WHAT HEALTH CARE REFORM MEANS TO YOUR CLIENTS (AND YOU)

By William “Bill” Pitsenberg
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By William Pitsenberger

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Technology for Attorneys with Hearing Loss
By Leonard Hall

Give a Hand Up to Those in Need

- Help is needed to provide pro bono legal services to low-income Kansans; ALL areas of practice are needed.
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For more information or to volunteer, contact Meg Wickham, KBA manager of public services, at (785) 234-5696 or at mwickham@ksbar.org.
Is there a person in your courthouse that always seems to be there and that you look forward to seeing each trip you make to the building? If not the courthouse, maybe someone in your office building, gym, church, store, or other place you frequent. You know that person I’m talking about, the one that always has a smile for you and makes you feel welcome. Many years ago, one of my favorite TV shows was “Cheers.” If you were acquainted with that sitcom, the opening song referenced a place, “where everybody knows your name and they’re always glad you came.” The characters in the show were at the bar so often that they sort of resembled a family and that is the way they treated each other. Norm was my favorite and every time he entered the bar his name was yelled out with great enthusiasm and welcome.

Many of us are in the courthouse so often that the people we encounter there begin to feel like family. These individuals, whether they are court clerks, security officers, probation officers, court reporters, or even judges, make us feel welcome and brighten the day. As I walk up the courthouse steps, they often greet me with a smile and show a genuine interest in how I am doing. One of the members of my courthouse family, who I always looked forward to seeing, is now gone. He was taken from us far too early, a victim of cancer.

He was a lawyer. He did not achieve great fame by winning million dollar verdicts or arguing cases dealing with novel areas of law. He served as a contract attorney in our area, representing juveniles, misdemeanor defendants, families in child in need of care cases, and people subject to mental illness and alcohol petitions. In private practice, he was the lawyer that was always ready to lend a hand by serving as a guardian ad litem or covering a hearing if a lawyer had a conflict. He never required compensation when assisting a fellow lawyer and would simply ask that the favor be returned in the future. He left us being owed a lot of favors. He labored somewhat in obscurity and his contributions in the courtroom did not make the front pages. He was not what one would call a high-profile lawyer, but to his clients and the people he touched in the courthouse, he was a giant.

When the cancer was discovered, he faced it bravely and with a smile. He was reluctant to ask for any accommodation from opposing counsel and forged ahead, day after day, representing his clients and improving their lives. I do not know whether he was aware of the inspiration he gave to those around him. He carried himself with dignity and made all of us proud to be his fellow lawyer and friend. It seemed as if every time I went to the courthouse, he was there smiling, which made me smile. Even when he was opposing counsel, he was a welcome sight. These days, we no longer have the joy of seeing him in the hallway. Our courthouse seems empty and less inviting.

If you are fortunate enough to know someone like the person described above, do not take the smiles for granted. We have all heard the saying, “stop and smell the roses.” The lesson I learned from the loss of my friend is to stop and enjoy the smiles. The people that populate our courthouses make our practice of law more enjoyable and enrich our lives. Take a moment and let them know how important they are; you may not get another chance and be reminded of that when you notice the empty hallway.

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

Every year we all do it. We make resolutions to eat better, exercise more, and save for retirement. And each year, usually sometime in the spring for me, those resolutions are broken as we are caught with our hands in the cookie jar, catching up on our favorite TV shows instead of hitting the gym, and deciding to splurge on something for ourselves with the thought of, “I’ll save more for my retirement next year.” While I think those are all wise resolutions to make (and will continue to make and try to uphold them myself), I urge you to consider making a resolution that allows you to better yourself by doing more pro bono work to assist a population lacking the financial ability to engage counsel in basic estate planning.

As I wrote in my September Journal article, one of my goals is to implement a successful pro bono project for this 2010-2011 bar year. At the beginning of October, I had the opportunity to attend the fall conference of the American Bar Association’s Young Lawyers Division (ABA YLD). This conference was the initiation of the ABA YLD’s 2010-2011 national public service project, “Serving Our Seniors.” The kickoff began Friday, October 15 in Santa Fe, N.M., as young lawyers volunteered their afternoons to assist seniors with essential elements of a basic estate plan.

In Santa Fe, I was fortunate to learn more about the project from Justin Heather, the senior adviser for the ABA YLD serving Our Seniors program, at an affiliates roundtable discussion. The project encourages attorneys to provide low-income seniors with peace of mind regarding future health care and financial decisions through estate planning services. The project was developed by the ABA YLD based on a clinical project created by the Center for Disability and Elder Law in conjunction with the Chicago Bar Association Young Lawyers Section, the Chicago Bar Foundation and Illinois Legal Aid Online. The program provides volunteer attorneys with a comprehensive multimedia package that educates attorneys about the program, elder law, and basic estate planning law. The package includes educational outreach, training, and implementation materials that are designed to empower affiliates of the ABA to implement this program and answer the need of a vulnerable and underrepresented population.

More details about Serving Our Seniors can be found at http://www.abanet.org/yld/sos/. This website provides basic information about the program, with important video links in the column on the right of the page. Please take a few minutes of your time to view the important information on this website. In particular, check out the “Promotional” video – it’s eight minutes long and can quickly be viewed over your lunch hour! There are other videos on the website that will be utilized for implementation of the program in Kansas, including one on “Attorney Orientation” as well as several educational outreach videos.

Details on implementation of the Serving Our Seniors project in Kansas will be available at the beginning of 2011, and the Young Lawyers Section of the Kansas Bar Association (KBA YLS) urges bar members to take the “KBA YLS Pro Bono Pledge” in January as your New Year’s Resolution, where you strive to utilize your legal knowledge in the form of pro bono assistance. The KBA YLS intends to implement the program through a “KBA YLS Pro Bono Day” in the spring, and encourages not only young lawyers, but also all members of the bar, to partake in the day’s activities. More senior members of the bar can commit to a successful implementation of this pro bono project by allowing the younger lawyers in your firms and offices to take the “KBA YLS Pro Bono Day” off to participate in the project.

This project is an important one, not only for the services attorneys in Kansas can provide to a population that is often the subject of fraud and abuse, but also in the education attorneys can provide to an underrepresented population about the importance of basic estate planning. Remember, in being admitted to the Kansas Bar, we as attorneys made the commitment to uphold the Kansas Rules of Professional Conduct. Rule 6.1 stresses the importance of pro bono and states that attorneys should render legal service in pro bono and public service. In fulfilling our responsibility to perform pro bono services, we not only give access to the law for everyone, but are rewarded with a feeling of satisfaction at helping those in need while acquiring opportunities to hone important legal skills, which include interviewing, document drafting, and direct communications with the client.

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.
Did You Make a Difference?

This time of year can be about many things — parties, family gatherings, shopping, stress, wrapping, cooking, stress, holiday programs, caroling, stress … This is also the time for being thankful and reflecting on the past year. Did you accomplish what you set out to do in 2010? Did you make a difference?

As a Fellow of the Kansas Bar Foundation (KBF), you make a daily difference. Your gifts stretch throughout Kansas. We most often hear about the big three: Wichita, Topeka, and Kansas City. The Foundation is proud of the statewide reach we have.

The Foundation has three objectives:

1. Support civil legal service programs that provide services to the low income,

2. Support and foster law-related education, and

3. Perpetuate the administration of justice.

Every year the KBF solicits IOLTA (interest on lawyers trust accounts) grant applications from agencies statewide who focus on civil legal services to low-income families, law-related education, and the administration of justice. IOLTA grants to Kansas Legal Services stretch from Dodge City to Abilene and everywhere in between. Past recipients have also included CASA (Court Appointed Special Advocates) of Kansas. CASA is a statewide charitable organization that gives a voice to children through a trained advocate during the court process.

The Kansas Bar Association’s law-related education (LRE) project has long been funded by the KBF providing tools to teach the rule of law for youth K-12. LRE has published booklets for teens giving them information about their civic responsibilities and laws. Law Wise is an electronic publication sent to educators across the state giving civic lesson plans, as well as a terrific technology section focusing on web tools for educators. The LRE Clearinghouse is a library resource for civics educators housed in kind by Emporia State University. The Clearinghouse is currently being updated thanks to Foundation contributions. New “state of the art” DVDs, interactive computer activities, and many other resources are enhancing this library for Kansas teachers at no cost, other than the return mail to the clearinghouse, to the teacher or the school.

The KBA YLS Mock Trial tournament is an annual competition for high schools across the state. Recently a letter went to all Kansas high schools to those who teach civics, social studies, history, debate, English, theater, government, and everything in between to encourage more schools to participate in the mock trial program. Thanks to Shook, Hardy & Bacon LLP, the KBA was able to waive the registration cost for all schools. We are especially reaching out to rural communities to form teams either with one school or combination of area schools if there are not enough participants to make a team in a single school.

While the Foundation places special emphasis on issues affecting children and families, and also supports exceptional educational programs for youth, the Foundation is also growing with new goals and ways to help show the good our Kansas lawyers do. The KBF will be awarding three scholarships in 2010. The Justice Alex M. Fromme Memorial Scholarship, The Maxine S. Thompson Memorial Scholarship and the Case, Moses, Zimmerman and Martin P.A. Scholarship benefitting Kansas law students.

If you are already a Fellow of the Kansas Bar Foundation, thank you for the gifts of your time, talent, and resources. As you are contemplating charitable giving during this holiday season, please consider giving again to the Kansas Bar Foundation. If you are not yet a Fellow, but would like to learn more about becoming a Foundation contributor please contact Meg Wickham, KBA manager of public services at (785) 234-5696 or e-mail mwickham@ksbar.org to receive your pledge card. Please help us make a difference in Kansas.

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(Please photocopy)
www.lawfirm.com: A Web of Risks
By J. Nick Badgerow, Spencer Fane Britt & Brown, Overland Park

Overview: In the 21st century, a law firm without a website may find itself left behind, as marketing, advertising, and sales leave the newspaper, radio, and other forms of communication for the Internet. It is not surprising that the American Bar Association has issued a formal opinion (Opinion 10-457 issued on August 5, 2010) addressing law firm websites. The surprise is that it has taken this long for such an opinion to be issued. And more surprising is the fact that – taking the opportunity to focus on the subject – the opinion lays out few definitive rules.

If there were previously any doubt, this opinion makes it clear that (a) websites must not contain false or misleading information, (b) law firms should maintain a watch on their websites to maintain the accuracy and currency of statements contained therein, and (c) law firms should make sure that unintentional attorney-client relationships are not formed through interaction on the website.

Applicable rules: As members of a profession, lawyers should be truthful in their communications with others. Op. 10-457 reviews a number of the applicable rules on this subject in the context of lawyer websites.

Rule 7.1 pertains to lawyer advertising and mandates that “A lawyer shall not make a false or misleading communication about the lawyer or the lawyer’s services.” This prohibits (a) material misstatements of fact or law, (b) the creation of unjustified expectations for the results of the lawyer’s services, and (c) unsubstantiated comparisons with the services of other lawyers.

Rule 8.4(c) makes it improper for a lawyer to “engage in conduct involving dishonesty, fraud, deceit or misrepresentation.”

Rule 4.1 holds it improper for a lawyer “knowingly ... to make a false statement of material fact or law to a third person,” although this rule applies to conduct committed in the course of representing a client.

Lawyer websites: After reiterating the rules mandating truthful communications on the part of a lawyer, Op. 10-457 then reviews the kinds of information which lawyers place on their websites:

1. Information about the lawyer: This includes biographical and historical information, as well as client information (if clients give their informed consent). This information can change and become outdated.

2. Information about the law: Under this Opinion, “Lawyers may offer accurate information that does not materially mislead.” However, as descriptions of the “law” are applied to factual situations, they can mislead the reader or lead to false expectations about results.

3. Interactive websites: When a website invites inquiries or contacts, there is a risk that the responder will believe that an attorney-client relationship has been created.

Guidance for websites: Op. 10-457 provides suggestions for avoiding these risks associated with a law firm website.

1. Updated: Information on the website should be updated “on a regular basis.”

2. Accurate: Lawyers should make sure that legal information in the website is “accurate and current.”

3. Disclaimers: The website should contain qualifiers or disclaimers that statements of the law should not create unjustified expectations or mislead the reader.

4. Not advice: If legal information is provided, the website should include a statement that the information is “general in nature” and that the information should not be construed “as a substitute for personal legal advice.”

5. Not forming relationship: Ironically, a substantial purpose of the website is to distinguish the law firm from all the others, and then to form an attorney-client relationship with the reader. However, if the website invites contact by the reader, the law firm should take care not to create the appearance or expectation that a relationship has been formed by the initial contact. The website disclaimer should be directed to avoiding a misunderstanding by the website visitor that (1) a client-lawyer relationship has been created; (2) the visitor’s information will be kept confidential; (3) legal advice has not been given; or (4) the lawyer will be prevented from representing an adverse party.

The risks of relationships being formed is that the client could expect the law firm to take action on his or her behalf, and the relationship could create conflicts of interest for the law firm. In addition to the disclaimer, MRPC Rule 1.18 helps to mitigate risks in creating an attorney-client relationship upon initial discussions between a lawyer and a potential client, on certain conditions. Lawyers should review that rule carefully.

Conclusion: ABA Op. 10-457 addresses law firm websites like any other forms of communications or advertising by lawyers, and the advice given applies equally to all such communications. Care should be taken to make sure that all such communications are accurate and up-to-date, and do not create false expectations.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Brown LLP, Overland Park. He is chairman of the KBA Ethics Advisory Opinion Committee; member of the Kansas State Board of Discipline for Attorneys; chairman of the Johnson County Bar Ethics and Grievance Committee; member of the Kansas Judicial Council; chairman of the Council’s Civil Code Advisory Committee; and member of the Kansas Supreme Court-KBA Joint Commission on Professionalism.

FOOTNOTES
1. While Op. 10-457 uses the word “may” 43 times, “might” 11 times, and “should” some 20 times, the word “must” is only used on seven occasions.
2. The Kansas Rules of Professional Conduct are found at Rule 226, Rules of the Kansas Supreme Court.
4. See Kansas Op. 94-15 (fraudulent and misleading communications violate Rule 8.4(c)).
5. See Kansas Op. 06-03 (listing Rule 4.1 in discussion of lawyer letterhead).

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A Nostalgic Touch of Humor

“Out of the Office” Replies – Too Much of a Bad Thing

By Matthew Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo, mkeenan@shb.com

Technology has changed the law practice more than anything since the Dictaphone. And as with any sudden change, there is a period of adaptation and adjustment. The BlackBerry, for example, has simultaneously elevated and diminished our game. It allows clients and attorneys to remain connected not simply outside the office but also literally outside. And that, obviously, is not necessarily a good thing. And, with every new gadget typically the first thing tossed is the instruction manual – we plug it in, turn it on, and “figure it out” as we go. Three years later, we wonder how to avoid sending “reply all” responses to 500 attorneys with this rejoinder: “I don’t know.”

The same is true of protocol, etiquette, and common courtesies. Reading your Blackberry in the company of others now is the equivalent of what used to be smoking around nonsmokers – it’s rude – a statement that says “you aren’t important to me.” So people go to hide. The New York Times recently noted where they are going – to the bathroom: “The bathroom, long home to the most private of human acts, has increasingly entered the public domain. From speaking on cordless phones at home to texting a colleague during a break at work, from updating your Facebook status at a family dinner to confirming that staff meeting during date night with your spouse, the restroom has become less a place to powder your nose and more a place to put your nose to the grindstone. The corner office has become the toilet office.” “The Corner Stall Office,” New York Times, September 17, 2010.

Meanwhile, as these gadgets go everywhere, they become dirtier than cotton boxers on a week long road trip. According to recent headlines, iPads, Android phones, anything with a touch screen, are one big germ factory. The Sacramento Bee reported that “mobile phones harbor 18 times more bacteria than a flush handle in a typical men’s restroom.” And so now we have attorneys taking their practice to the toilet where it’s more sanitary than that thing they are speaking into.

So if you wonder where this column is going, you probably have lots of company.

But here is my point – the latest annoying as heck-please-stop-before-I-lose-it-pin-headed-tech-geek-get-a-life-trick: the “out of the office” e-mail replies. A concept with understandable origins – alert others that you’re “not available.” From there, however, we’ve gone the wrong direction, fast. You send a short e-mail to someone with the content of “next week let’s visit about a settlement plan, no rush” and then, a second later, you get this “I’m in meetings all day and will have limited access to the computer.” It’s an all-or-nothing reply that’s both self-important and tone deaf to the impression you’re leaving with the entire free world. When I get these from the second-year associate, my reaction is the same: Where exactly are you? On a lunar mission? With coal miners in Chile? Can you get there from your cubicle?

And so, it turns out, I’m not alone with this as a pet peeve. Leave it to some blogger to speak the truth. “Why are you telling me this? I didn’t write you to find out what you’re doing, I wrote to communicate a message, ask a question, or get information that I require. Do you stay in touch with your customers and contacts any other time than when you’re in the office? I have two words to tell you how I really feel: Quit doing this. You’re making your customers mad at you. And you look like a fool. Okay, that’s more than two words. But you get the idea. Stop it. There, that’s two words.”

Here are some out of office replies circulating the net, plus a few of my own.

• “Right now, I’m someplace you’re not, doing something you’ve never dreamed of doing. Wish you were here. But you’re not.”

• “I’m currently wearing a bag over my head at Memorial Stadium. Waiting for basketball to start. I’m preparing to leave the game at halftime, so expect an early reply.”

• “I am currently out at a job interview and will reply to you if I fail to get the position.”

• “You are receiving this automatic notification because I am out of the office. If I was in, chances are you wouldn’t have received anything at all.”

• “I will be unable to delete all the unread, worthless e-mails you send me until I return from vacation on January 10. Please be patient and your mail will be deleted in the order it was received.”

• “Thank you for your message, which has been added to a queuing system. You are currently in 352nd place, and can expect to receive a reply in approximately 19 weeks.”

Or these for trial lawyers:

• “I’m in trial defending a Fortune 500 company whose future depends on my trial skills. I will call you from the victory party.”

• “I’m on a pace to bill a billion hours this year saving corporate America from pirates. So right now, I’m taking some time off in an exotic island far away from you. If it’s really important, give me a client ID and a billing task code and I will get back to you next month.”

So, do your partners and clients a favor and drop the out of office reply. Unless, of course, you think a BlackBerry is something that goes with yogurt. In which case, you are probably brimming with clients who love you and your dedication to servicing their needs. Maybe that newbie associate down the hall will stop texting and notice. Doubtful.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Advance Notice
Elections for 2011
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2011-2012 leadership year.

**Officers**

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KBA Secretary-Treasurer: (Current – Dennis D. Depew, Neodesha)
KBA Delegate to ABA House of Delegates: Sara S. Beezley, Girard, is eligible for re-election

The KBA Nominating Committee, chaired by Timothy M. O’Brien, Kansas City, Kan., is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, January 14, 2011. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 21, 2011. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

**Board of Governors**

There will be eight positions on the KBA Board of Governors up for election in 2011. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jeffrey Alderman by Friday, March 4, 2011. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2011 are:

- **District 1:** Incumbents Gregory P. Goheen and Mira Mdivani are eligible for re-election. Johnson County.
- **District 3:** Incumbent Eric L. Rosenblad is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties.
- **District 5:** Incumbent Teresa L. Watson is not eligible for re-election. Shawnee County.
- **District 7:** Incumbent Matthew C. Hesse is eligible for re-election. Sedgwick County.
- **District 8:** Incumbent Gerald L. Green is not eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
- **District 11:** Incumbent Nancy Morales Gonzalez is eligible for re-election. Wyandotte County.
- **District 12:** Incumbent William E. Quick is eligible for re-election. Out-of-State.

For more information

To obtain a petition for the Board of Governors, please contact Kelsey Schrempp at the KBA office at (785) 234-5696 or via e-mail at kscrempmp@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Timothy M. O’Brien at (913) 735-2222 or via e-mail at tim_o’Brien@ksd.uscourts.gov or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
One of the largest groups with a disability are people with a hearing loss. With about 30 percent of people reaching 65 years old having mild to severe hearing loss, it is common for attorneys in their 50s and 60s to suffer from some sort of significant hearing loss.

Approximately every 6 of 7 people who could benefit from a hearing aid do not wear one. When they first receive their hearing aid, they often comment that the hearing aids work well for them and wished they had gotten one earlier.

Over the past 10 years, there has been significant advancements in technology for hearing aids, assistive devices, specialized telephone equipment, and cochlear implants. This has made it more successful for the person with hearing loss to wear hearing aids and use assistive devices at home and at work.

**Latest Hearing Aid Technology**

Many years ago, hearing aids were analog technology that amplified all sounds and were not helpful for some users. Because of what some people have heard about the older technology, they do not believe they will benefit from wearing the latest technology.

Today, there is a wide range of digital hearing aids ranging from tiny in-the-canal (CIC) hearing aids to open-fit behind-the-ear (BTE) hearing aids with vastly improved technology to provide better hearing for people with hearing loss.

For those with a mild to moderate hearing loss, the open-fit hearing aids are a popular option. A small thin dome sits in the ear canal and allows sound to enter the ear naturally while amplifying the sounds that users have difficulty with, often in the high frequency range. The open-fit hearing aid is very small and can be hidden behind the ear.

BTE hearing aids for people with more severe hearing loss allow adjustment of the hearing aid programming over time, and they handle greater hearing loss.

Digital hearing aids offer different features: feedback reduction, noise reduction, speech enhancement, directional microphone, and other technology that the audiologist can customize for each user.

Several recent digital hearing aids are now Bluetooth compatible. They allow the user to use Bluetooth technology compatible devices to hear better sound wirelessly from a cell phone, television, or stereo.

In most cases, digital hearing aids can last five to seven years and cost in the range of $1,500 to $3,000 each.

**Sprint CapTel Phone (Captions on Telephone)**

One of the most interesting telephone devices is the captioned telephone called CapTel 800i. This phone works like any other telephone, but it connects to the Internet to allow the user to read written captions during telephone conversations. It uses voice recognition technology (with a human captioner to make sure the words are as accurate as possible) to create the word-for-word captions the phone displays for users to read.

Any person with a hearing loss using hearing aids or assistive listening devices can use CapTel. Even people with a severe hearing loss who want to hear their voice on the phone can use CapTel. A deaf person can read the captions and speak with their voice to communicate with the person on the telephone.

Another option is using WebCapTel that allows the hard-of-hearing person to go onto the Internet, make a phone call on the website, use their regular phone to talk to the other person, and read captioning of the other person speaking on the computer screen.

One key advantage of using WebCapTel is the ability to copy the captioned statements of the phone call onto your computer to print or save. As an attorney, I would advise the person on the other end of the phone call that I am using Sprint CapTel to read the captions of what they are saying and that I may print a copy for my file.

The CapTel800i phone has a smaller display screen that shows several words at a time while the WebCapTel uses the full computer screen that shows several paragraphs of captions.

The CapTel800i phone has been priced at $99, and the main cost is paying separate for your DSL line. In most cases,
Law Students’ Corner

Legal Education: A Positive Outlook in an Uncertain Time

By Anthony Michael Knipp, University of Kansas School of Law, antknipp@ku.edu

What do Mahatma Gandhi, Nelson Mandela, and Abraham Lincoln all have in common? Among other things, they were all lawyers. These three political figures have arguably done more for social justice than anyone else in history. However, it might not have been that way had they not been legally trained. As a lawyer, Gandhi became a highly influential political activist, leading several nonviolent campaigns to defend his people's rights and gain independence for India. Mandela became a lawyer to equip himself with the necessary tools to fight apartheid and alleviate racial segregation in South Africa. Lincoln used his legal education to lead an entire country through the American Civil War, ending slavery and reeducating our nation to equal rights. In my opinion, legal education is an intellectual boot camp of sorts that prepares people for leadership roles beyond the confines of the courtroom. It not only teaches future lawyers the vastness and complexity of the law, but also introduces a new way of thinking and conceptualizing that enables people to discover new perspectives of our world.

In the midst of the “Great Recession,” much attention is paid to the lack of job opportunities available to law school graduates. Unfortunately, this negative focus sometimes overshadows the actual quality of training acquired in law school. Although the relentless Socratic method is not always enjoyable, I believe that legal education deserves to be viewed favorably – even more so during these harsh economic times. The true value of law school should not be judged solely on the merit of immediate job opportunities, but on the abilities we develop in training to be a lawyer. There is no other curriculum out there that can duplicate the wide range of benefits associated with learning to “think like a lawyer.” The following are a few underappreciated benefits of a legal education (with or without an immediate job offer):

You Acquire Options No Other Education Can Provide

Upon graduation, a legal education will open a wide variety of proverbial doors. Subsequent to bar passage, most law school graduates choose to become lawyers and apply their legal education to the revered practice of law. Fortunately for these people, the legal universe is immense and specialty areas of practice are practically infinite. Some may choose to open their own solo practice, whereas others have their sights set on the big firm. Some will take their legal education straight to the courtroom, while others will devote their knowledge to complex transactional matters from the comfort of their office. A lawyer’s options in the practice of law run the gamut, and nothing inhibits a lawyer from exploring the terrain of every avenue. With a little determination, there is virtually no limit to what a law school graduate can achieve within the profession.

That being said, law school graduates are by no means bound to the legal profession. On the contrary, law grads may become whatever it is they want to be. Unfortunately, legal education alone will not send you to Mars aboard NASA’s Constellation, nor will it propel you to the first round of the NBA draft. Nevertheless, a law degree will show future employers that you are an ambitious and intelligent person. Law school graduates have excelled in practically every legitimate job out there. The J.D. gives graduates a leg up in almost every career path, simply due to the skills and attributes it cultivates. At the very least, all careers value the ability to understand and comprehend the law because of the relationship between the legal system and our economy. Regardless of what career path is taken, the multiple career options available to legal graduates are a relative luxury that should not be overlooked. While job opportunities may not currently be as plentiful in comparison to past years, if you are willing to put in the time and effort, you will definitely find something.

You Develop the Ability to Gather, Analyze, and Communicate Information

John Quincy Adams once said, “[T]o furnish the means of acquiring knowledge is … the greatest benefit that can be conferred upon mankind.” In the Information Age, the ability to gather, analyze, and communicate information is invaluable. Not coincidentally, these skills are part and parcel of modern legal education.

To most law students, an unanswered question is merely a research challenge. As more information is uploaded to the Internet everyday, the skill of online researching has become increasingly important. Information that seemed nearly impossible to obtain in the past is now only a few clicks away. Whether it be a research assignment from an employer or a heated dispute among friends, the ability to find pertinent information in a timely manner is invaluable.

Of course, to make a good decision, you not only need good information, but you must be able to analyze it. The study of law sharpens critical thinking, reasoning, and analytical skills. Law students develop the ability to identify a myriad of factors that can affect an outcome and understand how they relate to each other. Law school instills in students the ability to quickly and accurately make assessments and decisions.

Finally, the last piece of the information-flow puzzle: communicating. The values of communication skills extend well beyond success in your legal career. The ability to effectively communicate a message will largely determine whether any given endeavor is successful. The value of gathering and analyzing information is quite limited if the findings cannot be clearly and concisely expressed to others. Even in personal relationships, the ability to communicate is at the very core of connecting with another person.

(Continued on next page)
You Gain Confidence in Your Own Judgment

While others often try to avoid confrontation and questioning, lawyers cannot. Every lawyer knows that there is no clear answer to every question. This means that part of your job as a legal professional is to gain confidence in your judgment. Indeed, this is exactly what made Nelson Mandela, Mahatma Gandhi, and Abraham Lincoln so special, because they trusted their own judgment even when up against seemingly impossible opposition. They were able to stare adversity in the eye and fight it off with a reasoned stance. By definition, leaders must have the ability to trust their own judgment.

I came to law school not only for the possibility of becoming a lawyer, but also to receive what I believe to be the best educational experience in the country. I will never again have the opportunity to devote every waking moment to the study of such a vast and complex system. Like Ghandi, Mandela, and Lincoln, my legal education provides me with the necessary tools to succeed and the potential to make a difference. If I choose to practice law after graduation — excellent. If I choose to use my legal education for a nonlegal career path — equally great. I think the balance of being happy and successful is the ultimate goal and legal education can provide this balance in numerous ways. Legal education should be appreciated for its unique virtues, regardless of the state of our economy or the many uncertainties that lie ahead.

About the Author

Anthony Michael Knipp is currently a second-year student at the University of Kansas School of Law. He grew up in Kansas City, Mo. and graduated from KU’s School of Business with a Bachelor of Science in finance. Knipp is highly involved within the law school and has spent his last two summers working for a plaintiff’s firm in downtown Kansas City.

The author would like to thank Brian Jansen for his help with this article. In true KU Law fashion, Brian set aside his own pressing work to help out a fellow Jayhawk. The author would also like to thank Ryan McAteer and Chris Steadham, who helped make this article possible.

Technology for Attorneys

(Continued from Page 12)

you can use the same DSL for your computer and phone. The use of the captioning service on CapTel800i phone and the WebCapTel is free.

For more information on WebCapTel, visit www.sprintcaptel.com, and for the CapTel800i phone, you can go to www.sprint800.com.

Kansas Telecommunications Access Program (TAP)

The Kansas TAP is a telecommunications equipment distribution program. The program is funded through the Kansas Universal Service Fund (KUSF), which you pay as part of your phone bill.

The purpose of TAP is to provide specialized equipment to Kansans with disabilities or impairments in order to access basic home telecommunication services. People with a significant degree of hearing loss can qualify to get these types of telephone equipment for free.

A hard-of-hearing or deaf person can apply for and receive equipment if the following eligibility requirements are met: residency in Kansas, telephone service in the home, have a disability in which a specialized telephone would be helpful, and have a household gross income of less than $55,000 per year.

Among the specialized telephone equipment available are: large number amplified telephone, loud bell ringer, dialogue VCO (voice carry-over) telephone, light flasher/visual signaler, amplified cordless telephone and more.

There are demonstration sites across the state where you can inspect these telephone devices before ordering them from Kansas TAP. For more information, visit www.kansastap.org.

If you have an income of $55,000 or more, you cannot use the Kansas TAP program. You can purchase the telephone equipment and other types of equipment for hard-of-hearing and deaf individuals on the following websites: www.teltex.com, www.harriscomm.com, and www.hitec.com.

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The choice of a lawyer is an important decision and should not be based solely upon advertisements.
A Journey That Turned Into a Nightmare

Anonymous

I took my first drink when I was 13 while hanging out with a friend and his older brother. Little did I realize that I had started a journey that turned into a nightmare. I thought I would not survive. Drinking was mainly a social event through high school and college. I had a few scrapes with the law, but nothing major. Upon graduation from college, I married a beautiful woman and we moved to Kansas where I attended law school. I only drank occasionally, but usually always drank until drunk.

I was very successful in law school and graduated with honors. I joined a small law firm and had the good fortune to learn how to be a trial lawyer under the guidance of a very seasoned and skilled attorney. My wife graduated from college a couple years later and life was good. We had two children, purchased a house, and had new cars. Everything was perfect.

I still only drank periodically, but my behavior when drunk began to embarrass my law partners and family. My law partners expressed their concern from time to time, but after a short time everything was forgotten until the next drunk. My law practice flourished and the consequences of my drinking were minimal, so there was little reason to change. I began to hide my drinking. I did not drink at social functions. Instead I would down a few shots in the parking lot before I went in.

One of our children had a disability. As she became older; her problems were more difficult to manage. My wife began to suffer from depression. I was very consumed by my career. I tried to handle it all and was crumbling under the pressure. I was drinking every weekend and some week nights. One morning after a long night of drinking, I needed a drink to get going. I knew I was in trouble, but I did not know where to turn. Then one day I came to work drunk after lunch. My law partners had had enough and urged me to contact KALAP. I was scared, ashamed, and guilt-ridden. Why couldn’t I just stop?

A member of KALAP was quick to meet with me and offer help. I was reluctant at first because I was worried about my reputation and law license. That of course did not slow down my drinking. I went to treatment, but continued to struggle. KALAP continued to work with me and provide assurance that I could beat the drinking problem. My drinking lead to legal problems and my departure from the law firm. I found myself back in treatment, hopeless and beaten down. I did a lot of things wrong, but I also did a few right things even though I didn’t realize it at the time. I kept following the advice of KALAP and other members of the legal profession who were very supportive. I kept working toward my recovery.

I found help and hope in a 12-step program. I obtained a sponsor and began working the steps. I was able to find a solution to solve the drinking problem. I learned that alcoholism is a disease that requires continued maintenance just like any other chronic illness. I also learned a new way of living that led me out of the black hole of alcoholism.

My drinking escapades also led to a disciplinary hearing before the Kansas Supreme Court. My honesty and willingness to face the problem were recognized by the Court. Eventually the black cloud that brought ruin and despair to my life began to dissipate. It wasn’t always easy. Some days the only thing I accomplished was staying sober. With time it got easier. One day at time is what I heard over and over.

Today I once again have a flourishing law practice. My family survived the tornado of alcoholism. I am a better person and lawyer as a result of my journey. I am not proud of what happened while in the grips of the disease, but it is part of my story and I do not run from it. I now volunteer for the organization that I sometimes resented and feared. KALAP was a significant part of my recovery and continues to be a part of it today. My life today is free of the bondage of alcoholism and I am grateful.

My concluding words are these: You are not alone. There is a solution and better way of life other than living drunk. Do not be afraid, many people are there to help. There is a better and more fulfilling life on the other side of the disease. ■
Members in the News

CHANGING POSITIONS

Christina D. Arnone, Kansas City, Mo., and Patrick A. Edwards, Wichita, have joined the offices of Stinson Morrison Hecker LLP as litigation associates.

Jason R. Bock has joined Fleeson, Gooring, Coulson & Kitch LLC, Wichita, as an associate.

Christopher T. Borniger, Wichita, and Maren K. Ludwig, Topeka, have joined the offices of Morris Laing Evans & Brock Chtd.

Heather L. Botter and Matthew R. Erb have joined the Sedgwick County District Attorney’s Office, Wichita.

Shannon E. Hilding has joined South & Associates P.C., Overland Park.

Laura L. Botter and Matthew R. Erb have joined the offices of Morris Laing Evans & Brock Chtd., Topeka.

Jason R. Bock has joined Fleeson, Gooring, Coulson & Kitch LLC, Wichita, as an associate.

Christopher T. Borniger, Wichita, and Maren K. Ludwig, Topeka, have joined the offices of Morris Laing Evans & Brock Chtd.

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Obituaries

Herbert Kenneth Dodd

Herbert Kenneth Dodd, 86, of Wichita, died July 24, at his home. He was born December 4, 1923, in Milpaw, Okla., to Byron and Ophelia Dodd. Dodd was a veteran of World War II and a graduate of Wichita State University and Washburn University School of Law. A Wichita attorney, he had been a member of the Kansas Bar since 1956 and continued to practice law until the time of his death.

Dodd is survived by his sons, Kenny Dodd, of San Diego, and Jimmy Dodd, of Overland Park; and nine grandchildren. He was preceded in death by his parents; his brother, Hershel; and his sister, Eunice.

Delton M. Gilliland

Delton M. Gilliland, 70, of Wichita, died September 29, at a Wichita hospital. He was born June 21, 1940, on the family farm north of Lyndon, the son of Frank and Lucille Parker Gilliland. He earned a Bachelor of Science in aerospace engineering from the University of Kansas in 1964 and worked for Boeing in Wichita for three years before returning to KU. While at KU, he was on the Kansas Law Review from 1968-70 and was admitted to the bar in 1970. Gilliland was a law clerk for the Idaho State Supreme Court (1970-71) and was chief prosecuting attorney for Ada County, Idaho (1972-74). He returned to Lyndon, where he joined the firm of Coffman, Jones & Hederstedt (which later became Coffman, Jones & Gilliland). Gilliland became Osage County counselor in 1989 and county administrator in 2002. He was a member of the Osage County and Kansas bar associations.

Gilliland served as past master of the Euclid Lodge No. 101 in Lyndon and the Ridgeway Lodge No. 62 in Overbrook. He also served as district grand master of the Grand Lodge of Kansas and was a Scottish Rite mason in Topeka. He was a member of the Sons of the Union Veterans and the Sons of the American Revolution.

He is survived by his wife, Jan, of the home; two daughters, Stephanie Hughes, of Leon, and Lindy May, of Clearwater; one son, Josh Gilliland, of San Diego; three brothers, Darrel Gilliland, of Topeka, Frank Gilliland, of Holton, and Milton Gilliland, of Topeka; three sisters, Ina Beth Jordan, of Centennial, Colo., Amy Feitel, of Tulsa, Okla., and Susan King, of Republic, Mo.; and five grandchildren.

Frank J. Kamas

Frank J. Kamas, 55, of Wichita, died at his home on August 24. He was born December 11, 1954, in Wichita to Albert and Joann Kamas. He graduated from Wichita High School East in 1972. Kamas earned his bachelor's degree in political science from Fort Hays State University and his law degree from Oral Roberts University.

He is survived by his father, Albert Kamas, of Wichita; brother, John Kamas, of Sedona, Ariz.; and sisters, Lexi Tehven, of Denver, and Kacy Colbern, of Overland Park. He was preceded in death by his mother, Joann Kamas.

Keith U. Martin

Keith U. Martin, 89, of Overland Park, died August 27. He was born January 19, 1921, in Miami County to Monti and Hazel Martin, and was reared on the family farm between Paola and Wellsville. He attended the University of Kansas as a Summerfield Scholar, where he was elected to Phi Beta Kappa his junior year. Martin received his master's degree from Harvard Business School and his law degree from the University of Kansas School of Law, where he was Order of the Coif. While attending law school, he taught economics at KU. Martin was admitted to the Missouri Bar in 1947 and the Kansas Bar in 1948.

Martin helped to organize the city of Mission in 1951 and served as its first city attorney for 14 years. He became a member of Payne & Jones in 1965 and practiced there until his death. Lawyers from Johnson County elected him for two terms to the Johnson County Judicial Commission. He also served as a member of the Kansas Board of Tax Appeals, and as chairman of the Kansas Water Resources Board. In 2005, the Johnson County Bar Association awarded him the Justinian Award and in 2006, the Kansas City Metropolitan Bar Association honored him for his efforts in 1955 in amending its constitution to allow African-American lawyers to join.

He is survived by his wife, Hulda, of the home; his sister, Dr. Hellen Gilles, of Lawrence; his sons, Alson Martin, of Lenexa, David Martin, of Overland Park, and Richard Martin, of Lake Oswego, Ore.; his daughter, Dr. Ann Martin, of Leawood; eight grandchildren; and one great-grandson. He was preceded in death by his sister, Corrine Ervin, of Parsons.

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Welcome Fall 2010 Admittees to the Kansas Bar

Jessica Erin Akers  
Amy E. Ambroson  
Jennifer Dawn Ananda  
Donald E. Anderson  
Hissan Anis  
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Krystal Lynn Baer  
Kristin L. Balbin  
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Jason Blake Brinkley  
Kyle Brittingham  
Alyssa Claire Brockert  
Jennifer V. Brown  
Joshua David Brunkhorst  
Caden Luke Butler  
Adam Lyle Caine  
Corey Michael Casey  
Kevin Lee Chaffee  
Lindsay A. Chapman  
Carmen H. Chopp  
Cody G. Claassen  
Andrew Clark  
Bryan Charles Clark  
Eric Wayne Clawson  
Anna Rachel Cohen  
Kelli Nicole Cooper  
Ryan Christopher Cramer  
Danielle Hess Crowder  
Jacob Mark Cunningham  
Jeffrey M. Cure  
Shaun Michael Darby  
Brandan J. Davies  
Jeffrey Gregory Dazeys  
Jaskamal Preet Dhillon  
Chelsea Elizabeth Dickerson  
Thomas James Dickerson  
Michael Edward Dill  
Craig Micol Divine  

Ryan Michael Eagleson  
Patrick A. Edwards  
Nathan R. Elliott  
Lisa Ann Eyberg  
Sarah E. Fertig  
Blake Fields  
Andrew Levi Fouts  
Andrew French  
Tessa M. French  
Lane L. Frymire  
Gay Byrne Garrett  
Sara E. Germaino  
Robert C. Gistad  
Jonathan Eric Gilmore  
Joshua Brett Goetting  
Samuel A. Green  
James M. Greter  
Jennifer Lane Haaga  
Courtney Marie Hadley  
Luke Andrew Hagedorn  
Grant Allen Harse  
Matthew Blake Heath  
Sarah Elizabeth Heeke  
Daniel Spencer Heinz  
Lindsay Frances Heist  
Grant D. Henderson  
Sarah Anne Peterson Herr  
Addie Lou Herres  
Kammie L. Herrick  
Megan Leigh Hoffman  
Nathan R. Hoffman  
Blake Alan Hollander  
Justin K. Holstine  
Kimberly Ann Honeycutt  
Jennifer N. Horchman  
Gabriel H. Hubbard  
Nathan Timothy Jackson  
Misha Christine  
Jacob-Warren  
Stephen M. James  
Jason Michael Janoski  
Ashley Nicole Jarmer  
Benjamin A. Johnson  
Stephen Moreing Johnson  
Nicholas Royden Johnston  
Kevin Arthur Jones  

John Christopher Kanaga  
William H. Kariker  
Anne Viola Kealing  
Matthew Allen Kentner  
Jessica Lynn Kimbrell  
Richard Pace Klein  
Jeffrey D. Kleysteuber  
Debra Merle Knapp  
Jeremy D. Koop  
Maria Lucia Koreckij  
Edward Moran Lafaytette  
Michael Lloyd Lankford  
Kristen Lorraine Larson  
Ahsan Azhar Latif  
Tamera M. Lawrence  
Eunice Yoo Hyang Lee-Ahn  
Jessica Faith Leffler  
Brett David Legler  
Diane Hastings Lewis  
Jennifer Rose Lindahl  
Jodi E. Litfin  
Erica M. Lopez  
Anton H. Luetkemeyer  
Margaret Patricia Mahoney  
Christopher David Mann  
Lauren Leigh Mann  
Gary Mardian  
Lauren Michelle Marino  
Kevin William Martin  
Racheal Hannah Mastel  
Teresa Alexis Mata  
Adam C. Maxwell  
Patrick Jerome McAndrews  
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Darin Lynn McCollum  
Jonathan W. McConnell  
Megan McGinnis  
Andrea S. McMurtry  
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(continued on next page)
Court Bonds: A step ahead.

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

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

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

John Gunn
The Gunn Law Firm, PC
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The Journal of the Kansas Bar Association | November/December 2010 19
Dropbox

I have too many computers. In addition to the Linux server at work, I have two Windows desktop machines there – one on each floor. A small netbook travels with me, unless I forget, and then my Android phone takes its place. At home I split time between two Macs and may even steal a few moments on my wife’s Windows tablet. Getting the files I need to follow me gracefully from machine to machine would be a serious challenge without Dropbox.

Dropbox (dropbox.com) is a free online service providing file synchronization, file sharing, and automatic backup as simply as dropping a document in a file folder. Register and install a small application on your computer (or phone) to create a special Dropbox file folder on your desktop. Save any file in that Dropbox folder and it is immediately backed up online. Log into your account at dropbox.com to access the file or, more elegantly, install Dropbox on all your machines and access it seamlessly as if it were stored locally on your computer.

Synchronization Made Simple

Multiple versions of a document can turn into a mess quickly. Versions multiply when a copy is saved to a desktop, shared on the server for colleagues, copied to a USB drive for travel, and e-mailed to a client for review. With all those copies, you still somehow managed to forget synching one to your phone for tweaking during downtime at the dock. Merging the versions back into a final can be tricky and finding a preferred earlier draft in the mix is a chore. Dropbox is a quick fix with a simple interface.

Open a single Dropbox account (free accounts offer 2 GB of storage) and install the client on any computer needing regular access to shared files. Windows, Mac, and Linux clients are all available and work identically – simply move files to the Dropbox folder and they are immediately shared across machines. Quick access to a file in the Dropbox folder is possible from computers without the installed client as well; simply log into the dropbox.com account to download and upload shared files.

Security is provided by encryption on the data as it moves from computer to Dropbox server and data stored at Dropbox is encrypted as well. Special public folders can be added to allow limited access to a subset of files for specified users. Further, an event log provides date, time, and event tracking of documents added, users accessing, and computers synchronizing to your Dropbox account. Finally, file versions are stored up to 30 days (indeﬁnitely with a paid subscription) to recover an earlier copy or even to rescue a deleted version.

Full Mobility and Automation

The same, straight-forward process works from mobile devices as well. A smartphone Dropbox client is available for iPhone/iPad, Android, and BlackBerry.

Dictate a quick letter requesting documents to a client into your smartphone and save the audio file to your Dropbox folder. Your secretary back at home base transcribes the audio file saving it as a document in a client subfolder. Your client reads the request and scans the documents you wanted into the same folder where you pick it up from the road. You could do the same via e-mail but not as securely, conveniently, or seemingly.

The user community has also started building little scripts that extend the usefulness of the service. One example available at the Digital Inspiration blog (http://tinyurl.com/2efcgq) allows printing from a Dropbox-enabled smartphone. A simple script is provided that watches a Dropbox subfolder. When it sees a new document saved in the folder, it automatically sends it to the printer. Similar scripts can be used to remotely control all sorts of activity on a computer like sending a fax, snapping a picture with a webcam, or even rebooting the machine.

Caveat

As with any cool online service, it is only cool as long as it works. Uptime for Dropbox over the past two years has been impressive but it has had outages. A USB drive is still a handy backup when the service or the Internet takes a break. You may also want to consider a product like PogoPlug (pogoplug.com), a hardware device and service which provides similar features but which stores data on a local drive instead of in “the Cloud” online.

About the Author

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Patent Reform and the Perception of a Broken System

By Randall W. Schwartz, Hovey Williams LLP, Overland Park, rws@hoveywilliams.com

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I. Introduction

Many patent experts believe the U.S. patent system is in need of a fundamental overhaul. For three consecutive sessions, Congress has proposed various broad-based and controversial reform measures. In March 2009, House and Senate leaders introduced substantially identical versions of a patent reform bill. This year, the Senate bill (Act), now referred to as the Patent Reform Act of 2010, has been amended to achieve some compromise between competing interest groups.

The Act is designed to address problems at both the agency and the judicial levels. For instance, a number of high-profile, high-tech companies (mainly producing electronics, software, and computer products) are inundated with patent infringement litigation and charges of patent infringement, and such disputes are expensive to defend or resolve. These problems assertedly stem from the vague scope of the damages statute along with inconsistent and unpredictable application of law in assessing damages awards. Furthermore, computer and software companies blame the present system for enabling nonpracticing entities (NPEs) to pursue aggressive and frivolous patent infringement suits.

Additionally, multiple groups have criticized the U.S. Patent and Trademark Office (PTO/Office) for being incompetent and inefficient. The concerns are primarily related to the patent-granting process, but the PTO has other significant problems concerning appeals and post-grant challenges. Many concerns are chronic, such as issuance of low-quality patents, high examiner turnover rates, and low examiner morale. Internal problems, such as examiner staffing levels, have resulted in an unacceptably high pendency and backlog for pending patent applications, reexamination proceedings, and appeals to the Board of Patent Appeals and Interferences. These problems burden inventors and companies and give stakeholders a reason to question the competence of the PTO.

President Barack Obama has joined those seeking reform, calling the Office’s case management system outdated and embarrassing. Prefacing the Administration’s recent budget request, including a proposed 15 percent increase in fees, PTO Director David Kappos termed the agency’s computer system “antiquated” and suggested that the system will require hundreds of millions of dollars to upgrade.

This discussion rekindles a philosophical debate about the mandate of the Constitution to “promote the progress of science and useful arts.” While reform proponents continue to drive Congress to action, the debate provides an important context to arguments on both sides of the legislation. This article will discuss the pending Act, the stated priorities of the Obama Administration, the critical damages provision of the Act, and the conversion to a first-to-file priority system as proposed in the Act.

II. The Patent Reform Bills

A. Historical perspective

The present reform bill draws from two previous congressional reform efforts – the Patent Reform Act of 2005 and the Patent Reform Act of 2007. Notably, some provisions are common to all three of the bills, including damages reform, a shift to the first-to-file regime, and post-grant opposition proceedings.

The reform bill presented in 2005 included a number of contentious provisions and some considered the bill to be too ambitious. In particular, the 2005 Act required apportionment of damages in patent suits and included provisions that impacted continuation application practice, injunctions, and the duty of candor requirement before the PTO. The 2007 Act took a more moderate approach in some respects by removing certain provisions, such as a modified duty of candor provision.

B. Provisions of the pending Act

As initially presented, the Act included the familiar provisions for apportionment of damages, revised post-grant procedures, and the first-to-file priority standard. But the Act encompassed other areas for reform, such as relaxing the requirements for inventor declarations to permit assignees to more readily file patent applications. Another section expanded the scope of prior art submissions by third parties prior to patent issuance. This section permitted the pregrant submission of statements and documents in addition to patents and publications. Yet another provision restricted plaintiffs from manufacturing venue. The Act also granted broad fee-setting authority to the Office, provided that fees established by the Office serve to “reasonably compensate” the Office. Finally, the Act removed the restriction that judges of the Court of Appeals for the Federal Circuit reside within 50 miles of the District of Columbia (the so-called “Baldwin Rule”).

C. Committee amendments

Substantial amendments to the Act were then made by the Senate Judiciary Committee (Committee). In a somewhat

FOOTNOTES

6. S. 515 § 3.
10. S. 515 § 10.
hurried move, Sen. Patrick Leahy\textsuperscript{11} pushed several amendments to a vote in the Committee and also led a vote to send the amended bill to the full Senate in short order.

Of the amendments passed by the Committee, the most significant involved the so-called “gatekeeper” provision for determining damages, which is discussed further below.\textsuperscript{12} The Committee also amended the Act to conform the venue provision to the standard recently identified by the Federal Circuit.\textsuperscript{13} In particular, a district court can transfer any action relating to patents upon a showing that the transferee venue is clearly more convenient than the venue in which the civil action is pending.\textsuperscript{14} The Committee also passed an amendment eliminating the defenses of invalidity and unenforceability to infringement based upon the best mode requirement.\textsuperscript{15} Additionally, the amended bill includes a district court pilot program to promote the expertise of district judges in patent cases, authorization for an expanded telework program, and a virtual patent marking provision.\textsuperscript{16}

There were also several notable amendments discussed but not passed by the Committee. Specifically, the Committee tabled an amendment to eliminate diversion of excess fees from the PTO. Furthermore, Sen. Orrin Hatch\textsuperscript{17} sharply criticized the Committee for failing to include a measure limiting the scope of inequitable conduct.

Most recently, a substitute amendment to the Act, referred to as the Manager’s Amendment, was released by the Judiciary Committee. The Manager’s Amendment includes modifications that are primarily directed to post-grant review procedures. The amendment reflects a compromise agreement forged by key leaders of the Senate Judiciary Committee. However, members of the House Judiciary Committee remain opposed to the Act.

III. The Administration’s Position

The Obama Administration (Administration) has indicated its support for patent reform, although its interests are not necessarily aligned with the high-tech coalition. In an October 5, 2009, letter to the Senate Judiciary Committee, Commerce Secretary Gary Locke set forth several goals of the Administration. These goals included “improving the management of the PTO and patent examination process, improving the quality of patentability decisions and harmonizing patent laws, and better managing patent litigation.”\textsuperscript{18}

Furthermore, Locke explained the government’s priorities for patent reform. Not surprisingly, the letter asked that the PTO be granted fee-setting authority as well as an interim fee adjustment, calling such authority “critical” in view of the Office’s backlog and financial problems. Moreover, the letter also requested that the Act include a grant of substantive rulemaking authority.\textsuperscript{19} The PTO’s recent attempt to implement controversial rules concerning continuation and claim limits provides a stark example of the power and scope of such authority. In the wake of that rules package, it seems unlikely that a grant of substantive rulemaking authority could be included without stirring additional controversy. The Administration also stated its support for the gatekeeper approach to damages reform and for work-sharing between the Office and foreign patent offices.

IV. Damages

A critical issue throughout the patent reform debate has been formulating a compensatory damages scheme that reasonably addresses the paradigm shift from how patents were used 50 years ago to how patents are used today. Traditionally, patents were largely held by manufacturers, and patent disputes occurred principally between entities that manufactured similar goods. Thus, competing manufacturers could potentially infringe each other’s patent holdings, and this situation led to a perceived fairness in the availability of remedies.

Nonpracticing entities (NPEs) are different from manufacturers because they generally cannot be sued for infringement. NPEs, sometimes referred to as “patent trolls,” generally do not manufacture or sell products. Rather, NPEs generate revenue by granting patent licenses to manufacturers. Consequently, NPEs can own and enforce substantial numbers of patents but are not subject to patent infringement.

While NPEs only infrequently caused problems for manufacturers in the past, there were some notable exceptions. For instance, Jerome Lemelson was a prolific inventor beginning in the 1950s and is somewhat famous for an enforcement and licensing program that stretched over several decades. More recently, however, patent-savvy NPEs have developed business models based entirely upon aggressive enforcement of broad patent collections within whole industries. The high-tech industry has been particularly susceptible to suits from NPEs.\textsuperscript{20}

On the other side of the issue, entities that favor strong patent rights (such as pharmaceutical, biotech, manufacturers, universities, and independent inventors) have generally opposed limitations on damages.

A. Present law

Patent infringement damages law is criticized for being vague and producing unpredictable jury awards.\textsuperscript{21} Compensatory damages for patent infringement are presently specified by statute in 35 U.S.C. § 284:

Upon finding for the claimant the court shall award the claimant damages adequate to compensate for the infringement but in no event less than a reasonable royalty for the use made of the invention by the infringer, together with interest and costs as fixed by the court.\textsuperscript{22}

\begin{itemize}
  \item \textsuperscript{11} Chairman of the Senate Judiciary Committee.
  \item \textsuperscript{12} S. 515 § 4 (amended).
  \item \textsuperscript{13} In re TS Tech USA Corp, 551 F.2d 1315 (Fed. Cir. 2008).
  \item \textsuperscript{14} S. 515 § 8 (amended).
  \item \textsuperscript{15} S. 515 § 14 (amended).
  \item \textsuperscript{16} S. 515 §§ 4, 13, 15 (amended).
  \item \textsuperscript{17} Republican Member of the Senate Judiciary Committee
  \item \textsuperscript{18} Letter from Gary Locke, Secretary of Commerce, to Patrick J. Leahy, Chairman of the Senate Judiciary Committee, and to Jefferson B. Sessions, III, Ranking Member of the Senate Judiciary Committee (Oct. 5, 2009).
  \item \textsuperscript{19} As patent practitioners will recall, the rules package was heavily criticized by the patent bar, and the PTO’s authority to establish such rules was challenged in Tafas v. Doll, 559 F.3d 1345 (Fed. Cir. 2009). The PTO rescinded the proposed rules following the appointment of Director Kappos.
  \item \textsuperscript{20} Companies such as Apple, Sony, and Dell have reportedly been a party to at least 50 patent lawsuits brought by NPEs over the last six years. Patentfreedom, Ranking of Operating Companies by Number of NPE Lawsuits (October 20, 2010), https://www.patentfreedom.com/research.html.
  \item \textsuperscript{21} S. Rep. No. 111-18, at 8 (2009).
  \item \textsuperscript{22} Id.
Thus, damages can be determined according to the standard of either lost profits or at least a reasonable royalty.\textsuperscript{23} Damages based upon the reasonable royalty standard are generally determined by engaging in a hypothetical negotiation between a licensor and licensee according to a 15-factor test (the Georgia-Pacific factors).\textsuperscript{24} As summarized in the Senate Report, the Georgia-Pacific factors may be associated with one of the following categories: “(1) the royalty rates people have been willing to pay for this or other similar inventions in the industry, (2) the significance of the patented invention to the product and to market demand, and (3) expert testimony as to the value of the patent.”\textsuperscript{25} Application of such a multi-factor test is complicated and prone to some inconsistency. Moreover, courts have significant discretion in determining which factors are relevant, so long as the chosen rate provides “adequate compensation to the patentee.”\textsuperscript{26}

**B. The apportionment provision**

High-tech reform proponents, such as Microsoft, Micron, Intel, Cisco, Hewlett-Packard, and Apple, have pushed for apportionment of damages. In the simplest sense, apportionment involves an award of damages that is limited to the invention’s contribution over the prior art. For inventions that form an incremental improvement over the prior art, the patent claims may invoke difficult questions about the true value of the invention. For example, a hypothetical patent may be issued with one set of claims directed to an automobile having a new mirror and another set of claims directed only to the automotive mirror itself. Now, let’s assume that the actual invention is determined to be patentable solely because the new mirror incrementally distinguishes over mirrors in the prior art. If a manufacturer infringes the automobile claims, what measure of damages is sufficient to compensate the inventor?

Drawing from the 2007 Act, the pending Act initially provided that a reasonable royalty could be calculated based upon the entire market value, with a showing that “the claimed invention’s specific contribution over the prior art is the predominant basis for market demand for an infringing product or process.”\textsuperscript{27} Alternatively, the royalty could be based upon the terms of a previous license, where the claimed invention has been the subject of that license or the claimed invention has similar noninfringing substitutes that have been the subject of that license, and where the court determines that the infringer’s use is of substantially the same scope, volume, and benefit of the rights granted under that license.\textsuperscript{28} Finally, where the court finds that showings have not been made for either of these options, the court shall perform an analysis to ensure that a reasonable royalty is applied only to “the portion of the economic value of the infringing product or process properly attributable to the claimed invention’s specific contribution over the prior art.”\textsuperscript{29}

While computer and software companies favor apportionment, entities supporting strong patent rights oppose apportionment because it would weaken valuable patent portfolios. For instance, pharmaceutical companies often spend huge sums of money on research and development to bring a single inventive drug to market. Because such companies may file only a handful of patents covering a newly developed product, pharmaceutical patents often have significantly more value than patents from other industries. Thus, pharmaceutical companies believe that apportionment would drastically and unfairly undercut their revenues.

**C. The gatekeeper provision**

After receiving comments and testimony from both sides, the Senate Judiciary Committee amended the Act to adopt a gatekeeper approach for determining damages. The Manager’s Amendment retains this approach. Specifically, the amended language requires the court to determine “methodologies and factors” that are relevant to resolving damages.\textsuperscript{30} The parties must state with particularity “the methodologies and factors the parties propose for instruction to the jury ... specifying the relevant underlying legal and factual bases.” Prior to the introduction of evidence, the court is authorized to “consider whether one or more of a party’s damages contentions lacks a legally sufficient evidentiary basis.” Additionally, “the court shall identify on the record those methodologies and factors as to which there is a legally sufficient evidentiary basis, and the court or jury shall consider only those methodologies and factors in making the determination of damages.” Finally, “the court shall only permit the introduction of evidence relating to the determination of damages that is relevant to the methodologies and factors.”\textsuperscript{31}

In its report, the Senate Judiciary Committee asserts that the amendment does not substantively alter the law of patent damages. Rather, the amended law would provide a procedure to address the quality and sufficiency of guidance provided by judges to juries concerning damages. The amended language preserves flexibility for the courts to manage the variety of patent disputes.\textsuperscript{32} In specifying the court’s duties concerning admissibility of evidence and jury instructions, the amendment does not encroach on the jury’s fact-finder role, nor does it require a hearing or mini-trial on damages outside the presence of the jury.

For litigators, the amended damages provision does not disturb the Georgia-Pacific factors but does require parties to establish an evidentiary basis for their damages contentions. This requirement is not much of a departure from recent Federal Circuit jurisprudence. In particular, the Federal Circuit recently vacated damages awards where evidence of royalties supporting a Georgia-Pacific factor was speculative or unreliable.\textsuperscript{33}

\textsuperscript{26} Robert A. Matthews Jr., ANNOTATED PATENT DIGEST § 30:84 (2008) Thomson West.
\textsuperscript{27} S. 515, 111th Cong. § 4 (2009) (emphasis added).
\textsuperscript{28} S. 515 § 4.
\textsuperscript{29} Id.
\textsuperscript{30} S. 515 § 4 (amended).
\textsuperscript{31} Id.
\textsuperscript{33} See, e.g., Lucent Tech. Inc. v. Gateway Inc., 580 F.3d 1301 (Fed. Cir. 2009); ResQNet.com Inc. v. Lanza Inc., 2010 WL 396157 (Fed. Cir. 2010).
While high-tech reform supporters seemingly conceded some ground on damages, passage of the more moderate damages provision is still far from certain. Several members of the House recently expressed concern that the amended damages language ignores current patent protections that “adequately take into account apportionment concerns.”

Damage reform will likely be a key component of any agreement that results in passage of the Act.

V. First-to-File

The first-to-file provision of the Act would force many patentees to reconsider their patenting strategy. For two applicants attempting to patent the same invention, the first-to-file system would award a patent to the first applicant to file an application with the Patent Office. If passed, the first-to-file system would eliminate the first-to-invent principle, which has been a staple of U.S. patent law for roughly 200 years.

Under the present first-to-invent system, an applicant who can prove that he or she invented before another applicant would ultimately be awarded a patent. Even in a situation where the later-inventing applicant filed an application first, the other applicant can still win with the proper evidentiary showing.

Proponents of the first-to-file system correctly note that the United States is the only major industrialized nation to use a first-to-invent system. Supporters also note that the main benefit of the first-to-file system is the relative ease of analyzing who prevails between two applications claiming the same invention. Consequently, the need for any complicated, lengthy, and expensive interference proceedings before the Office would be unnecessary. Rather, under the proposed law, a derivation proceeding would be available should a dispute arise about whether one of the applicants is a true inventor.

While the implementation of the first-to-file system would provide benefits, proponents tend to gloss over or narrowly characterize the negative impact that the first-to-file system could have on applicants. For example, PTO Director Kappos recently remarked that “the chances that a patent will be subject to an interference based on a first to invent claim — that’s our current system — is 0.01 percent. That means we already essentially have a first inventor to file system.”

These remarks, however, sidestep a number of problems with first-to-file. For example, the adjustment from an invention-date-based rule to a filing-date-based rule will result in significantly more pressure to file quickly. Clearly, a change to first-to-file would represent a significant shift in patenting strategy for U.S. applicants and attorneys, and for the short-term could cause some uncertainty and inconvenience for stakeholders.

Moreover, there could be other prolonged effects. For example, applicants will almost certainly have an advantage if they can afford to file more applications than a competitor. Under the present system, applicants who invented first (and had evidence properly supporting the invention date) could benefit by delay filing an application (for example, until aspects of the invention were more thoroughly designed). Under the proposed first-to-file system, the pressure to file quickly would encourage applicants to file as soon as an inventive concept is formulated. Similarly, design and development work beyond the conceptual stage will prompt applicants to file one or more subsequent applications for corresponding design refinements or improvements. Also, applicants may choose to file more provisional applications early in the development process because provisional applications, in some instances, may be prepared and filed more quickly than conventional utility applications.

Thus, the proposed change from first-to-invent to first-to-file may have several negative consequences associated with the pressure to file quickly. First, moving to the first-to-file system may simply involve trading one costly battle, determining who invented first, for another costly battle, determining if the claimed invention has statutory support. Second, the first-to-file system may cause some applicants, particularly those with deep pockets, to file more applications, which could have the unintended effect of increasing the application backlog of the Office. Finally, first-to-file will almost certainly be seen as unfair toward independent inventors and small businesses — those who are traditionally seen as being core beneficiaries of the patent system — because those applicants will be outspent by wealthier competitors.

The proposed first-to-file system will also increase the number of references from third parties that are available as prior art. In particular, first-to-file will bar patentability of an invention based upon a publicly available third party reference that discloses the invention at any time before the applicant’s filing date. Under 35 U.S.C. § 102(a) of the present statute, the applicant has the opportunity to “swear behind” such a reference, provided the reference does not predate the applicant’s filing date by more than one year, by producing evidence that the applicant’s date of invention predates the publication date of the reference. In response to comments from universities and small inventors, the Senate Judiciary Committee wrote the first-to-file provision to retain the present one-year grace period for disclosures by the inventor.

Thus, the proposed first-to-file language would preserve an important pro-patentee aspect of the present first-to-invent system.

35. See, e.g., Donald S. Chisum, CHISUM ON PATENTS § 10.02 (2009).
38. For example, a validity challenge may focus on whether the application provides statutory support for the claimed invention under 35 U.S.C. § 112.
39. The one-year grace period allows the inventor to file an application within one year of an inventor’s public disclosure of the invention.
Patent attorneys will certainly need to update their strategies if the first-to-file system is enacted. For example, if a client must make any disclosure of the invention prior to filing a utility or design application, attorneys may need to bolster their confidentiality agreements (e.g., by including explicit language forbidding the use of disclosed information as part of a new application). Patent attorneys may favor increased filing of provisional applications, design applications, and continuation-in-part applications to minimize application drafting time and thereby achieve the earliest possible filing date. Attorneys may also suggest monitoring of published applications to determine whether (1) a competitor has beaten them to the Patent Office, (2) a derivation proceeding is necessary, or (3) the client wants to provoke licensing discussions prior to issuance of the competitor’s patent. Attorneys may also want to consider the option of defensive publications.

The present first-to-file provision seems to have fairly universal congressional support and could likely ride the coattails of a successful compromise on other provisions. Certainly, the first-to-file provision would bring U.S. law into closer conformity with foreign laws on priority. However, the provision may ultimately earn a stigma of unfairness for rewarding applicants who can outspend competitors on patent applications.

VI. Conclusion

When the amended Act made its way before the Senate, there was little certainty about what additional amendments would be necessary and whether the bill would pass. The future of patent reform remains uncertain because patent reform is less visible to the general public than many other Congressional priorities and because the end of this session of Congress is approaching quickly. If Congress renews their interest in the Act, we could likely see further compromises on the current language and a focus on the following provisions: compensatory damages with some form of a gatekeeper provision, a first-to-file standard, and fee-setting authority for the Office.

About the Author

Randall W. Schwartz is an associate with Hovey Williams LLP in Overland Park. Randall received his Bachelor of Science and Master of Science degrees from Kansas State University and his juris doctorate from the University of Houston. As a licensed patent attorney, he focuses his practice on patent prosecution and has particular expertise in the mechanical arts.
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WHAT HEALTH CARE REFORM MEANS TO YOUR CLIENTS (AND YOU)

BY

WILLIAM PITSENBERGER
I. Introduction

The law firm had a problem.

The health insurance premiums, already high, were increasing by 63 percent. The small firm had always paid the full cost of employee coverage, but this was simply unaffordable. Moreover, the rate hike was difficult to understand – no one in the small group had experienced any significant claims – until a representative from the insurer explained that it was primarily because of the change in the average age of the group. Earlier in the year, three younger employees had left the firm, leaving only four persons on the policy and dramatically increasing the average age of the group. Because state rating laws allow insurers to consider age in establishing small group rates, the premiums shot up more than simple medical inflation would have called for. With no better premiums available from other insurers, the group moved to the highest deductible health plan it could acquire. Moving to a large deductible plan to reduce the impact of rate increases can create a burden on lower-paid employees, a difficult economic choice many businesses and individuals have had to deal with in recent years.

That was in 2008. While that scenario will persist not just for law firms but for many small groups for a few years, the health reform law which President Barack Obama signed on March 23, 2010, after a contentious and often confusing year of debate in Congress, after raucous “town hall” meetings, and even after Glenn Beck vowed to leave the United States if re-elected back, after 2010, for one year. Small employers will claim the credit on their tax return filed for 2010; no corresponding deduction for amounts paid by the employer for employee coverage will be allowed. Two percent shareholders of an S corporation, 5 percent owners of a small business, partners, and persons who are dependents of such persons are not counted toward the 25 employee limit, nor are credits allowed with respect to their premiums. The amount of credit will vary with the size of the employer, and is reduced as average wages increase, with phase-down percentages for ranges from 10 to 25 full-time equivalent employees and from $25,000 to $50,000 in average annual wages.

Those credits are available for four years through 2013. Beginning in 2014, with the advent of the health insurance exchanges discussed below, they will be available only for “qualified health plans” (those providing “essential minimum benefits” as determined by the Secretary of Health and Human Services) and only for coverage offered to employees through those insurance exchanges. However, the credit increases to an amount up to 50 percent (35 percent for tax-exempt employers), but is only available for a two-year period. The credits are available both to businesses already sponsoring coverage and to businesses which start to offer coverage.

II. Tax Effects

Tax credits for health insurance premiums paid by small businesses in 2010

A provision giving a tax credit for health insurance premiums paid by a business will have an immediate impact on businesses with fewer than 25 full-time equivalent employees meeting certain wage and contribution requirements. To be eligible for the credit, an employer must contribute at least half the premium cost for employee-only coverage (or the equivalent spread over family coverage contributions), not counting amounts paid under a salary reduction arrangement under IRS § 125 cafeteria plans. The credit is worth up to 35 percent of the average premium in the small group market in the state where the employer offers coverage (25 percent for tax-exempt small employers, used as a credit against employment taxes).

The credits can be carried forward for up to 20 years or carried back, after 2010, for one year. Small employers will claim the credit on their tax return filed for 2010; no corresponding deduction for amounts paid by the employer for employee coverage will be allowed. Two percent shareholders of an S corporation, 5 percent owners of a small business, partners, and persons who are dependents of such persons are not counted toward the 25 employee limit, nor are credits allowed with respect to their premiums. The amount of credit will vary with the size of the employer, and is reduced as average wages increase, with phase-down percentages for ranges from 10 to 25 full-time equivalent employees and from $25,000 to $50,000 in average annual wages.

Those credits are available for four years through 2013. Beginning in 2014, with the advent of the health insurance exchanges discussed below, they will be available only for “qualified health plans” (those providing “essential minimum benefits” as determined by the Secretary of Health and Human Services) and only for coverage offered to employees through those insurance exchanges. However, the credit increases to an amount up to 50 percent (35 percent for tax-exempt employers), but is only available for a two-year period. The credits are available both to businesses already sponsoring coverage and to businesses which start to offer coverage.

Extension and expansion of adoption tax credit/ adoption assistance deduction through 2016

In 2001, the adoption tax credit was expanded from $5,000 to $10,000 (more for special needs children) and indexed for inflation (the amount for 2010 had risen to $12,170). That expansion was set to revert to $5,000 in 2011. Similarly, the ability to exclude from income amounts paid by an employer under an adoption assistance program followed the same
scheduled amounts. The reform bill increased the credit or deduction by $1,000 to $13,170 for 2010, the credits were made refundable, and the reversion was delayed until 2012.

Codification of the economic substance doctrine effective March 23, 2010

For some tax advisors involved in corporate and partnership tax planning, entering into a transaction principally for the purpose of tax reduction had been an acceptable reason for structuring certain deals. That has not been a position with which the IRS or most courts have agreed, and the health reform laws codified what had been a contested point of law: the nature of the “economic substance doctrine,” the requirement that transactions have a basis other than tax avoidance to enjoy favorable tax treatment. The changes specify that a transaction must have “economic substance” for a business (other than its federal tax position), requiring that the taxpayer’s economic position have changed in a meaningful way and that the taxpayer had a substantial business purpose (other than its federal tax obligation) for engaging in the transaction.

It appears that simply profiting is in itself insufficient in terms of a change in economic position; rather, if the first test is met (change in economic position) then profit potential can be considered as a substantial purpose, using a test of whether the present value of pretax profits, taking into account the transaction expenses, is substantial compared to the present value of the anticipated tax benefits. The technical explanation has a lengthy discussion indicating that these provisions are not intended to apply to certain tax credit transactions traditionally recognized, such as those involved in Section 42 low-income housing, production, new markets, and rehabilitation tax credits. The technical explanation further disclaims that the intent of the provision is not to change the law, but merely to clarify and codify existing case law.

The provision applies to transactions entered into on and after March 23, 2010. If a transaction is found to have no economic substance under the Code provisions, deductions, and credits are disallowed and a 20 percent penalty will apply if the transaction is disclosed on the taxpayer’s return (the same rate as the understatement penalty) or a 40 percent penalty if it is not disclosed. While the codification is likely to be the site of contests to clarify its meaning and application in various circumstances, the signals the law sends to the judiciary by this change and its potential penalties are likely to discourage some types of aggressive tax planning. It is worth noting that this provision and a few others in the reform laws have no relation to health care but were included to help drive federal revenues.

Extension of gross income exclusion for health coverage of adult children

As a complement to coverage provisions described below allowing children to remain on a parent’s coverage to age 26, the tax code was amended to allow for exclusion from gross income of the benefit of employer-provided health coverage for children under the age of 27, rather than 26, effective for the 2010 tax year. Self-employed individuals are allowed a deduction for premiums paid for such children.

W-2 reporting value of employer contributions to health coverage for 2011

Beginning with tax year 2011, employers will have the option to report on W-2 forms the value of health coverage paid by the employer and will be required to report it for 2010.

Change in eligibility for coverage under HSAs, FSAs, and HRAs in 2011

Today, there is a difference between medical expenses that are deductible and the kinds of medical services that can be paid from funds in a health savings account (HSA), flexible spending account (FSA), or health reimbursement arrangement (HRA). In general, the latter have broader provisions, allowing not only direct medical care and prescribed drugs and supplies to be eligible, but also encompassing self-purchased over-the-counter medicines and supplies. The reforms change the definitions beginning in 2011 for HSAs, FSAs, and HRAs to conform with the definitions used for deductions, limiting the expenditures for which these plans can be used. There is an exception for over-the-counter medications acquired with a prescription. These changes will be important in planning for contributions to such plans later this year for 2011.

Increased taxes for nonmedical distributions from HSAs and MSAs

Funds in HSAs and in Archer Medical Savings Accounts (MSAs) can be used for other than qualified medical expenses, subject to a surtax. In 2011, that surtax will be increased from 10 percent to 20 percent for distributions from HSAs for uses other than qualified medical expenses and from 15 percent to 20 percent for such distributions from MSAs.

SIMPLE Cafeteria Plans for employers with 100 or fewer employees available in 2011

An Internal Revenue Code § 125 cafeteria plan – a plan permitting an employee to elect between taxable benefits and nontaxable qualified benefits – can lower the functional cost to employees of what would otherwise be their share of health insurance premiums or other qualified benefits by allowing for payment on a pretax basis. However, the nondiscrimination testing requirements, intended to prevent plans which favor highly compensated or key employees either with respect to the plan as a whole or with respect to specified qualified benefits, can impose a significant administrative burden on smaller employers, creating obstacles to such employers in offering § 125 plan. Effective in 2011, the reform law creates a “safe harbor” for employers of 100 or fewer employees during either of the preceding two years if the plan meets certain eligibility and contribution requirements.

In brief, the eligibility requirements mandate that all employees be eligible to participate in any of the plan benefits if they are over age 21 (or a younger age if the plan provides), worked at least 1,000 hours in the prior year, and had (if the plan requires) at least one year of service with that employer. The contribution requirement is met if (a) the employer contributes a uniform percentage of at least 2 percent of the employee’s compensation for the year (regardless of whether the eligible employee chooses to make any salary reduction contribution) or (b) the value of employer-paid benefits is the lesser of (1) at least 6 percent of each eligible employee’s...
compensation or (2) twice the amount of the salary reduction amount for each eligible employee who is not a highly compensated employee or a key employee (as defined in the Internal Revenue Code) and who participates in the plan. In essence, an employer can contribute an equal amount to all employees, whether participating or not, the employer can provide a minimum value of paid benefits, or the employer can match salary reduction amounts of nonhighly compensated, nonkey employees.

1099s for payments to corporations

The obligation for a business to generate a form 1099 when it makes payments to another person currently does not require such information reporting to the IRS when payments are made to a corporation. Beginning in 2012, payments of $600 or more made to a corporation will also require generation of a 1099.

Elimination of deduction of expenses allocable to retiree drug coverage

To encourage employers to continue to provide drug coverage to retirees when the Medicare Part D drug benefit became available, Congress provided for payment of subsidies to employers electing to participate, covering about 28 percent of the cost of retiree drug coverage. That subsidy was excludable (deductible) from such employers’ incomes. Beginning in 2013, it will be nondeductible.

Additional taxes on high-income taxpayers in 2013

For tax years 2013 and thereafter, a new 3.8 percent Medicare contributions surtax will be applied on unearned income, i.e., the lesser of (a) net investment income or (b) the excess of modified adjusted gross income (adjusted gross increased by the amount excluded from income as foreign earned income less deductions attributable to such income) over a threshold amount of $200,000 for single taxpayers, $250,000 for joint filers, $125,000 for married taxpayers filing separately, and approximately $11,200 for estates and trusts (or undistributed net investment income, if less). Charitable remainder trusts and charitable lead trusts are exempted from the surtax. In addition, the law increases the FICA tax (currently at 1.45 percent) by 0.9 percent on earned income for individuals of $600 or more made to a corporation will also require generation of a 1099. Penalties for individuals failing to hold coverage or for large employers failing to contribute adequately towards premiums

One of the key aims of the health reform law is to assure persons that they could acquire health insurance without being rejected by insurers because of existing health conditions, or being subject to underwriting restrictions, such as waiting periods or exclusionary riders, related to those conditions. The requirements on insurers to achieve that objective are discussed below. To avoid insurers being saddled with a large number of persons buying coverage only when they have a known medical need – to avoid insurers having to sell insurance “after the house is on fire” – Congress created incentives in the form of penalties for individuals to purchase coverage and for large employers to contribute to premiums. Those penalties are effective beginning in 2014 as follows:

• The law imposes a penalty on U.S. citizens who fail to maintain minimum qualified health insurance coverage. The penalty in 2014 will be the greater of 1 percent of household income or $95, in 2015 the greater of $325 or 2 percent of household income, and in 2016 and thereafter, the greater of $695 or 2.5 percent of taxable income, not to exceed the national average premium for the lowest-cost qualified plan. The penalties apply only to persons with incomes over a threshold level – $9,500 for single taxpayers, $18,700 for married persons filing jointly, $3,650 for married persons filing separately, and $12,000 for head of household status. Also exempted from the penalties are persons who cannot find a premium that is less than 8 percent of their income.

• The law also imposes a nondeductible penalty on large employers (generally those with 50 or more full-time employees) who do not meet certain contribution and coverage requirements. The penalty applies to a large employer when any full-time employee enrolls in a health insurance exchange and receives a premium assistance tax credit or cost-sharing. A penalty of $166.67 per month ($2,000 per year) per employee, based on the number of employees in excess of 30, applies to an employer in such a circumstance who fails to offer full-time employees the opportunity to enroll in a “minimum essential coverage plan” sponsored by the employer. If the employer offers such coverage but any employee is nonetheless enrolled through a health insurance exchange and receives a credit, a penalty of $250 per month ($3,000 per year) per employee enrolled in the exchange applies, not to exceed $166.67 per month per employee times the total number of full-time employees.22 While that sounds like a complex approach, the concept underlying it is to encourage employers to offer coverage and to make an adequate contribution towards employee coverage so that employees elect to enroll in the employer’s program.

Limitations on FSA contributions

For tax years beginning in 2013, the reforms will limit the amount of contributions one may make to a flexible spending account plan to $2,500, a decrease from the current $5,000 limit. After 2013, the limit will be indexed to the consumer price index general component.

Raising the threshold for itemized medical deductions.

Currently, medical expenses are deductible only to the extent they exceed 7.5 percent of adjusted gross income. Beginning with 2013, that threshold increases to 10 percent of adjusted gross income.
III. Coverage Issues

Young adults can remain on parents’ coverage

Beginning with plan years six months after the effective date of the reform law (beginning September 23, 2010), children not otherwise eligible for employer-sponsored coverage will be able to stay on a parent’s health plan to age 26. For many persons, the effective date of this provision will be January 1, 2011, because many plans operate on a calendar year basis. The U.S. Department of Health and Human Services (HHS) issued proposed regulations on May 13, 2010, explaining that access to coverage is available for unmarried and for married adult children (but not the spouses or children of such married children) and that the child need not be dependent for tax purposes, need not be a student, and need not be living at home.

Several insurers have agreed to implement the change early, although the details may vary from one insurer to another. Otherwise, eligible adult children not currently on a policy will be able to be added during a special open enrollment following the start of the plan year after September 23, 2010. Any premium due because of adding them would enjoy the same tax treatment as parental premiums and benefits received would not be taxable. In addition, if employers wish to allow coverage through age 26, changes in the tax code allow premiums and benefits to be treated in the same fashion as they are for the employee up to age 27. Nothing in the regulations or the law limits how insurers may charge for such additional coverage, including requiring higher premiums for children with severe health conditions.

No unfair rescissions of coverage

Beginning six months from the effective date of the reform law, insurers are banned from rescinding coverage except with regard to individuals who performed an act or practice that constitutes fraud or making of an intentional misrepresentation of a material fact in applying for coverage.

No lifetime benefit caps

Beginning six months after enactment, group health plans (group insurance and self-insured plans) and individual insurance may not impose lifetime limits on the dollar value of benefits or set restricted annual limits on the dollar value of essential health benefits as determined by the Secretary of HHS. In 2014, annual limits will be banned entirely. These changes will eliminate a category of relatively low-priced insurance policies that insurers have sold in recent years such as those providing a very low lifetime limit on benefits or limited benefits for specified services, such as office visits, accidents, x-rays, and other services.

Access to coverage (high-risk pool)

Although Kansas currently has a high-risk pool as a resource for otherwise uninsurable persons, that pool involves a six-month waiting period and premiums that are capped at 130 percent of comparable individual coverage. Beginning 90 days from enactment of the reform law, each state must develop a high-risk pool for persons who have been uninsured for at least six months and who have a condition that prevents them from acquiring coverage in normal insurance markets. If a state does not develop such a pool, a pool run by the federal government will be available for citizens of that state. The pool coverage may not impose any limitations on preexisting conditions and must cover, on average, 65 percent of medical costs and limit out-of-pocket spending to that allowed for an HSA, or $5,950 for individual policies and $11,000 for family policies.

Premiums will be based on market prices for similar coverage but may not vary based on age by more than a factor of 4 (that is, the price for older persons may not be more than four times the price for younger persons). Because the enrollees will be less healthy – more expensive – than persons covered in the ordinary individual market, the premiums are subsidized by federal appropriations. The high-risk pool is temporary. When insurance exchanges come into being in 2014, the requirement to maintain high risk pools goes away, because (as explained below) insurers and health insurance exchanges will not be permitted to exclude persons based on health and will be subject to rating rules that eliminate health status as a factor.

First dollar coverage for preventive services

Cost sharing (deductibles and copayments) for proven preventive care services, which will be identified by the Secretary of HHS, will be eliminated for new plans commencing six months after the effective date of the law. Although high deductible health plans provided as a part of a health savings account already may provide such coverage for preventive services, there exist today catastrophic coverages which subject all services to significant deductibles before benefits are available for any such services; these requirements may result in the elimination of such coverages in the future.

Reinsurance for employers covering retirees

To be available within 90 days of enactment (June 23, 2010), employers providing insurance to retirees ages 55 to 64 (including coverage of a spouse, surviving spouse, and dependents) will receive up to 80 percent of costs for health benefits between $15,000 and $90,000. These amounts will be adjusted in future years by the medical component of the consumer price index. Plans must use these proceeds to lower health costs for enrollees (e.g., premium contributions, copayments, deductibles, etc.) The program terminates in 2014 when such persons will be eligible to acquire coverage through health insurance exchanges. Five billion dollars has been allocated for the program, and if that is exhausted, the program will end sooner.

Payments will be made to employer-sponsored health plans, and employers with either self-insured benefits or group health insurance are eligible. Because the proceeds must be used to lower premiums, deductibles or copayments, the amounts received are excludable from gross income. Employer health plans will have to submit an application to HHS along with documentation of paid claims for early retirees to receive the assistance. In addition, to be eligible, such employer health plans will have to implement programs aimed at generating cost savings for plan participants with chronic, high-cost conditions. Employers will likely have to secure paid claims data and other assistance from their insurers or claims administrators to complete the process.
Nondiscrimination in group health plans

New group health plans established six months or later after the effective date of the legislation will be prohibited from discriminating in eligibility rules in favor of the highly compensated. Although the group quota requirements of many insurers effectively require participation by most employees not having coverage elsewhere, it has not been unusual for some employers to have differing benefits available for different classes of employees, reserving the richer plans (and higher contribution levels) for more highly paid employees. The legislation specifically provides that a plan will not be considered discriminatory if it provides higher levels of contributions to lower-paid employees (some employers have provided what amounts to graduated employee contributions, increasing with pay levels).

New rights to external review of denied claims

Most states (including Kansas) have laws that create a right to external review by an independent entity of claims denied under a health insurance contract on the grounds of lack of medical necessity or because the service was determined to be experimental or investigational. For plan years beginning on or after July 1, 2011, health insurers and group health plans (including self-insured plans) will be required to make available both an internal review process and a process for independent external review of denied claims following a model of the National Association of Insurance Commissioners. The result of that external review, if exercised, will be binding.

Reducing the coverage gap for Medicare Part D (drug coverage) enrollees

Medicare beneficiaries are eligible to enroll, subject to payment of additional premiums, in prescription drug plans underwritten by private insurance companies but subsidized by the federal government. The benefit structure currently includes a coverage gap—the “doughnut hole”—after initial benefits during which enrollees are exposed to a potential personal out-of-pocket expense ranging from $2,700 to $6,154 in drug costs. Enrollees who acquire prescription drugs subject to this coverage gap will receive a $250 rebate for 2010. In 2011, a 50 percent discount on brand-name drugs acquired while in the coverage gap will reduce the impact of that gap, and additional discounts on both brand-name and generic drugs will be phased in until the coverage gap is completely eliminated in 2020.

Rebates from insurers for excessive administrative costs and profits

Beginning in 2011, health insurers will be required to spend 80 percent of premiums collected in the individual and small group markets and 85 percent of premiums collected in the large group market on medical services. Insurers not meeting those standards will be required to provide rebates to insureds for excessive premiums. The law directs the National Association of Insurance Commissioners to develop uniform definitions for insurer reporting of costs for medical services, and the Secretary of HHS is tasked with oversight and enforcement of the law.

Medicare advantage program changes

Beginning in 2012, the reform law changes the amount of government payments to privately operated Medicare plans (“Medicare Advantage” plans) to bring them closer to costs under traditional Medicare, thus affecting premiums enrollees must pay. The reform law also prohibits such plans, beginning in 2011, from having higher cost sharing requirements than traditional Medicare for chemotherapy, renal dialysis and other services, placing them on a more equal competitive footing with traditional Medicare.

Government-administered long-term care insurance

The reform measure includes provisions for a voluntary insurance program, to be administered by the federal government, providing coverage for community living services and institutional (long-term facility) care for persons who become functionally or cognitively disabled and require long-term care services when unable to perform activities of daily living. The provision is known as the Community Living Assistance Services and Supports program, or CLASS Act. The law calls for cash benefits to purchase nonmedical services and supports needed to maintain residence in the community of the insured (example services include adult day care, assistive technology, home modifications, personal assistance services, accessible transportation, and homemaker services) as well as payments when institutional care is necessary.

The level of benefits is to be based on the degree of disability, but may average no less than $50 per day. In modeling the program, a $75 per day benefit was widely anticipated. While that amount is not enough to cover the full cost of such care, it would offset a substantial amount of such costs. In addition, since Medicaid would be secondary to the benefits of such a program, it would ease the burden on Medicaid as well. The CLASS benefits are to be financed by self-sustaining voluntary premiums paid by those electing to enroll, estimated at an average of $123 per month (the rates will vary depending on age). Payroll deduction options will be available, and if an employer is participating, persons will be automatically enrolled unless they opt out. While it is expected that enrollment will begin in 2013, one must have paid premiums for five years and have worked for at least three of those five years before benefits are available.

2014 rules encouraging enrollment in coverage (the so-called “mandate”)

Starting in 2014, all U.S. citizens and legal residents (with income-related exceptions) will be required to have minimum essential coverage or pay a penalty. The Secretary of HHS will develop regulations specifying the contents of “minimum essential coverage.” The penalty is graduated over three years, beginning as the greater of $95 per person or 1 percent of income in 2014, increasing to $325 per person or 2 percent in 2015, to $625 and 2.5 percent in 2016, and indexed thereafter for inflation. The obligation will be monitored through reporting on tax returns (as well as matching required information reporting by insurers) and will be enforced by the IRS as a required payment in addition to taxes. The IRS will be entitled to withhold refunds to enforce the penalty but many of its traditional enforcement tools will not apply (underpayment penalties and interest, levies, and seizure of assets, for ex-
Making insurance affordable through advance tax credits

The law creates premium assistance tax credits designed to assure that low-income persons do not spend more than a specified percentage of income on medical insurance premiums. Those credits first become available in 2014. Persons with household incomes between 100 percent and 400 percent of the federal poverty level will be eligible for those credits, which will be payable in advance. The tax credits will assure that such persons at the lower end of this scale spend no more than 2 percent of income for premiums and that persons at the upper end spend no more than 9.5 percent. Such assistance may only be used to purchase coverage through a health insurance exchange.

Limits on cost sharing for low-income individuals

Starting in 2014, the law creates limits on out-of-pocket costs related to the same household income thresholds that determine eligibility for advance tax credits. For persons at the lower end of the scale the reform law limits cost-sharing to one-third of health savings account limits ($1,983 for individuals, $3,967 for families) and ranges up to two-thirds of the HSA limits for persons at the upper end of that scale.

Guaranteed availability of health insurance beginning in 2014

Beginning in 2014, insurers will be prohibited from rejecting any person from coverage, although insurers will be permitted to limit enrollment dates to open enrollment periods. This guaranteed-issuance requirement is a reciprocal of the requirement that individuals hold coverage or pay a penalty. Insurers could not be required to accept anyone who sought coverage if they could not get a broad cross-section of the healthy and those needing care, and to get such a broad cross-section, some disincentive to not enrolling in coverage was necessary. As noted above, upon the 2014 effective date of this guaranteed-issuance requirement, the need for a separate high risk pool for persons who would be rejected because of existing health conditions will be moot, and the high risk pools will be eliminated.

Rating rules in the individual and small group markets

As the scenario introducing this article indicates, in 2014 a provision becomes effective that will have important effects, favorable to some and unfavorable to others, limiting how insurers may develop rates in the individual and small group markets. Insurers will be prohibited from charging the oldest individuals, or small groups with persons with older average ages, more than three times the amount charged the youngest such individuals or groups. By comparison, insurers today may have age ratios of 1:7 or higher. While that will mean lower premiums for older persons, it will mean higher premiums for younger persons. In addition to this restriction, individual and small group rates may not take health status (other than tobacco use) into consideration in rate development, and may only use as additional factors geographic rating area and family composition. Today, other factors, including group size, group claims experience, industry classification, and (in the individual market) health status, all influence rates in these market segments.

Limits on deductibles and cost-sharing

Starting in 2014, deductibles in the small group market will be limited to $2,000 for individuals or $4,000 for families (with the additional requirement of first-dollar coverage of preventive services). In addition, annual cost sharing (deductibles and copayments combined) will be limited to the HSA limits in effect.

Health insurance exchange

The reform legislation creates state-based health exchanges (the “American Health Benefit Exchanges and the Small Business Health Options Program (SHOP) Exchanges), to be available beginning in 2014. Exchanges can be thought of as an insurance “shopping mall” in which persons can select the insurer and the benefit plan of their individual choice whether enrolling as an individual or as an employee of a participating employer.

The exchanges will be administered by a governmental unit or a nonprofit organization. Individuals and employers of up to 100 employees (prior to 2016, states have the option of limiting that to employers of up to 50 employees) can purchase minimum essential insurance through the exchanges. Those persons and employers receiving premium assistance or tax credits must acquire coverage through the exchanges. States are authorized to use a single exchange for both the individual and small group markets (and by 2017, can expand availability of the exchanges to larger employers).

Health insurance exchanges embody several theories. One is that by creating a central market in which price, quality, and other information can be accessed by consumers, a more competitive insurance market will result. Another underpinning is that exchanges will create a market of insurance purchasers of such significance that insurers have to offer rates (in essence, reduce their administrative costs and profit margins) to a level similar to those charged to large groups. A third element of exchanges is that they allow consumers, including employees accessing coverage through the exchange, to have a choice of insurance carriers and plans, and to acquire coverage which is portable – which can be carried from one place of employment to another, rather than depending on the insurance carrier and coverage selected by an employer.

The coverages available in an exchange would be sold by existing health insurers meeting qualifications established by HHS and the exchanges. The same underwriting limitations and rating restrictions (guaranteed issuance, limited rating factors) applicable to insurers selling coverage in the individual and small group markets would also apply to coverage sold through the exchanges. Each exchange must offer at least two plans available on a multi-state basis and at least one plan that provides no coverage for abortion other than coverage permitted by federal law. States can enter into regional compacts creating multi-state exchanges or can allow more than one exchange if each serves a distinct, separate geographical area.
The Secretary of HHS will set up and operate an exchange in any state that fails to establish one.

Other features of exchanges include:

• Availability of four benefit levels – The Secretary of HHS will define uniform benefit packages ("essential minimum coverage") which must include ambulatory patient services, emergency services, hospital services, maternity and newborn care, mental health services, substance abuse services, prescription drugs, rehabilitation services, ease management services, and pediatric services including oral and vision care. Four levels of coverage must be available: Bronze (the plan would provide 60 percent of actuarial value of plan benefits), Silver (70 percent), Gold (80 percent) and Platinum (90 percent). All plans in an exchange must offer at least one Silver plan and one Gold plan. Plans may also offer programs of catastrophic benefits, with deductibles at the HSA level but initial coverage for preventive services and three primary care visits per year to persons (a) either under age 30 or (b) who are exempt from the requirement to hold coverage or pay a penalty because the cost of coverage would exceed 8 percent of their income. States can also create a "Basic Health Plan" for persons with incomes between 133 percent and 200 percent of the federal poverty level to be available as an alternative to such persons receiving premium subsidies to purchase coverage through the exchange.

• Exchanges will certify insurers allowed to offer coverage in an exchange and will monitor (but not regulate) premium increases.

• Exchanges will make public ratings of health plans based on quality and price, and will require plans to make public information on claim payment policies, financial information, enrollment date, denied claim data cost sharing requirements, out-of-network payment obligations of enrollees and other information.

• Exchanges will require the use of a uniform enrollment form by participating insurers.

• Exchanges will operate a toll-free consumer assistance hotline and a website allowing persons to obtain standardized comparative information about health plans offered by participating insurers.

• Importantly, exchanges will administer subsidies for individuals, including "free choice" vouchers described below.

**Free choice vouchers**

To assure that affordable coverage is available to employees who would not qualify for Medicaid but for whom employee contributions for an employer plan pose a burden, the act provides that beginning in 2014, employers that offer minimum essential coverage to employees and pay any part of the premium must also provide a “free choice voucher” to employees for whom the required employee contribution would exceed 8 percent, but not exceed 9.8 percent, of household income.

The free choice voucher would be valued at the employer contribution level, and could be used by the employee in an exchange to pay premiums for a plan the employee acquires through the exchange as an alternative to the employer plan, with the employee paying for any difference between the value of the voucher and the premium. The vouchers do not count as taxable income to the employee, are used in determining any additional premium subsidy the employee gets in the form of tax credits, and are deductible by the employer. The underlying need for an employer to know not just an employee's wage base but the household income of the employee is worth noting in this element of the law.

**Provider provisions payments**

The reform law contains a variety of provisions dealing with Medicare payments, and a thorough description of those is not possible in this article. As a centerpiece of the reform, the law establishes an Independent Payment Advisory Board, modeled on the military base closure commission, which would be required to submit recommendations to achieve spending reductions beginning in 2014 unless growth in Medicare per capita spending is at or below a specified rate. The Secretary of HHS is required to implement those recommendations unless Congress enacts legislation achieving the same level of savings.62

The law also includes a variety of specific payment changes, including reductions in the index used to update payments for hospital services beginning this year, and for home health agencies, skilled nursing facilities and other Medicare institutional providers in 2012.63 Other payment change include reductions in payments made to hospitals serving a large number of Medicaid and uninsured persons (disproportionate share hospitals) beginning in 2014.64

The reform law also provides a 10 percent bonus payment to primary care physicians and nurse practitioners beginning in 2011 if at least 60 percent of their services were for primary care, and a 10 percent bonus to general surgeons practicing in health professional shortage areas.65 The law also schedules general reductions (no more than 1 percent in 2013, 2 percent in 2014, and 3 percent in 2015 and thereafter) in amounts otherwise payable to hospitals (other than critical access hospitals) to account for payment otherwise occurring for preventable readmissions, and a reduction by 1 percent beginning in 2015 for hospital-acquired infections.66

The law authorizes some innovative programs. These include a pilot program to pay a bundled amount for an episode of care for inpatient and outpatient services rather than paying for each service separately,67 payment arrangements to providers organized as Accountable Care Organizations allowing them to share in cost savings they achieve,68 and a program to encourage at-home care of high-need Medicare beneficiaries by allowing teams of health care professionals to share savings from reduced hospitalizations coupled with improved outcomes and patient satisfaction.69

The reform law also contains various provisions addressing quality, and incentives related to quality. These include payment programs for hospitals based on performance measures.
beginning in 2012, with a requirement for developing similar plans for skilled nursing facilities, home health agencies, and ambulatory nursing facilities. There are also provisions for incentive payments to physicians for quality reporting through 2014,70 coupled with a mandatory physician quality reporting program beginning in 2015.71

Changes to Antikickback Act and False Claims Act, obligation to return overpayments

Today, physicians and hospitals are prohibited by the Antikickback Act from furnishing a thing of value to another if any purpose was to induce referrals.72 Because the Antikickback Act containing these provisions includes criminal penalties, it is strictly construed and proof of intent to induce a referral is required.73 In addition, the False Claims Act, making it a crime to present the government with a false claim, has frequently been invoked against health care providers with respect to Medicare payments.74

The reform law includes an obligation for a health care provider to report and return known overpayments within 60 days, and provides that a known overpayment not returned is an obligation (a claim, in essence) under the False Claims Act.75 The reform law separately provides that a kickback also constitutes a false claim under that Act.76 Finally, addressing the enforcement of the Antikickback Act in all circumstances, the reform law provides that a person need not have actual knowledge of the provisions of the Antikickback Act or a specific intent to commit a violation of it to be liable.77

Time for submission of Medicare claims78

The time allowed for submission of Medicare claims is reduced in the law from three years to one year.

Charitable hospital obligations79

The law creates both action and reporting criteria for charitable hospitals. Charitable hospitals are required to engage in a community health needs assessment, to have a written financial assistance policy, not to charge persons eligible for financial assistance more than is generally billed to insured persons, not to engage in extraordinary collection efforts before determining whether a patient is eligible for financial assistance, and to undergo a mandatory review of their tax exemption every three years. Charitable hospitals are also subject to a special tax beginning in 2011 (regardless of whether they retain their tax exemption) for failure to meet the requirements applicable to charitable hospitals set out in the law.

Physician interests in facilities

Concern that physician ownership of specialty hospitals (e.g., heart hospitals, spine hospitals, etc.) resulted in unnecessary admissions caused Medicare to impose a moratorium on payments to new physician-owned specialty facilities for a period running from late 2003 through early 2005.80 The reform law prohibits expansion or new creation of physician-owned hospitals (not restricted to specialty hospitals), requires reporting on the identity and extent of current physician ownership, prohibits increases in percentages of current ownership, requires physician-owners referring patients to hospitals in which they have an interest to disclose that interest, and requires hospitals to disclose physician ownership interests on websites and in public advertising.81

In addition, beginning with the effective date of the act, the law creates an obligation for physicians with an ownership interest in an MRI, CT, PET, or other designated services to inform a patient, when referring that patient for such service, of that interest and to advise the patient that the service may be obtained from another place, providing the patient with a list of suppliers of the service.82

IV. Other Provisions

Demonstration programs for alternatives to medical malpractice litigation83

The act provides for the Secretary of HHS to award grants to states that develop demonstration programs allowing for alternatives to malpractice litigation. The alternative resolution procedures must be voluntary and the participants informed of the effect of them and of their alternatives.

Elder Justice Act84

The law contains the Elder Justice Act, addressing adult abuse, neglect or exploitation by a caregiver, including both volunteers and those working for pay (and encompassing family members who provide compensated or uncompensated supportive services to an elder). The Elder Justice Act provides grants to states for elder justice programs, to create elder justice forensic centers, to support long-term care ombudsman programs and adult protective services, and to create incentives and programs to enhance training, recruitment, and retention of staff providing direct long-term care. The Elder Justice Act also creates an elder justice coordinating council and an advisory board to provide recommendations on improving the quality of long-term care and other elder care elements.

Employers to provide lactation facilities85

The reform law requires employers to provide reasonable break times for an employee to express breast milk for a nursing child for one year after the child is born and to provide a place shielded from view and intrusion by others. An employer does not have to compensate for that time (other than compensation an employer might provide for regularly-provided breaks). The requirements do not apply to employers of fewer than 50 employees if doing so would create a substantial hardship on the employer in terms of facilities, staffing, or other factors.

Excise tax on tanning services in 201086

A 10 percent excise tax will be levied on indoor tanning services (those services using UV lamps) effective July 1, 2010. This tax replaced a proposed tax on cosmetic surgery.

Nutritional labeling in chain restaurants87

Chain restaurants will be required, pursuant to regulations to be issued within one year of the effective date of the act, to provide nutritional labeling (nutrient and caloric content) of standard menu items as well as suggested daily caloric intake on menus or with posted prices, and with each item at a salad bar.
V. Not a Conclusion

The Patient Protection and Affordable Care Act is so comprehensive and so broad in its reach that an exhaustive description of all elements that might be of interest to any given attorney or anyone interested in health care financing as a policy matter would be well beyond the limitations of this article. The article has not even touched on the provisions of the law regarding significant Medicaid expansion, for instance, or on those provisions regarding health information technology, the website the Secretary of HHS will have available in the summer of 2010 to allow persons to be aware of existing health insurance alternatives, the authorization for nonprofit cooperative health insurance plans in the exchanges, additional support for maternal and child health services, support for community health centers, nursing home quality, transparency and accountability, requirements on insurers when emergency services are obtained from a provider not contracting with that insurer, and other elements, each of significance. In addition, clarification of and implementation of many aspects of the law through the publication of regulations, particularly HHS regulations, is occurring regularly and will continue unabated during the next three years at least.

At a minimum, the Patient Protection and Affordable Care Act will affect the health insurance plans of law firms both this year and in the future, and likely will have impacts on the clients of and practices of nearly all lawyers in some fashion. 88

About the Author

William Pitsenberger is of counsel with the Topeka law firm of Newbery, Ungerer and Hickert LLP. He retired from Blue Cross and Blue Shield of Kansas in 2008 after 30 years as general counsel and senior vice president. He has been teaching health law and policy at Washburn University School of Law for several years.

ENDNOTES

1. The example is taken from the experience of the law firm with which the author is associated. Its health plan included health savings accounts and the firm increased its contribution to those accounts substantially when moving to the higher deductible.
2. H.R. 3590, the Patient Protection and Affordable Care Act, Pub. L. No. 111-148, and H.R. 4872, the Health Care and Education Reconciliation Act of 2010, Pub. L. No. 111-152. Throughout, citations to the former are to Pub. L. No. 111-148 sections, and to the latter are to section numbers of the Reconciliation Act. The sections of these laws frequently amend existing laws, such as the Social Security Act, the Public Health Services Act, and the Internal Revenue Code. For brevity’s sake, the sections of those existing laws which are amended are not always identified in the following footnotes unless doing so did not result in a complex footnote.
7. Reconciliation Act § 1409.
10. Reconciliation Act § 1004.
12. Id. § 9003, 124 Stat. 119, 854.
15. Id. § 9006, 124 Stat. 119, 874-77.
16. Id. § 9012, 124 Stat. 119, 855.
17. Reconciliation Act § 1402.
18. Id. § 9015, 124 Stat. 119, 871-72.
20. Id. § 9013, 124 Stat. 119, 868.
21. Id. § 1501, 124 Stat. 119, 242-49.
22. Id. § 1513, 124 Stat. 119, 253-56.
23. Id. § 1001, 124 Stat. 119, 132, adding new § 2714 to the Public Health Service Act. The exception to the obligation to cover children to age 26 if they have other employer-sponsored coverage available to them applies only to existing employer health plans, and those will be obligated to provide coverage without regard to the offer of other employer coverage beginning in 2014. Individual policies renewed after and new employer health plans established after September 23, 2010, must make the coverage available without regard to the availability of employer-sponsored coverage for such child.
26. Id.
28. Id. § 1001, 124 Stat. 119, 131, adding new § 2711 to the Public Health Service Act.
29. Id. § 1101, 124 Stat. 119, 141-43.
32. Pub. L. No. 111-148 § 1001, 124 Stat. 119, 131-32, adding new § 2713 to the Public Health Service Act. This requirement and certain other requirements do not apply to “grandfathered” health plans (plans without significant changes in coverage or employee cost sharing) until plan years beginning in 2014. 26 C.F.R. 2590.

(Continued on next page)

34. There is currently some difference of opinion over what constitutes a “new” health plan, i.e., whether an employer that changes carriers or that adopts a different benefit structure has adopted a new health plan or whether that employer has simply modified an existing plan.


37. K.S.A. 40-22a13 et seq.


40. Id. § 10101(f), 124 Stat. 119, 885-86, adding new § 2718(c) to the Public Health Service Act.

41. Id. § 3201, 124 Stat. 119, 442-54, amending § 1853(j) of the Social Security Act.

42. Id. § 3202, 124 Stat. 119, 454-55, amending § 1852(a)(1)(B) of the Social Security Act.

43. Id. § 8001 and 8002, 124 Stat. 119, 828-46, adding new §§ 3201-10 to the Public Health Service Act.

44. Id.


46. Id.


50. Id.

51. Id.

52. Id. § 1201, 124 Stat. 119, 156, adding new § 2702 to the Public Health Service Act.

53. Id. § 1501, 124 Stat. 119, 242-44, expressing the Congressional rationale for the requirement for coverage or payment of a penalty.

54. Id. § 1201, 124 Stat. 119, 155-56, adding new § 2701 to the Public Health Service Act.


58. Id. §§ 1311-1312, 124 Stat. 119, 173-84.

ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN RE PATRICK S. BISHOP
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 104,495 – OCTOBER 15, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Patrick S. Bishop, of Fort Scott, an attorney admitted to the practice of law in Kansas in 1979. On March 28, 2008, the respondent’s license to practice law was indefinitely suspended by the Supreme Court.

On July 15, 2009, the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving his failure to include a creditor in a client’s bankruptcy case and his failure to communicate with clients. The respondent filed an answer to the formal complaint on September 27, 2009.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be disbarred.


ORDER OF DISBARMENT
IN RE STEPHEN J. JONES
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 103,599 – OCTOBER 22, 2010

FACTS: This is an original proceeding in discipline filed against Stephen J. Jones, of Wichita, an attorney admitted to the practice of law in Kansas in 1968. On September 11, 2009, the Office of the Disciplinary Administrator filed a formal complaint against Jones involving his representation of workers’ compensation clients and appeals of their cases. He failed to file an answer to the formal complaint. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on December 1, 2009. Jones failed to appear at the hearing on the formal complaint.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Jones be disbarred.


HELD: Court found clear and convincing evidence supported the hearing panel’s determination that Jones violated KRPC 8.4(c) (misconduct) by falsely telling Carthel and Hizar that he retired from the practice of law and falsely telling Carthel he had filed a petition for review in her case.

Court stated it is clear that Jones does not appreciate the seriousness of his misconduct. He generally disparages the disciplinary process and the hearing panel’s conclusions. Despite his prior disciplinary experience, he brushed aside his obligation to follow this Court’s rules, to protect the public from potential injury, or to hold the legal profession in high regard. Apparently, Jones learned little from his prior disciplinary experiences. Court concluded that disbarment is the appropriate discipline.

ORDER OF DISBARMENT
IN RE CARLOS DUPREE ROMIOUS
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 104,200 – OCTOBER 8, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against Carlos Dupree Romious, of Kansas City, Mo., an attorney admitted to the practice of law in Kansas in 1997. Romious had a history of profane, rude, disruptive, and belligerent behavior in court proceedings, with court personnel, toward judges, opposing counsel, and clients. Romious’ conduct resulted in criminal convictions, contempt adjudications with jail time, injuries to court security, and an adverse impact on a military career.
DISCIPLINARY ADMINISTRATOR: Disciplinary administrator recommended that Romious be disbarred. Disciplinary administrator stated that had Romious filed an answer or otherwise participated in the process, indefinite suspension might have been an appropriate recommendation.

HEARING PANEL: Panel determined that Romious violated KRPC 1.1 (competence), 1.5(a) (fees), 3.4(c) (fairness to opposing party and counsel), 3.5(d) (engaging in undignified or discourteous conduct degrading to a tribunal), 4.4(a) (respect for rights of third persons), 8.4(b) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness or fitness as a lawyer), 8.4(c) (engaging in conduct involving misrepresentation), 8.4(d) (engaging in conduct prejudicial to the administration of justice), 8.4(g) (engaging in conduct adversely reflecting on lawyer’s fitness to practice law), and Kansas Supreme Court Rule 211(b) (failure to file answer in disciplinary proceeding).

HELD: The evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. Romious is disbarred from the practice of law.

ORDER OF TEMPORARY SUSPENSION IN RE DARYLE A. EDWARDS
NO. 23,111 – SEPTEMBER 29, 2010

FACTS: Daryle A. Edwards is presently the subject of a pending disciplinary complaint commenced as a result of Edward’s conviction of a felony offense in the U.S. District Court for the Western District of Missouri – conspiracy to commit wire fraud and interstate transportation of funds obtained by fraud.

HELD: Court held Edwards is temporarily suspended from the practice of law in Kansas until the pending disciplinary proceedings against him are finally resolved or until further order of this Court.

ORDER OF DISBARMENT IN RE TERENCE A. LOBER
NO. 104,496 – OCTOBER 15, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Terence A. Lober, of Leavenworth, an attorney admitted to the practice of law in Kansas in 1979. On September 15, 2009, the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving his representation of criminal defendants and acceptance of large retainer fees and failure to contact clients. The respondent failed to file an answer to the formal complaint. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on November 19, 2009. The respondent failed to appear at this hearing.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that respondent be disbarred.


HELD: Court noted that the respondent did not provide an answer to the complaint, appear for hearing before this court, or offer an explanation for his absence, although a copy of the hearing notice was mailed to him in accordance with the rules. Lober filed no exceptions to the hearing panel’s report. Court concluded there is clear and convincing evidence that Lober violated KRPC 1.1, 1.3, 1.4(a), 1.5, 1.15(b), 8.1(b), 8.4(a) and (d) as well as Supreme Court Rules 207(b) and 211(b), and Court adopted the conclusions of the hearing panel. Court held that the appropriate discipline is disbarment.

ORDER OF DISBARMENT IN RE SAMUEL P. LOGAN
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 14,832 – SEPTEMBER 29, 2010

FACTS: On September 14, 2010, Samuel P. Logan, of Overland Park, voluntarily surrendered his license to practice law in Kansas. On July 22, 2010, Logan was charged with two felonies in the U.S. District Court for the District of Kansas. The crimes charged are 18 U.S.C. § 2252(a)(2) (2006), certain activities relating to material involving the sexual exploitation of minors, and 18 U.S.C. § 2252(a)(2) (2006), coercion and enticement. These two charges were pending at the time the respondent surrendered his license to practice law.

HELD: Court found that having examined the files of the Office of the Disciplinary Administrator, the surrender of the Logan’s license should be accepted and that Logan should be disbarred.

ORIGINAL PROCEEDING IN DISCIPLINE
IN RE MICHAEL A. MILLETT
TWO-YEAR SUSPENSION
NO. 104,199 – OCTOBER 15, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Michael A. Millett, of Overland Park, an attorney admitted to the practice of law in Kansas in 1997. On October 26, 2009, the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving Millett’s representation of an individual charged with electronic solicitation for sex of a 14-year-old female. Millett was eventually charged with obstruction. The respondent filed an answer on November 18, 2009. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on December 16, 2009, where the respondent was personally present and was represented by counsel.

DISCIPLINARY ADMINISTRATOR: The deputy disciplinary administrator made two separate recommendations. First, if the hearing panel were to find that the respondent conspired with defendant and his brother or knew or encouraged the brother to provide false information to the police officers, then the deputy disciplinary administrator recommended that the respondent be disbarred. On the other hand, if the hearing panel concludes that the respondent did not engage in the fraud, but rather, only the remaining misconduct, then the deputy disciplinary administrator recommended that the respondent be indefinitely suspended from the practice of law.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 4.3 (2009 Kan. Ct. R. Annot. 572) (dealing with unrepresented person), 8.4(b) (2009 Kan. Ct. R. Annot. 602) (commission of a criminal act reflecting adversely on the lawyer’s honesty, trustworthiness, or fitness as a lawyer), 8.4(c) (engaging in conduct involving misrepresentation), and 8.4(d) (engaging in conduct prejudicial to the administration of justice). Hearing panel unanimously recommended that respondent be suspended from the practice of law for 30 days.

HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. Court held the respondent’s lack of any prior disciplinary record and his good reputation among his peers in the Johnson County bar
and awarded $4,050 in damages. Davenport appealed claiming: (1) county counselor's dual role as advocate during the hearing and legal advisor during commissioners' deliberation violated due process; (2) commissioners denied due process by viewing roads and examining maps outside the hearing; (3) no substantial competent evidence supported the damages award; and (4) K.S.A. 68-102a, 68-107, and 68-21019(d) are unconstitutional because the commissioners acting in a quasi-judicial capacity cannot decide damages in fair and unbiased manner when county is responsible to pay the damage award, and the district and appellate courts have only limited review. Court of Appeals affirmed denying Davenport's arguments.

ISSUE: County counselor's participation

HELD: Court held the multiple roles played by the attorney for the Board of Morris County Commissioners created a probability of actual bias that rose to an unconstitutional level. As a result, the other party's rights to due process of law were violated and the Board's decision is void.

CONCURRENCE (Biles, J.): Concur to emphasize the statutes created an inherent conflict of interest for county commissioners and an invitation for abuse. Justice Biles cautioned the Board to figure out a structured decision-making process that would exhibit neutrality and detachment toward both sides of the dispute.

STATUTES: K.S.A. 19-212; K.S.A. 20-3018(b); K.S.A. 26-501, -504; K.S.A. 60-456(b), -2101, -2101(d); K.S.A. 68-102a, -107, -107(1), -115(a); K.S.A. 72-5436, -5438; and K.S.A. 77-501, -514(h)

PARTITION
MCGINTY V. HOOSIER
STAFFORD DISTRICT COURT – AFFIRMED
NO. 101,674 – SEPTEMBER 24, 2010

FACTS: No appeal taken from district court's partition in 1973 of subject property, which McGintys purchased at sheriff's sale. Thirty-two years later, McGintys filed quiet title action claiming ownership of all surface interest and half of mineral interests in the property. Over defendants' challenge to ownership of mineral interests, district court granted summary judgment to McGintys based on the 1974 sheriff's deed in partition. Defendants appealed, claiming in part the sheriff's deed did not convey mineral interests because all owners of all interests in the property were not named as parties in the partition action.

ISSUES: (1) Necessity to join all owners in partition actions and (2) summary judgment

HELD: K.S.A. 60-1003 does not require that all owners of the entire tract involved in a partition must be made parties to obtain a valid partition. Cases in Kansas and other states are examined. Court has statutory authority to partition less than all property interests of all owners of a tract of real estate, so long as the remaining property interests are not adversely affected. Partition judgment in this case is examined from viewpoint of each class of defendants not parties in the partition action, finding no adverse impact.

Summary judgment was appropriate, as material facts necessary to quiet title in the McGintys were not in dispute.

STATUTES: K.S.A. 58-2202; and K.S.A. 60-219(a), -1003, -1003(a), -1003(a)(1), -1003(b), -1003(d), -2103(a), -2416

PENSIONS AND BENEFIT PLANS
ROBINSON V. CITY OF WICHITA EMPLOYEES’ RETIREMENT BD. OF TRUSTEES
SEDGWICK DISTRICT COURT – REVERSED
NO. 102,217 – OCTOBER 8, 2010

FACTS: City's Employees' Retirement Board of Trustees (Board) approved request by former city employee for disability retirement benefits. Applying Wichita City Code provision that "any amount received under the State Workers Compensation Act (except medical expenses) shall be deducted from the [City's] disability retire-
ment benefits,” it reduced Robinson’s disability retirement benefits $125,000 for Robinson’s worker’s compensation award. Robinson appealed to district court, claiming the deduction from her disability benefits should be the amount she actually received, and not include contingency fee paid to her worker’s compensation attorney. District court reversed, finding Board’s decision to deduct the full $125,000 was arbitrary and capricious considering purposes of disability benefits, finding Robinson was being penalized for exercising her right to recover workers compensation benefits, and finding no long-standing policy on this issue of first impression. District court also found Robinson was entitled to recover attorney fees from Board under common fund doctrine. Board appealed. Case transferred to Supreme Court.

ISSUES: (1) Board’s interpretation of city code, (2) reasonableness of Board’s decision, and (3) common fund doctrine

HELD: Matter of first impression. Cases in other states and Tenth Circuit are examined. Board’s interpretation of Wichita City Code provision was not arbitrary and capricious, but was a reasonable interpretation consistent with principles of statutory interpretation, and interpretation of similar provisions by other courts. Code provision clearly and unambiguously means the disability retirement benefit will be reduced by the full amount of the workers’ compensation award without exception for attorney fees incurred in obtaining the workers’ compensation award.

None of district court’s rationales established that Board’s interpretation was unreasonable or contrary to established policy. District court erroneously focused on prejudice and hardship in Robinson’s case rather than purpose of City’s retirement plan. Robinson was not being penalized by having to pay her attorney a fee deemed reasonable by workers compensation director. And Board’s interpretation of issue of first impression did not render it arbitrary.

Common fund doctrine is discussed. Two divergent lines of cases are examined, adopting less rigid equitable view by Nebraska Supreme Court in Kindred v. City of Omaha Emp. Ret. Sys., 252 Neb. 658 (1997), and dissent in Flynn v. State Compensation Ins. Fund, 312 Mont. 410 (2002). Common fund doctrine does not apply when a clear and unambiguous provision requires reduction of disability retirement award by entire amount of a workers’ compensation award without specifically excluding attorney fees.

DISSENT (Luckert, J., joined by Johnson, J.): Dissents from majority’s conclusion that common fund doctrine does not apply. Would adopt holdings and rationale in Leonard v. Southwestern Bell Corp. Disability, 341 F.3d 966 (8th Cir. 2003), and majority in Flynn, which better express views consistent with Kansas court’s past application of common fund doctrine. Appropriate to apply common fund doctrine in this case where Board benefitted from efforts of Robinson’s workers compensation attorney by saving Board more than $93,000 that it would have owed Robinson if she had not received worker’s compensation award.

STATUTES: K.S.A. 2009 Supp. 44-501(h); K.S.A. 2009 Supp. 74-4927(1)(B); K.S.A. 20-3018(c); K.S.A. 44-536, -536(b), -536(f); K.S.A. 60-2101(d); and K.S.A. 74-109, -4901 et seq., -4914e

TORTS – EVIDENCE

KUXHAUSEN V. TILLMAN PARTNERS L.P.
RILEY DISTRICT COURT – AFFIRMED
NO. 98,442 – OCTOBER 15, 2010

FACTS: Kuxhausen fell ill within minutes of reporting to work in building in which epoxy-based paint had been applied over the weekend. Over the next few days, she spent approximately eight hours in the building after it was painted. Kuxhausen sued Tillman Partners, claiming she now has an ongoing sensitivity to a variety of chemicals encountered in daily life, all due to her exposure to the epoxy paint fumes. She presented medical doctor’s testimony of her multiple-chemical sensitivity, but district court ruled the expert testimony was not sufficiently reliable to be admitted in a Kansas court. Summary judgment granted to Tillman Partners. Kuxhausen appealed. Court of Appeals affirmed, 40 Kan. App. 2d 930 (2009). Review granted.

ISSUE: Factual basis for expert testimony

HELD: Kuxhausen did not present a sufficient basis for introduction of her expert’s opinion that her symptoms were caused by her exposure to the epoxy paint. This leaves no causation to support her claim. Trial court’s summary judgment in favor of Tillman Partners was appropriate and is affirmed.

STATUTE: K.S.A. 60-456(b)

WORKERS’ COMPENSATION AND REPETITIVE TRAUMA
MITCHELL V. PETSMA RT INC. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 99,528 – SEPTEMBER 10, 2010

FACTS: Mitchell worked for Petsmart from July 2002 until July 2005. His duties included building store displays, assisting customers, and stacking merchandise, including 20-50 pounds bags of dog food. On December 31, 2003, Mitchell fell at work and broke his left thumb. He was ultimately diagnosed with bilateral carpal tunnel injuries in July 2005. Petsmart terminated Mitchell’s employment for poor attendance in July 2005. Petsmart changed insurance companies from Royal & Sun Alliance Co. to Travelers on February 1, 2004. The administrative law judge (ALJ) concluded: (1) Mitchell sustained a single, work-related injury on December 31, 2003, when he broke his left thumb; (2) Mitchell’s subsequent repetitive trauma injuries were the natural and probable consequences of the thumb injury; (3) Travelers and Royal were jointly and severally liable for all of Mitchell’s injuries; and (4) Mitchell made a good faith effort to find other employment after Petsmart terminated his employment. The ALJ gave Mitchell a disability rating resulting in an award of $85,354.09. The Workers Compensation Board (Board) concluded Royal was solely responsible for costs and compensation for Mitchell’s impairment to his left thumb and that it was a scheduled injury. The Board found Royal and Travelers jointly and severally liable for the medical treatment and the disability compensation relative to the repetitive trauma injuries. Court of Appeals reversed the Board’s decision to assign joint liability for all of Mitchell’s injuries; and (4) Mitchell made a good faith effort to find other employment after Petsmart terminated his employment.

Court of Appeals concluded the Board did not err in determining that the dates of accident for each of Mitchell’s repetitive trauma injuries were separate and distinct from the date of accident for his initial thumb injury. Court also concluded the Board did not err in interpreting K.S.A. 44-510d to permit compensation at the highest level of injury when multiple injuries within a single extremity occur. Finally, Court affirmed the Board’s deduction of the number of weeks of Mitchell’s temporary total disability from the maximum number of scheduled weeks of permanent partial disability in arriving at the total number of weeks of compensation under K.S.A. 44-510d.

ISSUES: (1) Workers’ compensation and (2) repetitive trauma

HELD: Court held the Workers Compensation Act requires that an injured worker is entitled to an award at each separate level for multiple injuries to the same extremity corresponding to the statutory schedule. Court reversed the Board’s and the Court of Appeals’ determinations combining the multiple scheduled injuries/impairments to the same extremity, and remanded to the Board for a recalculation of Mitchell’s award. Court held the administrative regulations do not violate the Workers Compensation Act by authorizing the Workers Compensation Board to deduct the number of weeks awarded to an injured worker for temporary total and the Board did not err in making this deduction. Court also affirmed the Board’s factual findings that Mitchell’s subsequent repetitive trauma injuries resulted from the combination of his work activities and his initial thumb injury. Court affirmed the Board’s decision to assign joint
and several liability to both Royal and Travelers for Mitchell's subsequent bilateral shoulder, carpel tunnel, and right elbow injuries. STATUTES: K.S.A. 20-3018(b); K.S.A. 44-501, -508, -510, -510c, -510d, -510e, -556(a), -573; K.S.A. 60-2103(h); K.S.A. 74-717; and K.S.A. 77-621(a)(2), (c)

WORKERS' COMPENSATION
REDD V. KANSAS TRUCK CENTER AND UNIVERSAL UNDERWRITERS INS. CO.
WORKERS' COMPENSATION BOARD – AFFIRMED
NO. 101,137 – SEPTEMBER 10, 2010
FACTS: Redd awarded permanent partial disability compensation for five scheduled injuries to portions of his right and left upper extremities due to work-related injuries. Workers Compensation Board (Board) ruled Redd's multiple right upper extremity impairments developed as a natural consequence of a prior crush injury to Redd's left hand and subsequent overcompensation use for that left hand injury. Kansas Truck Center and its insurance carrier appealed. The appeal addresses: (1) appropriate standard of review when agency's action is attacked as not supported by substantial competent evidence following 2009 amendments to Kansas Judicial Review Act, (2) methodology for calculating awards when an employee suffers multiple scheduled injuries, and (3) application of compensation cap under K.S.A. 44-510f(a)(4). Supreme Court granted Redd's motion to transfer appeal to that Court.

ISSUES: (1) Substantial competent evidence, (2) permanent partial disability award calculation, and (3) compensation cap in K.S.A. 44-510f(a)(4)

HELD: Conflicting Court of Appeals' decisions noted. Both K.S.A. 77-621(a)(2) and K.S.A. 2009 Supp. 77-621(a)(2) contain a savings clause limiting the revised standard of review in K.S.A. 2009 Supp. 77-621(c)(7), (d) to agency decisions issued on or after July 1, 2009. Because agency finding in this case was before effective date of 2009 amendments, standard of review under K.S.A. 77-621(c)(7) in effect when agency issued its order is applied. Substantial competent evidence supports Board's factual determinations that Redd's right upper extremities injuries resulted from his left hand crush injury.

Board correctly calculated Redd's award. Correct statutory interpretation requires assignment of separate awards for each scheduled member suffering disability or impairment that appears in the K.S.A. 44-510d schedule. Kansas Truck Center's argument that scheduled injuries should have been combined into a whole body impairment is rejected as inconsistent with Workers Compensation Act. Also rejected is calculation methodology approved by Court of Appeals in Mitchell v. Petsmart Inc., Appeal No. 99,528, reversed this same date. Issue of first impression for Kansas Supreme Court.

Kansas Truck Center's argument that Redd's award was subject to $50,000 liability cap in K.S.A. 44-510f(a)(4) is rejected because that cap does not apply to a worker awarded both temporary total disability benefits and permanent partial disability benefits for multiple scheduled injuries under K.S.A. 44-510d. Instead, award is subject to $100,000 cap in K.S.A. 44-510f(a)(3).

district judge erred in quashing subpoenas directed at various employees of Kansas Department of Health and Environment (KDHE), and at Shawnee County District Judge Anderson and attorney Cavanaugh. Appeal transferred to Kansas Supreme Court.

ISSUE: Motion to quash subpoenas

HELD: Extensive account of chronology of cases and events thus far including: former Attorney General Kline's opening of inquisition in Shawnee County under Judge Anderson; Judge Anderson's treatment of redacted patient records from two Kansas clinics; further proceedings before Judge Anderson and Kansas Supreme Court; criminal action filed against Comprehensive Health of Planned Parenthood (CHPP) by former Johnson County District Attorney Kline and continuing mandamus actions; motion to disqualify CHPP counsel; and preliminary hearing subpoenas in the Johnson County case and Kansas Supreme Court's protective order.

No appellate jurisdiction to address Judge Tatum's ruling quashing subpoena duces tecum directed to KDHE Interim Director for Center for Health and Environmental Statistics because notice of interlocutory appeal not timely filed.

Ruling on subpoenas to KDHE records custodian and KDHE Chief of Vital Statistics Data Analysis is affirmed in part and reversed in part based on K.S.A. 65-445. Under that statute, reports submitted to KDHE by an abortion clinic cannot be released to a district attorney, thus the reports qualify as “other protected matter” under K.S.A. 60-245(c)(3)(A)(iii), and any subpoena from a district attorney, insofar as it seeks production of the reports themselves or testimony revealing their contents, must be quashed. KDHE employees may be subpoenaed to testify in a criminal prosecution about general practices of the agency regarding reports submitted by abortion clinics, as well as general information about the agency's response to an earlier inquisition.

Under K.S.A. 65-445, judge who presided over attorney general's inquisition and thus became custodian of reports submitted to KDHE by an abortion clinic cannot be ordered to bring those reports to court to facilitate a district attorney's criminal prosecution. The subpoena duces tecum is quashed as to these records. The judge may be ordered to produce the CHPP patient records produced by the defendant clinic in the inquisition, with patient-identifying information sufficiently redacted. A lawyer designated by the judge presiding over an inquisition to act as special counsel for patients whose abortion records were redacted and then produced in the inquisition may be ordered to produce his affidavit and correspondence with defense counsel to facilitate a criminal prosecution. Under unusual facts of case, fact witness and document custodian testimony of that judge and attorney may be permitted on certain subjects during a criminal prosecution arising out of the inquisition, however neither, by virtue of their participation in the inquisition, is automatically transformed into an expert witness who may give opinion testimony on issue of the defendant clinic's criminal culpability.

This opinion constitutes a further Supreme Court order that superseded the April 2008 protective order in Morrison v. Anderson.


STATE V. HUERTA-ALVAREZ
SEDGWICK DISTRICT COURT – DISMISSED IN PART, CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED
NO. 100,402 – OCTOBER 1, 2010
FACTS: Huerta-Alvarez convicted of aggravated indecent liber-ties with a child, both before (Count 2) and after (Count 4) Jessica's law applied. On appeal he challenged his conviction and life sentence under Jessica's law, claiming: (1) complaint was defective because it did not allege he was over age of 18, (2) failure to instruct

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jtery to find his age at the time of the offense was clear error; (3) insufficient evidence supported his conviction because state failed to prove he was 18 years of age or older, (4) prosecutorial misconduct during closing argument and rebuttal, and (5) error to deny motion for departure sentence.

ISSUES: (1) Jurisdiction and defective complaint, (2) jury instructions, (3) sufficiency of evidence of age element of the offense, (4) prosecutorial misconduct, and (5) sentencing

HELD: Facts regarding charging document in this matter are in pertinent part identical to those in State v. Gracey, 288 Kan. 252 (2009), and State v. Gonzales, 289 Kan. 351 (2009). Documents as a whole indicate Huerta-Alvarez was adequately informed of his crimes and the penalty proposed.

Pursuant to Gonzales, constitutional harmless error analysis applies. Failure to instruct the jury to find Huerta-Alvarez’s age at time of the offense did not invalidate his conviction. However, application of Apprendi v. New Jersey, 530 U.S. 466 (2000), requires life sentence to be vacated because under the circumstances there is no overwhelming or uncontroverted evidence upon which to base a harmless error finding. Case remanded for resentencing.

Challenge to sufficiency of evidence of age refashions Apprendi argument, and is not addressed further.

Prosecutor’s comment during closing argument regarding credibility of victim was within latitude allowed when key issue is credibility of the complaining witness. Statements made in rebuttal concerning state’s dismissal of counts were inappropriate, but harmless error.

Constitutional claim in sentencing is not reached because sentence is vacated and case remanded for resentencing. Apprendi claim regarding aggravated sentence on Count 2 is controlled by State v. Johnson, 286 Kan. 824 (2008), and is dismissed for lack of jurisdiction.

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Constitutional claim in sentencing is not reached because sentence is vacated and case remanded for resentencing. Apprendi claim regarding aggravated sentence on Count 2 is controlled by State v. Johnson, 286 Kan. 824 (2008), and is dismissed for lack of jurisdiction.

STATE V. URBAN

JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 98,856 – SEPTEMBER 24, 2010

FACTS: Urban granted personal recognizance bond subject to condition that she go to Johnson County Community Corrections Residential Center. When she failed to return while on pass to visit her family, state charged her with aggravated escape from custody.

District court dismissed the charge, finding Urban’s release on bond and placement at the facility did not fit definition of K.S.A. 21-3809(b)(1). State appealed. Court of Appeals reversed, finding Urban was in custody for purposes of aggravated escape statute when she failed to return to the facility. 40 Kan. App. 2d 517 (2008), noting disagreement unpublished Court of Appeals decision, State v. Hampton, No. 91,092 (Sept. 24, 2004). Urban’s petition for review granted.

ISSUE: “Custody” and community corrections

HELD: Court of Appeals is reversed. District court’s dismissal of aggravated escape charge is affirmed. Under second sentence of K.S.A. 21-3809(b)(1), a defendant on a personal recognizance bond conditioned on residence in a community corrections facility is under a “constraint incidental to release on bail.” If such a defendant leaves or is absent from the facility without authorization, an aggravated escape charge cannot be pursued because the statutory definition of “custody” cannot be met.

STATUTES: K.S.A. 20–3018(b), -3809(b)(1); K.S.A. 21–3810; and K.S.A. 1983 Supp. 21-3809(b)(1)

Appellate Practice Reminders . . .

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Supreme Court Rule 9.01 (2009 Kan. Ct. R. Annot. 73 - 74) provides that petitions in original actions for mandamus, quo warranto, or habeas corpus include “a statement of the facts necessary to an understanding of the issues presented and a statement of the relief sought.” The petition should be “accompanied by a short memorandum of points and authorities, and such documentary evidence as is available and necessary to support the facts alleged.” Because the court has discretion to act on original actions ex parte, the content of the petition and memo is critical to success in an original action. There may be no further opportunity to address the court.

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COURT OF APPEALS

CIVIL

ARBITRATION
KOPP V. KOPP
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 102,247 – SEPTEMBER 24, 2010

FACTS: Brothers Paul and Earl Kopp had a dispute over the terms of a contract for the sale of Blackbob Corners, a parcel of commercial real estate in Olathe. Paul, the owner of Blackbob Corners, extended an option to purchase the property to Eagle Management and Investment Co. (Eagle). Eagle assigned its option to Earl and Earl's wife, Carolyn. When Earl sought to exercise the option, Paul refused to honor it. Litigation followed. Eventually, the brothers participated in a settlement conference in which they appeared to have settled their differences. Earl, a licensed real estate broker, was to draft the settlement agreement in the form of a real estate contract. Earl prepared the agreement, but Paul disagreed with some of its terms. The brothers were unable to reconcile their differences over the agreement, so Paul moved to enforce the settlement agreement. The court granted Earl's motion to compel arbitration. The arbitrator issued a preliminary ruling. He observed that the district court "prepared the sale contract consistent with all of the terms of the settlement. This is the law of the case." Nevertheless, the arbitrator found that the contract was not enforceable; because it was not signed by the parties. In the final arbitration order, issued four months later after Earl moved for reconsideration, the arbitrator ruled, without explanation, that the real estate contract was "part" of the settlement. The arbitrator found that the contract would not come into being until it was executed by the parties.

ISSUE: Arbitration

HELD: Court held the parties' settlement agreement created a valid and enforceable contract. The fact that neither party signed the contract form that was revised by the court to memorialize the agreement was of no moment. Court stated the lack of signatures on the contract, which embodies the settlement reached by the parties, does not vitiate the agreement. However, court held the district court erred in assigning to the arbitrator an issue the court had already resolved: the existence of a valid and enforceable agreement between the parties. Court held that notwithstanding the district court's directions to the contrary, the arbitrator did not have the power to determine whether the contract (which was the basis for the arbitrator's power to act) was in force. Whether the contract was in force was a matter for the district court to determine. In ruling on the enforceability of the parties' contract, the arbitrator exceeded his power. Accordingly, the district court erred in failing to vacate the arbitrator's award.

STATUTE: K.S.A. 5-401, -402, -411, -412, -413

ARBITRATION
MORELAND V. PERKINS, SMART & BOYD
JOHNSON DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
NO. 102,629 – OCTOBER 1, 2010

FACTS: In October 2006, Moreland worked for Perkins, Smart & Boyd (PSB), an investment firm. PSB terminated Moreland upon allegations that he forged the names of his wife, son, and daughter on a letter of instruction to a mutual fund company in order to redeem fund shares from a trust set up for their benefit. PSB filed a Form U-5 with the Financial Industry Regulatory Authority (FINRA) indicating the reason for Moreland's termination. PSB later amended the Form U-5. Moreland filed a claim with the National Association of Securities Dealers, now FINRA, alleging that as a result of the statements made in PSB's Form U-5, multiple insurance companies and brokerage firms had turned him down for employment. PSB and Moreland were required to submit to arbitration. The arbitration panel awarded $65,000 in compensatory damages to Moreland and the filing fee. The panel also granted an expungement of the language on the Form U-5. In the district court, PSB alleged an absolute privilege in the language on Form U-5. The district court denied PSB's motion to vacate the arbitration award finding it would not substitute its judgment for that of the arbitrators, there was no indication of fraud, and there was no evidence the arbitrators had complete indifference to the law.

ISSUE: Arbitration

HELD: Court restated the limited scope of review of arbitration awards. Court held that because the arbitration panel did not make any statements regarding the law on privilege, PSB could not show the panel manifestly disregarded the law. Court held that PSB was entitled to a qualified privilege in this situation. Court stated that the arbitration panel considered PSB's arguments, including privilege, and implicitly rejected them. Court concluded the arbitrators did the job they were told to do, and PSB failed to show that the arbitrators failed to consider PSB's claim of privilege or manifestly disregarded the law. However, the court agreed with PSB that the district court erred in granting Moreland's motion for sanctions and attorney fees.

CONCURRENCE (Leben J.): concurred in the majority's decision that there was no evidence that PSB acted with actual malice and he could not conclude that arbitrators acted with manifest disregard of the law. Judge Leben also stated it was not frivolous for PSB to argue that it was entitled to at least a qualified privilege for statements on the Form U-5 and the sanctions should be vacated.

STATUTES: K.S.A. 5-401, -412(a), -418(a); K.S.A. 17-12a507; and K.S.A. 60-211

CHILD ABUSE
L.E.H. V. SRS
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 100,893 – OCTOBER 22, 2010

FACTS: Christopher spanked his daughter, L.E.H. Her mother, Donna, sought a determination that he had abused L.E.H. The hearing officer who heard the testimony of the mother, father, daughter, and a physician determined that the father had committed abuse, but an agency appeals committee ruled that the evidence was insufficient because (1) the medical doctor "did not testify with 100 percent certainty" that the father's actions had caused the daughter's substantial bruising and (2) no one had shown that the father was a danger to other children. Donna appealed to the district court, which affirmed the agency finding. The district court noted that the agency's conclusion that there was insufficient proof that the spanking had caused the bruising was considered a "negative" finding, which meant that it had to be upheld by the court unless the agency had disregarded undisputed evidence or the agency had been motivated by bias, passion, or prejudice.

ISSUE: Child abuse

HELD: Court held that the appeals committee applied a too rigid burden of proof and misread the statute and regulation at issue here. Court sent this case back to the administrative agency for further proceedings that will apply the proper legal standards. Court stated the SRS appeals committee refused to find substantiated child abuse for two reasons. Court found that its first reason – that the perpetrator must first be shown a danger to all children – was based on an
incorrect understanding of the law. Court was unable to determine whether its second reason -- that it had not been shown by clear and convincing evidence that L.E.H.'s physical injuries were caused by Christopher's spanking -- was based on the proper evidentiary standard. Court remanded the case first to the district court to consider any issues of the award of fees or costs that may properly be before it; then directed the district court to remand the case to the agency for further consideration in light of the clear-and-convincing evidence standard.

STATUTE: K.S.A. 65-516(a)(3); K.S.A. 75-37,121; K.S.A. 38-1501, -1502, -1523, -220, -2226; and K.S.A. 77-425, -527, -601, -621

FEDERAL FIREARMS STATUTE, NEGLIGENCE, AND CIVIL CONSPIRACY

SHIRLEY V. IMOGENE GLASS ET AL.
CHEROKEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 102,570 – OCTOBER 8, 2010

FACTS: In this wrongful death action, Shirley’s 8-year-old son Zeus Graham, died on September 5, 2003, as a result of gunshot wounds inflicted by her estranged husband, Russell Graham. Graham, Zeus’s father, was a convicted felon and prohibited from purchasing a firearm. Russell shot Zeus with a shot gun and ammunition that his 77-year-old grandmother, Imogene Glass, had purchased that same day from Baxter Springs Gun & Pawn Shop while accompanied by Russell, through an alleged straw-person sale. Russell used the same firearm to fatally shoot himself. Shirley sued Glass and Baxter for negligence, fraud, and civil conspiracy. The district court granted summary judgment to Baxter for Shirley’s claims. Shirley later moved for and obtained a final order of dismissal with prejudice of her claims against Glass.

ISSUES: (1) Federal firearms statute, (2) negligence, and (3) civil conspiracy.

HELD: Court held there was a genuine issue of material fact created as to whether the appellants illegally sold the shotgun and ammunition to a known felon through a straw-person purchase. Court stated there was also a genuine dispute of material fact whether the appellants aided and abetted the knowing of making of false statements or representations with respect to the information required by the Federal Firearms Act to be kept in the records of a federal firearms licensee and that appellants could not produce the videotape from the surveillance cameras that would have recorded the entire transaction. Court held that Shirley is entitled to have a jury consider whether the appellee’s sale of the shotgun and ammunition, through a straw-person purchase, to a person known to have been a convicted felon along with all of the other facts surrounding the gun transaction, was reasonable in light of Shirley’s entrapment claim. Court held the facts of the case supported the existence of a special duty on the part of the owners of Baxter to protect Zeus or others from injury or harm and whether Zeus’ death or injury to others was foreseeable and whether the appellee’s illegal sale of the shotgun to Russell was the proximate cause of Zeus’ death required resolution by the trier of fact. Court held that Shirley cannot pursue a negligence per se claim based on the federal firearm statutes against the appellants. Court stated there is no legislative language indicating the Legislature intended to create a private right of action. Court also held the district court properly granted summary judgment on Shirley’s claim based on the Kansas criminal disposal of a firearm statute. On Shirley’s simple negligence claim, court held the appellees would not be held to a “highest degree of care” standard in safeguarding their gun because the appellants are gun dealers who in the course of business regularly sell guns to various individuals. Court stated that Shirley was unable to show the existence of a special relationship or special duty that would support a viable claim of simple negligence.

Last, court held there was never a meeting of the minds between Glass and the appellees to violate the federal firearms statute and Shirley’s civil conspiracy claim failed in that regard.

CONCURRENCE (Malone J.): Concurred and wrote separately to suggest that the Kansas Supreme Court re-evaluate the requirements for recovery under the theory of negligence per se in Kansas.

STATUTE: K.S.A. 21-3502(a)(1), -4203

INSURANCE AND PARENTAL IMMUNITY

THORBURN ET AL V. SCHWEITZER ET AL.
BROWN DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 102,608 – OCTOBER 1, 2010

FACTS: The district court granted summary judgment against Robert Thornburg, as special administrator of the estate of Ryker J. Schweitzer, and Kristy Schweitzer, Ryker’s mother and administrator of the estate on their attempt to garnish Bremen Farmers Mutual Insurance Company (Bremen) for the administrators’ default judgment against Ryker’s father, Brian Schweitzer, in an action for the wrongful death of 7-year-old Ryker. Ryker was killed by a female mastiff that was part of the family’s English Mastiff business operated at their home in Morrill, Kan. The district court determined that Bremen’s policy provided no coverage for the incident because Brian was entitled to parental immunity. The court refused to award attorney fees and costs to Bremen under K.S.A. 60-211.

ISSUES: (1) Insurance and (2) parental immunity.

HELD: Court held that a business pursuits endorsement to a homeowners’ policy must be read in conjunction with language from the general policy package in order to ascertain what language is specifically amended. The original terms of the policy control, except for those provisions that are specifically amended by language contained in the business pursuits endorsement. Court concluded that the unfortunate death of Ryker was the result of bodily injury to a resident of the Schweitzer household and expressly excluded from Coverage T Liability. Court also held that where a party has moved for sanctions under K.S.A. 60-211 but the court has not made the necessary analysis, has provided no findings that would serve to support meaningful appellate review, has not stated any basis whatsoever for the denial of a sanction, has not considered the Groh factors, and seems to have believed that there would be some later “stage” for a more complete review and determination of the motion, court stated it must vacate the denial and remand for further proceedings.

STATUTE: K.S.A. 60-211

MENTAL HEALTH – SEX OFFENDERS
IN RE Sipe
BOURBON DISTRICT COURT
REVERSED AND REMANDED
NO. 102,583 – SEPTEMBER 24, 2010

FACTS: Sipe involuntarily committed in 2000 under Sexually Violent Predator Act (SVP). Following 2008 annual review, Sipe petitioned district court for discharge. After reviewing that annual review and an independent review, district court denied the petition, finding Sipe failed to establish probable cause that mental condition or personality disorder had sufficiently changed. Sipe appealed. ISSUE: Application of K.S.A. 2009 Supp. 59-29a08

HELD: Overview of SVP is set forth. Because a sexually violent predator bears burden to establish probable cause at annual review hearing, district court must consider the evidence in the light most favorable to the committed person and resolve all conflicting evidence in that person’s favor. Here, Sipe presented sufficient facts to establish probable cause, thus evidentiary hearing is required where state bears burden of proving beyond a reasonable doubt that Sipe is not safe to be placed in transitional release and if transitionally released is likely to engage in acts of sexual violence. District court is reversed. Case remanded for evidentiary hearing pursuant to K.S.A. 2009 Supp. 59-29a08(c)(1).
hearing and that Frost's attorney indicated that he did not wish to present any evidence beyond the documents already in the court's file. Court stated that because no evidence was presented in the district court, it was in an equal position to review the matter without any required deference to the district court. Court held Frost's claims had no merit.

STATUTE: No statutes cited.

PROBATE AND JURISDICTION
IN RE ESTATE OF HEIMAN

NEMAH DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 103,047 – OCTOBER 15, 2010

FACTS: Thirty years ago, Helen M. Heiman sold a piece of land to her son, Maurice Heiman, on an installment contract. Maurice made some payments. Helen died about three years ago. Carol Leo Heiman, another son, is the executor of his mother's estate and, in that capacity, filed a petition as part of the probate proceeding in Nemaha County to recover the balance due from Maurice on the land sale. Maurice still owes some money. The substantive disagreement between the estate and Maurice about money is not before the Court of Appeals. At Maurice's request, the district court dismissed the probate petition on the notion the court lacked subject matter jurisdiction because the action should have been brought as a civil suit under Chapter 60 rather than in the probate proceeding under Chapter 59.

ISSUES: (1) Probate and (2) jurisdiction

HELD: Court held the district court had subject matter jurisdiction to hear Carol's action, whether it was a probate proceeding under Chapter 59 or a civil action under Chapter 60. Court reversed and remanded so that the district court and the parties may proceed with Carol's petition under Chapter 60. Carol should be allowed to restyle the petition as one under Chapter 60 and to otherwise amend his pleading consistent with the liberal rule of K.S.A. 60-215. Maurice, of course, should then answer, asserting any affirmative defenses he considers appropriate, as provided in K.S.A. 60-208(c).

STATUTES: K.S.A. 20-301, -335; K.S.A. 26-509; K.S.A. 59-103, -2201, -5960; and K.S.A. 60-102, 208(c), (f), -215(a), -609

RESIDENTIAL CONSTRUCTION, CONTRACTS, AND FRAUD

NEWCASTLE HOMES LLC V. THYE ET AL.
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 103,205 – OCTOBER 15, 2010

FACTS: On May 17, 2005, the Thyes entered into a residential new construction sale contract with Newcastle for the purchase of land and the construction of a house in Tonganoxie, for the price of $215,900. Dressler and Alpha Homes contracted with Newcastle to provide and oversee the personnel and manpower necessary to construct the custom-built home. The completion date for the new construction sale contract was June 2006. Maurice, of course, should then answer, asserting any affirmative defenses he considers appropriate, as provided in K.S.A. 60-208(c).

STATUTES: K.S.A. 20-301, -335; K.S.A. 26-509; K.S.A. 59-103, -2201, -5960; and K.S.A. 60-102, 208(c), (f), -215(a), -609

PRISON DISCIPLINE
FROST V. MCKUNE

LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 103,700 – OCTOBER 1, 2010

FACTS: Inmate Kenneth Frost appeals his prison disciplinary sanction for possession of tobacco. He contends he didn't know that tobacco was in the sandwich being passed down by inmates from cell to cell; he says he thought that it was a sandwich and that he was just the unlucky one who was passing it along when a guard spotted the action. He claims that he was denied due process when he wasn't allowed to call two witnesses and that the evidence wasn't sufficient to convict him because no one showed he knew that tobacco was in the sandwich. However, the hearing officer did call two other inmates that testified that Frost was just one of several inmates passing the sandwich down the cell line and that Frost had no reason to know what was in the sandwich.

ISSUE: Prison discipline

HELD: Court held the district court ruled against Frost's claims in a thoughtful written opinion rendered after a nonevidentiary
TAXATION AND NONTAXABLE INTANGIBLE INTEREST
IN RE TAX APPEAL OF LIPSON
COURT OF TAX APPEALS – AFFIRMED
NO. 102,648 – SEPTEMBER 10, 2010

FACTS: Lipson entered into a “City Lake Lease” with the city of Council Grove in March 2007 for a “cabin site” on Council Grove City Lake. The transfer/conveyance agreement between Lipson and the prior lessee contained an appoiontment of the $126,000 purchase price, allocating $100,000 to the lease rights, $20,000 to the mobile home, and $6,000 to the furnishings. The county relied on its Computer Assisted Mass Appraisal (CAMA) system sales approach, which relied on sales of comparable mobile homes located at the lake. Accordingly, the county valued the mobile home, docks, stoop, and storage shed on the property at $128,450. This assessment was later reduced to $107,800 after a hearing before the Small Claims Division of Court of Tax Appeals (COTA). Lipson appealed the small claims determination to COTA, arguing that the county's valuation of the improvements improperly assigned the “intangible value” of his lakeside leasehold interest to him. Lipson pointed out that in the prior year, 2007, the property was assessed at only $71,080. Furthermore, Lipson cited numerous sales of comparable properties at the lake, wherein buyers purchased 1970’s mobile homes and a transfer of lake lot leases for $88,000 to $99,000 and subsequently removed or destroyed the mobile homes. He also presented a sales listing for the rights to a lot lease containing no improvements for $120,000. Lipson contended that this evidence supported his contention that the majority of the subject property's market value is in the intangible rights to the leasehold interest and not the subject improvements. COTA agreed with Lipson and reasoned that only real and tangible personal property are subject to ad valorem taxation in Kansas. COTA determined that the county's appraisal of $107,800 for Lipson's property captured a nontaxable intangible interest in the leased property and was therefore inappropriately included in Lipson's taxable value. COTA concluded that Lipson's valuation opinion was more accurate and assigned the improvements a value of $71,000.

ISSUES: (1) Taxation and (2) nontaxable intangible interest

HELD: Court held that under the facts of this case, the plaintiff failed to assert in his claim of constructive fraud in his second amended petition, which was filed in response to the defendant's argument that the plaintiff's claims were barred by the statute of limitations, that he discovered the alleged fraud less than two years before the commencement of his suit. As a result, the plaintiff's amended petition failed to show that the statute of limitations was tolled and that Hemphill's claims were filed outside the period prescribed by the statute of limitations.

ISSUES: (1) Trusts, (2) breach of fiduciary duty, and (3) statute of limitations

HELD: Court held that under the facts of this case, the plaintiff failed to assert in his claim of constructive fraud in his second amended petition, which was filed in response to the defendant's argument that the plaintiff's claims were barred by the statute of limitations, that he discovered the alleged fraud less than two years before the commencement of his suit. As a result, the plaintiff's amended petition failed to show that the statute of limitations was tolled under K.S.A. 60-513(a)(3). Court also held the plaintiff failed to adequately plead fraud with the particularity necessary to satisfy K.S.A. 60-209(b). Based on the facts and circumstances contained in the pleadings in this case, the plaintiff has failed to demonstrate that he had any cause of action for constructive fraud that withstands or avoids the application of the 10-year statute of repose under K.S.A. 60-513(b).

STATUTES: K.S.A. 74-2426(c); K.S.A. 77-201 Eighth, -210 Eighth, -601, -603, -621; and K.S.A. 79-102, -412, -503a

TRUSTS, BREACH OF FIDUCIARY DUTY, AND STATUTE OF LIMITATIONS
HEMPHILL V. SHORE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,938 – SEPTEMBER 24, 2010

FACTS: On December 28, 1984, the grantors, Lee Shore and Linna S. Shore, created the Shore Family Trust (Trust). The Trust designated the Shores two children, Jay F. Shore (Jay) and Susan Hemphill (f/k/a Susan L. Shore), as trustees. The principal of the Trust consisted of farm land in Stanton County. Under the provisions of the Trust, income from the Trust was to be paid, in the trustees’ sole discretion, to Jay, Susan, or the issue of Jay or Susan, in such amounts as the trustees may deem necessary to provide for the beneficiaries' health, education, support, and maintenance. Any income not distributed was to become part of the principal. The Trust provided that if, in the trustees’ sole discretion, the income of the Trust was insufficient to provide for the health, education, support, or maintenance of Jay and Susan, the trustees were allowed to invade the principal of the Trust to the extent the trustees deemed necessary to provide for the benefit of Jay and Susan. Hemphill is Susan's son. Susan died on January 20, 1992, leaving Hemphill as her only child. On April 8, 2009, Hemphill sued Jay, as the surviving trustee, alleging breach of trust, breach of fiduciary duty, and conversion. The district court ruled in favor of Jay. District court held that the Trust was a discretionary trust and that it was Jay's sole discretion to determine when it was necessary to invade the principal. The trial court further found that Hemphill had failed to allege any specific acts of fraudulent conduct of misuse or theft of any trust assets. The trial court further determined that the applicable statute of limitations was not tolled and that Hemphill's claims were filed outside the period prescribed by the statute of limitations.

ISSUES: (1) Trusts, (2) breach of fiduciary duty, and (3) statute of limitations

HELD: Court held that under the facts of this case, the plaintiff failed to assert in his claim of constructive fraud in his second amended petition, which was filed in response to the defendant's argument that the plaintiff's claims were barred by the statute of limitations, that he discovered the alleged fraud less than two years before the commencement of his suit. As a result, the plaintiff's amended petition failed to show that the statute of limitations was tolled under K.S.A. 60-513(a)(3). Court also held the plaintiff failed to adequately plead fraud with the particularity necessary to satisfy K.S.A. 60-209(b). Based on the facts and circumstances contained in the pleadings in this case, the plaintiff has failed to demonstrate that he had any cause of action for constructive fraud that withstands or avoids the application of the 10-year statute of repose under K.S.A. 60-513(b).

STATUTES: K.S.A. 58a-101, -802, -1005, -1106(a)(5); K.S.A. 59-1601; K.S.A. 60-209(b), (h); and K.S.A. 60-212, -513(a)(2), (3), (4), (b), -515

CRIMINAL

IN RE J.L.B.
MITCHELL DISTRICT COURT – SENTENCES VACATED AND CASE REMANDED FOR RESENTENCING
NO. 103,933 – OCTOBER 8, 2010

FACTS: On the same day, J.L.B. pled guilty to felony theft in one case and residential burglary in another case. The sentencing court used the adjudications as prior adjudications to find that J.L.B. was a chronic offender II escalating felon and then a serious offender II in the other case. Based on J.L.B.'s offender classifications, the
magistrate judge sentenced J.L.B. to 18 months’ confinement in the juvenile correctional facility.

ISSUES: (1) Sentencing and (2) juvenile adjudications
HELD: Court held that when two juvenile adjudications occur at the same time before the same court, each adjudication cannot be counted as a prior adjudication in categorizing the offender in adjudication. Court vacated J.L.B.’s sentences and remanded for resentencing.

STATUTES: K.S.A. 21-3701(a)(1); and K.S.A. 38-2304(a), -2347, -2369(a)(2)(B), (3)(B), -16,129

STATE V. BABER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,804 – OCTOBER 8, 2010

FACTS: Baber pled no contest to aggravated indecent liberties with a child and aggravated indecent solicitation of a child. Baber filed a motion for dispositional departure and to enforce a plea agreement wherein the state originally agreed to recommend a post-release supervision term of 56 months but subsequently insisted that a lifetime post-release supervision was mandatory. Baber was sentenced to 41 months and 32 months respectively and finding it had no authority to deviate from the statutes, the district court imposed lifetime post-release supervision on both counts.

ISSUES: (1) Sentencing and (2) cruel and unusual punishment
HELD: Court held the fact that a murder conviction carries a shorter post-release supervision term does not by itself affect the sentencing statute’s validity. Court stated that Baber put forth no argument as to why the Legislature should not be permitted to require individuals convicted of sex crimes to remain under supervision longer than those convicted of murder. Court also stated that this arrangement may be suspect in isolation, but it is not sufficient on its own to invalidate the statute and that it might be argued that due to the nature of the crime, lifetime supervision might well be advisable. Court found Baber’s sentence did not constitute cruel and unusual punishment.

STATUTE: K.S.A. 21-3504(a)(2), -3511(a), -4643, -4704(a); and K.S.A. 22-3717(d)(1)

STATE V. BARRIGER
PRATT DISTRICT COURT – AFFIRMED
NO. 102,741 – OCTOBER 1, 2010

FACTS: Highway Patrol trooper arrested Barriger for DUI after finding Barriger's truck at night partially blocking traffic on two-lane state highway near intersection and curve, and after moving Barriger to parking lot a mile away to conduct field sobriety tests. Barriger moved to exclude all evidence because officer arrested him without probable cause by taking him to the parking lot prior to field sobriety testing. District court found the officer was in fresh pursuit.

ISSUE: Movement of suspect during investigatory detention
HELD: District court is affirmed. Getting Barriger’s truck off the highway and then conducting field sobriety tests at a convenient nearby parking lot was reasonable under Fourth Amendment. When required for safety of officer or suspect, a suspect may be moved a short distance during an investigatory detention if that is consistent with purposes of the investigation, does not unduly prolong the duration of detention, and does not otherwise turn the situation into the equivalent of a formal arrest.

STATUTES: None

STATE V. BISHOP
PRATT DISTRICT COURT – AFFIRMED
NO. 102,751 – OCTOBER 8, 2010

FACTS: Bishop convicted of third DUI, based on two prior diversion agreements. On appeal, Bishop claimed this was only her second DUI because one diversion agreement when she was a minor cannot be counted as a prior conviction.

ISSUE: Prior diversion agreement by a minor to avoid DUI prosecution
HELD: No Kansas case directly on point. Nature of diversion agreements, and rights of minors under standard contract law, are discussed. A diversion agreement entered into in lieu of further criminal proceedings on a DUI charge is considered a prior conviction under K.S.A. 2007 Supp. 8-1567 for purposes of enhancing an offender’s sentence for a subsequent DUI conviction. The fact that the offender was a minor at the time of entering into the prior diversion agreement does not alter this statutory provision. District court is affirmed.

STATUTES: K.S.A. 2007 Supp. 8-237(a), -1567, -1567(d)(1), -1567(d)(g), -1567(n)(1), -1567(n)(3), -1567(t), -2117(a), -2117(d); K.S.A. 38-2302(n); K.S.A. 8-235d, -239, -296, -1447, -1567; K.S.A. 22-2906(4), -2908(b)(1), -2909(c); and K.S.A. 38-101, -102, 103

STATE V. DEIST
RENO DISTRICT COURT – AFFIRMED
NO. 102,960 – OCTOBER 1, 2010

FACTS: Deist pled no contest to failing to register as sex offender. At sentencing, Deist argued his prior convictions on two counts of aggravated indecent liberties with a child was element of the current offense, thus neither count could be used to calculate criminal history. District court overruled Deist’s objection. Deist appealed, claiming district court erred in excluding only one of Deist’s aggravated indecent liberties convictions from criminal history.

ISSUE: Prior conviction as element of offense of failing to register as sex offender
HELD: Kansas Offenders Registration Act (KORA) is analyzed and applied. District court correctly determined Deist’s criminal history. Because KORA requires one prior conviction of a sexually violent crime in order to classify a defendant as an offender and impose registration requirement, only one of Deist’s convictions of aggravated indecent liberties is an element of failing to register. His other conviction was available for calculating criminal history.

STATUTES: K.S.A. 2008 Supp. 22-4902(b), -4902(c)(3); K.S.A. 21-4710(c), -4710(d)(11); K.S.A. 22-4902(a), -4902(b), -4902(c), -4903, -4904(b); and K.S.A. 2000 Supp. 21-4704(i)

STATE V. GALYARDT
PRATT DISTRICT COURT – AFFIRMED
NO. 102,635 – OCTOBER 8, 2010

FACTS: Prior to his conviction for aggravated burglary, Galyardt filed motion to suppress his arrest and the discovery of burglary tool evidence because Pratt police officer was in Stafford County during search of Galyardt’s vehicle. District court denied the motion, finding officer was in fresh pursuit at time of arrest and search. Galyardt also sought to suppress his identification in a one person show-up as impermissibly suggestive and as leading to a substantial likelihood of misidentification. District court recognized that show-up identifications were not favored, but denied the motion under facts surrounding the identification. Galyardt appealed both rulings, and claimed eyewitness instruction, which included “witness certainty factor,” was outdated and clearly erroneous.

ISSUES: (1) Extraterritorial jurisdiction of municipal police officers, (2) eyewitness identification, and (3) eyewitness jury instruction, PIK Crim. 3d 52.20
HELD: K.S.A. 22-2401a is analyzed and applied. Under totality of circumstances, and applying factors in State v. Green, 257 Kan. 44 (1995), and cases from other jurisdictions, trial court correctly found the officer was in fresh pursuit.

No error in trial court refusing to suppress witness’ identification of Galyardt. Identification procedure was suggestive, but not unnecessarily so under the circumstances. Reliability factors in State v. Trammell, 278 Kan. 265 (2004), and State v. Hunt, 275 Kan. 811
STATE V. GOFF
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 102,369 – SEPTEMBER 17, 2010

FACTS: Goff was pulled over for a traffic stop. As the officer approached the vehicle, he smelled the odor of raw marijuana. He waited for backup and then ordered Goff and his two passengers out of the car. Officers found marijuana cigarettes in a prescription bottle in the center console and a padlocked toolbox in the back passenger seat. When officers asked for a key, Goff told him he needed a warrant. Officers told Goff they would break the lock. Goff gave them a key and inside were 15 bags of marijuana. Goff filed a motion to suppress, but it was denied.

ISSUE: Probable cause smell of raw marijuana

HELD: Court held that if an officer detects the odor of raw marijuana emanating from a vehicle, such an odor could provide probable cause to search the vehicle. Court also held that when an officer detected the odor of raw marijuana emanating from a motor vehicle, obtaining a key to search a locker in the car by asking the driver for it without giving a Miranda warning was not improper.

STATUTE: K.S.A. 22-2202(4), -2402(l)

STATE V. HERNANDEZ
SEWARD DISTRICT COURT – AFFIRMED
NOS. 101,530 AND 101,531 – SEPTEMBER 17, 2010

FACTS: Hernandez convicted of attempted first-degree murder, and criminal discharge of a firearm at an occupied vehicle. In separate case, she was convicted of making a criminal threat. Cases and appeals consolidated. On appeal, Hernandez claims: (1) trial court erred in granting Hernandez’s request to not give a lesser-included offense instruction on attempted first-degree murder charges, (2) instructions on intent and premeditation impermissibly lessened state’s burden to prove attempted first-degree murder, (3) reversible error to give jury an outdated eyewitness identification cautionary instruction, (4) reversible error to give Allen-type instruction; (5) insufficient evidence supported criminal threat conviction where Hernandez was only attempting to convince stepmother to put Hernandez’ father on the phone, and (6) error to use criminal history in sentencing when convictions not proven to jury.

ISSUES: (1) Invited error and lesser-included jury instructions, (2) intent and premeditation instructions, (3) cautionary eyewitness identification instruction, (4) Allen-type instruction, (5) sufficiency of evidence of criminal threat, and (6) criminal history and sentencing

HELD: Invited error precludes Hernandez from raising issue of trial court not giving lesser-included jury instruction. No showing that State v. Angelo, 287 Kan. 262 (2008), was wrongly decided.


On issue of cautionary instructions concerning eyewitness identification, Kansas Supreme Court has suggested that factors set out in State v. Hunt, 275 Kan. 811 (2003), and State v. Ramirez, 817 P.2d 774 (Utah 1992), are refinements of analysis originally set out in Neils v. Bigger, 409 U.S. 188 (1972). Acceptance of Ramirez factors is not a rejection of the Bigger model. While Hunt and State v. Trammel, 278 Kan. 265 (2004), do not make clear where Kansas Supreme Court may be headed with PIK Crim. 3d 52.20 in future, there has been no explicit rejection of Bigger’s factors. Until this changes, it is abundantly clear that giving the instructions cannot be considered clear error.

State concedes error in Allen-type instruction, but under circumstances, there was virtually no chance jury would have rendered a different verdict.

Sufficient evidence for rational factfinder to find beyond a reasonable doubt that Hernandez intended to terrorize stepmother.

Criminal history claim is controlled by State v. Ivory, 273 Kan. 44 (2002).

CONCURRENCE (Leben, J.): Joins majority opinion but for analysis of claim that district court erred by giving outdated instruction on how to evaluate eyewitness testimony. Given strength of evidence against Hernandez, this was not an appropriate case for wading through legal thicket regarding what might constitute a proper eyewitness instruction.

STATUTES: K.S.A. 21-3201(b), -3401(a), -3419(a)(1); and K.S.A. 22-3414(3)

STATE V. HOWARD
SEDGWICK DISTRICT COURT – APPEAL DISMISSED
NO. 101,824 – SEPTEMBER 10, 2010

FACTS: In unpublished opinion, Court of Appeals affirmed Howard’s conviction and sentence for aggravated battery. Howard filed 1507 motion, alleging ineffective assistance of trial and appellate counsel. Trial court found trial counsel was deficient but Howard not denied a fair trial. Trial court further found error by appellate counsel and court report denied Howard a fair appeal, and allowed Howard to file a second direct appeal. Howard filed second notice of appeal in his criminal case. No appeal filed in Howard’s 1507 case.

ISSUE: Appellate jurisdiction

HELD: Appeal dismissed for lack of jurisdiction. Under plain language of K.S.A. 60-1507(b), a trial court ruling on a 1507 motion has authority to vacate and set aside the judgment and discharge the prisoner, resentence the prisoner, grant a new trial, or correct the sentence. Nothing in K.S.A. 60-1507 provides trial court with authority to grant a second direct appeal.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 22-3602(a), -3608, -3608(c); and K.S.A. 60-1507, -1507(b)

STATE V. KNIGHT
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED
NO. 100,167 – ORIGINAL OPINION NOVEMBER 6, 2009
MODIFIED OPINION FILED OCTOBER 8, 2010

ORIGINAL OPINION: Knight appealed his convictions for criminal possession of a firearm and carrying a concealed firearm. Court of Appeals affirmed trial court’s denial of Knight’s motion to suppress evidence arising from a car stop; reversed Knight’s conviction for criminal possession of a firearm because K.S.A. 21-4204(a)(4)(A) does not apply to Knight’s prior felony for an attempted crime; affirmed that Knights conviction for carrying a concealed firearm violated his constitutional right to bear arms, and vacated trial court’s imposition of Board of Indigent Defense Services attorney fees and remanded for district court’s determination of financial burden that payment of the fees would impose. 42 Kan. App. 2d 893 (2009). Supreme Court granted Knight’s petition for review, and summarily remanded the appeal to the Court of Appeals for consideration of U.S. Supreme Court’s decision in McDonald v. Chicago, 561 U.S. __, 130 S. Ct. 3020 (2010).

MODIFIED OPINION: Syllabus ¶ 11 in the November 6, 2009, decision is modified to state that the Second Amendment to U.S. Constitution is incorporated in Due Process Clause of Fourteenth Amendment and thereby enforceable against the states. Two para-
graphs in the original opinion discussing the Second Amendment right to bear arms are deleted, and are replaced by a new paragraph that cites McDonald. In all other respects, Court of Appeals adheres to the original opinion.

**STATE V. TROSTLE**
**LYON DISTRICT COURT – AFFIRMED**
**NO. 103,072 – SEPTEMBER 17, 2010**

FACTS: Trostle attempted U-turn with tractor-trailer but went off road and became stuck in soft ground. Police blocked traffic while tow truck cleared the tractor-trailer from the ditch. Trostle was charged with making an improper U-turn in violation of K.S.A. 8-1546, and eventually convicted of that offense in district court. Trostle appealed, claiming she did not actually make a U-turn, and there was no evidence that she caused a safety hazard or traffic interference.

ISSUE: Analysis and application of K.S.A. 8-1546

HELD: K.S.A. 8-1546 does not define “U-turn” or make a U-turn illegal, but proscribes turning a vehicle “so as to proceed in the opposite direction” unless that move can be made safely and without impeding traffic. Under the circumstances, there was sufficient evidence that Trostle was turning her vehicle to proceed in the opposite direction, and that this movement was not made in safety and without interfering with other traffic.

**STATUTE: K.S.A. 8-1546, -1546(a)**

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Complete and correct filings and fees must be received in the Office of the Secretary of State by 4 p.m. to acquire that day’s file date. Documents received after 4 p.m. will acquire the next day’s file date.

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The U.S. District Court for the District of Kansas gives notice of the amendment of local rules 54.1, 83.2.4, and 83.5.3. Copies of the amendments are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendments are also available on the U.S. District Court website at www.ksd.uscourts.gov.

Interested persons, whether or not members of the bar, may submit comments on the amendments addressed to the Clerk at any of the record offices. All comments must be in writing and, to receive consideration by the Court, must be received by the Clerk on or before 4:30 p.m., December 10, 2010.

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Tuesday, December 7, Noon – 1 p.m.
Guardian ad Litem (GAL) 101 - Representing Children*
Speaker: Erna K. Loomis, Attorney at Law, Olathe
Phone CLE

Wednesday, December 8, Noon – 1 p.m.
Guardian ad Litem (GAL) Case Law Update*
Speaker: Dennis J. Stanchik, Dennis J. Stanchik P.A., Olathe
Phone CLE

Friday, December 10, 9 a.m. – 3:30 p.m.
28th Annual Plaza Lights Institute*
Marriott Country Club Plaza, Kansas City, Mo.
Co-sponsored by GEICO

Tuesday, December 14, Noon – 1 p.m.
Representing the Child: Advocating Best Interests vs. Advocating the Child’s Wishes*
Speaker: Stephanie E. Goodenow, Law Office of Stephanie Goodenow LLC, Olathe
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