Deception and Misrepresentation in the Practice of Law
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Deception and Misrepresentation in the Practice of Law
By Brian J. Moline

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KBA Seeking Historical Items for Display at Law Center

A unique aspect of the newly enhanced Kansas Law Center is a “law museum” that will house and display historical law memorabilia. The museum offers an opportunity for members and friends of the profession to exhibit their personal pieces of law history for all to enjoy. If you or your firm has any historical legal treasures to donate, whether on loan or as a permanent addition to the collection, please contact KBA Executive Director Jeffrey Alderman at jalderman@ksbar.org or call (785) 234-5696.
WHY IS THE LRS GOOD FOR BUSINESS?

“I participated in the KBA Lawyer Referral Service for much of the nearly 20 years that I practiced in Dodge City. During the time I was involved with the LRS, I also advertised intensively in the local telephone directory. Although paid advertising and LRS referrals both generated a substantial volume of inquiries from potential new clients, I found that LRS-generated clients tended to bring more 'solid' legal matters and were more reliable than those who initially responded to phone book advertising.”

“The effectiveness in my experience of LRS referrals is demonstrated by my having sent a check to LRS for its 10 percent referral fee of nearly $54,000.”

- Henry Goertz, Goertz Law Office, Dodge City

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[To renew your membership, please go to our Web site at: http://www.ksbar.org/membership/index.htm](http://www.ksbar.org/membership/index.htm)
Most trial lawyers believe that “war stories” are good teaching devices. So let me pass along one of my own and we’ll call it educational. It was educational for me anyway.


If you read the Kansas Supreme Court case you will learn that my client, Dr. G. Ed Counselman was a chiropractor and that the plaintiff was his patient’s widow. The decedent, Mr. Richard Roberson suffered from a known heart condition as well as from an arthritic spine.

One afternoon around 4 p.m. my client gave a chiropractic treatment to Roberson for left shoulder and left side pain. At home later that same evening Roberson complained of continuing pain in those same areas. His widow said that he would not follow her advice and go to the hospital or call the cardiologist because “he instead relied on what his chiropractor told him.” She related a conversation that she had with the decedent where he told her that Counselman was a doctor and he thought it was just a “nerve out of place.” The chiropractic records provided no clarification.

His widow found Roberson unresponsive in his separate bedroom the next morning. He was rushed to the hospital where he died. A suit was promptly filed by the widow against the chiropractor for his failure to refer Roberson to the known cardiologist the afternoon of the treatment.

Various expert witnesses expressed opinions that the decedent would have had a 6 percent to 40 percent chance of survival had he gone to the hospital earlier rather than arguing with his wife. The trial court, following existing law, didn’t establish that it was more probable than not that Roberson would have survived even with treatment.

The Supreme Court reversed, sending the matter back to the district court for a determination of the value of a new life insurance policy. They also mentioned that they were experiencing difficulty convincing a “young” lawyer or two to move to Harper County. That is a shame. If anyone is interested in practicing with good lawyers who are also good people and good lawyers. They also mentioned that they were experiencing difficulty convincing a “young” lawyer or two to move to Harper County. That is a shame. If anyone is interested in practicing with good lawyers who are also good people, contact me.

This edition also features our lawyer legislators. These men and women give up a lot to serve the public and they need our support. By support I mean engagement. Get to know them. Put their contact information where you can find it. Let them know your opinions. They really do want to know what you think. You might also consider supporting a political action committee if the KBA adopts one.

Tom Wright may be reached by e-mail at twright21@cox.net or by phone at (785) 271-3166.
Executive Director’s Notes

Jeffrey Alderman

Celebrating our Success while Charting a new Path

The dozen or so Bar members that actually read my executive director’s column will note I have previously written at length about the new addition and renovations at the Kansas Law Center that have now been completed.

The final phase of this project will be a 50-space parking lot across Harrison Street where the Bar owns three large lots. We are presently in the design and engineering stage and hope to break ground in early March and finish the following month.

The completion of the building itself was the culmination of many years of dedicated planning and hard work by a special group of members who had a vision. Thankfully, despite these difficult economic times, we were able to fulfill that vision and can now harvest the benefits.

During the last few months, we have already hosted our first-ever legislative conference, numerous well-attended CLE seminars, as well as several depositions and other meetings for members.

It is important to remember the Law Center exists for benefit of our members. Should you ever need meeting space, whether for one or for as many as 100, we can handle it. In addition, we have several office suites, each outfitted with a computer, high-speed Internet, and a printer available for private use. There is also a Casemaker training area for members to become better acquainted with the Association’s popular online legal research tool.

Of course, there is never a charge to use the facilities, so please take advantage of this great benefit.

As I have mentioned in a previous column, a fun aspect of the new building is a “law museum” that will house and showcase legal treasures and historical law pieces. The museum offers an opportunity for members, law firms, and friends of the legal profession to exhibit their personal piece of law history — whether on loan or as a permanent addition to the collection — for all to enjoy.

If you or your firm has any historical legal treasures to donate, please let me know.

Now that the building has been completed, staff, most notably me, can start to refocus efforts on other projects. Generally speaking, the KBA has positioned itself well for the foreseeable future.

The Bar remains financially solvent, and we expect another six-figure surplus for the year. Recent member satisfaction surveys are as high as ever and we presently have the highest number of members in our history. A record number of handbooks will be published in the coming year and we’re currently planning for a wonderful joint meeting in 2009 with the judiciary from June 17-19 at the Overland Park Sheraton Hotel.

Despite our successes, this is no time to be complacent. So we are moving forward and taking advantage of our momentum and growing to meet the needs of our ever-changing membership.

Last month, the KBA welcomed Joseph “Joe” Molina III as our new Director of Governmental & Legal Affairs. Joe is a graduate of the Washburn University School of Law, and he comes to us from the Metropolitan Transit Authority, where he previously served as chief legal counsel. Prior to the MTA, he worked in the Attorney General’s Office leading the “Do Not Call” Registry. Among his numerous responsibilities, Joe will oversee the Bar’s legislative interests.

In addition, after spending some time reviewing present staff and charting a new course, I have revised the responsibilities of several managerial staff to better serve the organization.

• Susan McKaskell has been named Communications Director. She formerly served as Director of Bar Services.

• Lisa Montgomery has been named Member Services Director. She formerly served as Director of Sections & Communications.

Susan has been with the Bar for nearly 10 years and her background and college studies are an ideal fit for this position. In her new capacity, she will now be responsible for all external communications and will continue to be in charge of the Bar Journal, as well as the Annual Meeting. In addition, she will oversee the revision of all of our public services brochures and the creation of new membership, section, and foundation brochures during the next two years.

In her short tenure with the KBA, Lisa has shown herself to be a quick study and wonderful asset. In her new role, she will oversee all membership operations, including billings and renewals, Casemaker, sections, and local bar relations. She has a juris doctorate from the Washburn University School of Law and is active in the Topeka Bar Association, Women Attorneys Association of Topeka, and the Kansas Women Attorneys Association.

As we begin 2009, the Kansas Bar Association is poised to continue to make great strides for our wonderful profession and we hope you’ll join us for the ride.

On behalf of the staff of the KBA, thank you for allowing us the opportunity to serve you and best wishes for a healthy, happy, and prosperous year.

You may contact Jeffrey Alderman by e-mail at jalderman@ksbar.org or by phone at (785) 234-5696.

www.ksbar.org
As I write this column each month, I am forced to remind myself that I write this column for the benefit of the “young lawyer.” But each month, I find that I struggle to find topics that are of special interest to the young lawyer and not all lawyers alike. It often becomes difficult and I am compelled to question, “Are we really that different?”

After all, we are all lawyers. We all read the same cases and the same statutes. We all prepare similar documents, briefs, or arguments. We each practice our trade with our utmost skill and effort. We each put on our pants one leg at a time. So in many ways we are alike. But the young lawyers have their specific struggles. Among others, we struggle to manage the wide variety of demands placed on our time. We struggle to learn. And we struggle to achieve respect from our peers and seniors.

So are we that different? Maybe not. But we do have some basic differences that require specific attention. What are those differences, and what efforts does the Young Lawyers Section (YLS) make to address those differences? I hope the following sheds some light on why our organization exists to serve the young lawyer.

Mentorship. The young lawyer is hungry for mentoring and learning. We all know that those of us fresh out of law school benefit greatly from the experiences of those who came before them. Some of us have the opportunity to learn from those in our firm or office. Others do not. The YLS offers all its members mentorship opportunities to learn from our more experienced peers. Simply contact me and we will set you up with someone in your area who can help.

Continuing education. Law school equips us with the basics, but the real education comes on-the-job. It’s a steep learning curve. The young lawyer may need more “primer” type education or hands on training. The YLS offers both. Keep posted with the Journal and other KBA announcements. Chances are you might find a young lawyer CLE program right for you.

Networking. Young or senior, we all need the opportunity to network — creating professional relationships with our peers provides significant opportunity for business growth. And sure young and senior can network together (and should). But having the opportunity to network among those with similar experiences and similar needs provides something more. The YLS offers that, be it through annual meetings, regional gatherings, or our new Facebook page.

And this isn’t to say that our organization is only about networking amongst ourselves. The YLS offers opportunities to meet and converse with members of the judiciary, members of the senior bar in leadership positions, and more. Stay posted on some exciting opportunities at next year’s Annual Meeting.

Career paths. The day is past when partnership was the only goal. This may be difficult for some to understand. Some of us are interested in lifelong commitments to our firms. Others all ready have their minds set on more diverse opportunities. With YLS involvement, you get a chance to see a diverse group of members in diverse professions.

And the young lawyer is now more mobile than ever. Chances are, many of you will change firms at least once during your stint as a young lawyer. Involving yourself with YLS can afford you an easy transition to a new job, be it through connections you make in networking or knowledge you learn from continuing education.

Community service. Our generation has grown up in a very competitive environment. More so now than ever, it is necessary to set yourself apart from others not by your education, but by service that you provide to the community. So we as young lawyers have matured with a heightened sense of community service. And we are good at it. The YLS prides itself on providing you the opportunity to give back to others through our many service programs. And of course we welcome senior lawyers to join us in these programs.

Other opportunities. The reality is that gaining respect from peers and seniors often comes outside the actual practice of law. It can come from making CLE presentations, writing in this Journal, and bar leadership. The fact that we are newer to the practice of law should not prevent us from taking some ownership in our bar and participating in these activities. Although we may not yet be knowledgeable and experienced enough to lead one of the substantive committees or serve on the Board of Governors, you have the opportunity with YLS to make a difference in our profession.

So are we that different? Probably not. But we hope we can provide services specific to the young lawyer where we do have differences.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.
Advance Notice
Elections for 2009
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2009-2010 leadership year.

OFFICERS

KBA President-elect: (Current – Timothy M. O’Brien, Kansas City, Kan.)
KBA Vice President: (Current – Glenn R. Braun, Hays)
KBA Secretary-Treasurer: (Current – Hon. Benjamin L. Burgess, Wichita)
KBA Delegate to ABA House of Delegates: Sara S. Beezley is eligible for re-election

The KBA Nominating Committee, chaired by Linda Parks, Wichita, is seeking individuals who are interested in serving in the positions of President-elect, 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, Jan. 16, 2009. This information will be distributed to the Nominating Committee prior to its meeting on Friday, Jan. 30, 2009. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for President-elect, 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 six positions on the KBA Board of Governors up for election in 2009. 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 6, 2009. If no one files a petition by March 6, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2009 are:

- **District 1:** Incumbent Eric G. Kraft is eligible for re-election. Johnson County.
- **District 2:** Incumbent Gerald R. Kuckelman is not eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
- **District 4:** Incumbent William E. Muret is eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
- **District 5:** Incumbent Martha J. Coffman is not eligible for re-election. Shawnee County.
- **District 6:** Incumbent Gabrielle M. Thompson is not eligible for re-election. Clay, Cloud, Dickinson, Ellsworth, Geary, Lincoln, Marion, Marshall, McPherson, Morris, Ottawa, Republic, Riley, Saline, and Washington counties.
- **District 7:** Incumbent Rachael K. Pirner is not eligible for re-election. Sedgwick County.
- **District 10:** Incumbent Jeffrey A. Mason is eligible for re-election. Cheyenne, Decatur, Ellis, Gove, Graham, Jewell, Logan, Mitchell, Norton, Osborne, Phillips, Rawlins, Rooks, Russell, Sheridan, Sherman, Smith, Thomas, Trego, and Wallace counties.

For more information

To obtain a petition for the Board of Governors, please contact Kelsey Hendricks at the KBA office at (785) 234-5696 or via e-mail at khendricks@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 Linda Parks at (316) 265-7741 or via e-mail at parks@hitefanning.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2009 KBA Awards. These awards will be presented at the Joint Judicial Conference and KBA Annual Meeting, June 17-19. Below is an explanation of each award, and a nomination form can be found on Page 11. The Awards Committee, chaired by Anne Burke Miller, Overland Park, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! In addition, a new Diversity Award has been approved. More information will be included in next month’s issue once the criteria has been finalized. Deadline for nominations is March 6.

Phil Lewis Medal of Distinction: The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.
- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

Distinguished Service Award: This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.
- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

Professionalism Award: This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

Outstanding Young Lawyer: This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Outstanding Service Awards: These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.
- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize:
- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

Pro Bono Award: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

Distinguished Government Service Award: This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award: The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

Note: Nomination form on Page 11.
KBA Awards Nomination Form

Nominee’s Name ________________________________

☐ Phil Lewis Medal of Distinction
☐ Outstanding Service Award
☐ Outstanding Young Lawyer Award
☐ Distinguished Government Service Award
☐ Distinguished Service Award

☐ Diversity Award (criteria to be announced next month)
☐ Professionalism Award
☐ Pro Bono Award/Certificates
☐ Courageous Attorney Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

________________________________________________________________________
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________________________________________________________________________
________________________________________________________________________

Nominator’s Name ________________________________
Address _______________________________________
______________________________________________
Phone ________________________ E-mail _______________________

Return Nomination Form by Friday, March 6, 2009, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
A Nostalgic Touch

A Model of Professionalism: John Carpenter

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

These days it seems anything competitive can quickly become almost a life or death proposition. We just finished an election cycle with negative ads and negative campaigning reaching a new low. Look at sports. Baseball is now basebrawl. Fans follow suit; trading punches with each other, or in some cases, bullets. Consider this headline that appeared in the national news in October 2008: “Massachusetts barber pleads guilty in fatal Sox-Yankee fan fight.” Or this one in November: “Two dead in argument over Alabama-LSU game.” Even sandlot games are ripe fodder for parents who confuse little league with a pro tryout.

Our profession is adversarial; everyone understands that. Indeed it would unethical to be anything less than a zealous advocate. But sometimes, under the heading of aggressive advocacy, lawyers believe it’s an entitlement to rude, loathsome, abusive conduct. Searching the word “civility” on www.abajournal.com reveals the latest incidences of lawyers behaving badly.

National surveys of attorneys reveal a consensus that civility and professionalism among lawyers is at an all-time low. Almost 70 percent of lawyers surveyed for the “Pulse of the Legal Profession” — a comprehensive 2006 ABA study — stated that “lawyers have become less civil to each other over time.”

Some attorneys believe the antithesis of civility breeds success. The Florida bar challenged, successfully, one attorney whose ads featured a pit bull with a spiked collar. The notion, at least in Kansas, that a nice guy can’t be a successful advocate is demonstrably false. Indeed, in many communities here, in fact most, civility and professionalism is the rule, not the exception. And active and successful practices follow.

Which leads me to John Carpenter, a member of the Barton County Bar for 40 years, until he passed in September 2004. “John was a big man, maybe 6’4” tall. He carried himself in a classy elegant, way, and he was simply a great lawyer, a great guy. Maybe my best friend,” Tom Berscheidt told me recently. But Berscheidt and Carpenter weren’t law partners. They were adversaries. In multiple cases over the 36 years they worked in the same town, Great Bend. They had many jury trials against one another — three in the same year. “Neither one of us ever raised an objection. I didn’t try to push the rules; neither did he,” Berscheidt recalled. Motions to compel, motions to dismiss marginal claims — not necessary. “I opened up my file, he took what he wanted, and then he did the same for me.”

Because by any conventional measurement, the notion that a plaintiff’s lawyer and a defense lawyer could be best friends might strike an East Coast or West Coast lawyer in an unsettling kind of way. Yet their relationship was in spite of their differences. One dedicated to plaintiffs work. The other, for the defense. Carpenter — KU, Berscheidt — Washburn. Democrat, Republican, KTLA, KADC. Berscheidt — local kid, Carpenter and his wife, Mickey — interlopers from Lawrence.

But it’s what they had in common that predominated. “Good Scotch” for starters. A simple approach to preparing relatively simple cases. That fact-witness depositions should be finished in less than two hours. That the law was an honorable profession. Civility wasn’t a word. It was way of life. “You knew with John Carpenter he would prepare his case thoroughly, but he never made it personal. His practice reflected three important tenants — civility, openness, and honesty,” said Bob Peter, his former partner. Carpenter’s reputation earned him the Southwest Kansas Bar Association Civility Award.

Don Vasos was co-counsel with John in a case tried in Barton County in 1991. “I was an Eastern Kansas attorney, but couldn’t have been treated better. I’m sure that was a reflection of the esteem in which John was held by the court and opposing counsel. John was always a gentleman, an advocate for his client and knew how to relax at the end of a day’s work. We got a verdict,” said Vasos.

John’s sudden passing four years ago was not before he had the privilege of mentoring his daughter, Gail, who now owns the building her father once rented. She practices with Brown, Isern & Carpenter. “I had the absolute privilege of practicing with Dad for 18 years. We did okay together and I wouldn’t trade it for anything.”

John Carpenter’s funeral jammed the Trinity Lutheran Church, with the local bar represented, and the pall bearers were fellow attorneys. And to deliver the eulogy? Mickey had one choice. The law partner John never had. Tom Berscheidt.

About the Author

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

Do you have a story about civility among our fellow bar members? I am looking for column ideas about Kansas lawyers who embody traits of professionalism and civility. War stories welcome. Send your idea or suggestion to mkeenan@shb.com

Thank you,
Matt Keenan
When I got out of treatment in 1984, I wanted to retire from the practice of law and become an alcoholism counselor. Members of the recovering community tell me that many who come out of treatment on a “pink cloud” feel like becoming counselors too! I did not become a counselor but returned to the law, dissolved my partnership of 10 years and struck out on my own. I returned to private practice and did retire in April of 2008. I did not go into counseling. I was appointed executive director of the Kansas Lawyers Assistance Program (KLAP).

I am sure that the Kansas Supreme Court, when hiring me, took into account that since my last drink 25 years ago, I served on the Wichita Bar Association’s Lawyers Assistance Committee since 1984, from 1992 until April 2008 as its chair; and made hundreds of presentations statewide to lawyers, first-time DUI offenders, law students, and the public.

Having satisfied the Court that I was an appropriate appointment for the task, in April 2008, they announced my appointment. Of all things I have ever done in my life, this is the most important and probably the one task for which I am most qualified.

Since April, we have moved the KLAP’s office from Kansas City, Kan., to 515 S. Kansas, Ste. 202, Topeka, KS 66603. I have hired two staff members, Sarah McBurney, secretary/receptionist, and Brynn Mroz, executive assistant, and completely furnished the new office. I’ve made approximately 20 CLE or public presentations, spoke to both law schools, put thousands of miles on my car, met with countless judges and chief judges and lawyers by the score. In the time in between, our office has conducted interventions for lawyers and assisted lawyers’ family members.

In August of 2008 we embarked on a project to deliver “desk books” to every judicial district in the state. The book is a compilation of resource materials, volunteer lists, helpful phone numbers, and guides for lawyers and judges to identify friends and colleagues who might benefit from the services our program offers.

To date we have delivered books to all appellate court judges, federal and bankruptcy judges, most of the chief judges, departmental judges, municipal court judges, law schools, and student bar associations. The number of books delivered is approaching 170. Some chief judges have asked that we supply every judge in their district with a book. The message I am hearing is that we should put a desk book in the hands of every judge in the state; magistrates and municipal judges included. If the budget can stand it, that’s a pretty good idea.

In late October, I was privileged to attend the ABA Commission on Lawyers Assistance Program’s Annual Conference in Little Rock, Ark. I met, studied, and conferred with Lawyer Assistance Program directors from all over the country. The conference lasted a week and during that period I did no crosswords nor did I read the paper! Not to boast, but none of the presentations were boring, everyone was attentive to the speakers, and all of the speakers were excellent. Best seminar I have ever attended! The moral of this tale; I still need to be and still am teachable. My charge is to pass that information on. I trust this is a beginning!

Our plan for 2009 includes reaching out to senior lawyers. We have more than 1,000 active lawyers in this state who have reached the age of 65. All of them have led the way for the rest of us. Some of them face advancing age with difficulty. They need our help. Our hope is that we can identify them and assist them in addressing problems. They are entitled to all the respect we can give them so they can move on with dignity.

Supreme Court Rule 206 provides in part as follows:

The Kansas Lawyers Assistance program shall have the following purposes:
1. To protect clients from harm caused by impaired lawyers;
2. To assist lawyers in recovery; and
3. To educate the bench and bar to causes of and remedies for impaired lawyers.

Our Topeka office is manned from 8 a.m. to 5 p.m. Monday through Friday. We have a hotline, which is manned 24 hours a day, seven days a week. The executive director has a cell phone with him at all times. The hotline number is (888) 342-9080. We offer services to attorneys suffering from afflictions, such as alcoholism, drug addiction, depression, gambling addiction, sex addiction, and dementia. The staff and I make this pledge to every lawyer, every judge, and their families in this state: we will do anything, anytime, anywhere to help judges, lawyers, law students, and their families! Are we special people for doing this? Not particularly. Why then? Because YOU deserve it!
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Why Should Lawyers Join a Section of the Kansas Bar Association?
By Thomas E. “Tom” Wright, KBA president

I have been a member of the KBA for as far back as my memory runs. For the first 20 years I got little out of membership and added nothing to the cause because I only attended the annual meeting. That had social benefits but nothing else.

Former KBA president, Gerald Goodell, lured me into active participation in the legislative arena because he knew I was a political junkie. The Legislative Committee wrestled with the important issues of the day: medical malpractice, wrongful death caps, no fault insurance, evidentiary rules, and many other issues that are lost in time.

In addition to feeling like I had a tiny bit of influence on important issues there were connections formed with other committee members. Over the years those connections made legal life easier and more comfortable. Today there are legislators, Bar and government leaders that I know on a first-name basis because of those Legislative Committee days.

There is also a very self-serving reason to be active in sections. In practice when I needed an expert witness or other counsel, I always checked the roster of bar members in the Administrative Law or Alternative Dispute Resolution sections or whatever section was appropriate.

Here it is as simply as I can put it — if you’re going to belong to the Bar Association anyway then join a section and participate. Try it, you’ll like it.

KBA Sections Seek Volunteers

The KBA relies heavily on members who volunteer their time, talent, and energy to the sections. The KBA has 22 sections that focus on specific practice areas and help develop legislative proposals and CLE offerings.

If you would like to be active in your section, please complete and submit the following form. You may photocopy it.

KBA Section Call Form

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

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

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

Please return by March 15, 2009, to:

KBA Member Services Director
1200 SW Harrison St.
Topeka, KS 66612-1806
Fax (785) 234-3813
Chautauqua County’s Plight Highlights a Quiet Truth

By Sen. Derek Schmidt, 15th Senate District

When Gary House was elected district court judge in the 14th Judicial District last November, there were mixed feelings in Chautauqua County.

On the one hand, county residents are decidedly proud to have selected one of their own to sit on the district court bench that historically had been dominated by judges from their much more populous neighbor, Montgomery County.

On the other hand, local folks are plenty concerned about what the loss of their last practicing attorney will mean for the county.

That’s right – when Judge House is sworn in, there will not be single practicing attorney in Chautauqua County. There’s demand: The county’s 2,000-plus residents still need help with wills and estates, real estate transactions, oil and gas law, agricultural law, contracts, family law, criminal defense, and the whole range of legal services that small-town general practitioners typically provide. But there just isn’t any supply.

At the request of local residents in Chautauqua County, the Kansas Bar Association is trying to help by assisting with advertising (see page 58) to recruit an attorney to the county. But the county’s plight highlights a quiet truth about some of the state’s most rural communities. They’re all out of lawyers.

The shortage of lawyers in parts of rural Kansas is less well-known than the shortage of other professionals. Most of the headlines are about a lack of doctors, nurses, or pharmacists. But the lawyers are missing too.

During the past eight years I have represented the 15th State Senate District, at least two counties in my area have had a time when no local lawyer was available to serve as county attorney. Chautauqua County is one – residents there have had a nonlocal prosecutor for well over a decade and are, for the most part, resigned to that trend continuing well into the future. The other is Woodson County, also small in population, that for four years had a nonresident county attorney (they elected a local lawyer to that position last November).

For the past two years, I proposed an ill-fated effort to allow local residents to eliminate the office of county attorney and replace it with a district attorney. The impetus for this proposal was concern expressed to me by residents of counties with nonresident county attorneys. That proposal cleared the Senate but stalled in the House of Representatives and is not likely to gain sufficient support any time soon.

But the underlying issue is the absence of lawyers in some rural counties.

Small-town practice can be difficult. It can raise issues for a general practitioner who is the only lawyer in town that lawyers in larger communities never face. It can be tedious and it rarely is the lucrative profession portrayed in common lore. As one long-time local practitioner said to me when I went home to practice in Independence (a much larger community then the ones of concern in this article), “Why are you coming back here? You’ll work for years and never make $100,000.”

True. But there are plenty of other pluses to small-town practice. In the smallest communities, where there are only one or two lawyers in a county, the lawyers of today continue to be what lawyers historically have been: pillars of the community. They are involved in shaping a community’s future. While busy with the practice of law, they also serve in a much more general sense as counselors to all of the community’s residents and help chart its course.

The experience of a first-year associate buried in the bowels of a large metropolitan firm, straining one’s eyes over Westlaw and sweating about billable hours and pleasing partners is far removed from that of the young lawyer serving the most rural of communities. In the little town, practice by its nature is general and the lawyer’s routine is about helping people solve the problems of their daily lives (and some that are less common!). Small-town lawyering remains much more of a people-based profession and less of a cerebral exercise. Small-town lawyers really are trusted counselors right from day one.

It’s not for everybody. But it is for many who may not have considered it. There’s opportunity out on the rural frontier for recent law school graduates and for midcareer professionals looking for a change. Or maybe for early retirees from the law looking for something different in retirement.

I think of some of my law school classmates who no longer are practicing. Burnout. Frustration with the law. Or, frankly, raw boredom. I’m sending a few of them a copy of this article.

We’ll see what happens.
The Millennial Generation: Bridging the Technology Gap

By Carl Petterson, Washburn University School of Law

B efore attending Washburn University School of Law, I worked for five years in the information systems field. I had the opportunity to work side-by-side with elected officials, management, engineers, and shop staff. I designed computer systems, servers, and networks. I also trained hundreds of employees on computers, software, and general technology. Most of my peers were twice my age. On the weekends and weeknights, I started a part-time computer consulting company and provided services to clients remotely while in hotel rooms, coffee shops, and bistros. While working, I finished my undergraduate degree online.

When I moved to Topeka to go to law school, I was eager to see how the legal system used technology. I anticipated the law to reflect society’s philosophy regarding technology, which increasingly mirrors my generation’s integrated lifestyle. My generation, sometimes called the Millennial Generation, uses technology in almost every aspect of our lives. From these experiences, I found that the way that the Millennial Generation is using technology in law school holds a lot of promise for the legal profession, and that adapting to new forms is not as hard as some may fear.

On the first day of law school, I noticed that everyone in law school, besides an occasional luddite, used technology in innovative ways. The static buzz of keyboards suspended only when the professor stopped to catch a breath. Some students had purchased software specifically designed for notetaking. One program has an audio recording feature that enables the user to simultaneously take notes. After class, the lecture can be replayed while the user types corrections or additions. The same feature allows the user to select a word in the notes and listen to the professor’s lecture from that point in time. Still another feature is shared notebooks. A shared notebook allows multiple users to take notes on the same document at once. All the users have a shared computer screen and type simultaneously; the program keeps “real time” track of each person’s entries onto the document. Other students use oral dictation programs to translate spoken words into writing. One student uses a Livescribe pen, which records audio and translates natural handwriting into digital notes. Some even download recordings of cases or outlines and upload them to their iPods to listen to during their workout routines or commutes.

I was surprised at how much even our professors are using popular technology. For example, I nearly fell off my chair when Professor Schwartz permitted instant messaging in his classroom. When he called on one student, another could message her an answer. He encouraged students to use online forums and required presentations on substantive law. In their presentations, students used Microsoft PowerPoint and incorporated pictures, music, and video. Like Schwartz, many professors post assignments, hypotheticals, and syllabuses to course Web sites. Almost all require students to check their e-mail daily.

My generation will take these technological innovations and practices into the workforce. This may change the way lawyers record information, cross-reference audio interviews and written transcripts, work on briefs or transactions in teams, and use different kinds of media to make travel time more productive.

It is not as hard as some may fear to learn new kinds of technology, even when previous forms feel more comfortable. People do it all the time. I remember one of my training sessions on window multitasking with some engineers. Multitasking is a relatively simple concept, but it can take some time for a novice to master those hard-to-see and cryptic buttons in the top right-hand corner of a window. One of my more cantankerous trainees was having a difficult time remembering each button’s function until I gave him an analogy to a business practice he was comfortable with. Understanding the analogy, he used multitasking to improve his efficiency. Hesitant at first, once he discovered the value of using technology to reach a means, he loved it.

While technology has influenced the Millennial Generation since childhood, it has not saturated it like the generation coming after us. At age nine, my beautiful niece, Sophia, is already a master of multi-tasking. She does not use technology to reach an end, but rather to play Disney and Nickelodeon games simultaneously. When she enters the workforce, using technology will be natural. My cohort bridges this generation gap because we were the first to mature within a world of technology. We have grown up in scholastic and professional worlds while chatting on the Internet, writing e-mails, and texting on cell phones. As with previous generations, technological innovation soon will become the standard and will challenge previous generations to adapt, just as Sophia’s generation will challenge mine.

Technology’s influence holds much promise for the study and practice of law. As the Millennial Generation enters the legal profession, new innovations will continue to emerge and challenge us. Society’s philosophy regarding the use of technology will continue to evolve and the legal profession will change with it. Even though previous practices may feel more comfortable, adapting to new technology is not as hard as some may fear and may actually hold many exciting and practical benefits.

About the Author

Carl Petterson is a second-year law student at Washburn University School of Law, currently working toward his certificate in business and transactional law. He has numerous technical certifications and is looking forward to the role technology will play within the legal profession.
Members in the News

Changing Positions

Daniel B. Bailey has joined Ivinson Memorial Hospital, Laramie, Wyo.
Blake A. Bittel has joined the law firm of Oller, Johnson & Bittel L.C., Hays.
Brent Correll has joined Laser Law Firm P.A., Little Rock, Ark.
Remington S. Dalke has joined Bush, Bush & Shanelie, Lyons.
Jonathan J. DeJong has joined Hinkle Elkouri Law Firm LLC, Wichita, as an of counsel attorney.
Jeffrey W. Garrett has joined Carter Law Office, Kansas City, Mo.
Carolyn Y.Y. Grayson has joined Shuttlesworth Law Firm LLC, Overland Park.
Pamela E. Hamilton and Kana R. Lydick have joined Stevens & Brand LLP, Topeka.
Jonathan M. Hensley has joined the Office of the Missouri Attorney General, Jefferson City, Mo.
Cathleen M. Hobson has joined the Law Offices of Lauren K. Meachum, Berwyn, Ill.
Rickey E. Hodge has joined Stinson, Lasswell & Wilson L.C., Wichita.
Jane C. Holt has joined Blue Cross and Blue Shield of Kansas City, Kansas City, Mo.
Christopher R. Howard has joined McDowell, Rice, Smith & Buchanan P.C., Kansas City, Mo.
Andrew C. Hronek has joined Kutak Rock LLP, Kansas City, Mo.
Matthew R. Hubbard has joined the U.S. Department of State, Washington, D.C.
Ryan Huschka has joined Wilmer, Cutler, Pickering, Hale & Dorr LLP, Washington, D.C.
Amanda P. Ketchum has joined Dysart, Taylor, Lay, Cotter & McMonigle P.C., Kansas City, Mo.
Michael C. Leitch has joined the Kansas Attorney General’s Office, Topeka.
Eric F. Melgren has become a district judge for the U.S. District Court, District of Kansas, Wichita.
Michael H. Miller has joined Aviva USA, Des Moines, Iowa, as general counsel.
Brad Allen Oliver has joined The Moore Firm LLC, Barnwell, S.C.
Renee W. Parsons has joined Dairy Farmers of America Inc., Kansas City, Mo.
Benjamin A. Reed has joined Joseph & Hollander P.A., Wichita.
George E. Rider has joined MLP Co-Investment Fund L.P., Overland Park.
Ellen M. Ryan has joined Elder & Disability Law Firm, Overland Park.
Reed A. Schultz has joined YRC Worldwide, Overland Park.

Stephanie N. Scheck, has been named the chair of the Employment and Labor Law/Employee Benefits Division by Stinson Morrison Hecker LLP, Wichita.
Kannon Kumar Shannugam has joined Williams & Connolly LLP, Washington, D.C., as a partner.
Shelly R. Wakeman has joined the Legal Aid of Western Missouri, Kansas City, Mo., as the deputy executive director.
Maureen A. Walterbach has joined Bryan Cave LLP Kansas City, Mo., as an associate.
Ronald E. Wurtz, Topeka, has been appointed as acting federal public defender for the District of Kansas.
Samara Nazir Zaman has joined Mdivani Immigration Law Firm, Overland Park.

Changing Locations

The Backer Law Firm LLC has relocated to 14801 E. 42nd St., Ste. 100, Independence, MO 64055.
Cordell & Cordell P.C. has moved to 11225 College Blvd., Ste. 490, Overland Park, KS 66210.
Davis, Ketchmark & McCruig has moved to 2345 Grand Blvd., Ste. 210, Kansas City, MO 64108.
The French Law Office LLC has moved to 707 SE Quincy, Ste. A, Topeka, KS 66603.
Kenneth C. Havner has started the Law Office of Kenneth C. Havner, 6301 W. 128th St., Overland Park, KS 66209.
Judith C. Hedrick has started the Law Office of Judith Hedrick, 15465 W. 90th St., Lenexa, KS 66219.
Shawn C. Jergenson and Jennifer M. Zook have started Jergenson & Zook P.A., 1111 S.W. Gage Blvd., Ste. 300, Topeka, KS 66604.
Bryan R. LaGree has moved to 4701 College Blvd., Ste. 115, Leawood, KS 66211-1609.
The Katz Law Firm has relocated to 7227 Metcalf Ave., Overland Park, KS 66204.
David D. Leffingwell has started the Law Office of David D. Leffingwell, 416 E. Wyandotte St., Meriden, KS 66512.
Mark B. Rockwell has started Rockwell Law Firm Ch'td, 1201 Wakarusa Dr., Ste. E2, Lawrence, KS 66049.
Richard F. Stevenson has moved to 201 E. Loula, Ste. 200, Olathe, KS 66051-0010.
The Weitz Company LLC has moved to 10901 W. 84th Terr., Ste. 200, Lenexa, KS 66214.

Miscellaneous

Martin W. Bauer, Wichita, has become a member of the 2008-2009 board of directors of Arts Partners.
Richard C. Dearth, Pittsburg, was appointed as the dean of the Kelce College of Business at Pittsburg State University.
Amy S. Lemley, Wichita, was named a fellow of the American College of Trial Lawyers.
Edward L. Robinson, Wichita, was appointed by Gov. Kathleen Sebelius to the Kansas Home Inspectors Registration Board.
Craig Shultz, Wichita, has become the national board chairman for the Christian Legal Society.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
Dale Bruce
Dale Bruce, 90, a retired attorney from Wichita, died Oct. 20. He was born Nov. 4, 1917, in Mound Valley Township. He grew up in Coffeyville and was the first Eagle Scout in southeast Kansas. Bruce attended Coffeyville Junior College and joined the National Guard before going to the University of Kansas, where he studied history and law, graduating in 1941. In 1946, Bruce and his wife, Margaret, moved to Wichita after spending nearly three years in Newtown, Conn. He opened his law practice in 1946 and practiced for 60 years. He is survived by his wife; son, Eric Bruce, Wichita; daughters, Addie Seabarkrob, Quincy, Ill., April Bruce-Stewart, Lenexa, and Penny Shuler, Aurora, Colo.; eight grandchildren; and three great-grandchildren.

Gary F. Conklin
Gary F. Conklin, 72, a longtime resident and attorney of Westmoreland, died Oct. 28 at Mercy Regional Health Center in Manhattan. He was born May 6, 1936, in Savannah, Mo., the son of Delmas M. and Alma M. Kurtz Conklin. He attended Hutchinson Junior College and graduated from the University of Kansas with both his bachelor’s and law degrees. Conklin practiced law for 43 years in Westmoreland and also served as Pottawatomie County counselor. He was a member of the Westmoreland Masonic Lodge No. 257, the Kansas and Pottawatomie County bar associations, and the Bench Bar Committee for the 2nd Judicial District. He was also a past scoutmaster for Boy Scout Troop No. 97. Survivors include his wife, Marjorie, of the home; daughter, Kellie White, St. Louis; son, Cory Conklin, Wichita; and two grandchildren.

Robert P. Keenan
Robert P. Keenan, 85, Great Bend, died Oct. 25. He was born Dec. 30, 1922, in Great Bend, the son of Patrick and Mary Hall Keenan. He was a lifetime Great Bend resident and was a U.S. Navy veteran of World War II, attaining the rank of lieutenant executive officer aboard the USS Crosley. Keenan earned his bachelor’s degree from Fort Hays College in 1945 and his law degree from the University of Kansas in 1949. He then opened his own law office in Great Bend. He was past president of the Barton County Bar Association and was a member of the Kansas Bar Association and the American Judiciary Society. He was admitted to practice before the Kansas and all federal courts. He served in the Kansas House of Representatives for six years, acting as caucus chairman, served on the Barton County Community College board of trustees for 20 years, was president of the Great Bend Jaycees, exalted grand ruler of Benevolent and Protective Order of Elks Lodge No. 1127, and was president of Kiwanis. Survivors include his wife, Dorothy Burnette; three sons, Robert, Denver, Gregory, Great Bend, and Rodney, New York; daughter, Alison, Olathe; two brothers, Larry and Patrick, both of Great Bend; two sisters, June Klepper, Ellinwood, and Gloria Ball, Burien, Wash.; six grandchildren; and three great-grandchildren. He was preceded in death by three brothers, Paul, Russell, and Ora; and two sisters, Louise and Sylvia.
Volunteer for the Elder Law Hotline

- Does a will go through probate?
- Are a living will and a living trust the same thing?
- My husband has Alzheimer’s. What should we do?
- Should I put my kids on the deed to my house?
- My son wants to put me in a nursing home. Do I have to go?

These are just a sampling of the questions taken by the Kansas Elder Law Hotline (hotline). If you can answer any of these questions, you can help someone in need. Volunteering is convenient and invaluable to the elderly in Kansas. As a hotline attorney you volunteer a three-hour block of time every other month. Calls will be transferred to your office, along with demographic information about each client. You will be able to work in the comfort of your own office while being “on-call” for the callers. The shifts are: Monday – Friday, 9 a.m. – 12:30 p.m. or 1 – 4:30 p.m.

The hotline is a project of Kansas Legal Services Inc., which is funded in part by the Kansas Bar Foundation and Kansas Bar Association. It is available to persons who live in Kansas who are age 60 or older. There is no income eligibility to participate in this program. Volunteers can expect to talk to clients of widely varying economic and social backgrounds. The hotline provides the elderly access to an attorney to advise them about legal questions in a variety of legal issues and referrals to other resources for additional assistance.

Volunteers with malpractice insurance will be listed in a special elder law referral panel of the Kansas Bar Association’s Lawyer Referral Service (LRS) at no charge. You will be referred elder law clients from your area with cases like probate, estate planning, guardianship/conservatorship, personal injury, etc. LRS rules (including remitting 10 percent of fees more than $300) apply to this elder LRS panel. All volunteers receive free enrollment to be a part of the KBA LRS.

Elderly citizens face many complex legal problems. As a hotline participant, you can provide guidance to senior Kansans. Please consider volunteering for the Kansas Elder Law Hotline. You can register as a volunteer by calling Meg Wickham, manager of public services, at (785) 234-5696 or e-mailing mwickham@ksbar.org. You can make a difference.

Recognition of 2008 Journal Authors

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Thomas D. Arnhold – “Practical Tips for Handling Children’s Issues When One Parent is in the Military” – June
Robert A. Browning – “Deferred Compensation for Dummies: The Section 409A Compliance Check is Ticking” – October
Christopher F. Burger – “Recreational Use Immunity: Play at Your Own Risk” – February
Mary E. Christopher – “Gambling with Settlement Proceeds: Confidentiality After Amos v. Commissioner” – April
Ryan Farley – “A New Guiding Principle: Kansas Supreme Court’s Trend to Review and Reconsider Legal Precedent” – September
John W. Head – “How Letters of Credit Operate in International Commercial Transactions: An Introduction to the UCP” – March
Wm. Scott Hesse – “Recreational Use Immunity: Play at Your Own Risk” – February
David Jermann – “Kansas Noncompete Agreements – An Updated Overview” – January
Michael T. Jilka – “Political Spoils and the First Amendment” – November/December
Nicole Romine – “A New Guiding Principle: Kansas Supreme Court’s Trend to Review and Reconsider Legal Precedent” – September
John Vering – “Kansas Noncompete Agreements – An Updated Overview” – January
2008 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for September through December. Your commitment and invaluable contribution is truly appreciated.

Eric N. Anderson, Clark Mize & Linville Chtd., Salina
Scott W. Anderson, Gilmore & Bell P.C., Kansas City, Mo.
Charles J. Andres, Law Office of Charles J. Andres, Olathe
Shannon K. Barks, Lathrop & Gage L.C., Overland Park
David E. Bengtson, Stinson Morrison Hecker LLP, Wichita
David Bleakley, Colt Energy Inc., Mission Hills
Jon M. Callen, Edmiston Oil Co. Inc., Wichita
Brian J. Christensen, Bryan Cave LLP, Kansas City, Mo.
Christine A. Coates, Dispute Resolution Professional, Boulder, Colo.
Joseph R. Colantuono, Colantuono & Associates LLC, Leawood
Kevin M. Conley, UMB Bank N.A., Kansas City, Mo.
Matthew R. Crimmings, Walters, Bender, Strohbehn & Vaughan P.C., Kansas City, Mo.
Douglas M. Crotty III, Crotty Law Office P.A., Garden City
Kendall R. Cunningham, Gilliland & Hayes PA., Wichita
Timothy A. Davis, Constanzy, Brooks & Smith LLC, Kansas City, Mo.
E. Jay Deines, Deines & Deines, Wamego
Emily A. Donaldson, Stevens & Brand LLP, Lawrence
D. Michael Dwyer, Dwyer Dykes & Thurston L.C., Overland Park
James L. Eisenbrandt, Berkowitz Oliver Williams Shaw & Eisenbrandt, Prairie Village
Douglas C. Fincher, Woner, Glenn, Reeder, Girard & Riordan P.A., Topeka
Roger D. Fincher, Bryan Lykins Hejtmanek & Fincher, Topeka
Randall E. Fisher, Law Office of Randall E. Fisher, Newton
Shelly Freeman, Human Resources Return on Investment LLC, Kansas City, Mo.
Theron D. Fry, Trippelt Woolf & Garretson LLC, Wichita
Hon. Fernando J. Gaitan Jr., U.S. District Court, Western District of Missouri, Kansas City, Mo.
Jon W. Gilchrist, Payne & Jones Chtd., Overland Park
Jason Goeckler, Kansas Department of Wildlife & Parks, Emporia
Krista J. Gordon, Iberdrola Renewable Energies U.S.A., Hays
James J. Grogan, ATC Marketing LLC, Scottsdale, Ariz.
Robert I. Guenther, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita
Professor Neil Hamilton, Agricultural Law Center, Des Moines, Iowa
Richard L. Hathaway, U.S. Attorney’s Office, District of Kansas, Topeka
Stanton A. Hazlett, Disciplinary Administrator’s Office, Topeka
Professor Webb Hecker, University of Kansas School of Law, Lawrence
Hon. Stephen D. Hill, Kansas Court of Appeals, Topeka
Matthew H. Hoy, Stevens & Brand LLP, Lawrence
Mark M. Iba, Stinson Morrison Hecker LLP, Kansas City, Mo.
Debra Egli James, Hampton & Royce L.C., Salina
Professor Drew L. Kershew, University of Oklahoma School of Law, Norman, Okla.
Mike Ketchmark, Davis Ketchmark & McCreight, Kansas City, Mo.
David M. Kight, Spencer Fane Britt & Brown LLP, Kansas City, Mo.
Gordon Kirsten II, Foulston Siefkin LLP, Wichita
Eric J. Larson, Bever Dye L.C., Wichita
Hon. John Lungstrum, U.S. District Court, District of Kansas, Kansas City, Kan.
Jack C. Marvin, Stinson Morrison Hecker LLP, Wichita
Hon. Patrick D. McAnany, Kansas Court of Appeals, Topeka
John G. McCannon Jr., Kansas Corporation Commission, Wichita
Professor Roger A. McEowen, Iowa State University Center for Agricultural Law, Ames, Iowa
Kent A. Meyerhoff, Fleeson Gooing Coulson & Kitt LLC, Wichita
Leslie M. Miller, Stevens & Brand LLP, Lawrence
Amy R. Mitchell, Attorney at Law LLC, Olathe
C. Robert Monroe, Stinson Morrison Hecker LLP, Kansas City, Mo.
David P. Mudrick, Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka
Hon. Carlos Murguia, U.S. District Court, District of Kansas, Kansas City, Kan.
N. Royce Nelson, Hampton & Royce L.C., Salina
Patrick R. Nichols, Associates in Dispute Resolution LLC, Lawrence
David W. Nickel, Depew Gillen Rathbun & McInteer L.C., Wichita
Richard A. Olmstead, Kutak Rock LLP, Wichita
Timothy P. O’Sullivan, Foulston Siefkin LLP, Wichita
Kathy Perkins, Kathy Perkins LLC, Lawrence
Professor David E. Pierce, Washburn University School of Law, Topeka
John G. Pike, Withers Gough Pike Pfaff & Peterson LLC, Wichita
Ronald P. Pope, Ralston Pope & Diehl LLC, Topeka
Bradley J. Prochaska, Prochaska, Giroux & Howell, Wichita
Randall K. Rathbun, Depew Gillen Rathbun & McInteer L.C., Wichita
Philip D. Ridenour, Ridenour & Ridenour, Cimarron
Denise Fields, Bryan Cave LLP, Kansas City, Mo.
Alan L. Rupe, Kutak Rock LLP, Wichita
Larry R. Rute, Associates in Dispute Resolution LLC, Topeka
Hon. Robert J. Schmisser, 30th Judicial District, Pratt
Eileen M.G. Scefield, Alston & Bird LLP, Atlanta
Benjamin D. Sherber, Kansas Estate Recovery Program, Topeka
Tim Skarda, Allied Business Group, Leawood
Denis J. Stanchik, Attorney at Law, Olathe
Sarah O. Steele, Gilmore & Bell P.C., Wichita
Kelli J. Stevens, Law Office of Kelli J. Stevens, Lenexa
Terry D. Thomas, Kansas Bankers Association, Topeka
Arthur J. Thompson, Office of Judicial Administration, Topeka
Cheryl L. Trenholm, Barber Emerson L.C., Lawrence
Wally Underhill, Kansas Lawyers Assistance Program, Topeka
Brian M. Vazquez, Kansas Estate Recovery Program; Kansas Health Policy Authority, Topeka
Hon. David J. Waxse, U.S. District Court, District of Kansas, Kansas City, Kan.
Stewart T. Weaver, Foulston Siefkin LLP, Wichita
Trevor C. Wohlford, Kansas Court of Tax Appeals, Topeka
Molly M. Wood, Stevens & Brand LLP, Lawrence
Angel R. Zimmerman, Valentine Zimmerman P.A., Topeka
Larry N. Zimmerman, Valentine Zimmerman P.A., Topeka
Sen. Sam Brownback, R-Kan., has been serving as a U.S. senator for Kansas’ 2nd Congressional District since 1996. He is now serving his second full term, after filling the remainder of Sen. Robert Dole’s term. Prior to his election to the Senate, Brownback served one term in the U.S. House of Representatives. Currently, Brownback serves on the Appropriations, Judiciary, and Joint Economic committees, as well as the Helsinki Commission on Security and Cooperation.

Prior to joining Congress, Brownback served as the secretary of agriculture for Kansas from 1986 to 1990 and was a White House fellow with the Office of the U.S. Trade Representative. He is a 1979 graduate of Kansas State University and received his juris doctorate from the University of Kansas School of Law in 1982. He has practiced law in both Manhattan and Topeka.

Rep. Dennis Moore, D-Kan., is serving his fifth term in the U.S. House of Representatives for Kansas’ 3rd Congressional District. Moore currently serves on the Budget and Financial Services committees, as well as the Blue Dog Coalition and the Center Aisle Caucus.

Moore received his bachelor’s degree from the University of Kansas in 1967 and his juris doctorate from Washburn University School of Law in 1970. After serving in the Army and Army Reserve, he began his legal career as an assistant attorney general for Kansas. In 1973 he entered private legal practice in Johnson County. Moore was elected Johnson County district attorney in 1976 and served three terms until 1989, when he returned to private practice as a partner with Erker and Moore LLC.

He served two terms on the Johnson County Community College board of trustees; was the founding member, past president, and board member of Johnson County Safehome; and also worked in establishing the Coalition for the Prevention of Child Abuse (now the Sunflower House) and the Johnson County chapter of Court Appointed Special Advocates.

Rep. Jerry Moran, R-Kan., has been representing the 1st Congressional District of Kansas since 1997. He is a senior member of the Agriculture Committee, as well as an active member of the House Transportation and Infrastructure and House Veterans’ Affairs committees.

In Hays, Moran volunteers his time at several community organizations. He serves as a trustee of the Eisenhower Foundation, serves on the board of trustees of the Fort Hays State University Foundation, is an honorary member to the Special Olympics Kansas, and serves on the executive committee of the Coronado Area Council of the Boy Scouts of America.

Prior to his election to Congress, he served eight years in the Kansas Senate, spending the last two years as majority leader. Moran attended Fort Hays State University (FHSU) and later the University of Kansas, where he earned degrees in economics and law. After an early career as a small town banker in Hays, Moran established his law practice and was an adjunct professor of political science at FHSU.

Sen. Terry Bruce, R-Hutchinson, came to the Kansas Senate in 2005 representing the 34th District. Bruce is counsel with the Hutchinson law firm of Forker, Suter & Rose LLC, where he practices business law, appellate practice, trusts, wills, and bankruptcy. He earned his bachelor’s degree in political science from Fort Hays State University in 1997 and his juris doctorate from the University of Kansas School of Law in 2000. After his graduation from law school, Bruce served as assistant district attorney for Reno County, spending more than three years in the district attorney’s office. During the 2004 legislative session, he worked for House Majority Leader Clay Aurand, R-Courtland, as his communications director.

Bruce was appointed to the City of Hutchinson Human Relations Commission and the City of Hutchinson Sales Tax Advisory Board. He has also taught law courses part time at Hutchinson Community College.

Sen. Jay Emler, R-Lindsborg, a former municipal court judge, has been in the Kansas Senate since 2000 and represents the 35th District. He earned his bachelor’s degree from Bethany College, law degree from the University of Denver College of Law, and a master’s degree from the Naval Postgraduate School, Monterey, Calif. In the Senate, Emler serves as chair of the Ways and Means Committee.

(Continued on next page)
Senior Thomas “Tim” Owens, R-Overland Park, was elected to his first term in the Kansas Senate, representing the 8th District, in 2008. Prior to the Senate, Owens served seven years as a state representative in the 19th District in the Kansas House of Representatives. Owens will serve as chair of the Senate Judiciary Committee for the 2009 session.

Owens is a graduate of Kansas State University, with a degree in political science and earned his juris doctorate from Washburn University School of Law in 1974. Upon being admitted to the bar, he was employed by Employers Reinsurance Corp. in Kansas City, Mo., and by the city of Overland Park. Owens then became partner in the firm of McAulay, Owens, Heyl & Kincaid for 10 years before becoming general counsel for the Kansas Department of Social and Rehabilitation Services, where he served from 1988 until his return to private practice in 1991.

Owens is currently a solo practitioner in Overland Park and is a member of the Kansas and Johnson County bar associations. He is a retired colonel from the U.S. Army Reserve, a Vietnam veteran, and a graduate of the U.S. Army’s Command and General Staff College. Owens is also an adjunct professor of political science at Johnson County Community College.

Sen. Derek Schmidt, R-Independence, has been representing the 15th District in the Kansas Senate since 2000, where he is currently serving as majority leader. Prior to his election, Schmidt served as special counsel and legislative liaison to former Gov. Bill Graves and also served as assistant Kansas attorney general, where he was assigned to the Consumer Protection Division. Schmidt is currently in private practice with the Independence firm of Scovel, Emert, Heasty & Chubb.

For seven years, Schmidt worked in Washington, D.C., as a congressional aide and served five years as a legislative assistant to Sen. Nancy Kassebaum, R-Kan., including two years as her chief foreign policy aide. He also served two years as legislative director and general counsel to Sen. Chuck Hagel, R-Neb.

Schmidt earned his bachelor’s degree in journalism from the University of Kansas, his master’s degree in international politics from the University of Leicester, England, and his law degree from Georgetown University Law Center. During the fall of 2006, he was in residence at the University of Kansas as the first Simons Public Humanities fellow.

Sen. John Vratil, R-Leawood, represents the 11th District and is currently serving as Senate vice president. He practices law with Lathrop & Gage L.C. in Overland Park, focusing on commercial, business, appellate, real estate, and education law.

Vratil received his bachelor’s and law degrees from the University of Kansas, and studied at the University of Southampton, England, on a Rotary Foundation Fellowship. He is a former president of the Kansas Bar Association and received the Outstanding Service Award from
the Johnson County Bar Association in 1984. He has been 
president of the Overland Park Chamber of Commerce and 
a board member of the Shawnee Mission Medical Center 
Foundation.

**Kansas House**

**Rep. Pat Colloton**, R-Leawood, is serving her third term 
as a Representative in the Kansas House from the 28th 
District. She has been appointed chair of the Corrections and Ju- 
venile Justice Committee.

Colloton graduated from the 
University of Wisconsin School 
of Law and has undergraduate 
degrees in chemistry and psy- 
chology. She worked as a research 
organic chemist for Eli Lilly be- 
fore attending law school. She 
has practiced law in several jur- 
sdictions. She is a member of 
the New York, Massachusetts, 
Illinois, Wisconsin, and Kansas 
Bar associations.

She serves on the Counsel of State Government’s National 
Public Safety and Justice Task Force, their Legal Task Force, 
and as an executive committee member of the Board of the 
Justice Center that assists states with public policy and legisla- 
tion on corrections and juvenile justice issues.

Most recently, Colloton’s law practice has related to school 
law and charitable foundations. For her first 10 years of law 
practice, she was a litigator with a large law firm; subsequently, 
she has been a solo practitioner, representing clients on a wide 
variety of issues.

She is active in school organizations, several charitable 
foundations, the Leawood Chamber of Commerce, and the 
Leawood Rotary. She previously served on the Leawood Plan- 
ning Commission.

**Rep. Marti Crow**, D-Leavenworth, represents the 41st 
District in Leavenworth County. She is serving her eighth 
term after being first elected in 1996. She serves as the Agenda 
Chairman for the House Demo- 
crats, a leadership position she 
has held for the past eight years.

She is a partner in the law 
firm of Crow and Associates, 
Leavenworth. Crow received a 
bachelor’s degree from Baker 
University and a juris doctor- 
at from Washburn University 
School of Law.

Prior to serving in the Leg- 
islature, Crow was a member 
of the Leavenworth City Plan-
ning Commission and the Board of Zoning Appeals for 17 
years, and the USD 453 Board of Education for 13 years. She 
worked as an attorney for the Kansas Department of Revenue 
and the Kansas Department of Health and Environment prior 
to entering private law practice in 1995.

Appointed by the Kansas Supreme Court, Crow served on 
the Kansas Continuing Legal Education Commission from 
1993 to 1999. She was chairman of the commission from 
1997 to 1999. She has presented continuing legal education 
programs about military family law, ethics, and legislation for 
the Kansas and Leavenworth County bar associations, the 
Kansas Trial Lawyers Association, and the annual meeting of 
the Kansas Association of County Counselors. She is the 
author of the Military Family Law chapter in the KBA Fam- 
ily Law Handbook. She also wrote and published a series of 
articles in the *Kansas Governmental Journal* concerning solid 
and landfills.

**Rep. Paul Davis**, D-Lawrence, is serving his fourth term 
in the Kansas House of 
Representatives, representing the 
46th District in Lawrence. He is 
the House Democratic Leader.

Davis is a partner with the law 
firm of Skepnek, Fagan, Meyer 
& Davis P.A., Lawrence. Prior 
to serving with the Kansas Leg- 
islature, Davis was the legisla- 
tive and ethics counsel for the 
Kansas Bar Association. He also 
previously served as assistant di- 
rector for government affairs for 
former Kansas Insurance Com- 
misioner Kathleen Sebelius. 
Davis holds a bachelor’s degree 
in political science from the 
University of Kansas and a juris doctorate from the Washburn 
University School of Law.

He is active in the Lawrence community, having served on 
the board of directors of the Health Care Access Clinic and 
the Arc of Douglas County, and the City of Lawrence Hous- 
ing Trust Fund Advisory Board.

Davis has been active in both the Kansas Bar Association 
and American Bar Association.

**Rep. Raj Goyle**, D-Wichita, 
is serving his second term 
in the Kansas House represent- 
ing the 87th District.

Goyle serves on the Tax, Ju- 
diciary, and Veterans/Homeland 
Security committees and co- 
wrote the law protecting families 
from picketers at the funerals of 
Kansas’ fallen soldiers. Goyle 
is a lecturer at Wichita State 
University and an attorney. A 
native Wichitan, Goyle gradu- 
ated from Duke University and 

(Continued on next page)
Harvard Law School. Goyle has experience as a civil attorney and policy analyst with a specialty in homeland security and election reform.

He is an active member of his community.

Rep. Jeff King, R-Independence, is serving his second term in the Kansas House representing the 12th District, which includes parts of Montgomery, Elk, and Chautauqua counties. He has been appointed vice chair of the Taxation Committee.

King practices with King Law Offices LLC in Independence in the areas of appellate, business, and trust litigation.

He received his juris doctorate from Yale University, 2002, Master of Philosophy (MPhil) in European studies, 1999, and MPhil in land economy (agricultural economics), 1998, from Cambridge University, and Bachelor of Arts, magna cum laude, in 1997 from Brown University. King is admitted to practice law in Kansas and Missouri and before the U.S. District Court for the District of Kansas, the U.S. District Court for the Western District of Missouri, the U.S. Court of Appeals for the 6th, 8th, 9th, and 10th circuits, and the U.S. Supreme Court.

He is a member of the American Bar, Kansas Bar, and the American Agricultural Law associations and is a graduate of the Leadership Kansas 2003.

Rep. Lance Kinzer, R-Olathe, represents the 14th House District. He is serving his third term. He has been appointed chairman of the Judiciary Committee.

Kinzer received his bachelor’s degree at Wheaton College in Wheaton, Ill., and his juris doctorate at the University of Kansas School of Law. After graduating, he served four years on active duty as a captain with the Army JAG Corps.

Kinzer is currently a member of the Olathe firm, Schlager, Gordon and Kinzer LLC, where he has a civil litigation practice. Kinzer served as vice chair of the House Judiciary Committee 2006-2008, is the former chairman of the Olathe Republican Party and is a member of he Olathe Noon Rotary. He was admitted to the Kansas bar in 1995 and is also licensed to practice in Missouri. He is a member of the Johnson County and Kansas bar associations.

Rep. Mike O’Neal, R-Hutchinson, represents the 104th House District in Reno County and has been elected Speaker of the House. He has served in the Kansas House of Representatives since 1984.

O’Neal is a member of the Kansas Judicial Council and the National Conference of Commissioners on Uniform State Laws. He also serves on the Law and Justice Committee of the National Conference of State Legislatures and Council of State Governments.

He is a member of the Kansas Bar Association. O’Neal is a shareholder in the firm of Gilliland and Hayes P.A., Hutchinson.

Rep. Joe Patton, R-Topeka, will be serving his second term as representative for the 54th District. He has been appointed vice chair of the Corrections and Juvenile Justice Committee.

A 1977 graduate of Washburn University School of Law, he is founder and senior partner of the firm Patton and Patton Chtd., Topeka. His areas of practice include civil litigation, workers’ compensation, and auto insurance claims.

Patton is active in the Topeka community. He currently serves on the Advisory Board of Safe Streets organizing neighborhoods for the prevention of violent crime. Patton is a past president of the organization. He is a member of the Kansas Bar Association and a Kansas Elder Law Hotline volunteer He is also member of National Federation of Independent Business, The Voice of Small Business, Topeka Independent Business Association, and the Mayor’s Crime and Safety Committee.

Rep. Janice Pauls, D-Hutchinson, represents the 102nd House District in Reno County. She has served in the Kansas House of Representatives since 1991.

Pauls, a former district court judge and prosecutor, is a graduate of the University of Kansas School of Law. She is now in private practice in Hutchinson. Pauls is a member of the Kansas Sentencing Commission and is on the Law and Justice Committee of the National Conference of Legislatures. Pauls also serves on the Kansas Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee.
Rep. James “Jim” Ward, D-Wichita, will be serving his third term as representative for the 88th District.

He has been in private practice with the firm of Ward and Batt LLC, Wichita, since 1990. He has a general practice that includes probate, real estate, juvenile, and family law. He also does pro bono work with Kansas Legal Services, representing the victims of domestic violence in protection from abuse cases.

Ward received his bachelor’s degree from Creighton University, Omaha, Neb., in 1981 and his juris doctorate from Washburn University School of Law in 1985.

He served as an assistant district attorney in the Sedgwick County District Attorney’s Office from 1985 to 1990. Ward also served on the Kansas Judicial Council Civil Law Committee from 1992 to 1994. He is a former member of the Kansas State Senate and the Wichita City Council.

Rep. Jeffrey F. “Jeff” Whitham, R-Garden City, is serving his second term, representing the 123rd District, and has been appointed vice chair of the Judiciary Committee.

He has served as the president of Western State Bank for 25 years. In this position he handles some of the legal matters for the bank.

Whitham graduated magna cum laude from Kansas State University in 1975 and received his juris doctorate from Washburn University School of Law in 1979. He practiced three years in Garden City before joining Western State Bank.

He is a member of the Kansas Bar Association. He is a past Garden City commissioner and mayor, and board member and chair of Garden City Family YMCA and St. Catherine Hospital.

Rep. Kevin Yoder, R-Olathe, is serving his fourth term as representative for the 20th District. He has been appointed chair of the Appropriations Committee and the Legislative Budget Committee.

He is a partner with Speer & Holiday LLP, Olathe.

Yoder became a member of the Kansas Bar Association in 2002. He is a member of the Johnson County Bar Association’s board of directors, a board member of the Kansas Sentencing Commission, and a member of the Overland Park Rotary Club.


Rep. Aaron Jack, R-Andover, begins his first term in the Kansas House and represents the 99th District, which encompasses East Wichita and Andover. He began his consulting career in the financial services industry 10 years ago as a wholesaler for Jackson National Life Distributors Inc. Residing in Santa Monica, Calif., he consulted with more than 400 financial planners as a brokerage manager. After Jackson National, Jack joined New York Life, working five years as part of the Individual Annuity Department.

Currently, Jack resides in Andover and is co-authoring a book on personal finance with Derek Woods of Denver. He is a member of the Federalist Society, National Rifle Association, Kansas Bar Association, and the National Association of Insurance and Financial Advisors.

Jack received his bachelor’s degree from the University of Kansas in 1998, master’s degree from Friends University in 2007, and is a December 2009 juris doctorate candidate from Washburn University School of Law.

Please look to future Journals and eJournal for more information.
Thinking Ethics

ABA Provides New Guidance on Use of Ethics Counsel

By Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park

Just as the proverbial cobbler’s children often need new shoes, a lawyer occasionally needs legal advice, especially when confronted with volatile professional responsibility questions that have the potential to create conflicts (of both the technical and literal variety) between the lawyer and either a client or the lawyer’s firm or employer. KRPC 5.1 also imposes a duty upon lawyers in a firm to make reasonable efforts to ensure that all lawyers in the firm conform to the rules of professional responsibility. In recognition of this need and mandate, — and mindful of the courthouse wisdom that a lawyer who represents himself or herself has a fool for a client — an increasing number of firms and law departments have designated internal ethics counsel (in law firms, often designated as the firm’s general counsel) to serve as lawyer(s) for the organization to respond to professional responsibility matters. In ABA Formal Ethics Opinion 08-453 (Oct. 17, 2008) (Opinion), the ABA’s Standing Committee on Ethics and Professional Responsibility provides guidance on several aspects of this service. This column will summarize key points of the Opinion.

The Opinion specifically addresses in-house consulting on ethical issues within law firms. But most of its guidance also appears to be applicable to similar consulting that occurs within corporate or governmental law departments. Some aspects of the Opinion concern conflicts of interest between a law firm and its client, however, and these may not be applicable in particular circumstances to corporate or governmental law departments whose single-client focus may obviate conflicts.

Disclosure of client confidences. Usually, in order to obtain meaningful advice, the lawyer must disclose to ethics counsel the facts relating to a client representation that give rise to the issue. KRPC 1.6 prohibits disclosure of “information relating to representation of a client” without client consent. The Opinion notes that Comment 5 to Rule 1.6 indicates that lawyers in the same firm may share client confidences, unless instructed by the client to limit disclosure to particular lawyers. Thus, a lawyer seeking advice from ethics counsel within the firm may disclose the information about the representation necessary to obtain advice.

The Opinion also notes that current ABA Rule 1.6(B)(4) expressly permits disclosure of client confidences to an outside lawyer to obtain professional responsibility advice, but that subsection has not been adopted in Kansas. For that reason outside the scope of the Opinion, if outside counsel is needed by a Kansas practitioner or firm, the lawyer or law firm may have to pose a purely hypothetical question to outside ethics counsel, thereby not identifying the underlying client or disclosing information relating to the client representation.

Disclosure to client. According to the Opinion, normally a lawyer or firm need not disclose that it has sought internal ethics advice, although it may do so. This does not relieve the firm from any obligations to advise the client that its conduct may violate the law or ethics rules, or concerning the limits of the firm’s assistance.

Conflict of interest issues. Because a lawyer’s effort to conform to rules of professional responsibility is usually not at odds with client representation, the Opinion concludes that seeking advice on the subject does not ordinarily create a conflict of interest. On the other hand, when a lawyer seeks legal advice to protect the lawyer’s or firm’s interests, e.g., about whether completed conduct constitutes a violation of professional responsibility rules or malpractice, there is a risk that the representation of the client may be materially limited by the lawyers’ or firms’ own interests. In that circumstance, at least in the absence of informed and effective client consent, all of the firm’s lawyers are disqualified from continuing the underlying representation.

Disclosure by ethics counsel to firm management. Firm ethics counsel ordinarily represents the firm, not the individual lawyer, and thus, has all of the duties contained in KRPC 1.13 concerning representation of an organization, including the duty to disclose matters up the chain of management in certain circumstances. The Opinion recognizes that ethics counsel may represent both the lawyer and the firm (just as counsel for an organization may represent both the organization and a constituent person) in the absence of a conflict, but counsels the need for clarity in designation of the client in particular circumstances. The establishment of a client relationship depends upon the reasonable expectations of the lawyer consulting with ethics counsel. In the absence of clarity, ethics counsel may inadvertently take on representation of a consulting lawyer who has committed misconduct and find themselves in a conflict of interest with the client firm.

Reporting to disciplinary authorities. The Opinion states that ordinarily Rule 8.3 requires that violations of rules of professional conduct be reported to disciplinary authorities. KRPC 8.3 has perhaps the most stringent requirement in the nation, requiring the reporting of every violation of whatever type, in contrast to the ABA Rule 8.3 that only requires reporting of a violation that “raises a substantial question as to that lawyer’s honesty, trustworthiness, or fitness as a lawyer in other respects.” However, neither version of Rule 8.3 requires disclosure of information protected by Rule 1.6. Therefore, to the extent reporting would necessarily reveal client confidences, or the information is obtained as a client confidence in the ethics counsel-firm relationship, the Opinion states that disclosure to disciplinary authorities is not required (although it notes that a Comment to the Rule suggests that the lawyer should seek client consent to report). The Opinion notes that disclosure by ethics counsel to firm management may in some circumstances give rise to a reporting obligation by lawyers serving in firm management, although it does not address the fact that the communication from ethics counsel to firm management may itself be privileged (and within the confidences protected by Rule 1.6) as a communication between the firm (through management) and its counsel.

About the Author

Mark Hinderks serves as deputy managing partner for Stinson Morrison Hecker LLP. He practices business litigation and is a former co-general counsel at the firm’s Overland Park office.
We sometimes think our identities are our own, formed by our actions and deeds. No where is that less true than on the Internet. On the Wild, Wild Web, who we are is a complicated mix of where we go, who we speak to, and unexpected chance. The task of keeping up with who we are when we are not looking is a frustrating part of a lawyer’s busy life.

A Cautionary Tale

Facebook is an online community of 120 million users. Users open a free account, complete a profile, and start searching among other users for friends and colleagues. As you befriend others, you form your own mini network of friends. Those associations often branch out further into Facebook Groups centered more on a shared interest than the individual relationships of friend networks.

Recently, a group of current and former employees of my firm sprung up on Facebook. The administrator of the group was a former employee (possibly disgruntled given her description of the group). The group’s logo was an “official” photo lifted from our Martindale-Hubbell listing. About a dozen past and current employees joined and posted messages to the group before I discovered it by accident.

My initial reaction was irritation. How can someone take my image, my name, and even my ideas and set it up as their own without even asking? I tend to fall on the side of supporting Internet anarchy though so I tried to chuckle about it. What harm could happen?

Pretty soon, my “Stan-o-meter” tripped and I realized there were serious ethical concerns raised by the group. How could I exercise my KRPC 5.3 supervision obligations and how could I prevent disclosure of information protected by KRPC 1.6 when I do not administer the group? I might hide behind the group’s rogue status to the disciplinarian but that distinction would not matter to clients, defendants, or employees affected by purposeful or accidental mention within the group. How could I respond?

Managing Who You Are

Frankly, the options for managing your online persona are fairly limited. There are some basic steps you can take to preserve your good name, however. All of them require you to be actively engaged on the Internet flying in the face of warnings to get offline given by some lawyers and even hinted at by a few bars.

First, pay attention to who you really are online. You might assume that your Web site is the sum of your online existence — Google your name and firm to check. Try other searches like the people-specific search engine, pip1.com, as well. You may be surprised at what turns up.

If you do find something unflattering online, the second step is to contact the poster where possible. See if you can negotiate its removal or clarification. You are a lawyer; ask for what you want! In my case, a quick e-mail to the former employee established her harmless intent and the Facebook Group was deleted.

When contacting the poster fails, you may need to contact the site hosting the posts. A local lawyer upset a defendant and a nasty Web site went up blasting the lawyer personally and professionally. The defendant would not negotiate but the defendant’s employer who was unwittingly hosting the screed was much more reasonable. Legitimate users can very often get illegitimate sites removed.

Finally, the best defense is a strong offense. Get online in an active way. Publish quality content on your Web site, participate lucidly under your name in online forums, and become involved in professional associations contributing content to their sites. The effect will raise the search ratings for the persona you created above any personas you cannot control. This approach also helps to distinguish you from others who share your name so legitimate searchers can reach you.

Civilize the Wild, Wild Web

The Internet may seem full of rustlers, cutthroats, desperados, nitwits, halfwits, and dimwits enough to drag the whole enterprise down but they are the minority. Keeping those elements in line and civilized it in the process is a noble and necessary role for any lawyer. Your own good name may depend on it.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
DECEPTION AND MISREPRESENTATION IN THE PRACTICE OF LAW

By Brian J. Moline

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I. Introduction

Deception and misrepresentation as litigation tactics have always posed ethical challenges for lawyers. Sensitivity to the rights of others, particularly unrepresented persons who may become involved in litigation, is obviously an important ethical concern. On the other hand, effective advocacy of a client’s cause is another important professional and contractual obligation. A fine but very real line between zealous advocacy and prohibited conduct exists that lawyers occasionally cross in the heat of battle, consequently running afoul of the Kansas Rules of Professional Conduct (KRPC) provisions concerning deception and misrepresentation. This article will explore the interplay among Rules 4.1 and 4.4 and related rules and review case law with an eye toward comparing legal tactics with professional responsibility requirements.

II. KRPC 4.1 – Truthfulness in Statements to Others

In the course of representing a client, a lawyer shall not knowingly

(a) make a false statement of material fact or law to a third person, or
(b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client unless disclosure is prohibited or made discretionary under Rule 1.6 [confidentiality].

This rule expands the attorney’s ethical accountability for professional behavior toward clients and judges to include certain third persons. Whether a particular statement shall be regarded as coming within the purview of Rule 4.1 can depend upon the particular circumstances. While a lawyer is required to be truthful when dealing with others on a client’s behalf, there is no affirmative duty to inform an opposing party of all relevant facts. But a prohibited misrepresentation can occur if the lawyer incorporates or affirms a statement of another person that the lawyer knows is false. Moreover, misrepresentations can also occur by failure to act when circumstances warrant action.

Cases suggest the degree of ethical accountability varies according to the severity of the misrepresentation. Misrepresentation can easily degenerate into fraud and deceit, triggering multiple ethical prohibitions. Thus, an Arizona prosecutor was disbarred when he intentionally presented the false testimony of a detective in a capital murder case. His conduct was held to violate multiple ethical rules but refused to sanction him since he acted “not out of self-interest but from a sincere desire to bring a corrupt attorney to justice.”

A deeply conflicted Illinois Supreme Court delivered four separate opinions, including two dissents. In the end, the Illinois Court determined that the prosecutor had violated multiple ethical rules but refused to sanction him since he acted “not out of self-interest but from a sincere desire to bring a corrupt attorney to justice.”

The law enforcement dispensation was blessed by the U.S. Supreme Court at least in the investigative context when the court verified that deceptive tactics are occasionally necessary to gather evidence in some investigations. In Sorrells v. United States, the Court held that dissembling, even lying, is frequently necessary to reveal criminal design, illegal conspiracy, or other offenses.

Law enforcement officials often utilize undercover agents who routinely use deception to detect unlawful conduct. It has been held that the use of undercover operatives is not forbidden and does not, without more, establish entrapment as a matter of law.

When an attorney becomes involved in the deception, however, the attorney faces a potential ethical dilemma. It can, of course, be argued that a dispensation from ethical standards when the attorney is operating from “laudable motives” creates a troublesome, if not dangerous, double standard. It would be hard to imagine, for example, a civil liberties lawyer being given similar consideration because his conduct was motivated by the laudable goal of protecting First Amendment freedoms.

In the civil arena, the use of undercover operatives utilizing methods that include deception and misrepresentation has increased in recent years. When employed for socially desirable goals, such as detecting illegal discrimination in housing or prohibited employment practices, courts have often approved of techniques that might otherwise be seen as misleading or deceptive and deemed the evidence gathered admissible. The vicarious responsibility of supervising attorneys when deception and misrepresentation have been used by nonlawyer investigators has been more problematic.

When misrepresentation and deceit occur without law enforcement or social utility justification, courts are not so understanding. An Oregon lawyer representing a landowner who believed his neighbor was permitting her property to be used

However, there is precedent to support the assertion that misrepresentation, even deceit, is permissible when the ultimate goal is consistent with larger issues of social utility and the administration of justice. In an Illinois case, a police officer told the prosecuting attorney that defense counsel had offered him a bribe in exchange for false testimony. In order to expose the bribery, the prosecutor instructed the officer to testify falsely so that the bribe would be paid and the corrupt attorney brought to justice.


FOOTNOTES
1. See Kansas Supreme Court Rule 226, Cmt. to KRPC 4.1.
4. Id. at 1336.
5. 287 U.S. 436, 441 (1932). See also United States v Russell, 411 U.S. 423, 432 (1973) (asserting that infiltration of drug rings is a recognized and permissible means of identification).
as a base of operation by anti-animal cruelty activists hired a private investigator to pose as a journalist and “interview” the neighbor, hoping to elicit incriminating statements. The conduct constituted misrepresentation “through the acts of another” and warranted public censure. Similarly, an attorney who intentionally misrepresented his identity and made false statements to employees of a medical records company was reprimanded.

Kansas cases seem to follow the general trend. A Kansas lawyer unethically allowed his Interest on Lawyers’ Trust Account to be used as a conduit when money belonging to third parties was placed in the trust account. Those funds were then transferred to a corporation in which he was an officer and shareholder and eventually found their way to personal accounts in England of another shareholder and officer. The funds transferred to England ultimately disappeared, and the lawyer was suspended for two years for Rule 4.1 and other violations.

Similarly, a Kansas lawyer was indefinitely suspended for multiple violations, including Rule 4.1, when he falsely told a client he had filed an appellate brief on the client’s behalf when he had not. While suspended for failure to pay her annual registration fees, another Kansas lawyer nevertheless actively continued to practice law. Among other violations, she was found to have knowingly filed a frivolous answer and counterclaim in a suit brought against her by an apartment complex to which she owed rent. The allegations included a Rule 4.1 violation that she knowingly provided false statements of material fact to a third person when she filed the false counterclaim and signed the pleading as an attorney. She was disbarred for multiple violations.

A Kansas lawyer was recently disbarred when he knowingly and repeatedly converted attorneys fees belonging to his law firm to his own use. The Rule 4.1 violation was triggered when he falsely stated to a client in a letter that he would reimburse his law firm for the expenses advanced by the firm in the client’s cause and when he misrepresented the actual fees collected in his handwritten sheet of cases resolved and fees generated.

In a prior case, the same attorney was suspended for 18 months under the earlier Model Code of Professional Responsibility when he failed to file a client’s claim within the statute of limitations. The attorney untruthfully told the client he had received a settlement offer and advised the client to accept it. In truth, the attorney simply paid the client out of his law firm’s funds.

Rule 4.1 was violated when a lawyer falsely told a client’s medical providers that her settlement was inadequate to cover all her expenses and asked for discounts on her medical bills, which he simply kept. Also, a lawyer was disciplined when he served a purported “Notice by County Surveyor to Landowners” on the opposing party when no county surveyor had been consulted and no action had been filed.

The requirement that the misrepresentation be made in the course of representing a client was highlighted in the Kansas case of In re Albin. The attorney sent a letter marked as “Legal Mail” to an inmate in a correctional facility, hoping to avoid interception or monitoring. Contraband in the form of stamps or stamped envelopes was found enclosed in the correspondence. The disciplinary hearing panel found the letter, which was of a personal nature, could in no way be characterized as involving legal issues or representation and concluded that the attorney’s conduct violated Rules 4.1 and 8.4(c).

However, the Kansas Supreme Court refused to adopt the hearing panel’s finding as to Rule 4.1 since the rule requires the prohibited conduct to occur in the course of representation of a client and no attorney-client relationship existed at the time the letter was written. However, the Court upheld the Rule 8.4(c) violation, and the attorney was publicly censured.

### III. KRCP 4.4 – Respect for Rights of Third Persons

In representing a client, a lawyer shall not use means that have no substantial purpose other than to embarrass, delay or burden a third person, or use methods of obtaining evidence that violate the legal rights of such a person.

A North Dakota attorney was publicly reprimanded under Rule 4.4 when he wrote a letter threatening a defamation suit against a third party who had filed a vicious dog complaint against the attorney’s client/daughter. The letter, which accused the complainant of being an “animal hater” and ignorant of animals and suggested the complainant had “snuck up” on his client, served no valid purpose other than to harass or intimidate the complainant.

Similarly, a Kansas lawyer who wrote a letter to opposing counsel threatening to file a disciplinary complaint if a case were not settled within 20 days was publicly censured for a Rule 4.4 violation. The letter accused opposing counsel of representing an insurance company’s interests over those of the defendant insured, ignoring the defendant’s admissions and filing frivolous pleadings. In finding a Rule 4.4 violation, he had depleted the workers’ compensation second injury fund when he had not; In re Wisler, 254 Kan. 300 (1999) (lawyer told client he had collected only $400 on client’s judgment, when he collected $1,840.87); In re Albin, 267 Kan. 451, 982 P.2d 385 (1999).

the Kansas Supreme Court stated:

> [the attorney] later admitted this letter was unprofessional and should never have been sent. This admission is tantamount to acknowledging that the letter was used as a tool to gain a better bargaining advantage in the lawsuit. In our view, there was clear and convincing evidence that [the lawyer] sent a letter that had "no substantial purpose other than to embarrass, delay or burden ...".

Another Kansas lawyer was indefinitely suspended for several violations that emanated from inappropriate behavior in court. The attorney represented the mother in a contested custody proceeding. The father of the children arrived dressed in military uniform. During the hearing, the attorney made a comment that caused the father to "roll his eyes." The attorney reacted angrily and told the father he was a disgrace to the uniform of the Kansas Army National Guard. Moreover, the attorney continued, had he worn his uniform with an eagle on the shoulder, he could put the father at attention so he could not speak.

The hearing panel and the Kansas Supreme Court found that the lawyer's outburst served only to agitate and embarrass the father and delay and burden the hearing.

Occasionally an attorney takes a course of action while representing a client that will be seen as having a dual outcome — one legitimate and another illegitimate. This was the situation in the Kansas case of In re Royer. The attorney represented clients who came to own some real estate that had been damaged by a storm and the demolition of an adjacent building. The attorney arranged for a transfer of the property's title to a destitute third person. For Rule 4.4 purposes, it was necessary to determine if the lawyer's action had a substantial purpose “other than to embarrass, delay, or burden a third person.”

The lawyer conceded that his action burdened three persons but argued that he took the course of action at the request of his client, and he could not ignore the benefit that would accrue to his client. The hearing panel found that the transfer of the property had no substantial purpose other than to burden the transferee and the city of Abilene. The transferee was burdened by owning property on which back taxes were owed and had a negative value. The city was burdened with the legal expense of attempting to set aside the transaction.

Both the hearing panel and the Supreme Court found a Rule 4.4 violation even though the lawyer's action encompassed both a legitimate and an illegitimate purpose.

Responsibility to a client requires a lawyer to subordinate the interests of others to those of the client, but that responsibility does not imply that the lawyer may disregard the rights of third persons. It is impractical to catalogue all such rights, but they include legal restrictions on methods of obtaining evidence from third persons.

A Rule 4.4 violation was also found in the case of a Kansas attorney even though he was not representing a client's interests but his own while under investigation for multiple KRCP violations, including inappropriate sexual exploitation of three female clients. Among other ethical breaches, the attorney violated Rule 4.4 when he falsely told two schoolteachers that he was a social worker and that he was working on a child custody case. Both statements were untrue at the time they were made. The hearing panel and the Supreme Court found that the sole purpose was to intimidate one of the female clients and frighten her into not cooperating with the disciplinary investigation. The attorney was disbarred for Rule 4.4 and other violations.

A particularly compelling example of rules 4.1 and 4.4 violations resulted in the disbarment of a Kansas lawyer for conduct that occurred in his first four months of practice. In the course of a contested adoption proceeding, the lawyer filed numerous frivolous pleadings, requests for nonexistent transcripts, and serious but entirely groundless allegations of misconduct against opposing counsel, members of the judiciary, district court employees, and Kansas Court of Appeals staff.

In its opinion in the adoption case, the Kansas Court of Appeals "felt compelled” to comment on the lawyer’s behavior. "We are inclined to admonish that vigorous advocacy does not require or tolerate such conduct.” All three judges on the Court of Appeals panel signed a disciplinary complaint against the lawyer. At his disciplinary hearing, the lawyer made additional allegations against lawyers and judges.

In a case decided under the Model Code, a Kansas lawyer was censured for "undignified and discourteous conduct, which is degrading to a tribunal.” The improper conduct complained of included abusive language toward opposing counsel. The Kansas Supreme Court made clear that

A Kansas attorney was suspended for one year for violations of several rules, including 4.1; 4.4; 8.4(a), (c), and (g); and Supreme Court Rule 207. The complaint arose out of a meeting in the lawyer's office regarding the complainant's intent to name the attorney's best friend as the father of her child. During the discussion, the lawyer took a handgun out of his desk drawer and used it to demonstrate a point he was trying to make. Although he did not point the weapon at the

19. In re Pyle, 278 Kan. 230, 241, 91 P.3d 1222, 1231 (2004). Pyle was subsequently suspended for a KRCP 8.4(d) violation for conduct emanating from this incident discussed later in this article.
21. Id. at 826.
23. Id. at 454.
26. Id.
27. Id. at 623.
29. Id. at 577-78.
complainant or threaten her with it, the lawyer later lied about the incident.30
A Kansas lawyer was recently suspended for several KRPC violations, including 4.1, 4.2, and 4.4 transgressions.31
The lawyer was licensed to practice in Kansas and Illinois and at some point moved to Minnesota where she was never licensed. This case arose when she was convicted by a jury of six misdemeanor counts of unauthorized practice of law. Based upon the Minnesota record, the Illinois Supreme Court suspended her license to practice for one month, and reciprocal discipline proceedings were instituted in Kansas.

The lawyer apparently held herself out as an attorney specializing in mold cases. She claimed to represent several Minnesota homeowners who purported to have been damaged by construction companies providing defective products. She then engaged in a pattern of unprofessional and abusive behavior toward officials of the construction companies by telephone, facsimile message, and correspondence containing false information, inflammatory allegations, and peremptory demands for money.

The campaign was extended to include “bizarre letters,” purportedly from the clients themselves, but suspiciously similar in tone, format, and style to the attorney’s own missives. Despite repeated demands from counsel not to contact the companies directly, the lawyer and her clients continued to contact and harass company executives and board members.

The Kansas disciplinary administrator and the hearing panel recommended indefinite suspension, and the Supreme Court agreed after expressing surprise at the one-month suspension issued by the Illinois Supreme Court.35

Where KRPC 4.4 is concerned, legitimate ends do not validate inappropriate means. A Kansas lawyer34 was publicly censured for conduct arising out of a Kansas Open Records (KORA) request directed to his client, a private economic development corporation funded in part by public funds. In vigorously opposing the KORA request, the lawyer accused opposing counsel of unprofessional and reckless behavior and conflict of interest. The lawyer caused the dispute and his allegations to be disseminated in the community where it inevitably came to the attention of opposing counsel’s colleagues and clients.36

The lawyer defended his actions by claiming he and his client had a legitimate objective in that they desired the withdrawal of what they considered a meritless and extra-legal “fishing expedition” into a private entity’s records. The disciplinary hearing panel and the Supreme Court found that, while the lawyer and his client may have had legitimate objectives, the means they employed served no substantial purpose other than to embarrass opposing counsel in violation of KRPC 4.4.

“The client made me do it” is not a valid defense. There are times when an attorney’s only ethical duty is to tell a client ‘no,’ or perhaps ‘your legal objective is valid but I am ethically bound to pursue it through different means.35

IV. Other Relevant KRPC Provisions

Much of the conduct described in this article triggered other possible KRPC violations.

A. KRPC 4.2 – Communication with person represented by counsel

In representing a client, a lawyer shall not communicate about the subject matter of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law.

In the case of In re Pyle, supra, the attorney’s conduct also violated Rule 4.2. The attorney provided an affidavit for his client to ask the opposing party to sign. The affidavit stated that the opposing party was liable for the client’s injury sustained at the opposing party’s home and directing her insurer to admit liability. When the insurer denied liability, the attorney prepared a second affidavit for the opposing party, stating that the behavior of the attorney retained by the insurer to represent her “disgusted her.” The Kansas Supreme Court quoted an American Bar Association Formal Opinion in finding the Rule 4.2 violation:

A lawyer may not direct an investigatory agent to communicate with a represented person in circumstances where the lawyer herself would be prohibited from doing so. Whether in a civil or criminal matter, if the investigator acts as the lawyer’s ‘alter ego,’ the lawyer is ethically responsible for the investigator’s conduct.36

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32. Id.
33. Id.
35. Id.
36. Supra, n. 26 at 1228 (citing In re Marietta, 223 Kan. 11, 569 P.2d 921 (1977), and American Bar Association Formal Opinion 95-396).
A Tennessee lawyer was disbarred for 10 years for accompanying his investigator, while representing the husband in a divorce, to spy on the wife in her home, entrap her into committing adultery, photograph her over her objection, and then talk to her outside the presence of her counsel about the case and her alleged misconduct. \(^{37}\)

While it has been long established that the exclusionary rule mandates suppression of evidence gathered in contravention of a criminal defendant's constitutional rights, \(^{38}\) the applicability of the exclusionary rule to nonconstitutional transgressions, such as breach of ethical mandates, is murky. Some circuits have expressly included suppression among the remedies available for breach of ethical duty. \(^{39}\) Others have refused to suppress such evidence. \(^{40}\)

B. KRPC 4.3 – Dealing with unrepresented persons

In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer’s role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

In the Kansas case of Royer, supra, the attorney’s Rule 4.4 violation triggered allegations of a Rule 4.3 violation. The destitute individual to whom the damaged property was transferred “was an alcoholic, frequently intoxicated, frequently homeless, did not have a bank account, and, during the majority of his adult life, unemployed.” \(^{41}\)

The attorney, who had known the individual for many years, drove to his temporary residence and told the man he “had a deal for him” and that he wanted to give him the damaged building. However, neither the hearing panel nor the court found a Rule 4.3 violation under these facts. \(^{42}\)

C. KRPC 5.3 – Responsibility for nonlawyer assistants

With respect to a nonlawyer employed or retained by or associated with a lawyer ...

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer ...

The defining Kansas case involving nonlawyer assistants is Zimmerman v. Mahaska Bottling Co. \(^{43}\) The Kansas Supreme Court held that when a legal secretary, who acquired material and confidential information while working for plaintiff’s lawyers, later went to work for defendant’s lawyers, the defendant’s law firm was disqualified from continuing to represent defendant.

The disqualification was ordered despite the fact that the secretary might not have been aware of the importance of the facts learned, the file was not kept in the office in which the secretary worked, and the secretary was not assigned to the partner working on the case. The Court held that the policy of protecting the lawyer-client privilege must be preserved through imputed disqualification when a nonlawyer employee in possession of privileged information accepts employment with a law firm that represents a client with materially adverse interests.

However, the Court made clear: Our holding today does not mean that disqualification is mandatory whenever a nonlawyer moves from one private firm to another where the firms are involved in pending litigation and represent adverse parties. A firm may avoid disqualification if (a) the nonlawyer employee has not acquired material and confidential information regarding the litigation or (2) if the client of the former firm waives disqualification and approves the use of a screening device or Chinese Wall. \(^{44}\)

(Continued on next page)
In the KRPC context, a Kansas attorney’s suspension was stayed for two years while she was allowed to practice under supervision for multiple violations of competence, diligence, client communication, and billing practices rules. The attorney’s attempts to shift responsibility for mishandling out of state service and other problems to “staff shortcomings” were firmly rejected.\footnote{In re Kellogg, 269 Kan. 143, 4 P.3d 594 (2000).}

In a subsequent proceeding two years later, the same attorney was indefinitely suspended for violations of Rule 1.5 (fees) and other violations. The allegations included a Rule 5.3 violation for misuse of nonlawyer assistants. The Court found that the attorney directed her nonlawyer assistant to add false and fraudulent charges to clients’ bills for work that was not performed and for research for an article the lawyer was writing.\footnote{In re Kellogg, 274 Kan. 281, 50 P.3d 57 (2002).}

The hazards involved in the employment of a disbarred or suspended attorney without close supervision were highlighted in In re Juhnke.\footnote{273 Kan. 162, 41 P.3d 855 (2002).} The attorney hired a disbarred lawyer as a legal assistant. Initially the assistant assisted the attorney with appellate brief writing. Over time his “responsibilities expanded to whatever was placed on his desk.” With the attorney’s full knowledge, the assistant’s duties gradually expanded to writing contracts, maintaining client files, meeting clients personally and telephonically, writing letters, preparing pleadings, and providing legal advice. Neither the assistant nor the attorney held the assistant out as an attorney, but the assistant later testified he had from 175 to 300 client conferences per year and from three to 20 telephone calls a day.

In discussing what constitutes the practice of law, the Kansas Supreme Court set forth what suspended and disbarred attorneys may and may not do. The opinion highlights language from Matter of Wilkinson.\footnote{Id. at 166 (quoting In re Wilkinson, 251 Kan. 546, 553-54, 834 P.2d 1356, (1992)).}

Any contact with a client is prohibited. Although not an inclusive list, the following restrictions apply: A suspended or disbarred lawyer may not be present during conferences with clients, talk to clients either directly or on the telephone, sign correspondence to them, or contact them either directly or indirectly.

The attorney was aware that the assistant was actively engaged in activity that constitutes the practice of law and consequently violated KRPC 5.5(b).

Another Kansas lawyer was disbarred as a result of numerous complaints arising out of his relationship with a disbarred lawyer.\footnote{In re Anderson, 278 Kan. 512, 101 P.3d 1207 (2004).} The attorney entered an agreement in which the disbarred lawyer would meet with clients and prepare pleadings while the attorney would sign the pleadings and appear in court. Many of the numerous complaints involved failure to complete the work and failure to maintain adequate communication with clients.

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D. KRPC 8.4 – Misconduct

All of the Kansas cases cited in this article also included allegations of violation of KRPC 8.4, primarily 8.4 (c), (d), and (g).

It is professional misconduct for a lawyer to …

(c) engage in conduct involving dishonesty, fraud, deceit, or misrepresentation;

(d) engage in conduct that is prejudicial to the administration of justice; and

(g) engage in any other conduct that adversely reflects on the lawyer’s fitness to practice law.

Several cases also involve violation of Supreme Court Rule 202, which provides that it is the duty of all lawyers to conduct themselves at all times, both professionally and personally, in conformity with the standards imposed for the privilege of practicing law.

Although Rule 4.1 only applies when a lawyer is representing a client, Rule 8.4(c) is much broader and defines professional misconduct as “engaging in any conduct involving dishonesty, fraud, deceit, or misrepresentation.” Thus, the attorney involved in In re Albin was reprimanded under Rule 8.4(c) for sending contraband to a prison inmate rather than Rule 4.1 since the misconduct did not occur in the course of representing a client and no attorney-client relationship existed at the time of the misconduct.\footnote{In re Albin, 275 Kan. 543, 66 P.3d 884 (2003).}

Similarly, the Kansas Supreme Court found that the disciplinary administrator failed to make a convincing case for a Rule 4.1 violation when an attorney falsely informed a bankruptcy judge that several clients owed him money for services due. However, the attorney was suspended for one year for violation of Rule 8.4(c) and (d).\footnote{In re Farmer, 278 Kan. 281, 50 P.3d 57 (2002).}

There is obviously a good deal of overlap between the rules, and the same conduct can give rise to multiple violations. The Kansas case of In re Farmer\footnote{267 Kan. 451, 982 P.2d 385 (Kan. 1999).} is an example. The attorney was indefinitely suspended for multiple violations resulting from his bankruptcy practice. Three of his former employees complained to the disciplinary administrator that the lawyer provided little or no training, supervision, or guidance for his lawyer and nonlawyer employees that he allowed nonattorneys to give legal advice and that he would not return phone calls. The attorney admitted violations of numerous KRPC provisions, including Rule 5.3(a) and (b) and Rule 8.4 (d), and was indefinitely suspended.

In a reprise of his earlier ethical difficulties, a Kansas attorney ran afoul of KRPC 8.4(d) when he angrily reacted to his public censure in an earlier case.\footnote{In re Pyle, 283 Kan. 807, 156 P.3d 1231 (2007).} Several newspapers ran articles discussing his predicament, and he responded by sending a lengthy letter to more than 281 friends, clients, and family members. While the attorney indicated he merely wanted his correspondents to know “the rest of the story,” the disciplinary administrator took a different view and accused him of violating KRPC 7.1 (false or misleading communication about
a lawyer or a lawyer’s services), 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation), 8.4(d) (misconduct prejudicial to administration of justice), and 8.4(g) (conduct reflecting adversely on fitness to practice law).

The Court analogized this case to two prior disciplinary cases in that the facts require “us to navigate the tension between First Amendment freedom of speech enjoyed by all citizens and the limits that can be placed on the exercise of that freedom because a particular citizen chose to become a Kansas lawyer.”

Under these circumstances, although this is a close case, we strike the critical balance between First Amendment and disciplinary imperatives in respondent’s favor, concluding there was insufficient clear and convincing evidence that he knew or should have known his letter was making false statements of fact about [board members’ qualifications and integrity.

The Court concluded that there was not clear and convincing evidence that the attorney violated Rule 8.4(c). However, the Court found the same behavior qualified as conduct prejudicial to the administration of justice under Rule 8.4(d). A majority of the Court believed a three-month suspension was appropriate. The majority acknowledged the minority view that a less severe sanction was appropriate but rejected lesser sanction because the attorney had trivialized the process and sanctions imposed on him in the prior proceeding.

“Respondent’s inappropriate behavior and statements in response to Pyle I leave us no avenue other than harsher discipline to get his attention and motivate improved attitude and conduct.”

V. Effect of Recent KRPC Amendments

For the first time since 1988, the Kansas Rules of Professional Conduct were substantially revised, effective July 1, 2007. There are several changes to rules referenced in this article, although no disciplinary cases based on misconduct under the amended rules have yet found their way to final disposition in a reported Kansas Supreme Court decision.

A. KRPC 4.2 – Communications with persons represented by counsel

This rule has been modified in an attempt to clarify the confusion in wording between the title, which refers to “persons” and the text that referred to “parties.” The revised version clarifies that the broader meaning was intended and that the constraint applies to any nonparties and witnesses who the lawyer knows are represented by counsel in the matter at hand. Communication with the represented person can occur only with the consent of the person’s lawyer or where the communication is otherwise authorized by law or court order.

Investigative parameters are also clarified somewhat. Contact with lower level or former employees of an organization is now expressly permitted unless the attorney knows the person is represented “in the matter to be discussed.” The Comment makes clear that investigation of represented persons (a) performed directly or through investigative agents (b) by lawyers representing government agencies (c) prior to the commencement of criminal or civil enforcement proceedings is permitted.

The Comment states that the restriction on contact with represented persons requires actual knowledge but explains that actual knowledge can be inferred from the circumstances:

The lawyer cannot evade the requirements of obtaining consent of counsel by closing eyes to the obvious.

B. KRPC 4.4 – Respect for the rights of third persons

There is also a significant change to Rule 4.4. Paragraph (a) is unchanged but paragraph (b) is new.

A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.

Interestingly, new Rule 4.4(b) imposes no requirement on the innocent recipient to return the inadvertent communication unread nor any limit on how the recipient may utilize the information. The Comment makes clear that the decision on how or whether to utilize the inadvertently sent information is solely within the lawyer’s sound discretion and good judgment.

For purposes of the rules, “document” includes e-mail or other electronic modes of transmission.

Obviously, there are a number of ambiguities apparent in the new rule. For example, does the duty of communication (KRPC 1.4) require disclosure of the inadvertent communication to the client? What about potential conflict between other duties to the client (KRPC 1.1, 1.2, 1.3, and 1.7) versus fairness to opposing counsel (KRPC 3.4) and third persons (KRPC 4.4(a))? And the Comment observes that the potential evidentiary problem inherent in inadvertent disclosure of otherwise privileged and confidential information is “beyond the scope of these Rules.” Presumably time, trial and error will resolve these questions.

VI. Conclusion

The Kansas Rules of Professional Conduct attempt to create a series of thresholds to protect third persons and unrepresented parties from deception and misrepresentation when law-

56. Pyle at 821.
57. Id. at 824-25.
58. Id. at 832.
59. See Cmt. 5 to KRPC 4.2.
60. Id. at cmt. 8.
61. KRPC 4.4(b).
62. Id., cmt. 2.
63. Id.
64. Id.
yers gather information and evidence. Cases suggest the line between creative lawyering and unacceptable conduct is hazy.

Courts may tolerate conduct that is clearly deceptive conducted by undercover operatives when the goal is to detect unlawful activity or when it is the only practicable technique for law enforcement. But, when the lawyer is personally involved in misrepresentation or deceit or the investigator functions as the lawyer’s alter ego, courts generally hold that lawyers cannot do through others what they are ethically forbidden to do themselves. The question of the admissibility of evidence obtained through breach of professional responsibility rules prohibiting misrepresentation and deception — as opposed to constitutional transgression — remains unclear with federal circuits divided on the issue.

About the Author

Brian J. Moline contributed a great deal to The Journal of the Kansas Bar Association. He served on its Board of Editors for many years. In this capacity he brought articles written by other authors that he felt were worthy of publication to the attention of the Board. He also spent many hours assisting authors as an editor in preparing their articles for publication.

His historical and ethics articles are well known to Journal readers, as more than 10 of his articles have been published.

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I. Statutory Background

Attorneys practicing in Kansas may run into a situation where an injured person is a Kansas Medicaid recipient. What should be done first? Well, let’s go back to basics. Let’s start with the statute.

39-719a. Recovery of medical assistance paid; obligation of third party; payment by secretary secondary costs paid proportionately by parties as determined by court:

(a) Where medical assistance has been paid by the secretary and a third party has a legal obligation to pay such medical expenses to or on behalf of the recipient, the secretary may recover the same from the recipient or from the third party and shall be in all respects subrogated to the rights of the recipient in such cases except as provided under K.S.A. 39-786 and 39-787, and amendments thereto, or under section 303 and amendments thereto of the federal [M]edicare [C]atastrophic [C]overage [A]ct of 1988, whichever is applicable. Payment of medical assistance by the secretary shall be secondary to any other insurance coverage or third party with a legal obligation to pay such medical expenses to or on behalf of the recipient.

(b) Pursuant to this section unless otherwise agreed, the court shall fix attorney fees, which shall be paid proportionately by the secretary and the injured person, such person's dependents or personal representatives, in the amounts determined by the court. Attorney fees to be paid by the secretary shall be fixed by the court in an amount not to exceed [one-third] of the medical assistance recovered pursuant to subsection (a) for cases settled prior to trial, or in an amount not to exceed [two-fifths] of the medical assistance recovered pursuant to subsection (a) in cases when a trial is convened.

(c) In the event of a recovery pursuant to K.S.A. 60-258a, and amendments thereto, the secretary's right of subrogation shall be reduced by the percentage of negligence attributable to the injured person.

II. Appellate Cases in Kansas

A. Has the statute been interpreted by a Kansas court?

The only appellate case in Kansas is Copeland v. Toyota,1 which states quite clearly that Kansas Medicaid takes priority in any settlement because it is based on public funds. This portion of Copeland sets out the priority for Kansas Medicaid:

After reviewing the statutory scheme and specific language of § 39-719a, we conclude that Social and Rehabilitation Services’ (SRS) subrogation right is not subject to the equitable principles urged by Copeland. As in other cases in which courts have concluded equitable subrogation principles have been statutorily abrogated, the Kansas statute’s explicit provisions limiting SRS’ recovery in certain circumstances and the statute’s language emphasizing full reimbursement for medical assistance payments made by SRS are indications that the [L]egislature did not intend to reduce or eliminate SRS’ recovery when the injured party has not been fully compensated by the injured party’s settlement with the tortfeasor.2 The statute’s provisions and specific language instead indicate that the Kansas Legislature has ‘weighed medical recipients’ need to be compensated for their injuries against the need for conservation of public funds,’ and has determined that, in general, ‘the public funds have priority.’ We accordingly reject Copeland’s arguments that the district court erred in refusing to eliminate SRS’ recovery based on the ‘made whole’ rule.

III. Arkansas v. Ahlborn

Some attorneys have inquired about the U.S. Supreme Court case of Arkansas v. Ahlborn,3 but Ahlborn has not overruled Copeland for many reasons:

FOOTNOTES
2. Cf. Weller, 682 A.2d 643-44 (holding government was entitled to full reimbursement for Medicaid expenses although lawsuit was settled for less than alleged total damages, and noting court was precluded from adopting some equitable principle of proportionate compromise because the statute provided a distribution scheme and contained two express exceptions to full reimbursement: the government was required to contribute to the Medicaid recipient's litigation costs, and the government was allowed to waive its reimbursement claim in certain circumstances); Coplien v. Dep't of Health & Soc. Servs., 349 N.W.2d 92, 93-95 (Wis. Ct. App. 1984) (holding statute providing state with subrogation right for medical assistance payments abrogated equitable principles because statute prioritized distribution of proceeds, and rejecting recipient's argument that because she was not made whole by her settlement, the state could only recover a pro rata share of the settlement proceeds); Waukesha County v. Johnson, 320 N.W.2d 1, 3-4 (Wis. Ct. App. 1982) (holding statute providing county with subrogation right rendered traditional equitable principles, including "made whole" rule, inapplicable because statute specifically set forth the rights of the county and medical assistance recipient to maintain actions and recover from a third-party tortfeasor) at http://ca10.washburnlaw.edu/cases/1998/02/96-3181.htm.
the [L]egislature did not intend to reduce or eliminate SRS’ recovery when the injured party has not been fully compensated by the injured party’s settlement with the tortfeasor.\textsuperscript{35} The statute’s provisions and specific language instead indicate that the Kansas Legislature has ‘weighed medical recipients’ need to be compensated for their injuries against the need for conservation of public funds,’ and has determined that, in general, ‘the public funds have priority.’ We accordingly reject Copeland’s arguments that the district court erred in refusing to eliminate SRS’ recovery based on the ‘made whole’ rule.

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a. Ahlborn deals with Arkansas statutes not Kansas statutes, which are controlling here.

b. State law controls insofar as tort law is concerned.

c. Arkansas Medicaid was a PARTY to the litigation in Ahlborn. That agency entered into a stipulation (ill-advised, from our standpoint), which led to them losing their case. In a typical case here in Kansas, the Kansas Health Policy Authority (KHPA) has not intervened or entered into any stipulations.

d. Our statute is K.S.A 39-719a, which is a statutory claim, not a lien. Thus our statute cannot “run afoul” of any so-called anti-lien statute.

e. Ahlborn can have only limited impact in Kansas as Copeland is still valid in terms of Kansas Medicaid having a priority in any settlement. IF any Kansas Medicaid claims are reduced by Ahlborn, it would have to be done on a case-by-case basis, looking into factors such as how a jury award is characterized and whether or not an insurance payment is “earmarked” in any way, such as how a jury award is characterized and whether or not an insurance payment is “earmarked” in any way, such as designating a portion as medical damages.

f. We would also look to the plaintiff’s petition (what medical damages are sought?) and would examine the impact of Bates v. Hogg,\textsuperscript{4} which basically defines medical damages as the AMOUNT PAID by Kansas Medicaid.

g. Ahlborn actually REINFORCES the priority given to Medicaid in settlements where it is stated (quoting from the Ahlborn syllabus):

Arkansas Department of Human Services (ADHS) cannot claim more than the portion of Ahlborn’s settlement that represents medical expenses is suggested by § 1396k(a)(1)(A), which requires that Medicaid recipients, as a condition of eligibility, ‘assign the [s]tate any rights ... to payment for medical care from any third party’ (emphasis added), not their rights to payment for, e.g., lost wages. The other statutory language ADHS relies on is not to the contrary, but reinforces the assignment provision’s implicit limitation. First, statutory context shows that § 1396a(a)(25)(B)’s requirement that [s]tates ‘seek reimbursement for [medical] assistance to the extent of such legal liability’ refers to ‘the legal liability of third parties ... to pay for care and services available under the plan,’ § 1396a(a)(25)(A) (Emphasis added). Here, because the tortfeasors accepted liability for only one-sixth of Ahlborn’s overall damages, and ADHS has stipulated that only $35,581.47 of that sum represents compensation for medical expenses, the relevant ‘liability’ extends no further than that amount. Second, § 1396a(a)(25)(H)’s requirement that the state enact laws giving it the right to recover from liable third parties ‘to the extent [it made] payment ... for medical assistance for health care items or services.’ (Emphasis added.) Finally, § 1396k(b)’s requirement that, where the [s]tate actively pursues recovery from the third party, Medicaid be reimbursed fully from ‘any amount collected by the [s]tate under an assignment’ before ‘the remainder of such amount collected’ is remitted to the recipient does not show that the [s]tate must be assigned ‘the rights of [the recipient] to payment by any other party for such health care items or services.’ (Emphasis added.)

h. The Kansas Trial Lawyers Association (now the ‘Kansas Association for Justice’) held a CLE seminar in Topeka on May 10, 2007, titled ‘Lien On Me.’ The noted speaker was David Bryant of Chicago. Bryant made a point of telling the attorneys in attendance that ‘Copeland v. Toyota is a landmark case in Kansas. It is still good law.’

IV. Mediations

Mediations have become quite common as a method of resolving Kansas Medicaid subrogation claims. Several attorneys in Kansas have served as mediators, doing dozens of mediations over the past year or so. A separate mediation can easily be set up with the sole issue being: “How much is to be paid to Kansas Medicaid?” Issues at these mediations often include comparative fault and which medical bills paid by Medicaid are directly linked to a given injury or lawsuit. These mediations may be done quickly, and most often they are done by telephone. As an added benefit, after a mediation, attorneys reaching an agreed settlement can part company as friends.
KHPA and EDS use a form titled Standard Injury Questionnaire (SIQ), which is sent to the injured person for completion. Sometimes attorneys can assist the injured person or his family to complete the SIQ, but we do not require attorneys to complete or submit this form to KHPA Legal.

When someone makes an initial contact to KHPA Legal inquiring about a claim, it is helpful to give KHPA (Jennifer Meyer) most or at least some of the following information:
1. Name of injured Medicaid recipient;
2. Their Medicaid ID number or case number;
3. Date of accident/incident;
4. Type of injuries;
5. SSN (if available);
6. Date of birth (if available);
7. Attorney name, address, phone number, and fax number; and
8. Insurance company name, address, phone number, and fax number.

You may want to consider discussing a high dollar case in person with the KHPA attorney. Many times this is good strategy for all attorneys and parties involved. You may also want to know that if a Medicaid subrogation claim is going to be reduced, it helps to offer to provide the KHPA attorney with ample documentation for his file. This is because files of this nature are subject to both federal and state audit. “Ample documentation” should include “full settlement details” as well as copies of pertinent medical records, discovery, and correspondence from your file.

VI. Here is Some Additional Food for Thought

“Ahlborn is a decision capable of creating more confusion and pitfalls than any case in recent history.” So, let’s all remember that Ahlborn is a “medical damages” case that may or may not help a plaintiff’s attorney “defeat” the claim of KHPA. Each case must be handled on its own merits. And if you are a Kansas taxpayer, why try to defeat yourself and your fellow taxpayers? Think about it.

About the Author

Robert R. “Bob” Hiller Jr., Kansas Health Policy Authority, Topeka, is from the Chicago area where he received his Bachelor of Arts in political Science at Northwestern University in 1969. He then received his juris doctorate from the University of Kansas School of Law in 1972. He has practiced with Kansas Legal Services; the Legal Aid and Defender Society of Kansas City, Missouri; Social and Rehabilitation Services, Wichita and Topeka; and the Federal Deposit Insurance Corp. Hiller is the chairperson of the Kansas Bar Association Membership Committee.

ATTORNEY DISCIPLINE

IN RE ANDREW E. BUSCH
ORIGINAL PROCEEDING IN DISCIPLINE
SIX-MONTH DEFINITE SUSPENSION
NO. 100,217 – OCTOBER 17, 2008

FACTS: Respondent, a Kansas attorney now residing in Arkansas, was convicted in federal court of willfully failing to file and pay income taxes. At the time, he owed past due federal taxes, penalties, and interest in the amount of $1,073,503 and past due state taxes, penalties, and interest in the amount of $52,729 based on his failure to file returns for eight years. In August 2005, he was sentenced to three years of probation.

After finding clear and convincing evidence of a KRPC 8.4(b) (criminal misconduct) violation, the disciplinary hearing panel found five aggravating factors and six mitigating factors. The panel considered the disciplinary administrator’s recommended discipline of a six-month definite suspension and the respondent’s request for published censure and unanimously recommended published censure.

HELD: No exceptions were filed, so the Court considered the findings of fact and conclusion of the rule violation as contained in the final hearing report. The Court reviewed several recent cases involving tax evasion and noted the presence of an additional aggravating factor: actual harm to the legal profession. A majority of the Court concluded that suspension from the practice of law for a period of six months is an appropriate sanction, while a minority would impose an even greater sanction.

IN RE RICHARD E. JONES
ORIGINAL PROCEEDING IN DISCIPLINE
TWO-YEAR SUPERVISED PROBATION
NO. 100,491 – OCTOBER 17, 2008

FACTS: Respondent, a private practitioner from Topeka, faced a hearing on five separate complaints. One complaint was based on respondent’s failure to respond to orders of the 10th U.S. Circuit Court of Appeals, resulting in his indefinite suspension in that court; one was based on lack of diligence in a paternity matter; one arose out of a criminal defense matter; and one was an automobile negligence suit in which respondent failed to have the defendant served in a timely manner.

Respondent stipulated to the facts and violations alleged in the formal complaint, and the hearing panel found clear and convincing evidence of violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), and 3.4(c) (fairness to opposing party) and SCR 207 (cooperation with disciplinary administrator). The panel found that three aggravating factors and seven mitigating factors were present and recommended that a six-month suspension be stayed while respondent follows a two-year plan of conditional supervised probation.

HELD: No exceptions were filed, so the Court reviewed SCR 211(g) (requirements of probation). A majority of the court accepted the panel’s recommendation and ordered six-month suspension stayed for two years while respondent practices pursuant to the terms and conditions of his probation plan. A minority of the Court would impose a more severe discipline.

The only issue before the hearing panel was the appropriate level of discipline to be imposed. The panel found five aggravating factors and two mitigating factors. The disciplinary administrator’s office recommended a six-month definite suspension while respondent requested published censure. The panel unanimously recommended a 30-day definite suspension.
FACTS: Respondent, a private practitioner from Olathe, faced a disciplinary hearing on seven complaints. Most of the complaints were based on abandonment of the client during representation. Respondent stipulated to the facts and rules violations alleged, and the hearing panel found clear and convincing evidence of violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.16 (terminating representation), 3.2 (expediting litigation), 3.4 (fairness to opposing party), and 8.4(d) (conduct prejudicial to the administration of justice) and SCRs 207 (failure to cooperate with the disciplinary administrator) and 211 (failure to answer the formal complaint).

The hearing panel found that three aggravating factors and seven mitigating factors were present and considered the disciplinary administrator's requested sanction of indefinite suspension and the respondent's request for probation. The panel recommended six months of definite suspension followed by a reinstatement hearing to determine respondent's fitness to resume the practice of law under a probation plan.

HELD: Respondent filed no exceptions to the final hearing report, so the Court adopted the panel's findings of fact and conclusions of rules violations. The Court further agreed with the panel's recommended discipline and ordered definite suspension of six months.

—CIVIL—

ESTATES AND SETTLEMENT AGREEMENTS
RECTOR V. TATHAM ET AL.
DOUGLAS DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 97,725 – NOVEMBER 21, 2008

FACTS: Rector entered a handwritten agreement with her brother and sisters regarding their mother's care and assets wherein Rector agreed to purchase her mother's house, personal property would be sold, and any funds remaining in the conservatorship would be payable on death to Rector. The mother died with approximately $50,000 left, and it was distributed unevenly among the siblings per the mother's will. Rector sued her siblings alleging entitlement to the $50,000. The district court granted a dismissal to the siblings finding the agreement, if it was not a settlement agreement as argued by Rector, attempted to bind parties in a manner contrary to Kansas law. The Court of Appeals reversed finding Rector's petition could state a claim for assignment of an expectancy interest or for promissory estoppel. The panel rejected Rector's joint tenancy and incorporation arguments.

ISSUES: (1) Estates and (2) settlement agreements

HELD: Court held that Kansas law recognizes the validity of assignments of expectancy interests and Kansas courts enforcement of them, as long as such assignments are fair, supported by consideration, not induced by fraud, and clearly indicative of the intention of the parties. An assignment of an expectancy interest may be made in a settlement agreement among heirs entered into before the death of a testator. Court ruled that the present assignments remained possible within and outside of probate contexts. Court stated that it did not decide the merits of Rector's assignment claim and that decision would follow full factual development in the district court. Court held that Rector's petition stated a claim based on the assignment theory and that her lawsuit should not have been dismissed on the pleadings as a matter of law. Although defendants do not appear to dispute that the Jan. 31, 2003, agreement was supported by adequate consideration, further proof and argument on this and other salient points of fact and law will now proceed.

STATUTE: K.S.A. 59-102(8), -2249(a)

HABEAS CORPUS
BARR V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 94,429 – NOVEMBER 14, 2008

FACTS: Barr convicted in 2002 on plea to manufacturing methamphetamine. Barr chose dispositional departure sentence of probation with underlying 142 month sentence over trial court's offer of durational departure 60 month prison sentence. Barr did not appeal sentence. District court revoked Barr's probation in December 2003 and ordered him to serve underlying 142-month sentence. State v. McAdam decided while Barr's appeal was pending, and Barr claimed his sentence was illegal under McAdam. In unpublished 2004 opinion, Court of Appeals dismissed the appeal because was McAdam not available where Barr had not filed timely appeal from his sentence. In January 2005, Barr filed 60-1507 motion for resentencing under McAdam based on claim of ineffective counsel at sentencing, or for Ortiz hearing to establish right to perfect late direct appeal of his sentence. District court denied relief. In unpublished 2006 opinion, Court of Appeals found Barr was not entitled to a late direct appeal, and distinguished Barr's ineffective attorney claim from that in Laymon v. State, 280 Kan. 430 (2005).

ISSUES: (1) Late direct appeal and (2) ineffective assistance of counsel

HELD: Applying State v. Patton decided this date, state defeated Barr's attempt to invoke first Ortiz exception. Barr not entitled to take late direct appeal from his sentence on manufacturing methamphetamine.

Court of Appeals' distinction from Laymon is sound, and Barr presents no colorable claim of prejudice resulting from any ineffective assistance of counsel.

STATUTE: K.S.A. 20-2616, -3002(c), 21-4721(c)(2), -4721(d), -4721(e)(3), 22-3608, 60-1507, 65-4127c

SPECIAL USE PERMIT
MANLY V. CITY OF SHAWNEE
JOHNSON DISTRICT COURT
REVERSED AND REMANDED FOR DISMISSAL
NO. 99,155 – OCTOBER 17, 2008

FACTS: The Manlys owned 38 acres of land in Shawnee, adjacent to an 18-acre tract owned by the school district. The City Planning Commission voted 4-3 to recommend that the city deny the school district's application for a special use permit to build a lighted softball facility on the property. The city council voted to deny the special use permit. A motion to grant the special use permit in contravention of the planning commission recommendation and to modify any conflicting portion of the city's comprehensive plan passed on a 5-4 vote. The Manlys filed eight protest petitions and also filed a petition requesting the district court to make a determination of the city's approval of the special use permit and for an injunction. The district court found the city's action in overriding the planning commission by a simple majority was unlawful and remanded to the city council for further proceedings. The city council ratified and reaffirmed its prior actions. The district court issued a memorandum decision finding that the Manlys had failed to sustain their burden of proving the city's decision to grant the special use permit was unreasonable and that the permit did not constitute impermissible spot zoning. The district court reiterated that the original simple majority vote was unlawful, but that the district court did not have jurisdiction to consider the city's actions at the posttrial special meeting because that action had not been appealed.
ISSUE: Special use permit
HELD: Court held that under K.S.A. 12-757(d), the city was permitted to issue the special use permit by a simple majority vote notwithstanding the resubmitted planning commission recommendation to deny the permit. Court held that the district court erred in ruling that the special use permit was unlawfully approved. The court affirmed the district court’s determination that after reviewing the Golden factors, there could not be a determination that the evidence was so overwhelming or compelling that the city’s decision in favor of the special use permit was unreasonable. Court also held the proper notice and hearing requirements were followed and the hearings before both the planning commission and the city council were unquestionably fair, open, and impartial. Court reversed the district court’s holding that the city’s granting of the special use permit upon a simple majority vote was unlawful, but affirmed the district court’s finding that the city acted reasonably in granting the special use permit. Court stated that the project which has been completed was effected based upon a lawful special use permit and remanded to the district court for a dismissal of all further proceedings.
STATUTES: K.S.A. 12-104, -708, -741, -757(d), -760; and K.S.A. 20-3018(c).

CRIMINAL
STATE V. JEFFERSON
RENO DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,049 – OCTOBER 17, 2008
FACTS: Villa testified at Jefferson’s preliminary hearing, but refused to testify at trial even though he claimed no privilege, had not been threatened, and was not afraid to testify. District court admitted Villa’s preliminary hearing testimony. Jefferson appealed, arguing Villa’s refusal to testify did not make him an unavailable witness under Kansas hearsay statutes. In unpublished opinion, Court of Appeals reversed on the issue of Villa’s unavailability, ruling his mere refusal to testify did not make him “unavailable,” and vacated Jefferson’s conviction citing State v. Johnson-Howell, 255 Kan. 928 (1994). Supreme Court granted state’s petition for review.
ISSUE: Unavailability under K.S.A. 60-459(g)
HELD: K.S.A. 60-459(g) is examined and interpreted. The list of situations under which a witness is unavailable is exemplary rather than exclusive. A witness who refuses to testify is unavailable under plain language of the statute. Apparent assumption to the contrary in Johnson-Howell is disregarded and not controlling because it is analytically flawed, it fails to acknowledge the existence of contrary precedent, and its syllabus taken from discussion of a constitutional point has been misread as a statutory interpretation holding. Under facts of this case, Villa qualified as an unavailable witness under K.S.A.60-459(g), and his preliminary hearing testimony was admissible under K.S.A. 60-460(c)(2)(B).
STATUTE: K.S.A. 13-13a04(a), 20-2916(a), 46-282, 59-2246, 60-450(c), -455, -459(g), -460, -460(c)(2)(B), -460(d)(3), 65-1,172(d), 74-4954b(4), -4980g(c), -32,175(d)

STATE V. MCCARLEY
SEDGwick DISTRICT COURT – REVERSED IN PART
AND AFFIRMED IN PART
COURT OF APPEALS – REVERSED IN PART
AND AFFIRMED IN PART
NO. 95,818 – NOVEMBER 7, 2008
FACTS: McCarley convicted of reckless aggravated battery, a severity level 5 person felony. Presentence report erroneously classified it as a severity level 8 person felony, and trial court imposed appropriate sentence under that misclassification. State filed motion to correct an illegal sentence, which the trial court denied opining it could not correct an illegal sentence if the correct sentence would be harsher than the original one imposed. On state’s appeal, Court of Appeals affirmed. 38 Kan. App. 2d 165 (2007). Court of Appeals also summarily rejected McCarley’s cross-appeal on claim the trial court erred in not instructing jury that McCarley’s actions had to be proximate cause of victim’s injuries, where McCarley’s primary defense had been the victim’s actions were the cause of the victim’s injuries. Supreme court granted petition and cross-petition for review.
ISSUES: (1) Jurisdiction to correct purported illegal sentence and (2) jury instruction
HELD: Appellate court has authority to review state’s claim of illegal sentence. Sentence imposed is illegal because it was imposed by a court without jurisdiction and because the sentence did not comport with statutory provision in character or term of punishment authorized. Crimes of severity levels 5 and 8 aggravated battery are both lesser included offenses of severity level 4 aggravated battery because they are lesser degrees of same crime pursuant to K.S.A. 21-3107(2)(a). Because crime charged in this case was level 4 aggravated battery, trial court had jurisdiction to convict McCarley of severity level 5 battery.
Under facts of case, trial court did not clearly err in failing to instruct on proximate cause. Court of Appeals’ judgment on jury instruction claim is affirmed.

STATE V. MOORE
SEDGwick DISTRICT COURT – AFFIRMED
NO. 97,683 – OCTOBER 24, 2008
FACTS: Moore convicted of felonies, including capital murder in shooting death of a deputy sheriff. On appeal he claimed district court should have instructed jury on voluntary manslaughter based on imperfect self-defense, because he had honest but unreasonable belief he would be shot to death by police if they entered his home or he emerged from it. He claimed district court should have instructed jury on voluntary intoxication due to circumstantial evidence he was under the influence. And he claimed district court erred in not admitting testimony from a defense toxicology expert.
ISSUES: (1) Jury instruction on voluntary intoxication and (2) expert witness
HELD: Evidence did not merit any kind of self-defense instruction. Moore fired at officers in spite of undeniable knowledge of their identity and purpose. Under the circumstances, Moore could not have harbored an honest but unreasonable belief that deadly force was necessary. Circumstantial evidence of Moore’s voluntary intoxication at time of crimes was not strong, but was adequate to support an instruction. District court erred in refusing to give voluntary intoxication instruction, but error was harmless under either constitutional standard or trial error standard under K.S.A. 60-261.
District court’s treatment of defendant’s toxicology expert’s testimony was not error under facts of case.
STATUTE: K.S.A. 21-3110, -3208(2), -3211, -3301, -3403, -3421, -3439(a)(5), -4204
STATE V. PATTON
DICKINSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,860 – NOVEMBER 14, 2008

FACTS: Patton convicted on plea to drug charges. Sentencing court accepted the recommended downward duration sentence and erroneously told Patton he could appeal the denial of a dispositional departure sentence. Counsel filed no appeal notwithstanding Patton’s stated desire. Within weeks of McAdam, Patton filed motion to correct illegal sentence. Appellate courts upheld district court’s denial of that motion Patton then filed 60-1507 motion renewing ineffective assistance arguments, and sought leave to file late appeal on McAdam sentencing issue under exceptions recognized in State v. Ortiz, 230 Kan. 733 (1982). District court permitted Patton to file out-of-time appeal because counsel failed to abide by Patton’s wish to file an appeal. Court of Appeals refused to order resentencing under McAdam, finding Ortiz exception applied but it lacked jurisdiction because Patton waived right to appeal as part of plea agreement. 37 Kan. App. 2d 166 (2007). Patton’s petition for review granted.

ISSUES: (1) Ortiz exceptions and (2) application of Ortiz
HELD: Extensive examination of Ortiz exceptions Each exception is clarified and stated. Rules outlined in this opinion apply to all cases not yet final on direct appeal and to those appealed in the future.

For first exception, statutory requirements that defendant be informed of right to appeal apply regardless whether a defendant went to trial and regardless whether a defendant is indigent. If sentencing hearing transcript demonstrates the district judge did not adequately inform the defendant of right to appeal, and state is unable to demonstrate the defendant had actual knowledge of the required information from some other source, then the defendant must prove that he or she been properly informed a timely appeal would have been sought.

Second exception applies only to defendants who were indigent when they desired to take a timely appeal. Defendant bears evidentiary burden of demonstrating need for appointed counsel to pursue an appeal, that none was appointed despite a timely request, and that had counsel been available the defendant would have instructed counsel to file an appeal.

Third exception applies to retained and appointed counsel, and measure of adequacy of appellate counsel under this exception is under Roe v. Flores-Ortega, 528 U.S. 470 (2000). If counsel failed to file or perfect a direct appeal, prejudice is presumed. Defendant still must demonstrate that but for counsel’s failure a timely appeal would have been taken, but does not have to show that such a timely direct appeal would have been successful.

In present case, general waiver language in the plea agreement was ambiguous and is strictly construed in Patton’s favor. Patton satisfies for application of third Ortiz exception.

STATUTE: K.S.A. 20-111, -3002(c), 21-4721, 22-3210(a)(2), -3424(f), -3608, -3608(c), -4505, 60-1507, 65-4152(a)(3), -4159(a), -4161(a), 65-7006(a)

STATE V. HALL
MCPHERSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,896 – OCTOBER 31, 2008

FACTS: Upon release from prison and completion of Saline County prison sentence, Hall was served with a probation revocation warrant issued six years earlier in McPherson County and apparently lodged as a detainer during Hall’s prison term on the Saline County conviction. Hall moved to dismiss the warrant, arguing district court lacked jurisdiction due to state’s delay in prosecuting it. District court denied the motion, revoked Hall’s probation, and

ordered him to serve the original McPherson sentence. Court of Appeals reversed and remanded with instructions to discharge Hall, finding state waived the probation violation and Hall did not need to prove actual prejudice by the delay. 38 Kan. App. 2d (2007). State’s petition for review granted.

ISSUE: Delay in executing probation violation warrant
HELD: Consistent with Moody v. Daggett, 429 U.S. 78 (1976), if an alleged probation violator is incarcerated as the result of a new felony conviction arising in another county, the state does not waive a probation violation if it lodges a detainer but does not execute a probation violation warrant while the alleged violator is imprisoned on a consecutive sentence. Even if due process does not demand execution of a probation violation warrant before an alleged violator is released from custody after having served the sentence for an unrelated felony conviction, an earlier resolution may be necessary if an infringement of a liberty interest is demonstrated. In this case, possible prejudice to potential liberty interests is considered, finding Hall failed to establish prejudice or otherwise establish a liberty interest was infringed.

STATUTE: K.S.A. 20-3018(b), 21-4608(c), 22-2202(a), -3716(a), -4301 et seq., 60-2101(b)

STATE V. PRESTON
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 98,948 – NOVEMBER 7, 2008

FACTS: Preston appealed from district court’s ruling denying credit on prison terms for time Preston spent participating in an inpatient drug treatment program while on probation. Preston appealed, arguing: (1) K.S.A. 21-4603d(n) should be construed as not conflicting with jail time credit provisions of K.S.A. 21-4614a, (2) her inpatient treatment was not part of the mandatory drug treatment program, and (3) K.S.A. 21-4603d(n)’s preclusion of jail time credit violated her constitutional rights to equal protection. Appeal transferred to Supreme Court.

ISSUES: (1) Conflict in statutes, (2) inpatient treatment requirement, and (3) equal protection violation
HELD: By enacting K.S.A. 21-4603d(n), Legislature intended to change existing law with respect to jail time credit for a probationer’s time spent in inpatient treatment program when that inpatient treatment is a component of a K.S.A. 21-4729 mandatory drug abuse treatment program. Preston’s suggestion that K.S.A. 21-403d(n) merely clarified existing law governing jail time credit is rejected.

The time Preston, a S.B. 123 probationer, spent participating in the inpatient treatment at Valeo was time spent in the treatment program contemplated by K.S.A. 21-403d(n), and is not to be credited as service on the underlying prison sentence.

K.S.A. 21-4603d(n) does not violate equal protection guarantees. Preston is similarly situated with all other S.B. 123 probationers, and members of that class are not treated unequally.

STATUTE: K.S.A. 2007 Supp. 65-4160(a); and K.S.A. 20-3018(c), 21-4603d(n), -4610, -4614a, -4614a(a), -4729, -4729(b)(1), -4729(c), 22-3716(f)

STATE V. VASQUEZ
EDWARDS DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
NO. 95,400 – OCTOBER 17, 2008

FACTS: Vasquez convicted of felonies including three counts of first degree murder and one count of aggravated burglary. Three consecutive hard 40 terms imposed on the murder convictions. On appeal, Vasquez claimed: (1) error to admit evidence of his earlier domestic battery against Robin, one of the murder victims, (2) error to not give requested instruction on voluntary manslaughter based on heat of passion as a lesser-included offense of the premeditated murder, (3) state’s reliance on Robin’s inadmissible hearsay state-
ments to police officer to prove motive violated Vasquez's right of confrontation, (4) insufficient evidence supported aggravated burglary conviction where state failed to present evidence that he lacked authority to enter house he and one of the victims shared as husband and wife before Vasquez's extended stay in Mexico, (5) cumulative error denied him a fair trial, and (6) the hard 40 sentencing scheme is unconstitutional, and insufficient evidence supports sentencing court's finding of “heinous, atrocious, or cruel” aggravating factor.

ISSUES: (1) evidence of prior domestic battery, (2) instruction on voluntary manslaughter, (3) admission of victim's hearsay statements, (4) sufficiency of evidence of aggravated burglary, (5) cumulative error, and (6) hard 40 sentence

HELD: State v. Gunby, 282 Kan. 39 (2006), decided while Vasquez's appeal was pending, thus district court judge innocently but erroneously admitted marital discord evidence independent of K.S.A. 60-455. Under facts, admission of the testimony without a limiting instruction under K.S.A. 60-455 was harmless error.

Under facts, Vasquez not entitled to a lesser included offense instruction on voluntary manslaughter based on heat of passion.

Under facts, admission of certain hearsay statements of one of the victims did not violate Vasquez's right to confront witnesses against him because the statements were not testimonial. Also, admission of the statements was proper under K.S.A. 60-460(d)(3).

On record of case, state presented insufficient evidence that Vasquez's entry into home in which murders occurred was made without authority. Vasquez's aggravated burglary conviction is reversed.

Cumulative error rule has no application where no multiple errors were found.

Hard 40 sentencing scheme has been repeatedly found to be constitutional. Under facts, sufficient evidence supports “heinous, atrocious, or cruel” aggravator.

STATUTE: K.S.A. 21-3401, -3403, -3427, -3701, -3715, -3716, -4635 et seq., -4636(f), -4706(c), 22-3414(3), 60-261, -410(b), -455, -460(d)(3)

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Appellate Practice Reminders . . .

Supreme Court Archived Arguments
Archived recordings of oral arguments before the Kansas Supreme Court from August 2004 through the latest court week appear on the Court's official Web site at www.kscourts.org and have been recently reorganized. It is now easy to find exactly the docket and particular argument you want to hear.

By clicking on a specific docket you will be led to all recorded arguments heard during that court week. The arguments are arranged by date order in sequence the arguments were heard. Each case is identified with the appellate case number and short caption. If you do not know the month and year the case was heard, check the “Appellate Case Inquiry System,” which is also located on the Web site.

The direct link to the archived arguments page is www.kscourts.org/kansas-courts/supreme-court/archived-arguments.asp.

The Clerk's Orientation
The Kansas Supreme Court holds arguments during court week promptly at 9 a.m. and 1:30 p.m.

Counsel are requested to arrive at the Kansas Judicial Center early enough to be present for an orientation with the Clerk. The orientation is held 15 minutes prior to the call of each docket and is important since this is the last chance to verify names of counsel for the opinions. The orientation also provides counsel with important information on the composition of the bench for that session, proper protocol for the call of the docket, and common pitfalls to avoid.

Counsel who are appearing before the Supreme Court for the first time may want to listen to archived arguments to get a sense of the proceedings. Counsel are also welcome to attend another session of court in advance of their argument.


For questions about archived arguments or appearances before the Kansas Appellate Courts, call the Clerk's Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
CIVIL

ARBITRATION AWARD AND SUMMARY JUDGMENT
NOWICKI V. PROJECT PAINT RESEARCH LABS
SHAWNEE DISTRICT COURT – AFFIRMED

FACTS: Nowicki and McLaughlin (plaintiffs) entered a state distributorship agreement in their respective out-of-state companies in 2004 with Project Paint Research Labs, a Kansas corporation. The agreement required resolution of disputes by arbitration with the American Arbitration Association in Philadelphia. Plaintiffs demanded damages from Project Paint for a defective product that claimed to repair scratches and defects to cars in a professional manner in approximately 40 minutes. Project Paint did not participate in arbitration proceedings. The arbitrator awarded attorneys fees and then damages for out-of-pocket expenses, time, and anticipated profits of approximately $1 million. However, damages were reduced pursuant to the contract to $250,000 to each plaintiff. A copy of the award was faxed to Project Paint. Plaintiffs filed a motion to confirm the award in Kansas district court. The district court confirmed the award and the parties agreed the sole issue was whether Project Paint made a timely application to vacate the arbitration award. The district court granted summary judgment to plaintiffs finding the award was properly faxed to Project Paint at the attorney's request.

ISSUES: (1) Arbitration award and (2) summary judgment

HELD: Court found substantial competent evidence to support the district court's holding that the arbitration award was sent by fax to Project Paint and its attorney and was successfully faxed at the attorney's request. Court also found there was an inadequate record to sufficiently establish error that Project Paint's attorney sent an objection to Plaintiffs' attorney that he was not a party to the distributorship agreement. Court found there was no fraud, corruption, or other undue means and that the district court properly applied the arbitration statute in denying the request to vacate the arbitration agreement. Court also found an inadequate record to determine the validity of the arbitration agreement.

STATUTE: K.S.A. 5-408(a), -412(a), (b)

CREDIT LIFE INSURANCE AND FAILURE TO DISCLOSE EXISTING CONDITIONS
CHISM V. PROTECTIVE LIFE INSURANCE CO.
MONTGOMERY DISTRICT COURT – AFFIRMED

FACTS: In June 2005, Steve and Karen Chism purchased a new vehicle from Quality Motors of Independence Inc. As a part of the transaction, the dealership's business manager, Dennis Urban, offered to sell them a Protective Life Insurance Co., credit life insurance policy that would pay off their car loan if either of them died. Steve had high blood pressure since 1991, Type 2 diabetes since 1999, and was diagnosed with peripheral vascular disease in November 2004. The Chisms did not circle any health conditions on the application and Urban signed it as Protective's agent. About seven months later, Steve died from a sudden cardiac arrest and the death certificate listed diabetes mellitus, hypertension, morbid obesity, and peripheral vascular disease as cause of death. Karen submitted a claim for benefits under the policy. Based on Steve's prior medical condition, Protective denied the claim and rescinded the policy. Karen sued Protective. The district court granted summary judgment in favor of Protective.

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

HELD: Court stated the policy application specifically negated Steve's eligibility for coverage due to his medical conditions. Further, the policy application made it clear that Urban had no authority to waive Protective's insurability requirements. Under the circumstances, the medical conditions the Chisms failed to disclose in the application were clearly material to the risk Protective was being asked to underwrite. Court also stated that Urban did not fill out the policy application in its entirety and asked the applicants to sign it. Court found that Protective's opportunity and duty to correctly complete the portion of the application form relating to health issues; this they failed to do. Court also held that Quality Motors was entitled to summary judgment on Karen's claim of negligent procurement since there was no evidence that Urban, who was an employee of Quality Motors, owed any legal duty to the Chisms when it came to their obligation to read, understand, and
accurately respond to the inquiries made in the credit life policy application about their health. Court found no abuse of discovery or in refusing to allow admission of other credit life applications from other Quality Motors customers.

STATUTES: K.S.A. 40-418, -2205(C); and K.S.A. 60-226(c), -237(a)(2)


FACTS: Marvel M. Seth executed a valid will on May 13, 1984, leaving her 320-acre family farm to one of her sons, Laryl. At the time of her death on Dec. 4, 2005, Laryl, daughter, Loyola, and three children of her second son, Lowell, deceased, survived Maryel. In February 2006, Laryl and Loyola found the will and took it to an attorney, Kenneth McClintock, instructing him to admit it to probate. After the initial meeting with McClintock, Laryl tried repeatedly to contact him to ask about the will. On two occasions between April and May 2006, McClintock assured Laryl on the phone and in person that he was “taking care of” the will. The six-month period for probate under K.S.A. 59-617 expired in early June 2006. In late June 2006, however, the will had not been admitted to probate, and McClintock admitted he failed to meet the statutory deadline. McClintock possessed no assets or insurance to respond to a judgment, and he ultimately relinquished his law license in connection with disciplinary proceedings that resulted from his inaction on Laryl’s behalf. Laryl promptly retrieved the will from McClintock, took it to a different attorney, and filed a petition to probate the will in late August 2006. The grandchildren filed an answer and defense, challenging the belated admission of the will to probate. After a bench trial, the district court held that Laryl was an innocent beneficiary under K.S.A. 59-618 and entitled to belated admission of the will to probate.

ISSUES: (1) Estates and wills and (2) innocent beneficiary

HELD: Court held that under the facts of this case, a beneficiary who sought the timely admission of a will to probate but whose attorney failed to act in this manner despite false assurances to the contrary is an innocent beneficiary for purposes of K.S.A. 59-618 and may petition for belated admission of the will to probate within 90 days of regaining access to the will from the attorney.

STATUTE: K.S.A. 59-617, -618

HABEAS CORPUS AND MOTION TO SET ASIDE GUILTY PLEA WILKINSON V. STATE SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 99,169 – NOVEMBER 7, 2008

FACTS: David Wilkinson pled guilty to a second charge of possession of cocaine based on a plea agreement in which the state agreed to recommend that his sentences for the two convictions be concurrent. The concurrent sentences were a significant incentive for the plea. However, the district court could not consider giving Wilkinson concurrent sentences because the second offense had been committed while he was on felony bond for the first offense. Kansas’ law provides for consecutive sentences in such cases unless that “would result in a manifest injustice.” The district court dismissed Wilkinson’s motion under K.S.A. 60-1507 to set aside his plea.

ISSUES: (1) Habeas corpus and (2) motion to set aside guilty plea

HELD: Court stated that when a defendant’s plea is made in exchange for the state’s recommendation of concurrent sentences, a defense attorney should advise that defendant if statutes would preclude the district court from making the sentences concurrent without finding that manifest injustice would result from consecutive sentences. An attorney who does not so advise a defendant performs below reasonable standards for effective assistance of counsel. Court held in Wilkinson’s case, a concurrent sentence could be given only if consecutive sentences would shock the conscience of the court, and that’s more than a tilted playing field – the test is nearly insurmountable. Yet Wilkinson had every reason to believe that the odds were spread out evenly, not rising to the peak of a mountain. Wilkinson pled guilty in exchange for the state’s recommendation of a concurrent sentence, but the manifest-injustice standard substantially undercut the value of that bargain. Wilkinson could not make an informed decision about that plea bargain without knowledge of this standard. Court held that because Wilkinson may be entitled to have his plea set aside if the allegations made in his motion are true, the court reversed the judgment of the district court and remanded for an evidentiary hearing on Wilkinson’s motion. If Wilkinson’s attorney did not tell him about the manifest-injustice standard, then the attorney’s performance fell below the standard of reasonableness. And unless Wilkinson otherwise had knowledge of that standard, he would be entitled to relief if the district court concludes from the evidence that Wilkinson would not have pled guilty and would have insisted on going to trial but for his attorney’s error.

STATUTES: K.S.A. 21-4608(d), -4720(a) and K.S.A. 60-1507


FACTS: Diederich sued the stockholders of his former law firm alleging breach of contract, breach of fiduciary duty, tortious interference with contract, and civil conspiracy after he was fired. His termination resulted after the stockholders determined that Diederich had altered timesheets so that he would get credit for work done by other attorneys in the firm. The district court granted summary judgment to the defendants and denied Diederich’s motion for partial summary judgment.

ISSUES: (1) Law firm partnership, (2) termination of partner, and (3) summary judgment

HELD: Court stated that a corporation acts through the work of its officers, directors, and employees. Because the defendants are stockholders and directors of the corporation and they were acting within the scope of their duties when they dismissed Diederich for cause, court held that Diederich’s claims do not survive summary judgment. Court stated that as well as failing to show what contract had been breached in this cause of action, Diederich also failed to provide evidence showing the defendants were acting outside the scope of their employment. He failed to show they were acting for their own individual advantage or that the defendants were not acting for the benefit of the corporation.

STATUTES: None

MEDICAL MALPRACTICE AND SUMMARY JUDGMENT ROJAS V. BARKER PRATT DISTRICT COURT – AFFIRMED NO. 98,737 – NOVEMBER 14, 2008

FACTS: Rojas sued Dr. Barker for negligently performing her hernia surgery and for failing to obtain her informed consent to the surgery because he failed to notify her of his unavailability to provide follow-up care after her surgery. The district court granted partial summary judgment in favor of Barker on Rojas’ informed consent claim, finding Rojas failed to establish causation with respect to that
claim finding no “causative factor” between Barker’s unavailability following surgery and Rojas’ injuries. However, the court permitted Rojas’ negligence claim to go to the jury and the jury returned a verdict in favor of Barker. Prior to trial, the district court had sustained a motion limiting the amount of medical expenses to those actually paid by Medicare rather than the amount of medical expenses billed by Rojas’ health care providers prior to applying “write-offs.”

ISSUES: (1) Medical malpractice and (2) summary judgment

HELD: Court held a plaintiff proves causation in an informed consent case by showing (1) an objectively reasonable patient would have declined treatment had the patient been advised of a material risk or danger; (2) the patient was not advised of a material risk or danger; and (3) that risk or danger materialized, resulting in harm to the patient. Court concluded the material uncontroverted facts demonstrated that Rojas failed to establish a causal connection between the alleged breach of Barker’s duty to obtain Rojas’ informed consent and her injuries. The district court appropriately granted partial summary judgment to Barker on Rojas’ informed consent claim. Court found the damages issue was rendered moot.

STATUTES: None

PARENT AND CHILD IN RE B.E.Y.
RENO DISTRICT COURT – AFFIRMED
NO. 100,734 – NOVEMBER 21, 2008

FACTS: District court terminated parental rights to three children, finding both parents were unfit by conduct or condition that rendered them unable to care for the children. Natural father appealed, arguing insufficient evidence supported the findings, and district court failed to adequately consider fathers compliance with reintegration plan.

ISSUE: Termination of parental rights

HELD: Sufficient evidence supports termination of father’s parental rights, but district court’s journal entry failed to fully conform to statute. Better practice for district court to expressly reflect in its journal entry that the standard of proof in K.S.A. 2007 Supp. 38-2269 was employed in making all findings in terminating parental rights, and that best interests of the child or children were considered in making finding of unfitness.

STATUTE: K.S.A. 2007 Supp. 38-2269, -2269(a), -2269(b)(2)-(4) and (7)-(8), -2269(c)(3), -2269(g)(1)

PRISON MAIL AND SEXUALLY EXPLICIT MATERIAL
WASHINGTON V. WERHOLTZ
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 99,086 – NOVEMBER 26, 2008

FACTS: Washington, an inmate at the Leavenworth penitentiary, challenged the constitutionality of the Kansas Department of Corrections regulation that prohibits inmates from possessing sexually explicit material. Washington followed proper administrative procedures. The district court eventually held that the regulation was constitutional under U.S. Supreme Court precedent because it was reasonably related to legitimate interests of the penitentiary.

ISSUES: (1) Prison mail and (2) sexually explicit material

HELD: Court held that K.A.R. 44-12-313, which keeps sexually explicit materials from being received by Kansas prison inmates, is constitutional under Turner v. Safley, 482 U.S. 78 (1987).

STATUTES: K.S.A. 60-1501 and K.S.A. 75-5210(f)
Appellate Decisions

PROTECTION FROM ABUSE AND DIVORCE
CRIM V. CRIM
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 98,529 – MOTION TO PUBLISH
OPINION ORIGINALY FILED JULY 25, 2008

FACTS: Cynthia and Brian were married in 2001, but had been separated since the summer of 2006. The Crims had legal custody of their two minor children. Cynthia also had legal custody of another minor child from a prior relationship. Cynthia had previously filed a petition for protection from abuse in Douglas County on June 12, 2006, for herself and the two oldest children. On Jan. 23, 2007, Cynthia completed and filed a standardized form petition for protection from abuse against Brian. Cynthia requested a temporary restraining order and temporary custody of the minor children and supervision visitation for Brian. On the same day the petition was filed, the district court summarily dismissed it without prejudice. The order indicated the reason for the dismissal was “insufficient allegations for jurisdiction.” The order also contained the following statement: “Petitioner should seek to modify the custody/visitation temporary orders in the divorce case 2006 DM 606 entered on Dec. 22, 2006. Petitioner should follow the Amended Temporary Parenting Plan and seek mediation of disputes as required by the Parenting Plan.” The court denied the motion to set aside the dismissal.

ISSUES: (1) Protection from abuse and (2) divorce

HELD: Court held the actions described in Cynthia’s petition, construed liberally to facilitate the (Protection From Abuse Act) PFIA’s stated goal of promoting access to judicial protection for victims of domestic abuse, satisfied the statutory definition of abuse sufficient to establish jurisdiction with the district court. Court reaffirmed legal jurisprudence of no bright-line rule that the victim must actually show that she or he has had blood or suffered real physical pain in order to obtain an order, which may avoid that outcome. Court stated that the district court’s determination that it lacked jurisdiction over Cynthia’s petition was in error and the district court’s decision to deny Cynthia’s motion to set aside the dismissal was guided by an erroneous legal conclusion. Court held that ongoing divorce proceedings are not a jurisdictional bar to an individual pursuing a claim under the PFIA. The PFIA explicitly states that the remedies it provides are “in addition to any other available civil or criminal remedies.”

STATUTE: K.S.A. 60-259, -3101-3105, -3106, -3109, -3130

RES JUDICATA
KNOWLES V. FLEETWOOD MOTORHOMES OF CALIFORNIA
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 98,325 – OCTOBER 17, 2008

FACTS: In 2003, Robert and Kathleen Knowles bought a 2003 Fleetwood motor home for $88,000. They had continual problems, one of which was a persistent leak in the bedroom slide-out area. In May 2004, the Knowles sued Fleetwood for breach of warranty and deceptive acts under the Kansas Consumer Protection Act. The parties reached a settlement agreement, but the agreement fell apart after Fleetwood decided any body repair shop could fix the crack causing the leak, but the Knowles insisted the entire side wall needed to be replaced. The trial court allowed evidence of the crack in the jury trial, but only because of water infiltration. Later, the trial court stated that fixing the crack was irrelevant because the Knowles never asked for it to be fixed in the past. The parties agreed that at this trial the judge ruled in a motion in limine that the Knowles could not discuss the existence of the crack at trial because they had never presented the crack to Fleetwood to be repaired. The jury returned a verdict in favor of the Knowles only for their breach of warranty claim and awarded damages of $20,363.63. This decision was not appealed. Within Fleetwood’s warranty period, the Knowles made a written request to Fleetwood to repair the crack in the side-wall of the motor home. Fleetwood denied the request and the Knowles filed suit. The district court granted summary judgment in favor of Fleetwood finding that res judicata, specifically claim preclusion, prevented relitigation of the claims raised in the case.

ISSUE: Res judicata

HELD: Court held the defense of res judicata is deemed to have been waived by a defendant where the first suit did not include the subject matter of the second at the insistence of the defendant. Court found that Fleetwood asserted the Knowles’ right to recover damages for the crack did not exist until after they gave Fleetwood an opportunity to repair the crack and that by taking this position, Fleetwood did not consider the Knowles’ settlement negotiations request for repairs of the crack. The Knowles were unaware that they had lost the opportunity to present their claim for damages associated with the crack until the jury trial occurred, where the district court issued its final and confusing ruling over the matter. Court also held that had the Knowles instead appealed the district court’s ruling in the first lawsuit, it would have been ineffectual since the Knowles had not formally requested Fleetwood to repair the crack until after the first lawsuit had been completed. Last, the court held that the Knowles’ Kansas Consumer Protection Act claim in this lawsuit centered on Fleetwood’s failure to pick up the Bounder in January 2005 as it had agreed. This conduct all occurred after the first lawsuit was under way. Yet the trial court, finding res judicata, broadly swept away the consumer claim with the same broad ruling as the warranty claim. Neither were barred by res judicata.

STATUTES: K.S.A. 50-623 and K.S.A. 60-216(e)

WORKERS’ COMPENSATION AND NATURAL AGING PROCESS
MARTIN V. CNH AMERICA LLC
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 97,707 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED NOVEMBER 16, 2007
FACTS: Martin began working for Case New Holland (CNH) in 1987. In 2002, he began assembly work, which required getting underneath cars on a creeper, bending, getting on his knees, twisting, turning, squatting, and stooping. Martin began to notice right hip problems in May 2004. After visiting several doctors, Martin was diagnosed with avascular (or aseptic) necrosis of both hips and received hip replacements in March and April 2005. Martin was off work from February 2005 to May 2005. When he returned to work, he resumed the tasks and responsibilities of his job. The administrative law judge (ALJ) denied Martin’s claim for workers’ compensation. Based on the testimony of several doctors, the ALJ concluded that Martin’s condition was not caused by his employment, but rather by tobacco, alcohol, and steroid use, the aging process and normal daily activities. The ALJ found that the term “aggravate” as used by the doctors referred to an increase in symptomatology, not a change in the physical structure of the body. The ALJ held that Martin failed to meet his burden of proof. The Workers’ Compensation Board (board) affirmed finding that Martin failed to prove that (1) if he had not been employed with CNH, he would not be equally injured; (2) by the greater weight of evidence, Martin’s work activities aggravated and accelerated his condition beyond that caused by the natural aging process and normal daily activities; and (3) Martin’s injuries arose out of his employment with CNH.

ISSUES: (1) Workers’ compensation and (2) natural aging process

HELD: Court stated that the board’s determination is a negative
finding and that Martin did not suffer an injury that arose out of his employment with CNH. Court stated it would breed inefficiency to allow workers with preexisting conditions such as cancer, respiratory disease, muscle and joint disease, and similar conditions to place the burden of their personal health care expenses on employers. Although compensation seems necessary when work conditions directly accelerate or aggravate these diseases, it is less warranted when the symptoms encountered would have occurred regardless of whether the claimant was so employed. Workers' compensation should be reserved for persons who are injured on the job due to hazards specifically associated with that particular work, not for persons who come to an employer with a preexisting disease and suffer the inevitable consequences of that disease while they happen to be at work.

STATUTE: K.S.A. 44-501(c), -508(e)

WORKERS' COMPENSATION AND POST-INJURY WAGE
NISTLER V. FOOTLOCKER RETAIL WORKERS' COMPENSATION BOARD
REVERSED AND REMANDED WITH DIRECTIONS

FACTS: Nistler's injury, which occurred on Nov. 9, 2004, arose out of and in the course of his employment with Footlocker Retail Inc. (Footlocker), and coverage was afforded under the Workers' Compensation Act (Act). Prior to the injury, Nistler was employed by Footlocker as a material handler II and received an hourly wage of $13.19 based on a 40-hour workweek. The wage records reveal that from the date of the injury until shortly after the regular hearing before the administrative law judge (ALJ), Nistler worked 116.4 weeks, with weekly averages of 32.71 work hours and $465.41 in wages. Again, this compares to his stipulated average weekly wage immediately before the injury of $652.47. The administrative law judge determined Nistler had sustained a 17.6 percent wage loss and a 80.8 percent task loss, resulting in a 49.2 percent work disability and an award of $88,818.30. On the other hand, the board imputed a 40-hour workweek to Nistler, and determined claimant's post-injury average weekly wage was 90 percent or more of his pre-injury average weekly wage. Consequently, the board concluded Nistler was not entitled to work disability benefits and reduced his permanent partial disability award to $18,052.50.

ISSUES: (1) Workers' compensation and (2) post-injury wage

HELD: Court found that the phrase within K.S.A. 44-510e, "engaging in any work for wages equal to 90 percent or more of the average gross weekly wage that the employee was earning at the time of the injury," is an unambiguous statement of legislative policy that a worker's post-injury wage is to be based on actual hours worked and not determined by imputation of a hypothetical 40-hour work week. Court held the board erred in applying K.S.A. 2005 Supp. 44-511(a)(4) and (5), together with K.S.A. 2005 Supp. 44-511(b)(4), to determine Nistler's post-injury average weekly wage. Under K.S.A. 44-510e Nistler's actual wages should be used to determine his post-injury average weekly wage. Although court generally agreed with the ALJ's general approach to determine Nistler's post-injury wage, court remanded the initial award as it did not provide sufficient facts to support the ALJ's finding of a 17.6 percet wage loss. Court also entered the disclaimer that it did not presume to give further direction to the board as to what formula or guidelines should be followed to determine Nistler's actual post-injury wage. The appropriate method should be left to the board, whose members have the expertise and experience to formulate a sound approach. The board remanded for further proceedings to determine Nistler's post-injury average weekly wage, his resulting wage loss, and permanent partial disability benefits.

STATUTE: K.S.A. 44-501, -510e, -44-511(a)(4), (a)(5), (b)(4)

CRIMINAL

STATE V. ANDELT
MARSHALL DISTRICT COURT – APPEAL DISMISSED

FACTS: Andelt, on parole for Nebraska felony, convicted in Kansas on plea to possession of methamphetamine. Criminal history put Andelt in category for drug abuse treatment, but district court imposed prison term, citing K.S.A. 21-4603d(f). Andelt appealed, arguing district court erred in not sentencing him to nonprison sanction of drug abuse treatment under Senate Bill 123 as provided by K.S.A. 21-4729

ISSUE: Sentencing and drug abuse treatment

HELD: Reading K.S.A. 21-4603d(n), it is reasonable to conclude the legislature intended exceptions to K.S.A. 21-4603d(n)’s mandatory imposition of drug abuse treatment program. A sentencing court is not required to impose a nonprison sentence, even if such a sentence is presumed, in certain circumstances, such as when a new felony is committed while the offender is incarcerated and serving a sentence for a felony or while the offender is on probation, assignment to a community correctional services program, parole, conditional release, or postrelease supervision for a felony. Here, no reversible error in district court's sentencing, and no appellate jurisdiction to further review Andelt's nondeparture sentence.

STATUTE: K.S.A. 21-4603d, -4603d(b)(1), -4603d(c), -4603d(d), -4603d(f), -4603d(f)(1), -4603d(i), -4603d(f), -4603d(n), -4705(f), -4721(c)(1), -4722, -4729, -4729(a)(1), -4729(c), 22-3717(d)(1)(C), 65-4124, -4159, -4160, -4160(a), -4161, -4162, -4163, -4164

SUFFICIENCY OF EVIDENCE, INEFFECTIVE ASSISTANCE OF COUNSEL, PROSECUTORIAL MISCONDUCT, SUBJECT MATTER JURISDICTION, AND MENS REA
IN THE MATTER OF D.A.
JEFFERSON DISTRICT COURT – AFFIRMED

FACTS: The pastor of a church in Perry entered at his church to find D.A. and N.A. sitting outside with various items of church property strewn around them. They fled. The pastor entered the church and observed extensive damage from vandalism throughout the church. D.A. admitted his participation to the pastor shortly after the incident. The boys were charged with burglary and criminal damage to property in excess of $25,000. Attorney Dennis Hawver was appointed to represent both boys. The Prosecutor expressed a willingness to dismiss the burglary charge against the boys in exchange for their stipulating to the criminal damage charges and each family agreeing to pay half of the church’s expenses from the vandalism. Hawver first communicated with the boys in a joint meeting with them and their families on the morning of the first appearance. By the end of the hearing, Hawver gave his business card to D.A.'s family wanted more time, so the court continued the matter. On Nov. 21, 2006. N.A. and his family agreed to accept the offer.

ISSUES: (1) Sufficiency of the evidence, (2) ineffective assistance of counsel, (3) prosecutorial misconduct; (4) subject matter jurisdiction and (5) mens rea
HELD: Court stated that property owners are presumed to know the value of their property. As pastor and administrator of the church, the pastor was charged with the care, oversight, and stewardship of the church’s property, and he had the authority to speak for the church as its agent regarding the value of church property. Court held that while D.A. complained about the foundation for certain aspects of the police officer’s testimony, taken as a whole, and viewed in the light most favoring the state, it is abundantly clear that the extensive damage throughout the church caused by D.A.’s vandalism easily exceeded the $1,000 necessary to support this conviction. Court found no conflict of interest in Hawver’s representation and D.A. failed to present evidence that he was denied effective assistance of counsel. Court stated D.A. presented neither argument nor evidence to question the integrity of the process from arraignment to adjudication and disposition based upon anything Hawver did or failed to do. Court found no duty on a prosecutor to ensure that a defendant has conflict-free counsel. Court held that only those children chronologically younger than 10 or older than 18 are not subject to the Juvenile Justice Code and there is no exception in the Revised Kansas Juvenile Justice Code for persons chronologically within the code’s age range but “developmentally” younger than age 10. Except as provided in K.S.A. 2007 Supp. 38-2347, the code considers only how long a child has been alive. Court held there is ample evidence from which the trial court could conclude that D.A. had the requisite intent to commit the crime of burglary.

STATUTES: K.S.A. 21-3110(13), -3201(b), -3715, -3720(a)(1); K.S.A. 22-3220; and K.S.A. 38-2302(j)(1), -2304, -2347

STATE V. GARCIA
SEWARD DISTRICT COURT – AFFIRMED
NO. 99,135 – NOVEMBER 26, 2008

FACTS: Officers observed Garcia driving 16 mph under the speed limit and weaving within his lane and onto the shoulder several times. Garcia had bloodshot eyes and reeked of alcohol. Garcia blew a 0.093 on the Intoxilyzer on his second try and nine minutes later blew a 0.104.

A jury convicted Garcia of felony driving under the influence of alcohol. The court sentenced him to a maximum of one year in the county jail since this was his third conviction.

ISSUES: (1) DUI, (2) jury instructions, and (3) opening statement

HELD: Court stated that the trial court used PIK Crim. 3d 70.02 in this trial and it informs the jury that if a test shows a blood alcohol level of 0.08 or more in the defendant’s blood, the jury can assume the defendant was under the influence of alcohol. Court held this jury instruction is an accurate statement of the law. Court also found no error in the trial court telling the defense counsel to comment about the evidence and not the weight of it in his opening statement because that is not a time for argument. Last, court held the trial court did not abuse its discretion when it granted the state’s foundation and relevancy objections to some questions asked the trooper by the defense.

STATUTES: K.S.A. 8-1005(b), -1567(a)(2), (3) and K.S.A. 60-419, -467, -401(b)

STATE V. HOFFMAN
GREELEY DISTRICT COURT – AFFIRMED

FACTS: Seven times over a period of several months, a Greeley County sheriff’s deputy climbed into a trash truck before it entered Lewis Hoffman’s rural homestead. Hoffman’s trash was picked up and taken to the county landfill, where two deputies sifted through it for evidence of drug activity. Hoffman’s dumpster is not visible from any public road, and a visitor must travel a quarter mile on his driveway, a private dirt road running through a fenced pasture, before reaching the dumpster. Just to get to the driveway, you have to drive more than two miles east from Tribune (population 835) on Highway 96. Based on what was found in these warrantless searches, officers obtained a search warrant and found substantial evidence that Hoffman had attempted to manufacture methamphetamine, among other drug-possession violations. The district court granted Hoffman’s motion to suppress the evidence against him and concluded that the officers were not justified in intruding on Hoffman’s property to search his trash.

ISSUE: Trash searches

HELD: Court recognized that other jurisdictions have concluded that a person never has a reasonable expectation of privacy in trash left out for collection by a third party, but that these courts have gone well beyond the holding and rationale of the U.S. Supreme Court’s holding in Greenwood, which emphasized the importance of public accessibility to the trash left out for collection. Court stated that given the importance of public accessibility to the rationale of Greenwood, court believed that those cases provide the most helpful guidance in reaching the correct result in Hoffman’s case. His trash was in no way accessible to the public. Given his rural setting, we conclude that the mere fact that he allowed a third party to haul his trash away did not eliminate his reasonable expectation of privacy in that trash. The district court properly held that the trash pulls at Hoffman’s dumpster violated the Fourth Amendment, and that violation requires that the evidence be suppressed because it was obtained by a warrant based on the illegal trash pulls.

DISSENT: Judge Bukaty dissented arguing that Hoffman had no reasonable expectation of privacy in his trash.

STATUTES: None

STATE V. HORN
JOHNSON DISTRICT COURT – AFFIRMED
NO. 97,872 – NOVEMBER 7, 2008

FACTS: Horn pled guilty to seven sex crimes with a 10-year-old. Departure hearing jury found aggravating factor of a fiduciary relationship on counts of aggravated sodomy and aggravated indecent liberties. On appeal Horn claimed: (1) no statutory authority for impaneling jury to consider upward departure factor when a plea has been entered; (2) fiduciary relationship is an unconstitutionally vague term, existence of a fiduciary relationship is not an appropriate factor for aggravated indecent liberties and aggravated sodomy because this results in lesser sentences for stranger molestation than family molestation, and trial court held no pretrial hearing to determine whether existence of a fiduciary relationship was a proper factor to consider in this case; (3) abuse of discretion to admit evidence of Horn’s sex crimes against victim; (4) Confrontation Clause violated by allowing video of victim’s statements to be played when victim had not testified about the crimes at the sentencing hearing; (5) jury instructions failed to guide and focus jury on aggravating factor; (6) judgment for acquittal should have been granted because insufficient evidence of a fiduciary relationship; (7) error to not require mitigating evidence to be submitted with the aggravating evidence; and (8) district court failed to make proper and required finding that aggravating factor was substantial and compelling.

ISSUES: (1) Departure hearing and guilty plea, (2) fiduciary relationship, (3) evidence of sex crimes, (4) right to confrontation, (5) jury instructions, (6) sufficiency of the evidence, (7) mitigating evidence, and (8) substantial and compelling aggravating factor

HELD: Reference to “trial jury” in K.S.A. 21-4718 does not limit ability of state to only ask for upward durational departures where not guilty pleas were entered and a jury trial was held to determine guilt or innocence.

The term “fiduciary relationship” in K.S.A. 21-4716(c)(2)(D) is not vague or overbroad. Horn’s second challenge to is for Legislature rather than the courts. Third, district court is not required to make...
pretrial analysis of whether a fiduciary relationship is a proper factor to be presented to the jury.

Under facts, no abuse of discretion in admitting evidence of sex acts between Horn and victim as evidence supporting the establishment of a fiduciary relationship between the parties.

Under facts, Horn’s constitutional right to confrontation not violated because victim was available for cross-examination in proceedings below and case law indicates confrontation requirements do not apply to post-conviction proceedings.

Under facts of case, a cautionary instruction should have been given, but error was not clearly erroneous.

Under facts, sufficient competent evidence supported the jury’s verdict. Motion for acquittal was properly overruled.

Horn was given every reasonable opportunity to present mitigating evidence, but chose not to do so.

Although district court did not specifically state at sentencing hearing that upward durational departure sentence was being entered because the fiduciary relationship was a substantial and compelling factor and better practice would be for sentencing court to do so, this rationale was expressed in court’s statements.

STATUTES: K.S.A. 2006 Supp. 21-4718(b)(7); K.S.A. 21-3504, -3506, -3516, -4716, -4716(b), -4716(c)(1)-(2), -4716(c)(2)(D), -4716(d), -4718, -4718(a)(4), -4718(b)(2)-(7), -4720, -4720(c), -4720(c)(1), 60-401(b), -405, -407(j) -455; and K.S.A. 2000 Supp. 21-4716

STATE V. J.H.
FINNEY DISTRICT COURT – AFFIRMED
NO. 96,770 – JULY 6, 2007

PUBLISHED VERSION FILED NOVEMBER 13, 2008
ISSUES: (1) Revocation of probation and (2) adult sentence
HELD: Under facts of case, substantial evidence at revocation hearing supported trial court’s conclusion that J.H. violated provisions of the juvenile sentence.
K.S.A. 38-16,126(b) is construed and interpreted. If trial court after hearing revokes the juvenile sentence, court is specifically directed to enforce imposition of the adult sentence previously ordered under K.S.A. 38-16,126(a)(2). District court did not have jurisdiction to consider sentencing alternatives.
STATUTES: K.S.A. 2007 Supp. 38-2364(b); and K.S.A. 21-3414(a)(1)(A), -4704, 38-16,126, -16,126(a)(2), -16,126(b)

STATE V. KIRK
MCPHERSON DISTRICT COURT – AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED WITH DIRECTIONS
NO. 98,876 – NOVEMBER 21, 2008
FACTS: Melvin L. Kirk drove a vehicle with windows tinted darker than allowed by Kansas’ law. A highway patrol trooper stopped Kirk’s vehicle to perform a glass-transparency test that revealed Kirk’s windows had a transparency of only 4 percent, far below the minimum legal transparency of 35 percent. While investigating the window tint, trooper smelled marijuana and air fresheners from within the car. Based on that, he detained Kirk until a drug dog could check further. Contraband was found, and Kirk was convicted of possession of cocaine with intent to distribute as a third offense and possession of marijuana with intent to distribute. The district court had denied his motion to suppress the contraband found in his vehicle.
ISSUES: (1) Motion to suppress and (2) subsequent drug conviction
HELD: Court stated that the district court made the factual finding that the trooper did smell marijuana odor coming from the vehicle, a finding that the trooper’s testimony certainly supports. Court held that based on the district court’s factual finding, the district court properly found that the trooper had probable cause to believe that drug laws had been violated, thus justifying a search of the vehicle’s passenger compartment. However, court held that a conviction for possession of narcotics in violation of the former K.S.A. 65-4127a couldn’t be used as a prior conviction under the present K.S.A. 65-4161, which prohibits possession of narcotics with intent to sell or distribute. Only past convictions for possession with intent to sell or distribute may be used to enhance a sentence under K.S.A. 65-4161. Consequently, court vacated Kirk’s sentence and remanded with directions to resentenced him for a severity level 2 drug offense.
STATUTES: K.S.A. 8-1522(a), -1749a; K.S.A. 22-2402; and K.S.A. 65-4127a, -4160, -4161

STATE V. LOGGINS
SHAWNEE COUNTY COURT – AFFIRMED
NO. 98,796 – OCTOBER 17, 2008
FACTS: Loggins convicted on pleas to felony theft charges. On appeal, he claimed district court erred in calculating his criminal history by accepting authenticated copies of computer printouts of court records from a Minnesota district court, and in ordering Loggins to pay Board of Indigent’s Defense Services (BIDS) application fee without considering Loggins’ ability to pay the fee and whether it would impose manifest hardship. He also claimed imposition of BIDS application fee under K.S.A. 22-4529 is unconstitutional.
ISSUES: (1) Criminal history, (2) BIDS application fee, and (3) constitutionality of K.S.A. 22-4529
HELD: A certified journal entry is best evidence of a prior conviction, but it is not the only permissible form of evidence to prove a defendant’s criminal history. Under facts of case, district court did not err in finding state proved existence of Loggins’ criminal history by a preponderance of the evidence.
BIDS attorney fees under K.S.A. 22-4513(b) and BIDS application fee under K.S.A. 22-4529 are compared. Given permissive language in application fee statute, district court is not required to make explicit manifest hardship determination on record to assess application fee.
District court’s sentencing order that Loggins pay BIDS application fee previously assessed but not yet paid was consistent with procedure in State v. Hatkevich, 285 Kan. 842 (2008).
STATUTES: K.S.A. 21-4715(a)-(c), 22-4504, -4513, -4513(b), -4529, 60-456

STATE V. MCGINNIS
ATCHISON COUNTY COURT – AFFIRMED
FACTS: Officers had reports of a stolen vehicle partially submerged in Independence Creek. While en route to that location, officers observed McGinnis traveling north on a county road and then turning into a driveway that provided access to Independence Creek. McGinnis parked his car and then walked to the creek. Officers saw a 12-pack in the front of McGinnis’ car and then approached McGinnis at the creek. McGinnis claimed he was looking for a fishing
spot, and that he did not know anything about the submerged car in the creek. McGinnis was obviously intoxicated. He failed various field sobriety tests and he was charged with felony driving under the influence (DUI) and transporting an open container.

ISSUE: DUI

HELD: Court rejected McGinnis’ argument that the arresting officer stopped and detained him without reasonable suspicion of criminal activity, thus making the stop illegal. Court held that because the initial contact between McGinnis and the arresting officer constituted a voluntary encounter, the district court did not err in denying McGinnis’ motion to suppress the evidence. Court found that based on the officer’s immediate observations, he possessed reasonable suspicion to detain McGinnis for further investigation of a possible DUI. McGinnis was not unlawfully stopped or detained, and the district court did not err in denying his motion to suppress the evidence.

STATUTE: K.S.A. 22-2402(1)

STATE V. MORRIS
POTTAWATOMIE DISTRICT COURT
REVERSED AND REMANDED
NO. 97,785 – NOVEMBER 21, 2008

FACTS: Morris convicted of aggravated indecent liberties. On appeal he claimed trial court erred in admitting allegations of Morris’ prior bad acts and uncharged crimes. He also claimed trial court erred in not granting a mistrial after state witness testified about her expertise in counseling children of sexual abuse in violation of order in limine to limit the witness’s testimony to that of a lay witness. Finally, Morris claimed he was denied a fair trial by prosecutorial misconduct

ISSUES: (1) Evidence of prior bad acts and uncharged crimes, (2) expert testimony, and (3) prosecutorial misconduct

HELD: Morris’ failure to make timely specific objections precludes appellate review of his evidentiary claims.

Order in limine was violated by prosecutor’s questions and witnesses’ answers and opinion testimony.

Prosecutorial misconduct denied Morris a fair trial. Detailed examination of misconduct, including prosecutor commenting on her personal opinion of defense witnesses’ credibility, suggesting jury to abandon commons sense, giving personal belief on matters outside the evidence, vouching for State of Kansas, referring to matters not in evidence, vouching for credibility of state witness, soliciting Morris’ opinion on victim’s credibility, buttressing credibility of state witness, and appealing to passion and prejudice of jury. Misconduct was gross and flagrant, prosecutor knew or should have known that she was violating rules of prosecutorial conduct, and evidence against Morris was not overwhelming. Determination to reverse for a new trial is reinforced by prosecutor’s violation of order in limine.

STATUTE: K.S.A. 22-3423(1)(c), 60-404, -455, -456, -456(b)(2)

STATE V. RICHARDSON
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED
NO. 98,572 – OCTOBER 24, 2008

FACTS: Richardson convicted of fleeing or attempting to elude a police officer, reckless driving, and driving while suspended. On appeal, he claimed district court erred in failing to instruct jury: (a) on the specific moving violations that formed the basis for the fleeing or attempting to elude conviction, (b) that reckless driving and driving while suspended could not be used as two of the five moving violations required to prove the fleeing or attempting to elude offense, and (c) that each of the moving violations constituted a lesser-included offense of fleeing or attempting to elude. Richardson also claimed that his convictions of reckless driving and driving while suspended were multiplicitous with his conviction of fleeing or attempting to elude, and that his fleeing or attempting to elude conviction was based on acts not alleged in the charging document. He further claimed the district court erred in denying Richardson’s request for new counsel, by imposing aggravated sentencing in the gridbox, and in assessing Board of Indigents’ Defense Services (BIDS) attorney fees.

ISSUES: (1) Jury instructions, (2) multiplicitous, (3) charging document, and (4) sentencing

HELD: PIK Crim. 3rd 70.09 is silent as to whether district court should define the moving violations for the jury when the defendant is charged with fleeing or attempting to elude a police officer, and no published decision is directly on point. Unpublished opinions examined. When a defendant is charged with felony fleeing or attempting to elude a police officer based on the commission of five or more moving violations, district court should identify and define in jury instructions the moving violations relied on by the state and supported by evidence at trial. Under facts, no real likelihood would have returned a different verdict if district court had properly defined the moving violations in this case, or if jury had been instructed to not consider reckless driving or driving while suspended as moving violations. Under strict statutory elements test, the five individual moving violations in this case are not lesser-included offenses of the crime of fleeing or attempting to elude a police officer.

Under Schoonover analysis, Richardson’s convictions were not multiplicitous because statutes upon which the convictions are based do not contain an identity of elements.

Richardson’s constitutional claim regarding the charging document has no merit. It informed Richardson of the charge against him, and the evidence at trial conformed with the charging document.

Under facts, no abuse of discretion in denying Richardson’s request for new counsel.

No appellate jurisdiction to consider alleged error in Richardson’s presumptive sentence. State concedes district court did not consider Richardson’s ability to pay BIDS attorney fees or the financial burden it would impose. Case remanded for compliance with Robinson.


STATE V. RISINGER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,218 – OCTOBER 24, 2008

FACTS: Risinger convicted of attempted indecent liberties with a child for his online conversations with a police detective who identified herself to Risinger as a 14-year-old. On appeal, Risinger claimed there was insufficient evidence to prove the attempt element of his conviction.

ISSUE: Overt act and sufficiency of intent to commit crime of indecent liberties with a child

HELD: Risinger engaged in many online conversations with a young woman whom he thought was 14 years old. The conversations all had a strong sexual content. He then left his residence after setting up a meeting with the young woman for the avowed purpose of attempting inappropriate and illegal sexual acts. He arrived at the residence, left his car, knocked on the door, going as far as he could toward completing his crime prior to discovering his child victim was fictional. Viewed in the light most favorable to the state, this conduct constitutes an overt act toward the commission of indecent liberties with a child, and provided sufficient evidence to support the conviction.

STATUTE: K.S.A. 21-3503(a)
STATE V. SNOW
JOHNSON DISTRICT COURT – AFFIRMED
NO. 98,549 – NOVEMBER 14, 2008

FACTS: Snow was convicted of burglary, theft, and criminal damage to property. The jury found aggravating factors supported an upward durational departure, including that Snow was not amenable to probation, posed a significant risk to the community, would more likely than not reoffend, and posed a risk of harm to the fact witnesses against him. The court imposed a controlling sentence of 92 months. The Supreme Court affirmed the sentence, finding that the aggravating factors were supported by substantial and compelling reasons.

ISSUES: (1) Prosecutorial misconduct and (2) sufficiency of the evidence

HELD: Court held that the prosecutor did not commit misconduct by asking the defendant if he had been charged with a 13-year-old complaining witness in an aggravated indecent liberties case. The court found no error in the prosecutor's conduct.

STATE V. SNEROD
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 97,818 – OCTOBER 17, 2008

FACTS: A jury convicted Sherrod of attempted aggravated indecent liberties with a child involving G.S. G.S. testified at trial concerning the way Sherrod touched her and the actions that constituted attempted aggravated indecent liberties.

ISSUES: (1) Prosecutorial misconduct and (2) sufficiency of the evidence

HELD: Court held that the prosecutor did not commit misconduct by asking the defendant if he had been charged with a 13-year-old complaining witness in an aggravated indecent liberties case. The court found no error in the prosecutor's conduct.

STATE V. TATUM
JOHNSON DISTRICT COURT – AFFIRMED
NO. 98,880 – NOVEMBER 26, 2008

FACTS: Tatum was convicted at a bench trial of cultivating marijuana and possession of drug paraphernalia. The district court denied Tatum's motion to suppress based on an illegal search and that his consent was involuntary. The district court found that although the initial voluntary encounter turned into an illegal seizure, Tatum's subsequent consent was the product of his own free will and was sufficient to purge the illegal detention.

ISSUES: (1) Search and seizure and (2) motion to suppress

HELD: Court held under the facts of this case, the agents' continued conversation with the defendant following his single denial of illegal drug activity was insufficient for the district court to determine that the voluntary encounter with the defendant transformed into a seizure. Court stated that the state bears the burden of showing that the defendant's consent to search was freely and voluntarily given. Voluntariness of consent to search is a question of fact to be determined from all the circumstances. For a consent to search to be valid, there must be clear and positive testimony that the consent was unequivocal, specific, and freely given without duress or coercion, express or implied. Court held that a bluff or misrepresentation as to the amount of evidence that law enforcement officers have against an individual will not render involuntary an otherwise voluntary consent. Also, knowledge of the right to refuse consent is not required for a finding of voluntariness, although this is a factor to be considered. Court concluded that the district court's determination that Tatum knowingly and voluntarily consented to the search of his residence was supported by substantial competent evidence, even though some evidence may have supported a different conclusion.

STATUTES: None.

STATE V. YENZER
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 98,800 – NOVEMBER 7, 2008

FACTS: Legal assistant and dental staff alerted police of Yenzer's outstanding warrant and scheduled dental appointment. Yenzer misidentified herself and ran when police attempted to apprehend her at the dental office. District court denied Yenzer's motion to suppress evidence obtained in violation of Health Insurance Portability and Accountability Act (HIPPA), finding no HIPPA violation. Yenzer convicted of obstruction of legal process. On appeal she claimed trial court erred in denying motion to suppress and in enhancing more of the factors relied upon by the sentencing court is substantial and compelling, the departure sentence will be affirmed.

STATUTE: K.S.A. 21-3102(1), -3701, -3715, -3720, -4603(f), -4716(c)(2), -4720(b)(4), -4721(d)
the sentence without prior criminal history proven to a jury beyond a reasonable doubt.

ISSUES: (1) Suppression of evidence and HIPPA and (2) sentencing

HELD: An issue of first impression in Kansas. Even if violation of HIPPA is assumed, that Act does not provide for suppression of the evidence as a remedy or sanction for violation of its provisions. Because Yenzer failed to assert a constitutional claim warranting suppression, district court properly denied motion to suppress.


STATUTE: K.S.A. 21-3808

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AND INVITATION FOR PUBLIC COMMENT

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