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By Suzanne Valdez

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.
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Kansas and Missouri County Judges Elections Receive National Attention

Johnson County, Kan., and Greene County, Mo., were in the national spotlight at the American Bar Association (ABA) Midyear Meeting in Boston. The ABA program was titled, “The Anatomy of a Successful Merit Selection Election,” sponsored by the American Judicature Society, the ABA Coalition for Justice, and the ABA Standing Committee on Judicial Independence.

With the advent of the electronic information age, local elections in Olathe, Kan., and Springfield, Mo., can, and did, attract national attention. The Wall Street Journal weighed in on the Johnson County election and $340,000 went into sending out former U.S. Attorney General and Missouri Governor John Ashcroft’s message in favor of electing judges in Greene County, Mo. That was not local money, by the way.

Greg Musil, Posenelli Shugart P.C., described Johnson County’s successful effort to retain the judicial “merit selection” process for the district court:

Our message from the start was the system is not broken and the change to a political system will bring so many risks into our efforts to dispense justice that voters ought to reject it. ... Sixty percent of the voters figured that out and said we’re not going to turn our judges into political animals.

Greg and many other Kansas Bar Association (KBA) members contributed enormous amounts of time and effort on this issue. The Springfield election retaining the “merit selection” plan, against the wishes of the locally popular Ashcroft, was also discussed.

We never get far away from the question of whether we should elect judges in Kansas. After all, we elect the president of the United States and the local school board, so why not judges? If judges make important decisions about our lives, why shouldn’t people get to vote?

Opinion polls point out what we already know; the public wants fair and impartial judges. Those same polls present an interesting conflict. If you ask the question: Should we elect the judges who make important decisions about our lives? Three out of four people will answer, YES. But if you ask the question: Do you think that judges raising campaign funds is a major problem? MORE than three out of four people respond, YES.

We have a dilemma – should we elect or should we appoint our judges? Is it better to vet judicial candidates under some form of “merit selection” before they are elected or elect them and then hold them accountable for their actions and/or inactions in a retention election?

Seth Andersen, executive vice president of the American Judicature Society, points out that in the 13 original states all judges were appointed – nine by the Legislature and four by the executive branch. Decades later judicial elections were seen as reform and the election of judges became the standard. During the 20th century the standard began to reverse again, from elected to appointed. In 1940, Missouri became the first state to adopt a form of “merit selection.” The last state to make a constitutional change providing for “merit selection” was Rhode Island in 1994, but only through a compromise.

It is good to remember that the term “merit selection” refers to the process and not the judge. Most judges have “merit,” whether elected or appointed. What “merit selection” generally refers to are the systems utilized by judicial nominating commissions. These broad-based, nonpartisan commissions are made up of lawyers and lay members, who recruit, screen, and interview judicial applicants and finally send a short list of nominees to the appointing authority.

The KBA has had a consistent policy on this topic for many years. “The Kansas Bar Association, although aware we have a dual system of electing or appointing judges, supports a merit selection of judges. On balance, we believe the merit selection of judges based on qualifications for office rather than a political or fiscal ability to win partisan elections not only is the more desirable system of selecting judges but will result in a better cross-section of judges, including our ethnic and gender communities.”

My opinion about electing judges has changed. At first glance it seemed that all Kansas courts, appellate and trial alike, should use the merit system. But in our less densely populated areas the cost of elections doesn’t seem to be an issue. I am told that in most rural areas the candidates are well-known. If campaign contributions aren’t an issue and the individuals are known to the voters, then election may be fine.

The largest county in the state has more than two dozen judges who are certainly fine judges. But not one is female. Elections there are expensive, with campaign costs often approaching half the annual salary. Do voters there actually know anything about judicial candidates, other than party affiliation? We have been discussing this issue since the country was founded and it looks like the discussion won’t end any time soon.
On Jan. 14, 2009, I proudly welcomed my first child into the family. In an instant that seemed like eternity, my entire world changed. While I could go on for days discussing the wonders of fatherhood, I’d like to take this opportunity to talk candidly about this experience, and how it might relate to the “young lawyer,” or at least the fathers among us.

Like many before me, I thought I had it all planned out. On the one hand, I had checked out a few books on the topic of childbirth and raising a baby, so I felt incredibly at ease about that experience. But on the other hand, I didn’t have any idea what might happen when I tried to mix this “new world” with this professional career that I have been working so hard these past few years to grow.

So I provide some insight for new fathers from the perspective of the workplace. I will not focus on any specific paternity leave policy or the need thereof; instead I will try to highlight some issues that may be helpful to other new fathers who happen to share the same desire to make professional and home life meld. And while I am a new father myself, I won’t pretend to have it all figured out (at the time I penned this article, my son is only 7 weeks old). I’ve sought out the advice of a variety of other newer fathers: some are dual professional families, some have spouses that work part time, some have spouses who are full-time mothers. I’ll attempt to break down the collective advice into several distinct categories.

Determine expectations. I am positive that all soon-to-be fathers would prefer that I make a bold statement like “ignore work and don’t worry, it will be there when you decide to go back after several weeks.” Unfortunately, none of those interviewed shared this experience, nor did their firms or employers have the real ability to offer such privileges. Most of us are simply not in a position to take more than a couple of weeks off, if not something considerably less. But what is expected? Expecting fathers should know that no two firms or offices are the same, and there is even a lack of consistency within an office or a firm. Some expect that a new father will miss no work at all, while other are appalled to see a new father back in the office even a week later. Do your research. Learn what is expected in your specific practice. That might involve talking to more than one decision-maker.

Communicate with those in your office. Take time to communicate with your superiors, co-workers, and staff. We all know that even science cannot predict the childbirth process with complete accuracy. But science can provide fairly accurate guidance. Communicate due dates to those in your office. To the extent possible, communicate possible difficulties, including those related to the pregnancy, as well as those foreseeable postpartum issues (including issues such as family support or lack thereof).

Communicate with those outside your office. Not all of us have clients, nor do all practices require interaction with the outside world. To the extent you do, however, plan to communicate at least your due date and expected postpartum schedule with clients and opposing counsel. We all know the need to communicate vacations to opposing counsel where those may affect litigation or a transaction. This can be even more critical when that leave can’t be perfectly scheduled.

Plan ahead and have backup. Things may not go as scheduled. I’ve heard only around 5 percent of babies are born on their due date. What does that mean to you? Plan ahead and schedule around your baby’s due date. But just as important, work with those in your office to cover hearings, depositions, or meetings to the extent you may unexpectedly be out.

Be mobile. This is really two pieces of advice. The first relates to mobile technology. In today’s technological environment, most of us (unfortunately) cannot turn off e-mail and cell phone calls. But you can use this same technology to pass along critical information to someone who is in the position to deal with important messages and issues. The second advice relates to your person. Be prepared to leave the office at any time. Be prepared to work at home or a hospital, if necessary (although with proper planning and backup, you should be able to avoid that entirely). Wish I could say that I was so fully prepared!

(Continued on Page 16)
Let Your VOICE be Heard!

2009 KBA Officers and Board of Governors Elections

Candidates for Kansas Bar Association Officers Positions

President: Timothy M. O’Brien
President-Elect: Glenn R. Braun
Vice President: Rachael K. Pirner
Secretary/Treasurer: Brett A. Reber
Gabrielle M. Thompson

KBA Delegate to the ABA House of Delegates:
Sara S. Beezley

Candidates for Kansas Bar Association Board of Governors

District One: Eric G. Kraft
District Two: Charles E. Branson
District Four: William E. Muret
District Five: James R. “Rick” Biles
Natalie G. Haag
Michelle L. Miller

District Six: Bruce W. Kent
District Seven: Holly A. Dyer
Calvin D. Rider

District Ten: Jeffery A. Mason

Kansas Bar Association Districts

Out of State - 12
James Richard “Rick” Biles is a native Kansan, born and raised in Bourbon County. He attended high school in Uniontown, began his postsecondary education at Fort Scott Community College and has Bachelor of Arts and Master of Science degrees from Emporia State University. Biles taught social sciences at Washburn Rural High School before becoming executive director of the Nebraska State Board of Public Accountancy. While in state government, Biles developed an interest in tax law. He followed this interest and graduated from the University of Illinois College of Law.


Focusing on probate practice, estate planning, and ethics, Biles has been a frequent speaker at education seminars for attorneys. His article, “Lapses of Multiple Five and Five Powers: Gift Tax Options,” published in Estate Planning magazine, is cited by Professor Nancy Shurtz in Real Property, Probate and Trust Journal as one of the most significant estate planning articles written since 1990.

Biles is a member of the Topeka Bar Association and its Probate and Publications committees, the Kansas Bar Association’s Real Estate, Probate & Trust Law, Tax Law, Solo & Small Firm, Elder Law, and the Intellectual Property Law sections, and the American Bar Association.

Natalie G. Haag was awarded the Kansas Bar Association’s (KBA) Outstanding Service Award in 2008. The presentation of this award was in recognition of her service to the KBA. For the past 11 years, Haag has served on the KBA Legislative and CLE committees. She served as the chair of the Legislative Committee for three terms, between 2005 and 2008. Hagg has also been a member of the 2020 Diversity Committee since 2000. Her service to the bar includes involvement with

(continued on next page)
other bar associations. Recently, she has served on the board of directors for the Kansas Women Attorneys Association and the Women Attorneys Association of Topeka. For the last two years, she has served as chair of the Public Relations Committee for the Topeka Bar Association.

She has served on the board of directors and as an officer for the Kaw Valley Girl Scouts, the Topeka Swim Association, the Kansas Leadership board of trustees, and the Shawnee County 4-H Events Council.

Haag graduated from Washburn University School of Law in 1985. She prosecuted for four years before moving to private practice. Haag handled civil litigation and workers' compensation cases while working with the firms of Davis, Wright, Hummer & McCallister and Wallace, Saunders, Austin, Brown & Enochs. Thereafter, she served as Security Benefit's director of governmental affairs. Currently, she is serving as chair of the State Legislative Strategy Group for the American Counsel of Life Insurers, a national association of life insurance companies representing more than 90 percent of the life insurance companies nationwide.

Michelle L. Miller was born and raised in Hays and has been a lifelong Kansas resident. In 1998, she graduated magna cum laude from Fort Hays State University with a bachelor's degree in political science. She then attended Washburn University School of Law, graduating in May 2001 with dean's honors.

She began with the Law Firm of Alderson, Alderson, Weller, Conklin, Burkhart & Crow LLC in 1999 as a law clerk. Upon graduation in 2001, she became an associate and then a member of the firm in 2004. She continues to be a member with the Alderson Law Firm, focusing her practice in the area of family law.

Miller is licensed to practice law in Kansas and in the U.S. District Court for the District of Kansas.

She is a member of the Topeka and Kansas bar associations, and she is also a member of the Sam A. Crow Inn of Court, serving as an executive board member 2007 through 2008. Miller has been actively involved in the Topeka Bar Association (TBA), serving on its board of directors since 2005. Currently, she is an active participant in the work of the TBA's Probate and Family Law committees. She also has served on the Judicial Evaluation Committee, as well as the Shawnee County Family Law Guidelines Committee. She mentors law school students and new attorneys in the Topeka area. Miller was formerly a board member for the Women Attorneys Association of Topeka. In 2005, she received the Outstanding Young Lawyer Award presented by the TBA.

Holly A. Dyer is a partner in the Wichita office of Foulston Siefkin LLP, practicing in the areas of insurance defense, professional malpractice, and commercial and complex litigation.

She received her Bachelor of Art in journalism, magna cum laude, in 1988 from Wichita State University. She attended the University of Kansas School of Law receiving her Juris Doctor in 1994. While in law school she was articles editor for the Kansas Law Review, a member of Order the Coif, and received the Samuel Mellinger Leadership Award.

Dyer is a member of the American, Kansas (KBA), and Wichita (WBA) bar associations; Kansas and Wichita women attorneys associations; American Constitution Society; Wesley E. Brown Inn of Court; Defense Research Institute; Kansas Association of Defense Counsel; and sits on the board of governors of the University of Kansas School of Law.

Dyer is past president of the KBA Health Law Section. She is a member of the WBA board of governors, Awards and Civil Practice committees, chair of the Law in Education Committee, and a former member and chair of the Professional Diversity Committee. She helped develop the “Grow Your Own Lawyer” program for high school students interested in becoming lawyers.

She has made numerous presentations concerning health law for the KBA, WBA, and Foulston Siefkin.

Dyer has been active with the United Way serving as an allocations volunteer and on the Young Leaders Steering Committee.

Calvin D. Rider, Wichita, is of counsel with the law firm of Fleeson, Gooing, Coulson & Kitch LLC, where he practices in the areas of business and corporate law, education law, real estate, and probate.
Timothy M. O’Brien has been the clerk for the U.S. District Court, District of Kansas, since March 2008. For the 23 years immediately preceding, he practiced law and was a partner at the Shook Hardy & Bacon law firm in Overland Park and Kansas City, Mo. His litigation specialties included the Employee Retirement Income Security Act and fiduciary and complex commercial litigation.

He graduated from the University of Kansas in 1980 with Bachelor of Arts degree. He graduated from the KU School of Law in 1983, where he was an associate editor of the Kansas Law Review. Following law school, O’Brien was a law clerk for Chief Judge Earl E. O’Connor for the District of Kansas from 1983 through 1985.

O’Brien has been active in civic and professional groups; he has served as a member of the board of directors of the Johnson County Bar Association, the Johnson County Bar Foundation, and Johnson County Developmental Supports (a 501(c)3 organization), and the Kansas Bar Association. He was named as a Kansas Super Lawyer and has been listed in the Best Lawyers in America for employee benefits law and commercial litigation.

Glenn R. Braun, Hays, is a partner at Glassman, Bird, Braun & Schwartz LLP, where he has practiced law for the past 26 years. He represents plaintiffs in personal injury actions and handles domestic cases, felony criminal defense, and other areas associated with the general practice of law.

Rider received his Bachelor of Science degree in accounting from Fort Hays State University in 1981 and his juris doctorate from Washburn University School of Law in 1985. He has served on numerous Wichita Bar Association (WBA) committees, including the board of governors, 2002-2003. Rider currently chairs the WBA Building Management Committee and is a former president of the WBA Young Lawyers, 1991-1992. He is a past recipient of a KBA’s Pro Bono Award and the WBA’s President’s Award, 2007. Rider is a fellow of the Kansas Bar Foundation and a member of the Wichita, Kansas, and American bar associations, Kansas School Attorneys Association and the National School Board Association Council of School Attorneys. He is a current board member of Via Christi Foundation Inc., Health Concepts Foundation Inc., and Weeks Charitable Foundation Inc.

He serves as the city of Hays prosecutor and was previously elected to two terms as Ellis County attorney.

Braun is a graduate of Kansas State University and received his juris doctorate with honors in 1981 from Washburn University School of Law, where he was the Student Bar Association president. He is a member of the Ellis County Bar Association, previously serving as president and secretary/treasurer. He currently serves as vice president of the Kansas Bar Association (KBA) Board of Governors and previously served as the District 10 Governor, being elected in 2004 and re-elected in 2007. He serves on the association’s executive committee.

He was twice-selected by the Supreme Court Nominating Commission for a position with the Kansas Court of Appeals. He was appointed to the Kansas Racing & Gaming Commission in 2005 and reappointed in 2008, where he serves as vice chair and chief hearing officer.

Braun has held a variety of positions within the community, including the board of directors of the CASA program, where he served as president in 1992; board of directors for Big Brothers/Big Sisters and St. John’s Rest Home Endowment Association; and Thomas More Prep-Marian High School Council of Education. He is presently the finance council chairman for Immaculate Heart of Mary Parish, Hays.

Braun has also taught criminal law, criminal procedure, and introduction to law as an adjunct professor at Fort Hays State University and has participated in numerous presentations dealing with a variety of legal issues.

(continued on next page)
Rachael K. Pirner, Wichita, is a member of the Triplett, Woolf & Garretson LLC law firm. Her areas of practice include probate general litigation and assisted reproductive law.

She is serving her second term as District 7 Governor to the Kansas Bar Association (KBA) Board of Governors. She currently serves on its executive committee. Pirner has chaired the KBA Litigation Section and has served on the KBA CLE, Nominating, and Fee Dispute Resolution committees.

She is also active with local bar activities. She has been on the Wichita Bar Association’s Legislative, Public Relations, Probate (Chair), Diversity, Unauthorized Practice of Law, and Nominating committees. She currently chairs the Probate Committee.

Pirner has been active in the Wichita Women Attorneys Association (WWAA) since she graduated from the University of Nebraska School of Law in 1989. She has held all offices of WWAA. She has also served the Kansas Women Attorneys Association as its president, vice president, secretary, regional coordinator, and as a chair of the Public Relations Committee. She has been the co-chair of the annual women attorney’s Lindsborg CLE, which draws approximately 140 women attorneys from across the state for the three-day seminar.

She received the Louise Maddox Award in 2001 given by the WWAA, which honors persons who have worked to advance opportunities for women in law.

Pirner has long participated in the Lawyer’s Care Project through Kansas Legal Services. She has volunteered to represent women seeking Protection from Abuse orders and prepares advance directives for indigent persons in hospice care. Pirner has also served on the board of directors of the YWCA and Planned Parenthood.

In addition to serving on the KBA Board of Governors she also currently serves as immediate past president of the Community Council for Women’s Studies at Wichita State University, a member of the board of trustees for KPTS, public television, and on the boards of IOLTA and Kybele Inc. Pirner was also appointed by District Attorney Nola Foulston to serve on the Financial Abuse Specialist Team, which is a team assembled to combat financial abuse of dependent adults.

Eric G. Kraft practices with Duggan, Shadwick, Doerr & Kurlbaum P.C. in Overland Park in general and civil litigation with an emphasis in real estate litigation.

Kraft earned his bachelor’s degree, cum laude, from Wichita State University in 1995. He earned his juris doctorate from Washburn University School of Law in 1999, where he was a staff member of the Washburn Law Journal and was a member of the Order of Barristers.

He is licensed to practice in Kansas, Missouri, the U.S. District Court for the Western District of Missouri, the U.S. District Court for the District of Kansas, and the 10th U.S. Circuit Court of Appeals.

Eric G. Kraft

In addition to being a member of the Kansas Bar Association (KBA), Kraft is a member of the American, Missouri, Kansas City Metropolitan, and Johnson County bar associations.

He served as president of the KBA Young Lawyers Section (YLS) and in that capacity was a member of the KBA Board of Governors, 2004 to 2005. He was a member of the KBA CLE Committee and chaired the CLE Committee for the 2001 KBA Annual Meeting. Kraft served as the KBA YLS delegate to the American Bar Association, 2003 to 2005.

For the 2005 KBA Annual Meeting, Kraft organized the first CLE track of seminars designed for young attorneys. The program was successful and offered again at the 2006 and 2007 annual meetings.
He has written for the KBA Journal and has presented topics to numerous organizations, including the Institute for Paralegal Education and National Business Institute.

In 2007 Kraft organized and coordinated the Federal Emergency Management Agency Disaster Legal Services Hotline in response to the May 4, 2007, tornadoes in federally declared disaster areas of Kansas.

Charles E. Branson, a lifelong Kansan, was elected as district attorney of the 7th Judicial District on Nov. 2, 2004, and took office Jan. 10, 2005.

While leading a staff of 11 assistant district attorneys, 14 staff positions, and a budget of $1.3 million, Branson created the first consumer protection program in Douglas County. His work on behalf of consumers led the local press to refer to him as a true "consumer advocate."

He revamped the agency’s domestic violence unit to be sensitive to the special needs of domestic violence survivors, in part, by creating a partnership with the University of Kansas and local agencies to provide interns who work with and counsel violence survivors.

He created a program that allows crime victims and witnesses to participate in an educational program designed to make the legal process less threatening and frightening.

He has accomplished all of this while also facing a near-record new caseload and resolving, obtaining convictions, and closing hundreds of old criminal cases that had built up over time.

A native of Hutchinson, he graduated from the University of Kansas with a Bachelor of Science in business administration and received his law degree from the University of Kansas School of Law.

Branson started his legal career by opening a private law office in 1996 and focusing on the areas of criminal and civil litigation.

In 2002, Branson began public service as the Eudora municipal prosecutor. He continued this service until his election as district attorney.

Branson is a past president of the Douglas County Bar Association, a counselor for the Judge Hugh Means American Inns of Courts, a board member of Van Go, an advisory board member of Big Brothers and Big Sisters of Douglas County, and has helped with planning “Jazz it Up,” a fundraiser for Douglas County Senior Services. He also has worked for several years with the Juneteenth, the oldest known celebration of the ending of slavery, dating back to June 19, 1865, Planning Committee.

William E. Muret is currently in a general solo practice in Winfield. He is also the city attorney for Winfield and Udall and municipal court judge for the city of Douglass. Muret was in general practice with the firm of McSpadden & Andreas, Winfield from 1984 until establishing William E. Muret LLC.

He received his Bachelor of Arts in 1974 and a Master of Science in 1976 from Kansas State University. He then worked for Drake University, Des Moines, Iowa, and K-State for five years before beginning law school at Washburn University School of Law. He received a juris doctorate in 1984. He has been a member of the Kansas Bar Association (KBA) since 1984.

Muret is a member of the KBA Real Estate, Probate & Trust Law and Government Lawyer sections and previously was also a member of the Criminal Law and Family Law sections. He is a Fellow of the Kansas Bar Foundation.

He has served as president, vice president, and secretary/treasurer of the Cowley County Bar Association; as president and vice president of the Winfield area United Way; and as a member of the USD 465 School Board.

Bruce W. Kent received his law degree in 1970 from Washburn University School of Law School and in 1973 his Master of Law degree in taxation from the University of Miami. He was in private practice as a senior partner of the law firm of Ryan, Kent, Wichman, Walter, and McClymont in Hays and Norton from 1970 to 1987.

In 1988 he served as senior trial attorney for the Department of Treasury in Austin, Texas. In 1990 he was appointed as chief legal counsel for the Kansas Department of Human Resources by Gov. Joan Finney and he was appointed by President Bill Clinton to serve as the regional administrator of Region VII for the U.S. Small Business Administration in 1993. Since 2000, he has began legal counsel to the Kansas State University Foundation.

For more than 38 years Kent has been active in the Kansas Bar Association. He served on the Ethics Grievance Committee and also served on the CLE Committee for 20 years.

(Continued on next page)
Kent was vice president of the CLE Committee in 2006. He has served as president of the Tax, Corporate and Banking, and Employment Law sections and presently is president of the Agriculture Law Section.

He served as a trustee and on the executive committee of the Kansas Bar Foundation and was president in 2008. He served on the board of governors of the Kansas Trial Lawyers Association and was elected treasurer in 1975. He was awarded the Outstanding Service Award by the Kansas Bar Association in 2004. Kent is admitted to practice before the U.S. Supreme Court and all lower courts.

He is a member of the American Bar Association and was elected in 2007 as a trustee to the National Conference of Bar Foundations. He also presently serves on the KBA Planning Committee for the Federal Courts Celebration of the Rule of Law in Kansas for 2011. He is a member of the Riley County Bar Association and past president of the Ellis and Norton County bar associations. Over the years he co-founded several annual CLE seminars for the KBA, including the Fort Hays Agriculture Conference, Plaza Lights, and Slam-Dunk.

Jeffery A. Mason has practiced law in Goodland since 1983. He is presently a member of the firm of Vignery & Mason LLC. He received his undergraduate degree from the University of Kansas in 1980 and his law degree from the University of Kansas School of Law in 1983. He presently serves as a lawyer member of the Kansas Commission on Judicial Qualifications. He has served as a member of the Kansas State Highway Advisory Commission, 1996-2006, and as a member of the Kansas Continuing Legal Education Commission, 1997-2003, serving as chairperson from 2001 to 2003. He also served on the Kansas Water Authority, 1988-1994. He is an active member of the Sherman County and American bar associations and the Kansas Association for Justice. He served for a number of years on the Continuing Legal Education Committee for the Kansas Bar Association (KBA) and received the KBA Outstanding Service Award in 1998. He served as president of the KBA Solo and Small Firm Section, 1996-1997. He is active in the community as president of the Northwest Kansas Area Medical Foundation and secretary of the Kiwanis Club of Goodland. He was appointed to the KBA Board of Governors in October 2008.

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**District Ten**

Jeffery A. Mason

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University of Kansas School of Law in 1983. He presently serves as a lawyer member of the Kansas Commission on Judicial Qualifications. He has served as a member of the Kansas State Highway Advisory Commission, 1996-2006, and as a member of the Kansas Continuing Legal Education Commission, 1997-2003, serving as chairperson from 2001 to 2003. He also served on the Kansas Water Authority, 1988-1994. He is an active member of the Sherman County and American bar associations and the Kansas Association for Justice. He served for a number of years on the Continuing Legal Education Committee for the Kansas Bar Association (KBA) and received the KBA Outstanding Service Award in 1998. He served as president of the KBA Solo and Small Firm Section, 1996-1997. He is active in the community as president of the Northwest Kansas Area Medical Foundation and secretary of the Kiwanis Club of Goodland. He was appointed to the KBA Board of Governors in October 2008.
Native Kansan, Gerald F. Seib, to Make Keynote Address

With experience from his news coverage of the White House, native Kansan Gerald F. Seib will bring insight into the current presidency, during the Joint Judicial Conference and 2009 Kansas Bar Association Annual Meeting, with his keynote address, “The Obama Presidency: Great Ambition or Grave Overreach?”

Seib is assistant managing editor and executive Washington Editor of The Wall Street Journal. He writes the paper’s “Capital Journal” column on a weekly basis and is a regular commentator on Washington affairs for Fox Business News and CNBC.

Prior to assuming his current position in November 2008, Seib had been the Journal’s Washington bureau chief since March 2002 and deputy bureau chief in Washington since September 1997.

He joined the Dallas bureau of the Journal as a reporter in 1978 and transferred to the Journal’s Washington bureau in 1980 covering the Pentagon and the State Department. In 1984, he and his wife, Journal reporter Barbara Rosewicz, were transferred to Cairo to cover the Middle East. They returned to the Washington bureau in 1987 where he has covered the White House and reported on diplomacy and foreign policy. In December 1992, he became a news editor responsible for the Journal’s national political coverage from Washington and around the country and assumed responsibility for The Wall Street Journal/NBC News poll.

In 1988, Seib won the Merriman Smith Award, which honors coverage of the presidency under deadline, and the Aldo Beckman Award for coverage of the White House and the presidency, and in 1990, he received the Gerald R. Ford Foundation prize for distinguished reporting on the presidency. In 1992, the Georgetown University Institute of Diplomacy awarded him the Weintal Prize for his coverage of the Gulf War. He received honorable mention in the Edwin Hood Prize for diplomatic reporting from the National Press Club in 1998. He was part of the team from the Journal that won the 2001 Pulitzer Prize in the “breaking news” category for its coverage of the Sept. 11 terrorist attacks. In 2004, the William Allen White School of Journalism at the University of Kansas named Seib the winner of the 2005 William Allen White Foundation’s National Citation. Past winners of this award include the Journal’s Vermont Royster, Walter Cronkite, and Bob Woodward.

Seib earned a bachelor’s degree in journalism from the University of Kansas. While at the university, he was a member of Phi Kappa Phi, a national academic honor society, and Kappa Tau Alpha, a national journalism honor society. He was also an intern in the Journal’s Dallas bureau, editor of the university’s newspaper, the Daily Kansan, and a Sears Foundation congressional intern in the office of U.S. Rep. Gilles Long of Louisiana.

Seib is co-author of “Pennsylvania Avenue: Profiles in Backroom Power,” published by Random House in 2008. He and his wife have three sons and live in Chevy Chase, Md.

Excerpt from Seib’s acceptance address of the Kansas University’s William Allen White School of Journalism’s 2005 William Allen White Foundation’s National Citation. (Used with Seib’s permission)

“It will be 30 years ago this summer when my brother, Jeff, and I climbed into my car — a gold-colored Dodge Coronet, fast-back, pretty hot stuff at the time — and drove from my hometown of Hays to Lawrence, traveling east along I-70. We were two Western Kansas rubes trying to sneak into the big-time via the University of Kansas.

I made two stops that day. I didn’t realize it at the time, but in so doing I entered the very special family known as KU journalists. A KU journalist who happened to live in Hays at the time, Mike Walker of Fort Hays State University, sent me to meet Larry Knapp and Marla Gleason at University Relations. Somehow I proved to them that I could write press releases. So they gave me a job doing just that for the university, and I knew I could pay the tuition.

Next, at the arrangement of another KU alum, John Lee, then of the Hays Daily News, I went to the William Allen White School of Journalism. There, I met this gruff, hard-nosed young professor named Susanne Shaw. She gave me a writing test to see whether the one year I had spent studying journalism at Fort Hays State had qualified me to bypass Introduction to Journalism. She must have liked something she saw that day, because I was indeed moved up into Reporting I.

... I went to work for the Daily Kansan, and had so much fun it seemed sinful.

I got myself an internship at the Salina Journal, and encountered the legend of Whitley Austin, father of Dan Austin. Dan is a fellow Jayhawk, a member of the White board, and soon enough would be my colleague at The Wall Street Journal. Then, solely because I was from the William Allen White School of Journalism, The Wall Street Journal decided to take a chance and hire me as an intern — and when I arrived for my job in the Journal’s Dallas bureau I found myself sitting in front of yet ANOTHER Jayhawk, Bob Simison, who already was with the Journal.

Fortified by those who made this a great school, I left Lawrence and embarked on careers in what I consider the great and honorable vocation of journalism. I’ve been lucky. I’ve circled through Dallas, and Washington, and Cairo and back to Washington for the Journal. I’ve covered wars and kings and presidents and campaigns, and there have been some wonderful moments.”
I often hear, “What do I really get with my membership?” This column seeks to answer that question and will appear in every other issue of the Journal. I think that you, our members, will be surprised with the quantity and the quality of the member benefits with the Kansas Bar Association (KBA). The first benefit highlighted in this column is our online legal research tool, Casemaker.

Offered free to all KBA members, Casemaker is a comprehensive database that contains legal libraries for all 50 states, as well as a federal library. Casemaker 2.1, released Feb. 1, has added new topics within the federal library, such as the Internal Revenue Service, Court of Claims, Court of International Claims, and Board of Immigration Appeals. New states are also being added to what is known as the Casemaker Consortium.

Casemaker has made searching for case law easier than ever. Case law may be searched using the name of the court, an attorney involved with the case, the opinion author, as well as the case name, docket number, or case citation. A new feature of case law is browsing the official reporter in the same manner as you would statutes or codes. If you need any help with searching, search tips are located at the bottom of each search page.

The enhanced legal search engine has other features to help users. Casecheck lets users see which cases have cited the case they are currently researching and see its treatment within the new case, whether it be an appeal or a reference to that case. The multibook search function allows the user to search all the books within a library, while the multistate search function allows the searching of case law of all 50 states. There is also a currency link that lets users know how up-to-date a book is within a selected library.

These are just some of the functions that Casemaker offers to our members. In these tough times, it makes sense (or cents) to make use of every available benefit offered by your KBA membership. Casemaker is a money-saving tool that is free to you; it can be accessed from any computer anytime, day or night. Its use will fit into your schedule, not the other way around. Members can access Casemaker through the KBA Web site at www.ksbar.org and clicking the Casemaker logo on the homepage.

For more information about Casemaker or if you would like to schedule a free one-hour KBA Road Show Casemaker CLE, please contact Lisa Montgomery, director of member services, at lmontgomery@ksbar.org or at (785) 234-5696.

The Journal of the Kansas Bar Association

My First Foray
(Continued from Page 7)

Develop a feasible routine. I often suffer from grand illusions of what I am capable of accomplishing in any given block of time. This was especially true for the first few days and even weeks of my child’s life. Look honestly at what needs to be accomplished in a given day and schedule accordingly. Get a routine. That might involve going to office at an early hour so that your evenings are preserved for family. It may also involve some scheduled time off or shortened work days for a couple of weeks.

Be flexible. Once you have developed a routine, be ready to stray from it. There are some things you just can’t predict. What happens if baby comes early? What happens when mom has to stay in the hospital because of complication due to delivery? Even healthy babies and healthy mothers require some flexibility.

Consider your own needs. Last, but certainly not least, consider your own needs: physical, mental, and emotional. Without a doubt you will need to refocus your time and dedication to your family – the baby is now number one in your life. But take the time to do those things for yourself that keep you sane. For me, I run. For others, some enjoy a morning coffee or a good evening book. Try to focus on work when at work, and on the family when at home. Don’t allow yourself to break down. Others (at work and at home) are counting on you.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.
We Want You – Become a Kansas Bar Foundation Fellow in 2009

In 1957, a special committee of the Kansas Bar Association (KBA) recommended the establishment of the Kansas Bar Foundation (KBF) to the KBA Board of Governors. They foresaw an organization whose supporters would generously give time, talent, and contributions throughout the years to provide legal services for the disadvantaged, educate the public about the law, and foster the well-being of the profession.

For more than 50 years, the Foundation has grown to become an organization of nearly 700 members with numerous programs that serve the public.

The Foundation forges partnerships between the bar, the courts, and the legal aid organizations in Kansas to improve our system of justice and to help low-income and disadvantaged members in our community by ensuring that they have meaningful access to the justice system to protect their rights. The Foundation places special emphasis on issues affecting children and families and also supports exceptional education programs for youth.

Since 1986, the Foundation has provided more than $3.5 million for public services. Through the years the Foundation has been instrumental in the following projects:

- Developing law-related education programs for youth, including the statewide mock trial competition for junior and high-school students; conflict resolution programs to reduce in-school violence, legal rights and responsibilities booklets for teens; Law Wise, a school year publication sent to civics’ educators statewide complete with lesson plans and technology information; and a clearinghouse of law-related educational resources for educators.
- Administering the KBA’s reduced fee and pro bono programs.
- Providing legal advice and representation for senior citizens, the poor, and victims of domestic violence.

In December 2008, the KBF gave the second Case, Moses, Zimmerman & Martin P.A. scholarship to second-year Washburn University School of Law student Jennifer Horchem. The Case Moses scholarship will be an annual gift of $1,000 to second-year law students attending the University of Kansas School of Law, Washburn University School of Law, or Creighton University School of Law. The criteria of the award includes academic achievement, participation in community activities, as well as a bona fide intention to practice law in Kansas.

“We are excited to contribute to future Kansas attorneys, and hope this will also promote the work of the Kansas Bar Foundation to further the good deeds of the legal profession,” said David H. Moses, a shareholder in the Case Moses law firm.

There are a number of ways you can help the Kansas Bar Foundation, and it all truly makes a difference. You can support the Foundation by participating in the IOLTA program, by joining the Fellows program, or by volunteering your time. The Fellows recruitment season is upon us and we want to grow. New Fellows will be recognized at the annual Fellows Dinner this June in Overland Park during the Joint Judicial Conference and Kansas Bar Association Annual Meeting. If you are interested in becoming a Fellow or increasing your level of giving, please contact Meg Wickham, manager of public services, at (785) 234-5696 or e-mail at mwickham@ksbar.org.

The 2009 Fellows Dinner is scheduled for Thursday, June 18, 2009, at the Joint Judicial Conference and Kansas Bar Association Annual Meeting in Overland Park. Those added to the published roll of fellows and those who have reached a new contribution level will be honored at the dinner. This black-tie gala event of the year provides a wonderful opportunity to salute the new fellows, introduce new officers, and reminisce with colleagues. Invitations will be mailed. If you would like more information about the dinner, please contact Meg Wickham, KBA manager of public services, at (785)234-5696 or e-mail mwickham@ksbar.org.
A Nostalgic Touch of Humor

Dress for Success: 2009 Style

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

A long time ago, in a much different world than we live in today, people dressed up. Men wore coats and ties, women wore dresses and collectively made everyday events special. I don’t just mean Sunday church. Rather, routine activities — errands, meetings, social gatherings. Attending a high-profile sporting event, like a college or professional football, basketball, or baseball game required dressing like the day was important because, well, it was. Business trips, especially ones that involved air travel, demanded top-shelf threads and often a fedora.

In the 60s and early 70s, almost anyone in a position of leadership dressed in a manner to command respect. NFL coaches, for instance, always wore suits and ties on the sidelines. The images of Kansas City Chief’s coach Hank Stram barking out plays in Super Bowl IV wearing a dark sport coat, white shirt, red button-up vest and thin black tie is now part of NFL legend. So is Stram — who was miked for the game — calling “65 toss power trap” — which allowed Mike Garrett to score a touchdown. [In case you are under 40 and have no sense for history – the Chiefs once won a Super Bowl.]

And in those days, people treated each other differently. Respectfully, is one word that comes to mind.

Whatever the genesis, in many circles casual dress is now the rule. I read where our new president has made for a less formal dress code in the White House; breaking from a tradition that said the Oval Office was reserved for coat and tie. In less serious venues like NFL sidelines, these days head coaches are forbidden from wearing a coat and tie. Since 1993 coaches are required to wear NFL-sponsored gear as part of a marketing agreement with various apparel companies. The era of Stram, Tom Landry, and other Hall of Fame coaches commanding respect of their players, in part because they looked respectful — now ancient history. Today shouting, even shoving matches, between NFL coaches and players is not uncommon.

And so inevitably this trend has landed smack dab in the middle of the legal profession. Now it’s worth noting that many members of the bar have kept the faith and still make a tie the daily routine. A few take sartorial distinction to the ‘next level’ — sporting bow ties. C. Stanley Nelson, Justice Fred Six, and David Rebein are three that come to mind. Yet, anecdotal evidence suggests, that of late, particularly among those under 30, they are the exception.

But it appears that the pendulum has started to swing back where, some say, it belongs. Like the author Malcolm Gladwell describes in his best-selling book, “Tipping Point” — meaning a point in time where momentum for change becomes unstoppable. And maybe historians will track that tipping point to what happened one afternoon at oral argument before the U.S. Court of Appeals for the Federal Circuit. As reported in The Wall Street Journal Law Blog (Journal) last August, and then picked up by the ABA Journal and other legal publications, there an attorney from Seattle, Delbert Barnard, had completed an oral argument before a panel that included Judge Randall Rader.

Counsel’s argument went well, apparently, but there was another part of his argument that did not. His attire. You see, counsel was wearing a dark polo shirt. Turns out that he had brought a dress shirt, but it was missing a collar button. As he reported to the Journal: “I had popped a collar button on my one and only dress shirt,” explained Barnard. “I put it on, and the tie on to see if it could lay flat even though the collar wouldn’t stay down, and it wouldn’t. I thought to myself, out here on the West Coast a lot of people will wear a suit with a turtleneck. I had a dark polo shirt. So I wore that.” That decision, unquestionably, was from the General Custer school of “bad calls.”

When his argument was over, Judge Rader had this to say: “Next time, wear a tie. This is the federal circuit.” It’s worth noting Barnard won the appeal, but when his wardrobe choice hit the Web, and readers were invited to comment, the number and variety of responses pushed the Web to its brink. A sample:

“Bernard is a joke, who would hire this clown?”

“His one and only dress shirt? C’mon. Even corpses have..."
more than one dress shirt on hand at the funeral parlor.”

“The law is a profession, not just another service sector job. Thus, it seems appropriate to look professional. In short, there is no ‘club pro-client’ privilege, so let’s not dress like we’re going out to play the back nine. This sartorial obsession, while trivial and inane, is not baseless.”

“What kind of idiot travels ‘all the way across’ the country to appear in Federal court with only ‘one dress shirt’? Has he never heard of Murphy’s Law?”

Not everyone was in agreement, however:

“This article and most of these comments just show how idiotic and STUPID most people are. A tie does NOT look good, does nothing to enhance a person, and only fools wear them, because they are nothing more than a BIB!”

Beyond the courtroom, there is a renewed focus on what people wear. In another Journal article titled, “Law Without Suits: New Hires Flout Tradition” from Jan. 31, 2008, the writer noted that “older people have long complained about the sartorial sloppiness of the younger generation. But the divide is stark in the legal profession. ‘I share the lament and disgust about the general level of associates’ attire,” said Tom Mills, the 60-year-old managing partner of the Washington office of Winston & Strawn LLP. “I think it’s abysmal.” For young men and women, a business suit is an uncomfortable yoke to be dusted off for special occasions. “Getting up in the morning and putting on a suit is hard,” said Sara Shikhman, a 26-year-old legal associate at Cadwalader, Wickersham & Taft LLP in New York. She says she hasn’t worn one in six months.


“Who cares?! If the job is done with precision, then who cares?! A moron in a suit is still a moron. Old fogy partners get over it. Times have changed.”

“I agree with most of this board: children wear jeans and men wear suits. Clients do not want to hire children.”

“Hollywood is not a model for anything, let alone business dress.”

“If I see a partner wearing jeans, I automatically ratchet down my respect for that person.”

“I’ve noticed a lack of respect from my colleagues since those dry cleaners lost my pants and I stopped wearing any.”

I suspect this controversy is just getting started. In the meantime, memo to associates: ditch the flip flops and puka shell necklace.

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
Members in the News

**Changing Positions**

Chad E. Blomberg has joined Lathrop & Gage L.C., Kansas City, Mo.
Michelle L. Brenwald-Johnson and Sarah L. Newell have become members with Klenda Mitchell Asuterman & Zuercher LLC, Wichita.
Bruce C. Brown and Eric A. Commer have been installed as a Sedgwick County District Court judges, Wichita.
Cassie J. Carpenter has joined the Wirken Law Group, Kansas City, Mo.
Derek S. Casey has joined Prochaska, Giroux & Howell, Wichita.
Katie J. Cheney has joined Frasier & Johnson LLC, Beloit.
Shannon S. Crane has joined Hutchinson Legal Clinic, Hutchinson.
Brian P. Duncan has joined Case, Moses, Zimmerman & Martin P.C., Yates Center, and Susan G. Saidian has joined the firm’s Wichita office.
Heather Esau Zerger has been elected a partner of Bryan Cave LLP, Kansas City, Mo.
Neil B. Foth was appointed by Gov. Kathleen Sebelius as a 10th Judicial District judge for Johnson County.
Regan N. French has joined YRC World-wide/YRC Logistics, Overland Park.
Brian T. Goldstein was elected a shareholder of Waldeck, Matteuzzi & Sloan P.C., Leawood.
Roger L. Gossard has been appointed chief judge of the 14th Judicial District, Coffeyville.
Brette S. Hart has been elected a shareholder of Harris McCausland P.C., Kansas City, Mo.
Paul R. Himmelstein is now a member of Van Osdol & Magruder P.C., Kansas City, Mo.
Cynthia L. Kelly has become the attorney for Unified School District No. 501, Topeka.
Morgan B. Koon has joined Cornerjo & Sons Inc., Wichita.
Laura H. Lewis has been sworn in as the Meade County attorney, Dodge City.
James C. Spencer and Brian L. White have become members at Hinkle Elkouri Law Firm LLC, Wichita.
John R. Myer has joined the litigation practice group of the firm.
William E. Muret was appointed Municipal Court judge, Winfield.
Ryan M. Peck has been named a member with Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.
Kyle N. Roehler and Jacqueline M. Sexton have become shareholders at Poland, Wiens, Eifelder, Roper & Hofer P.C., Kansas City, Mo.
Patrick A. Turner is now with the U. S. District Court for the District of Kansas, Wichita.

**Changing Locations**

Jeff Bloskey and J. Scott Gordon have formed the firm of Gordon & Bloskey, 9300 W. 110th St., Ste. 470, Overland Park, KS 66210.
Kaylene M. Brin has started her own practice, Kaylene Brin P.A., 109 W. 10th, Hays, KS 67601.
The Cafer Law Office LLC has moved to 3321 SW 6th Ave., Topeka, KS 66606.
Heather L. Counts has started the firm, The Counts Law Firm LLC, 910 One Main Plaza, 4435 Main St., Kansas City, MO 64111.
Gene M. Cullan has moved to 20830 N. Tatum Blvd., Ste. 360, Phoenix, AZ 85050-7268.
Jill A. Elliott has started her own practice, Elliott Law Office, 301 N. Pomeroy, P.O. Box 128, Hill City, KS 67642.
Stephanie E. Goodenow, Attorney at Law, has moved to, 214 S. Chestnut, Ste. 4, Olathe, KS 66061.
E. Elaine Halley has started her own firm, Law Office of E. Elaine Halley LLC, 501 Delaware St., Ste. 10, Leavenworth, KS 66048.
G. Thomas Harris III has started his own practice, Harris Law Office, 200 NE Missouri Rd., Ste. 200, Lee’s Summit, MO 64068.
Jon M. King has moved to 5200 Bob Billings Pkwy., Ste. 201, Lawrence, KS 66049.
Kutak Rock LLP has moved its Wichita office to 1605 N. Waterfront Pkwy., Ste. 150, Wichita, KS 67206.
Jorgensen & Keiter Chtd. has moved to 331 N. Waco St., Wichita, KS 67202.
Annette F. Lightcap has moved to 8717 33rd St., Ste. 111, Shawnee Mission, KS 66202.
Brian T. Goldstein has joined YRC World-wide/YRC Logistics, Overland Park.
Katie J. Cheney has joined Frasier & Johnson LLC, Beloit.
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**MISC**
Gary Dean Paulsen

Gary Dean Paulsen, 61, of Onaga, died Feb. 2 at his home. Paulsen was born in Onaga on Jan. 11, 1948, to Wesley C. and Helen K. (Reichert) Paulsen. He was a 1966 graduate of Onaga High School and received his Bachelor of Science from Kansas State University in 1970. He earned his juris doctorate from Washburn University School of Law in 1973. He was admitted to practice in Kansas and Colorado.

Paulsen practiced law in Onaga and northeast Kansas for 34 years. He was a member of the Kansas and Pottawatomie County bar associations, Phi Kappa Theta fraternity, Onaga Area Chamber of Commerce, and a former member of the Onaga Lions Club.

He is survived by his wife, Deborah, of Onaga; his children, Ashley and Jennifer Paulsen, both of Topeka; one sister, Mary Matzke, of Topeka; and two grandchildren. He was preceded in death by his parents and a brother, Robert Paulsen.
The Kansas Bar Association is committed to providing service to its members and the bar-at-large. We also remain mindful of the economic crisis that we all face.

As such, the KBA Board of Governors has approved a financial hardship policy, which allows the Bar the discretion to waive annual membership dues and/or extend a full or partial waiver of CLE fees, depending on the circumstances.

Under this policy, any member, former member, or nonmember who has a genuine financial hardship may apply, in writing, explaining the basis of his/her hardship. Please specify if you are asking for an annual membership dues waiver and/or a CLE waiver.

Requests should be sent directly to KBA Member Services Director Lisa Montgomery at lmontgomery@ksbar.org or mailed to her attention at 1200 SW Harrison St., Topeka, KS 66612.

Requests for specific CLE programs must be received at least 14 days before the seminar. No phone calls, please.

The Executive Director, in conjunction with the Executive Committee, shall review all requests and determine whether a waiver can be granted. Special attention will be given to job loss or a reduction in household income. Any decision rendered shall be final.

Requests can be made as necessary.
Finding Opportunities in International Law from Kansas

By Dana Leigh Watts, University of Kansas School of Law

One of the reasons I chose the University of Kansas School of Law is that it offers a Certificate in International Trade and Finance. After living abroad for more than four years, I wanted to find a way to incorporate my experiences into the study of law. I’m not alone in this desire; the International Law Society Listserv at KU contains almost 200 addresses of interested students. Many students want to understand something about international law to give them a broader perspective on U.S. law. Some students want to practice it full time. There are a lot of opportunities to either add a bit of international law to your regular law school diet or to pursue a career in international law.

One of the most popular ways to take a few international classes is to study abroad. You can do this either through a program offered at your school or through another school. Some programs are offered during the summer; others are offered during the regular school year. The advantage of going through your own school is that you will have more support in arranging financial aid and travel plans, and you may pay tuition at your school rather than at another. However, if you have a specific country you want to visit, you may need to check out other schools’ programs. Check with your school’s Registrar to make sure your classes abroad will transfer to your school.

Another way to find out more is to join an organization. Two that I recommend are your school’s International Law Society (ILS) and the American Bar Association’s Section of International Law. ILS offers programs relating to international law at your school; the ABA offers conferences that can be great networking opportunities. The ABA also posts a list of foreign law firms that hire U.S. law students for international legal internships on its Web site.

If you are considering a career in international trade, you may want to read up on international law by finding books and magazines in your library. As with any other legal career, networking is very helpful. See if your Career Services office can put you in contact with any alumni who are practicing international law. Ask them what they are doing and how they got there. You can also look on Martindale Hubbell’s Web site under the “International Law” or “International Trade” practice areas to find organizations. Large firms may have an international trade department, and smaller boutique firms may work exclusively with international law. You can ask for an “informational interview” to find out more about what they do.

If you are serious about a career in international law, consider writing an academic paper on a current international law topic. This paper can serve as a “calling card” when you visit law firms or other organizations. If you can get your paper published, this will enhance your credibility. There are several international law journals and reviews throughout the country. Great places to look for topics for papers on international trade are the Economist magazine, the Financial Times newsletter, and the Bureau of National Affairs Inc.’s International Trade Reporter. Government Web sites are also a great place to look. For public international law topics, check out the Web sites of your favorite non-government organizations.

Finding a career in international trade while living in Kansas can be tricky and labor-intensive. Having an overview of what’s out there is helpful. The information that follows comes from Professor John Head’s annual “Careers in International Law” presentation and is presented here with his kind permission.

There are two basic career paths in international law: the public and the private. Public international law includes public international law and international relations, which deal mainly with political relations (including humanitarian issues). To find work in this area, check out the United Nations and the Organization of American States, U.S. Department of State, nongovernment organizations such as the Red Cross, UNESCO, Amnesty International, World Wildlife Fund, Save the Children, OXFAM, International Food Policy Research Institute, Bread for the World, private law firms (for example, those that take cases to the International Court of Justice), and academic institutions.


I am still unsure where I will work after graduation, and I don’t know if I will end up with a career in international trade. However, understanding a bit about international law will be useful wherever I end up.

About the Author

Dana Leigh Watts is from Syracuse, Kan. She received a BBA in marketing and Spanish from Pittsburg State University in 2001. As an undergraduate, she studied abroad in Salamanca, Spain. Watts also lived in Melbourne, Australia, for a few months after graduation. After returning from Australia, she worked for two years at the Kansas State University Student Union Program Council. She then went on to teach English in Osaka, Japan, for three years before starting law school.

Watts has served as president of KU Law’s International Law Society and is on the Kansas Law Review.
Metadata Brings More Value Than Harm to Attorneys’ Practice

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

“T’m not bad. I’m just drawn that way.”

Even a cursory review of legal technology issues reveals that metadata is a subject that weighs heavily on attorneys’ minds. The image conjured for many attorneys by metadata is one of a mole or a spy locked in our data, informing the adversary of our every move and leaking confidential data to our enemies. Seminars on metadata often drum up this dark aspect of metadata in hopes of drumming up attendance but metadata is just like Jessica Rabbit – it’s not bad, it’s just drawn that way.

Data about Data

Metadata is a routine part of our interface with computers. The court in Williams v. Sprint/United Mgmt. Co., 230 F.R.D. 640, 647 (D. Kan. 2005), wrote, “Metadata, frequently referred to as ‘data about data,’ is electronically stored evidence that describes the ‘history, tracking, or management of an electronic document.’” Metadata may be the hidden code that tells Microsoft Word to use Times New Roman font for a contract. Metadata for the same contract may record the date the document was edited and who created it. While invisible to someone viewing only the end product on screen, the metadata is vital to accessing, using, and understanding the document.

Metadata – Three Flavors

A great guide to metadata is provided in the November, 2008 decision in Aguilar v. Immigration and Customs Enforcement Division of the U.S. Dep’t of Homeland Security, 2008 WL 5062700 (S.D.N.Y.). The court in Aguilar very carefully defines metadata and then proceeds to explain three basic categories of metadata indicating the relative legal importance of each.

Substantive Metadata

“Substantive metadata, also known as application metadata, is ‘created as a function of the application software used to create the document or file’ and reflects substantive changes made by the user.” Id. at 3. Substantive metadata is the mundane data of font, size, type, indentation, bullets, etc. It can also be information revealing prior edits or comments. This type of metadata is linked with the document and travels with it when moved or copied.

Substantive metadata appears to give attorneys the most heartburn. The persistent example of substantive metadata gone awry is the image of negotiating parties swapping a contract back and forth via e-mail. One or both parties may be able to detect the other side’s bottom line by looking over prior or edits and comments attached unwittingly to the document. Attorneys involved in such disclosures do face uncomfortable ethical issues under KRPCs 1.6 and 4.4. Jim Calloway’s January 2009 article, Metadata – What Is It and What Are My Ethical Duties? at http://www.llrx.com/node/2130, is a must-read on substantive metadata and ethics.

System Metadata

System metadata is generally the information annotating a file or document by the case management database and the user’s operating system. For example, were you to open Windows Explorer on your laptop, you would see a list of files in a directory. You would also see a column for “Date Modified” meaning when the file was last accessed and changed. A right-click of the mouse on that header line would bring up other information you could see, including “Owner” (which machine on the network originated the file) and “Author” (who created the file).

“Courts have commented that most system (and substantive) metadata lacks evidentiary value because it is not relevant. System metadata is relevant, however, if the authenticity of a document is questioned or if establishing ‘who received what information and when’ is important to the claims or defenses of a party.” Id. at 4.

Embedded Metadata

Embedded metadata may be formulas, linked files, hyperlinks, etc., which are created in the document by the creator but not usually visible to a user viewing the output. “This type of metadata is often crucial to understanding an electronic document. For instance, a complicated spreadsheet may be difficult to comprehend without the ability to view the formulas underlying the output in each cell.” Id. at 4. Embedded metadata is so critical to understanding a file that it ought to be produced as a matter of course.

Here to Stay

Metadata becomes more interwoven in our computer experience with every new improvement to databases, operating systems, and software. Metadata improves our interface with data by enabling faster, more accurate, and prescient searches bringing far more value than harm to attorneys’ practices. To quote another ‘80s icon, it’s “Good stuff, Maynard.”

About the Author

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To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Addressing the Pro Se Litigant Challenge in Kansas State Courts

By Suzanne Valdez, clinical associate professor University of Kansas School of Law

I. Introduction

In early 2007, Kansas Supreme Court Justice Robert E. Davis, now Chief Justice, met with members of the Judicial Council Family Law Committee to express his and the Court’s growing concern about the increased number of self-represented litigants appearing in the state’s courts. In particular, Chief Justice Davis noted that district court clerk’s offices and judges were encountering a high number of pro se litigants in many areas, including family law, landlord-tenant, and other civil matters. The Court wanted to resolve pro se litigant issues, for the benefit of the courts, the public, and the practicing bar.

For those of us attending the Family Law Advisory Committee meeting that day, Chief Justice Davis’ acknowledgement of the pro se litigant challenge was welcome. As most family law practitioners know, anymore it is usually the exception rather than the rule for a lawyer in a domestic relations case to work with an attorney on the other side. Further, it is now a daily occurrence for the clerks’ offices and courts to deal with self-represented litigants, and it has become common for many types of lawyers to work with pro se parties sometime in their practice.

There are different opinions about why there has been a proliferation of self-represented parties in our courts in recent years, but we can all probably agree that something needs to be done to address the challenges that the courts, clerks’ offices, and attorneys face in this regard. So what, exactly, has been done to address the pro se litigant challenge in our state courts?

In June 2007, the Kansas Supreme Court convened the Pro Se Committee (Committee) and appointed its inaugural members. The Committee’s general mandate was to study and provide recommendations to the Kansas Supreme Court on how to resolve the issues relating to the challenges that self-represented individuals present to the state’s legal system. Chief District Judge Ed Bouker, of Hays, is chair of the committee whose original membership included judges, attorneys, court administrators, and district court clerks from all over the state who have volunteered their time. Over time, additional attorneys from throughout the state have been added to give more insight and weight to the concerns of the private bar.1 The committee’s name has changed since its inception and it is now known as the Self-Represented Study Committee.2 But its charge has remained the same. As the chief justice reported in his 2009 State of the Judiciary Address, “the intent of this committee’s work is not to marginalize or do away with the need for attorneys, but to make better use of limited resources for everyone involved in the system.”3

Once the committee was convened, it began its work with a broad-based discussion to decide what its specific purpose or mission should be. The committee reviewed and considered goals and objectives, as well as mission and purpose statements from other states, ultimately adopting a revised version of the North Carolina Bar Association Pro Se Committee’s purpose statement. The purpose statement of our state’s committee is:

(1) Study the prevalence of self-representation in the Kansas District Courts.

(2) In collaboration with national and statewide entities, including the Kansas Bar Association, study and report on self-representation programs from across the nation and how these programs might improve public access to Kansas courts.

(3) Study methods designed to assist self-represented litigants and the resources (including, time, money, and materials) necessary to implement those methods.

(4) Develop recommendations to encourage self-representing litigants to consult with and use the services of attorneys to the level to which they can afford those services.

(5) Develop recommendations and solicit feedback on those recommendations from the public, Kansas attorneys, and entities interested in access to the Kansas courts.

(6) Report to the Kansas Supreme Court no less than annually on the committee’s progress and recommendations.4

With this specific purpose structure in mind, the committee set out to study and address how to make the state courts more accessible to the public. It also planned to address how lawyers could provide affordable, quality legal services to individuals who represent themselves, but who are in dire need of legal representation. In this article, I will highlight what the committee has accomplished since it was convened almost two years ago. I will also discuss what the committee is currently working on. The organization of this review will be in two sections. In the first part, I will discuss objectives one and two — the collaborative study of the pro se litigant challenge, both nationally and in Kansas. In Part II, I will review objectives three, four, five, and six, all of which relate to the ideas shared and discussions that have been had to address the pro se litigant challenge in Kansas. As you will see, some of these ideas have resulted in proposals, projects, and recommendations for the Kansas Supreme Court to consider. Much has been ac-

FOOTNOTES
2. The inaugural name of the committee was the Pro Se Committee. Thereafter, for a short time, it was called the Access to Justice Committee.

www.ksbar.org  The Journal of the Kansas Bar Association  April 2009  25
Part I: The collaborative study of the pro se litigant challenge, both nationally and in Kansas

The increase of pro se litigants is a growing national concern, with individual states approaching the issues differently depending on the nature of their pro se litigant issues, the public’s access to their respective courts, and most of all, financial resources. In Kansas, although our Supreme Court had identified the issues and embraced the challenge, the Self-Represented Study Committee began from ground zero, starting only with the premise that there was a statewide burden on our courts, the practicing bar, and clerks’ offices because of the increased time spent on the issues that self-represented parties pose. In order to quantify the extent of the problem in Kansas, the committee conducted a survey of district judges across the state, which found that 68 percent of the judges who responded encounter a self-represented litigant at least once a week or more. And more than 25 percent of judges see self-represented litigants daily. A statewide survey of the clerks’ offices found that, on average, clerks spend at least 15 percent of their time working with pro se litigants. During one of the committee meetings, the law librarian from the Wichita Bar Association estimated that up to one-third of law library patrons are pro se litigants seeking legal advice and assistance.

In an effort to explore how the issues directly affect certain constituencies within the legal system, the committee created three subcommittees: (1) one comprised of its judges, (2) another comprised of its attorneys, and (3) a third comprised of its court administrators and clerks. In addition to attending full committee meetings, these subcommittees have met separately for the past year and so far have made significant progress in identifying specific challenges each unique group faces in handling pro se litigants. Moreover, each of these subcommittees has done extensive work in developing ideas and proposals that should greatly assist in addressing pro se litigant issues. Discussion of the subcommittees’ work is in Part II of this article, which follows below.

Importantly, along with statewide representatives from the judiciary, the practicing bar, and the clerks’ offices, the Self-Represented Study Committee also includes representatives from Kansas Legal Services (KLS), the Kansas Coalition Against Sexual and Domestic Violence, the Judicial Council Family Law Advisory Committee, and the Kansas Bar Association (KBA). The many viewpoints and interests represented on the committee ensure a comprehensive, fair, and sometimes lively discussion on how best to accomplish the committee’s goals and objectives.

In order to help guide and direct the committee’s efforts both before the committee was convened and after, former Chief Justice Kay McFarland appointed a small team of representatives to attend two national conferences in which the delegates learned how states throughout the country are handling the myriad of issues relating to the self-represented litigant.\(^5\) Additionally, the committee has studied and continues to explore best practices that other states have developed, including reviewing materials from the National Center for State Courts.

Collaborative efforts with the KBA are ongoing, with members of the committee having agreed to be a part of a three-hour CLE program at the Joint Judicial Conference and KBA’s Annual Meeting in June 2009 that will address the pro se litigant issue, as well as discuss new opportunities that may be possible for lawyers in this regard. A working relationship with the Judicial Council Family Law Advisory Committee has helped with the development of simple divorce forms, a project that will be discussed below. Finally, the committee has discussed the possibility of providing public education regarding its proposals and soliciting of public comment through the use of town meetings and caucuses, which may be scheduled throughout the state sometime in the future.

Part II: Proposals that should greatly assist in addressing the state’s pro se litigant challenge

There are three significant proposals or projects that the Self-Represented Study Committee has worked on to make Kansas courts more accessible to the public with the overarching goal of involving lawyers to the greatest extent possible. They are:

- Creation of a pilot project for limited scope legal services,
- Proposed judicial guidelines applicable to civil hearings involving self-represented litigants, and
- A proposed pilot project in clerks’ offices in which resource packets are given to self-represented litigants.

Another important project, the development of simple divorce forms for statewide use, has been undertaken by the Judicial Council Family Law Advisory Committee and also will be discussed below.

(1) Limited Scope Legal Services (Unbundling)

An important area that the committee has devoted time and effort to exploring is one that benefits both attorneys and litigants — limited scope representation. Many self-represented parties do not appreciate, nor fully understand the complexities of the legal issues in which they may find themselves involved. Thus, one of the main objectives of the

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5. See www.divorceinfo.com/azfaqsprose.htm for Arizona’s Web site, which provides information to self-represented parties who seek a divorce; see also www.wicourts.gov/forms1/circuit.htm for standard, statewide forms required by all Wisconsin courts for civil, criminal, family, juvenile, mental commitment, probate, and small claims cases; and finally see www.self-represent.mo.gov/page.asp?id=5240 for Missouri’s “Representing Yourself in Missouri Courts, Access to Family Court” comprehensive Web site.

Committee is to find ways of encouraging self-represented litigants to seek as much professional advice and legal assistance from attorneys as they can possibly afford.

In 2007, the Kansas Supreme Court approved a change to Kansas Rules of Professional Conduct, Rule 1.2, Client-Lawyer Relationship: Scope of Representation. This change presumably allows attorneys to provide limited legal services, otherwise known as unbundling. Subsection (c) of Rule 1.2 now reads as follows:

A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.

Given the change in the rule, the committee solicited the views and advice of Stan Hazlett, disciplinary administrator, and Sheila Reynolds, a Washburn Law professor and an expert in professional responsibility. Both attended a committee meeting in which the discussion focused on whether limited scope representation would be ethically permissible under the rule change. In particular, the committee was curious about limited scope representation in the family law context. Interestingly, in child support cases filed by the Department of Social and Rehabilitation Services, attorneys filing those cases only represent the payee parent with regard to the child support matter, but do not represent that parent on any other issues related to the child, like custody disputes. Courts find this practice acceptable. As well, insurance companies may limit the scope of representation they are obligated to provide an insured. This practice appears to be acceptable with some courts too. Currently, however, judges differ greatly on when or if they will allow a lawyer to withdraw from a domestic relations case once the attorney has entered an appearance and has done significant work on the case.

Ultimately, the committee’s discussion centered around whether limited scope representation could be accomplished without jeopardizing quality representation of a client’s interests. This discussion was particularly interesting with regard to divorce cases, especially the ones with never-ending post-divorce issues. Family law practitioners know that you can be sucked into a divorce case for years when, for example, the parties fight about their kids. And when a party is not paying for your services and the court will not allow you to withdraw, there becomes a disincentive to take on these types of cases in the future. Limited scope representation would allow a lawyer to assist a client with drafting, for example, a property settlement agreement for a certain fee without having to represent the client in issues related to the children. Or in another hypothetical, the attorney could limit the scope of representation to the divorce itself, but be clear that she is not representing the client in any post-divorce matters unless otherwise agreed to.

Other states, such as New Hampshire and Maine, allow limited scope representation. Representatives from their states claim at national conferences that their lawyers have improved their legal practices financially because they only have to focus on legal work and not on any nonlegal matters that result from the litigation. They also report fewer fee collection problems, because the client usually pays for the agreed upon legal services upfront. Lastly, limited scope representation allows the attorney to advise clients on how to proceed in small hearings or dockets, thereby saving the attorney valuable time at lengthy court dockets.

As you can see, the benefits of limited scope representation are numerous for all involved in the legal system, especially lawyers. Besides the anecdotes shared above, there are at least three other compelling and related arguments for limited scope representation. First, there is reassurance for the lawyer that their commitment to the client is limited and that they will not be drawn into protracted litigation for which the client cannot pay and from which the attorney cannot withdraw. Second, this type of arrangement will be attractive to a wider client base, who can afford to pay for some, but maybe not all, of their legal services. This argument also supports the idea that there will be greater public access to lawyers. Lastly, lawyers can represent a client on more complex and professionally interesting aspects of a legal matter and simply advise the client on how to proceed with simpler matters that may not necessarily require an attorney’s involvement.

Thus, with all of this research and leg work completed, the Self-Represented Study Committee will propose that the Kansas Supreme Court approve three pilot projects in which limited scope representation will be allowed, tested, and evaluated in domestic relations cases. Under consideration for the pilot project are the 3rd (Shawnee County), 10th (Johnson County), and 23rd (around Hays) judicial districts. The attorney subcommittee has developed forms, as well as best practices and procedures, for limited scope representation in domestic relations cases, which will allow a client to contract with an attorney only for those services they can afford. The main purpose of the forms is for the litigant to be informed about the scope of the representation that he and the lawyer have agreed to. The forms also ensure that the court will allow the attorney to withdraw from the case after the agreed upon legal work is completed. Subject to the Court’s approval, the proposed pilot projects will occur over a year's time and local attorneys who participate will be involved in evaluating the results.

(2) Judicial guidelines applicable to self-represented litigants

The committee decided that guidelines were necessary to assist the courts in their administration of justice when a pro se party is involved. With this in mind, the subcommittee of judges drafted proposed judicial guidelines applicable to self-represented litigants, which at this time are to be used for educational and informational purposes only. These guidelines also include helpful commentary to assist judges in applying them. With recognition that the issues and challenges presented by self-represented litigants may differ in courts throughout the state, judges are encouraged to use the guidelines in a manner that best suits their individual court and the litigants ap-

7. See proposed Judicial Guidelines Applicable to Civil Hearings Involving Self-Represented Litigants Including Commentary (prepared by Self-Represented Study Committee Judicial Subcommittee). In October 2008, Chief Judge Edward E. Bouker, 23rd Judicial Dist. Div. 1 presented the proposed judicial guidelines to judges at their annual judicial conference in Overland Park.
parring before them. The guidelines are specifically tailored for court interactions with self-represented litigants in civil cases in which there is no right to counsel. And they are advisory in nature. To the extent there is any conflict between the Guidelines and the Judicial Code of Conduct, the Code governs.

The guidelines are comprised of four sections: general practices, prehearing interaction, conducting hearings, and post-hearing interaction. All four sections have specific delineated guidelines with commentary following each guideline. Importantly, as a whole, the guidelines make clear that judges should never favor or penalize a self-represented litigant. But they also strongly suggest that judges should encourage self-represented litigants to seek legal counsel. For example, while acknowledging that a party has a right to represent himself, the commentary to Guideline 1.3, Legal Representation, stresses that “judges should make self-represented litigants aware of the consequences of proceeding without an attorney. Judges should explain that self-represented litigants have no right to a relaxation of the standards that apply to litigants who are represented by counsel.” This commentary is in line with Mangiaracina v. Garcia, a 1986 Kansas Court of Appeals case, in which the court determined, “[a] pro se litigant in a civil case is required to follow the same rules of procedure and evidence, which are binding upon a litigant who is represented by counsel. Our legal system cannot function on any basis other than equal treatment for all litigants.”

The proposed guidelines were made available to KBA members via the KBA’s weekly eJournal on Feb. 17, 2009, in which the committee solicited comments from the bar. As already mentioned, at present, the committee has decided to submit the guidelines to the Supreme Court Education Committee for judicial educational purposes.

(3) A proposed resource packet for self-represented parties

Besides judges, clerks, and court administrators are probably most burdened with the proliferation of self-represented litigants. Increasingly, clerks are spending more time working with pro se litigants, and sometimes these patrons are aggressive and difficult. The clerk’s staff is usually the first and only contact that the public may have with the judicial system. And that impression can affect the patrons’ overall perception of the legal system.

Unfortunately, it is often the case, that self-represented litigants expect clerk staff to provide legal advice and other procedural information. Under K.S.A. 20-3133, these are expectations that clerk staff are not legally able to meet. On a daily basis, clerk staff must provide prompt, accurate, and high-quality service, all while knowing that by law they cannot dispense legal advice. A committee survey of clerk staff and court administrators found that the most frequently asked questions by pro se litigants were family law related questions. But it is also common for self-represented parties to ask clerks for advice in many other types of cases. The subcommittee of clerks and court administrators, therefore, has studied ways to ameliorate or reduce the burden they currently face with pro se litigants, keeping in mind their obligation to provide quality public access to the courts. The subcommittee is currently developing a proposal for a pilot project in which clerks’ offices and courts, in test jurisdictions, would make a resource packet available to self-represented litigants. The resource packet would include:

- Administrative Order No. 232 – In Re: Services by Court Clerks and Staff to the Self-Represented Litigant, which directs clerks to conspicuously post a notice that clearly states that they are prohibited from providing legal advice or assistance.

Chief Justice Robert E. Davis signed this administrative order in January 2009. The notice also includes a detailed list of the services that a clerk’s office does provide, such as giving docketing information, sharing general information about the local court operations and facilities, and encouraging litigants to seek the advice of an attorney.

In addition, the resource packet would include the following:
- A “Self Assessment” tool, which would test a litigant’s ability to represent himself in court;
- A glossary of commonly used legal terms;
- Local court rules;
- A disclaimer stating (again) that the clerk’s office cannot give any legal advice and advising the self-represented litigant to seek advice of an attorney;
- A list of legal resources, including a list of local attorneys who will do low fee or no fee work; and
- A list of Web sites and online resources for forms for all types of cases.

A specific time frame for the pilot project has not been determined. Nor has the full committee yet submitted the pilot project to the Supreme Court for its approval. In the meantime, during the upcoming months, the court staff subcommittee will conduct presentations to district and municipal court clerks to educate them on Administrative Order No. 232 and the proposed resource packet pilot projects.

(4) Simple divorce forms developed by the Judicial Council Family Law Advisory Committee

The proliferation of non-Kansas specific domestic relations forms imposes burdens on the courts and the clerks’ offices. You probably know that you can find generic divorce

8. Id.
9. 11 Kan. App. 2d 594, 595-96; 703 P.2d 1109, 1111(1986); see also Jackson v. State, 1. Kan. App 744, 573 P.2d 637 (1977), rev. denied, 225 Kan. 844 (1978) (wherein the Court of Appeals determined that pro se pleadings are to be liberally construed so that relief can be granted if the facts warrant it); but see In re Estate of Broiderich, 34 Kan. App. 2d 695, 701, 125 P.3d 564 (2005) (in which the court stated that the liberal construction rule does not mean that statutory requirements may be ignored.)
10. This statute states, in relevant part: “It shall be unlawful for clerks of the district court or any of their deputies to … perform any services as an attorney or counselor of law in any case.”
11. The Judicial Council Family Law Advisory Committee has a subcommittee, which is reviewing and revising the Protection for Abuse and Protection from Stalking forms. These revisions are not yet complete.
forms on the Internet. But did you know that you can buy a divorce kit at Wal-Mart?12 These generic forms are often poorly or incorrectly drafted. To make matters worse, the self-represented party fails to complete these forms fully or accurately. Research I conducted almost two years ago shows that many, though not all, of the state’s judicial districts have developed divorce forms for use by both pro se litigants and attorneys.13 Most of these forms are posted on judicial district Web sites14 and clerks’ offices have paper copies of the forms available for pro se litigants. Yet, the forms are not uniform across the state and there are some judicial districts that do not have standard forms posted online, including one of the largest judicial districts, the 29th Judicial District, which is Wyandotte County.

So around the time the Self-Represented Study Committee was convened in 2007, the Judicial Council Family Law Advisory Committee created two subcommittees to draft simple forms. One of the subcommittees was charged with drafting simple divorce forms, with comprehensive packets both for a divorce with children and a divorce without children. The other subcommittee was charged with revising the Protection from Abuse and Stalking forms. The Judicial Council Family Law Advisory Committee, though working independently on this project, has worked closely with the Self-Represented Study Committee to ensure that the newly drafted divorce forms are consistent with the committee’s core objectives.

The divorce forms subcommittee completed the development of divorce forms in late 2008, both for cases involving children and cases without children. Both forms packets include the petition, a responsive pleading, a Domestic Relations Affidavit, a notice of hearing, and decree. If there are children involved, a Uniform Child Custody Jurisdiction and Enforcement Act form and parenting plan are included. Both sets of forms also include instructions for completing the forms, instructions for filing and forms for serving the action, and information on how to prepare and what to expect at the final divorce hearing. Most importantly, the instructions strongly recommend to pro se litigants that they seek the professional advice of a licensed attorney. The divorce forms subcommittee considered drafting uniform temporary order forms for the packet, but decided that variations in local practice concerning the issuance of such orders made it too difficult to do so. At present, the Self-Represented Study Committee recommends a link on the Judicial Council Web site to the various judicial districts so that a pro se litigant or an attorney may easily find local rules or procedures relating to the issuance of temporary orders.

The divorce forms, as drafted, were recently approved by the full Family Law Advisory Committee, the Judicial Council, and the Self-Represented Study Committee. In mid-December 2008, they were submitted to the Supreme Court for approval. Currently, the Kansas Supreme Court is seeking comment on the proposed divorce forms from the practicing bar and has set a deadline of July 1, 2009, for such comments. You can use the Internet to access the forms and comment on them by going to www.kansasjudicialcouncil.org.

Hopefully, once the Court is satisfied that there has been sufficient input by all relevant and appropriate constituencies, the Court will formally adopt or approve these forms for their statewide use. Then, it is anticipated that the approved forms will be posted on the Judicial Council Web site. KLS has a licensed “Hot Docs” program, which is a document preparation software that allows a party to respond to a series of questions, which will result in a printed pleading. Through the use of questions prompted by the “Hot Docs” software, the litigant is educated or informed about areas of law or procedure in which an attorney’s professional advice or expertise is needed. The Self-Represented Study Committee supports the idea of uploading the divorce forms into this KLS program for use by low-income litigants.15

II. Conclusion

You are now up-to-date on many of the key collaborative efforts that have been made to address the pro se litigant challenge in Kansas state courts. The Self-Represented Study Committee remains committed to addressing these issues for the benefit of all constituencies involved, especially attorneys. As mentioned before, there remains a lot of work to be done. The committee invites your comments and suggestions. These can be sent to Art Thompson, who can be contacted at thompsona@kscourts.org or at (785) 291-3748.

About the Author

Prior to joining the KU Law faculty in 1999, Suzanne Valdez was an attorney with Kansas Legal Services in Kansas City, Kan. As a legal aid lawyer in Wyandotte County and with the Law School’s Douglas County Legal Aid Society, Valdez worked with pro se litigants on a daily basis. Valdez currently serves on the Kansas Self-Represented Study Committee, the Judicial Council Family Law Advisory Committee, as well as the subcommittee that is responsible for drafting simple divorce forms for statewide use by pro se litigants. At the Law School, Valdez directs the Criminal Prosecution Clinic and Externship Clinic. She also teaches Practice in Kansas and Pretrial Advocacy. She wishes to recognize Art Thompson with the Office of Judicial Administration for his assistance with this article.

14. From the Kansas Judicial Branch at www.kscourts.org, the local court rules and forms can be accessed.
15. Marilyn Harp, executive director of Kansas Legal Services, presented the “Hot Docs” software to the Supreme Court in September 2008.
I. Introduction

On the television show, the judge overrules from the bench the objection by the “Attractive Young Attorney.” The Attractive Young Attorney proclaims, “Your honor, we are appealing that decision!” Although the rules for taking appeals on television appear to be fairly liberal, in Kansas state courts the rules are more complex. This article is intended to help the Attractive Young Attorney determine when and how he or she may take an appeal from an interlocutory order when practicing in Kansas.¹

An interlocutory appeal is an appeal that takes place before the trial court’s final ruling on the entire case.² Appellate courts frequently reach decisions relating to jurisdiction over interlocutory appeals early in the appellate process, either by ruling on motions to dismiss or by ruling on responses to sua sponte orders to show cause. The decisions may be made by the motions panel of the Court of Appeals or by the Supreme Court sitting in conference, and decisions to dismiss appeals for lack of jurisdiction often do not appear as published orders. This article will occasionally refer to such decisions, which obviously do not constitute binding precedent but may give some guidance relating to how our appellate courts apply the rules relating to interlocutory appeals.

Lesson 1. Make sure each and every claim with respect to each and every party is disposed of before seeking an appeal as a matter of right.

On the surface, the rule for taking appeals in Kansas is simple. An appeal may be taken from “any final decision” in a civil proceeding.³ A final decision generally disposes of the entire merits of the case and leaves open no further questions or the possibility of future directions or actions by the court.⁴ Judgment is effective in civil proceedings when a journal entry or judgment form is signed by the judge and filed with the clerk of the district court.⁵ Once a final decision has been made, however, any act or ruling from the beginning of the proceedings is subject to review.⁶ If issues remain pending, it is not enough for a district court to declare that its judgment is “final” for purposes of appeal.⁷ It is also not enough for a party on appeal to assure the

FOOTNOTES

1. These lessons also apply to those among us who are less young/attractive.
appellate court that it is abandoning a pending claim or cross-claim in order to achieve finality.\footnote{9} Parties may not stipulate to jurisdiction and confer jurisdiction on an appellate court by agreeing not to pursue other issues.\footnote{10} Our Supreme Court has explained that the term “final decision” is self-defining and refers to an order that definitely terminates a right or liability involved in an action or that grants or refuses to grant a remedy as a terminal act in the case.\footnote{11}

If they are not final, most district court rulings are not yet ripe for appeal. Our appellate courts have adopted a policy strongly opposing piecemeal appeals and generally do not allow review of nonfinal orders.\footnote{12} For example, an entry of default judgment would normally be appealable, but an order vacating a default judgment is not subject to immediate appeal, because the litigation has been reopened.\footnote{13}

Illustrating the finality doctrine are a number of cases that have applied it to find that appellate jurisdiction was lacking.

Orders relating to discovery are generally not subject to immediate appeal as a matter of right.\footnote{14} An order denying a motion to dismiss is not subject to immediate appeal.\footnote{15} An order disqualifying counsel is not subject to immediate appeal as a matter of right.\footnote{16} The Court of Appeals has dismissed an attempted appeal from an order denying a request for a jury trial.\footnote{17} An order granting a new trial is not final and appealable.\footnote{18} Summary judgment for one of several defendants is not appealable.\footnote{19} The Court of Appeals has likewise dismissed attempted appeals from orders staying arbitration or vacating arbitration awards and directing rehearings.\footnote{20} When the plaintiff filed a declaratory judgment action on three issues, but the parties asked the district court for an answer on a single issue and “preserved for later consideration” the remaining two questions, the ruling on the single issue was not ripe for appellate review.\footnote{21}

If the district court bifurcates its proceedings, such as separating issues of liability from issues of damages, the case becomes ripe for appeal only after both parts of the proceedings have been resolved. A judgment in a divorce proceeding, for example, in which the district court elects to bifurcate the divorce decree from the property division, may not be appealed until the district court has resolved both the divorce and the property issues.\footnote{22} Similarly, in a case in which the district court ruled on a portion of damages but ordered the parties to participate in a settlement conference with respect to other damages, the Court of Appeals dismissed the appeal as premature and interlocutory.\footnote{23}

The same general requirement of finality also applies to administrative proceedings.\footnote{24} There is, for example, no statutory provision for immediate judicial review of preliminary rulings in workers’ compensation cases.\footnote{25} A district court order remanding an administrative proceeding to the administrative agency for additional findings of fact is not a final, appealable order.\footnote{26} A district court order requiring a school board to conduct a due process hearing for a terminated teacher is likewise not a final, appealable order.\footnote{27}

Note, however, that where the district court remands a case to an agency to perform a particular act, the order requiring the agency to perform the act is considered final and ripe for appeal.\footnote{28} Similarly, an agency’s decision that it lacks jurisdiction to review a particular issue may also constitute a final and appealable order.\footnote{29}

The district court must not only dispose of all parties and claims, but it must also dispose of post-trial motions. In one recent case,\footnote{30} the Court of Appeals dismissed the appeal because the plaintiffs had filed a motion to reconsider an earlier order on the same date on which they filed a notice of appeal from that order. The plaintiffs docketed the appeal without the district court ruling on the post-trial motion, and the appellate court found that the appeal was not yet ripe for review. Motions filed under K.S.A. 60-260(b), however, do not toll the time to take an appeal and do not affect the finality of the underlying judgment.\footnote{31}

Filing a notice of appeal does not deprive a district court of jurisdiction to resolve pending matters, including post-trial motions.\footnote{32} Docketing the appeal or filing a motion to docket...
out of time, however, immediately transfers jurisdiction over most matters to the appellate courts. The district court may not then rule on pending matters without a remand from the appellate courts.33

Lesson 2. Be wary of dismissals as vehicles to achieving finality.

Sometimes orders appear to be final but are not really final, because they leave open the possibility of further action on the same subject matter. An order dismissing a case and imposing conditions on refiling is not subject to immediate appeal.34 An order granting voluntary dismissal without prejudice is not final for appellate purposes.35 An order granting involuntary dismissal of some claims and voluntary dismissal of other claims is not final for appeal purposes.36

The jurisdictional trap that voluntary dismissals can create is illustrated by the following set of unsuccessful appeals. In Arnold v. Hewitt I,37 multiple plaintiffs sued the defendants for breach of contract, fraudulent misrepresentation, and negligent failure to procure insurance. The district court granted the motion in the hope of avoiding a piecemeal trial. After filing a notice of appeal, the plaintiffs then refiled their negligence claim in district court under a different case number. The Court of Appeals dismissed the appeal that had already been docketed, finding that the plaintiffs were seeking a piecemeal appeal of a case in which litigation was ongoing, albeit under a new district court case number.38

Arnold v. Hewitt II39 was filed after the district court granted the defendants summary judgment on the remaining negligence claim. The plaintiffs sought appellate review of the adverse judgments on all three claims, two from their original action and the third from the refiled negligence claim. The Court of Appeals dismissed the second appeal, finding that the original action kept the case in a kind of perpetual appellate limbo. Because the original action had become res judicata and because the second action represented a forbidden splitting of the causes of action, the plaintiffs now appear to be forever barred from appellate review of any of the adverse decisions.

The plaintiffs attempted to use a voluntary dismissal to circumvent the finality requirement and consequently forfeited their opportunity for appellate review. The Court of Appeals explained: “The plaintiffs had a simple option after the summary judgment motions were granted in the original action. They could have waited, received a final decision on the negligence action, and then appealed the entire case to this court. They chose not to do that.”40

Lesson 3. Be wary of appeals involving costs and attorney fees.

A motion for attorney fees and costs that remains pending after final judgment has been entered on all other matters may not affect the finality of the judgment with respect to the other matters. The appeal from the case in chief must be taken as soon as final judgment is entered on those matters.41

Where the attorney fees are a part of the damages sought in the original cause of action, however, they must be determined before the case is ripe for appeal.42 An award of attorney fees as a sanction under K.S.A. 60-237 is an interlocutory order that may not be appealed until the case-in-chief is ripe for appeal.43 An award for sanctions under K.S.A. 60-211 must likewise be decided before a case is final for purposes of appeal.44

Lesson 4. Do not wait for final judgment if an immediate appeal is available as a matter of right.

Appeals may be taken from some interlocutory orders as a matter of right. For example, K.S.A. 5-418(a)(1) provides for appeals as a matter of right from orders denying applications to compel arbitration.
An appeal from such an order does not invoke the procedural requirements for an interlocutory appeal. An aggrieved party may likewise appeal from an order appointing or refusing to appoint a receiver without waiting for a final decision in the action. The probate code lists 21 different categories of orders involving decedents’ estates that may be appealed immediately, including 20 rather narrow categories and any “final order, decision, or judgment.” The Revised Kansas Code for Care of Children provides that a party may immediately appeal from “any order of temporary custody, adjudication, disposition, finding of unfitness, or termination of parental rights.”

If an interlocutory order is subject to immediate appeal as a matter of right, failure to take the appeal immediately may foreclose appeal of that issue when finality occurs. For example, failure to take a timely appeal from an order that is appealable under the probate code precludes consideration of that issue in a subsequent appeal from final judgment. Similarly, by waiting for final disposition, a party waives a right to appeal certain preliminary orders in parental rights cases if those matters could have been appealed immediately. In mortgage foreclosure cases, various interlocutory orders must be appealed at the time they are entered. These include determinations of lien priorities, orders of foreclosure, and confirmations of sheriff’s sales.

One apparent exception to this rule involves injunctions. The granting or denial of an injunction is subject to immediate appeal as a matter of right. Injunctive relief may be included as one count in a multicoount cause of action, and a party may elect to wait to appeal the granting or denial of such injunctive relief until final disposition of the other counts. In at least one case, the Court of Appeals elected to follow federal precedent in allowing the order relating to an injunction to merge into the final judgment.

Another apparent exception applies to appeals involving real estate title determinations. Although appeals from such determinations are allowed as a matter of right, our courts have permitted appeals only when the district court judgment has “some semblance of finality.” An appeal from a title determination is not allowed to proceed before other related claims, such as petitions for condemnation actions, are resolved, because the “proceedings would be subject to terminable interruption and delay.”

Lesson 5. Kansas statutes provide a mechanism for interlocutory appeals. Interlocutory appeals may be taken when the district court certifies (1) that an order involves a controlling question of law about which substantial grounds exist for a difference of opinion and (2) that an immediate appeal may materially advance the ultimate termination of the litigation. The Court of Appeals may then permit an appeal at its discretion. Any application for leave to take such an appeal should articulate all of the statutory factors – the legal issue in question will control the outcome of the litigation, substantial grounds exist for reaching a different result and an immediate appeal is likely to move the litigation significantly closer to a resolution.

The argument that an interlocutory appeal may save one or more parties substantial money or time or that the appeal may avoid complex litigation is usually not compelling. These arguments would likely apply to most cases in their early stages, and the Kansas appellate courts have opposed making interlocutory appeals routine. The courts are more likely to grant applications that demonstrate an irreversible harm if the litigation is allowed to proceed, such as

(Continued on next page)

55. K.S.A. 2008 Supp. 60-2102(a)(c). By statute, all applications for interlocutory appeal must be filed with the Court of Appeals. If jurisdiction over the appeal on its merits lies with the Supreme Court, the case will be transferred if the Court of Appeals grants the application.
the disclosure of trade secrets during discovery or the disqualification of counsel.60

In Adams v. St. Francis Regional Med. Center, Justice Edward Larson filed a separate opinion taking the Court of Appeals to task for granting interlocutory appeals in discovery matters.61 In Williams v. Lawton, Larson, sitting with the Court of Appeals, again expressed his philosophical opposition to interlocutory appeals. He argued that a district court order vacating a jury award in favor of the plaintiff and ordering a new trial was inappropriate for interlocutory review.62 He quoted an earlier Supreme Court decision finding that “[t]he policy of the new code leaves no place for intermediate and piecemeal appeals, which tend to extend and prolong litigation.”63

Once the Court of Appeals grants leave to take an interlocutory appeal, the party seeking appellate review must file a notice of appeal in district court, usually within 10 days after the leave is granted.64 The appeal must then be docketed with the office of the clerk of the appellate courts within 10 days of filing the notice of appeal.65 Unlike statutory deadlines for filing notices of appeal, Supreme Court rules governing procedures and time limitations are not jurisdictional and may be waived, and the untimely docketing of an interlocutory appeal is not absolutely barred.66

If an appeal has been accepted for interlocutory review, the appellate court may consider other issues, even if those issues are not in themselves suited for interlocutory appeal.67 The scope of the interlocutory appeal is not limited to the precise questions that the district court certified but is limited to the order or orders that generated the certified questions.68 Those orders may be reviewed in their entirety.69 Note that the converse is not true. The appellate courts will not assume jurisdiction over an issue or order for which it denied interlocutory appeal, even though other issues may be ripe for immediate appeal.70

A 2004 statutory amendment allows interlocutory appeals from orders granting or denying class-action certification.71 Although the statute does not spell out all the procedures and Supreme Court rules do not yet address such appeals, it appears that the district court is not required to certify such an appeal. The application to the Court of Appeals must be made

within 10 days of the district court order relating to certification, and the Court of Appeals may exercise its discretion in granting the application.72

Lesson 6. If the Court Of Appeals doesn’t grant your application, don’t give up.

Larson’s concerns that the Court of Appeals is overly generous in granting applications for interlocutory appeal notwithstanding, an applicant may petition to the Supreme Court for review of the denial of such an application.73 In at least one such case, the Supreme Court reversed the Court of Appeals and allowed the appeal to proceed in the Supreme Court.74

Lesson 7. Interlocutory appeals are available in criminal proceedings, but to a more limited degree.

In criminal proceedings, judgment is final and subject to appeal when the district court pronounces sentence from the bench.75 Following imposition of sentence, the appellate courts may review any decision or intermediate order entered up to and including sentencing.76 A judgment of conviction is considered an intermediate order and is not subject to appeal until after sentencing has occurred.77

The prosecution may, however, take immediate appeals from certain intermediate orders.78 These include orders dismissing a complaint, information, or indictment, orders arresting judgment, and orders granting new trials in cases involving off-grid crimes, such as first-degree murder.79 The prosecution may also appeal from orders suppressing the introduction of evidence and from orders suppressing admissions or confessions, as well as from pretrial orders quashing warrants.80 When taking such an appeal, the state should articulate in the notice of appeal the precise statutory basis for the appeal.81 When appealing from orders suppressing evidence, the prosecution must demonstrate that the suppression order substantially impairs its ability to prosecute the case.82 If the prosecution is unable to persuade the appellate court that the suppression order substantially impairs its ability to prosecute the case, the time expended in the appeal is charged to the state for speedy trial purposes.83 There is no similar requirement relating to impairment of the prosecution’s case for appeals from orders suppressing confessions or quashing warrants.84

60. See, e.g., In re A.A.T., No. 95,914, unpublished opinion by the Court of Appeals filed Dec. 22, 2006 (“once a parent test is conducted, the results cannot be undone, i.e., the bell cannot be unrung”).
69. 38 Kan. App. 2d at 572.
71. K.S.A. 60-223(f).
76. K.S.A. 22-3602(a).
78. The state may also take appeals on questions that are reserved. K.S.A. 22-3602(b)(3). A question reserved is not interlocutory; it presupposes that the case at hand has concluded but that an answer is necessary for proper disposition of future cases that may arise. State v. Ruff, 252 Kan. 625, 630, 847 P.2d 1258 (1993).
79. K.S.A. 22-3602(b).
80. K.S.A. 22-3603.
Lesson 8. If an interlocutory appeal is unavailable, consider alternative procedures.

One alternative to seeking an interlocutory appeal in civil cases is through K.S.A. 60-254(b) certification. This procedure is often confused with an interlocutory appeal, but it in fact gives the district court some discretion in severing claims and parties and entering final judgment while other claims remain pending. When more than one claim for relief is presented in an action, whether as a claim, a counterclaim, a cross-claim, or a third-party claim or when multiple parties are involved, the district court may enter final judgment as to one or more but fewer than all of the claims or parties upon an express determination that no just reason exists for delay and upon an express direction for entry of judgment.\(^93\)

The express determination and direction must appear in the record, preferably in the same form as the statutory language.\(^94\)

In one attempted appeal, the district court entered the following language: “The court made the divorce order of absolute divorce a final order so that any party could prosecute an appeal of the divorce order without stopping the court in its attempt to proceed to finalize all other aspects of the divorce action.” The Court of Appeals found this language insufficient to constitute 60-254(b) certification and dismissed the appeal.\(^95\)

K.S.A. 60-254(b) certification constitutes a final judgment, and an appeal must be taken within the 30-day statutorily prescribed time.\(^96\) If no appeal is taken, the issues determined in the 60-254(b) judgment cannot be raised in a subsequent appeal.\(^97\) The propriety of the 60-254(b) certification is, however, a proper subject for appellate review.\(^98\)

The collateral order doctrine may provide another avenue for appellate review in limited cases.\(^99\) This doctrine allows an appeal from a preliminary order when the order conclusively determines the disputed question, the order resolves an important issue completely separate from the merits of the action, and the order would be effectively unreviewable on appeal from a final judgment.\(^100\) Our appellate courts have been increasingly reluctant to apply the doctrine, recently rejecting its use to obtain review of a district court order denying the defense of sovereign immunity.\(^101\) Our Supreme Court has not, however, explicitly rejected the doctrine under all circumstances.\(^102\)

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Outside of these statutorily defined appeals as a matter of right, the prosecution may not appeal interlocutory orders.\(^85\) For example, in *City of Hutchinson v. Gibson*,\(^96\) the defendant took an untimely appeal to the district court of his conviction in municipal court. The prosecution moved to dismiss for lack of jurisdiction, and the district court denied the motion and set the matter for trial. The prosecution then attempted to appeal the jurisdictional finding to the Court of Appeals, which dismissed the appeal as an improper interlocutory appeal. Following his trial and sentencing in district court, the defendant sought to appeal his district court conviction to the Court of Appeals.\(^87\) The appellate court determined that the original jurisdictional question, which the prosecution had attempted to raise in the earlier appeal, was then ripe for consideration and was dispositive of the entire appeal.

Similarly, no statutory authority exists for the state to appeal from the dismissal of some of the counts of a multiple-count complaint, information, or indictment while the case remains pending before the district court on all or a portion of the remaining counts that have not been dismissed and that have not been finally resolved.\(^88\)

While the prosecution has limited statutory authority to take interlocutory appeals, there is no similar provision for interlocutory appeals by defendants.\(^89\) On at least one occasion the Court of Appeals has dismissed a cross-appeal sought by the defendant when the prosecution took an interlocutory appeal from a suppression order. Similarly, a district court order revoking a diversion agreement has been deemed interlocutory and not subject to immediate appeal by the defendant.\(^90\)

Although most juvenile prosecutions are not governed by the criminal code,\(^91\) the juvenile code also provides for immediate appeals by the prosecution from certain interlocutory orders. The prosecution may appeal from orders dismissing proceedings before jeopardy has attached and from orders denying authorization to prosecute a respondent as an adult.\(^92\)

As in proceedings under the criminal code, there appears to be no statutory authority for intermediate appeals by juvenile respondents.

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85. See *State v. Sinodgrass*, 267 Kan. 185, 196, 979 P.2d 664 (1999) (appeals by prosecution are governed by statute and are limited to specific circumstances).

86. No. 96,520, unpublished order by the Court of Appeals filed June 14, 2006.


89. *State v. Wallace*, 172 Kan. 734, 243 P.2d 216 (1952) (no immediate appeal from order denying motion to quash warrant); *State v. Levine*, 125 Kan. 360, 363, 264 Pac. 38 (1928) (defendant may not take immediate appeal from order denying motion to quash indictment or information).


92. *Interhab Inc. v. Janet Schalansky*, No. 95,389, unpublished order by the Court of Appeals filed Nov. 23, 2005.

93. K.S.A. 60-254(b).


95. In the Matter of the Marriage of Myers, No. 92,627, unpublished order by the Court of Appeals filed Sept. 10, 2004.


102. *See Harsh v. Miller*, 283 Kan. at 491 (declining to decide whether collateral order doctrine is “very narrow exception” to finality requirement); *Flores Rental*, 283 Kan. at 491 (deciding to apply collateral order doctrine).
In certain civil and criminal proceedings, an application to the appellate courts for an original writ of habeas corpus may provide a collateral avenue for reviewing intermediate district court rulings. Habeas corpus has been used to challenge intermediate orders affecting child custody. An original action in the appellate courts avoids an initial filing in a district court; it requires, however, that the party seeking the relief demonstrate that adequate relief is unavailable in the district court. The Court of Appeals has declined to grant relief through habeas corpus, for example, when the statutory appeals process afforded the party adequate protection.

Although writs of habeas corpus are generally not permitted to substitute for direct appeals in criminal actions, they have been used to challenge retrial in criminal prosecutions on double jeopardy grounds. Habeas corpus has also been recognized as an emergency vehicle for challenging extradition orders.

The related original writs, of mandamus and quo warranto, may also be used instead of interlocutory appeals to compel district courts to take particular actions. Mandamus, for example, is appropriate for compelling a public officer to perform a clearly defined duty, one imposed by law and not involving the exercise of discretion. And quo warranto may be used to restrain a public official from carrying out intended actions. Such original proceedings in the appellate courts might be appropriate, for example, when a party is frustrated by a lack of action in pending litigation. While an immediate appeal would not be possible due to a lack of finality, the appellate courts might nevertheless intercede in order to bring about resolution of issues in district court.

II. Summary of the Lessons
The Attractive Young Attorney may review the preceding lessons and elect to practice only on television. But the rules are not overwhelming. The general rule is that one must ensure that all proceedings in the district court or the administrative agency are complete, including motions and all parties, before seeking appellate review. Certain exceptions may require an earlier appeal, such as when an appeal is available as a matter of right from an intermediate order. If the case is not final, discretionary interlocutory appeal may be available, and if the interlocutory appeal is not available, certain other special procedures, such as 60-254(b) certification or habeas corpus, may be available to provide appellate review. It’s not so hard, really.

About the Author
Jonathan Paretsky is chambers counsel to Justice Eric S. Rosen of the Kansas Supreme Court. He received his Bachelor of Art in 1980, juris doctorate in 1987, and Doctor of Philosophy in German in 1991 all from the University of Kansas. He received a DAAD scholarship, Universities of Wuppertal & Tuebingen, FRG, 1981-82.

He has taught courses in Yiddish language and literature.

110. Tiller v. Corrigan, 286 Kan. 30, 182 P.3d 719 (2008); Alpha Med. Clinic v. Anderson, 280 Kan. 903, 916, 128 P.3d 364 (2006) (if judge’s order threatens to deny litigant right as a matter of law and appeal is not a remedy, mandamus is appropriate); State ex rel. v. Unified Sch. Dist., 218 Kan. 47, 50, 542 P.2d 664 (1975); City of Kansas City v. Jones & Laughlin Steel Corp., 187 Kan. 701, 703, 360 P.2d 29 (1961) (where no statutory basis for appeal exists, judicial redress for illegal or oppressive conduct must be invoked through appropriate extraordinary remedy such as mandamus or quo warranto).
112. See K.S.A. 60-1202.
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EMINENT DOMAIN, JURISDICTION, AND CONTEMPT
HARSCH V. MILLER
COFFEY DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
NO. 100,149 – FEBRUARY 13, 2009

FACTS: Miller, on behalf of the Kansas Department of Transportation (KDOT), instituted eminent domain proceedings against property owned by the Harsches. The Harsches then filed an action in district court appealing the amount of the damages award of the court-appointed appraisers. The Harsches filed a separate action contesting the Eminent Domain Procedure Act was unconstitutional and sought a stay of the damage lawsuit pending resolution of the constitutional challenge. Later, they filed a similar constitutional action in federal court. The state court temporarily denied the motion to stay. The Harsches filed a notice of appeal and docketing statement acknowledging the ruling was not a final order, but asserted jurisdiction under the collateral order doctrine. The Harsches argued the state court lost jurisdiction after their appeal to conduct any proceedings on the damage action. The Harsches did not appear at the trial on the damage action. The district court held the Harsches in contempt and dismissed the damage action for lack of prosecution and assessed $3,769 in costs and fees. The Kansas Supreme Court dismissed the stay order appeal for lack of jurisdiction and then the Harsches filed a notice of appeal of the state court’s dismissal of the damage action.

ISSUES: (1) Eminent domain, (2) jurisdiction, and (3) contempt
HELD: Court held the district court did not lose jurisdiction to proceed with the trial court once the Harsches filed their docketing statement with the clerk of the appellate courts. Court stated that the Harsches attempted to use the appeal as the functional equivalent of a stay of the state court proceedings to help protect their trial in federal court. Court stated they gambled and lost. Court also held that because the Harsches did not appear for trial, the district court dismissed their appeal of the appraiser’s award for lack of prosecution. Because they only argued that the court had no jurisdiction to take any action and they took no issue with the propriety of the dismissal, Court did not decide whether the dismissal was an abuse of the district court’s discretion. Court also found there was no abuse of discretion in the district court’s denial of the Harsches’ motion to stay and ordering the jury trial to proceed. However, Court held the district court erred in its contempt order. Court found the contempt order was void due to jurisdictional defect because the district court journal entry contains no reference why the Harsches did not appear for the jury trial.


GAS, CONTRACT, AND SANCTIONS
DOUBLE M CONSTRUCTION V.
STATE CORPORATION COMMISSION
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 100,312 – FEBRUARY 6, 2009

FACTS: Double M Construction Inc. (Double M) acted as subcontractor for Double J Pipeline LLC (Double J), providing excavation service in Labette County. As contractor, Double J was to spot and expose line crossing ahead of equipment and to excavate under and around existing utilities. Prior to excavation, Double J contacted Kansas One Call, but Double M did not. During excavation, equipment owned and operated by Double M struck and ruptured a high-pressure natural gas transmission line, resulting in death of a Double M employee and property damage. Kansas Corporation Commission (KCC) imposed $25,000 statutory penalty against Double M for failing to properly investigate and locate the natural gas pipeline prior to excavation. On judicial review, district court affirmed. Double M appealed, advancing statutory, equitable, and constitutional arguments. Appeal transferred to Supreme Court.

ISSUE: Construction and application of Underground Utility Damage Prevention Act (UUDPA)
HELD: Double M did not comply with plain, clear, and unambiguous language of UUDPA. District court correctly determined that KCC acted within its statutory mandate. Under plain reading of UUDPA, Double M was an “excavator” who failed to communicate with Kansas One Call. This failure to perform its statutory duty rendered Double M subject to penalties under K.S.A. 66-1,151.

Equitable considerations advanced by Double M do not apply and are not persuasive. UUDPA does not provide for delegation of duties, and Double M’s reliance on common law of negligence actions is not relevant to statutory sanctions imposed. To the extent Double J failed to inform Double M of its communications with Kansas One Call, that matter is for resolution between those parties, not between Double M and KCC. No merit to Double M’s claim of impairment of constitutional freedom to contract, or that UUDPA definition of “excavator” is unconstitutionally vague. Double J’s notification to Kansas One Call of the excavation plan did not satisfy statutory requirement imposed on Double M, the party directly engaged in excavating.

STATUTE: K.S.A. 66-118b, -1,151, -1,152, -1801 et seq., -1802(d), -1802(m), -1803, -1804, -1804(a), -1805, -1805(a), -1805(b), -1805(d), 77-529(a)(1)
MINES AND MINERALS, DEEDS, AND QUIETING TITLE
CENTRAL NATURAL RESOURCES V. DAVIS OPERATING CO.
LABETTE DISTRICT COURT – AFFIRMED
NO. 96,463 – FEBRUARY 6, 2009

FACTS: Central Natural Resources Inc. (Central) obtained coal warranty deeds on 16 Labette County tracts in the 1920s, but never exercised right to mine or remove coal, or to explore/produce coalbed methane gas (CBM). Some 75 years later, defendant oil and gas companies obtained oil and gas leases on same 16 tracts and proceeded to drill for and obtain CBM. Central filed quiet title action, claiming ownership of CBM and damages for trespass and conversion. District court granted summary judgment to defendants on CBM ownership issue, finding deeds conveying “all coal” to Central did not transfer ownership of CBM. As issue of first impression, district court certified interlocutory appeal, which Court of Appeals denied. Kansas Supreme Court granted Central’s motion to directly docket the civil interlocutory appeal in that court.

ISSUES: (1) District court’s handling of judicial notice motion, (2) proposed legal theory, (3) rules of deed interpretation, (4) application of R.S. 1923 67,202 — predecessor to K.S.A. 58-2202, and (5) parties’ intent

HELD: A detailed analysis of Central’s claim about the district court’s handling of its voluminous judicial notice motion is unnecessary to resolve case. District court provided initial review and determined materiality and relevance. Facts and circumstances to be established in the motion were not controverted and proffered material did not support Central’s conclusions.

Proposed “first severance/container theory” is discussed and rejected. Court declines adoption of artificial rule of law mandating that conveyance of all coal, with right to remove and mine the same, always affects a transfer of everything that may be contained within the strata where coal may be found. Instead, if coal deed is to include CBM, that inclusion must emanate from parties’ intent.

Proposed “control sevstrata/container theory” is discussed and rejected. Court declines to consider case based on limitations of appeal, or were vague and conclusory. On facts of case, this surviving claim of ineffective assistance of trial counsel has no merit. Claims that trial counsel failed to investigate false testimony, raised for first time on appeal, are not addressed.

Ineffective assistance of 60-1507 counsel is raised for first time on appeal, but issue is decided without remand because quality of the assistance provided is determinable on transcript of nonvidenitary hearing included in the record on appeal. There is no constitutional right to effective assistance of counsel in 60-1507 action, but there is a conditional right to counsel protected by statute. Once appointed, counsel for a 60-1507 motion must, within stricture of required candid to the court and other ethical rules, pursue relief for client. Counsel is not free to act merely as an objective assistant to the court or to argue against client’s position, as counsel for Robertson did in this case.

A showing of legal prejudice is required when the performance of statutorily provided counsel on a 60-1507 motion is questioned. The required showing of prejudice is the same as that imposed in constitutional cases. Disagreement stated with Court of Appeals panels that have appeared to impose a more rigorous standard. Missouri constitutional cases. Disagreement stated with Court of Appeals panels that have appeared to impose a more rigorous standard. Missouri constitutional cases.

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STATE V. GRACEY
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 99,310 – FEBRUARY 6, 2009

FACTS: Gracey entered guilty plea to aggravated indecent liberties with a child. District court granted duration departure agreed to by the state, but found it was barred by statute from granting dispositional departure sought by Gracey. On appeal, Gracey claimed district court lacked jurisdiction to sentence him under K.S.A. 21-4643 where charging instrument did not allege he was over the age of 18 and claimed district court erred in refusing to consider a dispositional departure of probation. State also argued the sentence was illegal because district court failed to find factors justifying a downward durational sentence.

ISSUES: (1) Sufficiency of the charging instrument, (2) dispositional departure in sentencing, and (3) legality of downward duration sentence

HELD: Under facts and circumstances, Gracey was adequately informed of crime charged and the penalty. He did not contend impairment of his defense or right to fair trial, and conviction has not been shown to affect any subsequent prosecution. Based on limited standard of review, no reversible error in district court’s decision to apply K.S.A. 21-4643 in sentencing Gracey.

For defendants convicted of certain sexually motivated or sexually violent crimes committed before July 1, 2008, and sentenced pursuant to K.S.A. 21-4643(d), a departure sentence includes both dispositional and dispositional departures. Because district court ruled as matter of law that it could not consider a downward dispositional
departure, case is reversed and remanded for resentencing.

Downward durational sentence pronounced from the bench was not an illegal sentence. District court’s stated reason, the mental capacity of the defendant as set forth by the parties in the plea agreement, was consistent with statutory grounds for downward durational departure. No determination made as to whether same findings may be used as mitigating factors to justify a departure under K.S.A. 21-4643(d) and as the statutory grounds for departure from a guidelines sentence as set out in K.S.A. 21-4643(d)(5).

STATUTES: K.S.A. 2008 Supp. 21-4719(a); K.S.A. 2006 Supp. 21-3504(a)(1)(C), -3504(a)(3)(A, -3504(c), -4643(a)(1), -4643(d)(5), -4704(a); and K.S.A. 21-3504(c), -4643, -4643(a), -4643(a)(1), -4643(a)(1)(C), -4643(d), -4643(d)(5), -4701 et seq., -4703(f), -4719, -4719(a), -4721(d), 22-3201(c), -3504(1), -3601(b)

**STATE V. SALTS**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 99,533 – FEBRUARY 6, 2009**

FACTS: Salts convicted of indecent liberties with a child. On appeal, he claimed district court committed reversible error in giving Allen-type instruction to jurors before deliberations began. Salts died 12 days after notice of appeal was filed.

ISSUES: (1) Death of appellant and (2) Allen-type instruction

HELD: Salts’ death does not render appeal moot. Language in Kansas Pattern Instructions (PIK) Crim. 3d 168.12 that “[a]nother trial would be a burden on both sides” is error. PIK Committee should strike this misleading and confusing language from the instruction. Under clearly erroneous standard of review in this case, error was not reversible because there was no real possibility the jury would have rendered a different verdict if the error had not occurred.

STATUTE: K.S.A. 22-3414(3)

**Appellate Practice Reminders . . .**

**From the Appellate Court Clerk’s Office**

**The Revised Kansas Code of Judicial Conduct**

Effective March 1, 2009, the Kansas Supreme Court adopted a revised Code of Judicial Conduct (Code), based on the 2007 ABA Model Code of Judicial Conduct. Adoption of the revised Code in Kansas followed over a yearlong study and recommendations by the Kansas Commission on Judicial Qualifications. The last major revision of the Code was adopted June 1, 1995.

The revised Code (Supreme Court Rule 601B) sets forth rules, which address permitted and prohibited conduct, following more closely the organization of the ABA Model Rules of Professional Conduct for lawyers than did the prior Judicial Code (Supreme Court Rule 601A). The number of canons has been decreased from five to four and significant reorganization of existing material has occurred.

The Supreme Court departed from the Model Code in the Application Section, which establishes when the rules apply to a judge or judicial candidate. Application of the Code is unique to each state. The Court also retained the financial disclosure reporting requirements already established in this state. See Rule 3.15.

New Comments throughout Rule 601B clarify established concepts, and some noteworthy additions have been made to the Code:

• Comment [4] to Rule 2.9 specifically recognizes therapeutic or problem-solving courts, mental health courts, or drug courts and cross-references new Supreme Court Rule 109A, which addresses ex parte communications.

• Rule 3.6 prohibits membership in any organization that practices invidious discrimination on the basis of race, sex, gender, religion, national origin, ethnicity, or sexual orientation.

• Rule 4.4 retains campaign committees as a permissive means of raising campaign contributions, but a judicial candidate may also personally solicit or accept campaign contributions.


For questions about the revised Code or the operation of the Commission on Judicial Qualifications, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
CIVIL

ADOPTION AND INCARCERATED PARENT
IN RE ADOPTION OF J.M.D. AND K.N.D.
SEDGWICK DISTRICT COURT – REVERSED
NO. 99,687 – FEBRUARY 20, 2009

FACTS: Mother and father had two children of their marriage, J.M.D. and K.N.D. They were also named managing conservators/ guardians of mother’s 5-year-old stepsister (H.R.B) and 3-year-old half-sister (L.H.D.). When father became the primary caretaker of the children, L.H.D. had to be flown to the hospital as a result of serious physical injuries. L.H.D. ultimately died from these injuries. Father was charged with felony child abuse against L.H.D.; father denied the allegations. Mother was told she would have to divorce the father in order to regain custody of the children. While still maintaining his innocence, father pled guilty to the charges and was sentenced to 17 years in prison. Several years later, mother was remarried and the stepfather filed a petition for adoption with the mother’s consent. Father participated in the adoption proceedings by telephone. Father’s sister testified that father remained in contact with the children, and he would have his sister buy gift cards for the kids. He also sent birthday and Christmas cards, and that he directed his veteran’s disability check to be used by the sister to purchase gifts and cards for the children. Trial court held the father failed to assume duties of a parent for two consecutive years prior to the filing of the adoption petition, that the father was unfit and that adoption by the stepfather was in the best interests of the children. Trial court granted the adoption.

ISSUES: (1) Adoption and (2) incarcerated parent

HELD: Court held that determinations regarding the best interests of the child and the fitness of the nonconsenting parent do not permit a court to override the requirement in K.S.A. 59-2136(d) of mandatory consent when a natural parent has assumed his or her parental responsibilities. Regarding financial support, court held the fact that father failed during the prior two years to request a reduction in child support or make partial payments of some sort does not render him financially able to pay the $254 per month. Court found the district court’s conclusion that — from June 2005 through August 2006 — father was financially able but failed to assume the financial duties of a parent pursuant to K.S.A. 2008 Supp. 59-2136(d) was not supported by substantial competent evidence. Regarding emotional support, court found whether father was incarcerated as a result of his own conduct is immaterial to whether father made reasonable attempts while incarcerated to maintain a close relationship with his children pursuant to K.S.A. 2008 Supp. 59-2136(d). Court stated that under the reasoning of the district court, no incarcerated parent could ever fulfill his/her parental duty of love and affection. Court held that even if we review the facts presented above in a light most favorable to stepfather, court still concluded there simply was insufficient evidence to support the district court’s finding that father did not make reasonable efforts to contact or communicate with his children and that any such contact that did occur was minor and incidental. Court also found father had both notice and an opportunity to be heard at a meaningful time and in a meaningful manner. Court also refugured appellate attorney fees using the amount dictated by the Legislature for court appointed attorneys.

DISSENT: J. Marquardt dissented finding the majority’s rationale flawed for three reasons: (1) It found that father has financially and emotionally supported his children in the two years preceding the filing of the petition for adoption; (2) it misconstrues the word “must” in the context of the statute as synonymous with the word “shall”; and (3) it completely ignores the final sentence of K.S.A. 59-2136(d), which states: “The court may consider the best interests of the child and the fitness of the nonconsenting parent in determining whether a stepparent adoption should be granted.”

STATUTES: K.S.A. 22-4507(c); K.S.A. 38-1122, -1613(b), -2205(e), -2215(b); and K.S.A. 59-104(d), -2111, -2134(c), -2136(d)

CHILD SUPPORT AND ADULT CHILDREN
IN RE MARRIAGE OF RISLEY
WYANDOTTE DISTRICT COURT – REVERSED IN PART AND AFFIRMED IN PART
NO. 99,157 – FEBRUARY 27, 2009

FACTS: During proceedings to extend child support to the date of graduation, mother filed supplemental motion requesting the district court not only to extend the child support obligation past the age of majority, but to extend the obligation indefinitely. The child in question, Darrin, suffered from cerebral palsy and was dependent on help for virtually everything he did. The district court found the divorce agreements required the father to make child supports through graduation. Additionally, the district court granted the mother’s motion to extend child support indefinitely since both parents remained obligated to support the child despite having reached the age of majority and that such support should continue so long as the child remains disabled.

ISSUES: (1) Child support and (2) adult children

HELD: Based on K.S.A. 2008 Supp. 60-1610(a)(1), court held it is clear that the district court did not have authority to order child support to continue for Darrin once he reached the age of 18 unless he fell under one of the narrow statutory exceptions. Here, there is no evidence of a court-approved written agreement signed by father stating that he will pay support beyond the age of Darrin’s majority; thus, the statute authorized the district court to decide only the issues set forth in subsection (a)(1)(B) and (C): Whether father’s support of Darrin should continue through the school year during which Darrin becomes 18 and/or 19 years of age. Notwithstanding this limited authority, the district court ordered father to pay child support of $900 per month until father’s death or the death of Darrin, whichever should occur first. Court concluded the district court exceeded its authority and reversed that portion of the decision below that orders father to pay child support of $900 per month at any time after the end of the school year during which Darrin becomes 19 years of age.

STATUTES: K.S.A. 23-451; and K.S.A. 60-1610(a)(1), (b)(4)

DRIVER’S LICENSE SUSPENSION, DUI, AND DEPRIVATION PERIOD
MITCHELL V. KANSAS DEPARTMENT OF REVENUE
LABETTE DISTRICT COURT – REVERSED
NO. 99,372 – FEBRUARY 13, 2009

FACTS: Mitchell was arrested for driving under the influence (DUI). During the mandatory 20-minute observation period, Mitchell had a cup of water and then was alone in the restroom for 2 to 4 minutes. Mitchell testified that he did not remember if he belched or burped in the restroom. Mitchell blew a 0.194 on the intoxilyzer and his driver’s license was suspended. The KDOR administrative hearing officer affirmed the suspension. The district court also affirmed the suspension after finding substantial compliance with the 20-minute protocol. The court found that even though Mitchell was out of the officer’s presence for a couple minutes, there
was no evidence that Mitchell belched or burped in the 20-minute period.

ISSUES: (1) Driver’s license suspension, (2) DUI, and (3) deprivation period

HELD: Court held that under the facts of this case, where the district court found that the petitioner was alone in the restroom out of the officer’s presence for a couple of minutes and the petitioner consumed a cup of water sometime during the deprivation period, the testing procedures failed to substantially comply with the Kansas Department of Health and Environment protocol.

STATUTE: K.S.A. 8-259, -1001, -1002(d), -1020(b)(2)(F), (k), (o), (p), (q)

HABEAS CORPUS
LITZINGER V. BRUCE
RENO DISTRICT COURT – AFFIRMED
NO. 99,251 – AUGUST 29, 2008 (MOTION TO PUBLISH)

FACTS: Jeffrey Litzinger was charged with various drug crimes and rape. He was convicted on drug charges, but the rape charges were dismissed. Litzinger was sentenced to prison. On Dec. 6, 2004, the Kansas Department of Corrections (KDOC) approved a request to have Litzinger identified and managed as a sex offender. Litzinger requested an override, which the override panel denied on Feb. 11, 2005. On July 20, 2006, Litzinger filed a grievance with KDOC in which he challenged his classification as a sex offender. His grievance was denied at every administrative level, including the final denial by the secretary of corrections who, on Aug. 16, 2006, mailed to Litzinger his decision upholding the sex-offender classification. The district court sustained the KDOC’s motion to dismiss, finding that Litzinger’s cause of action arose on either Dec. 6, 2004, or on Feb. 11, 2005, and Litzinger failed to file a grievance within 15 days from the date he discovered the event giving rise to the subject matter of the grievance.

ISSUE: Habeas corpus

HELD: Court held that the facts presented, the appellant failed to file his grievance within 15 days of the date of discovering the event for which he filed the grievance, as required by K.A.R. 44-15-101b. Accordingly, the 30-day time limit for him to file his K.S.A. 60-1501 petition was not tolled, and the petition he eventually filed was untimely. Court also stated that although the appellant claimed the 30-day time limitation for filing his K.S.A. 60-1501 petition does not apply because his treatment as a sex offender is ongoing, the gravamen of his petition was that he was wrongfully classified as a sex offender, not the resulting conditions of his confinement. Thus, the 30-day time limitation applied.

STATUTES: K.S.A. 60-1501; and K.S.A. 75-52,138, -5210, -5251

MEDICAL MALPRACTICE AND JURY INSTRUCTIONS
LEE V. FISCHER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,407 – FEBRUARY 27, 2009

FACTS: Lee was a 79-year-old female diagnosed with severe mitral regurgitation in 2003. She elected to undergo mitral valve replacement surgery to be performed by Fischer, a cardiothoracic surgeon. As a preliminary step in the surgery, the anesthesiologist for the surgery, Ernest McClellan, M.D., attempted to place a Swan-Ganz catheter into Lee’s internal jugular vein. He encountered problems in the insertion, but it was disputed the extent to which McClellan discussed these problems with Fischer. In any event, with at least some knowledge that the catheter was likely outside the vein, Fischer elected to proceed with the valve surgery rather than investigate and remedy the potential damaging effects of the misplaced catheter. Lee experienced major internal bleeding with related complications and died within days of the surgery. Lee sued Fischer and McClellan for medical malpractice, together alleging that (1) they knew or should have known the catheter had perforated an innominate vein and caused a potential life-threatening hemorrhage, and (2) they were negligent in electing to continue with surgery without first diagnosing and repairing the perforation that ultimately caused Lee’s death. McClellan settled with the Lee plaintiffs before trial, and other defendants were dismissed. The case proceeded to trial against Fischer and resulted in a jury verdict assessing 100 percent fault to Fischer and 0 percent fault to McClellan with total damages of $735,182.

ISSUES: (1) Medical malpractice and (2) jury instructions

HELD: Court held that the district court did not err in refusing to instruct the jury on Fischer’s contention that McClellan was at fault for his failure to meet the standard of care in his technique of insertion of the internal jugular vein catheterization of Lee. Court stated the record failed to contain any clear evidence that McClellan deviated from the standard of care in the insertion of the catheter or in causing the perforation. The entire focus of the trial was on fault and consequences for decisions made after insertion and apparent vascular perforation. Court also held the district court did not err in refusing to give a “best judgment” jury instruction. Court concluded that giving the instruction could have been as confusing as it could have been helpful. If the “best judgment” instruction had been given and a defense verdict rendered, the Lee plaintiffs would undoubtedly have claimed error. Court stated it was clear that the jury did not accept Fischer’s suggestion that he “had no choice” and it also rejected Myer’s suggestion that Fischer could have proceeded in either order because they found that Fischer breached the applicable standard of care. The omission of the “best judgment” instruction under these circumstances was not error. Court did find that the trial court erred in giving an instruction with the “common knowledge” exception to the requirement of expert testimony to establish standard of care, but the error was harmless.

STATUTES: No statutes cited.

MUNICIPALITIES
SOUTHWESTERN BELL CO. V.
BOARD OF LYON COUNTY COMM’RS
LYON DISTRICT COURT – AFFIRMED AND REMANDED
NO. 100,678 – FEBRUARY 27, 2009

FACTS: After no action was taken on a bill and a notice of claim, Southwestern Bell Telephone Co. (SWBTC) filed suit against Lyon County based upon damage to telephone facilities during county mowing. County moved for judgment on pleadings because AT&T was identified as the claimant in the formal notice of claim. District court denied the motion, finding substantial compliance with K.S.A. 2008 Supp. 12-105b(d). County filed interlocutory appeal.

ISSUE: Compliance with notice of claim statute

HELD: Under facts of case, no suggestion in record that county was unable to understand this claim or investigate its basis. After having received both the bill for damages and the formal notice, there is no question that purpose of statute was served by the notice, despite its identification of the claimant by its AT&T corporate name.

STATUTE: K.S.A. 2008 Supp. 12-105b, -105b(d), -105b(d)(1)

NEGLIGENCE, SERVICE, AND SUBSTITUTION OF PARTIES
LE V. JOSLIN, SPECIAL ADMINISTRATOR
OF THE ESTATE OF GIBSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,907 – FEBRUARY 27, 2009

FACTS: In this negligence action, Mai T. Le originally sued Dorothy Gibson for personal injuries that Le sustained during an automobile accident. Gibson passed away before Le was able to obtain
service of process on her. Le later substituted Paul S. Joslin, special administrator of the Estate of Dorothy K. Gibson, deceased (Joslin), as a defendant for Gibson. The district court granted summary judgment to Joslin on three alternative procedural grounds.

ISSUES: (1) Negligence, (2) service, and (3) substitution of parties

HELD: Court rejected Le’s argument that the trial erred in finding that good cause did not exist to support the order granting her an additional 30 days to obtain service of process on Dorothy Gibson. The record demonstrated that when Le moved for an additional 30 days to obtain service of process on Gibson, she had not made sufficient efforts to locate and serve Gibson. As a result, Le failed to meet her burden under K.S.A. 60-203(a)(1) to show good cause for the 30-day extension to obtain service of process. Next, the court rejected Le’s argument that the trial court erred in determining that K.S.A. 60-225, the statute pertaining to substitution of parties, was inapplicable here and that it was necessary for Le to amend her petition to name Joslin as a party. Under the plain language of K.S.A. 60-225, Joslin could be substituted for Gibson only if Gibson was a party to the lawsuit. Because Le never obtained service on Gibson before she died, Gibson never became a party to this lawsuit. In order to name Joslin as a defendant in the lawsuit, Le needed to move to amend her pleadings to include Joslin and to relate back the amendment to name Joslin as a defendant in the lawsuit, Le needed to move to amend her pleadings to include Joslin and to relate back the amendment to her original pleadings. Her failure to follow this procedure renders the court without jurisdiction in the matter against Joslin. Last, the court rejected Le’s argument that the trial court erred in determining that the summons served upon Joslin was invalid. The summons with which Joslin was served was not issued to him and was served before he was a named defendant in the lawsuit. Because proper service of process was never obtained upon Joslin, the trial court was without jurisdiction in the matter against Joslin. STATUTES: K.S.A. 59-2239(2); and K.S.A. 60-203(a)(1), -204, -215, -225(a)(1), -301, -513(a)(4)

PREMISES LIABILITY
HERRELL V. NATIONAL BEEF PACKING CO. ET AL.
FORD DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,451 – FEBRUARY 27, 2009

FACTS: A subcontractor’s employee, Shelly K. Herrell, was injured when she stepped into a hole in the concrete floor of the landowner’s (National Beef Packing Co. [National Beef]) plant. Herrell was working at the plant to obtain soil samples for testing. Herrell sued National Beef in a premises liability action, alleging that National Beef was negligent in creating, maintaining, and failing to warn of the dangerous condition; in violating an Occupational Safety and Health Administration (OSHA) regulation; in failing to inspect the premises; and in failing to keep the business place safe. National Beef asserted that Herrell’s injuries were covered by workers’ compensation and the claims of negligence were barred. The trial court held the workers’ compensation rule did not control because National Beef had created the dangerous condition of the hole by continuing to operate the plant during the construction. The jury ultimately returned a verdict assessing fault for Herrell’s total damages of $251,197.86 as follows: National Beef – 47.5 percent, JAG Construction – 32.5 percent, Terracon Construction – 15 percent, and Herrell – 5 percent.

ISSUE: Premises liability

HELD: Court stated that a landowner is not liable in tort on a theory of negligence to an employee of an independent contractor covered by workers’ compensation for injury resulting from a dangerous condition known to or discoverable by the landowner, absent evidence that the landowner exerted a significant degree of control over the details of the independent contractor’s project and work activities. Court held that based on the policy reasons advanced by the Kansas Supreme Court in Dillard v. Strecker, 255 Kan. 704, 877 P.2d 371 (1994), Herrell is precluded from bringing her claims of negligence against the defendant landowner. Court stated there are two reasons for denying landowner liability to a contractor’s employee even in a case like the present one: where the landowner retains possession of the premises and continues its business activities while the contractor is completing its project with the help of independent contractors.

CONCURRENCE: (McAnany, J.): Concurred that Dillard required the court to set aside the judgment against National Beef. Court dissented and would remand for retrial excluding Herrell’s claim that National Beef violated the OSHA regulation regarding barricading or otherwise guarding the hole where Herrell fell. STATUTE: K.S.A. 44-503(a), -504(a)

STATUTE OF LIMITATIONS
CAMPBELL V. HUBBARD
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS
NO. 97,826 – APRIL 25, 2008 (MOTION TO PUBLISH)

FACTS: In June 2003, a court dismissed Campbell’s employment-discrimination suit. In April 2005, Campbell filed a legal malpractice claim against Hubbard in Arizona. In January 2006, the Arizona federal court dismissed one defendant and found it lacked jurisdiction over the other defendants. In June 2006, Campbell filed a legal-malpractice suit in Kansas against the same defendants. The Kansas courts dismissed the malpractice claim and a claim based on the Kansas Consumer Protection Act (KCPA) based on statute of limitations.

ISSUE: Statute of limitations

HELD: Court held on the facts of this case, a suit was timely commenced in Arizona, under its procedural statutes, and then dismissed for reasons unrelated to its merit. The suit was refiled in Kansas within six months of its dismissal in Arizona. Because the suit was timely commenced in Arizona according to Arizona law, K.S.A. 60-518 allowed the suit to be refiled in Kansas within six months of its dismissal in Arizona. Court held the Arizona lawsuit was filed on time and reversed the dismissal of the malpractice claim in Kansas. However, the court held the district court correctly ruled that the statute of limitations barred Campbell’s KCPA claim.

STATUTES: K.S.A. 50-626(b) and K.S.A. 60-203(a), -518

CRIMINAL

STATE V. BEAVER
CLAY DISTRICT COURT – AFFIRMED
NO. 100,241 – FEBRUARY 13, 2009

FACTS: Magistrate judge bound Beaver over on drug charges arising out of search of residence where Beaver was present. District court granted Beaver’s motion to dismiss all charges for lack of probable cause, finding Beaver’s mere presence and proximity to the illegal drugs was not enough to establish constructive possession. State appealed.

ISSUES: (1) Probable cause and (2) constructive possession

HELD: Under facts of case, where illicit drugs were found in a residence and Beaver was nothing more than a social guest on the premises, his mere presence in the home and proximity to the illicit drugs were insufficient to show probable cause to believe he was in constructive possession of the illicit drugs. Constructive possession cases discussed and distinguished.

STATUTE: K.S.A. 2006 Supp. 65-4152(a)(2) and (3), -4161(a)
STATE V. BEJARANO
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 98,237 – FEBRUARY 20, 2009
FACTS: Bejarano was charged with rape and aggravated indecent liberties with B.G., a victim under the age of 13. His first trial resulted in a hung jury in which B.G. took the stand to testify, but was unable to respond. At his second trial, B.G. testified by closed-circuit television and the jury convicted Bejarano as charged.
ISSUES: (1) Testimony by closed-circuit television and (2) prosecutorial misconduct
HELD: Court held the trial court’s findings on the use of closed-circuit television were supported by substantial competent evidence. The trial court had compelling reasons to employ closed-circuit testimony of the child victim. Court also found no prosecutorial misconduct in the prosecutor’s questions concerning Bejarano’s use of his home computer to view pornography because the objection to the question was sustained and no evidence was presented to the jury.
STATUTE: K.S.A. 22-3434

STATE V. BLAUROCK
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 97,040 – FEBRUARY 27, 2009
FACTS: Blaurock convicted of aggravated indecent liberties with a child in first trial in which mistrial was declared on additional charges. In second trial, he was convicted of rape, aggravated criminal sodomy, and sexual exploitation of a child. On appeal he claimed: (1) trial court erred in admitting evidence of other crimes Blaurock allegedly committed against the victim, (2) trial court erred in allowing unredacted videotape to be shown, (3) he was denied his statutory right to a speedy trial in his second trial, (4) cumulative error denied him a fair trial, and (5) error to increase penalty by using criminal history not proven to jury.
ISSUES: (1) Evidence of other crimes, (2) admission of videotape, (3) statutory right to speedy trial, (4) cumulative error, and (5) sentencing
HELD: Under facts of case, other crimes evidence of Blaurock’s conviction and acquittals from his first trial was admissible under K.S.A. 60-455 to show identity and plan. Although trial court did not conduct appropriate K.S.A. 60-455 analysis before admitting the evidence, as required by State v. Gunby, 282 Kan. 39 (2006), that error was harmless. Also, lack of a limiting instruction on plan and identity was not reversible error in this case. Because no Kansas Supreme Court case has yet recognized the admission of other crimes evidence based on a material fact not explicitly set forth in K.S.A. 60-455, the decision in this case is not based on fact that other crimes evidence of DNA and photographs would corroborate victim’s testimony.
Under facts of case, Blaurock’s challenge to trial court’s failure to redact an evidentiary videotape to remove references to Blaurock’s federal parole status was precluded by Blaurock’s failure to preserve issue at trial.
Under facts of case, no statutory speedy trial violation occurred where Blaurock had been convicted of aggravated indecent liberties with a child at his first trial and was awaiting sentencing for that conviction when his second trial occurred, and where factors under K.S.A. 22-3402(5)(c) had been met to extend statutory speedy trial period to 180 days. State v. Mann, 274 Kan. 670 (2002), applied. Because factors under K.S.A. 22-3402(5)(c) were met, trial court was well within its discretion in granting state’s request for a continuance of second trial to analyze DNA evidence.
Cumulative error claim fails because no error was demonstrated. Controlling Kansas Supreme Court precedent defeats sentencing claim.

STATE V. HARVEY
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 98,447 – FEBRUARY 13, 2009
FACTS: Fearing, others at the Wichita Work Release facility, would kill him, Harvey walked away. He turned himself in two days later and was charged with aggravated escape. After mistrial, district court granted state’s motion to exclude compulsion defense, finding evidence at first trial showed elements of compulsion defense had not been met. Jury returned guilty verdict. Harvey appealed, claiming: (1) he was denied a fair trial and right to present a defense, (2) error for trial court to deny his request for a compulsion instruction, and (3) noncompliance with State v. Robinson, 281 Kan. 538 (2006), when district court directed Department of Corrections to determine Harvey’s ability to pay Board of Indigents’ Defense Services (BIDS) attorney fees upon Harvey’s release.
ISSUES: (1) Compulsion defense, (2) compulsion instruction, and (3) attorney fees
HELD: District court correctly determined that Harvey failed to satisfy two of the five elements of compulsion defense in State v. Irons, 20 Kan. 302 (1992), applicable when a defendant seeks to use it in an escape from custody case. No abuse of discretion in granting motion to exclude compulsion defense.
Under facts, Harvey not entitled to instruction on compulsion defense.
STATE V. HERRERA
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 97,381 – FEBRUARY 27, 2009

FACTS: Stephano Herrera convicted of aggravated indecent liberties with a child (solicitation and lewd fondling), sexual battery, and aggravated criminal sodomy. On appeal he claimed: (1) insufficient evidence supported his solicitation conviction under K.S.A. 21-3504(a)(3)(B), (2) prosecutorial misconduct denied him a fair trial, (3) trial court erred in admitting evidence of prior bad acts and in excluding evidence of a witness’s disbelief of another witness’s accusations, (5) trial court’s calculation and imposition of base sentence violated due process, and (6) cumulative error denied him a fair trial.

ISSUES: (1) Sufficiency of the evidence, (2) prosecutorial misconduct, (3) admission of prior bad acts, (4) exclusion of witness testimony, (5) sentencing, and (6) cumulative error

HELD: State presented no evidence that Herrera had solicited the victim to engage in any activity that might be construed as lewd fondling or touching of any person other than Herrera. Thus evidence was not sufficient to support Herrera’s conviction for aggravated indecent liberties with a child, as interpreted by State v. Johnson, 283 Kan. 649 (2007). This conviction is reversed and Herrera cannot be retried on this charge.

Prosecutor’s comments upon uncharged acts, which misrepresented facts related to the crimes charged and introduced facts not admitted at trial, were improper. Also improper for prosecutor to go outside the record and tell jury that Herrera was responsible for more crimes than those charged in the complaint. Prosecutor’s misconduct was gross and flagrant, and demonstrated ill will. Because evidence against Herrera was not strong, prosecutor’s misconduct was not harmless. Convictions for sexual battery, aggravated criminal sodomy, and aggravated indecent liberties with a child (lewd fondling) are reversed and remanded for a new trial.

Herrera failed to preserve issue for appeal regarding the admission of prior bad acts.

Herrera failed to lay a proper foundation for the admission of evidence excluded by the trial court.

Controlling Kansas Supreme Court precedent defeats sentencing claim. Cumulative error claim is moot.

STATE V. PENN
SEDGWICK DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCE VACATED, AND REMANDED
NO. 98,449 – FEBRUARY 27, 2009

FACTS: Penn convicted of rape and sexual battery of 17-year-old victim. On appeal he claimed: (1) trial court erred in excluding evidence of victim’s dishonesty, (2) prosecutor’s cross-examination of Penn violated trial court’s order in limine, (3) trial court failed to determine Penn’s ability to pay assessed attorney fees, and (4) error to use criminal history not proven to a jury to increase criminal history score in sentencing.

ISSUES: (1) Evidence of victim’s dishonesty, (2) violation of order in limine, (3) attorney fees, and (4) sentencing

HELD: Specific instances of victim’s conduct could not be admitted at trial to establish victim’s character traits for honesty and veracity under K.S.A. 60-422(d), and Penn never established a sufficient foundation to introduce opinion testimony and evidence of victim’s general reputation for untruthfulness in the community where she lived under K.S.A. 60-446. Trial court properly excluded this evidence at trial. State v. Hinton, 206 Kan. 500 (1971), is distinguished.

Under facts in case, Penn did not open the door to prosecutor’s cross-examination questions. Prosecutor violated trial court’s order in limine, and this misconduct was gross and flagrant. However, record shows no prosecutorial ill will, and evidence against Penn was overwhelming. No substantial prejudice to Penn.


Controlling Kansas Supreme Court precedent defeats sentencing claim.

STATE V. TROSTLE
FRANKLIN DISTRICT COURT – APPEAL SUSTAINED
NO. 99,960 – FEBRUARY 6, 2009

FACTS: Trostle pled guilty to multiple driving under the influence (DUI) related crimes. At sentencing the parties recommended the defendant serve one year in jail for the DUI conviction, with no provision for work release or electronic monitoring, due to the defendant’s prior record. The court so sentenced Trostle. After assessing further fines, the district court stated: “I would reserve jurisdiction in this case to consider an alternative to incarceration, but no motions for alternatives to incarceration would be entertained by the court until the defendant has served nine months county jail time, including whatever jail time she may have already served awaiting disposition of the action.” The court then ordered fees, costs, and post-release treatment and supervision. The district court sentenced Trostle to six months in the jail for battery against a law enforcement officer. After nine months, Trostle sought release and electronic monitoring. The state claimed the district court had no jurisdiction to modify the sentence. The district court granted Trostle’s request, modified her sentence, and released her to 12 months’ probation.

ISSUES: (1) Modify sentence and (2) jurisdiction

HELD: Court stated that the Kansas Sentencing Guidelines Act does not vest a district court with continuing jurisdiction after a sentencing proceeding is concluded. Court held that once a court has imposed a legal sentence for felony DUI under K.S.A. 2005 Supp. 8-1567, the district court has no jurisdiction to modify that sentence except to correct arithmetic or clerical errors pursuant to K.S.A. 21-4721(i). Court also held that jurisdiction may not be “reserved” by the sentencing court to entertain modification of a sentence at some future date. Court stated that if the district court wanted to impose alternative sentencing, it needed to be ordered while originally sentencing a defendant.

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STATE V. WALKER
WYANDOTTE DISTRICT COURT – AFFIRMED
NO 99,457 – FEBRUARY 27, 2009

FACTS: Investigating a report of auto burglary, officer questioned Walker as a person within a description of the offender, asked for identification, and arrested him on outstanding warrant. Drug evidence discovered in subsequent search of Walker. Trial court denied Walker's motion to suppress that evidence, and Walker convicted of drug offenses. On appeal, Walker claimed trial court erred in denying motion to suppress because the officer lacked a reasonable suspicion to detain him, the search exceeded the investigatory nature of the stop, and the subsequent discovery of an outstanding warrant did not purge the taint of the illegal detention.

ISSUES: (1) Reasonable suspicion to detain, (2) extension of the investigatory stop, and (3) discovery of outstanding warrant

HELD: Given Walker's proximity in time and location to the crime, and Walker matching the general description of the auto burglary suspect, officer had a reasonable suspicion based on articulable facts that Walker had just committed the automobile burglary. State v. Anguiano, 37 Kan. App. 2d 202 (2007), is distinguished. No Kansas statute deals with a police officer running a warrants check during a street encounter. Tenth Circuit case, United States v. Villagrana-Flores, 467 F.3d 1269 (10th Cir. 2006), is followed. Permitting a warrants check during a Terry investigative stop on the street promotes strong governmental interest in solving crimes and bringing offenders to justice. Officer's investigatory detention in this case did not exceed the permissible scope of Walker's detention. The warrants check is not illegal and does not violate a suspect's constitutional rights.

Walker's reliance on State v. Martin, 285 Kan. 994 (2008), is misplaced. As in Martin, officer was drawn to Walker because Walker matched the description of a burglary suspect, but no evidence the officer's purpose for the stop was to search Walker for drugs.

STATUTE:  K.S.A. 22-2402(1) and (2), -2501

STATE V. WILSON
RENO DISTRICT COURT – AFFIRMED
NO. 98,050 – NOVEMBER 21, 2008
PUBLISHED VERSION FILED FEBRUARY 18, 2009

FACTS: Wilson convicted by a jury of two counts of abuse of a child. On appeal she claimed: (1) insufficient evidence supported the convictions, (2) error to admit evidence of prior acts, (3) error to deny her motion for bill of particulars, (4) error to deny motion for new trial based upon newly discovered evidence, and (5) prosecutorial misconduct in suppressing evidence in violation of Brady.

ISSUES: (1) Sufficiency of the evidence, (2) evidence of prior bad acts, (3) motion for bill of particulars, (4) motion for new trial, and (5) prosecutorial misconduct

HELD: Under facts of case, the punishment was “corporal” as stated in K.S.A. 21-3609 or “bodily” as the jury was instructed at trial following PIK Crim. 3d 58.11. There was sufficient evidence to show the victims were intentionally deprived of adequate space, heat, ventilation, light, recreation, socialization, bedding, sanitation, food, and clothing for a prolonged period and based upon such evidence, a rational factfinder could conclude beyond a reasonable doubt that the punishment was cruel and inhuman.

Wilson's trial strategy, of portraying actions as the end result of increasingly desperate attempts to control victims' behavior, was impossible without evidence of her “prior acts.” She may not appeal from this invited error.

Although trial court never ruled on Wilson's motion for a bill or particulars, Wilson waived the issue by failing to object to the lack of a ruling, failing to renew her motion upon the filing of an amended complaint/information, and failing to ask for a continuance.

Evidence that one of the victims was given growth hormones after being removed from Wilson's home, and medical records stating Wilson's belief that victims may have been sexually abused while in care of natural mother, are discussed. Wilson knew of growth hormone therapy before trial, and substance of medical records was not new. No reasonable possibility of a different result upon retrial regarding any of this evidence.

No Brady violation and no prosecutorial misconduct. No merit to Wilson's claim that state bore a positive duty to search out medical records not already in its possession and forward them to her.

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April

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. – 12:05 p.m.
Consumer Law for the Attorney Practicing in Kansas Video Debut
Dodge City, Lenexa, Topeka, Wichita

Friday, April 24, 9 a.m. – 3:45 p.m.
Bankruptcy 2009 – “When All of the Bailouts, Moratoria, and Stimulus Packages Just Haven’t Worked ...”
DoubleTree, Overland Park

Friday, April 24, 9 – 11:45 a.m.
Veterans Administration Representative Accreditation CLE
Radisson Hotel, Lenexa

May

Friday, May 8, 9 a.m. – 3:15 p.m.
Intellectual Property*
DoubleTree, Overland Park

Tuesday, May 12, 9 a.m. – 4:35 p.m.
Foreclosure Fallout: Challenges Facing Creditors in a Weakening Economy*
South & Associates, Overland Park

Wednesday, May 13, Noon – 1 p.m.
Live! Late-Breaking! Appellate Court Update*
Hon. Michael B. Buser, Kansas Court of Appeals, Topeka
Telephone CLE

Thursday, May 14, Noon – 1 p.m.
From ICE’s Best Employment Practices to E-Verify, plus Overview of Hot Federal and Kansas Issues
Mira Mdivani, The Mdivani Law Firm LLC, Overland Park
Deena Hyson Bailey, Cargill Meat Solutions, Wichita
Kathleen Harvey, Kathleen A. Harvey P.A., Overland Park
Telephone CLE

Wednesday, May 20, Noon – 1 p.m.
Conflict of Interest
Joseph R. Colantuono, Colantuono & Associates LLC, Leawood, Ethics Telephone CLE

Wednesday, May 27, Noon – 1 p.m.
Hot Free Trial Issue: Should the Defendant be Permitted to Make Comparative Allegations Contingent on a Settlement or Dismissal with a Co-Defendant
Jerry D. Hawkins, Hite Fanning & Honeyman LLP, Wichita
Telephone CLE

Friday, May 29, 8:30 a.m. – 4:05 p.m.
2009 Criminal Law*
Radisson Hotel, Lenexa

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