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<td>Charles E. Branson</td>
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<td><a href="mailto:cbranson@douglas-county.com">cbranson@douglas-county.com</a></td>
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Our Mission

The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
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Dude!! Down on the Field!

By Matthew Keenan

Cover design by Ryan Purcell
rpurcell@ksbar.org
In case you haven’t noticed, we are in the midst of an election year. Then again, in the United States, isn’t it always an election year?

In the not so distant past, I was invited to address a leadership class of approximately 25 high school seniors. I was asked to speak about the importance of the courts in our constitutional system. My address was to take place in the fall and there was to be an election in November of that year. Knowing this, I decided to take a different approach in talking about government. I posed the following question to the group: “How many of you are 18 years old?” Almost every hand went up. Next I asked, “Of those of you with your hands raised, keep them up if you believe 18 year olds should have the right to drink alcohol.” Not surprisingly, all the hands stayed up. My final question was, “Keep your hand raised if you are registered to vote.” All the hands went down but one.

I concluded with the following: “Now, can anybody explain to me why 18 year olds do not have the right to drink alcohol?”

This illustrated some of the apathy that exists among our youth but it also made me wonder about the voting habits of young people on a national level. In the 2008 election, 25,791,000 people between the ages of 18 and 24 were eligible to register to vote. Of that number, 59 percent registered and only 49 percent voted. Conversely, in the 65 to 74 age bracket, 78 percent registered and 72 percent voted.

It might not be obvious what these statistics have to do with lawyers and why they are being discussed in the Journal. KBA staff were asked to compile statistics on past elections for KBA Board of Governors officers and members. In the last contested election for an executive office in the KBA, out of the 6,092 possible ballots, only 1,495 votes were cast; this is only a 25 percent turnout. In the last two district governor elections, 41 percent and 43 percent of the total eligible ballots were submitted. There are no statistics that could be found to show the number of votes cast in general elections for public office based upon occupation, but the KBA numbers reflect that when it comes to participation in our own association, lawyers do worse than the youth of this nation in voting in general elections.

J.B. Priestly once said, “Like its politicians and its wars, society has the teenagers it deserves.” It is easy to level criticism at the youth of this nation for their lack of involvement in the political process. However, before we point the finger, we may want to take a closer look at our own performance at the polls. I encourage each of you to make a special commitment this year to become more involved in the electoral process. We face important issues involving the funding of the courts and selection of judges. We need to be leaders and set an example for our youth to demonstrate the importance of becoming involved politically. Make sure you are registered to vote and that you vote.

Take the time to volunteer to speak at your local high schools, community colleges, or universities about the importance of voting and at the same time, put in a nice plug for our court system. And finally, take the time to acquaint yourself with the candidates for KBA offices and vote.

I leave you with the words of Sen. Sam J. Ervin, a statesman who proudly called himself “a country lawyer”: “If men and women of capacity refuse to take part in politics and government, they condemn themselves, as well as the people, to the punishment of living under bad government.”

Glenn Braun may be reached by e-mail at grbraun@haysamerica.com, by phone at (785) 625-6919, or post a note on our Facebook page at www.facebook.com/ksbar.
Every year, the executive committee of the Kansas Bar Association’s Board of Governors takes a retreat to discuss ideas and plan for the upcoming bar year. The Young Lawyers Section is fortunate to have a representative on the executive board. In May, Glenn Braun, the KBA president, hosted the retreat in Hays, where he practices as a partner at Glassman, Bird, Braun & Schwartz LLP.

President Braun began the retreat by talking about his “theme” for his year as president, which is “Promoting Lawyers.” He talked with the board about the importance of lawyers getting out and doing service work in their communities, and making the traditionally bad word of “lawyer” into a good image. Everyone knows someone who has a bad image of attorneys, in spite of our duty to be responsible for the quality of justice and zealously represent our clients. “The lawyers I know are the leaders in their communities. They serve on charitable, religious, and civic boards. They speak out against injustices and have the courage to stand for what is right even when opposed by the majority,” says Braun. “If you know of lawyers that fit this description and deserve recognition for their service outside of the practice of law, inform the KBA so that we might promote their accomplishments and improve the image of our profession.”

I would like to encourage attorneys across the state to promote the image of lawyers and expand on it. In this bar year for the Young Lawyers Section, I plan to promote our section with the theme of “Promoting Lawyers, Promoting Kansas and Pro Bono.”

When I started thinking about the theme for this bar year, I thought about how it could be incorporated to get young lawyers involved with the bigger bar. I agree with the concept of getting attorneys out in the community and demonstrating to the public that lawyers are good people who do good things. So there’s step 1, promoting lawyers across the state.

Next, I would like to promote Kansas to lawyer communities across the country. I have been fortunate to attend conferences of the American Bar Association and meet young lawyers in similar organizations from other states. Kansas has traditionally had a small bar association, since membership is not mandatory like many states. Recently, the YLS has gained national attention at these ABA meetings with the programming and activities we have implemented. In particular, the YLS won the first place national award from the ABA Young Lawyers Division for newsletter project in a category with other young lawyer organizations with a similar budget in 2009 and 2010. At the 2010 ABA Annual Meeting held last month in San Francisco, Kansas had the opportunity to shine with a panel presentation of our implementation of the ABA YLD’s public service project, “They Had a Dream Too.” The KBA YLS was selected to present this to other young lawyers from across the country because of the success we had implementing the program, and teach others how to develop programs of similar scope to their communities.

Finally, my goal is to implement a successful pro bono project for this upcoming bar year. It is vital to our profession that we give back our services for the public good. Pro bono allows you to use your specialized skills to help indigent clients who might not otherwise have access to the legal system and presents legal opportunities that you may not experience in your daily practice. This year, the ABA YLD is initiating a national pro bono public service project entitled “Serving Our Seniors,” which encourages attorneys to provide basic estate planning to low-income seniors. The project targets a population that does not have advanced directives, living wills, and the like. I plan to take this project to the KBA YLS and persuade young lawyers in the state to participate, and encourage senior bar members to join in not only by participating in the service project, but also by allowing your junior associates the opportunity to take some time out of billable hours to do important pro bono work.

I hope each of you will join me in “Promoting Lawyers, Promoting Kansas and Pro Bono” for this bar year. I would love to hear stories of you getting out and doing community service, any national attention Kansas gets in the legal field, and any pro bono work you’ve done for Kansans, so be sure to call or e-mail me with any stories! If you are interested in learning more about “Serving Our Seniors,” please contact me for more information.

About the Author

Melissa R. Doeblin is a 2005 graduate of Washburn University School of Law and received a certificate in natural resources law. She currently serves as advisory counsel for the Kansas Corporation Commission in Topeka.
The Robert K. Weary Award

The Robert K. Weary Award recognizes “lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.” This award was given for the first time in 2000 by the Board of Trustees of the Kansas Bar Foundation.

Despite Robert Weary’s objection, the KBF Board of Trustees selected Weary as its initial recipient of the award in recognition of his decades of service to his community, the Kansas Bar Foundation, and the legal profession in Kansas. Weary was a member of the KBF’s Board of Trustees from 1994 – 2000 and served on the KBF Investment Committee. In 1997, he donated the lead gift toward the Kansas Law Center building campaign. Weary passed away in early 2001 and his counsel to the Kansas Bar Foundation is missed, but his legacy lives on.

The 2002 Robert K. Weary Award was given to Frank C. Norton, to Justice Robert L. Gernon in 2005, to Mikel L. Stout in 2006, the prestigious award was presented posthumously to Daniel J. “Dan” Sevart in 2007, to Judge Wesley Brown in 2008, to Constance M. Achterberg in 2009, and in 2010, Jack E. Dalton was unanimously chosen by the Board of Trustees to receive the award.

The 2010 Robert K. Weary Award was awarded to Jack Dalton at the Kansas Bar Foundation’s Fellows Dinner on Thursday, June 10 at the Petroleum Club in Wichita. Receiving the award on Dalton’s behalf was David J. Rebein.

Jack Dalton graduated from Sedan High School in 1946 and then served in the U.S. Army in the occupation of Korea. Upon discharge, he earned his bachelor’s degree from Baker University in 1950 and then entered the University of Kansas School of Law, graduating in 1953. Dalton then went into private practice in Jetmore for 12 years. Dalton now resides in Dodge City, where he has practiced for 28 years. He was the first attorney in Kansas to appear in a Kansas court where in-court photography was allowed.

Dalton has been a member of the Kansas Bar Association since 1953 and served as KBA president in 1976-1977. He was honored by the KBA in 1983 for “continuous, long-standing service on behalf of the legal profession, the public and the association.” Dalton also served as the Kansas Bar Foundation president from 1985-1986.

When Dalton wasn’t practicing law he was either scuba diving or planning the next scuba diving trip. In later years, Dalton added another hobby as a writer. Jack Dalton’s latest novel, “A Country Lawyer” is a story of a young attorney in western Kansas who also has a great love of scuba diving. A friend read it, and said, “I can’t tell what’s true in it and what isn’t.” Dalton admits it’s both a novel and an autobiography.

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Jack Dalton is a Fellow Gold of the KBF and has received KBA awards, including the Outstanding Service Award in 1989 and the Distinguished Service Award in 1990. ■
Diversity and the White Male Attorney

By Bob Hiller, Kansas Health Policy Authority, Topeka, bob.hiller@khpa.ks.gov

Bob, you are a white, male attorney who has been around quite awhile. Have you noticed more diversity in the past few decades?

Well, yes, quite a bit. I graduated from KU Law School in 1972. All three years were in Old Green Hall. We had only about two or three women in our graduating class. And about the same number of black males. No black females, however.

Why is diversity important to lawyers today?

It has been said – by those smarter than me – that hiring employees with diversity in mind can help promote creativity and energy in the workplace. In order to promote the success of any organization, it’s often beneficial to have employees from different backgrounds, races, genders, and age groups.

What about the so-called “bottom line”?

While it has been said that diversity is the “politically correct” thing to do, many times we find out that it is also the smart thing to do financially. Looking at organizations that rank high in terms of diversity, we see they tend to outperform other organizations. This can just as easily apply to law firms as well.

How can this work on a daily basis?

I am one of several attorneys in a working group, and the people that we serve and work with are diverse. We are trying to create a friendly and enthusiastic environment because we believe there is strength through diversity. Having individuals that represent a variety of different backgrounds makes us stronger. Having younger people mixing with those who are older, for instance, promotes an energy that is not found when everyone is close to the same age.

How does a white male keep up with, and promote, diversity issues?

Well, in order to keep up the pace in a fast-moving world, white males cannot afford to hang out only with other white males on a 24/7 basis. The days of the all-white male Kiwanis or Optimist Club are over. How can anyone learn anything by talking to his mirror image all day long? It simply does not compute, as they say. Make every day count.

What else is important?

Take time to smell the roses or the scent of fresh air, help someone else who is much older or much younger, travel to a new place, meditate, take a walk, grow a beard, tell stories, get romantic, be a mentor, post cartoons on a bulletin board, shave your head, listen more, play the harmonica, sing, read poetry, tune out negative people, bloom where you are planted or someplace totally different, or just consider how you would like to be remembered when you are gone. Life is short, as they say. Make every day count.

About the author

Robert R. “Bob” Hiller Jr., Kansas Health Policy Authority, Topeka, is from the Chicago area, where he received his Bachelor of Arts in political science at Northwestern University in 1969. He then received his juris doctor from the University of Kansas School of Law in 1972. He has practiced with Kansas Legal Services; the Legal Aid and Defender Society of Kansas City, Mo.; Social and Rehabilitation Services, Wichita and Topeka; and the Federal Deposit Insurance Corp. Hiller is the past chairperson of the KBA Membership Committee and currently serves on the Diversity Committee.
June 30 is the end of the fiscal year for many governments, and it has become a custom of sorts for state lawyer assistance programs to issue an Annual Report in July. So here is an abbreviated version of ours.

When I staffed the Kansas Lawyers Assistance Program (KALAP) exhibit at the Kansas Bar Association (KBA) Annual Meeting, I talked with a lot of Kansas lawyers. Not surprisingly, they said, “I don’t need your services right now,” and that got me to thinking. According to statistics, most lawyers DON’T need KALAP. But for the ones who do, we’re here.

Most statistics cite an alcoholism rate of about 10 percent in the general population and about double for lawyers. The rate of depression in lawyers may be more than double the rate in the general population. But still – roughly 80 percent of Kansas lawyers do not need KALAP services for themselves. That doesn’t mean, however, they aren’t impacted by another lawyer’s impairment. We all are, at least in a general way and many of us are directly affected by a colleague’s impairment.

KALAP is financed by lawyers for lawyers; our budget is funded from attorney registration fees. So you should know how it is used to serve the legal profession. We get many calls from or about attorneys, and not all of them result in an actual open file, but we have 38 new files in the 12-month period from July 1, 2009, through June 30, 2010. We currently have more than 225 open files. Almost one-half of the cases originate in our urban areas of Johnson, Wyandotte, Shawnee, and Sedgwick counties. Close to half are sole practitioners. Males outnumber females 72 percent to 28 percent. Almost one-half of the lawyers we work with are dealing with alcohol dependence, but more are actually dealing with stress and/or depression. And there are several cases in which age-related disabilities are a factor.

Recently, staff in attorney admissions have referred bar applicants for formal monitoring, or law schools have referred students. We have worked with 11 students or applicants in the last year. Also, disciplinary administrator staff have issued referrals to KALAP in some diversion agreements, and five such cases are open now. Formal monitoring involves an actual contract between the applicant or attorney and an attorney volunteer with KALAP. The contract will always include some type of regular meeting and may include a requirement for on-going treatment for substance abuse or mental health issues. On occasion, we request random drug and alcohol screens because we need to document compliance with the terms of the contract. We appreciate the excellent working relationship with the admissions and disciplinary staff – they alert us when it appears a lawyer might need assistance and fully understand that the communication is only one way.

More than 140 attorneys are KALAP volunteers; but we need more, particularly in the outlying areas. Many are in recovery but that is not a requirement – a lot are just generous with their time and desire to help other lawyers. They are the true foundation of KALAP work. KALAP efforts are not effective in every case, but there are a lot of success stories due to the efforts of the volunteers. You won’t hear the details of those though, because of confidentiality.

The KBA is very supportive of KALAP’s mission. When KALAP presented its first CLE and training for volunteers this past April, the KBA graciously offered the use of the Law Center. They include a KALAP exhibit at many of the KBA functions, and we enjoy the opportunity to write this column regularly for the Journal.

The April program was not the only CLE event presented by KALAP staff during the past year. KALAP presentations are always free and usually approved for ethics credit. Board members and I have participated in presentations to several local bar associations. Another service inaugurated in 2009 was the Resiliency Group. This is a discussion group solely for lawyers, held twice a month at a law office in Ovlerland Park; a second such group will begin in Topeka on September 17. We are exploring ways to set up a confidential online discussion group for any attorney in Kansas because having face to face meetings isn’t always possible for lawyers in small towns. We have a website: www.kalap.com; e-mail: kalap@kscourts.org; and a Facebook page: Kansas Lawyers Assistance Program.

In one way or another, we work every day to serve the lawyers of Kansas – a great group of people.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.
Not too long ago, things were a lot different with KU’s athletics. Our football coach, for instance, was known the world over. An inspiration to T-shirt designers everywhere, he was, let’s face it, huge. There was another thing about him that was more important to season ticket holders like me — he won games, which included beating Nebraska and then Virginia Tech in the Orange Bowl.

There were other things about KU back then, too. The Big 12 didn’t have trouble counting, for one.

And so, perhaps, three years ago KU was experiencing a zenith no one quite appreciated at the time. And on Saturday home games, I was there. It was a typical early fall Saturday on the hill. KU was playing a directional school. And it was a game like most, except this was Band Day.

With me were Keenan dudes #2 and #3. Our seats were the product of a points system that allowed us to see the Colorado Rockies and the Gulf of Mexico in one sitting, and our vista included the field below, which was great, so long as you enjoyed watching ants with tiny helmets.

And there we were. And at halftime it happened. I can’t forget it, try as I might. Halftime for Band Day is generally not the kind of thing that keeps the fans in their seats. And, curiously, my kids — who normally head to the concession stand to stand in a two-hour line — were still at my side. They were fixated at something happening on the field. They were laughing, pointing. This was more entertainment than they experienced the entire game. They were actually paying attention to something on the field. The bands, no less. Or so I thought.

“Look at that funny man on the field. He’s going crazy!”

Sure enough, someone was on the field with the alumni band. But he had no instrument. He was tossing around a baton.

I remembered that I had brought my binoculars. I drew a focus. I saw a man who appeared to have OD’d on Red Bull. Forget marching to your own drummer. This guy was marching to some beat Bob Marley couldn’t replicate. His silver hair was aflight. Think Christopher Lloyd from “Back to the Future” gone insane. High-stepping, marching right, left, toss, catch, toss, catch.

By now the collective eyes of everyone in the stadium were locked on him. But the longer I looked, the more he took on a familiar appearance. And then it hit me, and I blurted out: “I think I know him. I know I know him.”

In a second, the entire section 24 turned to me. This declaration was akin to me claiming allegiance to Tom Osborne or the Big Ten. “Wait. He’s not a mental patient. I swear. He’s normal.” The circle around me tightened. “I mean – pretty normal.” The crowd tightened more. “OK, he’s got issues. But he’s cool. He’s from my hometown!” The glares continued. “His name is Opie. Glenn Opie.” I then pointed to the field – “and now look what he’s doing!” Their eyes quickly shot down below.

By now Opie had left the turf, now he was marching across the sidelines, heading to an unknown destination; perhaps joining Mangino for the halftime buffet. All the while, his baton — right on the mark. I went back to the binos and, with the other hand, reached for my cell phone. I dialed a number. “Hey dad, Glen Opie is marching on the field at Memorial Stadium!” None of this shocked Larry. “Sure,” he said. “In KU Law School he was in the band. Quite a story.” I then grabbed my camera and took a few photos.

When I hung up, Opie had left the field; but he wasn’t close to being finished. He was doing his work near section 3. Flawless, considering the rest of the band was three zip codes separated from him.

And 12 months later, there we were, at Memorial Stadium, and like clockwork, my kids said, “That man is back!” Indeed. And with some spadework, I since learned that Opie, while a student at KU Law in 1954, was called into Dean Moreau’s office and asked to serve as the KU drum major. Apparently Opie’s reputation in the same capacity while an undergrad at Northwestern University made its way to Mount Oread. Whether Moreau appreciated that Opie’s talents would be used to keep hyperactive teenagers occupied at halftime, some 56 years later, seems improbable.

So here’s hoping that the calamities that struck the athletic department this year haven’t impacted one baton tosser. On September 26, this year’s Band Day, Glenn Opie — you’re free to move about the stadium. [We’ve alerted sections 1 through 26.] ■

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Offering Unexpected Lessons Through a Joint-Degree Program

By Erin DeKoster, University of Kansas School of Law

It was in the back row of my required media law course during my junior year of college that I realized I wanted to go to law school. While learning journalism theory intrigued me, being a journalist never did. What did intrigue me was the way journalism interacted with the law. I decided then my law school choice had to coincide with my new goal of pursuing media law. The University of Kansas’ joint law and journalism program was going to be the perfect fit for my future career—and it has been, but in a very different way than what I originally envisioned.

Those who know me well, and even those that don’t, know that I don’t always have positive things to say about my choice to pursue a master’s in news and information in addition to my JD. Why the negativity? Well first there’s the extra year spent borrowing more money than I care to even think about. There’s also the fact that most everyone I have grown close to, in both programs, have already graduated. And there’s the fact that I have to trek up steep hills to the Journalism building in frigid cold, extreme humidity, rain and snow (honestly, that part is the worst). It’s also because I know I am meant to be an attorney, even if not in the field of media law, and my master’s degree may never be relevant to the work I do.

But when I find myself questioning my decision, I remind myself of all that I have gained, and I am reassured that the positives far outweigh the negatives. Originally, I knew I would learn some journalism theory and be required to write a thesis. And when that thesis was still three years in the future it sounded like a fantastic experience (and while it horrifies me as it stares me in the face, in one year’s time, I’ll again think it’s a fantastic experience). But there are many things I have learned outside of the required curriculum that surprised me. For the sake of brevity, I will only mention two, but I can assure you that they have all added to the lawyer I will someday be.

First up was a lesson in humility. After surviving the rigors of my first year of law school, I figured nothing the J-School threw at me would be difficult. Imagine my arrogance when I was told I had to take a sophomore-level undergraduate class in grammar and basic writing—and for no credit no less! Despite my undergraduate degree in journalism and mass communication, the master’s program required this basic skills course, and only taking the same course at a different university would waive the requirement.

“I already have a degree in journalism; I’ve finished a year of law school. How can they expect me to sit next to 19 year olds at 8 a.m. and take weekly quizzes on spelling, current events, and the proper use of which and that?” I was floored and annoyed, especially since my senior year in college I dropped the class that would have passed me out of this painful pre-requisite.

I was humbled by how much work it took to deserve an “A” in that class and how not only my graduate writing improved but my legal writing too. I learned more effective ways to make a point, and I finally learned how to spell the word “definitely” without the help of spell check. Yes, that’s embarrassing, but it’s also very true. On a related note, I am proudly no longer dependent on Microsoft Word’s squiggly green line that indicates poor sentence structure. It is all thanks to those early mornings sitting among 19-year-old college sophomores who may, or may not, have been asleep.

Even more so than in my legal education, I am forced to reach out to people I have never met and ask them for major favors. For example, I wrote a seminar paper about campus newspaper policies on naming rape victims. This required cold-calling people all over the country and asking them probing questions about very sensitive events. It took the courage and professionalism I always knew I had but had never been forced to use. This experience developed a skill I will continually channel in my future as an attorney.

What was almost as challenging was walking into a group of approximately 20 other master’s students. My first year in the J-School I only took three credits each semester while the rest of my classmates were taking many more and were typically all in the same class. Initially, it was like walking into a 1L. small section as a nameless outsider (actually, I think they named me “that girl who’s also in law school”). Everyone knew each other, everyone hung out, and no one knew who I was. I had to make a choice. I could either take the easy route and make my way through the master’s program as the nameless law student, or I could be Erin DeKoster, the girl who likes to read, laugh, and has a love-hate relationship with running. I made the choice early on that I was going to put myself out there and break into the J-School “clique.”

Looking back, I’m so happy I made the second choice. I made, and continue to make, incredible connections with incredible people. It’s a choice I will make from here on out. Never again will I fear walking into a close-knit group as an outsider because I know with a little spunk I can break through. The J-School helped me realize that being an outsider is nothing to fear, for it can easily be remedied.

While I may never practice a day of media law in my life, it does not make my journalism experience any less valuable. Without it, I would not have realized my full potential. Without it, I may have walked across the stage in three years with a little less debt but I would have walked across that stage a little less comfortable with who I was. My joint-degree education is much more than an extra diploma on my office wall—it is an added chance to grow into the lawyer I am meant to become.

About the Author

Erin DeKoster is entering her final year at the University of Kansas School of Law and School of Journalism and Mass Communications. She grew up in Waterloo, Iowa, and graduated from Iowa State University with a Bachelor of Science in journalism and mass communication with minors in history and English. DeKoster is a publications editor for the Kansas Journal of Law & Public Policy and spent the summer with Hite, Fanning & Honeyman LLP in Wichita.
“You be the Judge” Goes to Washington, D.C.

By Hon. G. Joseph Pierron, Kansas Court of Appeals, Topeka, pierronj@kscourts.org

Since 1996 Kansas judges and lawyers have been presenting the KBA public education program, “You be the Judge — The U.S. Supreme Court in Review,” to Kansas students and community groups. After more than 400 presentations to 50,000 Kansans, the program went national with its presentation to the American Legion Auxiliary Girls Nation on July 18, 2010, at the 4-H National Convocation Center in Chevy Chase, Md. The program, which was developed by then – Kansas Court of Appeals Judges Robert Gernon, and Kay Royce and current Court of Appeals Judge Joe Pierron, is highly interactive and aims at teaching people about the judicial system of the United States and encouraging students and adults to view important issues from the standpoint of being decided by an independent judiciary that relies on the rule of law to make its decisions.

Girls Nation and Boys Nation are sponsored by the American Legion Auxiliary and the American Legion, respectively. Boys Nation, since 1946, and Girls Nation, since 1947, have brought student delegates together to receive an education in the structure and function of our government. Now representing 49 states, the students, who have completed their junior year in high school, spend a week learning about how our national government works. Girls Nation decided to expand its curriculum this year by inviting a presentation of “You be the Judge” to their students to educate them more in depth about how the U.S. judiciary works. The 98 delegates and the staff members were enthusiastic about the interactive program, even to the extent of delaying their lunch to give more of them the opportunity to enter into the discussion of the Fourth Amendment issues that were the focus of the program.

Pierron, who presented the program, noted that “You be the Judge” has been presented for the last 14 years at Kansas Boys State and Girls State and has always been well received. The program is also presented through the Kansas Humanities Council to adult groups.

About the Author
Hon. G. Joseph Pierron graduated from Rockhurst College of Kansas City, Missouri, in 1968 and the University of Kansas School of Law in 1971. Prior to his appointment to the Court of Appeals in 1990, he served as a district judge in Olathe from 1982. Before that he was an assistant county and district attorney in Johnson County from 1971. He also served as municipal judge of Spring Hill in 1972. Pierron served as president of the Kansas committee for the Prevention of Child Abuse and on the board of directors of the Kansas Children’s Service League. He currently serves on the Kansas Bar Association Law-Related Education committee and is a member of the American Bar Association Judicial Administration and Alternative Dispute Resolution sections. He is presently chair of Kids Voting Kansas, founded by former Gov. Bill Graves and Secretary of State Ron Thornburgh.

Gihani Dissanayake, of Lenexa, and Yuqi Hou, of Manhattan, the Kansas delegates to the 2010 American Legion Auxiliary Girls Nation, served as U.S. Supreme Court marshals during the presentation of “You be the Judge – The U.S. Supreme Court in Review” by Judge Joe Pierron on July 18.

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For online information and registration, go to our website at www.ksbar.org/public/cle.shtml
Support the Future Lawyers of Kansas

By Jenny Michaels, Parker & Hay LLP, Topeka, jmichaels@parkerhaylaw.com

As a Kansas lawyer, you likely volunteer your time and resources to clients in need, serve on committees and boards, and participate in community organizations and events. The contributions you make are valued by those you help and your efforts maintain the legal profession’s commitment to community and service.

As the pro bono/mock trial liaison for the Young Lawyers Section (YLS) Executive Board, I encourage you to expand your volunteerism and promote the Kansas Bar Association YLS Mock Trial Competition, presented by Shook Hardy, & Bacon LLP. No matter the size or location of your firm, you can help!

Mock trial is a one-of-a-kind program that offers high school students the opportunity to test-drive the legal profession in a practical and fun way. Few other high school activities allow students to actually experience a vocation first-hand.

Here is how the program works. Each year, high school students analyze and present a civil or criminal case before a panel of “judges” using modified rules of evidence. High schools across Kansas are allowed as many teams of at least six students as they can fill with interested students. Each team gets a copy of the case, which they analyze and use to create their own trial strategy. Each team has three mock attorneys who present opening and closing arguments and three mock witnesses that are subject to direct- and cross-examination by the mock attorneys.

In the early spring, all of the teams will compete at one of two regional tournaments in Olathe and Wichita and six teams compete at the state tournament in Olathe. The top Kansas team will then compete at the 2011 National High School Mock Trial Championship in Phoenix.

Students develop skills in analyzing, public speaking, drama, and debate. The program encourages teamwork and camaraderie, which are skills real-life attorneys use every day. The goal of mock trial is to inspire future advocates and informed young citizens who will drive our economy and judicial system. Mock trial promotes genuine interest in the legal profession and creates compassionate and skilled lawyers.

The Kansas high school mock trial program has been a tremendous success in the past. Thanks to the hard work of Danny Back, the 2009-2010 YLS mock trial liaison and now the 2010-2011 YLS secretary/treasurer, more than 20 Kansas high schools and more than 150 students competed in the 2010 two regional tournaments.

The YLS wants to continue the success of the Kansas high school mock trial program, but we need your help. The best part about mock trial is that lawyers like you all across the state can get involved as much or as little as your interest and schedule permits. As a lawyer, you have a thorough understanding of the judicial process and, most likely, desire a strong legal profession locally and statewide. Your help will go a long way in encouraging students to learn more about becoming a lawyer. Here are a few of the ways I encourage you to get involved:

• Coach an existing team at your local high school or volunteer to create a new team;
• Commit a couple of hours to judge the regional and/or state tournaments;
• Volunteer to answer questions for students at your local high school during a class or practice;
• Encourage high school students you know to ask if their school has a mock trial team, and if not, to start one!

Many high schools in Kansas have mock trial teams, but there are still many schools that do not participate in the program. The goal of the YLS is to create a third regional tournament in western Kansas by spring 2012. If you are a lawyer in the western part of the state, your support will go a long way toward helping reach that goal.

Mock trial does not just benefit students. By volunteering, you will create contacts with other attorneys and judges in your area, meet local high school students, administrators, and teachers and, for those attorneys in rural areas, meet future lawyers with ties to your community.

The best way for you to promote the legal field is to share it with the future lawyers of Kansas. A small amount of time for you will create a lasting and meaningful impression on the high school students you support.

If you are interested in supporting the high school mock trial program in Kansas, please contact me, Jenny Michaels, by e-mail at jmichaels@parkerhaylaw.com or by phone at (785) 228-5736. I am happy to provide you with more information, answer questions, connect you with your local mock trial program or help your local high school create its own team.

About the Author

Jenny Michaels graduated from Washburn University School of Law in May 2009 and is an associate attorney at Parker & Hay LLP in Topeka. She is the YLS mock trial/pro bono liaison for 2010-2011.
Members in the News

CHANGING POSITIONS

Jerome Vincent Bales has joined Douthit Frets Rouse Gentile & Rhodes LLC, Kansas City, Mo.
Kara S. Bemboom has joined the Federal Reserve Bank of Kansas City as a staff attorney.
Jon E. Bunten has joined Dairy Farmers of America Inc., Kansas City, Mo.
Wade M. Carter has joined Allen andSweetLaw Office, Minneapolis.
Alan R. Clever has joined the Kansas City, Mo., Regional Office of the Federal Deposit Insurance Corp., as senior regional attorney.
Jennifer L. Dahlstrom has joined Swenson, Brewer & Long Chtd., Concordia.
Jody R. Gondring has joined Hennessy and Boe P.A., Mission.
Amanda R. Haas and Jonathan A. Schlatter joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita, as summer law clerks.
Charles J. Hannagan has joined DST Systems Inc., Kansas City, Mo.
Robin L. Hathaway has joined the U.S. Attorney’s Office, Wichita.
J. Todd Hiatt has joined the Shawnee County District Attorney’s Office, Topeka.
Katherine A. Jeter-Boldt has joined Commercial Law Group P.A., Leawood.
Scottie S. Kleypas has joined Robert A. Kumin P.C., Overland Park, as an associate.
Charles E. Reis IV has joined Littler Mendelson P.C., St. Louis.
Elizabeth D. Rogers has joined Manson & Karbank, Overland Park.
Rachel E. Rolf has joined the University of Kansas, Lawrence, as assistant general counsel.
Michelle R. Stewart has joined Hinkle Elkouri Law Firm LLC, Overland Park.
Sarah Toevs Sullivan has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as a partner.
Jennifer W. Svancara has joined the Law Offices of Donald B. Balfour, Overland Park.
Katherine L. Walker has joined Commercial Development & Management LLC, Bonner Springs.
David J. Welder has joined Norris & Keplinger LLC, Overland Park.
Cheryl L. Whelan has joined the Kansas State Department of Education, Topeka.
Marc S. Wilson, Overland Park, has been named the Kansas securities commissioner by Gov. Mark Parkinson.
Matthew D. Wright has joined Koch Chemical Technology Group LLC, Wichita.

CHANGING LOCATIONS

Lance W. Behnke has moved to 701 Fifth Ave., Ste. 6200, Seattle, WA 98104.
Donna L. Huffman has started Law Office of Donna Huffman LLC, PO Box 1, Oskaloosa, KS 66066.
Jennifer R. Johnson has moved to 10801 Mastin Blvd., Ste. 420, Overland Park, KS 66210.
Eric J. Kidwell has moved his office to 225 N. Market, Ste. 100, Wichita, KS 67202.
Jamie B. Landes has moved to 211 NW Executive Way, Ste. J, Lee’s Summit, MO 64063.
Terry L. Lawson Jr. has started Lawson Law Center LLC, 700 E. 8th St., #700, Kansas City, Mo. 64106.
Brant A. McCoy has started McCoy Law Firm LLC, 130 N. Cherry St., Ste. 103, Olathe, KS 66061.
Mustoe Law Firm LLC has moved to US Bank Building, Ste. 260, 5100 W. 95th St, Prairie Village, KS 66207.
Paul M. O’Hanlon has moved to 4601 College Blvd., Ste. 280, Leawood, KS 66211.
Aaron J. Racine has moved to 1411 E. 104th St., Ste. 100, Kansas City, MO 64131.
Brian F. Stayton has started Stayton Law Group P.A., 4365 Lynx Paw Trail, Vallrco, FL 33596.

MISCELLANEOUS

Daniel J. Buller and Lindsey Smith have joined Foulston Siefkin LLP, Wichita, as summer clerks.
Eric Dekoster has joined Hite, Fanning & Honeyman LLP, Wichita, as a summer law clerk.
Timothy R. Emeret, Independence, has been appointed to the Kansas Board of Regents by Gov. Mark Parkinson.
Michael H. Haas, Hoxie, has been admitted to U.S. Supreme Court in a swearing-in ceremony held in Washington, D.C.
Marilyn M. Harp, Topeka, received the Distinguished Alumni Award from the University of Kansas School of Law.
Amanda R. Haas and Jonathan A. Schlatter joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita, as summer law clerks.
Kammie Herrick-Dillner, Topeka, has received the CALI Excellence for the Future Awards from Washburn University School of Law’s Administrative Law and Taxation of Gratuities Transfers, Estates, and Trusts classes.

Winton M. Hinkle, Wichita, has been named president of the Washburn University School of Law Alumni Association from 2010 to 2012.
David H. Moses, Wichita, has been appointed to the Washburn University Board of Regents by Gov. Mark Parkinson.
David J. Rebein, Dodge City, was recently inducted into the International Academy of Trial Lawyers.
Jon E. Newman, Wichita, is the 2010-11 president of the Wichita Bar Association and Jay F. Fowler is president-elect; Sharon L. Dickgrafe, vice president; and Jennifer L. Magana, secretary-treasurer. Board of Governors members include: Hugh W. Gill IV, Jennifer M. Hill, Michael G. Jones, Kent A. Meyerhoff, John E. Rapp, and F. James Robinson Jr.
The 2010-11 Wichita Bar Association Young Lawyers' officers are: Brooks G. Kancel, president; Rachel E. Avey, treasurer; Krystle M.S. Dallek, secretary; Alene D. Aguilera and Adam R. Burrus, social chairs.

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

Douglas Mickelsen Beck
Douglas Mickelsen Beck, 57, of Lee’s Summit, Mo., died July 4 after a five-year battle with cancer. He was born March 16, 1953, in Salt Lake City to Russell R. and Maxine Mickelsen Beck. He grew up in Murray, Utah, earned his Eagle Scout Award, and graduated from Murray High School. Beck attended Brigham Young University, receiving his bachelor’s and master’s degrees in accounting and his juris doctorate. Beck worked as an attorney for Swanson Midgley LLC and was a member of the American and Kansas bar associations. He was also a member of the J. Reuben Clark Society.

He is survived by his wife, Sandra, of the home; five children, Stephenson, of Fargo, N.D., Heidi, of Birmingham, Ala., David, of Provo, Utah, Heather, of Las Vegas, and Mark, of Rexburg, Idaho; two brothers, Bruce, of Sandy, Utah, and Ray, of Murray, Utah; and four grandchildren.

Karl Victor Shawver
Karl Victor Shawver, 89, of Olathe, died June 10 at Cedar Lake Village. He was born September 18, 1920, in Paola to Ella Horton and Karl Victor Shawver Sr. He graduated from Paola High School in 1937 and went on to graduate with a bachelor’s degree from the University of Kansas in 1941, where he was a member of the Phi Gamma Delta fraternity.

He entered into law school at KU in 1942 and was admitted to the Kansas Bar before enlisting in the Marine Corps. After serving two years of active duty in the South Pacific, Shawver served as a captain in the Marine Corps Reserve in La Jolla, Calif., until being honorably discharged in 1949. He returned to Paola, where he was an attorney for more than 50 years.

Shawver is survived by his wife of 65 years, Jane Shawver, of the home; three children, Sandy Janssen, of Kearney, Neb., Gail Frapolli, of St. Louis, and Steve Shawver, of Mequon, Wis.; a sister, Betty Reitz, of Eudora; five grandchildren; and a great-granddaughter.

J. Richard Showalter II
J. Richard Showalter II, 63, of Topeka, died July 27 at Midland Hospice House. He was born April 21, 1947, in Meyersdale, Penn., to John R. “Dick” and Betty Stark Showalter. He graduated from Salisbury (Penn.) Elklick High School in 1965 and received his bachelor’s degree in psychology from Thomas Edison State College in Trenton, N.J., in 1988 and his juris doctorate from Washburn University School of Law in 1990.

Prior to his law career, he worked in the insurance industry. He opened his Topeka law practice in 1990 and was a member of the Kansas and American bar associations. He was also a member of the Topeka Arab Temple, Provst Guard, and the Meyersdale Lodge No. 554, Meyersdale, Pa.

He is survived by his wife, Lynn Heiligenthal-Showalter, of Topeka; his mother, Betty S. Showalter; two brothers, Michael Showalter, of Salisbury, Penn., and Brad Showalter, of Aubrey, Texas; and a sister, Pam Baer, of Salisbury, Penn. He was preceded in death by his father, Dick Showalter.

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Law Practice Management Tips & Tricks

Proposed CLE Rule Changes – Law Practice Management

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ks/lpm@larryzimmerman.com

I should disclose that I have been having an affair – with another bar association. It started with a few passing glances at an ABA conference in Chicago that blossomed into a series of e-mails. In June, the Oklahoma Bar Association (OBA) and I hooked up at the Downstream Casino Resort in Quapaw, Okla.

Oklahoma Bar Association – Management Assistance Program

Jim Calloway and the OBA have been law practice management trailblazers since creating the Management Assistance Program (OBA-MAP) in 1997 “… to help Oklahoma lawyers better organize and operate their practices.” Their website (www.okbar.org/members/map) goes on to point out “… a growing realization in many circles that many bar complaints filed against lawyers were not the result of malfeasance or incompetence in the law, but were the result of poor law office management practices.” To answer those concerns, the OBA-MAP offers a telephone helpline, live consultations, a management listserv, and library, all aimed at coaching attorneys through practice management issues.

One of the showcase items in the OBA-MAP practice management toolkit is their annual Solo and Small Firm Conference. Originally held near Oklahoma City, the conference moved this year to Quapaw – just over the Kansas border. The move put the conference within reach of attorneys from Kansas, Missouri, and Arkansas, and the seductive sirens at the OBA make no secret that they are happy to lure us there for a weekend of informative sessions and networking with other management-minded attorneys.

The conference drew about 150 attorneys (Oklahoma is a mandatory bar, so attendance at state bar functions is noticeably better than KBA attendance). The entire syllabus was approved for CLE, including two to three ethics hours and brought several national vendors and ABA presenters. Sessions covered cloud computing, law firm technology tools, client communication tools, and even a session on ways to weather the current economic storm battering law firms. The conference was tailored for families, with daytime sessions for kids and an evening dinner and event for the entire family.

Nebraska Bar Association – Solo & Small Firm Conference

Just more than a month after my rendezvous with the OBA, I snuck out to Nebraska for a date with their Solo and Small Firm Conference (http://tiny.cc/y8mn4). The program had more traditional CLE, including family law, evidence, and estate planning, but broadened its offerings with workshops on law firm succession planning, workflow automation, and law-life balance. The same general CLE credit was offered for the workshop on best practices for disposing of computer hardware as for the legal survey of wind energy and carbon credit issues – true parity between the management and legal theory courses. (Nebraska is a mandatory bar like Oklahoma, so more resources and participation are available for such a conference.)

Kansas CLE Commission – Law Practice Management

How our neighbor states tackle the problems of law practice management and the intersection of technology issues with competent legal representation is of particular interest as our Kansas CLE Commission solicits comments on proposed rule changes (www.kscle.org). Included in the proposed new rules is acceptance for CLE general credit of up to two hours for law office management programming. Anyone who has attempted to get credit as a speaker or attendee for these areas knows what a dramatic shift this change represents. Even as the attitude has thawed at the Commission in recent years, the perception that law practice management training is not approved has sometimes stymied our own bar’s attempts at matching neighboring states’ offerings in this area.

Oklahoma called it right, back in 1997, when they recognized that many of the attorney ethics issues were really practice management issues misdiagnosed as impairment. We have an opportunity with the proposed rules changes to dig into the thorny problems of successfully balancing the practice and the business of law to the benefit of our clients. The still-brewing national economic storms will continue to batter those needing legal counsel as well as attorneys hoping to stay afloat for clients, staff, and family. It is a perfect time to reward those attorneys ready to step into the storm. If the changes are approved, perhaps I can end my shameless consorting with neighboring bar associations.

The comment period on the proposed CLE rule changes runs through September 15, 2010. Comments should be directed toward cleadmin@kscle.org.

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.
2010 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April through June 2010. Your commitment and invaluable contribution is truly appreciated.
Jason P. Oldham, Kansas Judicial Center, Topeka
Sen. Thomas C. “Tim” Owens, Chair of the Senate Committee on Judiciary, Topeka
Victor C. Panus, Panus Law Firm LLC, Kansas City, Mo.
R. Lance Parker, The Parker Group Inc., Wichita
Nancy E. Parrish, Chief Judge of the District Court, Division 14, Topeka
Rep. Janice L. Pauls, Ranking Minority Member of the House Judiciary Committee, Hutchinson
Eunice C. Peters, Ellis Zolotor & Peters Law Office LLC, Spring Hill
Patti Petersen-Klein, Kansas Corporation Commission, Topeka
Professor David E. Pierce, Washburn University School of Law, Topeka
Hon. G. Joseph Pierron, Kansas Court of Appeals, Topeka
Rachael K. Pirner, Triplett, Woolf & Garretson LLC, Wichita
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Supreme Court of the United States
Swearing-In Ceremony for
Kansas Bar Association Members

The Kansas Bar Association is offering a three-day 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 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 all-marble 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.
- Tentative Tour of the White House and/or Capitol.

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 your 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

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Firm Name:________________________

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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.
How HITECH Are You?
New HIPAA Privacy and Security Rule Requirements

By Catherine Walberg
I. Introduction

Several years ago, many health law attorneys found themselves immersed in the sea of the Health Information Portability and Accountability Act (HIPAA) Privacy and Security Rules. Having returned to the surface for air, attorneys may resist revisiting the sea of detail of the HIPAA Privacy and Security Rules. Unfortunately, given recent changes in the law, it is time to jump back into HIPAA if you use, receive, or disclose health information in representing clients or advise clients who do.

In February 2009, President Barack Obama signed into law the Health Information Technology for Economic and Clinic Health Act (HITECH) as part of the American Recovery and Reinvestment Act of 2009. HITECH amends the HIPAA Privacy and Security Rules and its aim is to strengthen the privacy and security of electronic health information. In addition, Congress increased and widened the scope of penalty provisions under HIPAA. Unless otherwise specified below, HITECH became effective February 17, 2010.

HITECH is relevant to Kansas attorneys who represent in any capacity health care providers, health insurers, or health care clearinghouses. HITECH will impact the advice Kansas attorneys give to their clients about HIPAA in terms of the storage, use, disclosure, and destruction of health information. HITECH will also require attorneys who receive health information from their clients to implement certain safeguards in terms of protecting the confidentiality of such information.

Most would find HITECH impenetrable, however, without at least a gross understanding of the HIPAA Privacy and Security Rules. Consequently, it is useful to generally summarize HIPAA Privacy and Security Rules as a precursor to outlining recent changes to these rules by HITECH.

A. Pre-HITECH privacy rule

Very simply, the HIPAA Privacy Rule (Privacy Rule) sets out minimum rules that covered entities must follow in protecting the confidentiality of protected health information (PHI) and in granting patients access to their PHI. A “covered entity” is defined as a health plan, a health care clearinghouse, or a health care provider that transmits health information in electronic form in connection with a transaction covered by HIPAA (i.e., most health care providers). PHI is essentially the health information about an individual created or received by a health care provider, health plan, employer, or health care clearinghouse. It includes information about the past, present, or future physical or mental health condition of an individual and payment information relating to such care.

The Privacy Rule establishes the minimum level of privacy covered entities must afford PHI and the minimum level of access covered entities must give individuals to their PHI. To the extent state law affords greater privacy protection to PHI or affords an individual more access to the individual’s PHI, state law controls. The Kansas laws addressing the confidentiality of health information consist of case law and a myriad of statutes. Reconciling the myriad of Kansas statutes with HIPAA is a daunting task, best left to the Kansas Legislature or another article! Suffice it to say that the Privacy Rule is often referred to as a confidentiality floor, i.e., the minimum level of confidentiality covered entities must afford PHI and the minimum level of access to PHI covered entities must give individuals who are the subject of the PHI.

Very generally, under the Privacy Rule, subject to numerous exceptions, PHI must be kept confidential unless a patient signs an authorization permitting disclosure of PHI or unless disclosure is otherwise authorized by HIPAA and state law. The authorization must meet the requirements of the Privacy Rule to be valid. A key exception to this general rule allows disclosure of PHI for payment, treatment, or health care operations. Exceptions to the authorization requirement also include typical disclosures, such as disclosures required by law, e.g., contagious disease reporting, disclosures pursuant to a court order, and disclosures for purposes of a workers’ compensation claim. In those situations, no authorizations are needed.

The other major branch of the Privacy Rule is the access provisions. Very generally, subject to certain exceptions, an individual has unfettered access to the individual’s PHI.

In addition to detailed rules related to privacy of, and access to, PHI, the Privacy Rule imposes numerous administrative requirements. For instance, the Privacy Rule requires most covered entities to give a “notice of privacy,” detailing an individual’s rights related to PHI privacy and access. Health care providers must give patients the opportunity to request amendments to their PHI. The Privacy Rule also mandates workforce training and policies and procedures relating to the confidentiality of PHI and relating to sanctions for privacy violations.

The Privacy Rule also requires covered entities to keep an “accounting” of disclosures of PHI, subject to exceptions. An accounting is a list of disclosures of PHI made by a covered entity to those outside its workforce. The accounting must be maintained in the manner specified by the Privacy Rule. One key exception to the accounting requirement makes clear that, “pre-HITECH,” covered entities did not have to provide an accounting of disclosures made for purposes of payment, treatment, or health care operations.

One last administrative requirement of the Privacy Rule is noteworthy before reviewing HITECH. If a covered entity discloses PHI outside its workforce to a business associate, as that term is defined by the Privacy Rule, the covered entity must obtain certain “satisfactory assurances” via a business associate agreement prior to sharing PHI with the business associate. The business associate must abide by the business associate agreement in using and disclosing PHI. The obligations of such business associate were strictly contractual pre-HITECH.

B. Pre-HITECH security rule

Prior to discussing HITECH, it is also helpful to briefly review the HIPAA Security Rule (Security Rule). The Security Rule outlines the requirements covered entities must take to protect electronic health information. E-PHI is PHI transmitted by, or maintained in, electronic media. Under the Security Rule, covered entities must:

1. Ensure the confidentiality, integrity, and availability of E-PHI;
2. Protect against any reasonably anticipated threats or hazards to the security or integrity of E-PHI;  
3. Protect against any reasonably anticipated uses or disclosures of such information that are not permitted or required by the Privacy or Security Rules; and  
4. Ensure compliance by their workforce with the Privacy and Security Rules.  

After that rudimentary review of the Privacy and Security Rules, HITECH becomes, perhaps, more comprehensible. What follows is a brief overview of the key additions and changes HITECH makes to the HIPAA Privacy and Security Rules.

II. Covered Entities

Below is a summary of the key changes HITECH makes to the HIPAA Privacy and Security Rules that are applicable to covered entities. “Covered Entities” is defined under HIPAA, and the definition is unchanged by HITECH. The definition includes most health care providers, health insurers, and health care clearing houses.

A. Notification of Breach [Effective 9/23/09]

Covered entities must notify individuals of any breach of privacy regarding unsecured protected health information. On August 24, 2009, Health and Human Services (HHS) issued interim final regulations regarding the breach notification requirements under HITECH as discussed below.

HITECH adds a new definition for “unsecured protected health information.” Unsecured PHI is defined as protected health information that is not rendered unusable, unreadable, or indecipherable to unauthorized individuals through the use of technology or methodology specified by the Secretary of HHS (Secretary) in its guidance. The guidance specifies technologies and methodologies that HHS believes render protected health information unusable, unreadable, or indecipherable to unauthorized individuals.

Following the discovery of a breach of unsecured PHI, a covered entity must notify each individual whose unsecured PHI has been, or is reasonably believed to have been, accessed, acquired, used, or disclosed as a result of such breach. PHI includes individually identifiable health information maintained in any form or medium, including paper or electronic. If PHI is secured, i.e., uses a technology or methodology specified by the Secretary, then no notification to the individual is required.

As used in HITECH, “breach” means the unauthorized acquisition, access, use, or disclosure of protected health information “which compromises the security or privacy of the protected health information.” The privacy or security of PHI is “compromised” only if the use or disclosure poses “significant risk of financial, reputational, or other harm to the individual.”

HITECH includes three exceptions in which a use or disclosure is not considered a breach. Specifically, “breach” does not include the following:

(i) An unintentional acquisition, access, or use of PHI by a workforce member or individual acting under the authority of a covered entity or business associate, provided the PHI is not further used or disclosed in a manner that violates the Privacy Rule. Such individual must have acted in good faith and within the course and scope of employment or other professional relationship. HHS gives an example of a nurse mistakenly sending an e-mail with PHI to a hospital’s billing employee. After opening the e-mail, the billing employee notifies the nurse and deletes the e-mail. No reportable breach has occurred in this situation.

(ii) An inadvertent disclosure of PHI from one covered entity or business associate employee to another similarly situated covered entity or business associate employee, provided the PHI is not further used or disclosed in any manner that violates the Privacy Rule.

(iii) Unauthorized disclosures in which the covered entity or business associate has a good faith belief that the unauthorized person to whom PHI is disclosed would not reasonably have been able to retain the information. HHS gives an example where a covered entity sends out explanations of benefits (EOBs) to the wrong individual. If the EOBs are returned by the post office, unopened, as undeliverable, the covered entity can conclude that the recipient did not retain the information (for EOBs that are not returned, HHS says this should be treated as a potential breach).

In essence, covered entities might use the following three-step process to determine whether a breach has occurred for which notification must be given:

1. Determine whether there has been an impermissible use or disclosure of PHI under the HIPAA Privacy Rule;
2. Determine and document whether the impermissible use or disclosure compromises the privacy or security of PHI by posing a significant risk of financial, reputational, or other harm to the individual; and
3. Determine whether the incident is excluded from the definition of “breach” under one of the three exceptions referenced above.

By regulation, a use or disclosure of PHI that does not include direct identifiers of an individual or an individual’s date of birth or zip code would not compromise the security or privacy of PHI. In addition to notice to the individual, covered entities must also notify the Secretary of HHS of any breach of unsecured PHI. In certain instances, notice to the media must also occur.

1. Timeliness of notification to the individual

Notification must be made to individuals “without unreasonable delay” but no later than 60 calendar days after discovery of the breach. Breaches are considered to be discovered on the first day the breach is known to the covered entity (i.e., known to any member of the covered entity’s workforce or agents) or when, by exercising reasonable diligence, the breach would have been known to the covered entity.

2. Content of notification

Notification sent to individuals must be “in plain language” and include the following:

• A brief description of what happened, including the date of the breach and the date of discovery of the breach, if known;
• A description of the types of unsecured PHI that were involved in the breach;
• Steps individuals should take to protect themselves from potential harm resulting from the breach;
• A brief description of the steps the entity is taking to investigate the breach, mitigate harm, and protect against further breaches; and
• Contact procedures for individuals to ask questions or obtain additional information, including a toll-free number, e-mail address, website, or postal address.  

3. Methods of notification to individuals

Notification to individuals must be sent to the individual’s last known address via first-class mail, or e-mail if the individual has agreed to e-mail and has not withdrawn such agreement.  
If the contact information is outdated or insufficient, substitute notice reasonably calculated to reach the individual must be made.  
If there is outdated or insufficient information for fewer than 10 individuals, substitute notice may be provided by an alternative written notice, telephone, or other means.  
If the contact information for 10 or more individuals is found to be outdated or insufficient, the entity must provide substitute notice in one of the following forms:

• Conspicuous posting on the home page of the covered entity’s website for a period of not less than 90 days; or
• Conspicuous notice in major print or broadcast media in the geographic areas where the affected individuals likely reside.

In addition, the substitute notice when 10 or more individuals are involved on the website, in print, or broadcast media must include a toll-free telephone number that will remain active for at least 90 days where individuals can learn whether their unsecured PHI was included in the breach.

4. Notification to media if more than 500 affected

If the breach affects more than 500 residents of a particular state or jurisdiction, the covered entity also must notify “prominent media outlets” serving the state or jurisdiction of the breach without unreasonable delay, but no later than 60 calendar days after discovery of the breach.

5. Notification to HHS if 500 or More Affected

A covered entity must notify the Secretary of HHS following the discovery of a breach of unsecured PHI.  
If the breach affects 500 or more individuals, notice must be made to HHS contemporaneously with the notification to the affected individuals and in the manner specified by HHS on its website.  
If fewer than 500 individuals are affected, the covered entity must maintain a log of any such breaches, and submit the log annually to HHS no later than 60 days following the end of the calendar year.

6. Law enforcement exception

If a law enforcement official states to a covered entity that notification of a breach would impede a criminal investigation or cause damage to national security, a covered entity shall delay the notification if the law enforcement’s request is in writing and specifies a time for the delay.  
If the statement is oral, the covered entity must document the statement, and identify the official, and delay notification no longer than 30 days from the oral statement unless the official submits the statement in writing during this period.

7. Administrative requirements

A covered entity must comply with the following HIPAA Privacy Rule administrative requirements in implementing the breach notification rule:

• Training its workforce;
• Complaint process;
• Sanctions for violations;
• Prohibition against retaliatory acts;
• Prohibition against a waiver of rights;
• Implementation of policies and procedures; and
• Documentation.

B. Request to limit disclosure

A covered entity must grant an individual’s request to limit disclosure of PHI if the disclosure is to a health plan for the purposes of carrying out payment or health care operations and the PHI pertains solely to a health care item or service for which the health care provider has been paid out-of-pocket in full.  
In other words, if an individual requests that there be no disclosure to a health plan for health care operations or payment purposes, and the health care provider has been paid out-of-pocket in full, the covered entity must grant the request.

C. Enhancement of the “minimum necessary” rule

Covered entities must satisfy the “minimum necessary” requirement under the HIPAA Privacy Rule by limiting disclosure or use of PHI to the minimum necessary to accomplish the purpose of the use, disclosure, or request.  
Under HITECH, this “minimum necessary” rule is satisfied only if the covered entity limits such PHI, to the extent practicable, to the “limited data set” as defined by the Privacy Rule.

The HIPAA Privacy Rule defines the “limited data set” and includes elements, such as names, address, phone numbers, etc.

The covered entity makes the determination of the “minimum necessary to accomplish the intended purpose of use or disclosure.”  
The following exceptions to the “minimum necessary” requirement continue to apply under HITECH’s “minimum necessary rule.”  
In the following situations, covered entities do not need to make a “minimum necessary determination”:

1. Disclosures/requests by a health care provider for treatment;
2. Uses/disclosures to the patient;
3. Uses/disclosures made pursuant to an authorization;
4. Disclosures to HHS;
5. Uses/disclosures required by law; and

D. New accounting rules for electronic health records

Covered entities that use electronic health records will need to log disclosures made by the covered entity through an electronic health record for payment, treatment, and health care operations.  
This section is effective January 1, 2014, if the covered entity had an electronic health record as of January 1, 2009.  
For those who obtain an electronic health record after January 1, 2009, the effective date is the later of January 1, 2011, or the date the covered entity obtained the electronic health record.

Prior to this change, covered entities did not have to keep an accounting of disclosures for purposes of payment, treatment, or health care operations.  
HITECH modifies this provision such that covered entities need to include disclo-
sures made through an electronic health record even if the purpose of the disclosure is for payment, treatment, or health care operations. In response to an individual's request for such an accounting, a covered entity can provide either an:

1. Accounting of the electronic disclosures during the three years prior to the request through an electronic health record for payment, treatment, or health care operations made by the covered entity and by a business associate acting on behalf of the covered entity; or
2. An accounting described in No. 1 above for disclosures by the covered entity and a list of all business associates of the covered entity, including name, address, phone, and e-mail.

E. Remuneration for PHI [Effective six months after interim regulations are issued, i.e., on or about February 2011]

Under HITECH, covered entities may not receive remuneration in exchange for PHI unless the exchange for PHI for remuneration is for:

1. Public health activities;  
2. Research;  
3. Treatment of the patient;  
4. Health care operations described in 45 C.F.R. § 164.501(6)(iv);  
5. Activities performed by a business associate at the specific request of, and on behalf of a covered entity pursuant to a business associate agreement;  
6. Copies to a patient of his/her PHI; or  
7. Purposes listed in HHS regulations.

F. Marketing

Communications encouraging recipients to purchase a product or service are permitted as a health care operation without an express authorization if they describe a health-related product or service provided by or included in a plan of benefits of the covered entity or if the product or service is for treatment of the person or is for case management or care coordination. However, if a covered entity receives payment for the communications described above, it loses its status as a health care operation unless:

1. The communication describes a drug/biologic currently being prescribed for the patient, and the payment is reasonable;  
2. The communication is by a covered entity and such covered entity obtains an authorization from the recipient of the communication; or  
3. The communication is by a business associate consistent with a business associate contract.

G. Electronic copy of PHI

Patients are entitled to get a copy of PHI in an electronic format and may direct covered entities to transmit copies electronically to the patient or to a third party if the choice is clear, conspicuous, and specific. The cost for such copying and transfer cannot exceed the entity's labor costs.

III. Business Associates

In addition to the above changes applicable to covered entities, there are also new requirements for business associates. Significantly, business associates must comply with the
Security Rule, and the business associate agreement must be amended to reflect the business associate’s obligations under the HIPAA Security Rule.96 Moreover, business associates will have an obligation to report to the covered entity any breach of a person’s privacy as to unsecured PHI.97 Finally, business associates must comply with the additional requirements under HITECH that relate to privacy and security.98

Under HITECH, as to electronic E-PHI, business associates must now comply with the administrative, physical, and technical safeguards set forth in 45 C.F.R. §§ 164.308, 310, 312, of the Security Rule.99 In addition, business associates must now implement policies and procedures to comply with the Security Rule as set forth in 45 C.F.R. § 164.316 and document compliance.100 Business associates are also obliged to follow the new security provisions applicable to covered entities under HITECH and the new requirements must be incorporated into the business associate’s agreement.101 To the extent a business associate violates these Security Rule requirements, the business associate is subject to the penalties in 42 U.S.C. §§ 1320d-5 to -6.102 HHS will issue annual guidance on effective technical safeguards.103

A business associate that accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured PHI must, following the discovery of a breach of unsecured PHI, notify the covered entity of the breach.104 The notice must include the identity of the individual whose unsecured PHI has been, or is reasonably believed to have been, accessed, required, or disclosed during the breach.105 As the information becomes available, a business associate must provide any available information to the covered entity that the covered entity is required to include in the notice to the patient.106 The notice by the business associate to the covered entity must occur “without unreasonable delay” but no later than 60 days after discovery of the breach.107

A business associate that obtains or creates PHI must comply not only with the new HITECH security provisions and the Security Rule, but a business associate must also comply with the new privacy requirements of HITECH.108 The new privacy obligations of the business associate must be included in the business associate contract.109 The business associate who violates such rules would be subject to the penalties in 42 U.S.C. § 1320d-5 to -6.110

Under the privacy obligations set forth in HITECH, a business associate must grant a request by an individual to limit disclosure and use of PHI to the minimum necessary to accomplish the purpose, absent an applicable exception.111

Finally, the business associate must limit disclosure and use of PHI to the minimum necessary to accomplish the purpose, absent an applicable exception.111

Just as with the covered entities, business associates cannot receive remuneration for PHI absent an authorization expressly allowing remuneration for PHI subject to certain exceptions such as exchanges of PHI for public health activities, research, treatment, and various health care operations.114

IV. Conclusion

In essence, the key changes to HIPAA caused by HITECH can be boiled down to a few subject areas: breach notification, the minimum necessary rule, accountings of disclosures through electronic health records, marketing, and new business associate requirements. It is useful to gain an understanding of each of these subject areas pre-HITECH and then learn HITECH’s fine tuning of these concepts. HITECH is not conceptually difficult. The challenge with HITECH is absorbing the detail of the law. Tackling each subject area of HITECH separately will ease the strain of compliance.

About the Author

Catherine M. Walberg is currently general counsel and vice president for Kansas Medical Mutual Insurance Co. (KaMMCO). Walberg has also been an active speaker and writer on current insurance and health law topics. She is currently a member of the Physicians Insurers of America’s (PIAA) Legal Section and serves on the regulatory affairs committee and Medicare reporting taskforce for the PIAA. In addition, she currently serves on the Insurance Law Section of the Kansas Bar Association as president-elect. Prior to KaMMCO, Walberg was a partner in a Topeka-based law firm, where she specialized in litigation and health law. She also served as the Kansas deputy secretary on aging.

Walberg is currently acting as the Kansas Medical Society representative on the Kansas Department of Health and Environment’s E-Health Advisory Committee, which is charged with reviewing and proposing legislation designed to improve the electronic exchange of protected health information.

FOOTNOTES

2. 42 U.S.C. § 17921 et seq.
3. Id.
5. 42 U.S.C. § 17931. Note
6. 45 C.F.R. § 164.500 et seq.
7. PHI is defined in 45 C.F.R. § 160.103.
8. The terms “covered entity,” “health plan,” “health care clearinghouse,” and “health care provider” are defined in 45 C.F.R. 160.103.
9. 45 C.F.R. § 160.103.
10. Id.
11. 45 C.F.R. § 164.502(a).
14. 45 C.F.R. §§ 164.502(a), 164.508(a).
15. 45 C.F.R. §§ 164.502(b), 164.508(b).
17. See, e.g., 45 C.F.R. § 164.512 (listing the uses and disclosures for which an individual’s authorization is not required).

(Continued on next page)
18. Id.
19. 45 C.F.R. § 164.524.
20. 45 C.F.R. § 164.524(a).
21. See, e.g., 45 C.F.R. § 164.530 (listing some of the Privacy Rule’s administrative requirements).
22. 45 C.F.R. § 164.520.
23. 45 C.F.R. § 164.526.
24. 45 C.F.R. § 164.528(a)(1)(i).
25. 45 C.F.R. § 164.528.
26. Id.
27. Id.
28. 45 C.F.R. § 164.528(a)(1)(i).
29. 45 C.F.R. §§ 164.502(e), 164.504(e).
30. Id. § 164.504(e).
31. Id.
32. 45 C.F.R. § 164.302-318.
33. 45 C.F.R. § 160.103.
34. 45 C.F.R. § 164.306(a).
35. The terms “covered entity,” “health plan,” “health care clearinghouse,” and “health care provider” are defined in 45 C.F.R. § 160.103.
38. 45 U.S.C. § 17932(h).
39. 45 C.F.R. § 164.402(2).
40. Id. See also Guidance Specifying the Technologies and Methodologies that Render Protected Health Information Unusable, Unreadable, or Indecipherable to Unauthorized Individuals, 74 Fed. Reg. 42,741-42,743 (Aug. 24, 2009).
41. 45 C.F.R. § 164.404(a).
42. 45 C.F.R. § 160.103.
44. 45 C.F.R. § 164.520.
45. 45 C.F.R. § 164.526.
46. 45 C.F.R. § 164.528(a)(1)(i).
47. The term “workforce member” includes employees, volunteers, trainees, and other persons whose conduct, in the performance of work for a covered entity, is under the direct control of such entity, whether or not they are paid by the covered entity; 45 C.F.R. § 160.103.
48. 45 C.F.R. § 164.402(2).
49. These direct identifiers are listed in 45 C.F.R. § 164.514(c)(2).
50. 45 C.F.R. § 164.402(1)(ii).
51. 45 C.F.R. § 164.408(a).
52. 45 C.F.R. § 164.406.
53. 45 C.F.R. § 164.404(b).
54. 45 C.F.R. § 164.404(a)(2).
55. 45 C.F.R. § 164.404(c).
56. 45 C.F.R. § 164.404(d)(1).
57. 45 C.F.R. § 164.404(d)(2).
58. 45 C.F.R. § 164.404(d)(2)(i).
59. 45 C.F.R. § 164.404(d)(ii)(A).
60. 45 C.F.R. § 164.404(d)(ii)(B).
61. 45 C.F.R. § 164.406(a).
62. 45 C.F.R. § 164.408(a).
63. 45 C.F.R. § 164.408(b).
64. 45 C.F.R. § 164.408(c).
65. 45 C.F.R. § 164.412(a).
66. 45 C.F.R. § 164.412(b).
67. 45 C.F.R. § 164.530(b), (d), (e), (g), (h), (i), (j).
68. 45 C.F.R. § 164.414(a).
70. Id.
71. Id.
72. 45 C.F.R. § 164.520(b).
73. 42 U.S.C. § 17935(b).
74. 45 C.F.R. § 164.514(e).
75. 42 U.S.C. § 17935(b)(2).
76. Id.
77. 42 U.S.C. § 17935(5).
84. 42 U.S.C. § 17935(c)(3).
92. 42 U.S.C. § 17936(a); 45 C.F.R. § 160.103.
95. 42 U.S.C. § 17936(b).
97. 42 U.S.C. § 17936(b).
98. 42 U.S.C. §§ 17931(a), 17934(a).
100. Id.
101. Id.
102. 42 U.S.C. § 17931(b). The penalties in 42 U.S.C. §§ 1320d-5 to -6 include monetary penalties ranging from $100 per violation for violations which were unknown by exercise of reasonable diligence to $50,000 per violation for violations due to willful neglect and not corrected.
103. 42 U.S.C. §§ 17931(c), 17934(c).
104. 42 U.S.C. § 17932(b).
105. Id.
106. 45 C.F.R. § 164.410(c)(2).
107. 42 U.S.C. § 17932(d).
108. 42 U.S.C. §§ 17931(a), 17934(a).
110. 42 U.S.C. § 17931(b).
111. 42 U.S.C. §§ 17931(a), 17934(a), 17935(a).
112. 42 U.S.C. § 17935(c).
113. 42 U.S.C. § 17935(b).

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**Supreme Court**

**ATTORNEY DISCIPLINE**

**ORDER OF DISBARMENT**

**IN RE MICHAEL LEE GOODRICH**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 17,878 – JULY 22, 2010**

FACTS: In a letter signed on June 9, 2010, Michael Lee Goodrich, of Baxter Springs, voluntarily surrendered his license to practice law in Kansas. Goodrich was temporarily suspended by this Court on November 1, 2008. At that time, the respondent had been indicted on four felony counts in the U.S. District Court for the District of Kansas. The crimes charged in the indictment were: (1) interference with commerce by extortion, 18 U.S.C. § 1951 (2006); (2) interference with commerce by extortion, aiding and abetting, 18 U.S.C. § 1951; (3) fraud by wire, 18 U.S.C. §§ 1343 and 1346 (2006); and (4) intimidation of a witness, 18 U.S.C. § 1512(b)(3) (2006). On June 24, 2008, Goodrich pled guilty to one felony count of interference with commerce by extortion.

DISPOSITION: Court disbarred Goodrich from the practice of law in Kansas and revoked his privilege to practice law.

**ORDER OF DISBARMENT**

**IN RE JEREMIAH C. GRAMKOW**

**NO. 22,138 – JULY 8, 2010**


DISPOSITION: Court ordered that Gramkow is disbarred from the practice of law in Kansas and his license and privilege to practice law are revoked.

**CIVIL**

**OIL AND GAS, SHUT-IN ROYALTY CLAUSE, AND HABENDUM CLAUSE**

**LEVIN ET AL. V. MAW OIL & GAS ET AL.**

**MIAMI DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 100,132 – JULY 16, 2010**

FACTS: The plaintiff landowners had oil and gas leases with Maw Oil that contained habendum and shut-in royalty clauses. The landowners filed verified petitions to quiet title against Maw. Landowners requested that the district court declare: (1) Lessees had no right, title, or interest in the landowners’ realty; (2) title to landowners’ realty was vested in the landowners; and (3) KGE had the sole right to develop natural gas wells on landowners’ realty. The answers filed by Maw admitted that no pipe had been laid to deliver gas to a gathering system and that the wells had neither produced nor led to sale of any natural gas. Maw also filed counterclaims, alleging KGE tortiously interfered with its leases with the landowners. The district court consolidated the cases and granted summary judgment to the landowners before any pretrial discovery, determining that the governing leases had terminated.

ISSUES: (1) Oil and gas, (2) shut-in royalty clause, and (3) habendum clause

HELD: Court held that the fact that a well has not yet been connected to a pipeline does not necessarily make it incomplete or prevent it from being accurately described as shut-in. The setup and performance of dewatering operations may affect a well’s completeness, but Kansas does not apply a rigid legal definition of shut-in entirely dependent upon whether dewatering has begun or upon whether equipment or repairs are still needed. Under Kansas case law and in the absence of a lease provision to the contrary, the factors to be considered by the fact-finder in determining whether a well is physically complete and capable of producing in paying quantities, i.e., shut-in, are those that affect the properties and potential of the well itself, rather than the likely success of any processing or transport of product that remains to be attempted or accomplished. Other factors, such as comparisons to marketing efforts pursued for minerals produced on neighboring leases, on the other hand, are not relevant. They go to an entirely different legal theory – whether damages are due for breach of the covenant to produce and market production reasonably and diligently. They do not go to whether an oil and gas lease should be canceled for failure to extend its term through compliance with a shut-in royalty clause. Court held the case must be reversed and remanded with directions to vacate the summary judgment in favor of landowners and to permit further proceedings, including, as the parties and the district judge deem necessary, discovery and the development of expert testimony. Court stated the question to be answered by the trier of fact is
whether the subject wells were physically complete and capable of producing in paying quantities.
STATUTES: K.S.A. 60-256(f)

EMINENT DOMAIN – TAKING OR INJURING PROPERTY AS GROUND FOR COMPENSATION
FRICK V. CITY OF SALINA
SALINE DISTRICT COURT – AFFIRMED
NO. 101,335 – JULY 9, 2010

FACTS: City used eminent domain to acquire Fricks’ property for improvement project (Project). See Frick v. City of Salina, 289 Kan. 1 (2009) (Frick I) (reversed and remanded for independent findings and conclusions regarding question of relocation benefits based on record before hearing examiner). Fricks then brought inverse condemnation action claiming City was improperly thwarting attempts to relocate their business adjacent to project by denying reasonable access, damaging relocation site with project construction requiring removal of driveways built by Fricks and imposing moratorium on improvements within project right-of-way, failing to issue building permit to Fricks, and causing flooding of relocation site. District court granted City’s motion for summary judgment on all claims. Fricks appealed.

ISSUE: Opposition to summary judgment – discussion of taking for public use issues

HELD: Court emphasizes that a party opposing summary judgment must come forward with evidence to establish a dispute as to a material fact and must support the dispute by precisely citing to transcripts, depositions, interrogatories, admissions, affidavits, exhibits, or other supporting documents in the record. Fricks failed to do so on any claim in response to City’s motion for summary judgment. District court properly granted summary judgment on Fricks’ claims that City inversely condemned their property by denying ability to construct driveways or otherwise access their property, by improperly refusing to grant building permit, and by damaging their property. Opinion discusses right of access and removal of driveways, application of Penn Central standards to three-year moratorium, ripeness of claim regarding City’s failure to issue building permit, and damage to property under eminent domain law.

STATUTES: 28 U.S.C. § 1033 (2006); K.S.A. 20-3017, K.S.A. 26-501 et seq., K.S.A. 26-513, -513(a), -513(d) subsections (7), (8), (10), (12), (14), and (15); and K.S.A. 58-3501 et seq., -3509(a)

TRUST AND MODIFICATION IN RE TRUST OF DARBY
WYANDOTTE DISTRICT COURT – JUDGMENT OF THE DISTRICT COURT IS REVERSED AND REMANDED WITH DIRECTIONS
103,108 – JUNE 25, 2010

FACTS: Darby executed a last will and testament, which established several trusts for the benefit of his daughters and sister. One of those trusts was Trust D to be established at Darby’s death by bequest of $240,000. Marjorie was to receive $12,000 annually from the trust. Later, by codicil, Darby increased the Trust D amount to $480,000 with annual payments to Marjorie in the amount of $24,000. Approximately nine years later, Marjorie filed a petition for modification of the trust distribution because the sum was no longer sufficient to satisfy her basic living expenses. The district court approved the modification.

ISSUES: (1) Trust and (2) modification

HELD: Court held that a proposed modification to increase the specified annual distribution payable to the first generation beneficiary of an irrevocable spendthrift trust is inconsistent with a material purpose of the trust to preserve excess funds for future generation beneficiaries. Court also held that under the facts of this case, funding an increase in the first generation beneficiary’s mon-

Criminal

STATE V. BECKER
CHEROKEE DISTRICT COURT – AFFIRMED
NO. 100,475 – JULY 9, 2010

FACTS: In January 2007, three men engaged in a course of conduct that would take them across two Kansas towns and into the homes of several people, ultimately resulting in one death and multiple charges of kidnapping, assault, battery, and murder. Becker was convicted by a jury of one count of first-degree murder, four counts of kidnapping, one count of attempted kidnapping, two counts of aggravated battery, two counts of aggravated assault, and one count of aggravated burglary. He complains on appeal of various trial errors, including the admission of hearsay testimony, misconduct by the prosecutor, failure by the prosecution to prove various parts of its case, and improper jury instructions.

ISSUES: (1) Admission of hearsay testimony, (2) prosecutorial misconduct, (3) sufficiency of the evidence, and (4) jury instruction

HELD: Court held the out-of-court statements did not violate statutory prohibitions on hearsay testimony because they were not hearsay. These statements were made in the course of the criminal activity, not in the course of the subsequent investigation. Because the statements were not testimonial, that is to say, they were not made in the reasonable expectation of eventual use in a criminal proceeding; the statements also did not violate the Sixth Amendment Confrontation Clause. Court also held the prosecutor’s comments about aiding and abetting were not improper. They must be read in conjunction with the closing argument as a whole, which asserted the need to find intent on Becker’s part, and in light of the evidence as a whole, which showed that Becker behaved much like a principal and engaged in conduct from which it could easily be inferred that he intended the elements of the crimes charged. Regarding the sufficiency of the evidence, Court held that because the state offered more than adequate evidence supporting the kidnapping convictions, Becker’s challenge to the felony murder conviction based on the sufficiency of the evidence also failed. Court found no error on the trial court’s failure to give a specific unanimity instruction or a lesser-included offense instruction of unintentional second-degree murder.

DISSENT: Justice Johnson concurred in the result, but disagreed in the court-made special rule for lesser-included instructions in felony-murder cases.

STATUTES: K.S.A. 21-3420(c); K.S.A. 22-3414(3); and K.S.A. 60-460

STATE V. COLSTON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 100,005 – JULY 23, 2010

FACTS: Colston was convicted of rape, aggravated criminal sodomy, and aggravated indecent liberties with a child. Colston had sexual intercourse with his girlfriend’s 12-year-old daughter. The trial court sentenced Colston to three concurrent life sentences without the possibility of parole for 40 years.

ISSUES: (1) Unanimity jury instruction, (2) lesser-included offense jury instruction, (3) element of offense, (4) deadlocked jury instruction, and (5) cumulative error
HELD: Court found the state presented evidence of three separate acts which could have supported the rape charge in Count I based on the “on or about” language in the charging document and the jury instruction. Although the state argued that only one act supported the charge, this is not the same as informing the jury that it could not consider evidence of other acts supporting the same charge or that it must agree on the same underlying criminal act. Court concluded that as to Count I, error occurred because there was a failure to elect or instruct on the underlying act supporting the charge. However, Court held it was not reversible based on the overwhelming evidence and the consistency of the victim’s testimony. Court rejected Colston’s lesser-included offence argument. The crimes of rape and aggravated indecent liberties with a child do not have an identity of elements. Rape requires sexual intercourse; aggravated indecent liberties consists of lewd fondling or touching done with the intent to arouse or to satisfy the sexual desires of the offender, the child, or both. Because the crimes do not contain an identity of elements, Colston’s convictions of rape and aggravated indecent liberties with a child are not multiplicitous. Court rejected Colston’s argument that his convictions should be reversed because the district court failed to instruct the jury to determine his age as an essential element of each offense. Court held the undisputed evidence presented at Colston’s trial established beyond a reasonable doubt that he was at least 18 years old when the crimes were committed. Court was convinced the jury verdict would have been the same absent the error in the instructions. Court also rejected Colston’s claim the Allen instruction was erroneous. Court stated the instruction was given before the jury deliberated and was included with all the other jury instructions. Colston did not object to the instruction. The jury reached its verdicts on the same afternoon that deliberations began, so the jury deliberations were not more than a few hours. After the verdicts were read, the trial court polled the jury and each juror stated he or she agreed with the verdicts. The evidence against Colston was substantial. Court found no reversible error. The Court acknowledged that some of the trial court’s jury instructions were erroneous, but not clearly erroneous, and none of the errors involved the admission of questionable evidence. Court said it was firmly convinced that the cumulative effect of any errors committed by the trial court did not deprive Colston of his right to a fair trial.

DISSENT: Justice Johnson dissented on the issue of the missing element of the defendant’s age.

STATE: K.S.A. 21-3421, -3501, -3502, -3504, -3506, -4643; and K.S.A. 22-3414(3), -3601(b)

STATE V. GARZA
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 100,359 – JULY 30, 2010

FACTS: Garza was convicted of aggravated indecent liberties with a child and rape of a child under 14 years of age. He was sentenced to life in prison with a mandatory minimum sentence of 25 years under Jessica’s Law.

ISSUES: (1) New counsel before trial; (2) exclusion of evidence; (3) proof of defendant’s age; (4) cruel and unusual punishment; (5) departure sentence; and (6) charging alternative crimes

HELD: Court rejected Garza’s claim that he established justifiable dissatisfaction with his appointed counsel and was entitled to new counsel appointed before trial based on Garza’s claims that his counsel was not prepared, failed to provide a preliminary transcript and to secure witness testimony. Court also rejected Garza’s new claim on appeal that he wanted to seek a continuance before voir dire to subpoena a witness, but counsel did not file a motion. Court found no error in the trial court’s exclusion of evidence that his wife had an Internet relationship with another man, who moved in after Garza’s arrest, and his wife left the man alone with the children and also the statement of the victim’s sister whether Garza became upset with the sister and the siblings and his wife after looking at inappropriate websites. Court held the failure to allege Garza was 18 years of age or older in the complaint does not invalidate his conviction and that there was testimony Garza was more than 18 years of age and no dispute about it during trial. Any error in the trial court making the age determination was harmless. Court held Garza did not raise the cruel and unusual punishment issue below and there was no evidence of an effort to preserve the issue for appeal. Court also rejected Garza’s claim that Jessica’s Law violated his due process rights. Court stated that Garza did not argue that judge violated his due process rights while using his discretion, but instead argued the discretion itself violates due process. Court found the argument lacked merit. Court agreed with Garza that he could not be convicted of both aggravated indecent liberties with a child and rape of a child under 14 because the information charged these counts in the alternative. Court reversed the aggravated indecent liberties conviction.

DISSENT: Justice Johnson dissented and would hold that Garza should have been sentenced for the crime for which he was charged and of which he was convicted by the jury, severity level 1 version of rape.

STATE: K.S.A. 21-3502(a)(2), -3504(a)(3), -4643; K.S.A. 22-3601(b)(1); and K.S.A. 60-401(b), -405

STATE V. GOMEZ
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,213 – JULY 9, 2010

FACTS: Gomez convicted on guilty plea to charge of aggravated indecent liberties with a child. Pursuant to Jessica’s Law, district court sentenced him to mandatory 25-year sentence with postrelease supervision for life. Gomez appealed, claiming for first time his sentence was disproportionate in violation of 8th Amendment of U.S. Constitution, and § 9 of Kansas Bill of Rights.

ISSUES: (1) U.S. Constitution and (2) Kansas Constitution Bill of Rights

HELD: Under Graham v. Florida, 560 U.S. ___ (May 17, 2010), proportionality challenge to term-of-years sentence is allowed under 8th Amendment. However, appellate review was precluded by Gomez’s failure to raise issues before district court and obtain necessary findings of fact for review of the first, as applied, classification discussed in Graham. Court discussed Graham but did not decide whether a categorical challenge could be brought under circumstances of this case, or whether such a challenge would have merit.

Unlike previous U.S. Supreme Court decisions, Kansas’ law has consistently allowed a claim that a term-of-years sentence was disproportionate. However, because Gomez made no effort in district court to present issue of whether a Jessica’s Law sentence is cruel and unusual under § 9 of Kansas Constitution Bill of Rights, issue cannot be raised for first time on appeal.


STATE V. MAGALLANEZ
LYON DISTRICT COURT – REVERSED AND REMANDED
NO. 99,694 – JULY 16, 2010

FACTS: Magallanez was convicted in three child sexual abuse cases tried together by the district court. Magallanez’s victims were between the ages of 13 and 15 and involved sexual relations after Magallanez provided alcohol and drugs. Magallanez raised 15 issues on appeal, five were dispositive of the appeal.

ISSUES: (1) Prosecutorial misconduct, (2) admission of evidence, (3) rape shield, (4) jurisdiction, (5) jury verdict, and (6) cumulative error

HELD: Court held there were two instances of improper state-
ments that amounted to prosecutorial misconduct, but that given the amount of evidence, the errors did not require a reversal under the prejudice prong of the prosecutorial misconduct standards. Next, Court held that the trial court erred in admitting K.S.A. 60-455 evidence and instructing the jury on all the relevant admissible grounds under the statute. Court stated it was error for the trial court to instruct upon any K.S.A. 60-455 factor that is obviously inapplicable. However, Court stated that given the weight of the evidence, the errors standing alone were harmless. Court concluded it was error for the district court to refuse to redact a portion of a letter written by one of the victims concerning the victim's virginity. Court held that the trial court erroneously instructed the jury on aggravated indecent liberties with a child as a lesser included offense of rape and since the jury convicted on the lesser, Magallanez could not be retried on the greater charge. Court held that the trial court erred in giving the Allen-type instruction including language that it would be a burden on both sides to retry the case. However, Court stated that it did not discuss the error and left resolution for the cumulative error analysis. Court reversed based on cumulative error. Court stated that each error, viewed independently, would not have been enough to require reversal, but Court could not hold Magallanez received a fair trial when the errors were aggregated. Court stated that it would not discuss the propriety of consolidating the three cases for trial, but that it must reverse all of the convictions in this case. At the very least the prosecutorial misconduct, Allen instruction, and shotgun K.S.A. 60-455 limiting instruction infected all three cases.

STATE V. MARTINEZ
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 100,175 – JULY 30, 2010

FACTS: Martinez was convicted of attempted rape of a child under 14 years of age, an off-grid felony, for sexual acts committed against a 5-year-old girl. He was sentenced to life in prison with a mandatory minimum sentence of 25 years under Jessica's Law. He was acquitted of a rape charge of the same child.

ISSUES: (1) Videotaped evidence; (2) prosecutorial misconduct; (3) sufficiency of the evidence; (4) jury instructions; (5) admission of prior sexual abuse allegation; (6) cumulative error; (7) proof of defendant's age; and (5) constitutionality of sentence.

HELD: Court held it was error to admit into evidence a videotaped interview with the child victim because the state failed to provide the defendant with a written transcript of the video. Court rejected state's substantial compliance argument that it gave a copy of the video to defense counsel. However, Court found the error to be harmless. Court held the reasonable inferences to be drawn from the child's testimony provided sufficient evidence for a rational fact-finder to determine Martinez intend to penetrate the victim's vagina. Court held it was not necessary for the state to prove someone or something prevented Martinez from penetrating the victim's sexual organ in order to sustain an attempted rape conviction. Court found Martinez failed to object to the lesser included offense instruction of attempted rape and the giving of the lesser instruction was not clearly erroneous. Court held the trial court did not err by excluding Martinez's claim the child victim had previously accused someone else of sexual abuse. Court found the admitted evidence fell short of what Martinez sought to introduce and would not have established that the child had accused someone else of sexual abuse. Court also held the prosecutor made an improper comment during closing argument attempting to divert the jurors' attention from the evidence and the law to a desire to let a little girl know that reporting such a crime was appropriate. Court found two other claims of improper statements to be without merit. Court held there was sufficient evidence to convict Martinez and while the Court was not willing to state the evidence was overwhelming. Court found that it did not require a reversal. Court stated that weight of one factor should not dominate the analysis, and the combination of a lack of ill will and substantial evidence of guilt is sufficient to find Martinez's right to a fair trial was not violated. Court held the combination of the two trial errors did not rise to a level of sufficient prejudice to deny Martinez a fair trial under cumulative error analysis. Court rejected Martinez's claims based on the state's burden to prove he was 18 years or older as an element of the crime. Court affirmed the constitutionality of his sentence.

DISSENT: Justice Johnson dissented on the issue of the missing element of the defendant's age.

STATE V. PLOTNER
FORD DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 101,635 – JUNE 25, 2010

FACTS: Plotner convicted on plea to three charges of rape of child. Prior to sentencing, district court held hearing on Plotner's motion to withdraw plea, and denied the motion, finding Plotner had been adequately represented by counsel, and plea was knowing and voluntary. District court found no showing of substantial and compelling mitigating circumstances supported Plotner's motion for downward durational departure. Sentence imposed included three concurrent hard 25 life sentences with lifetime post-release supervision and an order that Plotner have no contact with victims. Plotner appealed claiming district court erred in denying motion to withdraw plea and motion for downward durational departure, and in imposing no-contact order. Plotner also claimed statutorily-mandated lifetime post-release supervision order was unconstitutional.

ISSUES: (1) Withdrawal of guilty plea, (2) motion for downward durational departure, (3) no-contact order, (4) constitutional challenge to lifetime post-release supervision.

HELD: District court properly considered whether there was good cause for withdrawing plea and found none. No abuse of discretion to deny motion to withdraw plea. District court sufficiently evaluated facts and circumstances in denying Plotner's motion for downward durational departure. State concedes the no-contact order is illegal. State v. Post, 279 Kan. 664 (2005), controls. This condition of Plotner's sentence is vacated. Remaining portions of Plotner's sentence are valid and remain in force.

Constitutional challenge to lifetime post-release supervision was not preserved for appellate review.

STATE V. SANDBERG
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 100,037 – JULY 23, 2010

FACTS: Sandberg was charged with electronic solicitation in violation of K.S.A. 2006 Supp. 21-3523, however, the indictment did not specify which subsection of the statute was charged, severity level one or severity level three. However, both the indictment and the written plea agreement identified the crime as the most severe, i.e., a severity level 1 person felony pursuant to K.S.A. 2006 Supp. 21-3523(a)(2), (b). Sandberg pleaded no contest to this charge. Dur-

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Appellate Decisions

STATE V. SHADDEN
JOHNSON DISTRICT COURT
AFFIRMED ON ISSUES SUBJECT TO REVIEW
COURT OF APPEALS
REVERSED ON ISSUES SUBJECT TO REVIEW
NO. 97,457 – JULY 9, 2010

FACTS: Jury convicted Shadden of driving under the influence. During trial an officer testified Shadden failed the National Highway Traffic Safety Administration’s (NHTSA) standardized field test, and this failure meant there was a 68 percent chance that Shadden’s blood alcohol content (BAC) was more than 0.10. Shadden appealed, challenging this testimony under Frye v. U.S., 293 F. 1013 (D.C. Cir. 1923), and officer’s use of scientific terminology as adding scientific credibility to the officer’s opinion. Shadden also claimed, in part, prosecutorial misconduct by violating order in limine prohibiting officers from rendering their personal opinion whether Shadden was intoxicated. The Court of Appeals reversed Shadden’s conviction and remanded for new trial, finding no foundation for Frye evidence, and holding error was not harmless due to possibility the jury placed undue weight on field sobriety test results.

ISSUES: (1) Frye and evidence of intoxication, (2) field sobriety terminology, (3) prosecutorial misconduct, and (4) constitutional issues

HELD: Issue regarding admission of officer’s testimony linking NHTSA results with probability of BAC level was properly raised and preserved for appellate review. Standards for granting and reviewing in limine orders are discussed and applied. Frye test must be met before admitting evidence establishing a relationship between NHTSA test failure and a specific measurement of a driver’s BAC. State did not lay the necessary foundation for admitting officer’s opinion that 68 percent of the time a person exhibiting two clues...
has a BAC of more than 0.10. Court of Appeals correctly found district court erred in admitting this testimony, but applied wrong harmless error standard in reversing Shadden's conviction. Under circumstances, this error was harmless. Shadden's conviction was affirmed.

No error in allowing state and its witnesses to use words like “test,” “pass,” “fail,” or “points” when referring to Shadden's performance on NHSTA test. These words are commonly used by lay and expert witnesses to describe evidence not scientific in nature. Not necessary to meet Frye test before these words are used. Prosecutor committed no gross and flagrant misconduct and exhibited no ill will in eliciting officer's opinion regarding Shadden's impairment, and prosecutor's elicitation of testimony linking field test results with probability of BAC level – while error – did not violate order in limine.

Constitutional issues concerning testimony regarding Shadden's refusal to take breath test, raised for first time on appeal, are not considered.

STATUTES: K.S.A. 2009 Supp. 8-1567(a)(3); K.S.A. 8-1567(a)(1); K.S.A. 22-3602(e); and K.S.A. 60-216(c)(7), -261, -401(b), -404, -455, -456, -456(a), -456(b), -456(d)

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**Appellate Practice Reminders . . .**

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**Responses Ordered by the Court**

When an appellate court requests a response to an order such as a show cause, it is incumbent on the parties to respond, even if the response is a simple one page document. The court has asked a question and expects an answer. The court can make the best, reasoned decision with information from all parties.

A show cause order for consolidation is sometimes viewed as a fait accompli, with no need to respond. This is not correct. When the court issues an order to show cause why cases should not be consolidated for briefing and hearing, the parties must respond and await the court's order of consolidation before filing a single brief.

**Filings with the Court**

All appellate pleadings must be filed with the Clerk's Office. After being scanned and entered on the system, pleadings are routed to the proper court and chamber for action. No document should be filed with an individual justice or judge, even if the document is filed in response to an order signed by a judge.

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.

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**New Local Court Rule No. 27 for 16th Judicial District**

There are no pictures taken in any courtroom in the Sixteenth Judicial District unless prior approval has been given by either the Chief Judge or the presiding judge. Violators will have their camera, including cell phone camera, confiscated.

By order of the Court on this 10th day of August, 2010.
CIVIL

CHILD CUSTODY AND RELIGIOUS BELIEFS
HARRISON V. TAUHEED
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,214 – JULY 16, 2010

FACTS: Monica Harrison and Adiel Tauheed met in Wichita in 1999. Two years later, Monica became pregnant with J.D.H. Adiel acknowledges that J.D.H. is his biological son. About six months after J.D.H.’s birth in February 2002, Adiel left Wichita to attend graduate school in California. He later resided in Lenexa. Monica filed this paternity action on June 30, 2006, when J.D.H. was 4 years old. On February 17, 2009, when J.D.H. was almost 7 years old, the district court issued its custody ruling that is the subject matter of this appeal. Prior to the temporary order which gave Monica residential custody during this litigation, no orders regarding custody had been issued by any court. During the four years following the temporary order, Monica and Adiel informally and amicably cooperated regarding both support and custody of J.D.H. Adiel claims Monica’s religious beliefs and practices have adversely affected or could adversely affect J.D.H. in the future. After a bench trial, the district court ordered Monica and Adiel to share joint legal custody of J.D.H. The court also awarded residential custody to Monica with substantial parenting time to Adiel. Adiel asserts the trial court applied an incorrect legal standard, which resulted in the court’s failure to consider evidence about Monica’s religious beliefs and practices as a Jehovah’s Witness.

ISSUES: (1) Child custody and (2) religious beliefs

HELD: Court stated that when a child custody issue arises between parents, the paramount consideration of the trial court is the welfare and best interests of the child. As a general principle, a parent’s religious beliefs and practices, regardless of how obnoxious they might seem to the trial court, the other parent, or the general public, may not provide a basis for depriving a parent, who is otherwise qualified, of the custody of his or her minor child. Court concluded that a parent’s religious beliefs and practices may not be considered by the trial court as a basis to deprive that parent of custody unless there is a showing of actual harm to the health or welfare of the child caused by those religious beliefs and practices. Court found the trial court applied the correct legal standard, best interest of the children, in making its custody determination.

DISSENT: (J. Caplinger) Dissented, arguing that the case should be remanded to the district court based on the district court’s failure to fully and consistently apply the “best interests of the child” standard in determining residential custody. Remand is appropriate because the district court erroneously concluded it could not consider factors relating to a parent’s religious practices, even if those practices adversely impacted the child’s interests.

STATUTE: K.S.A. 60-1610(a)(2), (3), (4), -2105

CONTRACTS

IRON MOUND LLC V. NUETERRA HEALTHCARE MANAGEMENT LLC
RILEY DISTRICT COURT – REVERSED AND REMANDED
NO. 101,647 – JUNE 25, 2010

FACTS: Operating Agreement between Iron Mound LLC (Iron Mound) and ASC Group LLC (ASC Group) set forth division of management fees from surgical centers. ASC Management LLC (ASC Management), a wholly owned subsidiary of ASC Group, entered into Management Agreement with Manhattan Surgical Center. Iron Mound later dissolved ASC Midwest, whose only significant asset was its interest in management fees from the Manhattan Center. ASC Management, which later became Nueterra, continued to pay Iron Mound for years until Management Agreement II was negotiated with lower management fees, and payments to Iron Mound were discontinued. Iron Mound sued Nueterra for breach of contract. Both parties filed motions for summary judgment. Trial court granted summary judgment to Nueterra, finding Iron Mound had no contractual right to share in Nueterra’s management fees under Management Agreement II, and any vested right to fee-sharing under Management Agreement I terminated when that agreement expired in 2006. Iron Mound appealed.

ISSUE: Interpretation of contract and termination of operating agreement

HELD: Provisions of Operating Agreement are interpreted, finding contract is ambiguous as to whether parties intended for Iron Mound to receive portion of management fees for a management agreement contemplated on date Operating Agreement was executed, or for Iron Mound to be paid a portion of management fees as long as Nueterra had management contract with the Manhattan Center. Also ambiguous whether parties intended for Operating Agreement as to payment of management fees to survive dissolution of ASC Midwest. Saylor v. Brooks, 114 Kan. 493 (1923), is distinguished where parties’ conduct and course of dealing indicates parties intended payment of management fees under the Operating Agreement to continue after dissolution of ASC Midwest. Issue of fact exists as to effect of the continued payments to Iron Mound at dissolution of ASC Midwest, thus trial court’s grant of summary judgment was premature. Trial court’s entry of summary judgment in favor of Nueterra is reversed, Iron Mounds’ argument that summary judgment should have been granted in its favor is rejected, and case is remanded to trial court.

STATUTE: K.S.A. 17-7635, -7675

CORPORATIONS, LITIGATION EXPENSES, AND INDENNIFICATION
WESTAR ENERGY INC. V. WITTIG
SHAWNEE DISTRICT COURT – AFFIRMED AND CROSS-APPEAL DENIED
NO. 102,579 – JULY 9, 2010

FACTS: In 2003, a federal grand jury indicted Wittig for allegedly defrauding Westar Energy Inc., a Kansas corporation. Wittig was the former CEO and chairman of the board of Westar. Wittig hired two law firms to help in his defense, one from Washington, D.C., and one from Kansas City. Wittig sought advances from Westar to cover his legal expenses under Westar’s Articles of Incorporation. After advancing more than $3.6 million for legal fees, Westar sought relief by filing a declaratory judgment action seeking a ruling on the reasonableness of the fees and expenses that Wittig wanted them to advance and also that Wittig was in breach of contract by requesting unreasonable fees. The district court granted declaratory relief to Westar finding that Westar agreed to advance reasonable fees, not all fees. The district court ruled the fees of the Kansas City firm were reasonable, but the hourly rate of the D.C. firm was unreasonable. The district court ruled that the breach of contract remedies such as recoupment or setoff for fees and expenses already paid by Westar could not be resolved until after the criminal case against Wittig ended.

ISSUES: (1) Corporations, (2) litigation expenses, and (3) indemnification

HELD: Court held that Westar must reserve any action seeking recoupment, such as setoff, until after it is determined whether Wit-
tig must pay any of the money advanced back to Westar. To rule otherwise would destroy the right of advancement entirely and thus rewrite the parties’ contract, something a court cannot do. Therefore, court upheld the district court’s denial of declaratory relief to Westar on this point. Court stated that a district judge in Kansas is considered an expert on attorney fees and must use the factors found in Kansas Rule of Professional Conduct 1.5(a) to measure the reasonableness of an attorney fee request. Here, after taking testimony on the subject and methodically considering all eight factors in Rule 1.5(a), the district court determined that the fees requested by Wittig for a Washington, D.C., law firm were unreasonable and lowered the hourly rate that Westar is to advance in Wittig’s defense. Court held there is no dispute that Wittig is entitled to advancement. Even so, the district court here was obliged to determine the reasonableness of the fees Wittig requested. Because the findings of the district court were supported by substantial competent evidence, court found no abuse of discretion on this point and upheld the district court’s ruling. Wittig’s cross-appeal was denied.

**STATUTES:** K.S.A. 17-6305 and K.S.A. 60-1701, -1704

**CORPORATIONS, LITIGATION EXPENSES, AND INDEMNIFICATION**

**WITTIG V. WESTAR ENERGY INC.**

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

**NO. 102,746 – JULY 9, 2010**

**FACTS:** In 2003, a federal grand jury indicted Wittig for allegedly defrauding Westar Energy Inc., a Kansas corporation. Wittig was the former CEO and chairman of the board of Westar. Wittig hired two law firms to help in his defense, one from Washington D.C., and one from Kansas City, Mo. Wittig sought advances from Westar to cover his legal expenses under Westar’s Articles of Incorporation. Westar Energy Inc. promised in its Articles of Incorporation to advance attorney fees and expenses reasonably incurred by its officers and directors charged with a crime, sued, or the subject of a criminal or administrative investigation. If the company failed to make the advances within 30 days of the request and an officer or director was thereby forced to come to court to enforce this right of advancement, Westar promised to pay the expenses of that lawsuit as well. Wittig filed a breach of contract action. District court held it was not reasonable to require Westar to advance significantly higher hourly rates for nonlocal attorneys than those charged by the Kansas City law firms. On the breach of contract claim, the district court held the contract obligated Westar to advance reasonably incurred fees and expenses and dismissed Wittig’s claim stating that Westar was not ignoring the contract, but there was a legitimate dispute over what was reasonable.

**ISSUES:** (1) Corporations, (2) litigation expenses, and (3) indemnification

**HELD:** Court held that Westar breached its contract when it failed to advance fees reasonably incurred by Wittig arising from his federal criminal prosecution. Court affirmed the district court’s discretionary ruling that Wittig’s counsel was entitled to a higher rate of compensation than Westar advanced because the court carefully assessed each factor found in Kansas Rule of Professional Conduct 1.5(a) when it made the fee determination. Court reversed the district court’s decision to dismiss Wittig’s breach of contract claim based on its conclusion that Westar was entitled to a second chance to comply with its contractual obligation because the company had paid some money to Wittig’s lawyers. Court found the district court’s conclusion rendered the contract meaningless and therefore was improper. Last, court remanded the matter to the district court for a determination of the costs of this action the court must assess against Westar because Wittig was successful in his action.

**STATUTE:** K.S.A. 60-1701

**EXPERT TESTIMONY AND DISCLOSURE**

**WALDER ET AL. V. THE BOARD OF COMMISSIONERS OF JACKSON COUNTY**

**JACKSON DISTRICT COURT – AFFIRMED**

**NO. 101,854 – JULY 23, 2010**

**FACTS:** Richard Walder died after an accident involving a collapsed culvert on a rural road. His estate sued Jackson County, alleging that the county had been negligent in road inspection and maintenance and that this negligence caused Walder’s death. But the county moved for summary judgment, arguing in part that Walder’s estate hadn’t shown in its expert-testimony summary the cause of the culvert collapse and how the county could have prevented the collapse through better inspections. Thus, the county argued, the estate hadn’t proved that the county had been negligent or that its negligence had caused Walder’s death. The estate’s expert witness eventually said that he thought the culvert’s collapse was caused by a process called piping — essentially soil erosion — that had caused the soil around the culvert to fail and the road to wash out. But the district court struck that testimony because it hadn’t been disclosed by the estate in the required expert witness disclosure. Without that testimony, the estate had no evidence of causation and can’t support its negligence claim. The estate appealed, arguing the district court abused its discretion in striking the expert’s testimony.

**ISSUES:** (1) Expert testimony and (2) disclosure

**HELD:** Court held that an expert opinion central to a party’s claim must be disclosed at least 90 days before trial in the expert disclosures required under K.S.A. 60-226(b)(6). Supplementation may occur later and is intended for changes due to newly discovered evidence or material inadvertently left out, not for the initial disclosure of an opinion on the central issue of the lawsuit. Court held the expert’s opinion about piping as the cause of the washout was central to the estate’s legal claim and found no abuse of discretion in the trial court’s decision to strike the testimony. Court held that without the excluded testimony from its expert, the estate failed to show that the culvert was defective, that inspections would have found the defect, or that the county could have fixed the defect and prevented the accident. The judgment of the district court was affirmed.

**STATUTES:** K.S.A. 60-226(b), (e); and K.S.A. 75-6104(e)

**KANSAS SEXUAL PREDATOR ACT, APPOINTMENT OF COUNSEL AND TREATMENT RECORDS**

**MERRYFIELD V. SRS**

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

**NO. 103,750 – JULY 30, 2010**

**FACTS:** Dustin J. Merryfield is confined for treatment at the Larned State Hospital under the custody of the Kansas Department of Social and Rehabilitation Services (SRS), pursuant to the Kansas Sexually Violent Predator Act (Act). He appeals the district court’s denial of his habeas corpus petition pursuant to K.S.A. 60-1501 and of his motion for the appointment of counsel. Merryfield contends that K.S.A. 22-4503(a) entitles him to counsel in these proceedings and that he is entitled to a copy of his treatment records. The district court found that in May 2009 Merryfield submitted a request for his “medical and/or treatment records” to hospital officials. The hospital’s privacy officer denied the request, and the hospital’s medical director affirmed the denial of his habeas corpus petition pursuant to K.S.A. 60-1501 and of his motion for the appointment of counsel. Merryfield contends that K.S.A. 22-4503(a) entitles him to counsel in these proceedings and that he is entitled to a copy of his treatment records. The district court found that in May 2009 Merryfield submitted a request for his “medical and/or treatment records” to hospital officials. The hospital’s privacy officer denied the request, and the hospital’s medical director affirmed the decision on Nov. 5, 2009. The medical director contended that Merryfield was not entitled to his records because the records contained information “compiled in reasonable anticipation of or for use in civil, criminal, or administrative actions or proceedings.” The director stated that these grounds for denial of Merryfield’s request were unreviewable under HIPAA. On Dec. 21, 2009, Merryfield filed his habeas corpus petition, alleging that SRS improperly denied his request for copies of his treatment records.
and that he should not be required to pay for the copies requested. On the same date, Merryfield filed a motion requesting the appointment of counsel. The district court summarily denied both Merryfield’s petition and motion. The court found that Merryfield had not demonstrated a right to inspect or receive a copy of his treatment records and had not alleged shocking or intolerable conduct of a continuing nature or mistreatment of a constitutional stature. The court also found that Merryfield was not entitled to the appointment of counsel.

ISSUES: (1) Kansas Sexual Predator Act, (2) appointment of counsel, and (3) treatment records

HELD: Court stated that the right to counsel is predicated on the person’s being confined pursuant to either K.S.A. 22-3428 or K.S.A. 59-2965. K.S.A. 22-3428 sets out the procedure for committing an individual to the state hospital for mental health treatment after that individual has been acquitted of a crime by reason of mental illness on a special verdict. K.S.A. 59-2965 involves the civil commitment proceeding for mentally ill persons. Court held that Merryfield’s confinement is not the result of either of these circumstances. Merryfield does not argue that he is entitled to counsel pursuant to K.S.A. 59-29a06(b). Accordingly, court concluded that the district court did not err in denying Merryfield’s request for the appointment of counsel in the K.S.A. 60-1501 proceedings. However, court held that it is unclear whether Merryfield’s request for records was in anticipation of litigation. Court remanded for further proceedings to determine (1) the nature and extent of Merryfield’s “medical and/or treatment records”; (2) which records constitute patient records to which Merryfield is entitled under HIPAA; (3) which records contain information prepared in anticipation of litigation; and (4) with respect to that subset of documents, whether Merryfield demonstrates an entitlement to them pursuant to K.S.A. 2009 Supp. 60-226(b)(4).

STATUTES: K.S.A. 22-3428, -4503(a); K.S.A. 59-29a01, -29a08, -29a22, -2965; and K.S.A. 60-226(b), -1501, -1503

**MOBILE HOME SALE AND MANUFACTURER’S STATEMENT OF ORIGIN**

**CORNERSTONE HOMES LLC v. SKINNER ET AL.**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 101,058 – JUNE 25, 2010**

FACTS: Cornerstone Homes LLC (Cornerstone) is a seller of mobile homes, sometimes referred to as manufactured homes. It sold such a home to Gary, Alberta, and Shawn Skinner, who made a cash down payment. They signed a note and gave a mortgage on certain real estate they owned in favor of Cornerstone for the remainder of the purchase price. The Skinners later defaulted in their payments, and Cornerstone filed suit to foreclose its mortgage. The Skinners never denied signing the mortgage or defaulting on their payment obligations. In their defense, they argued that Cornerstone was guilty of fraud for failing to deliver to them the manufacturer’s statement of origin (MSO) for the mobile home and this precluded Cornerstone from obtaining judgment for the amount due and for foreclosure of its mortgage. The Skinners also counterclaimed for damages on various theories all based essentially on Cornerstone’s failure to deliver the MSO. They also sued Jack Hunt, a principal in Cornerstone on these same claims. That suit was consolidated with Cornerstone’s foreclosure action. The district court granted Cornerstone the judgment it requested and denied all of the Skinners’ claims.

ISSUES: (1) Mobile home sale and (2) manufacturer’s statement of origin

HELD: Court held that where the purchasers of a new mobile home did not dispute that they purchased the home, signed a note and mortgage as a part of the purchase, and then defaulted on their payments, the district court did not err in granting judgment prior to trial to the seller on its foreclosure claim once the court determined that the seller’s failure to deliver the manufacturer’s statement of origin did not void the sale.

**STATUTES: K.S.A. 8-135; K.S.A. 50-623, -626, -627; K.S.A. 58-4201, -4204(e), (h); and K.S.A. 84-2-401(2), -2-102**

**OIL AND GAS AND RULE AGAINST PERPETUITIES**

**RUCKER ET AL. v. DELAY ET AL.**

**BARBER DISTRICT COURT – AFFIRMED**

**NO. 101,766 – JULY 23, 2010**

FACTS: The parties stipulated that on May 17, 1924, in consideration of $1,200, Earl R. DeLay and Leah Griffith DeLay, his wife, executed a general warranty deed in favor of Lurena Keener covering real property in Barber County, which contained the following reservation: “The grantor herein reserves 60 percent of the land owner’s one-eighth interest to the oil, gas or other minerals that may hereafter be developed under any oil and gas lease made by the grantee or by his subsequent grantees.” The DeLays are the successors in interest of the grantors in the above-described deed, and the Ruckers are the present owners of the described real property and, thus, the successors in interest of the grantee of the above-described deed. In 2008, the Ruckers filed a quiet title action against the DeLays in which the Ruckers contended the reservation violated the rule against perpetuities in that it was an attempt to retain a royalty interest in the grantor in production, and not a mineral interest in place. The trial court ruled in favor of Rucker that the 1924 reservation was of a royalty interest, which violated the rule against perpetuities.

ISSUES: (1) Oil and gas and (2) rule against perpetuities

HELD: Court held that it would find a different result if it were not duty bound to follow Kansas Supreme Court precedent. Court found the statements in Sidwell, Drach, and Singer indicate the Supreme Court may be susceptible to arguments, which would limit the scope and application of the rule against perpetuities to commercial transactions, including the reservation of a royalty interest. Court held that because Miller v. Sooy, Lathrop v. Eyestone, and Cosgrove v. Young are existing and binding precedents, it was compelled to follow those decisions and hold the reservation to the DeLays in the 1924 deed was of a royalty interest, which is in violation of the rule against perpetuities and, therefore, null and void. Court encouraged the DeLays to seek review of the decision and our Supreme Court to accept, review, and determine whether the language found in Sidwell, Drach, and Singer indicates a change in the application of the rule against perpetuities to royalty interests.

**STATUTE: K.S.A. 58-2202**

**REAL ESTATE, EASEMENT, AND LICENSE**

**GILMAN ET AL. v. BLOCKS ET AL.**

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

**NO. 102,084 – JULY 9, 2010**

FACTS: This declaratory judgment action involved contiguous lots 1, 2, 3, and 4 of certain residential real estate in Johnson County, Kan. A pond was located on part of lots 2, 3, and 4. Based on the pond’s location, part of lot 3’s land was on the backside of the pond and could only be accessed by land by going around the pond, which meant going onto the property of lot 2 or lot 4. Two of the adjoining landowners entered a written declaration creating an easement or a license for a 15-foot tract of land adjacent to a party pond. The trial court determined that, based upon a specific paragraph in the declaration, the landowners intended to create a license and not an easement. Alternatively, the trial court determined that even if an easement had been created, the landscaping done by the servient tenement owners, Gerard Blocks and Sandra Ullah, did not unreasonably obstruct the use of the easement by the dominant tenement

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owners, John and Nancy Gilman. The trial court further determined that an irrigation or sprinkler system on the 15-foot tract of land did not unreasonably obstruct the easement and, thus, rejected Blocks and Ullah's request that the Gilman's pay for the cost of removing the system. The Gilman's now appeal from the trial court's ruling that the declaration created a license and not an easement and its ruling that the landscaping done by Blocks and Ullah did not unreasonably obstruct the Gilmans' use of the property. Blocks and Ullah cross-appeal from the trial court's ruling rejecting their request that the Gilmans pay for the cost of removing the irrigation or sprinkler system, which they allege encroaches on their property.

ISSUES: (1) Real estate, (2) easement, and (3) license

HELD: Court held that the plain and unambiguous language of the declaration demonstrated the previous landowners' intent to create an easement over the 15-foot tract of land. Moreover, even if the language in the declaration created an ambiguity as to whether the previous landowners intended to create an easement or a license, court determined that the surrounding circumstances showed that the landowners intended to create an easement over the tract in question. In addition, court held that Blocks' and Ullah's landscaping on the 15-foot tract of land unreasonably obstructed the Gilman's use of the easement. As a result, court reversed the trial court's rulings that the declaration created a license and that Blocks and Ullah were not required to remove the landscaping on the tract in question and remanded for further consideration of the issue of removal of the obstruction created by Blocks and Ullah. Nevertheless, because Blocks and Ullah failed to present any evidence to the trial court regarding a problem of the sprinkler system on their property, we determine that the trial court properly denied their request for a declaratory judgment on this issue. Although Blocks and Ullah contend that their attorney and the Gilmans' attorney had an agreement to litigate this issue separately from the other issues in this case, they never told the trial court of this agreement before the trial occurred in this case. Such conduct amounted to invited error, and Blocks and Ullah cannot complain that the trial court failed to rule on an issue that they never properly presented to the trial court. As a result, court affirmed the trial court's judgment on Blocks' and Ullah's counterclaim regarding the sprinkler system.

STATUTES: No statutes cited.

STATUTES – LIMITATION OF ACTIONS
CHATTERTON V. ROBERTS
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 102,466 – APRIL 8, 2010
PUBLISHED VERSION FILED JULY 8, 2010

FACTS: Chatterton was injured in March 2006 car accident. He filed personal injury action in Missouri in October 2007, which was dismissed August 2008 for lack of personal jurisdiction. Within 10 days, Chatterton refiled in Johnson County. District court granted defendants’ motion to dismiss the action as time barred, finding action commenced upon filing in Missouri but was void from the beginning because it could not have been saved in that state, thus Kansas savings statute did not apply. Chatterton appealed.

ISSUE: Savings statute

HELD: Missouri law examined, finding only the filing of a petition is required to commence an action. District court erred in applying Missouri savings statute. Kansas' statute applies.

STATUTE: K.S.A. 60-518

TAX EXEMPTION
IN RE TAX EXEMPTION OF CLASS HOMES I LLC
COURT OF TAX APPEALS – AFFIRMED
NO. 101,658 – JUNE 25, 2010

FACTS: CLASS is a Kansas limited liability company with three members: (1) managing member CLASS LTD, a not-for-profit Kansas corporation with a 0.01 percent interest in CLASS; (2) investor member Kansas Equity Fund IV L.P. (KEF), which has a 99.99 percent interest in CLASS; and (3) special member Midwest Housing Assistance Corporation. The CLASS operating agreement states that its purpose is to acquire, finance, construct, own, maintain, improve, operate, and lease housing units consistent with Section 42 of the Internal Revenue Code for the benefit of low-income, developmentally disabled individuals and in a manner that addresses their unique needs. CLASS sought the exemption for group housing properties located in Labette, Crawford, and Cherokee counties, and Court of Tax Appeals (COTA) found that because CLASS received low-income housing tax credits, which were allocated to its majority owner, the exemption did not apply because the properties were not used exclusively for the purpose of group housing of mentally ill or retarded and other handicapped persons.

ISSUE: Tax exemption

HELD: CLASS failed to satisfy its burden to show it clearly qualified for an exemption. Court held that although this particular contractual relationship between an otherwise tax-exempt operator (CLASS) and a for-profit shareholder-owner (KEF) is not discussed in K.S.A. 2009 Supp. 79-201b Sixth or Kansas case law, the resolution of doubt against exemption, coupled with the standards set forth in Wyandotte County Commisions, Univ. of Kan. School of Medicine, and Johnson County Commisions, suggest that CLASS does not qualify for the exemption under K.S.A. 2009 Supp. 79-201b Sixth, given its current arrangement with KEF, and that COTA did not err as a matter of law. Court stated that CLASS has to pay KEF $1,087,890 in full, either through allocation of the tax credits or otherwise, and KEF possesses ultimate control over the properties because it has a 99.99 percent interest in CLASS. Court held KEF is also distinguishable from employees of a not-for-profit enterprise, because employees are paid in return for personal services rendered to the enterprise, whereas KEF is a majority owner with a direct financial stake. Court also stated that KEF is not a tax-exempt organization, and it is a private shareholder-owner that would derive income generated by the tax-exemption credits, that CLASS expects to accrue through its operations.

STATUTE: K.S.A. 79-201b Sixth, Ninth

TERMINATION OF PARENTAL RIGHTS
IN RE K.P.
ROOKS DISTRICT COURT – AFFIRMED
NO. 103,602 – JULY 30, 2010

FACTS: Mother cared for K.P. as a single parent until October 2008, when K.P. was referred to foster care because mother was arrested for possession of marijuana and three misdemeanor counts including child endangerment. Upon mother’s release from jail, K.P. was returned to her, and the Kansas Department of Social and Rehabilitation Services (SRS) prepared a permanency plan for mother. In mid-December 2008, however, a petition to have K.P. declared a child in need of care was filed by the state after mother was in a domestic dispute with her boyfriend, leading to domestic battery charges against mother. K.P. then went to live with her uncle and aunt, where she has resided at all times thereafter. The state filed its petition to terminate mother’s parental rights in the summer of 2009, after mother tested positive for alcohol and was taken into custody for a probation violation. She had previously been adjudicated as an unfit parent and had her parental rights to an older son terminated. At the hearing on this motion, mother testified to the
mitigating circumstances surrounding the prior adjudication and then demonstrated that she had complied with some of her case plan objectives for reintegration with K.P., felt that she had gotten control of her life, and had been sober for six months. A family support worker testified that mother was doing a much better job of handling K.P. since her inpatient drug/alcohol treatment and that mother loves K.P. very much. The district court made extensive findings of fact and then concluded that mother was unfit. Considering the best interests of K.P., however, the court declined to terminate mother's parental rights and instead concluded that appointment of a permanent custodian for K.P. was in her best interests. Mother appealed the finding of unfitness, and the state cross-appealed the court's refusal to terminate mother's parental rights.

ISSUE: Termination of parental rights

HELD: Court held that despite some progress by mother in late 2009, it concluded that the evidence adequately supported the district court's finding of parental unfitness. Eight statutory factors were met, and the evidence supported the conclusions. Court was convinced that a rational fact finder could have found it highly probable by clear and convincing evidence that mother was legally unfit to be a parent. Court also held that the district court's conclusion that a permanent custodian rather than termination of mother's parental rights was most suitable for K.P., was within the statutory options under these circumstances and must be affirmed. No abuse of discretion by trial court. The parties are reminded that a subsequent motion to terminate mother's parental rights is not barred by reason of the proceedings.

STATUTE: K.S.A. 38-2266, -2269, -2271, -2272

WORKERS' COMPENSATION AND REVIEW
GREATHOUSE V. KASB RISK MANAGEMENT SERVICES ET AL.
WORKERS COMPENSATION BOARD
REVERSED AND REMANDED
NO. 102,640 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED MAY 21, 2010

FACTS: This case arises out of a dispute between OHS Comp-care (OHS) and Kansas Municipal Insurance Trust, Alternative Risk Services, and the Kansas Association of School Boards Risk Management Services (collectively, the insurers). OHS provided medical care to a number of workers’ compensation claimants whose medical bills were being paid by the insurers. The insurers disputed OHS's fees under K.S.A. 44-510j. A hearing officer was appointed to conduct an informal medical dispute hearing pursuant to K.S.A. 44-510j(b). The informal hearings failed to resolve the dispute, so the parties requested a formal hearing. The Kansas Department of Labor (Labor), the parent agency of the Kansas Division of Workers Compensation, entered into a contract with the Department of Administration, the parent agency of the Office of Administrative Hearings, to provide officers to conduct hearings for workers compensation medical fee disputes, among other issues. Pursuant to K.S.A. 44-510j(d)(2), the director of the Kansas Division of Workers Compensation (director) referred the matter to the Office of Administrative Hearings to conduct the formal hearing requested by the parties. A hearing officer conducted formal hearings and concluded that inflated claims were submitted for payment by OHS on all medical claims which are the subject of review in this matter.

OHS appealed to the Workers Compensation Board (Board). After hearing oral arguments, the Board held K.S.A. 44-510j(d)(2) provides for review by the Board of the decision of the director. Accordingly, in the absence of a decision by the director, this appeal was premature.

Labor appeals, contending that the Board misinterpreted K.S.A. 44-510j(d)(2). The parties to the underlying dispute take no position on whether the Board’s interpretation of the statute is correct.

OHS claims the hearing officer’s order on the medical expenses issue was in error, and that it simply wants a final agency determination which, if unfavorable, would entitle it to seek judicial review.

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

HELD: Court held K.S.A. 44-510j sets forth the procedure to be followed when, in a workers’ compensation case, the employer’s insurance carrier or a self-insured employer disputes a bill for services rendered for the care and treatment of an employee under the Kansas Workers Compensation Act. The plain language of the statute authorizes a party to the dispute to have the Workers Compensation Board review the decision of the hearing officer without first seeking an intermediate review by the director of the Kansas Division of Workers Compensation.

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

CRIMINAL

STATE V. BURNS
GEARY DISTRICT COURT – AFFIRMED
NO. 102,403 – JULY 23, 2010

FACTS: On May 11, 2006, the state filed a complaint charging Burns with two counts of forgery and one count of felony theft. When this complaint was filed, Burns was serving a 620-month sentence in the El Dorado Correctional Facility. On Aug. 4, 2008, Burns filed a request under the Uniform Mandatory Disposition of Detainers Act (UMDDA), for a final disposition of these charges. The district court scheduled Burns’ first appearance hearing on Aug. 28, 2008.

At the Aug. 28 hearing, Burns was declared indigent and counsel was appointed for him. A status hearing was scheduled for Sept. 11, 2008. At the September hearing, the district magistrate judge scheduled Burns’ preliminary hearing for Oct. 28, 2008. At the October hearing, the district magistrate judge granted a continuance to the state due to an incorrect subpoena. On Nov. 25, 2008, the district magistrate granted another continuance to the state due to a mix up about which attorney would handle the case in the district attorney’s office.

On Jan. 8, 2009, the district magistrate granted another continuance to the state because the detective in the case had moved. At the conclusion of the February preliminary hearing, a district judge found that the state had established probable cause to bind Burns over for trial, and Burns pled not guilty at arraignment on Feb. 20, 2009. Burn filed a motion to dismiss the charges under statutory speedy trial rights. The district judge reviewed the continuances that were granted by the magistrate judge and found that Burns’ speedy trial rights were violated and granted Burns’ motion to dismiss. The state appealed.

ISSUE: Speedy trial

HELD: Court stated in order for a continuance to toll the period within which an inmate must be brought to trial pursuant to K.S.A. 22-4303, the parties must stipulate to the continuance or the court may grant the continuance after good cause has been proven, and then only after the defendant has been given reasonable notice and the opportunity to be heard on the motion. Under K.S.A. 22-4303 and the facts of this case, court held the delays caused by the state should be counted against the speedy trial deadline and the district court did not err by dismissing the complaint.


CONCURRENCE (J. Brazil): Concur by not agreeing with the majority opinion wherein it stated that “we do not consider a mix up about which attorney would handle the case in the district attorney's office.

STATUTES: K.S.A. 20-3402, -4301, -4303, -4401; and K.S.A. 60-206
STATE V. FRANKLIN
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,195 – JULY 2, 2010

FACTS: Franklin entered plea to two aggravating robbery offenses and admitted using a BB pistol. District court determined that the BB pistol used was a deadly weapon pursuant to Kansas Offender Registration Act (KORA), and ordered Franklin to register as a violent offender. Franklin appealed, claiming (1) multiplicity and (2) constitutionality of sentence.

HELD: K.S.A. 2009 Supp. 22-4902(a)(7) is interpreted and applied. Franklin's request for objective test for determining “deadly weapon” is inconsistent with legislative intent. When Franklin pled guilty to aggravated robbery and attempted aggravated robbery he admitted each and every element of the crimes, including element that each was committed with use of a dangerous weapon. “Dangerous weapon” in aggravated robbery statute is synonymous with “deadly weapon.” Notwithstanding Franklin's use of a BB pistol, he intended that victim believe the pistol was a dangerous weapon, and the victim reasonably believed it was. No error in district court requiring Franklin to register under KORA.

Requiring Franklin to register under KORA did not violate his constitutional rights in manner prohibited by Apprendi.


STATE V. HOOD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,953 – JUNE 25, 2010

FACTS: Hood was convicted of aggravated burglary and two counts of felony theft. Hood went to the Yen Ching restaurant just before closing, ordered a drink and waited in the balcony. After closing, Hood stole a bank bag and the owner's purse off the bar. He was confronted by the owner and hit the owner in the head with his hand.

ISSUES: (1) Multiplicity and (2) Apprendi

HELD: Court held Hood's two theft convictions were not multiplicitous where the defendant's conduct in taking a woman's purse and a restaurant's bank bag at the same time constituted separate units of prosecution under the theft statute. Court stated that Hood's conduct in taking the bank bag and Chang's purse constituted two separate offenses. Hood had reasonable notice that the property he took belonged to two different owners. Hood testified that he watched Chang empty the money from the restaurant's register and place it in the bank bag. Hood also watched Chang place her purse on the bar after everyone had left the restaurant. Those observations, along with the character of the property stolen (a bank bag and a woman's purse), were enough to give Hood reasonable notice that the items he took belonged to two separate entities – the restaurant and Chang. Court rejected Hood's criminal history/Apprendi argument based on Ivory, 273 Kan. 44.

STATUTES: K.S.A. 21-3110(13), (14); and K.S.A. 21-3701(a)(1), (b)(3)

STATE V. JONES
DOUGLAS DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 101,936 – JUNE 25, 2010

FACTS: Jones convicted on plea to three criminal charges. Aggravated presumptive guidelines sentences imposed for each conviction. Jones appealed, claiming Apprendi violation in jury's not making the determination that he be prosecuted as an adult, and claiming Apprendi violation in sentences imposed from longest range in relevant presumptive grid blocks rather than from middle of each range.

ISSUES: (1) Adjudication as adult and (2) sentencing


STATE V. KARSON
JOHNSON DISTRICT COURT – AFFIRMED
NO. 101,263 – JULY 30, 2010

FACTS: Karson parked his pickup at a Quik Trip, where an officer performed a routine check on the license plate. During that check, the officer found that it was registered to Karson and that Karson had an outstanding arrest warrant for traffic violation. After securing Karson in the back of the officer's patrol car, the officer searched Karson's pickup. Drugs and drug paraphernalia were found in Karson's truck, and he was convicted of drug charges.

ISSUE: Search and seizure

HELD: Court stated that in 2007 pretty much all courts in the United States — and certainly those with jurisdiction over Kansas police officers — said it was legal to search the passenger compartment of a car any time one of its occupants was arrested. But in 2009, the U.S. Supreme Court concluded that a vehicle could not be searched merely because an occupant had been arrested when, as was true in Karson's case, the defendant was already handcuffed and in the back of a patrol car. Karson argued that the evidence against him should have been excluded because his constitutional rights were violated. Court stated the purpose of the exclusionary rule is to deter wrongful conduct by police, not to suggest that they should be leery of following what courts have told them is the law. Court held the good-faith exception to the exclusionary rule applied, and affirmed the Karson's convictions.

STATUTE: K.S.A. 22-2501

STATE V. KERESTESSY
RICE DISTRICT COURT – AFFIRMED
NO. 101,851 – JUNE 25, 2010

FACTS: Kerestessy filed motion to suppress drug evidence obtained in search of car and in subsequent search of residence and outbuildings including a school bus at back of property after obtaining consent from Kerestessy's unmarried partner (Konen) at the residence. Trial court denied motion to suppress regarding Kerestessy's arrest and interrogation. Regarding evidence found during search of house and garage, trial court found Konen gave voluntary consent. Because Konen did not have actual or apparent authority to consent to search the bus, trial court suppressed drug manufacturing evidence recovered from the bus. State filed interlocutory appeal, arguing Konen had apparent authority.

ISSUE: Authority for consent to search

HELD: Trial court properly suppressed evidence obtained from school bus. No challenge to trial court's finding of insufficient showing to establish Konen had actual authority to consent to search of
school bus, and under circumstances of case, substantial competent evidence supported trial court’s finding that Konen did not have apparent authority to consent to search of bus. When, as in the present case, an officer is presented with ambiguous facts related to authority to consent to search of property, the officer has a duty to investigate further before relying on a consent. Here, facts available to officers failed to establish that a person of reasonable caution would believe Konen had authority over premises to be searched, and officers never made any attempt to ascertain whether Konen had “mutual use” of school bus or any legal interest in the bus. Officers’ warrantless entry into the school bus without further inquiry was unlawful under Fourth Amendment.

STATUTES: None
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SEPTEMBER

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

Friday, September 24, 9 a.m. – 3:45 p.m.
Construction Law: It’s Not Easy Being Green (and other updates)
The Oread, Lawrence

Friday, September 24, 9 a.m. – 4 p.m.
The Cybersleuth’s Guide to the Internet
Super Search Engine Strategies and Investigative Research Strategies for the Legal Professional
Overland Park Convention Center, Overland Park
Co-sponsored by the UMKC School of Law

OCTOBER

* Pending CLE Credit approval

Tuesday, October 5, Noon – 1 p.m.
Wrongful Discharges in Employment: A Legal Overview
Amanda S. Vogelsberg, Henson Hutton Mudrick & Gragson, Topeka.
Co-sponsored by the Kansas Human Rights Commission
Telephone CLE

Friday, October 8, 8:30 a.m. – 3:45 p.m.
Lawyers as Employers
Kansas Law Center, Topeka

Friday, October 8, 9 a.m. – 11:45 a.m. (Federal)
and 1 – 3:45 p.m. (Ethics)
Myriad Mishaps We’ve Watched Silently From Afar: A Candid Discussion with Federal Judicial Law Clerks
Ethics Potpourri
Sheraton Suites Country Club Plaza, Kansas City, Mo.

Tuesday, October 12, Noon – 1 p.m.
Employment Law Update – 2010 Review and 2011 Preview
Joseph Philip Mastrosimone, Kansas Human Rights Commission, Topeka
Co-sponsored by the Kansas Human Rights Commission
Telephone CLE

OCTOBER (CON’T.)

Wednesday, October 13, 9 a.m. – 4 p.m.
Media and the Law in Changing Times
Wichita State University, Rhatifgan Student Center Ballroom, 3rd Floor, Wichita
Co-sponsored by the KBA Media Bar Committee; The Elliott School of Communication, Wichita State University; Kansas Association of Broadcasters; Kansas Press Association; Media, Law, and Policy, University of Kansas School of Law

Friday, October 15, 9 a.m. – 3:45 p.m.
Working 9 to 5: A Day in the Life of Employment Law
The Oread, Lawrence

Tuesday, October 19, Noon – 1 p.m.
Immigration in Employment Law
Ashley J. Shaneyfelt and Trinidad P. Galdean, Kutak Rock LLP, Wichita
Co-sponsored by the Kansas Human Rights Commission
Telephone CLE

Tuesday, October 19, 9 a.m. – 3:45 p.m.
Lesbian, Gay, Bisexual and Transgender Legal Issues*
Stinson Morrison Hecker LLP, Kansas City, Mo.

Friday, October 22, 2010, 9 a.m. – 3:45 p.m.
35th Annual KBA/KIOGA Oil & Gas Conference
Hyatt Regency, Wichita

Friday, October 22, 2010, 9:15 a.m. – 4 p.m.
Nuts & Bolts for the Transactional Lawyer*
Crowne Plaza, Lenexa
Reception following hosted by the Corporation, Banking & Business Section

Tuesday, October 26, Noon – 1 p.m.
Look Who’s Talking—Communicating with the Opposing Party: Your Ethical Responsibility
Alan L. Rupe, Kutak Rock LLP, Wichita
Co-sponsored by the Kansas Human Rights Commission
Ethics Telephone CLE

Friday, October 29, 2010, 9 a.m. – 4:30 p.m.
Agricultural Law Update*
Kansas Farm Bureau, Manhattan
Co-sponsored by the Kansas Farm Bureau Legal Foundation

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