Six things you won’t hear from other 401(k) providers...

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  State Bar of Arizona
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  Indiana State Bar Association
  Iowa State Bar Association
  Kansas Bar Association
  Louisiana State Bar Association
  Maine State Bar Association
  Mississippi State Bar Association
  Minnesota State Bar Association
  Montana State Bar Association
  Nevada State Bar Association
  New Hampshire State Bar Association
  New Jersey State Bar Association
  New Mexico State Bar Association
  New York State Bar Association
  North Carolina Bar Association
  North Dakota State Bar Association
  Ohio State Bar Association
  Oklahoma State Bar Association
  Rhode Island Bar Association
  State Bar of Texas
  Vermont Bar Association
  Washington State Bar Association
  Wisconsin Bar Association
  American Immigration Lawyers Association (AILA)
  Association of Legal Administrators (ALA)
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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.
Brown Bag Ethics Seminars
Kansas Law Center
1200 SW Harrison St.
Topeka, Kan.

REGISTER EARLY!
Space is limited to 75 participants!
Go to http://www.ksbar.org

A KANSAS BAR ASSOCIATION TRADITION
Get ALL of your required professional responsibility hours in a three-week period!

Noon to 12:50 p.m.
Registration begins at 11:30 a.m.

WEDNESDAY, APRIL 1*
Ethical Concerns in Probate and Estate Planning
K. Kirk Nystrom, Attorney at Law, Topeka
This presentation will review considerations of who the client is, representing more than one client in probate and estate planning, dealing with diminished capacity in a client, and conflicts of interest in probate and estate planning.

WEDNESDAY, APRIL 8*
The Ethical Duty of Honesty: Exploring its Breadth and Limits
Dean Sheila M. Reynolds, Washburn, University School of Law, Topeka
This presentation will explore one of the core values of the legal profession, the duty of all lawyers to be honest. Although this value is incorporated in several ethical rules governing behavior of lawyers throughout their lives, the public often perceives the legal profession as dishonest. The discussion will include the reasons for that misperception, as well as examples of lawyers who failed to understand and abide by the widespread duty of honesty, subject to its limits.

MONDAY, APRIL 13*
Applying Professional Ethics to a Cost/Benefit Analysis
Hon. Patrick D. McAnany, Kansas Court of Appeals, Topeka
Forget the corrosive effects of unethical conduct on your moral character. Do the rewards of ethical conduct outweigh the risks or attending ethical conduct? Judge McAnany will examine: What are the rewards/risks? Is there an advantage attorneys give up by engaging in ethical conduct ... or is there an advantage gained by engaging in ethical conduct?

* Pending approval by the Kansas CLE Commission for 1.0 CLE credit hour, including 1.0 hour professional responsibility credit.
To Our Members:

The Kansas Bar Association would like to take this opportunity to thank our members for your continued dedication and support.

In these challenging economic times, we understand that the decision of whether to retain a voluntary membership can be a difficult choice.

That is why you can count on us while we continue to expand on our many services and programs designed to help save you money.

If you have not already done so, now is the perfect time to try out the newest version of the online legal research tool, Casemaker 2.1. Also, a record number of discounted seminars and handbooks are on tap for the coming year as is a wonderful joint meeting with the judiciary from June 17-19 at the Overland Park Sheraton Hotel.

The newly expanded Kansas Law Center offers numerous amenities to visiting lawyers and we’re rolling out several new affinity programs including one for office supplies later this spring.

As always, please do not hesitate to call upon us whenever you need assistance.

We look forward to serving you in the coming year.

Sincerely,

The KBA Staff
Trials are like that too. It’s the illusion that we recall. Winning or losing at trial is sometimes an illusion — that is — something that appears to be what it isn’t.

Recently I wrote about a case blowing apart when a witness changed or “corrected” his testimony during trial. Frankly I didn’t consider the outcome a loss but my wife, Carole, thought it certainly sounded like a loss. Being very supportive, she felt it was important that I tell about a case that I won. That certainly narrows the focus.

Once I was appointed to defend a young man on a charge of armed robbery. He was accused of relieving a convenience store of some of its money. He had supposedly threatened the clerk with a knife. The surveillance camera hadn’t been working and there was no one else in the store. Weeks after the robbery the clerk “identified” my client from a photo in a high school annual. The clerk's daughter attended the high school across the street from the store. Since the alleged robber appeared to be high school age they decided to search her last year’s annual. That is how the so-called eyewitness “found” my client.

At trial, the store clerk had testified that she looked at the annual from cover to cover. She said that she looked carefully at each page and first recognized my client when she reached Page 76. After that she had no doubt. None at all!

The defendant was acquitted by the jury after a trial that lasted several days. That win elevated my standing with my new firm, “Goodell Casey Brieman and Hardesty.”

Actually I wasn’t surprised at the acquittal because I had made what I considered to be one of the greatest closings ever heard in Shawnee County. I had carefully pointed out the inconsistencies in testimony and the so-called eye witness’s lack of credibility. When I finished talking about the presumption of innocence I had the jury’s attention riveted to our side. When the jury returned its verdict I had no doubt why they acquitted.

At that time there was no local rule about interviewing jurors after trial was concluded. Believing that I would hear confirmation of my skill, I struck up a conversation with the jury foreperson. What she said was that it was obvious that neither the prosecutor nor the defense counsel had really looked at the evidence. She explained that the jury went through the annual — page by page — just like the witness said she had done. Except the jury found very clear photos of the defendant at Pages 24, 37, 48, 53, and 62. Actually you couldn’t tell much at all from the photo on Page 76.

That created reasonable doubt. So my client was acquitted. To everyone else the case seemed to be a clear victory. It just seemed to me that a “win” should feel better.

After some time passed it dawned on me that what I had actually witnessed was an example of the greatness of the jury system. People without legal training were the ones who produced justice. We should always keep in mind that it is only partly about us as lawyers and judges. Don’t get me wrong. The illusion is also important.

Joni Mitchell expresses it this way in “Clouds”:

---

I’ve looked at life from both sides now,  
From win and lose and still somehow,  
Its life’s illusions I recall,  
I really don’t know life at all.

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Tom Wright may be reached by e-mail at twright21@cox.net or by phone at (785) 271-3166.
The Young Lawyer and Web 2.0

By Scott M. Hill, Hite, Fanning & Honeyman LLP, Wichita, KBA Young Lawyers Section president

I begin with two disclaimers. First, this is a “Young Lawyers” column, not a technology column, so I promise to keep the techie talk to a minimum. But, as you will see, I believe it is important to address the young lawyer’s interaction with the world via the “Web 2.0” technology. Hang in there, as I bet this relates to you. Second disclaimer: When I talk about technology and the “young lawyer,” I do not intend to exclude the growing percentage of seasoned lawyers who embrace technological innovations and the Web.

As a bit of background, we all know that technology surrounds each of us. I use my own life as an example. As I sit here, at my office desk, writing this article (on my personal laptop), I occasionally gaze at my work computer (it has dual monitors, of course) at my e-mail or check the latest updates on Facebook or the latest posting to one of my favorite blogs. I hear a buzz of an incoming text message from my Treo PDA. While I may be enamored with this sort of technology more than the average person, I imagine my use of these technologies is not all that different from most of my colleagues. But there is more to technology than these hardware devices that we all have become accustomed to. And I believe that it behooves each of us to understand this technology, so that we might work to incorporate it into our practice.

What is Web 2.0? Wikipedia states that this term “describes the changing trends in the use of World Wide Web technologies and Web design that aim to enhance creativity, communications, secure information sharing, collaboration and functionality of the Web. Web 2.0 concepts have led to the development and evolution of web-culture communities and hosted services, such as social-networking sites, video sharing sites, wikis, blogs, and folksonomies.” Whew, that was a mouthful. What does that mean? Well, in layman’s terms Web 2.0 is simply the next generation of the Internet. It describes how we interact with the Web and each other. While once the Web included at most static Web sites and two-way e-mail communication, Web 2.0 offers features, such as enhanced interaction though dynamic Web content and broad social networks, such as Facebook and LinkedIn.

Allow me to briefly describe where we have been and some of the new ways we can use the Web within our bar association and our practice.

As you read this article, chances are you have a physical copy of The Journal in your hands. While the KBA has an index of The Journal available in the “Members Only” section of its Web site (www.ksbar.org) and the substantive legal articles available through Casemaker, our membership has not yet indicated a need for Web access to The Journal. But times are changing. For instance, the KBA YLS newsletter is now available exclusively online (www.ksbar.org/members/sections/yls/newsletters.htm). I imagine in months to come we may see requests for online access to The Journal. Web 2.0, however, doesn’t stop with simple online access to articles. Web 2.0 includes interactivity within articles. It includes blogs (for those who don’t know, a “blog” is simply a person’s or group’s Web site that includes routine entries of commentary, pictures, and links, often in the format of an online diary). It includes the ability to comment on articles. It is within the interaction like these comments to articles that allow true communication between writers and readers. And you can already see Web 2.0 take shape in the legal community by performing a simple Google search for “legal blog.” The question for you is, do you or can you use this technology to advance your practice?

Networking was once conducted entirely in person. For bar associations, that meant physical meetings, face-to-face. And while I continue to strongly embrace the virtues and importance of face-to-face networking, Web 2.0 provides additional opportunity to achieve similar interaction. Many of you may already be a part of this culture, through Facebook, LinkedIn, or similar social or professional networking sites. But the virtues of networking (defined as “getting to know others”) within Web 2.0 isn’t limited to these sites. If you are one to share video over YouTube or photos through Shutterfly or Flickr, you have familiarity with Web 2.0. Again, the question for you is, do you or can you use this technology to advance your practice?

We at the KBA YLS have in fact tried to grasp Web 2.0 to advance our practice, through the recent launch of a Facebook Group, the “Kansas Bar-Young Lawyers” (e-mail me at hill@hitefanning.com if you have questions on how to join). Part of the goal of our bar association is to bring lawyers, who are often geographically spread out, together. Facebook offers each of us a unique way to connect to one another on a personal or professional level. It allows us the opportunity to make new connections, as well as reconnect with law school classmates or former colleagues. It is our hope that the Facebook group page will offer an additional resource to help our membership communicate. Please join us.

What is in store for the future? Is Facebook or its contemporaries/competitors the answer? Some believe that many of the sites offer avenues for purely social networking. And since we are a professional organization, maybe a new method of interaction may be appropriate. And about those blogs? Many believe blogs offer a far too public, yet far too informal approach to communication. The answer is that Web 2.0 is a movement or a trend. It doesn’t define a specific technology but instead an idea. Let us be the generation to bring technology and the Web to our practice. If you have ideas on how to bring Web 2.0 to our practice, I’d love to hear your thoughts.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.

www.ksbar.org
Why You Should Be a Fellow of the Kansas Bar Foundation - Part I

By Sarah Bootes Shattuck, Kansas Bar Foundation, president, Shattuck and Shattuck, Ashland

Here is a secret: I sorta nominated myself to become a member of the Kansas Bar Foundation (KBF).

Several years ago I had my malpractice insurance through ALPS. When it demutualized I had the option of being paid my initial contribution of $1,000 in 10 annual payments of $100 or of having the money paid to the KBF. I thought: “That’s a good group” so I designated the KBF. A couple of months later Linda Parks, who was then on the KBF Board of Trustees, nominated me to become a Fellow. Since the Foundation already had my money, maybe they felt obligated. Anyway, I signed up and I have loved being a Fellow ever since.

Lawyers become Fellows for different reasons. Recently I surveyed the Trustees of the KBF board and here is some of what I found.

We were encouraged by someone we respect.

Topeka lawyer Jim Wright told me about a lunch meeting with Bob Fowks, a former Washburn Law professor of his who was then working for the KBA. Bob talked with him about the Foundation and Jim said, “I joined that day.”

Sara Beezley, of Girard, told me: “I don’t remember if someone asked me or if I got a letter but I remember seeing the list of attorneys who were already Fellows and thinking that it was a very impressive, well-respected list. Those attorneys were all so proud of their profession and I felt the same way.”

Lawrence attorney Kathy Kirk was “directly approached by a friend. I had not really given it much thought before that time. When I found out the details of the Foundation I was very interested in how I could help. Becoming a member increased my interest ten-fold.”

We like to give back.

Susan Saidian, this year’s IOLTA chair, said, “I particularly enjoy working on the IOLTA committee as a way of maintaining our profession’s involvement in philanthropy in Kansas, especially with programs that benefit children.”

Terry Leibold, also of Lawrence, said, “I thought it was the right thing to do to support the Bar.”

Together we can do more.

John Jurcyk, our KBF president-elect, said he was looking for a different way to help those left behind. “As my law practice became more and more specialized and restricted, the opportunities for pro bono work became more difficult. Working through the KBF provides the vehicle to enhance the reputation of the Bar in some small way and to serve those less fortunate than the members of our profession.”

Amy Cline, of Wichita, was drawn to the Foundation because of “the collective charitable effort of attorneys.” While the individual contribution attorneys make in their communities is very important, Amy feels that combining our efforts through the KBF has a “greater impact” on the public’s perception of attorneys.

In March the Board of the Trustees invites Kansas lawyers to become members of the Kansas Bar Foundation. These lawyers are nominated by current members of the Foundation because we think (and hope) they support the KBF’s goals and/or they have expressed an interest in the Foundation. But, you don’t have to wait to be nominated. If you believe in what the KBF is doing, let us know.

We want You as a Fellow of the Kansas Bar Foundation.

The Kansas Bar Foundation has provided millions of dollars for public services, which have been instrumental in the following projects: providing legal advice and representation for senior citizens, the poor, and victims of domestic violence; providing mediation for the poor in discrimination cases; administering the KBA’s reduced fee and pro bono programs; and developing law-related education programs for youth. Learn more about becoming a Fellow by contacting Meg Wickham, public services manager, at (785) 234-5696 or e-mail mwickham@ksbar.org.
A Nostalgic Touch

Greensburg, Kansas, and Charley Herd

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

The Greensburg tornado is now forever committed to the Kansas history books. A category 5 tornado, it took 11 lives, and seriously injured 60 in just Greensburg, while leveling 95 percent of the city. Experts say it is also the first five classification since May 3, 1999, when an F-5 tornado ripped through Moore, Okla. Those same experts also tell us that the Kansas version was at least a mile wide, which was twice the width of the Moore tornado.

The devastation brought President George W. Bush to the city twice. The efforts of Steve Hewitt, city manager, earned him two trips to the White House, including being one of a handful of invited guests to Bush’s farewell address to the nation in January.

But if the name of Charley Herd, Esq., isn’t familiar to you, all that is about to change. You see, in a city of 1,400 people, Greensburg had just one attorney, Herd. And while with a disaster of the magnitude of Greensburg, there are countless everyday heroes, how the paths of Herd intersected with that city is a story worth retelling.

Naturally, Charley was raised in a town called Protection. Located in Comanche County, it was also the birthplace to another local, John Graue. But Graue and Herd were hardly contemporaries. John was a veteran of World War II, having served in the Pacific Theatre, then finished college and law school on the GI bill. Graue recruited Herd from Washburn University, where Herd graduated in May 1986. “My first day of work was Aug. 4, 1986. I was an associate with him until his retirement on Dec. 31, 1991, then took over his practice. John died five months later. When I came to Greensburg I was one of six attorneys. By January 2007, I was the only one left. The ironies of John and I moving from Protection to Greensburg separately, and then ending up together hasn’t been lost on me,” said Herd.

Charley met his wife, Jana Hall, while in law school. She was working for Goodell, Stratton, Edmonds, Palmer & Wright as a secretary.

And maybe it was dumb luck, or other forces were at play when on that fateful evening on May 4, 2007, Jana and their daughter, Melanie, were out of town, in Manhattan, attending Junior Day at K-State. Charley was at home with their other daughter, Lauren, when the tornado siren sounded. “Our house did not have a basement, so Lauren grabbed our dog, Shaztzi, and we went to a neighbor’s basement.”

“When the tornado came through, we huddled below the stairwell in the basement, Lauren clutching our dog. When we emerged from our neighbor’s basement, there was darkness. Flickers of lightning showed a landscape of utter devastation. No trees, no line poles, no houses, and no buildings. There were heaps of rubble and vehicles scattered in yards, some upside down. One of the first things I noticed was my pickup was in the neighbor’s yard, facing the opposite way, with its emergency flashers on. We decided the best place to go was the sheriff’s office, near my office. I walked to work most days during my 20 plus years of living in Greensburg. But without landmarks, such as light poles, houses, even the water tower was missing, it was a challenge finding the same route I could walk blindfolded before the tornado.

“As we headed that way, people pushed their way out of their homes to what was left of the street. It was like a scene from ‘War of the Worlds’ – people asking ‘have you seen so and so’ and most often, the answer was ‘no.’ When we finally made it to Main Street, we found emergency help from neighboring towns had already arrived – Kingman, Pratt, Dodge City. I was amazed they were already there, ready to help. My plan was to find a way to contact my brother, John, who lived in Protection and have him pick us up. We had just walked to a parking lot in Dillons, where they had assembled everyone. No one had phone service except one lady – her phone worked – she had service from Sprint. I called my wife and reassured her we were OK. And then, out of nowhere, I saw my

(continued on next page)
Charley Herd

(Continued from Page 9)

brother’s pickup truck – he was already there! Shaztzi, Lauren, and I jumped in and spent the night at my Mother’s house in Protection.

“Officials quarantined Greensburg for three days after the tornado to clear streets and look for injured. For those days, I was not able to inspect my office and assess damages until the quarantine was lifted. My office was in the Greensburg State Bank building. The storm collapsed the south wall into the office area. File cabinets, desks, and credenzas were covered with three layers of brick and mortar. This kept records from being scattered and contained them in the office area. Heavy equipment was needed to remove the larger pieces of wall. The rest was removed by hand so that records were not damaged during the search.

“Friends helped me remove debris and gather records. Records were placed in storage at a nearby town. Records lost were destroyed by water, debris, and mold. Jana and I discussed moving to the Lawrence – Topeka area. In the end we decided to remain in Comanche County.

“I had an established client base there. The children were accustomed to small towns and small schools. We moved to Coldwater, the county seat, in part because it is the county seat, but also as a gesture to clients in Kiowa County that I was trying to stay reasonably close.”

And what about the support from others? “The most humbling part of the experience was the outpouring of support from the lawyers and judges. Then-KBA President David Rebein contacted me frequently. He traveled from Dodge City to Coldwater to consult about my plans. He helped me inspect potential office locations. The KBA gave me money to help set up a new office. If I tried to list all of the lawyers who called, offered support, helped me and my family, I’m afraid I would inadvertently leave someone out. Leslie Hess, attorney from Hays, gave me some furniture from her former office in Dodge City. John Bird, another Hays lawyer, was also very helpful. I did not know Mr. Bird before the tornado.

He arranged, through the Ellis County Bar, to purchase a laptop computer for me. The laptop was invaluable during the period prior to establishing a new office.”

Judges in the 16th Judicial District gave him latitude to regroup on pending cases, extending deadlines, copying files as needed. “Administrative Judge Daniel Love called frequently after the tornado, not to monitor my cases, but to offer help and encouragement. Judges Leigh Hood, and Van Hampton helped me in countless ways. So did Judge Bob Schmisseur of the 30th Judicial District.”

“In October 2007, I formally reopened my office in Coldwater. Jana and I bought a house across the street. Things are going well.” So, for the record, Charley Herd is open for business. Box 428, Coldwater, KS 67029. (620) 582-2020. If you call his office, you’ll likely reach his secretary. She has another title — his wife, Jana.

About the Author

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

Mark Your Calendar!

Joint Judicial Conference &
Kansas Bar Association Annual Meeting

Working Together for Professional Excellence

Wednesday, June 17 thru Friday, June 19
Overland Park Sheraton Hotel
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.

Please return by March 15, 2009, to:

KBA Member Services Director
1200 SW Harrison St.
Topeka, KS 66612-1806
Fax (785) 234-3813
Changing Positions

Joseph C. Baca has joined the Sumner County Attorney’s Office, Wellington.
David D. Belling and Natalie K. Randall have joined the Ford County Attorney’s Office, Dodge City.
Jill Bremer-Archer has joined Adoption Law LLC, McPherson.
Tracy L. Broderick has joined Fidelity National Title Group, Omaha, Neb.
Mark D. Dodd has joined the Prairie Band Pottawatomie Nation, Mayetta, as general counsel.

Brian P. Duncan has joined Case, Moses, Zimmerman & Wilson P.A., Yates Center.
Carly E. Farrell has joined the Law Office of Edward C. Gillette, Kansas City, Kan.
L. Stephen Garlow has joined Quintiles Transnational Corp., Overland Park.
Kari M. Gilliland, St. Francis, was sworn in as Cheyenne County attorney.
Kenton T. Gleason, Jetmore, was named a district magistrate judge at the Hodgeman County District Court.
Chelsea S. Herring has joined McNearney & Associates LLC, Overland Park.
Curtis N. Holmes, John A. Oliveros, and Peter C. Robertson have joined Crow Clothier & Associates, Leavenworth.
Gary R. House has been appointed as district judge for the 14th Judicial District, Div. 3, Independence.
Judy Y. Jewsome has joined the Kansas Corporation Commission, Topeka.
Kevin M. Johnson and Mark E. McFarland have been elected as shareholders and directors at Wallace, Sanders, Austin, Brown & Enoch, Chtd., Overland Park.
Michael L. Leyba III has joined the Seward County Attorney’s Office, Liberal.
Christopher M. Magana has joined the 18th Judicial District Juvenile Dept., Wichita.
Michael J. Marsh has joined AMG Services Inc., Overland Park.
Joshua D. Mast has joined the Kansas Health Policy Authority, Topeka.
Timothy P. Matas has joined the Platte County Public Defender’s Office, Columbus, Neb.
Nancy J. Morales Gonzalez has joined the Social Security Administration, Kansas City, Mo.
Paul M. O’Hanlon has joined Leverage Law Group LLC, Kansas City, Mo.
Julie F. Oswald has joined the Jackson County Circuit Court, Div. 11, Kansas City, Mo., as a judicial law clerk.
Sylvia B. Penner has joined Pleeson, Gooing, Coulson & Kittch LLC, Wichita.

Justen P. Phelps and David A. Vinduska have joined the Sedgwick County District Attorney’s Office, Wichita.
Christopher A. Pittman has joined Schlee, Huber, McMullen & Krause P.C., Kansas City, Mo.
Josh A. Pollak has joined Minter & Pollak, Attorneys at Law, Wichita.
Kyle R. Ramsey and Trevin E. Wray have joined Holbrook & Osborn P.A., Overland Park, as associates, and Mark W. Stafford has joined the firm as of counsel.
Megan J. Redmond has joined Shook Hardy & Bacon LLP, Kansas City, Mo.
Keli N. Robertson has joined Jenkins & Kling P.C., St. Louis.
Jason P. Roth has been elected as partner with Sanders Conkright & Warren LLP, Overland Park.
Thomas K. Ryan has been named a district court judge for the Johnson County District Court, Div. 17, Olathe.
Mark A. Simpson has joined the Douglas County District Attorney’s Office, Lawrence.
Christopher P. Sobba has been named a shareholder with Shughart, Thomson & Kilroy P.C., Kansas City, Mo.
Caleb Stegall has joined the Jefferson County Attorney’s Office, Osakaloo.
Gaye B. Tibbets has been named a partner with Hite, Fanning & Honeyman LLP, Wichita.
Warren P. Wade has joined Legal Aid of Western Missouri, Kansas City, Mo.
John L. Waite III has joined Carnahan Evans Cantwell & Brown P.C., Springfield, Mo.
Randall J. Wharton has joined South & Associates P.C., Overland Park.
David L. Zeiler has joined S&T Enterprises: Commercial Div. LLC, Blue Springs, Mo.

Changing Locations

Cindy L. Cleous has moved to 129 E. 2nd St., Wichita, KS 67202.
Billam & Henderson LLC has moved to 110 N. Cherry, Ste. 200, Olathe, KS 66061.
Stephen P. Doherty has started the law firm of, Hoffmeister, Doherty & Webb LLC, 13200 Metcalf Ave., Ste. 230, Overland Park, KS 66213.
Garretson, Webb & Toth LLC has moved to 105 E. Park, Olathe, KS 66061.

Robert K. Weary Award

The Board of Trustees of the Kansas Bar Foundation established the Robert K. Weary Award in 2000 to recognize lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.

Despite his objection, Bob Weary was selected as the initial recipient of the award in recognition of his decades of service to his community, the Kansas Bar Foundation, and the legal profession in Kansas. Sadly, Mr. Weary passed away in early 2001.

In 2008, this prestigious award was presented to Judge Wesley E. Brown. He was honored for his dedication to fostering the welfare, honor, and integrity of the Kansas legal system and to enhancing public opinion of the role of lawyers in our society.

Nominations for the Robert K. Weary Award should be submitted to Jeffrey Alderman, KBF Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, March 27, 2009.
Members in the News (continued)

Bridget A. Schell has started her own firm, Schell Law Firm LLC, 105 E. Park St., Olathe, KS 66061.

Robert E. Shaver has moved to 8200 E. Thorn Dr., P.O. Box 782110, Wichita, KS 67278-2110.

Bryan W. Smith, Attorney at Law LLC, has moved to 2300 S.W. 29th St., Ste. 100, Topeka, KS 66611.

Swanson Midgley LLC has relocated to Plaza West Building, 4600 Madison, Ste. 1100, Kansas City, MO 64112-3043.

L. Dean Wilson Jr. has started his own firm, Wilson Law Firm, 610 S. Pearl Ave., Joplin, MO 64801.

Miscellaneous

John E. Angelo, Wichita, was installed as vice chair of the International Legal Affairs Committee at the Association of Corporate Counsel’s Annual Meeting in Seattle.

Holly A. Dyer, Wichita, is one of the founding members of the Women’s Advisory Council for the University of Kansas Law School.

John F. Hayes, Hutchinson, was awarded the Kahrs Lifetime Achievement Award by the Kansas Association of Defense Counsel.

Donald F. Hoffman, Hays, has become a fellow of the American College of Trial Lawyers.

Murray, Tillotson & Wiley Chtd., Leavenworth, is now Murray, Tillotson & Burton Chtd.

Kelly J. Rundell is the new president and Linda S. Parks is the new president-elect of the Wichita YWCA, which operates the Women’s Crisis Center.

Mikel L. Stout, Wichita, received the 2008 Distinguished Alumni Citation from the University of Kansas School of Law for his exemplary service to the legal profession.

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.

Obituary

Eugene W. Hiatt

Eugene W. Hiatt, 91, of Topeka, died Dec. 31. He was born Sept. 21, 1917, in Kansas City, Kan., the son of Charles and Amelia Jane (Walters) Hiatt. Hiatt was a 1935 graduate of Argentine High School in Kansas City, where he was class president and valedictorian as well as an Eagle Scout. He was a member of the Sigma Alpha Epsilon Fraternity at the University of Kansas, graduating in 1940. He served in the army Air Corps on Gen. Eisenhower’s HQ staff in England during World War II, attaining the rank of captain before receiving an honorable discharge.

Hiatt attended law school at night at the University of Missouri-Kansas City and was an attorney in private practice in Topeka for more than 50 years before retiring at the age of 88. He was a longtime member of both the American Legion, which he served as Kansas state commander, and the Kansas Republican Veterans. He served as a member of the Washburn University Board of Regents and was a lifetime member of the Kansas Bar Association.

Survivors include his wife, Geraldine V. Smith, of the home; two sons, Roger, Kansas City, Mo., and Robert, Topeka; and four grandchildren. He was preceded in death by his two brothers, Elmo and Clifford.
Women, Addiction, and Recovery

By Anne McDonald, Kansas Lawyers Assistance Program commissioner, Kansas City, Kan.

“I got my life back.” “I’m more willing to take risks.” “I’m a more authentic person, less fearful.” “It opened me up to another way of living.” “I learned to take responsibility for my own life and not blame others.” When I asked some women who had addressed their own alcoholism, that is what they said about being in recovery. “Being in recovery” — what does that mean? It means that someone in the grip of an addiction has admitted it, dealt with it, and no longer uses the addictive substance. Most believe they remain addicted so they don’t use the words “cured” or “used to be”; they say “in recovery.”

When I asked them if they thought alcoholism affected women differently than men, they said “Yes And no.” In one sense addiction is addiction and gender doesn’t make the condition clinically different. And there is strong evidence of a genetic component, which can affect both genders. (That was the “no.”) But in another sense (the “yes”) they have observed certain differences. There is some empirical evidence that women in general get drunk faster when they drink, and that the harmful medical effects of alcohol abuse show up sooner. The women I spoke with thought that women were often more secretive about their drinking — and about their recovery. They speculated that in the legal profession, women still think they have to excel and cannot show any chink in their armor, so to speak. One woman said, “I think also that women drink because of self-esteem, confidence issues, trying to mask that by drinking,” and another woman said, “There’s often something from the past that haunts the person, something unresolved.” Women are sometimes viewed as more emotional than men but ironically, most of the women thought that female alcoholics often have a hard time getting in touch with their emotions. All believed that though women in recovery ought not isolate themselves, it was a distinct benefit to attend a women’s group, or at least talk with other women about these issues.

The two most well-known addictions in the legal profession are alcohol and drugs, but we know there are many more and when I refer to alcoholism, I’m using it as shorthand for all of them. Another caveat: We don’t always realize that the people who live — or work — with an alcoholic are affected too and can become addicted to the emotions and attitudes that arise from that situation. They too can be in recovery.

And let me make clear as well that lawyers (and judges) may need assistance for any number of conditions or situations, not just addiction. Men and women lawyers may be afflicted with grief or depression or a medical condition like diabetes, or advancing dementia. The Kansas Lawyers Assistance Program (KALAP) Commissioners and staff are willing and eager to help in all these situations. Some new lawyers have recently been appointed to the KALAP Commission: Carol Ruth Bonebrake, Topeka; Hon. Karen Humphreys, Wichita; and Lara Blake Bors, Garden City. They join Tom Kowalski and Sue Dickey, Olathe; Don C. Staab, Hays; Barry Gunderson, Minneola; Jack Focht and The Hon. Cliff Ratner, Wichita; Wayne Hundley, Topeka; and Anne McDonald, Kansas City, Kan.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in the Kansas City, Kans. Municipal Court and in the Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a former chair of the KBA Committee on Impaired Lawyers and has been a KALAP Commissioner from its inception.

1. Until recently, very little was known about the effects of alcohol on women; it was simply assumed that they were the same as in men. I have only just begun to learn how alcohol affects women differently from men. Physiologic research shows alcohol is not oxidized as efficiently in women as in men. Possibly because of this, women appear to suffer the physical consequences of steady drinking earlier than men. http://www.njalap.org/ForWomenOnly/WomenandAddiction/tabid/77/Default.aspx.

2. During the last decade, the legal profession began facing up to a crisis of chemical dependency problems. Studies indicate that lawyers engage in higher-than-average drug and alcohol abuse, affecting from 15 percent to 18 percent of the profession, compared with 10 percent of the general population. The impact on clients can be devastating when lawyers miss filing deadlines, spend money held in trust, or are asleep at the switch in trial. Disciplinary bodies discover that chemical dependency problems are at the root of 40 percent to 70 percent of complaints about lawyers, says New York state Chief Judge Judith Kaye, president of the Conference of Chief Justices. http://www.abanet.org/lisd/stulawyer/dec03/alcohol.html.

The vast majority of American law students share a relatively universal first-year curriculum. Generations of lawyers have shared a similar introduction to legal education. The practice of law, on the other hand, has changed dramatically since the introduction of the traditional first-year curriculum. The gap between education and practice may provide insight into a central question facing legal education: Is it time to change the approach? In this essay, I propose that American law schools use recent changes in the curriculum at Harvard as an opportunity to explore introducing administrative law, international law, and more skills instruction into the first year.

In 1870, Christopher Columbus Langdell became the dean of Harvard Law School. Langdell radically changed the approach to legal education by creating a three-year curriculum taught by a full-time faculty. Langdell’s influence on legal education did not end with institutional changes. He also divided the curriculum into defined courses of study. These courses, to the chagrin of a century of law students, ended with final examinations. Traditionally, the first-year curriculum has been comprised of a combination of six courses—contracts, torts, criminal law, civil procedure, property, and constitutional law. This lineup is the legacy of Langdell’s innovations.

Although the Langdellian approach to legal education began at Harvard, the school recently made changes to its first-year curriculum. In an effort to create a curriculum representative of modern legal practice, Harvard chose to slightly reduce class time devoted to the traditional core subjects. As a result, the school now includes small courses introducing administrative and international law to first-year students.

As Harvard’s changes suggest, the traditional bedrock courses may no longer be adequate foundations for the complexities of today’s legal practice. First, administrative and regulatory law was essentially nonexistent when the traditional 1L course of study was instituted in 1870, and yet, in modern practice, administrative agencies and regulatory law now intersect with many areas of law. A number of my professors have stressed the importance of taking administrative law. I have come to realize that administrative law affects most areas of practice on some level. The Social Security Administration, the Department of Labor, the Department of Health and Human Services, the Environmental Protection Agency, the Securities and Exchange Commission, and the modern Internal Revenue Service, and the rules and regulations these agencies promulgate, are just the more familiar examples of the prominent place that administrative law now occupies in modern legal practice. The increasing prominence of regulatory agencies in our legal system suggests that administrative law should be formally included in the first year.

Second, international law now occupies a prominent place in modern legal practice. Before World War II, international law was primarily limited to the principles and treaties governing the relationships between sovereign states. Following the war and the creation of the United Nations, international law began to address new areas of law.

Today, economic globalization is central to the modern role of international law. In the age of instant digital communication, the law of international business is becoming increasingly relevant to Kansas businesses. For example, a recent press release from the governor’s office noted that “today, over 50 percent of the airplanes flown in the world are made in Kansas.” Furthermore, a 2007 report by the Kansas Department of Labor indicates that Kansas’ foreign exports totaled $8 billion in 2006. Given the increasing role of international business transactions in regional economies, it may be time to introduce the basic international legal order to first-year students across the country.

As a final consideration, it may also be time to tweak approaches to existing classes in order to increase the amount of instruction in legal skills. Certainly, the addition of legal research and writing courses to the first year is a fundamental source of skills instruction. It may be time, however, to increase the level of practical instruction within the remaining foundational first-year courses.

Legal education has already learned the importance of practical skills-oriented instruction. This is apparent from the real-world types of assignments students often experience in upper-level courses. I think professors would find beginning students excited by the opportunity to draft a basic contract, write a civil pleading, or answer a criminal complaint.

In conclusion, the first-year curriculum gives students a foundation in substantive law and the tools to build upon that foundation in future courses. However, the curriculum remains largely unaltered in approach since its 19th century introduction. There is neither a need, nor a compelling reason, to abandon the case method or Socratic styles of teaching. However, the time is ripe to recreate the first-year curriculum in a way that both mirrors the modern practice of law and introduces students to the specialized skills necessary to navigate within it.

### About the Author

Travis Turner received his Bachelor of Arts in philosophy from St. Louis University. He is in his third-year at Washburn University School of Law, where he has twice participated in the Philip C. Jessup International Law Moot Court Competition. Turner plans to graduate in May 2009.

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2. Id. at 9-11.
4. Id.
Law Practice Management Tips & Tricks

The Organized Lawyer

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

When I told a colleague that I had just bought “The Organized Lawyer” by Kelly Lynn Anders, he questioned, “Is it satire?” Looking around my office at a spread of documents on the floor and a desk only an archaeologist could love I muttered, “I sure hope not.”

Anders, associate dean for student affairs at Washburn University School of Law, joins a growing chorus of attorneys concerned about the impact of poor personal management and business skills on the profession. She writes, “Attorneys are regularly sanctioned for misdeeds that can be traced back to disorganization, such as commingling of funds, the failure to produce records to opposing counsel, late court filings, being inaccessible to clients, and seeming ill-prepared to represent clients during hearings.”

“The Organized Lawyer” is her attempt at drawing attention to the issue and providing attorneys with a means of finding their own system to better organize our hectic lives. Anders begins with a brief test for self-evaluating personal organizational style. Questions about current behavior aim at helping the reader see objectively how they view, store, and retrieve information. My own self-analysis revealed that my tendencies overlap several categories. The “Stacker” in me has piles of documents on floor and desk organized by issue, but my current project is spread out on the desk so I can see and touch everything at once — true “Spreader” behavior. My “Free Spirit” has added “The Organized Lawyer” to a bookshelf overrun with titles about a broad range of seemingly unrelated topics. Finally, my inner “Packrat” is trying to hold the line against a corner of my desk where personal trinkets threaten to break loose into my “professional” zone. You too will probably discover there are pieces of you scattered between her categories but one set of habits will be closest and personalize the framework for Anders’ chapters on office and desk arrangements, filing, finances, and calendaring.

The most dramatic advice offered by Anders comes with her guide to getting through the first day and week. I went through a “first day” with David Allen’s “Getting Things Done” and am still scarred at the sight of an inbox piled to three feet awaiting my two-minute next actions. Anders’ approach is a more practical work study.

Clear the entire surface of your desk but for your phone, a notepad, and your computer. Every file, paper, tool, and gizmo goes in a box that will sit at your feet for a week. As you work through the week pulling items from the box, you document on the notepad what was removed (and returned back to the box). By the end of a week, you have the serenity provided by a clear work surface combined with detailed knowledge about what items deserve priority space in a metal step-file holder that will become your office’s smooth-running Union Station.

I had undergone this system a few years back when I moved offices and recall it working well. Everything of importance has long since been worked, while what was left in the boxes are the unimportant distractions that had cluttered my prior office. As a beginning step, I find this a much better approach to establishing the organizational habit than other systems that require a decision on each item immediately. Where I still struggle with Anders’ system is figuring out how to apply it daily going forward from the first week.

She does a good job of explaining her own folder system and wisely recommends that we choose our personalized system carefully. However, some may want a bit more explanation of what each day might look like in the first weeks and months of their new organizational habits. As she says in an interview with The Topeka Capital-Journal in December 2008, “Organization is about you setting rules that you are going to stick with.” Supplementing “The Organized Lawyer” with other helps like Leo Babauta’s “Zen Habits” (zenhabits.com) can help ensure your new habits stick.

The second half of “The Organized Lawyer” focuses on extending application of her system beyond the office to home and mobile offices. My only complaint would be that their tone seems to feed the view that a 2,200-billable-hour week is inevitable (it is not). On the whole, Anders has put out one of the best books on organization for lawyers by a lawyer. Look for it in the nonfiction section of your bookstore.

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.
Journals and treatises have recommended that law firms appoint one or more of their partners as “in-house counsel” for purposes of giving legal advice to lawyers and other professionals within the firm. One purpose for designating a law firm counsel is to help preserve in-house communications under the attorney-client privilege. Just like other clients, lawyers should feel free to consult with an attorney for the purpose of obtaining legal advice on decisions and actions to be taken by the lawyer. The January 2009 edition of this column addressed this issue from the standpoint of the Model Rules of Professional Conduct, based on a recent ABA Ethics Opinion.

Another recent development has helped to refine this issue, this time from the standpoint of the rules of discovery. A Louisiana federal court issued an opinion which includes an in depth analysis of the in-house law firm privilege as it relates to production of documents. In *In re Vioxx Products Liability Litigation*, the court did not depart from generally recognized law; but the decision encapsulates in one place a number of legal principles, particularly related to the interface between in-house counsel and electronic discovery.

From this decision, several practical principles emerge. These principles should guide not only lawyers dealing with in-house law firm counsel, but also any dealings between lawyers and clients:

1. Law firms should designate an in-house lawyer as “counsel” to the firm, preferably in advance of the dispute or issue which causes the consultation.

2. Communications between a lawyer and his in-house counsel (or a corporate employee and his corporate counsel) can be confidential under Rule 1.6, and privileged under the attorney-client privilege. For lawyers consulting law firm in-house general counsel, no client consent is required in order to seek this consultation, even if it involves the disclosure of client confidences.

FOOTNOTES


4. Rule 5.1(a), KRPC, Comment (3).

5. Rule 1.6, KRPC, Comment: “Lawyers in a firm may, in the course of the firm’s practice, disclose to each other information relating to a client of the firm, unless the client has instructed that particular information be limited to specified lawyers.”

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3. In order to maintain the privilege, the primary purpose of the consultation must be to seek and obtain legal advice, and not personal or business advice. This is because only legal communications from or to in-house counsel are protected by the privilege. As with any client, the fact that a lawyer was involved with a transaction does not automatically attach the privilege to all communications with the lawyer. The burden to establish this purpose will be on the lawyer seeking to rely on the privilege.

4. Thus, when consulting with in-house counsel, “clients” (including clients who are lawyers) should refrain from mixing business discussions with legal advice. In an e-mail context, this means keeping e-mail chains separate.

5. Separating “legal advice” e-mail chains from “business decisions” e-mail chains will also help avoid the risk that copies of privileged messages will inadvertently be sent to persons outside the attorney-client relationship — a result that could damage or destroy the privilege.

6. The fact that blind copies of an e-mail were sent to in-house counsel is itself a privileged communication, which need not be disclosed.

7. When documents are sent (for example, as attachments to e-mails) for review by lawyers and nonlawyers, there is likely no privilege. For the privilege to attach, the primary purpose of the transmittal must have been the obtaining of legal advice from the lawyer regarding the attachment.

8. On the other hand, an e-mail that transmits an attachment to counsel for edit or comment, but which is copied to others in the firm or corporation may well maintain the privilege, since it may indicate that the copy was sent merely to inform the “others” that legal advice was being requested from counsel.

9. Documents that are privileged maintain their privilege even if they are attached to e-mails, which are not privileged — unless they are sent to persons outside the attorney-client relationship.

10. In-house counsel should make it clear to the lawyer consulting him that counsel represents the law firm (or corporation, as the case may be), and not the individual lawyer. In-house counsel may need to disclose to firm management the information received from the lawyer (or corporate employee) consulting him.

11. Once a dispute arises between the law firm and the client, the work product doctrine should also apply to protect in-house communications.

In summary, the attorney-client privilege is a valuable protection accorded to all clients, even “clients” who are lawyers practicing with a law firm.

With the guidance provided by this recent case, care should be taken to maintain that privilege, particularly as it relates to e-mails and other electronic communications.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP, Overland Park. He is a member of the Kansas Judicial Council and the Kansas State Board of Discipline for Attorneys. He is chairman of the KBA Ethics Advisory, Johnson County Ethics & Grievance, and Judicial Council Civil Code committees.

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I. Introduction

Yogi Berra has been reversed in part. In the legal arena, sometimes it is over before it’s over. But another famous Yogi-ism – “when you come to a fork in the road, take it” – remains controlling. In Cooke v. Gillespie, the Kansas Supreme Court ruled that a potentially dispositive statute of limitations defense had been lost by failure to cross-appeal or brief the issue in a previous appeal. While Cooke was the last installment in unusually protracted litigation that had continued for 20 years, many cases present at least the potential for multiple appeals. The opinion in Cooke sounds an alert that parties who are satisfied with the outcome in district court may nevertheless need to cross-appeal to avoid losing important rights if the case is remanded. This article examines the mandatory cross-appeal rule and its implications in practical circumstances, including discussion of three questions: (1) Is a cross-appeal necessary when the appellee is 100 percent satisfied with the judgment? (2) Is conditional cross-appeal of issues that are moot if the judgment is affirmed mandatory? (3) Is interlocutory cross-appeal permitted or mandatory or neither?

II. Factual Background of Cooke v. Gillespie

Cooke was one of a series of related cases in which opposing factions made their way six times to the Kansas Supreme Court, three times to the Kansas Court of Appeals, and once to the Tenth U.S. Circuit Court of Appeals. One of the cases settled in 2002. Cooke, as trustee of the Polly Townsend Trust, and Gillespie, as executor of the Warren B. Gillespie Estate, had been represented by the same law firm and shared the settlement 50-50. But they were in dispute over a portion of the settlement proceeds set aside for reimbursement of litigation expenses. Their law firm filed an interpleader action and paid the funds into court. The Gillespie Estate claimed the funds under a number of theories, including oral and written contract, the “common fund” theory, and unjust enrichment or quantum meruit. Cooke claimed the funds for the Townsend Trust, and moved for summary judgment, contending that Gillespie was entitled to an equitable share of the litigation expense reimbursement on “common fund” and unjust enrichment or quantum meruit theories. The court of appeals remanded for a new trial without mentioning Cooke’s statute of limitations defense. Cooke’s appellee’s brief had noted that she asserted a limitations defense, but that it was not reached by the district court and was not an issue on appeal.

On remand Cooke again asserted the statute of limitations defense. This time, the district court ruled that limitations was not a valid defense because Gillespie’s claims were similar to claims made in a previous case that had been dismissed for lack of jurisdiction. Therefore, the “saving” statute, K.S.A. 60-518, avoided the bar of limitations. The court then determined that the equitable distribution of the interpled funds would be $33,000 to Cooke, as trustee of the Townsend Trust, and $223,000 to Gillespie, as executor of the Gillespie Estate. Cooke appealed, contending that the trial court’s ruling on the statute of limitations was erroneous.

The Kansas Supreme Court declined to consider Cooke’s argument. The Court said that the limitations defense had been waived and abandoned as an issue by failure to raise it in response to Gillespie’s previous appeal. This decision is notable not just for the ruling made, but also because the Court itself raised the issue of waiver or abandonment in the prior appeal. No such argument was made in the appellee’s brief. Thus, an issue once waived or abandoned on appeal cannot be revived, and the resulting legal bar cannot be waived by the opposing party’s failure to assert it.

III. Controlling Legal Principles

The Court’s analysis in Cooke begins with K.S.A. 60-2103(h), which provides that when “an appellee desires to have review of rulings and decisions of which such appellee complains,” the appellee shall timely “give notice of such appellee’s cross appeal.” The Court cites numerous cases holding that, in the absence of a notice of cross-appeal complying with the statute, rulings adverse to the appellee cannot be considered on appeal. The Court also cites the established principle that “a second and direct appeal — by the original appellee — cannot be used as a substitute for a cross-appeal as directed by the statute.”

The right of appeal is not guaranteed by the state or federal constitutions and is conferred solely by statute. Therefore, compliance with the statutes is jurisdictional. By raising the issue sua sponte, without objection by the opposing party, the Court in Cooke emphasizes that the notice of cross-appeal under K.S.A. 60-2103(h) is a jurisdictional requirement, just like the appellant’s notice of appeal under K.S.A. 60-2103(b). The Court has plainly stated in several cases that a timely notice of

FOOTNOTES
cross-appeal is jurisdictional. Because courts are duty-bound to police their own jurisdiction, the appellate courts raise jurisdictional issues regardless of whether any party does.

But the rule that a notice of cross-appeal is jurisdictional is not universal. In federal court, the circuits have split over the question. Some circuits hold that a notice of cross-appeal is not a jurisdictional requirement but is procedural and can be excused when circumstances so warrant. In other circuits, including the Tenth Circuit, the time limits for filing a cross appeal are mandatory and jurisdictional.

_Cooke_ also notes that Cooke could have raised her statute of limitations argument before as an alternative ground for affirming judgment in her favor, and that her failure to do so is also grounds for precluding appellate consideration of the issue on the second appeal.

**IV. Practical Implications of the Mandatory Cross-Appeal Rule**

While these rules might seem simple on their face, the courts have had surprising difficulty stating and applying the rule consistently. When the appellee is dissatisfied with the judgment and wants more money or other additional relief, a cross-appeal is necessary to obtain it. A judgment cannot be altered to the benefit of a nonappealing party. But is a cross-appeal necessary to complain that the trial judge should have ruled for the appellee for a different reason? Do the appellate courts really want to read cross-appeal briefs on every point.

Cross-appealing rulings adverse to the appellee may be unnecessary and counter-productive. The appellee must determine whether the issue he proposed to argue on appeal demonstrates that the trial court committed prejudicial error against the appellee or that the trial court actually was right for a different reason than the one given. Justice Louis Brandeis stated the basic rule for determining when a cross-appeal is necessary in _United States v. American Railway Express Co._:

> It is true that a party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought here by the appeal of the adverse party. In other words, the appellee may not attack the decree with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary, whether what he seeks is to correct an error or to supplement the decree with respect to a matter not dealt with below. But it is likewise settled that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it.

If an appellee seeks any greater relief (such as a broader injunction, more damages, prejudgment interest, or attorneys fees) a cross-appeal is clearly required, but an appellee “may defend the judgment won below on any ground supported by the record without filing a cross-appeal.”

An appellee who fails to discern the difference and takes an unnecessary cross-appeal may encounter a court’s dismay. Judge Frank Easterbrook of the Seventh Circuit put it most pointedly:

> Cross-appeals for the sole purpose of making an argument in support of the judgment are worse than unnecessary. They disrupt the briefing schedule, increasing from three to four the number of briefs, and they make the case less readily understandable to the judges. The arguments will be distributed over more papers, which also tend to be longer. Unless a party requests the alteration of the judgment in its favor, it should not file a notice of appeal.

Perhaps the strongest condemnation of an unnecessary cross-appeal was imposed by the Tenth Circuit Court of Ap-appeal under Rule 4(a)(3). _See United States v. Tabor Court Realty Corp._, 943 F.2d 335, 342-44 (3rd Cir. 1991).

_Akron Center for Reproductive Health v. Slaby_, 854 F.2d 852 (6th Cir. 1988), rev’d on other grounds sub nom _Ohio v. Akron Ctr. for Reproductive Health_, 497 U.S. 502 (1990); _Young Radiator Co. v. Celotex Corp._, 881 F.2d 1408 (7th Cir. 1989); _Savage v. Cache Valley Dairy Ass’n_, 737 F.2d 887 (10th Cir. 1984).


_265 U.S. 425, 435, 44 S. Ct. 560,_, 5765, 68 L. Ed. 1087, 1093 (1924) (emphasis added). For a Tenth Circuit case stating the rule, _see Tinkler v. United States_, 982 F.2d 1456, 1461 n.4 (10th Cir. 1992) (“[a]n appellee may defend the judgment won below on any ground supported by the record without filing a cross-appeal.”)

_Tinkler v. United States ex rel. F.A.A._, 982 F.2d 1456, 1461 n.4 (10th Cir. 1992).

_Jordan v. Duff & Phelps Inc._, 815 F.2d 429, 438 (7th Cir. 1987).
peals when it sanctioned an appellee with an order to pay the costs of the cross-appeal in *Leprino Foods Co. v. Factory Mutual Ins. Co.* The appellee had won a defense verdict in a jury trial and then argued on cross-appeal that the trial court had erred in letting the case go to the jury and refusing to grant judgment as a matter of law. The court of appeals found that this was merely an alternative argument in support of judgment on all counts in favor of the appellee. “Taking a cross-appeal was neither necessary nor appropriate for this purpose. Only a party aggrieved by the judgment may appeal, and [the defendant] was 100 percent successful.” Recent Tenth Circuit decisions have reiterated “that a party should not take a cross-appeal when it succeeds below.”

Kansas cases also recognize the rule that when judgment reaches a result that is correct for any reason shown of record, it should be affirmed even if the reason given by the trial court is in error. “[W]here the district court reaches the right result, albeit for the wrong reason, it will not be reversed.” A cross-appeal is not required for a prevailing party to present any legitimate argument in support of the judgment below, even if the argument was rejected or ignored by the trial court. In some instances, arguments that were not raised at all in the trial court can be raised for the first time on appeal as grounds for affirming a judgment that is right, but for the wrong reason.

Unfortunately, a number of cases overlook the “right for any reason” rule and fault parties for failing to cross-appeal. In *Mid-Continent Specialists Inc. v. Capital Homes L.C.*, the defendant agreed to build and sell a new home to Lynn Smith under a $50,000 partnership draw made payable directly from Mid-Continent and would make payment by having a check for a $50,000 partnership draw made payable directly from Mid-Continent to Capital Homes. In fact Smith was not a partner, but a bookkeeper for Mid-Continent’s accounting firm and had been using her check-signing authority to embezzle from Mid-Continent. Mid-Continent sought recovery from Capital Homes, alleging conversion of the $50,000 check. Capital Homes contended that K.S.A. 84-3-420 precludes the issuer of a check from maintaining an action for conversion and that it was protected from the claim as a holder in due course (HDC). The trial court rejected the HDC claim as a matter of law that the judgment entered by the trial court was right for a different reason, but technically cross-appeal need not be, and preferably should not be, filed if the trial court was wrong about merits of the underlying claim. The court of appeals reversed on the merits. The court of appeals, citing *Lombardi*, refused to consider the appellee’s contention that the claim was barred by the statute of limitations. Again, the limitations defense, if supported by the law and the record, would have meant the judgment was correct and should be affirmed for a different reason.

All appellate courts accept the proposition that a notice of cross-appeal need not be, and preferably should not be, filed if the sole purpose is to argue an alternative ground for finding as a matter of law that the judgment entered by the trial court is correct. In *Cooke*, the court does not insist that the appellee had to make a choice between cross-appeal and arguing that the judgment was right for a different reason, but technically cross-appeal was not required because the argument being made was that the claim was barred as a matter of law by the statute of limitations. Although only failure to cross-ap-

18. 453 F.3d at 1290. *Colorado Right to Life Comm. Inc. v. Coffinman*, 498 F.3d 1137, 1155 n.8 (10th Cir. 2007) (“We reiterate that a party should not take a cross-appeal when it succeeds below.” *Citing Lprino Foods.*).
23. *State v. Ortega-Cadell*, Kan., __ Kan. __, __ 194 P.3d 1195, Kan. 2008 (constitutional issues not raised in trial court may be presented for the first time on appeal as “right for the wrong reason issues.”)
25. 889 F.2d 959, 962 (10th Cir. 1989).
26. 211 F. 3d 1279 (10th Cir. 2000).
27. *See 15A Wright, Miller and Cooper, Fed. Prac. and Procedure § 3904, pp. 204-05 (1992) (“Occasional decisions forbidding argument in support of the judgment without cross-appeal seem to misunderstand these general rules, but in most circumstances the rule seems well understood.”)
As noted above, a number of federal court decisions state that cross-appeal should be taken only when the appellee seeks to enlarge its own rights or lessen the rights of the appellant under the judgment on appeal. These cases could not only preclude a prevailing party from appealing evidence and instruction errors and the like, but also preclude the type of cross-appeal Cooke holds is mandatory.31 Wright, Miller & Cooper state in their well-known treatise that cross-appeal “is not required to preserve the right to orderly disposition of issues that become relevant only because of reversal.”32 There are statements in Kansas cases that would support omitting contingent or conditional cross-appeals. The Supreme Court in In re Waterman refused to consider a cross-appeal on the ground that: “A party cannot appeal from a judgment unless he has been in some way injured or aggrieved thereby.”33

When the prevailing party seeks no greater relief and is aggrieved only if (1) the case is remanded, (2) the error is repeated, and (3) the result is different on remand, then a cross-appeal arguably is unwarranted and not necessary to protect the right to a fair trial in accordance with applicable law on remand. Judicial economy may be best served by not requiring (or encouraging) cross-appeals on issues that may not be issues on remand, and that, at least at the time of the first appeal, resulted in no prejudice to the appellee, who is “aggrieved” by the ruling only if all three of the contingencies enumerated above come to pass. But Kansas cases appear to favor cross-appeal of such contingent issues and may effectively treat them as mandatory.

Assuming that a mandatory cross-appeal from a trial court ruling has been omitted, does that make commission of same error mandatory on remand? The answer, at least as to plain errors, is generally “no.” Although prior rulings may be the “law of the case,” this doctrine is a discretionary policy, which allows a court to refuse to reopen a matter already decided; it does not limit the court’s power to do so.35 A ruling may be reconsidered before final judgment, and should be if, it is clearly erroneous or some manifest injustice has been imposed.36 Questions of law are for the court to decide, and a court cannot be bound by an admission of or stipulation by one or both parties to adopt or follow

VI. Contingent or Conditional Cross-Appeals

Many cases involve conditional cross-appeals in which the appellee does not seek to alter the judgment in any way, but seeks review of trial court errors that are pertinent only in the event of remand. Examples include rulings admitting or excluding evidence and rulings on jury instructions. Such appeals appear to be permitted by K.S.A. 60-2103(h) and have been considered,30 but are they mandatory in order to preserve an issue on remand?

29. Id. See also Reazin v. Blue Cross & Blue Shield of Kan., Inc., 899 F.2d 951, 979 n.43 (10th Cir. 1990) (issues included in docketing statement but not briefed are abandoned).
31. In Mosher v. Speedstar Div of AMCA Int’l Inc., 52 F.3d 913 (11th Cir. 1995), the defendant was denied summary judgment on a statute of repose defense, then won a jury verdict, but lost on appeal. On remand, defendant renewed the statute of repose defense and was granted summary judgment. On the second appeal, plaintiff contended the defendant had to cross-appeal the denial of summary judgment in the first appeal to preserve the issue. The Eleventh Circuit readily dismissed that objection, stating that there can be no such requirement because the defendant could not have cross-appealed from a judgment entirely in its favor. 52 F.3d at 917 n.2. Neither the parties nor the court appear to have considered whether the failure to argue the statute of repose as an alternative ground for upholding the first judgment could result in forfeiture or waiver.
32. 15A Wright, Miller and Cooper, Fed. Prac. and Procedure § 4478 p. 637 (2002), the authors observe that, "Law-of-the-case doctrine seems to have exploded during the closing decades of the Twentieth Century." The basic principles remain the same, but the elaborations and complications have multiplied. The doctrine permits the same court may revisit its rulings any time before final judgment, but directs the court to be reluctant to do so as a rule of practice necessary to points previously argued and decided to be put at rest. Appellate court rulings in the same case, although often referred to simply as the “law of the case,” are more than that and are binding on trial courts. Crist v. Hunan Palace Inc., 277 Kan. 706, 89 P.3d 573 (2004); 20 Am. Jur. 2d Courts § 142 (2007). The difficult issue is whether an appellate court decision precludes renewing argument and objections that could have been, but were not, decided in the prior appeal. See, e.g., Mosher, Supra, 52 F.3d at 917 (trial court bound only by issues actually decided by appellate court).
34. In 15A Wright, Miller and Cooper, Fed. Prac. and Procedure § 4478 p. 637 (2002), the authors observe that, "Law-of-the-case doctrine seems to have exploded during the closing decades of the Twentieth Century." The basic principles remain the same, but the elaborations and complications have multiplied. The doctrine permits the same court may revisit its rulings any time before final judgment, but directs the court to be reluctant to do so as a rule of practice necessary to points previously argued and decided to be put at rest. Appellate court rulings in the same case, although often referred to simply as the “law of the case,” are more than that and are binding on trial courts. Crist v. Hunan Palace Inc., 277 Kan. 706, 89 P.3d 573 (2004); 20 Am. Jur. 2d Courts § 142 (2007). The difficult issue is whether an appellate court decision precludes renewing argument and objections that could have been, but were not, decided in the prior appeal. See, e.g., Mosher, Supra, 52 F.3d at 917 (trial court bound only by issues actually decided by appellate court).
The cross-appeal rule, we of course agree, does not confine the trial court. But default and forfeiture doctrines do. It would therefore be hard to imagine a case in which a district court, after a court of appeals vacated a criminal sentence, could properly increase the sentence based on an error the appeals court left uncorrected because of the cross-appeal rule.40

A thorough discussion of the default and forfeiture doctrines is beyond the scope of this article, but other decisions of the Supreme Court suggest that the trial court, not being bound by the cross-appeal rule, could increase the sentence on remand. In Day v. McDonough,41 the Court held that a district court had power to dismiss a habeas corpus petition, sua sponte, for untimeliness despite the government’s failure to raise the issue. Although statute of limitations defenses generally are subject to forfeiture if not raised, because a trial court has power to grant leave to amend to raise such a defense, the Supreme Court found that it could do so on its own motion. The principle involved was stated as follows:

If, as this Court has held, ‘[d]istrict judges have no obligation to act as counsel or paralegal to pro se litigants,’ Pfler v. Ford, 542 U.S. 225, 231, 124 S. Ct. 2441, 159 L. Ed. 2d 338 (2004), then, by the same token, they surely have no obligation to assist attorneys representing the [s]tate. Nevertheless, if a judge does detect a clear computation error, no [r]ule, statute, or constitutional provision commands the judge to suppress that knowledge.42

The Court concluded that district courts “are permitted, but not obliged, to consider, sua sponte, the timeliness of a state prisoner’s habeas petition.”43 The principles referred to by the Supreme Court decision in Day are consistent with those suggested above as the rule in Kansas cases. A trial court has the power to avoid errors and correct errors, but when a litigant has abandoned a waivable defense (e.g., a statute of limitations, not lack of jurisdiction) by failure to assert it in the time and manner required by law, the litigant may be held to the consequences.44 It could be an abuse of discretion to commit a plain error on remand when the only justification is that the error was committed before without objection.

The Kansas statute governing cross-appeals bears little resemblance to the wording of the Federal Rules of Appellate Procedure governing cross-appeals. K.S.A. 60-2103(h) permits cross-appeal of any ruling of which the appellee complains and provides that the appellee “shall” file a notice of cross-appeal to challenge any such rulings. The Kansas appellate courts have made it clear that cross-appeals are jurisdictional and this may extend to contingent or conditional issues that will arise only if the judgment is reversed. However, there is room for disagreement about the existence of an obligation to complain of rulings by cross-appeal that

(Continued on next page)
VII. Interlocutory Cross-Appeal

K.S.A. 60-2103(h) permits cross-appellate of rulings and decisions of which the appellee complains “when a notice of appeal has been served,” but does not address the nature and extent of this right when the notice of cross-appeal is in response to notice of an interlocutory appeal following a granted application as provided in Kansas Supreme Court Rule 4.01. In Haas v. Freeman, the appellee argued that once an interlocutory appeal has been filed, K.S.A. 60-2103(h) allows cross-appeal to be filed on any issues the appellee wishes to argue by the mere filing of a notice of appeal. The Court rejected this argument, noting that precedent required interlocutory cross appeals to be “perfectly” in accordance with all applicable statutes, including K.S.A. 60-2102(c), which requires trial court findings authorizing interlocutory appeal and leave of the court of appeals. An interlocutory cross-appeal cannot be perfected merely by giving notice under K.S.A. 60-2103(h).

While it seems clear that neither an interlocutory appeal nor cross-appeal can be taken without leave to do so under K.S.A. 60-2102(c) and that this requirement is jurisdictional, a doctrine of “pendent jurisdiction” allows some claims or issues that would otherwise be barred by the cross-appeal rule issues to be considered. This doctrine was stated in Cypress Media v. City of Overland Park as follows:

Where an appealable issue in an interlocutory appeal is inextricably intertwined with other issues that do not themselves meet the criteria for an interlocutory appeal, the latter issues may also be reviewed to allow meaningful review and promote judicial economy.

This doctrine has been the subject of two subsequent court of appeals decisions. The first, Rodriguez-Tocker v. Estate of Tocker, distinguished Cypress Media and indicated that its holding would be confined fairly narrowly to its specific facts. The second, Williams v. Lawton, found that the pendent jurisdiction rule was applicable and allowed interlocutory review of an otherwise nonappealable order for new trial. Cases where this will be permitted are surely rare. This is a doctrine to remember for potential use, but it would not be a good idea to rely on its applicability to any particular matter because of the difficulty of determining what kind of issue relationship will be sufficient to avoid the general rule that the right of appeal is statutory and that the courts’ authority to create exceptions is limited.

VIII. Conclusion

The principles of appellate jurisdiction involve more complexity and uncertainty than one might expect. One appellate court criticizes unnecessary cross appeals while another defaults a party for failure to take one. Trial lawyers may come to rely on the court’s ability to do what’s fair and equitable, such as liberally granting leave to amend pleadings or granting relief from procedural defaults for good cause, such as excusable neglect. But these are procedural rules, not jurisdictional rules. Although some federal courts have held that the mandatory cross-appeal rule is procedural and need not be enforced if relief is justified in a particular case, the Kansas appellate courts and the Tenth U.S. Circuit Court of Appeals have held that the cross-appeal rule is jurisdictional. In Kansas state and federal courts, there is no equitable relief from the failure to take a mandatory cross-appeal because the courts have determined they have no power to grant it. Thus, appellants have to consider whether there are issues that should be cross-appealed, but have to be careful not to take improper cross-appeals or clutter up their good arguments with weaker arguments on cross-appeal issues that might be better foregone than argued.

As a final point, it should be noted that the Kansas Supreme Court has held that jurisdiction of a cross-appeal is dependent on the main appeal; it will not stand alone. If the main appeal is dismissed for any reason, such as a defective notice of appeal or voluntary dismissal, the cross-appeal must also be dismissed. If a party is genuinely dissatisfied with a judgment, a notice of appeal should be filed without delaying the decision until the time for cross-appeal.

About the Author

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

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46. Id.
50. Carr v. Carr, 212 Kan. 638, 512 P.2d 357 (1973) (cross-appeal does not stand alone and must be dismissed if principal appeal is dismissed).
CIVIL

ADMINISTRATIVE LAW AND PROCEDURE

FRIEDMAN V.

KANSAS STATE BOARD OF HEALING ARTS

SHAWNEE DISTRICT COURT – APPEAL DISMISSED

NO. 100,564 – JANUARY 16, 2009

FACTS: Kansas Board of Healing Arts filed formal disciplinary action against Friedman. Friedman filed motion to dismiss, alleging the board did not have subject matter jurisdiction because his medical license had expired prior to commencement of the discipline. When administrative law judge denied Friedman’s motion, Friedman filed petition for judicial review and injunctive relief. District court dismissed the action, finding Friedman had not exhausted administrative remedies, and to the extent Friedman asserted an independent action for injunctive relief it should be denied because board had jurisdiction to take action. Friedman appealed, claiming exhaustion of administrative remedies was not required for judicial review of an administrative agency’s interlocutory order concerning the agency’s jurisdiction and claiming the board did not have jurisdiction over a physician whose license has expired unless that physician is then practicing medicine unlawfully.

ISSUES: (1) Exhaustion of administrative remedies and (2) injunctive relief

HELD: District court correctly dismissed Friedman’s attempt to obtain interlocutory review of a nonfinal agency action without establishing his entitlement to do so under K.S.A. 77-608(b). District court had no jurisdiction to consider the merits of the attempted judicial review. Appeal dismissed for lack of appellate jurisdiction.

No jurisdiction to consider independent request for injunctive relief. Board had authority to grant this relief; thus a request for such relief must be construed as a petition for judicial review subject to Kansas Act for Judicial Review and Civil Enforcement of Agency Actions notwithstanding petitioner’s attempt to label it as a separate action. District court should have dismissed petition in its entirety.

STATUTES: K.S.A. 2007 Supp. 65-2809(a), -2809(d), -77-527; and K.S.A. 65-2801 et seq., -2851a(b), 77-601 et seq., -606, -607, -607(a), -607(b)(2), -608, -622

AUTOMOBILE INSURANCE AND SURVIVOR

POLSON V. FARMERS INSURANCE

JOHNSON DISTRICT COURT – AFFIRMED

NO. 99,908 – JANUARY 30, 2009

FACTS: Timothy and Michelle Polson were found dead at the scene of a Kansas automobile accident. Timothy and Michelle, who were married and did not have children, were insured at the time of their deaths by an auto insurance policy issued by Farmers. The policy provided personal injury protection (PIP) benefits as required by the Kansas Automobile Injury Reparations Act (KAIRA), K.S.A. 40-3101 et seq., which included coverage for disability, funeral expenses, medical and rehabilitation expenses, as well as substitution and survivors’ benefits. John Polson (Polson), father of Timothy and representative of Timothy’s heirs-at-law, and Pauline Fallis (Fallis), mother of Michelle and representative of Michelle’s heirs-at-law, made separate written demands upon Farmers for survivors’ benefits in the identical amount of $10,800. Farmers denied the demands of both Polson and Fallis, finding that the definition of “survivor” was not met in either claim. After considering the uncontested facts and hearing the arguments of counsel, the district court found Timothy and Michelle were not survivors of each other under the provisions of the KAIRA. In addition, the district court determined the provisions of the KAIRA provide specific statutory guidance for the award of survivors’ benefits and, therefore, the KAIRA controls in the event of a conflict with the more general provisions of the Kansas Uniform Simultaneous Death Act (KUSDA). Consequently, the court concluded that Polson and Fallis were not entitled to such benefits.

ISSUES: (1) Automobile insurance and (2) survivor

HELD: Court held that neither Polson nor Fallis advanced any evidence that either Timothy or Michelle outlived the other. Therefore, there was no evidence to support a finding that either Timothy or Michelle was a survivor of his or her spouse. Court applied the same analysis under the KUSDA. Court also rejected Polson and Fallis’ argument that as parents of the decedents and representatives of the heirs of the decedents, they should be entitled to receive survivors’ benefits, even though they were not survivors. Court held the district court did not err in rejecting the plaintiffs’ claim for attorney fees.

STATUTES: K.S.A. 20-3018(c); K.S.A. 40-256, -3101, -3103, -3104, -3107; and K.S.A. 58-708, -709

INSURANCE AND DUTY TO DEFEND

MILLER ET AL. V. WESTPORT INSURANCE CORP.

SHAWNEE DISTRICT COURT

REVERSED AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – REVERSED

NO. 95,768 – JANUARY 30, 2009

FACTS: Miller, Zeller, and Kohn are licensed life, accident, and health insurance agents who referred several of their clients to John F. Usher and Associated Financial Solutions Inc. (Associated), a company offering debt adjustment services. Usher, the owner of Associated, absconded with the clients’ funds, approximately $55,000,
while he was under investigation by the Kansas Attorney General’s Office. Miller, Zeller, and Kohn made claims under their professional errors and omissions insurance policies with defendants Westport Insurance Corp. (Westport) and Employers Reinsurance Corp. (Employers). Coverage was denied. The agents settled with their clients and again sought coverage. Again, they were unsuccessful, and then they filed this action. The district court granted the insurers’ motion for summary judgment, and the Court of Appeals affirmed.

ISSUES: (1) Insurance and (2) duty to defend

HELD: Court stated this is not a negligence action; it is not an action to establish the existence or absence of the agents’ liability to their clients. This is a straightforward contract dispute, brought by the agents against their insurers. The agents assert they have a colorable claim under their errors and omissions policy and that the insurers breached their contract by failing to investigate or defend on the agents’ behalf. When their clients’ money was stolen, the agents did everything they were required to do to invoke coverage under their policy for their potential liability. They notified the administrator of their insurers and then made a formal claim for coverage, including the losses sustained by all 12 clients. Because the agents ultimately settled with those clients, liability will never be determined. That question was not at issue in this case, and it and the concepts of foreseeability and proximate cause were inappropriate bases for its disposition. The district court and the Court of Appeals panel erred in ruling on the possibility of negligence when faced with dueling summary judgment motions; their actual charge was to determine whether, on the facts established by the pleadings, depositions, answers to interrogatories, affidavits, and admissions on file, there was a possibility of coverage under the language of the policy. Court held that Westport had a duty to defend the agents and that this duty was not relieved through any of the exceptions in the errors and omissions policy. Court reversed and remanded to the district court to vacate its previous order of summary judgment, to enter summary judgment in favor of plaintiffs in the amounts prayed for in their petition, and for such other orders as the district court deems necessary and consistent with the opinion.

STATUTE: K.S.A. 50-623, -1101

WARRANTY OF MERCHANTABILITY Hodges v. Johnson

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

COURT OF APPEALS – REVERSED

NO. 97,062 – JANUARY 30, 2009

FACTS: The Hodgeses purchased a 1995 Mercedes from Johnson, a used car dealer, for $17,020. Three months later the Hodgeses said the air conditioning unit was defective at the time of sale and that the required repairs would cost $3,474 and was awarded the amount of his claim plus interest. Johnson appealed the denial of attorney fees and Johnson cross-appealed the finding there was an implied warranty of merchantability. However, the court did not allow the Hodgeses’ claim for attorney fees. The Hodgeses appealed the denial of attorney fees and Johnson cross-appealed the finding of an implied warranty of merchantability.

ISSUE: Warranty of merchantability

HELD: Court held under the facts of this case, there is substantial competent evidence to support the district court’s conclusion that the sale of a 1995 Mercedes with a defective air conditioner by a merchant in 2005 breached the implied warranty of merchantability. Court also stated there is substantial competent evidence to support the district court’s conclusion that the implied warranty of merchantability in this transaction was not limited to only the Mercedes’ major components affecting transportation, but rather extended at a minimum to the vehicle’s air conditioning unit. Court stated there was substantial competent evidence to demonstrate that the air conditioning unit was defective at the time of sale and that the required repairs would cost $3,474. Court reversed the Court of Appeals’ reversal of the district court’s judgment in favor of the Hodgeses and affirmed the district court’s decision. Court remanded for the district court to determine an appropriate award of attorney fees as well, that such attorney fees do not violate the state or federal guarantees of equal protection, and granted reasonable appellate attorney fees as well.

STATUTES: K.S.A. 61-2701, -2703, -2707, -2709(a), -2712; and K.S.A. 84-2-314

CRIMINAL

STATE V. BENNETT

DICKINSON DISTRICT COURT – REVERSED

COURT OF APPEALS – AFFIRMED

NO. 98,038 – JANUARY 30, 2009

FACTS: Bennett was convicted of criminal charges and as a condition of his probation the district court required him to submit to random, suspicionless searches performed by community corrections or law enforcement officers. Bennett appealed the terms of his probation. Court of Appeals reversed the district court finding that Kansas’ statutes did not provide for suspicionless searches and the condition of probation imposed in this case was unconstitutional and unenforceable.

ISSUE: Suspicionless searches as conditions of probation

HELD: Court agreed with the Court of Appeals that although probationers have more limited expectations of privacy than do free citizens, the U.S. Supreme Court has found that law enforcement’s ability to search probationers is “not unlimited.” Given probationers’ expectations of privacy, community corrections officers or other law enforcement officers must have a rational, articulable suspicion of a probation violation, or other criminal activity before subjecting the probationer’s person or property to a search. Court held that the condition of probation in this case, requiring that Bennett submit to random, suspicionless searches, violates the defendant’s constitutional rights under the Fourth Amendment and § 15 of the Kansas Constitution Bill of Rights. The decision of the Court of Appeals is affirmed, and the decision of the district court is reversed. However, because Bennett is no longer on probation, no remand is necessary.

STATUTE: K.S.A. 21-4610(c), -4721(c)

STATE V. BRINKLOW

BARBER DISTRICT COURT

REVERSED AND REMANDED

COURT OF APPEALS – REVERSED

NO. 96,231 – JANUARY 30, 2009

FACTS: Brinklow convicted of six counts of aggravated indecent liberties with a child. On appeal he claimed: (1) trial court erred in denying motion to sequester witnesses, (2) prosecutor’s misconduct in questioning witnesses and closing argument denied him a fair trial, (3) insufficient evidence supported the convictions as charged in bill of particulars, (4) cumulative error denied him a fair trial, and (5) district court unconstitutionally considered Brinklow’s prior criminal history in determining sentence. In unpublished opinion, Court
of Appeals affirmed Brinklow's convictions and departure sentence.

ISSUES: (1) Sequestration of witnesses, (2) prosecutorial misconduct, (3) sufficiency of evidence, (4) cumulative error, and (5) sentencing

HELD: District court erred in ruling it did not have authority to sequester witnesses and consequently erred in failing to exercise its discretion to determine whether witnesses should have been sequestered in this case. Error was not harmless where under facts state elicited testimony from mother, which was directly tailored to testimony of child victim.

Instances of prosecutorial misconduct examined, finding improprieties that standing alone would not mandate reversal, but are to be considered in assessing cumulative effect of trial error.

Sufficient evidence supported the convictions. Inconsistencies in the evidence did not render child victim's testimony of occurrence dates to be so incredible or improbable as to defy belief.

Cumulative effect of erroneous ruling on a witness sequestration motion and of prosecutorial misconduct prejudiced Brinklow's ability to obtain a fair trial. Because evidence against Brinklow was not overwhelming, conviction is reversed and case is remanded for new trial.

Brinklow's Appendix sentencing claim has no merit.

STATUTE: K.S.A. 60-404

STATE V. DAVIS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,665 – JANUARY 30, 2009

FACTS: Davis was convicted in May 1992 of attempted first-degree murder, aggravated burglary, aggravated robbery, aggravated battery, and two counts of unlawful possession of a firearm. He was sentenced to a term of 40 years to life in prison. In July 2007, Davis filed a motion to correct an illegal sentence, claiming that he was eligible for an earlier parole date based upon amendments to the statute under which he was sentenced — in particular, by the enactment of the Kansas Sentencing Guidelines Act (KSGA) in 1993. Davis claimed that his current sentence 40 years to life, with parole eligibility in 20 years, was illegal and did not conform to the governing statutory provisions because a person sentenced for the same offenses today would receive a different sentence, with earlier parole eligibility, under the KSGA. The district court denied his motion.

ISSUE: Sentencing

HELD: Court held that K.S.A. 1991 Supp. 22-3717(n) provides that an inmate shall be eligible for parole on the date provided by statute at the time the inmate committed the crime for which imprisoned unless subsequent amendment of the statute provides an earlier parole eligibility date. Contrary to Davis’ arguments, the references in K.S.A. 1991 Supp. 22-3717(n) to “the statute” relate to an inmate’s parole eligibility under K.S.A. 22-3725, not the length of an inmate’s sentence under K.S.A. 21-4704 (the current nondrug grid under the KSGA). The plain language of K.S.A. 21-4704(a) indicates that this statute, as part of the KSGA, applies “in felony cases for crimes committed on or after July 1, 1993.” (Emphasis added.)

Davis’ crimes were committed a year and a half before July 1, 1993. His argument that the KSGA altered his parole eligibility date is without merit. The district court correctly determined that his sentence is not illegal and denied his motion under K.S.A. 22-3504.


STATE V. GANT
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,026 – JANUARY 30, 2009

FACTS: Gant and accomplices charged with felony murder and attempted aggravated robbery. Jury convicted Gant on both charges. On appeal Gant claimed: (1) it was error to admit statements made after he had requested counsel, (2) prejudicial error for detective to sit at end of counsel table for state, and (3) and his sentence was improperly aggravated at high end of sentencing grid without submitting aggravating grounds to jury. In pro se supplemental brief, Gant claimed insufficient evidence supported his conviction because he only drove accomplices, and it was fundamentally unfair for district court to sentence him more severely than accomplice who subsequently entered plea.

ISSUES: (1) Invoking right to counsel, (2) witness at prosecution table, (3) sentencing, (4) sufficiency of evidence, and (5) sentencing disparity

HELD: Under facts, district court’s decision was sound. Gant’s request for counsel was ambiguous at best and directed to women in his car rather than to police, and there was no unambiguous request for counsel assistance at custodial interrogation. When a suspect makes a statement that might be ambiguous as to whether the suspect is asserting right to remain silent or to confer with attorney, the interrogator is permitted to ask clarifying questions but is not required to clarify the ambiguous statement.

Constitutional challenge to witness at prosecution table, asserted for first time on appeal, is not properly before the appellate court. Although it is better practice to discourage law enforcement witnesses from sitting at prosecutor’s table during a jury trial, the practice does not constitute per se abuse of discretion.

More than sufficient evidence supports convictions based on aiding and abetting.

Under facts of case, no rational basis for comparing sentences. District court is under no requirement to explain disparities among the sentences.

STATUTE: K.S.A. 21-3401(b), -3427, 22-3601(b)

STATE V. HOFFMAN
GREENWOOD DISTRICT COURT – AFFIRMED
NO. 98,394 – JANUARY 30, 2009

FACTS: In two separate attacks on same day, Hoffman first beat up victim and then returned to stab him. Hoffman convicted of first-degree felony murder, aggravated burglary, and aggravated battery. On appeal he claimed: (1) district court erred in not instructing jury on lesser-included crime of involuntary manslaughter based on commission of a misdemeanor in the second attack; (2) insufficient evidence supports the felony murder conviction because autopsy was inconclusive as to whether victim died from blows in first beating or stabbing in second attack; (3) error to admit evidence that Hoffman and victim had fought a month earlier as evidence to prove relationship of parties; (4) error to admit certain autopsy photographs that were gruesome, repetitive, and prejudicial; and (5) cumulative error denied him a fair trial.

ISSUES: (1) Jury instruction on lesser-included crime, (2) sufficiency of evidence of felony murder, (3) evidence of previous fight, (4) admission of autopsy photographs, and (5) cumulative error

HELD: Under facts, district court’s failure to instruct jury on involuntary manslaughter that would include the commission of a misdemeanor was not clear error.

Evidence sufficiently established victim’s death occurred during a felony and was a direct result of Hoffman’s action. No extraordinary event intervened between second attack and victim’s death.

Hoffman did not preserve issue regarding admission of evidence of prior fight, and absence of record on this issue does not allow finding of reversible error.

Admitted photographs were not extreme or gruesome and were introduced for legitimate purpose to show cause of death.

No merit to cumulative error claim.

CONCURRING (Johnson, J.): Agrees that failure to give instruction on involuntary manslaughter while committing a misdemeanor was not clearly erroneous, and Hoffman’s theory that he entered
victim’s house a second time to commit simple misdemeanor battery stretches imagination. Wrote separately to reiterate concerns in his concurring opinion in State v. Jones, 287 Kan. 547 (2008), about special rule for lesser-included offense instructions in felony murder cases, which focuses on strength of evidence to support the charged crime rather than the proposed lesser-included offense.

STATUTE: K.S.A. 21-3404(b), -3414, -3414(2), 60-455

STATE V. OVERSTREET
SEDGWICK DISTRICT COURT
REVISED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 96,682 – JANUARY 30, 2009

FACTS: Overstreet convicted of aggravated assault and attempted first-degree murder. On appeal he claimed (1) instructional error on aiding and abetting, (2) prosecutorial misconduct; after jury began deliberating the trial court erred in granting additional summation and in giving additional instruction to resolve jury indecision, (3) and ineffective assistance of counsel. Court of Appeals affirmed in unpublished opinion. Overstreet’s petition for review was granted.

ISSUES: (1) Jury instruction on aiding and abetting, (2) prosecutorial misconduct, (3) court’s conduct during jury deliberations, and (4) ineffective assistance of counsel

HELD: Under State v. Engelhardt, 280 Kan. 113 (2005), district court clearly erred in giving aiding and abetting foreseeability instruction, which negated state’s burden to prove premeditation, an essential element of crime charged.

Under circumstances of case, where prosecutor’s comments on closing argument track district court’s instructions, there was no prosecutorial misconduct even though instructions were erroneous.

Case involved inordinate amount of contact between court and jury after case was submitted for deliberation. Issue of whether court engaged in impermissible ex parte communication when he asked jury if additional summation from counsel would help clarify questions was not preserved for appeal. Supplemental instruction given when jury was unable to reach unanimous decision on one of the charges was clear error and requires reversal. Although the Court has approved use of PIK Crim. 3d 68.12, it is much better to give such an instruction before case is submitted to jury for deliberations. But for this instruction, there is a real possibility the jury in this case may have returned a different verdict on the unresolved charge.

Court of Appeals correctly concluded counsel’s performance fell below objective standard of reasonableness, but incorrectly found no prejudice resulted. But for counsel’s deficient performance in this case, there is real possibility the jury would have reached a different verdict. Convictions are reversed and case is remanded for new trial. Overstreet’s remaining appellate claims are not addressed.

STATUTE: K.S.A. 21-3205, -3205(1) and (2), 22-3414(3)

STATE V. PRINE
RENO DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 93,345 – JANUARY 16, 2009

FACTS: Prine convicted of rape, aggravated criminal sodomy, and aggravated indecent liberties with a 6-year-old girl. On appeal, Prine claimed in part (1) the district court judge erred in admitting evidence of Prine’s prior sexual misconduct to prove intent, plan, and absence of mistake and (2) insufficient evidence supported his conviction for rape. In unpublished opinion, Court of Appeals found no abuse of discretion in the admission of the 60-455 evidence during trial, and found sufficient evidence supported the rape conviction.

ISSUES: (1) K.S.A. 60-455 evidence of prior sexual abuse and (2) sufficiency of the evidence

HELD: Inconsistency in Kansas’ cases analyzing K.S.A. 60-455 evidence of prior sexual abuse is reviewed. Standard to be exclusively applied is stated. Before a district judge admits evidence of prior bad acts to prove plan or modus operandi under K.S.A. 60-455, the evidence must be so strikingly similar in pattern or so distinct in method of operation to the current allegations as to be a signature. Applying this standard, and where neither the existence of criminal intent nor the absence of mistake or accident was actually at issue at trial, district court erred in admitting evidence of prior bad acts. Error was not harmless. Reversed and remanded for new trial.

Under facts, sufficient evidence supported Prine’s rape conviction.

DISSENT (McFarland, C.J.): Agree there has been confusion among Kansas’ appellate decisions, but disagrees with majority’s reading of the cases. Dissents from the new standard for evidence of bad acts to be considered relevant to prove plan under K.S.A. 60-455 and believes the new standard will be more difficult to satisfy. Also dissents from majority’s finding that error was not harmless.

STATUTE: K.S.A. 20-111, 21-3501(1), -3502, -3502(a)(2), -3504, -3506, 59-29a01 et seq., 60-261, -401(b), -455, -2016(b)

STATE V. THOMPSON
MCPherson DISTRICT COURT
COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

MODIFIED OPINION FILED JANUARY 28, 2009

FACTS: Thomas pled no contest to two counts of aggravated indecent liberties with a child under 14 for actions involving his 4-year-old granddaughter. The first count was a severity level 3 felony and the second count, due to statutory amendments, was an off-grid felony. Thomas requested a downward departure, but it was denied. The trial court sentenced Thomas to life imprisonment.

ISSUES: (1) Sentencing, (2) cruel or unusual punishment, and (3) departure

HELD: Court held that Thomas’ argument that a life sentence imposed under the provisions of K.S.A. 2006 Supp. 21-4643(a)(1) is a cruel or unusual punishment cannot be presented for the first time on appeal. Court also held that under the facts of this case, the district court did not abuse its discretion by denying a defendant’s motion for a downward departure.

But for this instruction, there is a real possibility the jury in this case may have returned a different verdict on the unresolved charge.

Court of Appeals correctly concluded counsel’s performance fell below objective standard of reasonableness, but incorrectly found no prejudice resulted. But for counsel’s deficient performance in this case, there is real possibility the jury would have reached a different verdict. Convictions are reversed and case is remanded for new trial. Overstreet’s remaining appellate claims are not addressed.

STATUTES: K.S.A. 21-3504, -3717, -4643, -4703, -4704; and K.S.A. 22-3601

STATE V. TROTTER
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 98,563 – JANUARY 30, 2009

FACTS: Trotter’s conviction for capital murder and first-degree
premeditated murder were affirmed in direct appeal. State v. Trotter, 280 Kan. 800 (2006). Here he appealed from the summary denial of post-conviction relief on two groups of issues. First, whether appellate court can consider whether the convictions were multiplicitous when issue is raised for first time in this appeal. Second, whether district court erred in summarily dismissing 60-1507 motion that claimed (a) trial counsel was ineffective for failing to request eyewitness instruction and (b) affidavits of co-defendants admitting perjury constituted newly discovered evidence warranting a new trial.

ISSUES: (1) Multiplicity and (2) evidence before district court
HELD: Under State v. Martis, 277 Kan. 267 (2004), and State v. Scott, 286 Kan. 54 (2008), Trotter's two convictions arising out of double homicide, one for capital murder based upon intentional and premeditated killing of more than one person under K.S.A. 21-3439(a)(6) and the other for first-degree premeditated murder under K.S.A. 21-3401(a) of one of those victims, are improperly multiplicitous. Failure of Trotter's counsel on direct appeal to raise multiplicity argument based upon authorities available at the time and arguments appellate counsel or colleagues had made on behalf of other defendants creates exceptional circumstance allowing Trotter to raise issue for first time on appeal from denial of 60-1507 motion. Trotter's first-degree murder conviction is reversed.

No error in district court's summary dismissal of Trotter's post-conviction motion. Trotter cannot establish prejudice prong necessary for showing trial counsel was ineffective in not requesting eyewitness instruction. Also, affidavits were insufficient to warrant an evidentiary hearing or to exonerate Trotter.

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OIL AND GAS

LEWIS V. KANSAS PRODUCTION CO. INC. ET AL.
CHAUTAUQUA DISTRICT COURT
REVERSED AND REMANDED
NO. 98,859 – JANUARY 16, 2009

FACTS: The Lewises own land in Chautauqua County that has been leased for oil and gas production since 1972. The original lease, called the Raymon lease, is a recorded burden on the Lewises’ land. The Lewises purchased the land in 2005 from David and Deborah Lowe. After a bench trial, the district court terminated Kansas Production Co.’s (KPC) oil and gas lease on the Lewises’ land for KPC’s breach of the implied covenant to explore and develop the lease. The court found that KPC received no demand for development before this lawsuit was filed. It also found that KPC’s failure to explore or develop the land for six years negated the prior demand requirement for cancellation.

ISSUE: Oil and gas

HELD: Court found that neither the futility nor the abandonment exceptions saved the district court’s order. KPC indicated not only an intent to retain its lease rights, KPC now knows that it must act immediately to preserve them. KPC may have sat on its rights but so did the Lowes. If compliance was desired, they should have asked for it. Further, KPC was not speculating on the lease; it only failed to get to it fast enough. This was not a case where the lessee refused a demand for development and claimed a right to hold the property indefinitely without development. At trial, KPC indicated that it was willing to develop the lease, and that exploring the lease could happen within six months. Court held that since there has been no compliance request, and no evidence of abandonment or futility in requesting compliance, cancellation is not appropriate. KPC’s actions have been sluggish, but before the extreme remedy of forfeiture could be imposed, under these facts, there should have been a demand for compliance. Absent such a demand, KPC should be given a reasonable time to comply with the lease.

STATUTES: K.S.A. 55-201, -223, -224, -226, -229; and K.S.A. 77-109

WORKERS’ COMPENSATION

GUTIERREZ V. DOLD FOODS INC.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 99,535 – JANUARY 16, 2009

FACTS: Lazaro Gutierrez injured his back while working for Dold Foods Inc. Dold Foods argues that Gutierrez should receive a lower award because Dold Foods fired him for cause based on an inaccurate statement Gutierrez made on a form he had filled out for a temporary-employment firm, which placed him at Dold Foods. The Workers’ Compensation Board (Board) found that Gutierrez had lost the ability to perform 62 percent of the work-related tasks he had done in the past. The Board found that his post-injury wages were 61 percent lower than they had been; he averaged $662.89 per week before the accident but only $260 per week at the time of his hearing. The Board averaged those percentages (62 percent and 61 percent) — apparently using only whole numbers — and determined that Gutierrez’s percentage of permanent partial general disability was 62 percent. Since Gutierrez was earning far less than 90 percent of his pre-injury wages, the statutory ceiling on a partial general disability award was not applicable.

ISSUE: Workers’ compensation

HELD: Court held that the Board’s factual findings that Dold Foods had not established that Gutierrez “failed to make a good faith effort to perform accommodated work,” and the Board...
found there had been no evidence that the employee showed bad faith, even though she was fired based on a claim of just cause to do so. Court concluded the record supported the Board’s factual findings, and the Board’s award tracked the approach set out in the statute for calculating it. The decision of the Board is therefore affirmed.

STATUTE: K.S.A. 44-510e(a)

WORKERS’ COMPENSATION

MCCREADY V. PAYLESS SHOESOURCE

WORKERS’ COMPENSATION BOARD – AFFIRMED

NO. 100,191 – JANUARY 30, 2009

FACTS: McCready worked at Payless Shoesource. She made a claim for benefits after she hurt her right ankle when she stepped on a roll of tape that was left on the floor at her workplace. Then, several months later, as she was returning to work after visiting a company doctor, McCready fell, with no explanation why, on the sidewalk going to her employer’s warehouse and hurt her right knee, right wrist, and her back. McCready made a claim for those injuries as well. Payless claimed her ankle impairment was a result of McCready’s preexisting diabetic condition. Turning then to the second injury, caused by the unexplained fall, Payless argued McCready simply fell while walking to her job site, a normal day-to-day activity and her injury was therefore not compensable. An administrative law judge and then the Workers’ Compensation Board (Board) awarded McCready workers’ compensation benefits for both claims.

ISSUE: Workers’ compensation

HELD: Court stated the experts agreed on some points and disagreed about others. Court held that because the law directed the court not to weigh the evidence, reviewing the record in a light favorable to the prevailing party, the Board’s findings about McCready’s ankle injury were supported by substantial evidence. Court stated there are three general categories of risks to employers recognized in Kansas: (1) those risks particular to the job, (2) those personally associated with the worker, and (3) neutral risks not associated with either employer or employee. The employer bears the costs of neutral risks. Unexplained falls at work are neutral risks. In light of Supreme Court precedent, court agreed with the Board’s risk analysis. Because McCready’s fall was unexplained and substantial competent evidence supports the Board’s impairment findings, court affirmed.

DISSENT: Greene, J., dissented and held that McCready’s injuries were the result of normal activities of day-to-day living and not compensable.

STATUTE: K.S.A. 44-501(a), -508(f), -510d, -510e

CRIMINAL

STATE V. DAVISON

SHAWNEE DISTRICT COURT

REVERSED AND REMANDED

NO. 99,229 – JANUARY 30, 2009

FACTS: Davison convicted of theft and removal of a theft detection device, based on taking DVDs he removed from their cases. He appealed from his conviction on the second charge, arguing clear error in the court’s jury instruction. Davison died while his appeal was pending. State argued appeal was moot.

ISSUES: (1) Death of appellant and (2) jury instruction

HELD: Death of a defendant does not abate direct appeal as it is in public interest that issues raised on appeal be adjudicated on the merits. This is true despite the fact that a defendant’s death moots the sentence and renders a new trial impossible.

District court gave recommended PIK instruction was revised after Davison’s case. Because instruction given in Davison’s case contained no reference to elements of knowledge and specific intent required by K.S.A. 21-3764(d), it was not a correct statement of law and was erroneous. Error was harmless where there was no evidence Davison should have known theft detection devices were in the packages. Reversed and remanded to vacate the conviction for removal of a theft detection device.

STATUTE: K.S.A. 21-3701, -3764(d), 22-3414(3)

STATE V. JONES

WYANDOTTE DISTRICT COURT – AFFIRMED

NO. 98,571 – JANUARY 23, 2009

FACTS: Jury convicted Jones of aggravated kidnapping and rape. During deliberations, jury asked if it was appropriate to accept vote of juror willing to join others to avoid hung jury. On appeal Jones claimed district court erred in: (1) denying Jones’ motion to represent himself at the preliminary hearing, (2) admitting prejudicial evidence that victim had filed a Protection from Abuse Act (PFA) order against Jones, (3) submitting aggravated kidnapping instruction to jury that added intent to terrorize, which was not in the charge in the information, (4) giving sympathy instruction to the jury, (5) not answering jury’s question with a simple “no,” and (6) imposing sentence in part on criminal history not proven to jury beyond a reasonable doubt.

ISSUES: (1) Right of self-representation at preliminary hearing, (2) evidence of filing PFA, (3) aggravated kidnapping instruction, (4) sympathy instruction, (5) response to jury’s question, and (6) sentencing

HELD: Under facts, district court violated Jones’ right to self-representation at the preliminary hearing by requiring him to be represented by counsel, but error was subject to harmless error analysis. District court’s error had little if any likelihood of changing the trial’s outcome.

Admission of prejudicial evidence is raised for first time on appeal. Even if analysis of probative value and prejudicial effect were to be considered, no error would be found. Even if PFA evidence were to be assumed more prejudicial than probative, error would have been harmless under the facts. And even if evidence was admissible under 60-455, no clear error in the district court not giving jury a limiting instruction.

District court’s instruction regarding aggravated kidnapping was error, but not reversible error because there was no prejudice to Jones’ substantial rights.

Sympathy instruction (previously PIK Crim. 2d 51.07) is no longer approved for general use, but may be used if the facts present very unusual circumstances. District court’s sympathy instruction was error in this case, but error did not prejudice Jones’ substantial rights.

District courts fail to state “no period” prior to directing jury to reread approved PIK instruction was a proper statement of law and responsive to the jury’s question.

Controlling precedent defeats Apprendi claim regarding sentence.

STATUTE: K.S.A. 22-3420(3), 60-414, -455, -3101 et seq.

STATE V. LUTTIG

RENO DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED

NO. 100,290 – JANUARY 9, 2009

FACTS: Luttig, with two prior forgery convictions, was convicted of two more counts of forgery. Based on Luttig’s third forgery conviction, district court ordered her to serve 45 days in jail as condition of probation. Finding inclusion of prior forgeries would enhance penalty, district court did not include them in criminal history. State appealed.

ISSUE: Sentencing and enhancement of penalty
HELD: District court correctly determined that to the extent Luttig's prior forgery convictions were used to enhance her applicable penalty, the prior convictions could not be construed in determining Luttig's criminal history. Under facts, however, use of both prior forgeries was not required because only one prior forgery conviction was necessary to impose the 45-day jail term as a condition of probation. District court should have counted the remaining prior forgery in Luttig's criminal history.

DISSENTING IN PART (Knudson, S.J.): Maintains that counting Luttig's prior forgery convictions to determine criminal history does not run afoul of K.S.A. 21-4710(d)(11) and is supported by K.S.A. 21-4704(l). Would remand for resentencing using both prior forgeries in Luttig's criminal history score.

STATE: K.S.A. 21-3710, -3710(b), -3710(b)(4), -4602(c), -4614, -4704, -4704(l), -4710(a), -4710(d)(11)

STATE V. SHADDEN
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 97,457 – JANUARY 16, 2009

FACTS: Shadden convicted of driving under the influence of alcohol. On appeal he claimed: (1) district court erroneously denied motion in limine to exclude testimony referring to field sobriety exercises as “tests” and claimed unfair prejudice in officer’s testimony that Shadden’s performance under National Highway Traffic Administration (NHTSA) standards indicated a 68 percent likelihood of having at least a 0.10 blood-alcohol concentration; (2) prosecutor violated trial court’s ruling that prohibited officers from rendering their opinions regarding Shadden’s intoxication; (3) breath test required him to waive constitutional rights, and testimony about his refusal to take breath test was unconstitutional; and (4) district court imposed Board of Indigents’ Defense Services (BIDS) attorney fees without first finding Shadden’s ability to pay such fees, and fee order in the journal entry was unenforceable because it was not announced during sentencing.

ISSUES: (1) Evidence of field sobriety tests, (2) prosecutorial misconduct, (3) constitutional claims, (4) BIDS attorney fee order

HELD: Issue of first impression in Kansas. Kansas’ courts have consistently referred to field sobriety exercises as “tests” and have described a person’s performance on such tests as “passing” or “failing.” It is appropriate for officer to testify that field sobriety tests were administered and that, based upon the officer’s training and experience, the driver failed those tests. It is impermissible to take the additional step of equating a level of certainty or probability to the officer’s opinion or to correlate a driver’s performance with a specific blood-alcohol concentration. Here, officer’s testimony regarding the NHTSA standards was not established as scientifically reliable, and thus was inadmissible. Under facts, error was not harmless.

State did not violate district court’s order in limine, and even if error, it was harmless.

Constitutional claims not raised below are not considered.

BIDS attorney fees vacated for noncompliance with State v. Robinson, 281 Kan. 538 (2006). Claim of error in imposition of BIDS attorney fees in journal entry and not during sentencing is moot, and would have no merit if not moot.

STATUTE: K.S.A. 22-4513, -4513(a), 60-401(b)

STATE V. THOMAS
SALINE DISTRICT COURT
REVERSED AND REMANDED
NO. 99,633 – JANUARY 9, 2009

FACTS: Thomas pled guilty to aggravated indecent liberties with a child, M.N.R., and in exchange the state dismissed rape charges. Thomas was 19 years old at the time and M.N.R. was 15 years old. Thomas filed a departure motion based on M.N.R. being the aggressor and the degree of harm or loss attributed to the crime was significantly less than typical for such an event. M.N.R. testified to the contrary at the sentencing hearing. At the sentencing hearing, the district court failed to make explicit findings resolving the many instances of contradictory testimony. The district court granted Thomas’ motion for a dispositional departure and placed him on probation with community corrections for 36 months. The district court’s reasons for departure were that Thomas had no criminal history and M.N.R.’s conduct leading to the offense of her suggestive behavior in wearing only a T-shirt and underwear while watching television with Thomas late at night.

ISSUE: Departure factors

HELD: Court held the conduct of M.N.R., specifically that M.N.R. was wearing only a T-shirt and underwear while alone with Thomas, did not rise to the level of aggression or participation required to furnish a substantial and compelling reason for departure under K.S.A. 21-4716(c)(1)(A). Court also held it was also unwill- ing to conclude that M.N.R.’s behavior constituted a substantial and compelling reason for a departure as a matter of law. Had the district court made specific findings that M.N.R. participated in the sexual intercourse and consented to it, this would have supported a departure sentence. Court stated that upon remand, the district court must impose a presumptive sentence unless the district court makes additional findings warranting a departure.

DISSENT: Greene, J., dissented and held the district court’s findings were a substantial and compelling reason for departure and had previously been viewed as adequate for this court to affirm dispositional departures.

STATUTE: K.S.A. 21-4716(c)(1), 4721(a), (d)
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MARCH

*Pending CLE credit approval

Tuesday, March 24, Noon – 1 p.m.
Class Actions 101: Best Practices and Potential Pitfalls in Providing Class Notice
Brian J. Christensen, Bryan Cave LLP, Kansas City, Mo.
Richard W. Simmons, Analytics Inc., Minneapolis, Minn.
Telephone CLE

Wednesday, March 25, Noon – 1 p.m.
The ABCs of Education Law – Accommodation, Bullying, and Confidentiality
Donna L. Whiteman, Kansas Association of School Boards, Topeka
Cynthia L. Kelly, Kansas Association of School Boards, Topeka,
Telephone CLE

Friday, March 27, 9 a.m. – 3:45 p.m.
2009 Health Law Institute*
DoubleTree, Overland Park

APRIL

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Wednesday, April 1, Noon – 1 p.m.
Brown Bag Ethics – Ethical Concerns in Probate and Estate Planning*
K. Kirk Nystrom, K. Kirk Nystrom, Attorney at Law, Topeka
Kansas Law Center, Topeka

Wednesday, April 8, Noon – 1 p.m.
Brown Bag Ethics – The Ethical Duty of Honesty: Exploring its Breadth and Limits*
Dean Sheila Reynolds, Washburn University School of Law, Topeka
Kansas Law Center, Topeka

Friday, April 10, 9 a.m. – 3:45 p.m.
Family Law Institute – The Educational Bailout for 2009*
Circle S Ranch, Lawrence

Monday, April 13, Noon – 1 p.m.
Brown Bag Ethics – Applying Professional Ethics to a Cost/Benefit Analysis*
Hon. Patrick D. McAnany, Kansas Court of Appeals, Topeka
Kansas Law Center, Topeka

Friday, April 17, 8:30 a.m. – 12:15 p.m.
Consumer Protection Video Debut*
Dodge City, Lenexa, Topeka, Wichita

Friday, April 24, 9 a.m. – 3:45 p.m.
Bankruptcy Institute*
DoubleTree, Overland Park

Friday, April 24, 9 a.m. – 3:45 p.m.
Veterans Benefits Law and Social Security Disability*
Radisson Hotel, Lenexa

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