for either subsidy.

Appellate Review

The brevity of childhood has led the Legislature to limit the opportunity for appellate review and the judicial branch to expedite the process of review.

The right of appeal is purely statutory and limited under the revised code for both parties and interested parties to “any order of temporary custody, adjudication, disposition, finding of unfitness or termination of parental rights.”109

There is no right to appeal the selection of a prospective adoptive parent. This limitation is an intentional effort to prevent the Dickensian result of a child growing older as adults argue over which of two adequate adoptive placements is best. When determining custody for the purpose of adoption, preference must be given first to relatives and second to a person with whom the child has close emotional ties.110 If neither of those options is in the child’s best interest the Secretary or another agency may be given custody with the authority to consent to adoption. The trial court retains oversight but only for the purpose of assuring reasonable efforts and progress toward finding an adoptive placement.111

The revised code contains the unusual requirement that “Every notice of appeal, docketing statement, and brief shall be verified by the appellant if the appellant has been personally served at any time during the proceedings. Failure to have the required verification shall result in the dismissal of the appeal.”112 The requirement applies only to the appellant.113

There are no deadlines unique to these proceedings but K.S.A. 38-2273(d) provides for priority over all other cases. Do not plan on being granted an extension of time.

Conclusion

The state’s obligation to provide for the safety of children is now a given. The appropriate balance between safety and maintaining a child’s connection to family continues to be the source of heated debate. It is a consideration in every court case and the concern of every involved lawyer. Nonetheless, the system is intended to determine not what is best for a child’s parents or caregiver but, instead, what is best for the child – the only goal that counts.

About the Author

Robert A. Sue McKenna is an assistant director of Children and Family Services for the Kansas Department of Social and Rehabilitation Services (SRS) responsible for legal services including liaison with the judicial branch and Legislature. McKenna currently serves on the Judicial Council Committee for the Child in Need of Care and Juvenile Offender codes; and participated on the Supreme Court’s Task Force on Permanency Planning from 1985 through 2009. McKenna received her Juris Doctor from Washburn University in 1975 and was in private practice until accepting a position with SRS in 1985. She received her undergraduate degree from the University of Northern Colorado in 1969 and taught elementary school in California, Louisiana, and Topeka before attending law school. She may be reached at sue.mckenna@srs.ks.gov.

ENDNOTES

1. Larry S. Milnar, A Brief History of Infanticide Hardness of Heart/Hardness of Life: The Stain of Human Infanticide (University Press of America 2000). See also Linda A. Pollock, Forgotten Children: Parent-Child Relations from 1500 to 1900 (Cambridge University Press, reprinted 1984); and Lloyd DeMause, The Foundations of Psychohistory, Ch. 1, The Evolution of Childhood, opening paragraph, New York: Creative Roots (1982) Available at http://www.psychohistory.com/hmt/p1x22.htm. In 1646, the General Court of Massachusetts Bay enacted a law where “a stubborn or rebellious son, of sufficient years and understanding,” would be brought before the court and “such a son shall be put to death.” “Stubborn child laws” were also enacted in Connecticut in 1650, Rhode Island in 1668, and New Hampshire in 1679. These colonial ordinances were based on Deuteronomy 21:18-21, “... then all the men of his city shall stone him to death, so as to remove the evil from your midst” and continued into 19th century United States.

2. K.S.A. 38-2201 et seq. The CINC code was revised after extensive review by a Judicial Council subcommittee, became law when HB 2352 passed the Legislature in 2006 with an effective date of Jan. 1, 2007. KARA, the Kansas Adoption and Relinquishment Act, is found at K.S.A. 59-2111 et seq. Regulations specific to SRS administrative proceedings begin at K.A.R. 30-7-64 and for child protection at K.A.R. 30-46-10.

3. In re Bulen, 28 Kan. 781, 786. Pagination changed in 1887 edition and it became 28 Kan. 557. The case involved an orphan whose mother had left conflicting instructions for the child’s care. The battle was between family in England and the Sisters of Charity in Leavenworth.

(Continued on next page)
5. 1905 Kan. Sess. Laws ch. 190. It included both delinquent and dependent children within its jurisdiction without procedural distinction and with the common goal of preventing future criminal behavior. For a more complete historical analysis, see Marvin Ventrell JD, Evolution of the Dependency Component of the Juvenile Court, 49 Juv. & Fam. Ct. J. 4 (Fall 1998).


7. The court held that the family is subject to reasonable regulation in the public interest. However, the state did not meet its burden to justify intervention here where child and relative proselytizing together on street corner.

8. The Child Abuse Prevention and Treatment Act (CAPTA), 42 U.S.C. 5101 et seq. First enacted in 1974, reauthorization of CAPTA is currently being considered by Congress. To qualify for CAPTA grant funds, Kansas is required to submit a plan for improving child protection, which includes provisions for confidentiality and, for each child subject to court proceeding, the appointment of an advocate. CAPTA includes a minimum definition of child maltreatment and initiated the mandated reporting of suspected child abuse or neglect.


11. K.S.A. 38-2201 sets out the policy of the state providing that the provisions of the CINC code be “liberally construed to carry out” those policies.


15. 42 U.S.C. 671 et seq. Among other things, it conditioned federal funds on judicial determinations that reasonable efforts had been made to maintain the family, reintegrate child with family, or provide child with an alternative through adoption or guardianship.


17. K.S.A. 75-5301.

18. When capitalized, Family Preservation references short term, intensive in-home services intended to stabilize a family in crisis and improve the family's ability to meet the needs of their children.


21. 42 U.S.C. 629h. These grants are administered in Kansas by the Supreme Court through the Judicial Administration's Office of Families and Children. The Kansas Supreme Court's Task Force on Permanency Planning assisted by Office of Judicial Administration staff advises the Supreme Court on the development and implementation of the state assessment, plan, and programs for court improvement.

22. Kansas draws federal funds to assist with the cost of juvenile offenders in eligible placements: foster and group homes, which also serve CINCs. Federal funds are not available for placements, like detention centers, designed and used primarily by juvenile offenders.

23. K.S.A. 38-2226. See also K.S.A. 38-2210, which provides for a free exchange of information among those involved in the investigation in order to facilitate the investigation and the provision of necessary services.


25. K.S.A. 38-2231(b).

26. K.S.A. 38-2233 mandates the county or district attorney review the facts, recommendations, and other available evidence to determine if a petition should be filed. K.S.A. 38-2214 sets out the duties of county or district attorneys to, among other things, prepare and file petitions alleging a child may be in need of care.

27. K.S.A. 38-2242.

28. K.S.A. 38-2202(g).

29. PPM Section 2471 provides, "When the safety of a child cannot be reasonably assured without removal of the child or the alleged perpetrator and removal of the perpetrator from contact with the child is not feasible, a law enforcement officer should be contacted to determine whether, in the officer’s opinion, the child should be removed from the home and placed in police protective custody."

30. http://www.srskansas.org/CFS/Program/Services at "Services to Preserve Families".


32. K.S.A. 38-2230.

33. K.S.A. 38-2241(a) provides that all parties and interested parties are subject to the court's jurisdiction and, at (e)(3) authorizes the court to make anyone an interested party. K.S.A. 38-2255 provides a variety of options for court oversight while the parents continue to have custody. Additionally, "informal supervision" at K.S.A. 38-2244 is akin to diversion in that, if the parties agree, adjudication is avoided while the court monitors the family’s progress.

34. K.S.A. 38-2242(c), 2243(h), and 2255(d)(4).

35. K.S.A. 38-2202(d). In addition to abuse or neglect, a child may be in need of care when without adequate parental control, placed for adoption in violation of the law, is truant or otherwise out of control, commits offenses, which are not crimes if committed by adults, is under 10 and commits an act which would be crime if committed by an adult.

36. K.S.A. 38-2230 provides that SRS consider allegations that a child may be in need of care for reasons other than abuse or neglect and to determine if further action should be taken.


39. K.S.A. 38-2202(a), (b), (s) and (x); K.A.R. 30-46-10.

40. K.A.R. 30-46-10.

41. CFS 2012 (family reports) or the CFS 2013 (facility reports), http://www.srskansas.org/CFS/ppmforms/ppmformandappendices.htm.

42. K.S.A. 75-723. The ANE Unit was created in 2006 to receive and monitor complaints of abuse or neglect of children and vulnerable adults investigated by SRS, Department of Aging, KDHE, and law enforcement.

43. K.A.R. 30-7-68, which allows an additional three days if the request is mailed.

44. K.A.R. 30-7-68(a).

45. K.A.R. 30-7-75.

46. https://www.da.ks.gov/hearings/; hearing request forms and additional helpful information may be found at this location.

47. K.A.R. 38-2212(c) and 42 U.S.C. 5106(b). See also 45 C.F.R. 1340.14 and 45 C.F.R. 205.50.


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Caring When a Parent Does Not ...
ATTORNEY DISCIPLINE

IN RE NANCY F. ORRICK
TWO-YEAR SUSPENSION
NO. 103,698 – JUNE 11, 2010

FACTS: This is an original proceeding in discipline filed by the disciplinary administrator's office against the respondent, Nancy F. Orrick, of Overland Park, an attorney admitted to the practice of law in Kansas in 1988. A bill Orrick submitted to the Johnson County District Court in a child in need of care case contained significant misrepresentations on time and billing.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator's office recommended respondent receive a two-year suspension. The office also recommended that prior to respondent being allowed to resume the practice of law that she undergo a reinstatement hearing.


HELD: Court stated suspension was the appropriate discipline because respondent's misconduct was the result of multiple misrepresentations in her dealings with the district court. Court found a two-year suspension to be the appropriate length for respondent's discipline given the nature of her offenses and the undisputed findings that respondent knowingly gave the district court misleading explanations in response to inquiries after the initial misrepresentations were disclosed. Court agreed that a reinstatement hearing would be necessary.

IN RE BRYAN W. SMITH
TWO-YEARS SUPERVISED PROBATION
NO. 103,860 – JUNE 11, 2010

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Bryan W. Smith, of Topeka, an attorney admitted to the practice of law in Kansas in 1992. Smith's alcoholism leads to charges of misdemeanor public intoxication, disorderly conduct, and felony vandalism. The felony charges were eventually dropped in a plea. Smith's employment with his law firm was terminated. Smith entered treatment, but was unable to control his alcoholism. Smith participated in a diversion agreement with the disciplinary administrator's office, but he was unable to stop drinking and the diversion was terminated.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be placed on probation pursuant to the terms and conditions outlined in the respondent's proposed probation plan.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 8.4(b) (2009 Kan. Ct. R. Annot. 602) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer) and 8.4(g) (engaging in conduct adversely reflecting on the lawyer's fitness to practice law).

HELD: The evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel's conclusions of law. Court adopted the panel's findings and conclusions. Smith was suspended for one year from the practice of law in the state of Kansas, but that imposition of the suspension be suspended, provided that respondent continues to abide by the terms of his probation plan for two years from the date of the filing of this opinion. In addition, the Court hereby imposes an additional probation term requiring respondent Smith to obtain, within 30 days of the filing of this opinion, a supervisor for his law practice for the term of his probation.

CIVIL

COLLATERAL SOURCE RULE
MARTINEZ V. MILBURN ENTERPRISES INC.
RICE DISTRICT COURT – REVERSED AND REMANDED
NO. 100,865 – JUNE 4, 2010

FACTS: On July 23, 2005, plaintiff Karen Martinez slipped and fell while shopping at defendant's business in Lyons. She underwent back surgery at Wesley Medical Center and was ultimately billed $70,496.15. The hospital accepted $5,310 in satisfaction of the bill: $4,689 from plaintiff's private health insurance company, Coventry Health Systems (Convery), and $621 from plaintiff as her deductible and co-pay. Pursuant to its contract with Coventry, the hospital wrote off the balance of $65,186.15. In plaintiff's suit for recovery of damages, defendant filed a motion in limine asking the district court to prohibit plaintiff from claiming the full $70,496.15 as damages. The defendant apparently erred in its recitation of the specific amounts paid by each source to satisfy the bill, as well as the total amount paid to the hospital. Those errors apparently were repeated by plaintiff and the district court and by the parties on appeal. The court granted defendant's motion, limiting plaintiff's recovery to those amounts actually paid by Coventry and plaintiff ($5,310) and preventing her from submitting evidence of medical expenses in excess of that amount. The court granted an interlocutory appeal. The case was transferred to the Supreme Court.

ISSUE: Collateral source rule

HELD: Court synthesized the state and federal case law on applying the collateral source rule to medical benefits. Court stated the question before it was whether in a case involving private health insurance write-offs, the collateral source rule applies to bar evidence of (1) the amount originally billed for medical treatment or (2) the reduced amount accepted by the medical provider in full satisfaction...
of the amount billed, regardless of the source of payment. Court held the rule does not bar either type of evidence; both are relevant to prove the reasonable value of the medical treatment, which is a question for the finder of fact. Court reversed and remand to the district court for further proceedings.

CONCURRENCE (Johnson, J.): Concurs that the existing case law precedent would instruct the trial court to admit only the evidence of the amount which the medical care provider had contractually agreed to accept in full satisfaction of the bill for medical services (amount paid), but the Court's opinion clearly muddy's the water as to what evidence should be admitted. Justice Johnson concluded that both the prediscount amount and the amount actually paid are relevant, admissible evidence of damages.

CONCUR IN PART; DISSENT IN PART (Davis, C.J., and Rosen, and Biles, J.J.): Concur in part and dissent in part. The three agreed the district court erred in limiting plaintiff’s recovery for medical expenses to only those cash amounts actually paid by plaintiff and her health insurance company. The jury must determine the reasonable value of medical services. But this determination should not depend upon how successful plaintiff’s insurance company was at negotiating lower prices to benefit its insureds. However, the three stated the defendant should not be permitted to enjoy any benefit from plaintiff’s private insurance contract. That principle should be preserved.

STATUTES: K.S.A. 8-173(c); K.S.A. 20-3018(c); K.S.A. 40-3104, -3117; and K.S.A. 60-401, -406, -455, -2102(c), -2106

CREDIT LIFE INSURANCE AND
FAILURE TO DISCLOSE EXISTING CONDITIONS
CHISM V. PROTECTIVE LIFE INS. CO. ET AL.
MONTGOMERY DISTRICT COURT – ISSUES SUBJECT
TO REVIEW ARE REVERSED AND REMANDED
COURT OF APPEALS – REVERSED ON THE ISSUES
SUBJECT TO REVIEW
NO. 99,291 – JUNE 11, 2010

FACTS: In June 2005, Steve and Karen Chism purchased a new vehicle from Quality Motors of Independence Inc. As a part of the transaction, the dealership’s business manager, Dennis Urban, offered to sell them a Protective Life Insurance Co. credit life insurance policy that would pay off their car loan if either of them died. Steve had high blood pressure since 1991, Type II diabetes since 1999, and was diagnosed with peripheral vascular disease in November 2004. The Chisms did not circle any health conditions on the application and Urban signed it as Protective’s agent. About seven months later, Steve died from a sudden cardiac arrest and the death certificate listed diabetes mellitus, hypertension, morbid obesity, and peripheral vascular disease as cause of death. Karen submitted a claim for benefits under the policy. Based on Steve’s prior medical condition, Protective denied the claim and rescinded the policy. Karen sued Protective. The district court granted summary judgment in favor of Protective. The Court of Appeals affirmed the district court finding the policy application specifically negated Steve’s eligibility for coverage due to his medical conditions and the conditions the Chisms failed to disclose in the application were clearly material to the risk Protective was being asked to underwrite. Court found that the Chisms had the opportunity and duty to correctly complete the portion of the application form relating to health issues. Court also held that Quality Motors was entitled to summary judgment on Karen’s claim of negligent procurement since there was no evidence that Urban, who was an employee of Quality Motors, owed any legal duty to the Chisms when it came to their obligation to read, understand, and accurately respond to the inquiries made in the credit life policy application about their health. Court found no abuse of discovery or in refusing to allow admission of other credit life applications from other Quality Motors customers.

ISSUES: (1) Credit life insurance and (2) failure to disclose existing conditions

(Continued on next page)
HELD: Court held that an insurer is estopped from setting up a defense of fraud on the part of the insured in the application process where such fraud was on the part of the insurer’s agent. This rule applies with particular force where false answers are inserted by the agent without the knowledge of the applicant, regardless of whether such statements be considered representations or strict warranties. Thus, where an application is prepared without even consulting or interrogating the insured, and the insured had no knowledge of the making of such statements, much less their verity, an estoppel arises. Court stated that in cases where the truth of the representations or the facts surrounding the taking of an insurance application are in dispute, the questions presented are for a jury’s determination. Court held that if Karen’s facts are accepted, then she has created a question of fact for the jury’s consideration. Court also found the issue of fraud and the elements of intent and materiality presented jury questions.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 40-418, -2205(C)

HABEAS CORPUS
HOLT V. STATE
GEARY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 101,563 – MAY 6, 2010

FACTS: District court summarily denied Holt’s fourth post-conviction motion for relief under K.S.A. 60-1507, finding it was successive and nearly identical to previous motions, and barred Holt from filing further 1507 or similar motions regarding Holt’s 1994 criminal conviction. Holt appealed, challenging district court’s failure to hold a hearing on claim of ineffective assistance of counsel, and claiming district court exceeded its power to limit Holt’s filing of future motions.

ISSUES: (1) Successive 1507 motion and (2) filing restrictions

HELD: Under facts, Holt did not demonstrate exceptional circumstances to justify consideration of his successive 1507 motion. District court’s dismissal of the motion is affirmed.

Inherent power of court to control its docket, and to restrict abusive filings, is discussed. District court has jurisdiction and authority to impose reasonable filing restrictions. A court’s docket management decisions are reviewed for abuse of discretion. Here, district court’s ban of future 1507 motions and similar avenues of relief cuts off possible meritorious future claims, does not define “similar motions,” and does not allow Holt an opportunity to seek court permission before filing future motions. District court abused its discretion by denying Holt meaningful access to the courts. On remand, court is to enumerate reasonable conditions Holt must meet to allow future filings, and give Holt notice and opportunity to be heard before the restrictive conditions are to become effective.

STATUTES: K.S.A. 20-3012, -3018(c); K.S.A. 21-2512; K.S.A. 22-3504; and K.S.A. 60-211, -211(f), -1507, -1507(c), -2601(a)

WHISTLE-BLOWER, CIVIL SERVICE BOARD, AND ATTORNEY FEES
POWELL V. KANSAS DEPARTMENT OF REVENUE
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 99,491 – JUNE 4, 2010

FACTS: The Civil Service Board entered a default order in favor of the Kansas Department of Revenue (Department) in an appeal from their action of suspending and dismissing Jill Powell. Powell walked out of the hearing on her claim, so the Civil Service Board (Board) had no choice but to rule in favor of the Department. As the prevailing party, the Department sought attorney fees under K.S.A. 2007 Supp. 75-2973(f), which allows the Board to award attorney fees to the prevailing party in a whistle-blower case. The Board denied the motion for attorney fees. The Department appealed to the district court, which found the Board had discretion in awarding attorney fees under K.S.A. 2007 Supp. 75-2973(f). Court of Appeals held that where the Board refused to grant the Department attorney

(Continued on next page)
fees as the prevailing party in a whistle-blower claim because of the possible chilling effect such a ruling would have on future claims, it was an exercise of the Board’s discretion that would not be disturbed on appeal.

ISSUES: (1) Whistle-blower, (2) Civil Service Board, and (3) attorney fees

HELD: Court held the Board abused its discretion based on several findings: (1) there were no facts in the record upon which the Board based an important part of its ruling; (2) that assessing costs and fees against Powell would have a chilling effect; (3) a tribunal’s issuance of a blanket ruling, both for resolving a current case and effectively all those in the future, is such an abuse; and (4) the Board’s blanket ruling of automatic exclusion improperly renders meaningless the 1998 statutory amendment that expanded fee award recipients to include employers.

STATUTES: K.S.A. 20-3018(b); K.S.A. 60-1507; K.S.A. 75-2973(f), (g); and K.S.A. 77-621

CRIMINAL

STATE V. ALLEN
SEWARD DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 99,014 – JUNE 4, 2010

FACTS: Allen convicted of one count of possession of cocaine with intent to sell. On appeal, he claimed in part the district court erred in failing to give unanimity instruction because the state did not specify whether charge was based on cocaine found in Allen's pocket or in upstairs bedroom. Court of Appeals affirmed in unpublished opinion. Review granted on single issue of whether possessing cocaine in bedroom and in pocket were multiple acts requiring jury unanimity as to at least one of those acts or whether possessing cocaine in different parts of house at time of arrest were part of a single crime of possession with intent to sell.

ISSUE: Multiple acts

HELD: Cases discussing multiple acts are reviewed. Court of Appeals incorrectly decided State v. Kinmon, 26 Kan. App. 2d 677 (1999), was superseded by State v. Keserlving, 279 Kan. 671 (2005), and found case did not involve multiple acts. There is no single test for whether conduct constitutes one act or separate and distinct multiple acts. Instead, courts must look to facts and theory of the crime as argued to determine whether a jury verdict implicates unanimity issues. Here, Kinmon analysis applicable to situation where jury could find either, or both, actual or constructive possession. Under facts, acts were sufficiently separate and distinct to warrant instruction on separate theories. Failure to give unanimity instruction was reversible error. Conviction reversed and case remanded to district court.

STATUTE: K.S.A. 2006 Supp. 65-4160, -4161(a)

STATE V. AGUILAR
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED
NO. 95,249 – MAY 21, 2010

FACTS: Police stopped and arrested driver (Ayalla) and passenger (Aguilar) when drugs were found in inventory search of vehicle. Aguilar then asked to withdraw plea, claiming she was not guilty, had entered plea under duress due to her inability to pay attorney's bill and her close relationship with Ayalla, and had ineffective assistance of counsel. District court held a hearing and denied the motion. Aguilar appealed.

ISSUE: Motion to withdraw guilty plea

HELD: Factors in State v. Edgar, 281 Kan. 30 (2006), as clarified in State v. Schow, 287 Kan. 529 (2008), do not transform lower good cause standard of statute's plain language into constitutional standard for ineffective assistance of counsel. Under particularly egregious facts of this case, in which a conflict of interest between Aguilar and Ayalla was insurmountable, and the record reveals no sufficient disclosure by counsel and waiver by client, Aguilar met her presentation K.S.A. 22-3210(d) burden to show good cause to withdraw her plea. District judge's failure to apply appropriate standards in plea withdrawal hearing was abuse of discretion requiring reversal and remand to grant Aguilar's motion to withdraw plea.

DISSENT (Nuss J., joined by McFarland, C.J., and Luckert, J.): Would follow guidance and practice of Kansas' courts, consistent with federal cases addressing this issue. For defendants filing presence motions to withdraw pleas under K.S.A. 22-3210(d) alleging ineffective assistance of counsel due to conflict of interest through concurrent representation, would require meeting constitutional standards to establish "good cause" for withdrawal.

STATUTES: K.S.A. 22-3210(a)(2), -3210(d); and K.S.A. 60-1507

STATE V. DUKE
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 96,563 – MAY 6, 2010

FACTS: Dukes was convicted of driving under the influence of alcohol and of driving with a suspended license. District court imposed $2,500 fine, and required reimbursement to Board of Indigents' Defense Services (BIDS) for attorney fees and application fee. On appeal, Dukes claimed that proving license suspension and proper calibration and certification of the machine, without calling witnesses who maintained his driving record and handled the calibration and certification process, violated his constitutional right to confront witnesses against him. Court of Appeals held that documents showing certification or calibration of a breath-test machine or certification of the machine operator do not constitute testimonial evidence and may be offered without an accompanying witness for cross-examination. Similarly, proof of a defendant's driving record is nontestimonial. Court of Appeals vacated fine and assessment of BIDS attorney fees, but affirmed payment of the application fee because Dukes did not request waiver, claim hardship, object to the fee, or present any information about his financial resources.

ISSUE: Contemporaneous objection rule

HELD: Court held that Dukes failed to preserve his claims on appeal by failing to object to the admission of the evidence in the court below. Court stated that its ruling is consistent with the Court's recent accentuation of the procedural bar of the contemporaneous objection rule.

STATUTE: K.S.A. 60-404

STATE V. FOSTER
ALLEN DISTRICT COURT – AFFIRMED
NO. 101,029 – JUNE 11, 2010

FACTS: Foster convicted of first-degree murder, rape, aggravated kidnapping, aggravated arson, aggravated criminal sodomy, aggravated battery, and criminal threat. Sentence included hard 50 off-grid life sentence for murder conviction. On appeal, Foster claimed 11 grounds of error: (1) trial court should have reconsidered Foster’s competency during trial, (2) court’s failure to address potential conflict between Foster and trial attorney, (3) failure to instruct jury on lesser-included offense for voluntary manslaughter, (4) right to unanimous jury verdict violated regarding criminal threat and rape charges, (5) mistrial warranted when Foster's father in gallery disrupted the proceedings, (6) admission of prejudicial photographs, (7) prosecutorial misconduct in opening statement and closing argument, (8) cumulative error denied a fair trial, and (9) through (11) constitutional challenges to sentence imposed.

ISSUES: (1) Reconsideration of competency, (2) attorney-client conflict, (3) lesser-included offense, (4) unanimous jury verdict, (5) mistrial for disruption from public gallery, (6) admission of photographs, (7) prosecutorial misconduct, (8) cumulative error, and (9) through (11) sentence imposed
Held: Two instances of Foster's "confusion" during trial examined. Issue raised for first time on appeal is considered. No abuse of discretion in trial court not initiating further competency inquiries.

Allegations of irreconcilable conflict with trial counsel examined. No evidence of any conflict with counsel or neglect by district court.

Under facts, no evidence supported giving jury a voluntary manslaughter instruction.

Under facts, no multiple acts of criminal threat, but two separate rapes. State failed to elect which acts jury was to rely on when considering rape charge. Trial court's failure to give unanimity instruction on rape charge was error, but if unanimity instruction had been given, jury still would have convicted Foster of rape.

Abuse of discretion standard applies, and none found in district court's denial of motion for mistrial based on gallery disruption. Cases with comparable facts are discussed.

Claim regarding admission of prejudicial photographs, raised for first time on appeal, is not considered.

Alleged inflammatory statements by prosecutor examined, finding no prosecutorial misconduct.

Cumulative error doctrine not applicable to case with only single error.

Sentencing issues defeated by prior and controlling Kansas Supreme Court decisions.

STATUTES: K.S.A. 21-3107(a), -3107(b), -3401(a), -3402(a), -3502(a)(1)(A), -4635, -4704; K.S.A. 22-3301 et seq., -3302, -3302(l), -3401, -3414(3), -3423, -3423(1)(c), -3423(1)(d), -3601(b)(1); and K.S.A. 60-261, -404

**STATE V. GONZALEZ**

RENO DISTRICT COURT – REVERSED AND REMANDED NO. 102,400 – JUNE 18, 2010

FACTS: State filed motion based on KRPC 3.8(e) to issue subpoena for public defender Sweet-McKinnon to testify about a former client who expressed intent to commit perjury in prosecution of Gonzalez. District court granted the motion and denied McKinnon's motion to quash, finding the information was not protected by attorney-client privilege because of crime-fraud exception under K.S.A. 60-426(b)(1). When McKinnon refused to testify, district court entered contempt judgment and $1,000 per day coercive sanction. McKinnon's appeal transferred to Supreme Court.

ISSUE: (1) K.S.A. 60-426 – Attorney-client privilege and (2) KRPC 3.8(e)

HELD: Court examines fundamental and significant differences between attorney-client privilege and disciplinary rules concerning an attorney's ethical duties with respect to client confidences, and enunciates a new rule. A prosecutor who seeks to have criminal defense counsel testify about a current or former client's confidential information enunciates a new rule. A prosecutor who seeks to have criminal defense counsel testify about a current or former client's confidential information may include nonexistence of any of the three KRPC 3.8(e) factors, as well as any other factors listed in K.S.A. 60-245(c). On record of case as so far developed, attorney-client privilege applies to prevent disclosure of identity of McKinnon's former client, thus first KRPC 8.3(e) factor not satisfied. Contempt judgment and sanction order is vacated. Case is remanded for further proceedings. Also, McKinnon's summary of client's intention to commit perjury is slim circumstantial evidence insufficient to establish crime-fraud exception to attorney-client privilege, but even if it were, third factor not satisfied because state failed to establish it has no feasible alternative to obtain the information sought from McKinnon through a subpoena.

STATUTES: K.S.A. 2009 Supp. 60-245(c)(3), -245(c)(3)(A)(ii) and (iv), -245(c)(3)(B)(i) and (iii); K.S.A. 20-1205, -3017; K.S.A. 22-3101(1), -3101(2); and K.S.A. 60- 226(b)(4), -226(c), -245(c), -426, -426(b)(1), -437(a), -437(b), -2102(a)(4)

**STATE V. LABELLE**

SEDGwick DISTRICT COURT AFFIRMED IN PART, VACATED IN PART, AND REMANDED COURT OF APPEALS AFFIRMED IN PART AND REVISED IN PART NO. 98,136 – MAY 28, 2010

FACTS: LaBelle convicted of sexual exploitation of a child. In sentencing, district court formally classified LaBelle as a persistent sex offender without specifying whether the prior sexually violent crime was LaBelle's 1988 juvenile adjudication or 1991 felony conviction. LaBelle appealed, claiming sentence was illegal because the 1991 conviction could not be used to both calculate criminal history and classify him as a persistent sex offender. LaBelle also claimed Apprendi violation by being sentenced to aggravated term in grid block without submitting aggravating factors to a jury. In unpublished opinion, Court of Appeals affirmed, finding dual use of 1991 conviction was impermissible, but 1988 adjudication could support the persistent sex offender classification. LaBelle's petition for review granted.

ISSUES: (1) Persistent sex offender classification and (2) constitutionality of aggravated sentence

HELD: Threshold arguments that LaBelle stipulated to criminal history score at sentencing, and did not challenge use of juvenile adjudication until after Court of Appeals' decision, are rejected under facts of case. LaBelle's 1991 conviction cannot be used to both calculate criminal history score and to classify him as a persistent sex offender. LaBelle also claimed Apprendi violation by being sentenced to aggravated term in grid block without submitting aggravating factors to a jury. In unpublished opinion, Court of Appeals affirmed, finding dual use of 1991 conviction was impermissible, but 1988 adjudication could support the persistent sex offender classification. LaBelle's petition for review granted.

STATE V. MCGINNIS


FACTS: Responding to report of stolen vehicle partially submerged in creek, officers observed McGinnins turning into driveway that provided access to the creek, parking car, and walking to creek.
Appellate Decisions

Officer parked two to three car lengths away and did not activate lights. As officer approached McGinnis to ask if there was a problem, officer saw 12-pack in the front of McGinnis’ car. After it was evident that McGinnis was intoxicated, DUI inquiry initiated and McGinnis failed various field sobriety tests. McGinnis charged with DUI fourth offense and transporting open container. District court denied motion to dismiss, found encounter with police was voluntary, and found McGinnis guilty on stipulated facts. Court of Appeals affirmed, 40 Kan. App. 2d 620 (2008). McGinnis’ petition for review granted on sole issue of whether initial contact with officer was a voluntary encounter or an investigatory detention unsupported by reasonable suspicion.

ISSUE: Voluntariness of encounter with police

HELD: Various cases discussed and distinguished. Under totality of circumstances and State v. Parker, 282 Kan. 584 (2006), officer’s conduct would convey to a reasonable person that he or she was free to refuse to answer the officer’s questions or otherwise terminate the initial encounter. Judgments of district court and Court of Appeals are affirmed.

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

**STATE V. REYNA**
**SALINE DISTRICT COURT – AFFIRMED**
**NO. 100,000 – JUNE 4, 2010**

FACTS: Reyna convicted of four counts of aggravated indecent liberties with a child and sentenced under Jessica’s law to life with no possibility of parole for 25 years. Trial court denied post-trial motions that alleged failure to plead and prove Reyna’s age required sentencing under Kansas Sentencing Guidelines Act rather than as off-grid felonies, and that sought dispositional and durational departures. On appeal, Reyna claimed: (1) insufficient evidence supported his conviction; (2) state’s failure to allege Reyna’s age in the complaint deprived district court of jurisdiction to impose life sentence, and the failure to instruct the jury that Reyna was over 18 years old at the time of the offenses violated Sixth Amendment; (3) expert testimony of licensed clinical marriage and family therapist concerning behavioral characteristics of children who have been sexually abused impermissibly vouched for credibility of victims; (4) trial judge unreasonably limited defense counsel’s voire dire of jury panel; (5) sentence was unconstitutionally cruel and unusual and disproportionate to the offense; and (6) departure from sentence was warranted under circumstances.

ISSUES: (1) Sufficiency of the evidence, (2) defendant’s age – complaint and jury instruction, (3) expert testimony, (4) voire dire, (5) constitutionality of hard 25 sentence, and (6) departure motions

HELD: Under detailed facts, there was sufficient evidence for a rational factfinder to find Reyna guilty beyond a reasonable doubt. State v. Matlock, 233 Kan. 1 (1983), distinguished.

As in State v. Gracey, 289 Kan. 351 (2009), and State v. Gracey, 288 Kan. 252 (2009), failure to allege Reyna’s age in the complaint is not basis to invalidate convictions of the off-grid offense. Failure to allege and instruct on Reyna’s age was harmless error where jury had evidence on which it could have based a finding of Reyna’s age at the time of the offenses.

Despite trial judge’s questioning of need for expert testimony in this case, case law supports conclusion that testimony of general behavioral traits of sexual abuse victims is helpful to jury and therefore admissible. Reyna also was able to cross-examine witness to bolster defense theory of case. Under circumstances, no abuse of discretion to admit this testimony.

Under facts, Reyna’s counsel was not limited in questioning jury panel in any meaningful way, and trial judge’s actions did not prejudice Reyna.

Constitutional challenge to sentence, raised for first time on appeal, is not considered.

Convictions and concurrent hard 25 life sentences are affirmed.

**DISSENT (Johnson, J.):** Disagrees with majority’s decision to affirm Reyna’s sentence for off-grid version of aggravated indecent liberties with a child. Instead, Reyna should have been sentenced for crime with which he was charged and convicted by jury – the severity level 3 version of the offense. No error in jury instructions for that crime. Error to sentence Reyna for a more severe off-grid crime than that with which he was charged and convicted. This error in sentencing pursuant to Jessica’s law was not harmless under Kansas state law.

**STATUTES:** K.S.A. 2006 Supp. 21-3107(2), -3107(2)(b), -3504, -3504(a)(3)(A), -3504(c), -4643, -4643(a)(C), -4643(c), -4643(d); K.S.A. 21-3504(a)(1), -3504(c); K.S.A. 22-3408(3), -3502, -3601(b)(1); and K.S.A. 60-456(b), -456(c)

**STATE V. SHELDON**
**COWLEY DISTRICT COURT – REVERSED**
**NO. 98,160 – MAY 21, 2010**

FACTS: Sheldon charged with three counts of making false information and two counts of felony obstruction of an official duty, all arising out of firearm pawns. One obstruction count dismissed. Jury convicted Sheldon on remaining counts. In unpublished opinion, Court of Appeals reversed convictions for making false information and affirmed conviction for obstruction of an official duty. Supreme Court granted Sheldon’s petition for review and denied state’s cross-petition.

ISSUE: Felony obstruction of an official duty

HELD: Under facts and undisputed testimony of investigating detective, state could not prove elements of felony obstruction of official duty under K.S.A. 21-3808. That conviction is reversed. Remaining convictions reversed by Court of Appeals were not subject to grant of review and thus stand.

STATUTE: K.S.A. 21-3808
Notice of Consideration of Reappointment of Magistrate Judge and Invitation for Public Comment

The current term of the office of U.S. Magistrate Judge K. Gary Sebelius at Topeka, Kan., is due to expire on February 20, 2011. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conduct of most preliminary proceedings in criminal cases; (2) trial and disposition of misdemeanor cases; (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court; and (4) trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court. Comments should be directed to Timothy M. O’Brien, Clerk, U.S. District Court, 259 Robert J. Dole U.S. Courthouse, 500 State Ave., Kansas City, KS 66101. Comments must be received by 4:30 p.m., August 31, 2010.

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Appellate Rules Amended to Conform to Civil Code Time Computation Changes

Effective July 1, 2010, K.S.A. 60-206 was amended by 2010 H.B. 2656 to change the way time is counted. There is no longer a different computation method for time periods of less than 11 days. Under the former statute, those short time periods were measured in business days. Under the amended statute, every day is counted for all time periods, regardless of length.

Supreme Court Rule 1.05(c) (2009 Kan. Ct. R. Annot. 5) directs that K.S.A. 60-206 be used to calculate time in the appellate courts. To avoid further shortening the time periods in some appellate rules by counting calendar days rather than business days, the Supreme Court has, effective July 1, 2010, amended a number of time periods in the appellate rules. In general, five-day time periods have been extended to seven days and 10-day time periods have been extended to 14 days. For example, the time to respond to routine motions has been extended from five to seven days after service of the motion. See Rule 5.01. The time to move for rehearing or modification in a case decided by the Court of Appeals has been extended from 10 to 14 days of the date of decision. See Rule 7.05. For a complete listing of all rule changes, go to www.kscourts.org and find the reference to recent rule amendments in the “What’s New” column.

A number of time periods have also been changed in the district court rules. Those changes also appear in the “What’s New” column.

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

ACTION – PERSONS ENTITLED TO SUE MUNICIPAL CORPORATIONS
HARTMAN V. CITY OF MISSION, KANSAS
JOHNSON DISTRICT COURT
AFFIRMED IN PART AND DISMISSED IN PART
NO. 101,804 – JUNE 11, 2010

FACTS: Hartman challenged City of Mission’s (City) refusal to hold referendum election for two ordinances proposed through citizens petition related to establishment of historic district. He also challenged council’s exclusion of one member from an executive session held to discuss the proposed ordinance. Trial court dismissed case for lack of standing because Hartman had a business in City but did not reside there. Hartman appealed.

ISSUE: Standing to sue City

HELD: No dispute that Hartman resided in Shawnee and not City. Hartman’s business in City does not give him standing to force City to act in any way regarding ordinances. Nor can Hartman assert rights of excluded council member. Alleged injury to right of representation has no merit because mere property owner who is not a City resident has no right to representation on City’s council.

STATUTE: K.S.A. 12-3013, -3013(a)

ACQUIESCENCE
ALMACK V. STEELEY
JOHNSON DISTRICT COURT – APPEAL DISMISSED
NO. 100,664 – MAY 14, 2010

FACTS: Steeley served as a broker for Almack of multiple office-related items under a contract where Steeley would receive 50 percent from total proceeds. After a year, Almack made a demand upon Steeley for full disclosure of all deposits, repairs, and diminished value otherwise severe sanctions might be imposed. The magistrate granted judgment on the pleadings as a sanction for Steeley’s failure to comply and ordered judgment in the amount of $22,825 for conversion, plus $1,745 in diminution of value and $500 in attorney fees. Almack began hearing in aid of execution for the amount of $22,825, plus $1,745 in diminution of value and $500 in attorney fees. Almack appealed and Almack cross-appealed. Almack began collections efforts on the district court’s judgment.

ISSUE: Acquiescence

HELD: Court held that Kansas appears to fall in line with a minority of jurisdictions that have adopted a rule that prevents an appeal if a party takes any action inconsistent with the right of review. Almack’s actions savor of acquiescence. He has accepted the benefits of the judgment by commencing a hearing in aid of execution proceeding. Court stated this is not a case about the completion of a sale or accepting payments on the judgment or even protective measures necessary to preserve a judgment. Instead, this case involves the voluntary actions of a judgment holder to enforce a judgment. Holding that Almack acquiesced in the judgment, the appeal was dismissed.

STATUTES: No statutes cited.
ISSUES: (1) Breach of contract, (2) statute of frauds, and (3) tortious interference with a prospective business advantage

HELD: Court reversed summary judgment. Court found in regard to M West’s claims against Cingular, the appellate record established that the communications between the parties met the statute of frauds. Moreover, in looking at the record in the light most favorable to M West, court determined that there existed a genuine issue of material fact as to whether the communications between M West and Cingular evidenced the existence of a binding contract with conditions precedent to performance under the contract or only preliminary negotiations with conditions that had to be met before formation of the contract. Importantly, if a binding contract existed between Cingular and M West, Cingular could be held liable to M West if it is found that Cingular did not act in good faith with regard to the contract or hindered, delayed, or prevented the happening of the condition precedents for the purpose of avoiding performance of the contract. Because these are issues of fact, court determined that the trial court erred in granting summary judgment to Cingular. Moreover, based upon the nature of the relationship between Cingular and M West, the viability of M West’s tortious interference claim against Oak Park is dependent upon whether there is a binding contract between Cingular and M West. If it is found that a binding contract existed between Cingular and M West, then there is evidence to create a genuine issue of material fact as to whether Oak Park engaged in intentional misconduct, which was unjustified and malicious.

DISSENT (Leben, J.): Dissented with argument that summary judgment could not be granted to Cingular, but that M West had provided sufficient evidence to avoid summary judgment in favor of Oak Park Mall.

STATUTE: K.S.A. 33-105

CHILD SUPPORT AND PATERNITY TESTING
SRS V. KIMBREL
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 101,722 – MAY 21, 2010

FACTS: Taylor and Kimbrel acknowledged paternity of J.L.K. by executing a document titled “Paternity Consent Form for Birth Registration.” Kimbrel read and initialed every disclosure paragraph. Two years later SRS filed a petition for child support and served Kimbrel. In response, Kimbrel requested genetic testing. SRS opposed genetic testing based on the acknowledgment. The district court decided genetic testing was in the best interests of J.L.K. and granted Kimbrel’s motion. Tests showed that Kimbrel was not the biological father of J.L.K. An administrative hearing officer found Kimbrel did not have to pay child support. The district court affirmed finding the acknowledgement created only a presumption of paternity.

ISSUES: (1) Child support and (2) paternity testing

HELD: In an action brought by the secretary of Social and Rehabilitation Services on behalf of a mother and her biological child for an order of child support, a district court may determine, based on genetic testing ordered pursuant to K.S.A. 38-1118(a), and In re Marriage of Ross, 245 Kan. 591, 783 P.2d 331 (1989), that clear and convincing evidence proves a man who has executed a voluntary acknowledgment of paternity under K.S.A. 38-1138 is not the biological father of the child, and accordingly, the court may find the presumption of paternity is rebutted, end the father child relationship, and deny a petition for child support.


**Pending approval from the Kansas CLE Commission.**
DISABILITY RETIREMENT BENEFITS
MEDINA V. POLICE & FIRE RETIREMENT BOARD OF THE CITY OF WICHITA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,097 – MAY 21, 2010

FACTS: Officer Medina was dispatched to assist with an unattended child. When he arrived at the scene, he twisted his right knee when he got out of the car. Later at home, his knee buckled. He received workers’ compensation for injuries to both knees and his right ankle. Medina sought disability retirement benefits from the Wichita Police & Fire Department System and its board of trustees (Board). The Board denied Medina’s request finding the twisted knee was not a “physical or mental incapacity resulting from external force, violence, or occupational disease occasioned by an act of duty . . . imposed by the ordinance or rules and regulations of the city, or any other disability, which may be directly attributable to the performance of an act of duty.” The district court granted summary judgment to the Board.

ISSUE: Disability retirement benefits

HELD: Court first addressed two procedural issues. Court found that Medina conceded that he did not file the administrative record with the district court, but he requested true copies of the appropriate proceedings from the Board so he could perfect his appeal. Court held while the filing of a timely notice of appeal is jurisdictional; the failure to comply with other requirements such as a timely designation of the record is not jurisdictional when no prejudice results, as was the case with the Board. Court also held that in all of the cases that prohibit a party from raising an issue not raised at an administrative hearing, an intermediate administrative body was present that could consider factual and legal arguments before that party sought relief from the district court through an appeal. Medina had no such opportunity here. His next and only step was a district court appeal. However, court held that Medina read the charter ordinance too narrowly in arguing that all he had to prove was that he was permanently injured while he was engaged in the performance of his duties. Court held the ordinance applied to acts involving special risks not generally assumed by a citizen in the ordinary walks of life. Court concluded that Medina’s interpretation of the ordinance unreasonably renders a portion of the ordinance meaningless. And there is no evidence that Medina suffered a “Service-Connected Disability” and therefore he failed to prove that he was entitled to disability benefits.

STATUTES: K.S.A. 60-2101(d); and K.S.A. 77-601, –602

INSURANCE – EXECUTORS AND ADMINISTRATORS, INTERPLEADER AND CONTRACTS
KANNADAY V. BALL
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART, REVISED IN PART, AND REMANDED
NO. 102,359 – JUNE 18, 2010

FACTS: Kannaday was one of three passengers injured in Hoyt’s car when it collided and killed Hoyt. One passenger settled for $25,000 of $50,000 insurance policy limit on the accident. Kannaday filed personal injury action against Hoyt’s estate (Estate). Hoyt’s insurer filed federal interpleader action for disposition of remaining policy proceeds. In personal injury action, Estate moved for partial summary judgment to limit recovery against Hoyt to $25,000 deposited in federal court because Kannaday failed to present timely claim required by nonclaim statute. Before district court could rule on motion, federal court disbursed the $25,000 to a medical center. Estate again moved for summary judgment, arguing no possible claim where federal court had disbursed interpleader proceeds and Kannaday failed to comply with nonclaim statute. District court granted partial summary judgment with respect to first $25,000, denied summary judgment to balance of Kannaday’s claim, allowed Kannaday to proceed to trial to determine damages, and held Kannaday could not attempt to satisfy any judgment with Estate assets because of noncompliance with nonclaim statute. Per Kannaday’s signed agreement with estate administrator, district court held ex parte hearing on Kannaday’s evidence and entered more than $7 million judgment against Estate. Estate appealed, claiming district court erred in denying its second motion for summary judgment. Estate also claimed the ex parte judgment is void because it is based on an invalid agreement.

ISSUES: (1) Summary judgment – nonclaim statute and federal injunction and (2) ex parte trial on damages

HELD: District court correctly denied Estate’s motion for summary judgment. Kansas’ nonclaim statute, K.S.A. 59-2239, does not bar a cause of action filed within applicable statute of limitations against a decedent’s estate when ultimate object of the suit is not estate assets otherwise available for distribution to heirs or legatees, but rather assets of decedent’s liability insurance carrier. Federal court’s injunction reached only policy proceeds on deposit with the court, not any possible future claim against insurer for bad-faith failure to settle Kannaday’s claim.

Under facts, parties’ settlement agreement, which authorized Kannaday to proceed to trial ex parte and obtain judgment against Hoyt without further notice to or involvement by Hoyt, was invalid because it was not supported by consideration of any kind. District court’s judgment is set aside, and case is remanded for new trial.


OIL AND GAS AND CLASS ACTION
FARRAR V. MOBIL OIL CORP.
STEVENS DISTRICT COURT – AFFIRMED
NO. 103,009 – JUNE 11, 2010

FACTS: Mineral rights owners sought to certify a class action on behalf of interest owners of minerals burdened by 1,200 leases on acreage within the areal extent of the Kansas Hugoton Field, whose gas flowed through the Bushton gathering system owned by ONEOK. The action alleged that Mobil had breached express and implied contractual obligations by deducting from royalty payments a pro rata portion of the amount paid by Mobil to ONEOK for services necessary to gather the gas and transport it to the processing plant. These claims were expanded three years later to include claims of the additional mineral interest owners whose gas flowed through the Jayhawk Plant on the Hickok gathering system owned by Mobil. The district court granted certification of a class action. Mobil filed its application with this court to take an interlocutory appeal pursuant to K.S.A. 60-223(f). This court granted the application and stayed the district court proceedings pending resolution of this interlocutory appeal. Mobil then timely filed its notice of appeal.

ISSUES: (1) Oil and gas and (2) class action

HELD: Court found the district court did not err in holding that the doctrine of lex loci contractus would defeat the prerequisites for maintenance of a class action because of the need to apply varying and disparate laws of numerous states where the instruments were executed. Court held that the allegations of the plaintiffs’ class implicate significant contacts with Kansas and there is no arbitrariness or unfairness in the application of Kansas law in determining how the subject oil and gas leases should be construed and enforced. Court held that where a purported class action claims improper deductions in calculating royalties under oil and gas leases, there is no need for individualized examination of lease formation or the intent of the parties thereto for purposes of determining predominance of common issues or manageability in certification proceedings where there has been shown a systemic common course of conduct by an oil and gas lessee in calculating royalties payable pursuant to leases to explore and develop Kansas minerals. Court concluded that because...
class action certification is discretionary with the trial court, the class may be altered, expanded, subdivided, or abandoned as the case develops. Class actions may be amended, limited, or subclasses of plaintiffs may be established if needed.

STATUTES: K.S.A. 55-223; K.S.A. 58-2221(b); and K.S.A. 60-223(a), (b), (f)

PARENT AND CHILD AND CONSTITUTIONAL LAW – DUE PROCESS
IN RE J.O.
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 103,481 – MAY 6, 2010

FACTS: Facts leading to trial on state’s motion to terminate natural father’s parental rights to J.O. are detailed. Citing Supreme Court Rule 145 and K.S.A. 60-243(a), and referencing father’s incarceration in Colorado, district court denied father’s motion to appear by telephone or video conference and granted state’s motion for termination. Father appealed, claiming he was denied due process by the termination hearing being conducted without father’s requested participation.

ISSUE: Due process – opportunity to be heard at meaningful time and in meaningful manner

HELD: In trial on merits of motion to terminate parental rights, strict application of Rule 145 and K.S.A. 60-243(c) to prohibit telephonic participation by the subject parent violates constitutional due process requirements. Integrity of the judicial process obviously must include incorporation of some flexibility in mode of appearance at a trial on the merits for good cause in compelling circumstances. Where the only manner of appearance for an incarcerated person to participate in a proceeding to protect a fundamental liberty interest is by telephone, neither rule nor statute should prohibit that modicum of due process. By being wholly denied any mode of appearance, father was also deprived of opportunity to counter district court’s findings and the presumption of unfitness. Reversed and remanded for further proceedings. In re Estate of Broderick, 286 Kan. 1071 (2008), is discussed and distinguished.


PERSONAL JURISDICTION AND DISCOVERY
MARTIN-MANATEE POWER PARTNERS V.
PEERLESS MANUFACTURING ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 102,582 – JUNE 18, 2010

FACTS: This case arises out of a fire at a power plant in Florida. Martin-Manatee Power Partners LLC (MMPP), contracted with Florida Power & Light Co. to design and construct a natural gas-fired power plant in Martin County, Fla. Peerless supplied and installed four gas heater skids in the plant. The purchase order for the skids specified that any litigation regarding the skids would occur in Kansas and be governed by Kansas’ law. In September 2005, one of the gas heater skids supplied by Peerless allegedly overheated, ruptured, and caused a fire at the plant. MMPP claimed that components in a gas valve in the skid were incorrectly installed, thereby causing the release of gas and the resulting fire. MMPP claimed it cost more than $5.7 million to repair the damage to the plant. MMPP sued Peerless in Johnson County on various legal theories. Peerless asserted a third-party claim against Controls International Inc. (Controls), a Texas corporation, asserting that Peerless purchased the claimed defective valve from Controls. Controls filed a motion to dismiss on lack of jurisdiction. Peerless moved to conduct limited discovery on the personal jurisdiction issue. The parties came to loggerheads over

(Continued on next page)
Appellate Decisions

**TERMINATION OF PARENTAL RIGHTS**

**IN RE K.R., T.H. & E.R.**

**SEWARD DISTRICT COURT – REVERSED**

**NO. 103,442 – JUNE 11, 2010**

FACTS: Mother’s three children, ages 8, 13, and 16, were removed from her home based on truancy of the children and homelessness issues faced by mother. Until her parental rights were terminated by the district court, mother had a mixed history of some compliance and some neglect of the conditions imposed for reintegration of her family. Compliance was undoubtedly affected by mother’s diagnosed bipolar disorder. Among the conditions imposed on mother for reintegration of the children with mother were maintaining employment, maintaining stable housing, submitting to UAs, taking medications as prescribed, attending individual and family therapy sessions, and otherwise cooperating with community services’ personnel assigned to her case. The guardian ad litem opposed termination of parental rights, that it was in the best interests of the children to stay in the home, and the children wanted to be with their mother. The trial court found the mother was presumed unfit based on the fact that the children had been out of the home for more than a year and she substantially neglected or willfully refused to carry out a reasonable plan of reintegration.

ISSUE: Termination of parental rights

HELD: Court held the district court proceedings were flawed by the assertion of a statutory presumption with little notice to the mother, by the failure of the court to make a K.S.A. 60-414(a) or (b) determination before applying the presumption, and by the failure of the district court to consider the best interests of the children under K.S.A. 38-2269(g)(1). Additionally, the state failed to establish by clear and convincing evidence that any unfitness of the mother was unlikely to change in the foreseeable future as required by both K.S.A. 38-2269(a) and K.S.A. 38-2271(b).

STATUTES: K.S.A. 38-2266, 38-2269(a), (g), -2271; K.S.A. 1994 Supp. 38-1585; and K.S.A. 60-414

**WORKERS’ COMPENSATION, NOTIFICATION OF INJURY, AND JUST CAUSE**

**KOTNOUR V. CITY OF OVERLAND PARK**

**WORKERS COMPENSATION BOARD – AFFIRMED**

**NO. 102,619 – MAY 28, 2010**

FACTS: The Kansas Workers Compensation Board (Board) determined that Kotnour, a police officer, who suffered a twinge in his right knee during his employment while pursuing a suspect and who did not know he had suffered an injury, which could lead to a compensable disability until nearly two and one-half months later when he visited his family physician for some medical issues unrelated to his right knee and who failed to report the right knee twinge.
to his employer within the requisite 10-day statutory notice period was not precluded from recovering benefits, where the employee furnished notice to the employer within 75 days after the date of the injury and there was no reason why the employee should have known or suspected that he had suffered an injury that could lead to a compensable disability.

ISSUES: (1) Workers’ compensation, (2) notification of injury, and (3) just cause

HELD: Court stated the city did not attempt to contradict Kotnour’s testimony or theory of what happened. As a result, the Board had reason to believe Kotnour did not know that he had suffered an injury, which could lead to a compensable disability until his doctor told him to report his right knee complaints to his employer. The Board’s findings were further supported by the fact that Kotnour continued to work and that the injury did not cause him to be off from work. In addition, when Kotnour sought medical care, it was unrelated to the injury to his right knee. Court held that upon the facts presented, there is substantial evidence, when viewed in light of the record as a whole, to support the Board’s finding that Kotnour had no occasion to assume, until his visit with his family physician on Dec. 3, 2007, that his right knee injury could cause a compensable disability and that under K.S.A. 44-520 just cause existed to extend the period to report the accident to the city to within 75 days after the date of the injury.

STATUTES: K.S.A. 44-501, -508, -520, -556(a); and K.S.A. 77-601, -621(c)(4), (7), (d)

WORKERS’ COMPENSATION AND STANDARD OF REVIEW
CONROW V. GLOBE ENGINEERING CO. INC. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 101,933 – MAY 28, 2010

FACTS: Beginning in 1979, Conrow worked for Globe in the “burn shop” where he used vibrating tools. After a few years he began to experience numbness in his hands and shoulders. His fingers started to hurt and tingle. Conrow continued to work for Globe until his discharge in November 2005. After that, Conrow worked at G&D Metals. Immediately following his discharge from Globe, Conrow sought workers’ compensation benefits in November 2005. Conrow claimed he suffered injury or disease due to the repetitive use of the vibrating tools. The administrative law judge agreed, holding Conrow was entitled to compensation for scheduled injuries to his left and right forearms and his left and right arms. Later, this award was affirmed by the Workers Compensation Board (Board) in 2007. But Conrow’s condition worsened. Conrow suffers from a congenital defect of his joints known as arthrogryposis. He then sought a review and modification of his workers’ compensation award. This time Conrow argued he suffers from a permanent total disability since he lost his job at G&D Metals because he was no longer physically capable of performing his assigned tasks. Further, he alleged that despite an active job search, he was never offered a job. Despite vigorous opposition by Globe, the administrative law judge concluded that Conrow was realistically unemployable “and therefore permanently and totally disabled.” The Board upheld the award finding Conrow had proved a change of condition or circumstance to the extent that a modification of his award was permitted, that he had suffered injuries to both upper extremities, which results in a presumption of permanent total disability, and Globe never rebutted this presumption of total disability.

ISSUES: (1) Workers’ compensation and (2) standard of review

HELD: Court held that substantial competent evidence supports the Board’s finding that Conrow’s testimony suggesting he was employable was outweighed by the testimony of Drs. Fluter and Hardin, in the view of the Board. Court will not reweigh that evidence and there was nothing in the record that indicated the Board disregarded any undisputed evidence. The Board’s conclusion that the greater weight of the evidence supported the presumption that Conrow was totally disabled is supported by this record and the court would not disturb the Board’s finding. Court also stated that it would not address Globe’s argument that Conrow was not entitled to permanent total disability benefits because both of his arms had not been amputated because the issue had not been raised before the Board.

STATUTES: K.S.A. 44-510(c)(2); and K.S.A. 77-621(c)(7), (d)

WORKERS’ COMPENSATION, BURDEN OF PROOF, AND PRESUMPTION OF IMPAIRMENT
WIEHE V. KISSICK CONSTRUCTION CO. ET AL.
WORKERS COMPENSATION BOARD – REVERSED
NO. 102,669 – MAY 6, 2010

FACTS: While working for Kissick, Wiehe was injured when the machine he was operating tipped over and he was ejected from the machine. Shortly after the accident, Wiehe underwent drug testing, which revealed a level of marijuana that demonstrated a conclusive presumption of impairment under K.S.A. 2009 Supp. 44-501(d)(2). The Workers Compensation Board (Board) determined, however, that the impairment exception under K.S.A. 2009 Supp. 44-501(d)(2) did not apply to relieve Kissick of liability for workers’ compensation benefits because there was not sufficient evidence to show that Wiehe had behaved “erratically” or “unusually” before the accident. Kissick and its insurance company, Builders Mutual Casualty Co., appeal from a decision by the Board to award Michael Wiehe workers’ compensation benefits.

ISSUES: (1) Workers’ compensation, (2) burden of proof, and (3) presumption of impairment

HELD: Court held that the Board erroneously interpreted and applied K.S.A. 2009 Supp. 44-501(d)(2) to impose a highly inflated, and seemingly insurmountable, burden of proof on the employer. Court stated that the evidence produced by Kissick established a
(Continued on next page)
Conclusive presumption of Wiehe’s impairment under K.S.A. 2009 Supp. 44-501(d)(2) and also showed that Wiehe’s injuries had been contributed to by his impairment, which resulted in him operating the machine in a manner that demonstrated extremely poor judgment. Under those circumstances, court held that Kissick met its burden to establish that Wiehe’s injuries were contributed to by his use of drugs and that the impairment exception under K.S.A. 2009 Supp. 44-501(d)(2) relieves Kissick of liability for workers’ compensation benefits. Court reversed the Board’s decision awarding Wiehe workers’ compensation benefits.

STATUTES: K.S.A. 44-501(d)(2), -556(a); and K.S.A. 77-621(c)(7), (d)

CRIMINAL

STATE V. ADAMS
COMANCHE DISTRICT COURT AFFIRMED
NO. 101,392 – JUNE 4, 2010

FACTS: Adams convicted of drug charges. On appeal, he claimed: (1) motion to suppress should have been granted because deputy’s search warrant affidavit overstated his knowledge of methamphetamine manufacturing process; (2) jury was given improper instruction regarding Adams’ testimony about prior drug use; (3) error to sentence for possession of lithium metal with intent to manufacture a controlled substance instead of lesser penalty provision of drug paraphernalia with intent to manufacture, and (4) error to sentence to higher sentence without proving criminal history to jury beyond a reasonable doubt.

ISSUES: (1) Search warrant affidavit, (2) testimony of prior drug use, (3) sentencing for possession of lithium metal with intent to manufacture a controlled substance, and (4) Apprendi sentencing claim

HELD: Trial court correctly denied motion to suppress. Franks v. Delaware, 438 U.S. 154 (1978), is analyzed and applied. Even without officer’s affidavit, there was a substantial basis to determine there was probable cause that methamphetamine was being manufactured at the residence. Officer’s affidavit did not contain material statements of deliberate falsehood or reckless disregard for the truth. Fact that officer used template in preparing the search warrant was not enough to constitute a material misrepresentation.

Under facts, evidence of Adams’ drug usage to prove contemporaneous crime of manufacture of drugs was permissible, and a jury instruction to that effect was appropriate. State v. Boggs, 287 Kan. 298 (2008), is factually distinguished.

K.S.A. 65-4150(c) and 21-4717(a)(1)(D) are analyzed and applied. Sentence was correct and similar to State v. Dalton, 41 Kan. App. 2d 792 (2008).


STATUTES: K.S.A. 2007 Supp. 65-4150(c), -4152, -4152(c), -4157(a)(3), -7006(a); K.S.A. 2006 Supp. 65-4152, -7006; K.S.A. 21-4171(a)(1)(D), -4721(e)(3); K.S.A. 60-455; and K.S.A. 65-4152(a)(3), -4152(c), -7006(a)

STATE V. JOHNSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 100,864 – MAY 28, 2010

FACTS: Johnson charged with DUI offenses after being stopped in DUI sobriety check point, performance on field sobriety test, and 0.084 blood-alcohol concentration. He filed motion to dismiss based on destruction of arresting officer’s field notes and failure to preserve breath sample stored in Intoxilyzer. He also filed motion to suppress claiming insufficient probable cause for breath test, and challenging Intoxilyzer test results and certification. Trial court denied both motions, and jury convicted Johnson of misdemeanor DUI. Johnson appealed.

ISSUES (1) Destruction of field notes and failure to preserve breath sample, (2) probable cause, (3) constitutionality of warrantless breath test in sobriety checkpoint, (4) admission of Intoxilyzer evidence, (5) confrontation and admission of Intoxilyzer certification evidence

HELD: Under facts, Johnson was not denied a fair trial or right to confrontation. Where testimony established the field notes were destroyed after information contained therein was fully and accurately transcribed into a narrative report, no due process violation because substantial competent evidence supports trial court’s finding of no bad faith by officers. No suggestion the destroyed breath sample was exculpatory rather than wishful thinking. Nor did Johnson request an independent test as provided by statute.

Even if video showed little impairment, officer had probable cause to arrest.

Johnson’s argument that organization of checkpoint should include access to magistrate to resolve probable cause decisions is reviewed and rejected.

Sufficient foundation was laid to admit Intoxilyzer results. Johnson’s concern over temperature of simulator solution in Intoxilyzer goes to weight of evidence, not admissibility.


STATUTES: K.S.A. 2009 Supp. 8-1001, -1001(a), -1001(b)(10), -1002(a)(3)
CASH FOR ESTATES/HEIRS that own producing oil and gas wells. Simplify probate with pre-death transfers. No interest too small. Esquire Investments LLC, Broomfield, Colo., N. Andersohn, Attorney (303) 650-6414, e-mail andersohnn@aol.com.

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AUGUST

Wednesday, August 4, 8:25 a.m. – 12:15 p.m. (Session I); 1:25 – 5:15 p.m. (Session II)
Legislative & Case Law Institute Video Replay
(Featuring the 2010 Kansas Annual Survey as seminar materials)
Kansas Law Center, Topeka

Wednesday, August 11, 9 – 10:40 a.m. and 1 – 2:40 p.m.
Brown Bag Ethics Video Replay
Featuring Chadwick Jonathan Taylor, Shawnee County District Attorney, Topeka; Everyday Ethics – Prosecutor’s Edition; and Hon. Nancy E. Parrish, Chief Judge of the District Court, Division 14, Topeka, Avoiding Ethical Violation Minefields
Kansas Law Center, Topeka

Friday, August 20, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
Featuring Chadwick Jonathan Taylor, Shawnee County District Attorney, Topeka; Everyday Ethics – Prosecutor’s Edition; and Hon. Nancy E. Parrish, Chief Judge of the District Court, Division 14, Topeka, Avoiding Ethical Violation Minefields
Kansas Law Center, Topeka

Friday, August 20, 12:30 p.m. – 4:10 p.m.
When Family Courts Collide with Special Needs Children Video Replay
Featuring David Barnum, Ph.D., clinical director and director of training at The Guidance Center, Leavenworth, and co-owner of The Family Therapy Institute Midwest, Lawrence; Betsy Nelson, Ronald W. Nelson P.A., Lenexa; and Ronald W. Nelson, Ronald W. Nelson P.A., Lenexa
Kansas Law Center, Topeka

SEPTEMBER

* Pending CLE Credit approval

Friday, September 10, 9 a.m. – 3:45 p.m.
2010 KBA Insurance Law Institute*
Kansas Law Center, Topeka

Friday, September 17, 9 a.m. – 3:45 p.m.
2010 KBA Litigation CLE*
The Oread, Lawrence

Wednesday, September 22, Noon – 1 p.m.
Kansas Gambling Law Primer*
Patrick D. Martin, Kansas Racing and Gaming Commission, Topeka
Telephone CLE

Thursday, September 23, Noon – 1 p.m.
Not-for-Profit Governance Basics*
Professor Janet Thompson Jackson, Washburn University School of Law, Topeka
Telephone CLE

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