STATE OF CIVILITY AND PROFESSIONALISM IN THE KANSAS BAR
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Focus 09

Civility, Professionalism, and Good Deeds: The State of the Kansas Bar
By Matthew Keenan

Items of Interest

8 Dan Biles Appointed to the Kansas Supreme Court
10 Why You Should be a Fellow of the Foundation
15 Welcome Spring 2009 Admittees to the Kansas Bar
17 Thinking Ethics A Recurring Issue: The Lawyer as a Witness
18 Kansas Lawyers Serve Their Country, State, and Profession

Regular Features

6 President’s Message
7 Young Lawyers Section News
11 Law Students’ Corner
12 Members in the News
12 Jest is for All
13 Obituaries
14 Law Practice Management Tips & Tricks
29 Appellate Decisions
33 Appellate Practice Reminder
41 Classifieds
43 CLE Docket

The Kansas Bar Foundation (KBF) will hold its next Annual Meeting beginning at 10 a.m. on Friday, June 19, 2009, in the Hawthorne Room of the Sheraton Overland Park Hotel.

The meeting will include the election of KBF Officers and Board members. Any other business items will be conducted as necessary.

All Fellows are cordially invited to attend.
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TABLE OF CONTENTS CONTINUED

Article

19 Building the Rule of Law in Iraq
By Kristafer Ailslieger

25 Recovering (Some) Honor by Proxy: The Lawyers’ Fund for Client Protection
By Hon. David L. Stutzman, 21st Judicial District

2009 Joint Judicial Conference & Kansas Bar Association Annual Meeting

How Nice Guys Finish First – A Roundtable Discussion with Kansas Attorneys and Judges, Addressing the State of Civility and Professionalism in the Kansas Bar

In this 50-minute ethics CLE, Matthew Keenan has assembled a panel of attorneys and judges from a cross section of communities in Kansas. State judges, federal judges, and civil and criminal attorneys from large and small communities will discuss the state of civility in our practice. Is civility declining? If so, why? What are lessons we can learn from practitioners and judges who encounter it.

Panel On the Cover:
(i to r): Hon. James O’Hara, Hon. Nancy Parrish, Lee Woodard, Matthew Keenan, Stanton Hazlett, Robb Edmonds, and Brett Reber

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Look for the registration form included with this issue of the Journal

www.ksbar.org
Telling Noah About the Flood

Telling most of you that we have an economic crisis is a little like telling Noah about the flood. No one has to tell KBA members that times are rough.

After looking at http://lawshucks.com/layofftracker/, things are actually worse than I thought for “major” law firms. And if you look at that site, remember that the layoffs listed there don’t include the complete failure of firms like Heller Ehrman, a 500-plus law firm founded in 1890. It was big and powerful and it is gone.

Consider these numbers. From Jan. 1, 2008, to March 31, 2009, there have been 9,946 people laid off by major law firms. That is 4,046 lawyers and 5,905 staff. In the month of March alone, 1,334 attorneys and 2,343 staff have been cut loose. We are talking about real live people here – people with mortgages, student loans, and dreams. Or at least they had dreams. And these numbers are undoubtedly low because the layoff trackers only consider “major” law firms. “Major” means the ones that the researchers in New York had heard about. Also many large law firms don’t talk about their “restructuring” for public relations reasons. So it should be clear. The law business is in a hell of a mess – just like the rest of the economy.

I haven’t found any published data for attorney job loss in Kansas, although there are a few firms that have announced cut backs. If there are major layoffs in New York and Chicago then those layoffs will be felt everywhere to one degree or another.

What is the likelihood that this storm will pass and everything will go back to the way it was five years ago? Sorry. That isn’t likely.

Most likely compensation for lawyers will go down everywhere. Industry watchers say the pressure is on at the “top” firms to drop starting salaries from $160,000 per year to as low as $100,000. That doesn’t exactly qualify someone for food stamps but it surely will drive down compensation everywhere in a ripple effect. Chicago and Kansas City firms certainly will note that New York salaries are down.

What will be the results of all of this for law schools and bar associations? Like Noah, we all must stay afloat.

Law schools may accelerate their programs. The following is from the Northwestern Law School Web site:

Northwestern Law is the first top tier law school to offer an accelerated JD program. The school will enroll a limited number of highly-motivated students to this two-year JD program.

Students in the accelerated JD program complete the same number of credit hours as traditional three-year JD students in five semesters over the course of two calendar years.

This is clearly aimed at giving students just two years’ worth of borrowing and not three. Since today’s law graduates currently leave school owing an average of $80,000, something needs to change. Law schools will respond if law jobs become scarce.

The American Bar Association recently published a study covering 58 bar associations. It is titled the “Impact of Economic Downturn on State and Local Bars.” Some changes were to be expected but some not. Membership has decreased in many bar associations. That is to be expected. The tough economic climate on the other hand has led to a marked increase in bar CLE programming. More lawyers are obtaining CLE close to home and not in resort settings. Contributions to foundations have dropped off while attendance at meetings where there is a lot of social networking is up significantly. Lawyer Referral Service is up.

Bar associations are responding to the economic crisis in a number of ways. Free CLE programs on “How to Survive the Crash” are popular. Some bars offer dues waiver or payment plans for those lawyers facing financial hardships. Career counseling and CLE for those switching practice areas are also popular. Other state and local bars are following the lead of the Kansas Bar Association in offering free online research through “Casemaker.”

It looks to me like my worthy successor Tim O’Brien will have to deal with all the water.
Mock Trial Competition Provides Invaluable Learning Experiences

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

Recall back to your days in high school. For some, those memories are increasingly vague; for others, high school seems just like yesterday. Regardless, you probably all recall how impressionable we were. With this fact in mind, consider what great opportunities members of the Kansas bar have to shape the minds of our youth. The Kansas Bar Association Young Lawyers Section (KBA YLS) has been shaping these minds during the section’s involvement with the High School Mock Trial Tournament. Over the past few months, the KBA YLS has worked with today’s highly impressionable high school students to encourage their desire for a career in law as they have prepared and presented their cases at an annual tournament.

It may help to provide a little background about this program. In the mid-1990s the KBA, in cooperation with the Kansas Supreme Court, formed the Law and Citizenship Project, which was the primary sponsor for the first two Kansas mock trial competitions. Shortly thereafter, this committee wanted to encourage the development of the program and sought and received assistance of the KBA YLS. The YLS was originally responsible for the three regional meetings and helping select the case used in the competition. Several years ago, the YLS became the primary sponsor of the competition, and the competition molded into the format seen today: two regional competitions and one state competition.

The regional competitions (one in Johnson County and one in Sedgwick County) are coordinated through local bar organizations, specifically the Young Lawyers Section of the local bar, if possible. The local bar is responsible for obtaining lawyer-coaches for the teams, as well as the lawyer-judges for the competition. Each tournament consists of four rounds of trials, with each team participating in the prosecution and defense of the case. Each team consists of three or four student attorneys and three or four student witnesses. The case materials contain witness statements, which purposefully conflict, and a bare-bones compilation of applicable law. Panels of three volunteer lawyers judge each round of the competition, with one serving as presiding judge to rule primarily on evidentiary objections. The top six teams from the combined tournaments repeat the process at a state competition. The winning state team then travels to nationals to compete.

This year’s regional competitions were held in early March, while the state competition was held in Olathe in early April. The teams tried a civil wrongful death case pitting a high school student’s surviving parent against the child’s former track coach, alleging that the track coach was responsible for the child’s death resulting from performance enhancing drugs. The competition was nothing short of impressive. The performances demonstrated some great potential for these students as they pursue careers in the law. In addition, the lawyers supporting this project as judges provided the students with meaningful insight.

Mock trials have proven to be effective and popular part of the comprehensive, law-focused program designed to provide young people with an operational understanding of the law, legal issues, and the judicial process. The essence of the appeal of a mock trial is the fun involved in preparing for, and participating in, a simulated trial. Mock trials are exciting, but more importantly, they provide invaluable learning experiences.

Participation in, and analysis of, mock trials provides young people with an insider’s perspective from which to learn about courtroom procedures. Mock trials help students gain a basic understanding of the legal mechanism through which society chooses to resolve many of its disputes. And while obtaining this knowledge, young people develop useful questioning, critical thinking, and oral advocacy skills, as well as significant insight into the area of law relevant to the case in question.

Inviting judges, attorneys, and other members of the legal community to take part in the mock trial helps bridge the gap between the simulated activity and reality, and also provides us a real opportunity to share our knowledge and experience with students. Finally, mock trials give participants knowledge about courts and trials, which can be invaluable should they ever be jurors or witnesses in a real trial or parties to a legal action.

The YLS is proud to sponsor this competition and to provide a grant to the state champion in order to participate in the National Mock Trial Competition. This project has been operated successfully for more than 10 years due in large part to a gift from Shook, Hardy & Bacon LLP, numerous IOLTA grants from the Kansas Bar Foundation, grants from the American Bar Association Young Lawyers Division, and donations from local bar associations and other companies. We thank those organizations, as well as our many volunteers, for their support.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.
As a newly minted journalist from Kansas State University, William Daniel “Dan” Biles, of Shawnee, worked for a weekly newspaper, a daily newspaper, and then the Associated Press (AP) – all within his first year after graduation in 1974. His decision to go to law school was a way to help him “shore up his credentials as a journalist” and become more employable.

Today, the El Dorado native is the newest member of the Kansas Supreme Court, having been sworn-in on March 13. Biles replaced Chief Justice Kay McFarland, who retired after more than 31 years on the bench; her departure elevated the next senior justice, Robert E. Davis, to chief.

“For nearly 30 years, Dan has been an incredible advocate for those he represents, including the Kansas State Board of Education,” said Gov. Kathleen Sebelius of the Jan. 7 appointment. “His constitutional knowledge of issues and extensive experience in the legal field is well-respected.”

Sebelius continued, “He has argued in front of the Supreme Court on multiple occasions and will now bring his unique perspective to the other side of the bench.”

After graduating from Washburn University School of Law in 1978, he returned to the AP in Topeka and reported on legislative hearings and sessions, the Kansas Supreme Court, the governor’s office, various state agencies, and political and campaign activities. He continued his work at the AP until 1980, when he made the transition over to becoming a lawyer.

His transition was partly due to finding a way to use the legal training he received. “Becoming a trial lawyer had more accountability attached,” Biles said.

Biles, 56, joined the Overland Park law firm of Gates & Clyde Chtd. in 1985 after spending five years as an assistant attorney general in the litigation division. The law firm would go on to become Gates, Biles, Shields & Ryan P.A., and his practice emphasized administrative, trial, and appellate work on behalf of individuals, corporations, and various state and local government agencies.

To Biles, appellate practice, particularly the Supreme Court, became the most comfortable; he argued more than two dozen cases before the Court. Biles had several key cases in his career as a litigator, including:

- Successfully defending then Kansas Insurance Commissioner Sebelius’ decision to deny the merger between Blue Cross & Blue Shield of Kansas, the state’s largest health insurer, and Anthem, an Indiana corporation. Blue Cross & Blue Shield of Kansas Inc. v. Praeger.

- Representing the Kansas Board of Education in a decision that resulted in the state spending more on public schools. Montoy v. State of Kansas.

- Representing the Kansas Lottery in a lawsuit over the constitutionality of a 2007 law expanding gambling. State ex rel. Six v. Kansas Lottery.

“It felt like it kind of became my court,” Biles said.

So when the opening became available, he jumped at the chance to join a group of individuals whose independent voice he admires.

Biles said the difference currently between appellate practice and becoming a justice is that you no longer have a stake in the outcome. But he is still making the transition, enjoying the relative quiet and is absorbing as much information as he can until oral arguments begin.

His professional organizations and activities include serving on the board of directors of Community Living Opportunities Inc., a Kansas not-for-profit serving more than 300 children and adults with severe developmental disabilities in residential, day programs, and case management; an advisory board member of the Johnson County Housing Coalition, a Kansas not-for-profit providing low-cost housing and affordable home ownership in Johnson County for low-income residents; and past chair of the National Council of State Education Attorneys, which is associated with the National Association of State Boards of Education. He has served as an adjunct professor of law at Washburn University School of Law; a member of Friends of the Schiefelbusch Life Span Institute, whose mission is to improve the quality of life for persons of all ages, primarily those with disabilities; and the Kansas Bar Association.

Biles and his wife, Amy McCart, Ph.D., who is an assistant research professor at the University of Kansas, Beach Center on Disability, have three children, Allison, Sydney, and Claire.
In David Brooks’s Jan. 27, New York Times column, he commented on the changing role that institutions play in our society. “As we go through life, we travel through institutions – first family and school, then the institutions of a profession or a craft.” Yet he observed, “institutional thinking is eroding. Faith in all institutions, including charities, has declined precipitously over the past generation, not only in the U.S. but around the world. Lack of institutional awareness has bred cynicism and undermined habits of behavior. Bankers, for example, used to have a code that made them a bit stodgy and which held them up for ridicule in movies like ‘Mary Poppins.’ But the banker’s code has eroded, and the result was not liberation but self-destruction.”

Brooks’s column continued: “We are not defined by what we ask in life. We are defined by what life asks of us.” That statement should give pause to any adult – especially one who labors in a profession whose central touchstone is a dedication to public service and public good. His observation prompted a moment of reflection as I wondered what are the institutional markers for our profession? And are we meeting them, or falling short? What are the teachings that make the one part of the whole? That weave the “I” into “we.”

It seems that today’s villains toil not in courtrooms but boardrooms. Perhaps now, more than ever in recent history, our profession is demonstrating the truism that no one likes a lawyer until they need one. And right now people like us. For good reason. They are depending on us – largely – to sort out the mess that another singular entity – bankers – has got us into. Including counting on the lawyer who goes by “Mr. President.”

One hallmark of our trade is professionalism. In a word, respect. Be kind. Be on time. Be prepared. Justice Clarence Thomas once noted that “civility … is the natural functioning of a legal profession in which we are all servants of that higher, nobler master, the Constitution and the law. The lawyer on the other side, or the judge is not the enemy, but a fellow traveler on the journey toward discovering the correct legal answer.” And so, is our institution in decline, or experiencing a resurgence as the rest of the world seems in free fall?

All institutions offer a way of teaching, mentoring others coming up through the profession. But our craft has a legacy that no other professional institution can match. The role of lawyers in the formation of our country, the shaping of our most fundamental ways of life, our liberties, cannot be overstated. For instance, 26 of the 56 signatories to the Declaration of Independence were attorneys. Of our 44 presidents, 26 have been attorneys, including the one historians consider to be the greatest president of all, Abraham Lincoln.

An integral part of this has been the role of the bar associations, whether local or state. Early visionaries in this state founded the Kansas Bar Association (KBA) 127 years ago. Today its mission statement includes advancing the professionalism and legal skills of lawyers, promoting the interests of the legal profession, providing services to its members, advocating positions on law-related issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice. The KBA needs us. And we need it.

Our Kansas Bar Association has a membership of roughly 6,500 reflecting about half of the total number of Kansas attorneys. This year, as a reflection of our economic woes, the Bar has introduced a hardship program for those attorneys whose firms are no longer paying for membership, or solos and small firms that simply had to tighten their belts.

This is a time for rallying around the Bar, as our annual meeting is approaching. This is a great time to show our support for this institution that is an integral part of what we do every day for our clients, for our families, for our profession. So what does life ask of us? What does our profession ask of you? For our meeting, I have assembled a panel of our peers to discuss our profession in this new age. Where are we heading? What is our legacy? Representing a demographic and geographic cross section of our state bar, I have invited four private practitioners, a state judge, a federal magistrate, and the state disciplinary administrator to join me on a roundtable discussion of the practice and the state of civility and professionalism. Friday, June 19, at 3:30 p.m. at the KBA Annual Meeting.

It will be an interesting and engaging give-and-take with the panel and the assembled audience that hopefully will include you. While giving you ethics credit as a bonus. See you there! •
Why You Should Be a Fellow of the Foundation—Part II

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

One of the benefits of writing an article like this is that it gives you a reason to articulate what you believe. Over the past year, I talked about what the Kansas Bar Foundation does, what we can achieve, and about the many people who give their time and money to advance our goals.

Why should you be a Fellow? Because it will bring you joy. No. Really.

I come from a family that believes in giving to the community. My Dad, my greatest hero, survived the jungles of World War II New Guinea and the Philippines and came home determined to do what he could to serve his community. His wartime experience convinced him that having had the luck — and he believed it was luck — to come back alive and relatively healthy he needed to make a difference. My other hero, my Mother, was a social worker before she was a full-time mom, and helping people was always her passion. So, in a sense, I am a genetically imprinted do-gooder.

However, lots of people come from families like mine, but don't venture beyond their own rather narrow world. Through the years, I have wondered why.

I read an article1 recently in which the author postulated that people are motivated to give because of Maslow's hierarchy of needs. Maslow, as you probably know, was a psychologist who in the 1940s theorized that only after we meet our basic needs — food, safety, love and affection, and self-esteem, can we seek to fulfill our highest need — the need for “self-actualization” — i.e., doing what we were born to do.

According to the author, people who are “self-actualizing” are characterized by their abilities to:

• Embrace the facts and realities of the world, including themselves, rather than denying them.
• Be spontaneous in their ideas and actions.
• Be creative.
• Be problem solvers — it is often the key focus of their lives.
• Act from a system of morality that is fully internalized and independent of external authority.
• Be discerning and view things in an objective manner.

Does this sound like a group of people you know? Delete “self-actualizing” and insert “practicing law.”

Lawyers are people who believe in philanthropy. I believe good lawyers are, by definition, givers — giving to their families, their clients, their communities. I think that giving is another one of the ways, like practicing law, we fulfill our calling — our highest need. It gives us a sense of purpose. It brings joy — not happiness, which is fleeting — but the satisfaction of a job well-done.

The Kansas Bar Foundation’s mission is to “serve Kansans and the legal profession by funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, by enhancing public opinion of the role of lawyers in our society.”

Bring joy into your life. Become a Fellow of the Kansas Bar Foundation.

FOOTNOTE

I never thought I would be interested in immigration law. That is, until I had to go through the immigration process with my husband. Immigration laws are very complex, and one misstep could have jeopardized my husband’s application. If that had happened, I would have had to leave the country to be with him. Lucky for us, we could afford to hire an attorney. Unfortunately, there are plenty of others who cannot.

Following my newfound interest, this semester I began working at the U.S. Immigration Court in Kansas City. In just a few weeks, I’ve learned more about immigration law than I ever could have imagined. I have also seen large numbers of unrepresented immigrants leave without a glimmer of hope in their eyes. About 80 percent of the immigrants who come before the immigration judge (IJ) are unrepresented. Of course, the IJ gives them time to find an attorney, but at the next hearing, they usually report that the attorney was just too expensive. The court does not hesitate to provide a list of legal aid attorneys to the respondents, but alas, there is only one attorney on the list. Needless to say, there is no way that one attorney can meet the needs of the 200 or so new cases that are filed in court every month.

Because so many immigrants go unrepresented, they accept voluntary removal, which leads to word on the street that there is no hope, and that even the worthiest of immigrants may as well just go home. This, of course, is untrue. There are many immigrants who may be eligible for relief. But without representation, they will never know, and may end up leaving their families unnecessarily. In one of the first hearings I saw, the IJ asked a very young man, no more than 21 years old, to designate a country in case of removal. He responded, “I can’t go home. They will kill me.” The judge told him he could fill out an asylum application. As the court staff handed him a copy of the application, the young man looked at it, obviously thinking, “what am I supposed to do with this?” Whether he is eligible for relief, the point is that if he cannot afford even the reasonable $100 hourly rate for an attorney, he has no options.

For these reasons, we need to offer free or reasonably priced legal representation, not just to immigrants, but to all people in need of legal assistance. If every attorney or firm took just one immigration case on a pro bono basis, what a difference we would make!

Studies show that on average, an alien who is represented in removal proceedings is twice as likely to have his case approved than one who is not.1 And immigrants don’t just need legal representation in removal hearings. They also need legal representation when they change their legal status, or when they quickly need to get a family member to the United States to avoid a dangerous political situation. In a 1993-94 survey by the Institute for Research on Multiculturalism and International Labor, 64 percent of the immigrants surveyed reported having a legal problem in the previous year. Of those 64 percent, 20.4 percent needed help with immigration issues.2 More importantly, only 25.5 percent actually obtained legal assistance.3 The main reason for not obtaining representation was financial difficulty.4

Immigrants already in the United States are not the only ones in need of assistance. Many would-be immigrants come to the United States seeking protection from persecution in their home countries, only to be detained for months on end, until their asylum claims can be heard.5 These may be the immigrants most in need, and yet with the least access to legal assistance. On average, of arriving immigrants who are seeking asylum, 25 percent receive relief if represented, compared to a dismal 2 percent of those who are unrepresented.

Thus, it is clear that immigrants are in desperate need of legal assistance from professionals in a very complex area of administrative law. Considering there is still only one attorney on the Immigration Court’s legal aid list in Kansas City, immigrants are unlikely to get the help they need. For immigration attorneys who offer pro bono and reduced-fee representation, please make your services known to the court. And if you don’t already provide pro bono or reduced fee assistance, please consider doing so.

About the Author

Christine Dickerson de Galindo is a second-year law student at Washburn University School of Law. She is currently a legal intern for the Immigration Court in Kansas City, where she researches legal issues related to asylum and removal. She came to Topeka with her husband, Amador.

FOOTNOTES
1. Donald Kerwin, Charitable Legal Programs for Immigrants: What They Do, Why They Matter, and How They Can Be Expanded, Immigration Briefings No. 04-06, at 6 (June 2004).
3. Id.
4. Id.
**Changing Positions**

Jennifer C. Bailey has been named as a partner with Hovey Williams LLP, Overland Park.

P. John Brady and Robert J. Bruchman have joined the Kansas City, Mo., office of Polsinelli Shughart P.C. and Amy E. Morgan and Kelly D. Stohs have joined the firm's Overland Park office.

Michael S. Cargnel has been named a partner with Shook, Hardy & Bacon LLP, Kansas City, Mo.

Russell A. Coleman has joined the Harvey County Attorney's Office, Newton.

Matthew M. Dwyer and Matthew J. Olson have joined the Sedgwick County District Attorney's Office, Wichita.

Heather R. Gill has joined Sprint Corp., Overland Park.

Paul F. Good has joined McDonald, Tinker, Skar, Quinn & Herrington P.A., Wichita.

Richard G. Guinn has joined the Kansas Attorney General's Office, Topeka.

Christine G. Hamm, Michael S. Hargens, David A. Schatz, and Christi J. Hilker Vaglio have been promoted to partners with Husch Blackwell Sanders LLP, Kansas City, Mo.

Martha Jenkins has been appointed acting general counsel to the Alcoholic Beverage Control Board for the District of Columbia.

David A. Jermann and Christine L. Schloemann have been named as partners with Armstrong Teasdale LLP, Kansas City, Mo.

Eric L. Johnson has been named a partner with Spencer Fane Britt & Browne LLP, Kansas City, Mo.

Laura Dakhil-Monahan has become an associate with Hinkle Elkouri Law Firm LLC, Wichita, and John R. Myer has joined the firm's litigation practice group.

Wakil O. Oyedemi has become an assistant Reno County district attorney, Hutchinson.

Jennifer J. Price has been promoted to partner with Shaffer Lombardo Shurin, Kansas City, Mo.

Mathew F. Rigdon has joined Account Recovery Specialists Inc., Wichita.

Kendra M. Robben has joined McAfee and Taft, Oklahoma City.

Carson E. Schilling has joined Lemon, Shearer, Phillips & Good, Perryton, Texas.

Brandi L. Studer has joined Henson, Hutton, Mudrick & Gragson LLP, Topeka, as an associate.

Jeffrey L. Syrios has been appointed as a judge for Sedgwick County District Court, Division 27, Wichita.

Richard D. Winston Jr. has joined Koch Companies Public Sector, Wichita.

**Changing Locations**

Curtis G. Barnhill has started his own practice, Curtis G. Barnhill, Attorney at Law LLC, 719 Massachusetts St., Ste. 120, PO Box 1459, Lawrence, KS 66044.

Café Law Office LLC has moved to 3321 SW 6th Ave., Topeka, KS 66606.

Gates, Shields & Ferguson P.A. has moved to 10990 Quivira, Ste. 200, Overland Park, KS 66210.

Amy M. Gulinson has moved to 300 N. LaFalle St., Ste. 4000, Chicago, IL 60653.

The Law Office of Johnson & Johnson, LLC has changed to The Law Office of Johnson & Thadani LLC and has moved to 3120 Mesa Way, Ste. B., Lawrence, KS 66049.

J. Ryan Hare, Lindsay Hare, and Jay Norton have formed the firm of Norton Hare LLC and are at 9200 Indian Creek Parkway, Ste. 660, Overland Park, KS 66210.

Dana M. Milby has moved to 500 W. Douglas Ave. Ste. 600, Wichita, KS 67202-2917.

Orrick & Associates have moved to 11900 College Blvd., Ste. 210, Overland Park, KS 66214.

Rockwell Law Firm Chtd. has moved to 1201 Wakarusa Dr., Ste. 2, Lawrence, KS 66049.

The office address of Carl L. Wagner has changed to 7325 W. Taft, Wichita, KS 67209.

The office of Michael T. Wilson has moved to 300 N. Main St., 301 Occidental Plaza, Wichita, KS 67202-1505.

**Miscellaneous**

Hon. Wesley E. Brown, Wichita, has received the Wichita State University Award of Distinction at the WSU Alumni Association awards dinner.

Laura L. Ice and Monte A. Vines, both of Wichita, are members of the 2009 board of directors for Music Theatre of Wichita.

Thomas D. Herlocker, Winfield, received the Community Cornerstone Award from Corner Bank.

Mark E. Klinkenberg has changed the firm's name to The Klinkenberg Law Firm LLC, Raymore, Mo.

**Editor's note:** It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
**Obituaries**

**Robert Paul Anderson**

Robert Paul Anderson, 85, a longtime Overland Park resident, died Feb. 17 in Olathe. He was an original member of the law firm Payne, Jones, Anderson, Martin and Payne, now Payne & Jones. He was one of the first municipal judges in Overland Park after the city was incorporated in 1960. He served with the Army Air Corps during World War II as a bombardier, flying many missions in B-24s over Italy and Germany.

Survivors include his daughter, former Emporian Cynthia Moneymaker; and two grandchildren, Katherine and Alan Moneymaker, both of Emporia.

**Hon. John W. Brookens**

Hon. John W. Brookens, 92, of Shawnee and a former 2nd Judicial District judge, died March 16. He was born Jan. 13, 1917, the son of E.C. and Flora E. Brookens in Westmoreland. He attended public schools in Westmoreland and earned a bachelor's degree in 1938 from the University of Kansas and graduated from the University of Kansas School of Law in 1941 with a LLB.

He entered the U.S. Army in 1942 and was discharged in 1946 as a first lieutenant. He spent two years overseas and served with the 5th Armored Division in Europe. He was declared physically unfit to the officer's commission in the states due to his poor eyesight. While overseas he earned a Bronze Star Service Medal and five campaign ribbons.

He returned to Westmoreland where he made his home for the rest of his life. He practiced law with his father until his death in 1950. He continued to practice and served as Pettawatomie County attorney for several terms. Brookens served as a representative in the Kansas Legislature for four years in the early 1950s. He was appointed 2nd Judicial District judge in September 1965 and retired in 1982. After retiring, he served as legislative counsel to the Kansas Bar Association for two years and served as a hearing officer for the Kansas Medical Society and Kansas Dental Society. He was appointed as assigned judge to hearing panels of the Kansas Court of Appeals and various district courts throughout the state.

He was preceded in death by his first wife, Ethel; second wife, Regina; sisters, Gertrude and Mary; and brother, Roy. Survivors include two daughters, Mary Dettmer, Shawnee, and Sara Caton, Wichita; a son, J. Robert Brookens, Marion; a sister, Jane Hessler-Brown, Wichita; 11 grandchildren; and six great-grandchildren.

**Dave Gaumer**

Dave Gaumer, 73, of Lawrence, died March 27. He was born Aug. 24, 1935, in Oberlin, the son of Wesley and Fern Frickey Gaumer.

He was a graduate of the University of Kansas and Washburn University School of Law. Upon graduation, he pursued a brief career in general and corporate law in Denver then joined a law firm in Kingman, Kan., for seven years. Gaumer then worked for three years in Washington, D.C., for the Agency for International Development before returning to Kingman in 1973, where he practiced law until retiring to Lawrence in 2003.

He was an active member in the communities in which he lived and served on numerous organizations as a board member or volunteer, including serving on the Kanza Bank board for 20 years. He remained active in the Phi Beta Kappa Honorary Society, Kansas Bar Association, Rotary International, and the Lawrence Memorial Hospital Auxiliary.

Gaumer is survived by his wife, Mary, of the home; three sons, David, Allen, Texas, and Dan and Doug, both of Lawrence; and seven grandchildren. He was preceded in death by his parents and his sister, Jean Ann Kump.

**Norman W. Jeter**

Norman W. Jeter, of Hays, died at Hays Medical Center on April 16. He was 96. Jeter was born June 27, 1912, in Alden to Bessie (Ross) and Charles Harris Jeter.

After attending Alden schools, he received a football scholarship to Ottawa University, graduating in 1934 with a bachelor's degree. After graduation he entered the University of Kansas School of Law, graduating in 1937 with his juris doctorate. He began practicing law in September 1937 in Hays, where he served as Ellis County attorney from 1939-1943 and was senior partner of the Jeter Law Firm LLP.

Jeter served as a member and past president of the Ellis County and Northwest Kansas bar associations and was a member of the Kansas and American bar associations. He was a former member of the board of directors of the Federal Power Commission Bar and board of governors of the KU Law Society; served as a U.S. commissioner; and was awarded for 70 years of legal service by the KBA in 2007.

In addition to his professional memberships, Jeter was a member and president of the Hays Board of Education; was on the KU Athletic Board; an Ottawa University trustee; a member of the Fort Hays State University President’s Club; member and chair of the Kansas Board of Regents; and served on the board of Kansas Natural Gas, Eagle Communications, and Empire Bank, formerly First National Bank of Hays. Upon the death of his cousin, Murray Fleming Ross, the trustees of the Ross Foundation – Hal Ross, Susan Ross Sheets, and Jeter – made a sizeable contribution to fund the Murray Fleming Ross Laboratory and to endow the Murray Fleming Ross Scholarship at Ottawa University. The Ross Foundation also funded construction of a new athletic facility for the university, including the Norman W. Jeter Athletic Training Room. In 2008, Jeter received the Outstanding Achievement Award from Ottawa University for his life of service in the field of law and his many philanthropic contributions to education across the state.

Jeter was also committed to the Hays community. He was a member and past president of the Hays Rotary Club and Chamber of Commerce; board member and vice president of the Kansas State Chamber of Commerce; member and chair of the Hadley Memorial Hospital and Hays Medical Center; and board member and president of the Hadley Foundation. Jeter was instrumental in merging St. Anthony's Hospital and Hadley Regional Medical Center in 1991 to create what is now the Hays Medical Center. The Hays Medical Center created the “Norman W. Jeter Humanitarian Award” in his honor.

He was preceded in death by his parents and sister, Cleta Schafer. He is survived by his wife of 68 years, Ann; daughter, Margaret, Parkville, Mo.; and three sons, Joseph W. Jeter, William W. Jeter, and Dr. John H. Jeter, all of Hays. He is also survived by eight grandchildren, five step-grandchildren, five great-grandchildren, and nine step-great-grandchildren.
Law Practice Management Tips & Tricks

Cloud Computing: Possible Lurking Dragons are Real

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

Here be Dragons

One of the most ancient globes, the Lenox Globe dating ca. 1503-1507, bears the inscription “hic sunt dracones” or “here be dragons” on the eastern coast of Asia to denote unexplored and potentially dangerous territories. Modern network maps continue that medieval tradition replacing the dragons with an icon of a cloud. Look at your own network diagram or google one and you will see the cloud marking out the territory of the Internet. The cloud may be a more benign metaphor than dragons but the dangers of the unexplored territories still exist regardless of the metaphor concealing them.

One area of concern is a concept loosely referred to as cloud computing. This concept replaces the software installed locally on your PC (case manager, word processing, etc.) with software that exists on the Internet. Rather than buying a disk and installing it on your desktop, you pay a subscription and visit a Web page. Your work and work product is online. It is an appealing concept to many smaller offices without information technology staff and attorneys who travel or work off-site frequently. Nevertheless, the possibility of dragons lurking is real.

Some of the concerns with cloud computing are demonstrated by recent Google experiences with Gmail, Calendar, and Docs.

Service Outages

When your software and data reside on the PC in front of you, you can afford to be unconcerned about Internet or service outages. Sure, you may not be able to e-mail your work product but you can still work with your documents, spreadsheets, and data. Move your data and applications online and your attention to Internet and service outages is magnified considerably.

The BBC reported on March 11 that Google had confirmed its Gmail services had gone down for the second time since February. The earlier outage lasted several hours and affected all users while the shorter March outage affected only a subset of users. That is actually pretty solid reliability for a free service as large as Gmail but if all your tools and data are only accessible online, you should hope those outages do not coincide with any immediate need.

Access Restrictions

Another issue raised by a Gmail user, Nick Saber, involves purposeful access restrictions by the service provider. In Saber’s case, he tried logging in one morning to be given the message, “Sorry, your account has been disabled.” (Brogan, Chris. When Google Owns You. Aug. 5, 2008 (accessed March 27), http://www.chrisbrogan.com/when-google-owns-you/)

Saber’s account was reactivated after working through the twists and turns of Google’s support team but he was locked out of his data throughout. It turns out that this happens all the time. Accounts can be suspended for suspected illegal activity, suspected spamming, or attempted hacking. While it seems impossible with respect to Google, many online providers may simply go out of business taking their servers (and your data) with them.

Unintended Disclosures

Google was the poster child for yet another potential issue with cloud computing in March 2009 when it accidentally shared some users’ potentially confidential documents. Google’s note to users said, “We’ve identified and fixed a bug, which may have caused you to share some of your documents without your knowledge. This inadvertent sharing was limited to people with whom you ... had previously shared a document.” (Kincaid, Jason, Google Privacy Blunder Shares Your Docs Without Permission, March 7 (accessed March 27), http://www.techcrunch.com/2009/03/07/huge-google-privacy-blunder-shares-your-docs-without-permission/). The problem seemed limited to 0.05 percent of users but who would want to run that risk in a legal environment?

Use with Caution

Google is not unique and their track record given their size and price (free) is amazing. Their experiences in the first two months of 2009 are simply illustrative of the general concerns many feel about cloud computing. In fact, there can be significant benefits to online applications and data. Offsite backup is integral to the system. Small firms and solo attorneys can leverage huge IT departments. Frequent travelers can access tools and data from anywhere on the globe. Those benefits can justify the risks for many attorneys and some tech-savvy lawyers will mitigate the risks for their practices and slay the dragons. Casual users might still want to heed the warning that “here be dragons.”

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Welcome Spring 2009 Admittees* to the Kansas Bar

Anne L. Alexander
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Peter K. Andreone
Michelle Leigh Ashburn
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January Michelle Bailey
Ashley L. Baird
Joseph Edward Bant
Gabrielle A. J. Beam
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I’ve been on the witness stand as a fact witness, and I’ve put lawyers on the witness stand as fact witnesses. I suspect some lawyer you know has testified too. And when it happens, an array of considerations come into play, limiting the work a lawyer-witness may do as a lawyer, and sometimes limiting the involvement not only of the lawyer-witness but also of his or her firm. In this column, let’s work through a checklist of ethics rules that must be considered.1

We start with Rule 3.7 and its exceptions. The rule: “[A] lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness.” The exceptions: (1) testimony on an uncontested issue, (2) testimony about the nature or value of legal services rendered, (3) when disqualification “would work substantial hardship on the client,” and (4) when the attorney acts pro se (though this exception is not actually stated in the rule).

“Trial” for the purpose of this rule may cover whatever evidentiary hearing is at hand. In a criminal case, if the lawyer is a necessary witness in a pretrial evidentiary hearing on an issue that would not be repeated at trial, the disqualification would be for the hearing at which the lawyer was a necessary witness, not the actual trial. In a civil case in which the attorney served process, as allowed in Kansas, the attorney presumably can’t act as an advocate at an evidentiary hearing regarding a dispute about service made by the attorney. On the other hand, since the rule is primarily designed to avoid confusion of a jury when evaluating the testimony of an attorney-advocate, some judges may not strictly apply the rule in a bench-tried matter.2

The “necessary witness” requirement may be a bit murky. It at least covers a witness with nonprivileged, material testimony not available anywhere else.3 But there are certainly times when evidence that might seem cumulative is important to present, and a court might well deem the witness necessary in such cases.4

Even if the lawyer-witness may not act as the advocate for the client at a particular evidentiary hearing, that lawyer’s firm may do so unless there’s a conflict under Rules 1.7 or 1.9. Conflicts also may prevent the lawyer-witness from continuing to act as the client’s advocate even when disqualification might work a substantial hardship on the client. Some conflicts to consider:

- If there may be a substantial difference between the lawyer’s testimony and the client’s testimony or position in the case, there’s a conflict under Rule 1.7. A conflict with a present client under Rule 1.7 generally can be waived in writing after informed consent, but the lawyer must reasonably believe that the representation can still be competent and effective.

- If the testimony would require disclosure of information regarding another client, there may be a conflict under either Rule 1.7 (if it’s another current client) or Rule 1.9 (for a former client). Other conflicts with other clients could also arise, and ones with former clients generally can be waived in writing after informed consent. But note that though a client may waive conflicts under Rules 1.7 and 1.9, because Rule 3.7 protects the factfinder, not a client, it does not allow for waiver.

Of course, even if the rules allow a lawyer to testify — or both to act as an advocate and testify — that may not be a wise course. Testifying may open the door to waiver of work-product or attorney-client privilege. For example, let’s assume that the attorney has documented his or her recollection of the key events to be testified to within an otherwise privileged document. A voluntary, selective waiver of privilege might lead to a much broader, implied waiver.5 Or it may turn out that the lawyer, though a good advocate, really isn’t that good as a witness. That may leave the client unhappy, potentially ending a longstanding relationship.

Based upon the potential problems, it’s usually best to avoid becoming a witness if at all possible. Having a paralegal or investigator conduct, or at least be present for, interviews with fact witnesses can keep the attorney’s testimony from being needed when a fact witness changes stories at trial. With an explanation of the problems that may arise if the lawyer is forced into a witness role, clients may even more readily understand why they should pay for both an attorney and a second person to be present for such interviews, since it allows the attorney to personally evaluate and shape the case while preserving the attorney’s role as the client’s advocate at trial.

FOOTNOTES
4. See Flamm, supra note 2, § 17.2 (“[T]estimony may be competent, useful and relevant without being strictly necessary.”).
Kansas Lawyers Serve Their Country, State, and Profession

Throughout the history of our United States and before, our citizens – men and women alike – have stepped up to fight the battles that have kept our country free. In the 20th and 21st centuries, their courage and dedication have reached outside of our borders to help others to keep their freedoms. In some instances they have fought so others can feel freedom for the first time.

Members of the legal profession have been on the front lines in more ways than carrying a weapon, flying a plane, or being on the high seas. They have been there to help the freed countries recover or establish the “Rule of Law.”

The Kansas Bar Association is proud to recognize the men and women of the Kansas legal profession who have given of themselves, after the events on Sept. 11, to ensure that others can live free and under the “Rule of Law.” If we have missed anyone, we apologize.

We have not forgotten our Kansas attorneys who took up the banner of freedom prior to Sept. 11; the KBA will recognize those who served their country in earlier times in a future issue of the Journal.

Maj. Paul E. Ailslieger  
U.S. Army Reserves – JAG  
Koch Industries  
Wichita

Ret. Col. Thomas Arnold  
Kansas Army National Guard  
Oswalt, Arnhold, Oswald & Henry  
Hutchinson

Capt. Diane L. Bellquist  
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Office of the Kansas State Bank Commissioner  
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Capt. Jeff Bottenberg  
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Polsinelli Shughart P.C., Topeka  
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U.S. Air Force  
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Kansas Army National Guard  
Tallil, Iraq

Maj. Alma Whitelaw  
Kansas Army National Guard  
Tallil, Iraq

Col. Bruce Woolpert  
Kansas Army National Guard  
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Capt. Adam Weitzel  
Kansas Army National Guard  
Rothgerber Johnson & Lyons LLP, Colorado Springs, Colo.

Maj. Patrick Wiesner  
U.S. Army Reserves  
Wiesner & Frackowiak LLP  
Overland Park
Building the Rule of Law in Iraq

“Establishing the rule of law is a key goal and end state in counterinsurgency.”

By Kristafer Ailslieger, Office of the Kansas Attorney General

I. Introduction

All societies function according to a set of rules. In the absence of such, society breaks down and chaos ensues. Some observers might conclude that is what happened in Iraq in the immediate aftermath of the fall of the Saddam Hussein regime in 2003. Certainly, there was a brief period of chaos, but shortly after Saddam’s fall, Iraqi society endeavored to regain not just a sense of order, but the actual rule of law. Having been in Iraq as a mobilized army reservist, first during the invasion and the months that followed, and then again last year, I had the opportunity to observe, and in some small measure, assist that effort and gauge its slow but steady progress.

My second deployment to Iraq, from February to November 2008, found me assigned as the deputy rule of law advisor on the Provincial Reconstruction Team (PRT) for Kirkuk Province. The PRT is an interagency organization consisting of both military personnel and civilians from various U.S. government agencies, and is headed by a State Department foreign service officer. The PRT concept was first introduced in Afghanistan, and following its success there, it was implemented in Iraq. Within each PRT are sections designed to focus civilian and military subject matter experts on various lines of operation ranging from infrastructure to governance.

Within the rule of law section, I was paired with a civilian Department of Justice attorney named Rebecca Staton. Prior to joining the Justice Department, Staton had been a prosecutor in Indianapolis for many years and brought a wealth of knowledge, enthusiasm, and creativity to the job. We were assisted by two Iraqi interpreters and a small number of soldiers that varied depending on our needs and the needs of the other PRT sections. Our mission was to strengthen and improve the rule of law in Kirkuk province, a daunting task.

II. What is the Rule of Law?

The term “rule of law” is an oft-used but ill-defined. Politicians, activists, and pundits cite the importance of the rule of law, and a variety of organizations and institutions claim to promote the rule of law, with each offering its own definition according to its own goals. However, no uniformly accepted definition exists. The U.S. Army Rule of Law Handbook restates the army’s doctrinal definition as follows:

Rule of law is a principle of governance in which all persons, institutions and entities, public and private, including the state itself, are accountable to laws that are publicly promulgated, equally enforced, and independently adjudicated, and which are consistent with international human rights norms and standards.

Nonetheless, the same handbook notes, “[f]rom an operational standpoint, any approach to actually implementing the rule of law must take into account so many variables – cultural, economic, institutional, and operational – that it may seem futile to seek a single definition for the rule of law and how it is to be achieved.” Accordingly, we had to accept a certain amount of ambiguity in our task and remain flexible.

III. Our Strategy

Given the ambiguous nature and broad scope of “the rule of law,” our first challenge was to determine exactly where we needed to focus our efforts. To guide us in this endeavor we had the Department of Justice work plan that outlined a national-level strategy focused on six key aspects of the criminal justice sector: assisting with issues of court administration, assisting with the expansion of Central Criminal Court of Iraq (CCCI), facilitating cooperation between the Iraqi police and judiciary while encouraging criminal investigations

FOOTNOTES

2. I was deployed as a member of A Company, 418th Civil Affairs Battalion, an Army Reserve Unit based in Belton, Mo.
3. While any given mission included a number of soldiers for security, throughout the deployment we had as few as one and as many as three enlisted soldiers dedicated to the Rule of Law section. Sgt. Emmitt Smith, a reservist and Kansas State University senior, remained in the section throughout the deployment. Sgt. Josh Erickson, a reservist and college student from Missouri, and Spc. Leah Serrano, a reservist and Transportation Security Administration employee from Connecticut also assisted the Rule of Law section at various times. We also worked hand in hand with the military lawyer for the army brigade assigned to Kirkuk (1st Brigade, 10th Mountain Division), Maj. Rose Bennett.
5. Id. at 4.
based on evidence rather than coerced confessions, ensuring the security of judges and court staff, ensuring respect for the human rights of detainees, and encouraging modernization of the Iraqi criminal law and procedural code. Combining this general guidance with the particular circumstances in Kirkuk, we determined the priority of our efforts in the criminal justice sector should be focused on ensuring the success of the recently established Major Crimes Court (a branch of the CCCI), facilitating greater cooperation between the police and judiciary, ensuring respect for human rights, and improving judicial security.

With respect to the civil law arena, however, we had nothing to guide us. We had to gather information on the ground and then devise a strategy on our own. To that end, we decided first to travel the province to assess the various district courts and make first-hand observations. Following that, we concluded that our efforts would be best directed at improving public knowledge of the legal system and individual rights, and improving public access to trained lawyers.

IV. Our Activities

A. The criminal justice sector

The first challenge we faced was simply understanding Iraqi criminal procedure. Iraq follows an inquisitorial, civil law system similar to that of continental Europe, not an adversarial, common law system like the United States.

Of greatest significance in the Iraqi system is the role of the investigative judge (IJ). The IJ combines elements of a police detective, prosecutor, and judge all in one person. He oversees the investigation of all crimes, directs police investigators, questions witnesses, gathers evidence, issues search and arrest warrants, and ultimately determines whether there is sufficient evidence to send a case to trial. However, he is not viewed as being aligned with the police in the way that a prosecutor is in the United States. Rather, he is viewed as neutral, searching with equal vigor for inculpatory and exculpatory evidence. Even if he determines that there is sufficient evidence to send a case to a trial panel (criminal trials in Iraq are conducted before a three judge panel), he does not prosecute the case, he simply forwards the case file and evidence to the trial court.

The prosecutor in Iraq is much more passive than in the United States. An Iraqi prosecutor is actually a judge, and his role is to ensure that the public laws are followed. At the close of a criminal trial, he will advise the trial panel whether he believes the defendant is guilty, although the panel will reach its own verdict. If the prosecutor believes that the trial panel erred in some way or the public laws were otherwise violated, he may appeal the case to an appellate court (and he may appeal both convictions and acquittals).

A trial in Iraq is not like one in the United States. In many cases, the trial consists of nothing more than a review of the investigative judge’s case file. The panel may call and question witnesses, and the prosecutor and the defense may ask questions of witnesses by submitting them to the panel. The defense also has the opportunity to address the panel and present arguments. However, it bears little resemblance to the adversarial trials in the United States with which we are familiar.

a. Major Crimes Court

Since the fall of the Saddam Hussein regime, the most glaring weakness of the Iraqi criminal justice system was its inability to consistently prosecute and punish terrorists and major criminals. There were many reasons for this, but the most prominent was fear. Given the high level of violence and active terrorism in the country, local judges were extremely reluctant to oversee investigations and preside over prosecutions of violent criminals and terrorists for fear of retribution. Thus, outside of the secure judicial complex in Baghdad (the CCCI), few, if any, such prosecutions occurred.

To address this issue in Kirkuk Province, our immediate predecessors on the PRT oversaw the construction of a secure Major Crimes Court (MCC) complex on the grounds of an Iraqi Army base. The MCC complex included not only a courtroom, but also living quarters and office space for the judges, lawyers, and court staff; a small detention area to hold defendants; a guard barracks; and a helipad for transportation of judges from Baghdad. This provided not only a secure site for the trials, but also allowed for the use of traveling judges. These judges were unknown in the local community and thus, were not exposed to the potential of intimidation or violent retaliation for a guilty verdict.

There were downsides to this arrangement, however. Logistically, it was challenging to get all of the necessary parties, support personnel, and supplies together for trials. Moreover, while it succeeded in jump-starting the criminal process, it did not build up local capacity. And worst of all, it was incorrectly perceived by the public as a military court operated at least in part under the direction of American forces.

Of course, the MCC had never been intended to be a permanent solution, and to move things forward, the Iraqi Chief
Justice ordered the assignment of a panel of local judges to oversee major crimes trials. While reluctant, three Kirkuk judges took on the task and began hearing cases at the MCC. Then, after two or three sessions, we achieved a major breakthrough. The judges asked to move the major crimes cases from the MCC compound to the provincial courthouse in the city of Kirkuk. For a variety of reasons, they did not like using the MCC, and they felt that the security situation had improved to the point where it was safe to hold the trials in the regular courthouse. We advised the chief judge of the province that we viewed this as a positive step toward the return to normalcy and if he felt that moving the trials to the provincial courthouse was appropriate and safe, we would support that decision.

Shortly thereafter, major crimes trials began being held at the provincial courthouse and were eventually placed on the regular criminal docket. This was a significant step. In a few short months, we had gone from no trials, to trials at a secure facility with traveling judges, to trials being held in the local courthouse with local judges presiding. At the time, this was one of the only areas in Iraq where this was occurring.

This success, however, raised another concern. The trials resulted in an inordinately high acquittal rate. After speaking with the judges, we learned that many of the acquittals were due to allegations of police misconduct and torture coupled with a lack of any evidence other than a confession. This led us to look closer at the police force and police training.

b. Police training

The training of the Iraqi police force involved a combined effort of the U.S. military, civilian international police advisors, and the Iraqis themselves. The professional core of the police training effort was a group of civilian police advisors from the United States. All were retired or current law enforcement officers and brought with them a wealth of knowledge and expertise.

Adjoining the American military base in Kirkuk was the Kirkuk Police Academy. There, Iraqi police trainers, assisted by cadre of American civilian police advisors, trained new police recruits. The curriculum relied heavily on international police standards and Western police practices, providing the new recruits with a solid foundation of professional police training. Once in the field, the police were mentored by both U.S. military police transition teams and civilian police advisors. However, even with this training and mentoring, reports of torture and human rights abuses by the police continued to surface. While efforts were made through the existing train-
ing and mentoring programs to increase the focus on human rights and reduce abuse, we determined that something else had to be done, and to be effective, it ultimately had to be an Iraqi solution. This led us to establish what we called the “Criminal Justice Council.”

**c. Criminal Justice Council**

The Criminal Justice Council (CJC) was a meeting of the provincial police and judicial leadership. It included the provincial director of police (PDOP), his chief deputies, the head of the Major Crimes Unit, the head of the Criminal Evidence Unit, the jail commandant, the chief judge of the province, the judges of the MCC, the chief investigative judge, and the public prosecutor. Surprisingly, before we convinced everyone to take part in this process, it was rare for many of these individuals to talk to each other. Prior to the advent of the CJC, the judicial leaders had very little contact with the police leaders. In a mature, functioning legal system, that might not be an issue, but in a developing, postwar legal system such as Iraq’s, it was a significant roadblock to success. Often, as we brought issues to various criminal justice leaders, they tended to point the finger at one of the other institutions and accuse its personnel of being inept or corrupt or otherwise failing to do their jobs, rather than seeking and actual solution.

We envisioned the CJC to be a regular meeting of the criminal justice leaders to discuss issues and resolve problems in the system. And the first topic of discussion was police torture and abuse of detainees.

**District courthouse for Zab district, Iraq.**

The first meeting opened with an unexpectedly forceful address by the chief judge, essentially stating to all present that torture was a violation of international and Iraqi law and would not be tolerated, that confessions coerced through torture would not be accepted by the courts, and that police guilty of detainee abuse could expect to be prosecuted. The chief judge of the MCC then explained to the police leaders that the high number of acquittals in his court was directly related to the use of coerced confessions and the absence of other evidence.

In response, the provincial director of police, somewhat surprisingly, did not deny or minimize the allegations of torture and abuse. Rather, he reiterated to the other police leaders what the chief judge had said. He stated that he would not tolerate torture and he emphasized that the police needed to improve their evidence collection and focus on physical and forensic evidence rather than relying solely on confessions.

While a cynical observer at this first meeting could have concluded that this was all just talk, we were pleased to find in the days that followed that the PDOP put his words to action. Immediately after the CJC, he held a series of meetings with all of the provincial station chiefs where he reiterated the points made at the CJC. He then instituted a training program for all of the police focusing on human rights and he started a new investigator training program that included members of the judiciary as trainers, as well as medical and forensic evidence experts.

While this obviously did not end police abuses, it was certainly a step in the right direction. More significantly, it established working relationships among the leaders of the various police institutions and the judiciary. Given the important role of the investigative judges in the criminal justice process, this was crucial.

As time went on, we were able to hold CJC meetings roughly every other month. While the same core group of people always participated, at each meeting they invited certain others depending on the topics to be discussed. For example, at one meeting a group of police investigators was invited and allowed to raise questions directly with the police leaders and the judges. This provided them with an unprecedented opportunity to get answers directly from the judges regarding everything from the proper procedure for arrest warrants to the types of evidence the courts would accept.

Although simply facilitating a meeting such as this seemed, at first, like a rather mundane task, once the CJC got started, we realized that this was a significant event with lasting impact. In retrospect, I believe this was one of our greatest accomplishments in the criminal justice sector during my time in Kirkuk.

**B. The civil law sector**

As noted earlier, the state of the noncriminal law sector was unknown to us in the beginning. But as we traveled the province, we were pleasantly surprised to find that all of the district courts were open and operating, and that local citizens were using them. At each location, we observed Iraqi civilians taking care of various mundane legal actions ranging from registering cars, to obtaining marriage licenses, to resolving civil disputes. While not perfect – none of the courts were fully staffed, most had equipment and supply shortages, and all struggled with intermittent electricity – the civil law system was functioning. Most of the problems we saw were minor and were issues that needed to be resolved by the Iraqi central government. While we raised these problems through our lines of communication to get the attention of the central government, and we made suggestions in an effort to improve their evidence collection and focus on physical and forensic evidence rather than relying solely on confessions.

(Continued on Page 23)
project proposal to the U.S. Agency for International Development (USAID) and, in surprisingly quick fashion, received a grant of roughly $140,000 to implement it.12

Our effort was resoundingly successful. We were quite surprised both by the energetic and effective implementation of our Iraqi partners, and by the project’s public reception. Indeed, the project’s initial success was recognized by USAID and highlighted in a USAID publication that described some of its achievements:

The first three workshops were well-received by the community. Led by prominent lawyers, the workshops, each lasting three full days, taught 60 local citizens about their legal rights. Twelve law students, from the local university, were among the first attendants; they found the format so compelling, they recommended it to their colleagues. As a result, 57 students are now on the waiting list for future workshops.

The demand for legal consultation was also immediately apparent. Within its first three months, the new branch gave legal advice to 93 Kirkuk residents and successfully represented 23 cases in court. As an example, when a 2007 law passed that discontinued benefits for families victimized by the horrific Anfal Campaign, many families became destitute. By arguing their cases in court, the KJU has helped families again receive the monthly benefits, thereby saving them from poverty.

Each month, the KJU has also been publishing a newspaper covering court news and statistics, a law handbook and a pamphlet explaining the court codes and procedures. The resources are regularly distributed to key offices, institutions, and individuals throughout Kirkuk.

The three activities – public workshops, free legal services, and information distribution – are empowering Kirkuk’s diverse community of Arabs, Kurds, Turkmen, Assyrians, and other minorities with the knowledge of lawful ways to address grievances and find protection. By helping residents have a better understanding of the court and legal system KJU, with PRT and USAID assistance, is helping make peaceful coexistence a sustainable reality.13

Pleasantly surprised at our success with this project, we followed it up with a similar project to open a legal aid office through a local women’s nongovernment organization to focus on women’s legal issues. And we were so impressed with the KJU that we utilized them to implement another project to provide law libraries to all of the provincial courts and the Kirkuk law school.

11. The actual bar association, or “syndicate” as it was sometimes translated for us, was actually only open to practicing private lawyers and consisted primarily of criminal defense lawyers. Thus, the bar association did not include other legal professionals, such as government lawyers, judicial investigators (who were trained lawyers), judges, law professors, etc.

12. As an nongovernment organization, the Kirkuk Jurists Union received no Government of Iraq funding. It was funded by its members and by grants. Thus, lack of funds was the primary obstacle it faced. Although some have questioned the use of U.S. government funds for development programs such as this in Iraq (and for that matter, other developing countries), one need only look to such places as pre Sept. 11 Afghanistan, or lawless lands like Somalia, to see the possible consequences of U.S. indifference.

In the grand scheme of things, these projects were all relatively low-cost and yet demonstrated exceptional promise for advancing the rule of law in Iraq. An educated public with knowledge of its legal rights is fundamental to ensuring the fair and just application of the law. Just as important is access to trained lawyers to press legal claims and advocate before the courts. These projects certainly advanced both.

V. Conclusion

I left Iraq in November 2008 with a sense of encouragement. Having seen Iraq in the immediate aftermath of war in 2003, and then again five years later, I can say that I observed real progress. Although physical progress was not so apparent, the progress in the institutions and in the people and leaders was readily apparent to me. The police and the courts (at least in Kirkuk Province) have advanced well beyond the emergency state they were in during 2003, when the greatest challenges were finding volunteers to be policemen and just getting the courthouse doors open. Now, the police force has adequate manpower, a reasonable training base, and proactive leadership. The courts are all open and functioning, and staffed with qualified and conscientious judges. And, as evidenced by the efforts of the KJU, Iraq has an active and passionate legal community that is striving to secure the rule of law in a place once threatened by chaos.

About the Author

Kristafer Ailslieger is an assistant solicitor general in the Office of the Kansas Attorney General, representing the state of Kansas in appellate matters in the state and federal courts. He is a December 1999 graduate of Washburn University School of Law, and also holds Master of Arts and Bachelor of Arts degrees from Wichita State University.

He is admitted to practice in Kansas, the U.S. District Court for Kansas, the U.S. Court of Appeals for the Tenth Circuit, and the U.S. Supreme Court.

He is presently a major in the U.S. Army Reserve, assigned as a civil affairs officer in the 418th Civil Affairs Battalion. In that capacity, he has deployed for operational missions to Iraq (twice), Kosovo, and Senegal.

His prior service includes many years in the Kansas Army National Guard, where he served as an armor officer, commanding tank units from platoon to company size. He is a graduate of the U.S. Army Command and General Staff College.
I. Introduction

The Roll of attorneys licensed by the Kansas Supreme Court lists more than 10,500 active lawyers. Of those, the Office of the Clerk of the Appellate Courts, which manages lawyer registration, estimates more than 8,000 actively practice in the state. From that group, an average of about 12 lawyers per year are the subject of claims filed with the Lawyers’ Fund for Client Protection, based on allegations of dishonest conduct. In other words, each year, on average, about 0.15 percent of the lawyers actively practicing in Kansas are the subject of claims to the Client Protection Fund Commission (CPFC) that they have committed dishonesty. The dishonest acts of that 0.15 percent, however, can negate considerably more than their weight in goodwill generated by the rest of the bar who practice honestly and responsibly. Beyond the loss of goodwill toward the bar, and of greatest concern, is the damage done to the clients left in the lurch by this dishonest conduct.

II. History

A mechanism for reimbursement to clients victimized by the dishonesty of their attorneys has existed in Kansas for almost 40 years. Between 1971 and 1985, the Kansas Bar Association (KBA) established and oversaw a Client Security Fund. Assistance from that fund was limited to claims filed by clients of bar association members, the funding was limited, and few claims were filed. Through continued efforts of the KBA, however, the Supreme Court accepted the importance of providing a source of some relief for clients whose lawyers failed them in such a fundamental way. The Court responded with Rule 227, adopted March 30, 1993, applicable to lawyer conduct on or after July 1, 1993. Rule 227 established the Lawyers’ Fund for Client Protection (Fund) in Kansas. Today, every U.S. jurisdiction, and every Canadian province, has a client protection fund in some form.

A justice of the Supreme Court serves as liaison to the CPFC, which was created as the body to exercise the responsibilities of the Fund. Over nearly 16 years, and after review of almost 600 claims, the Fund has become a well-established, but relatively unknown, facet of the profession’s relationship with its clients.

The seven-member CPFC, appointed by the Supreme Court for three-year terms, is composed of four active lawyers, one active or retired judge or justice, and two nonlawyers. Including nonlawyer members recognizes that evaluating claims arising from the lawyer-client relationship should not be left solely to members of the bar. The clerk of appellate courts serves as the secretary of the Commission and the clerk’s office provides the administrative resources necessary for the Commission’s functioning.

III. The Claims Procedure

The purpose of Rule 227 is “to promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses to clients caused by the dishonest conduct of lawyers.” Only lawyers admitted and licensed to practice in Kansas may be the subject of claims, and claims must arise from acts “occurring in the course of a lawyer-client relationship between the lawyer and the claimant.” These limitations relate both to the purpose of the Fund, its size, and financial integrity.

One of the most important features of the Fund is that its resources come entirely from annual assessments on active Kansas lawyers and transfers from the bar discipline fee fund.
The Fund is not a taxpayer-supported pool, overseen by an appointed board. Instead, it is another aspect of one of the profession’s long-standing traditions, lawyers policing their own. While the actual “policing” is handled through the Office of the Disciplinary Administrator, the Fund is a natural partner to that office and the disciplinary administrator and his staff are instrumental in the functioning of the CPFC. Although the disciplinary administrator is not a voting member of the CPFC, he regularly attends its meetings and, as a prerequisite to filing a claim with the CPFC, a claimant must file a report of the alleged lawyer dishonesty with the disciplinary administrator, or with a county or district attorney. The investigation of the complaint by the disciplinary administrator’s staff then serves a dual purpose as background for the Commission’s consideration in evaluating the claim. If a lawyer has been disciplined for the conduct that forms the basis for the claim, it is evidence before the Commission that the acts were committed.

Claims are filed with the clerk of the appellate courts on a form approved by the CFPC, completed by the claimant, and signed under penalty of perjury. The form can be obtained by a request through the clerk’s office or at the Judicial Branch’s Web site, www.kscourts.org. In broad terms, the claim must include: identifying information for both the claimant and the lawyer alleged to have acted dishonestly, the scope of the services for which the lawyer was hired, the sums paid to the lawyer (with documentation), the amount of the loss and the date and nature of its discovery, other sources for reimbursement of the loss, steps taken to recover the loss from the lawyer, whether a claim has been filed with the client protection fund of another state, and any other relevant documentation or facts important to evaluating the claim.

To receive consideration, a claim must be filed no later than one year after the claimant knew or should have known of the lawyer’s dishonest conduct. Consistent with the equitable spirit that is at the heart of the Fund’s existence, however, the rule grants to the Commission the discretion to recognize a claim that otherwise would be excluded. The Commission has used that discretion at times to avoid a particularly unfair result, while mindful of the constraint that this broad power should be used only in “cases of extreme hardship or special and unusual circumstances.”

When a claim has been filed, the lawyer charged with dishonesty is notified and given a chance to respond within 20 days. Once the period for response has passed, the Commission may consider the claim, the response, if any, and the report of the investigation by the disciplinary administrator. The absence of a response from the lawyer does not preclude consideration of the claim. If further investigation is needed, the Commission can undertake that or can ask the disciplinary administrator to supplement the prior investigation.

After all the information is gathered, the Commission as a whole considers each claim. Regular meetings are scheduled quarterly, although the Commission may meet at other times if necessary for timely review of pending claims. If the Commission should find the claim, response, and investigations are insufficient, it has the authority to compel testimony and production of records and documents. The CPFC is not obligated to apply the formal rules of evidence in its considerations. The standard to be used is a practical one, given a civilized formulation: if evidence is relevant and is “the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs,” it may be admitted. Four or more members must agree on the disposition of a claim. If they find that dishonest conduct occurred, that finding is limited to the issue of reimbursement from the Fund and is not determinative of disciplinary, civil, or criminal proceedings against the lawyer.

The Fund must be financially sound to remain viable. In that sense the members of the Commission have a role as stewards. On the other hand, since the purpose of the Fund is protection of clients, rather than just protection of the Fund, the members’ mission is to identify and reimburse valid claims. Those potentially conflicting objectives have been met in two ways. First, the Fund was established on a strong basis, and the continuing support from the Supreme Court has made it possible to supplement the Fund periodically so that more complete compensation can be considered.

Second, caps on the amount that can be reimbursed to one claimant, and on the aggregate amount that can be reimbursed for all claims against one lawyer, have been in place from the outset. Over time, management of the Fund has allowed those claim caps to rise to the current level of $100,000 per claimant and $300,000 aggregate for one lawyer. The caps are currently large enough to accommodate almost all claims experienced over the Fund’s history, but they provide solvency protection for the Fund.
in the event of lawyer dishonesty on a grand scale. In practice, the claimant cap has from time to time been a limiting factor while, to date, the aggregate cap has restricted recovery only twice, with each of those cases leaving uncompensated losses of around $1 million.

Many claims come from clients whose lawyers took on more clients and more work than they could competently handle, received retainer fees from those clients and, when the weight of it all overtook them, failed either to perform the work or refund the fees they took in advance. In many other cases, the volume of representation is not a factor, but lawyers have simply taken fees for work they later did not do and either would not refund the fees, or could not because by then the money was gone.

Not all losses from dealings with those having the right to practice law are compensable through the Fund. The Commission regularly receives claims that are, in reality, fee disputes. The lawyer did the work, took a fee, and the client feels the work did not justify the fee. While the client may see taking that fee as dishonesty, the Commission has generally distinguished between “excess” fees and “unearned” fees, and has referred excess fee claimants to various fee dispute resources. Similarly, the Commission does not compensate claims that are based in malpractice, although the client may see the issue as one of honesty. From time to time, the CPFC has received claims for reimbursement because a person has entered into a business venture with, or acted on investment advice from, a person who is a lawyer. In many of those cases, the Commission has determined that, although the lawyer's behavior may have been scandalous, or the advice poor, the transaction did not occur within the attorney-client relationship, even though the person's status as a lawyer unfortunately may have impressed the claimant into giving greater weight to the person's representations or advice.

IV. Conclusion

Improved public relations for the profession should not be the principal justification for the Fund. Still, lawyers using money from lawyers to mitigate the wrongs of their colleagues can be a small but important counter to the popular disparagement of lawyers as self-centered and self-enriching. Good businesses are highly conscious of the importance of trying to maintain good relations with customers. They are well-acquainted with the belief that a satisfied customer will tell one or two people about the experience, while a dissatisfied customer will tell 10. Whatever the numbers attached to a particular happy or unhappy client’s distribution list, the availability of e-mail address books and blogs now gives that dissatisfied client the actual ability to tell the world.

Perhaps the best rationale for the Fund is the claimant of limited means who has borrowed or saved $1,000, or $2,000, paid it in good faith to a lawyer for a divorce or other legal work important in his or her life, then had the lawyer do nothing, close his office, and keep the fee. If the word “Lawyer” on a sign or letterhead is to represent something worthy of respect, there should be a place to get that client some help starting over. The Fund provides that place. ■

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About the Author

Hon. David Stutzman is a district judge in the 21st Judicial District. He graduated from the U.S. Naval Academy, Annapolis, Md., in 1973 and received his juris doctorate from the University of Kansas School of Law in 1982. Prior to his appointment to the bench in December 1996, he was in private practice in Manhattan. Stutzman was a member of the Client Protection Fund Commission from 2001 to 2007, serving as chair during his final year.
Access to Justice Grant Applicants Sought

The Access to Justice Fund is administered by the Kansas Supreme Court and is intended as a source of grant funds for the operating expenses of programs providing access for persons who would otherwise be unable to gain access to the Kansas civil justice system. Its purpose is to support programs, which provide persons, who otherwise may not be able to afford such services, with increased access to legal assistance for pro se litigation, legal counsel for civil and domestic matters, as well as other legal advice and dispute resolution services.

Applications for grant funds will be due May 29, 2009. Grant application packets may be requested from the Office of Judicial Administration, 301 W. 10th St., Rm. 337, Topeka, KS 66612. Please direct telephone inquiries to Art Thompson at (785) 291-3748.

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FACTS: Father is an enrolled member of the Cherokee Nation. Mother consented to adoption of their child, A.J.S., by members of her family and sought to terminate father's parental rights. The district judge rejected father's effort to transfer this matter to tribal court and rejected the tribe's attempt to intervene, basing his decision on prior Supreme Court precedent. The parties stipulated that A.J.S. qualified as an Indian child under the Indian Child Welfare Act's (ICWA) definition. Nevertheless, the district judge ruled that ICWA was not applicable to this termination and adoption because A.J.S. had never been part of any Indian family relationship. Under these circumstances, the district judge also denied the Cherokee Nation's motion to intervene and declined to modify the temporary custody order. Interlocutory appeal was granted.

ISSUES: (1) Adoption and (2) ICWA

HELD: Court overruled In re Adoption of Baby Boy L., 231 Kan. 199, and abandoned its existing Indian family doctrine. Indian heritage and the treatment of it have a unique history in U.S. law. A.J.S. has both Indian and non-Indian heritage, and courts are right to resist essentializing any ethnic or racial group. However, ICWA's overall design, including its “good cause” threshold, ensures that all interests — those of both natural parents, the tribe, the child, and the prospective adoptive parents — are appropriately considered and safeguarded. ICWA applies to this state court child custody proceeding involving A.J.S. and the Cherokee Nation must be permitted to intervene. Court concluded that ICWA applies to Kansas proceedings to terminate the parental rights of an Indian child's unmarried natural father, who is Indian, and to allow the child's adoption by the unmarried natural mother's family, who is non-Indian.

STATUTE: K.S.A. 59-2111, -2136

FACTS: After a traffic stop, Kingsley failed field sobriety tests and blew a 0.142 blood alcohol content in a breath test. The officer certified that he had reasonable suspicion of DUI and issued a notice of suspension of Kingsley's driver's license. Kingsley's suspension was affirmed by the Department of Revenue. He filed a petition for review in Ellis County District Court seeking review of all issues raised in the administrative hearing and that he was subjected to an illegal and improper preliminary breath test, he was not allowed to subpoena witnesses at the administrative hearing, and an illegal vehicle search. The district court dismissed the petition because it failed to comply with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA). The Kansas Court of Appeals affirmed finding the petition lacked sufficient specificity and there was “no indication the proper administration of the Preliminary Breath Test (PBT) was raised below” and that “there is no specific reason pled to indicate why the PBT was illegal and improper.”

ISSUES: (1) Driver's license suspension, (2) exhaustion of administrative remedies, and (3) sufficiency of petition for judicial review

HELD: Court found that Kingsley's petition for judicial review set forth sufficient facts to demonstrate his standing, the exhaustion of his available administrative remedies, and the timeliness of his filed petition. Read as a whole, it is possible to determine from his petition that Kingsley was a party to an agency action, that he exhausted the administrative process, and that he filed the petition within the statutory period. His petition established that he is entitled to obtain judicial review under the KJRA. Court reversed the district court and the Court of Appeals conclusion that Kingsley did not meet the requirements of the KJRA. Court found that Kingsley exhausted the entire administrative procedure available to him regarding the suspension of his license and therefore he complied with the KJRA. Court also found the Department of Revenue's claim that Kingsley did not raise the general issues of which he is seeking judicial review is not supported by the record. Rather, the administrative hearing notes list the precise issues for which Kingsley is seeking review and the issues were properly preserved.

STATUTES: K.S.A. 8-255, -259, -1001, -1020; and K.S.A. 77-607, -608, -611, -612, -613, -614(b), -617

FACTS: After a traffic stop, Rebel exhibited signs of severe intoxication and displayed signs of severe intoxication. The district court dismissed the petition because it failed to comply with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA). The Kansas Court of Appeals affirmed finding the petition lacked sufficient specificity and there was “no indication the proper administration of the Preliminary Breath Test (PBT) was raised below” and that “there is no specific reason pled to indicate why the PBT was illegal and improper.”
Officers had reasonable suspicion of DU and issued notice of suspension of his driver’s license. His suspension was affirmed by the Department of Revenue. In his timely filed petition for review, Rebel sought review of all issues raised in the administrative hearing and that the suspension order should be vacated because the officer improperly certified the form DC-27, and he was physically unable to complete the breath test. The district court dismissed Rebel’s petition for failure to comply with the Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), and the order made no mention of the Department of Revenue’s argument relating to Rebel’s failure to present evidence of his alleged medical condition. The Court of Appeals reversed the dismissal finding that Rebel stated facts to support his claim that he did not refuse testing but was physically unable to complete testing due to a medical condition and his pleading was more specific than prior Kansas cases rejecting review. Court of Appeals held the petition met the pleading requirements of the KJRA.

ISSUES: (1) Driver’s license suspension, (2) exhaustion of administrative remedies, and (3) sufficiency of petition for judicial review

HELD: Court held the district court erred when it concluded that Rebel’s petition for judicial review should be dismissed under K.S.A. 77-614(b)(5) and (b)(6). Rebel’s petition set forth facts demonstrating that he is entitled to judicial review—that he has standing, has exhausted his administrative remedies, and has complied with the applicable timing requirements. The petition also sets forth Rebel’s reasons for believing why relief should be granted in his case. Court held the record did not support the Department of Revenue’s claim that Rebel did not raise the claim regarding his alleged medical condition during the administrative hearing. Rather, the administrative hearing notes list the precise issues for which Rebel is seeking review and the issue was preserved for judicial review.

STATUTES: K.S.A. 8-259, -1001; and K.S.A. 77-601, -607, -611, -612, -613, -614, -617

EMINENT DOMAIN
WINKEL V. MILLER
MITCHELL DISTRICT COURT – AFFIRMED
NO. 99,768 – MARCH 27, 2009

FACTS: Winkel is the owner of an 80-acre farm in Mitchell County. In conjunction with a 1952 highway project, the Kansas Department of Transportation (KDOT) established an easement on part of the land, but allowed farming of the land to continue. In 1994, KDOT obtained a strip of land adjacent to the easement to use as an asphalt-mixing strip with the easement to support the mixing operations. Winkel sought to permanently enjoin the operation of the mixing strip and to recover damages. The district court granted KDOT summary judgment. In Winkel I, the Court of Appeals found any interference was trivial, the cases should not go to a jury, Winkel failed to establish a trespass, and inverse condemnation was not available. Winkel filed a second action for injunctive relief and for a declaratory judgment that KDOT’s use of the easement exceeded the scope of the easement because the access road was actually Winkel’s. The district court again granted summary judgment finding use of the easement and access tract to be consistent with the originally condemned easement. In Winkel II, the Court of Appeals found that KDOT admitted no interest in the access tract, that Winkel was entitled to compensation and that the district court erred in finding KDOT’s use of the access tract to be consistent with the original easement. Unable to negotiate a resolution of damages, KDOT filed an eminent domain action alleging use of the two tracts to be lawful and necessary to its public purpose and the eminent domain action proper.

ISSUE: Eminent domain

HELD: Court held that the district court correctly found KDOT’s use of the land was lawful and necessary. Court stated that Winkel did not dispute that an asphalt-mixing strip is necessary for the construction and repair of highways, KDOT’s principal mission. Nor did Winkel suggest that KDOT does not need an area to store raw materials, park vehicles, and otherwise support the mixing strip. The Court dismissed Winkel’s complaint that other locations in Mitchell County could have been used and that also found that other locations would have been impracticable. The Court again rejected Winkel’s resurrected argument from prior appeals that KDOT was required to condemn a fee simple interest, rather than an easement. The Court declined Winkel’s invitation to engage in a theoretical debate on the policy considerations on declining to grant injunctive relief in hypothetical scenarios and his case did not present an indiscernible or wrongful taking for an unnecessary purpose. Court found the granting of summary judgment denying Winkel’s application for a declaratory judgment was appropriate and Winkel was free to challenge the appraiser’s methodology or valuation in the condemnation proceedings. Court also found that even viewing the evidence in a light most favorable to Winkel, KDOT’s use of the easement after 1994 was within the parameters of the occasional and intermittent operation contemplated by Winkel I. Winkel’s affidavit did not support an argument that KDOT’s subsequent use of the property materially increased so as to support a new and independent action for nuisance and the harm created by the asphalt mixing strip is trivial remains valid.

STATUTES: K.S.A. 26-508, -513; and K.S.A. 68-413

INEFFECTIVE ASSISTANCE OF COUNSEL
HARRIS V. STATE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 98,845 – MARCH 27, 2009

FACTS: Harris was convicted of premeditated first-degree murder in 1997 and the conviction was affirmed on appeal in State v. Harris, 266 Kan. 270. In 1999, Harris filed a pro se 60-1507 action alleging ineffective assistance of counsel. In 2002, with appointed counsel, he filed an amended motion. In October 2003, the trial court denied Harris’ motion. He filed a pro se appeal. In June 2004, the trial court filed a second opinion essentially the same as the earlier one denying Harris’ claim. Harris filed a second appeal. The trial court appointed counsel in June 2007 to represent Harris on appeal.

ISSUE: Ineffective assistance of counsel

HELD: Court rejected all of Harris’ claims of ineffective assistance of counsel. Court stated there was no merit in his allegation that trial counsel was incompetent by failing to request a conspiracy jury instruction, failing to request separate trials from the codefendant, or failing to develop facts at the preliminary hearing that would have established a basis for a motion to dismiss.

STATUTE: K.S.A. 60-1507

WORKERS’ COMPENSATION AND EXPERT WITNESS FEES
HIGGINS V. ABILENE MACHINE INC.
WORKERS’ COMPENSATION BOARD – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 97,649 – MARCH 27, 2009

FACTS: Higgins sustained a back injury in 1997 while working for Abilene Machine Inc., which is insured by Respondent Continental National American Group. Higgins received compensation for his injury and later twice received post-award medical benefits. During the second post-award proceeding, Drs. Paul S. Stein and
Gary W. Coleman gave depositions for Higgins. At the conclusion of the proceeding, Higgins sought payment for $1,064.47 in fees and expenses – “costs” – for his expert witnesses under the authority of K.S.A. 2008 Supp. 44-510k(c). The administrative law judge (ALJ) denied the requested payment, and the Workers’ Compensation Board (Board) affirmed the denial as to the portion attributable to expert witness fees, $905. The Court of Appeals affirmed.

ISSUES: (1) Workers’ compensation and (2) expert witness fees

HELD: Court held that the Kansas Workers’ Compensation Statutes do not permit an ALJ to grant a workers’ compensation claimant expert witness fees, when such fees have been incurred in the pursuit of post-award medical benefits.

DISSENT: J. Johnson dissented arguing the ALJ should have the discretion to award as costs the claimant’s expenses incurred to provide the proof to overcome an employer’s objection to necessary post-award medical care and that the fees and expenses incurred by Higgins to obtain the medical evidence needed to substantiate his claim for additional medical care was allowable at the discretion of the ALJ.

STATUTES: K.S.A. 16-1305; K.S.A. 28-125(a); K.S.A. 44-501k(c), -536(g), -553; K.S.A. 49-426(d); K.S.A. 60-2003; and K.S.A. 75-5672(c)

CRIMINAL

STATE V. COFIELD

WYANDOTTE DISTRICT COURT – AFFIRMED

NO. 98,133 – MARCH 27, 2009

FACTS: Cofield convicted of first-degree murder and arson. He filed motion to suppress his recorded statement to investigating officers in which he admitted to being a primary participant in the shootings of two pedestrians and the burning of a car. District court denied the motion, finding the statement was voluntarily given. On appeal, Cofield claimed his statement was involuntary because he was deprived of sleep, under the influence of drugs, and was subjected to overly strenuous interrogation and threats by the police. He also claimed error in jury instructions and claimed cumulative error denied him a fair trial.

ISSUES: (1) Suppression of incriminating statement, (2) jury instructions, and (3) cumulative error

HELD: Recorded statement was clearly incriminating in that it was not only a confession but also explained contradictions among trial witnesses. Under facts in record, no reason to reverse trial court’s determination that Cofield’s statement was voluntary.

No objection to aiding and abetting jury instruction. As in State v. Engelhardt, 280 Kan. 113 (2005), the error in combining PIK Crim. Ed. 3d 54.05 and 54.06 was harmless. No objection to two Allen-type instructions. Court has previously determined that neither instruction constitutes clear error when given prior to deliberations. No objection to jury instruction regarding presumption of innocence. As in State v. Gallegos, 286 Kan. 869 (2008), this less than ideal wording was not erroneous.

No error supports cumulative error claim.

STATUTE: K.S.A. 23-3601(b)(1)

STATE V. DECKER

DOUGLAS DISTRICT COURT – AFFIRMED

NO. 98,226 – MARCH 13, 2009

FACTS: Decker convicted of felony murder based on death occurring during physical abuse of an infant. On appeal he claimed trial court erred by: (1) admitting autopsy and postmortem photographs after cause of death had been determined, (2) allowing testimony of a prior crime or civil wrong, (3) limiting Decker’s redirect exam of a witness, and (4) failing to instruct jury on accomplice testimony as requested. Decker also claimed the prosecutor’s misstatement of law in closing argument denied him a fair trial, as did cumulative trial error.

ISSUES: (1) Admission of photographs, (2) evidence of prior crimes or civil wrongs, (3) excluded testimony, (4) jury instruction, (5) prosecutorial misconduct, and (6) cumulative error

HELD: No exceptional circumstances were established to excuse Decker’s failure to raise issue below on all but three photographs. On those three contested photographs, trial court’s assessment that gruesome nature of the photographs did not override probative value is upheld.

No abuse of trial court’s discretion to admit 60-455 evidence. This evidence was not offered to prove identity, but rather the disputed material fact as to whether injuries were inflicted accidentally.

Under facts of case, trial court’s exclusion of child victim’s mother’s conduct toward another child was not an abuse of discretion. No logical connection between mother’s aggressive move to protect one’s own child and the likelihood that the protecting mother would abuse her own child.

No error in refusing to give a cautionary jury instruction on accomplice testimony. No showing that child victim’s mother met definition of an accomplice, or that jury could have been misled or confused by the instructions given.

Prosecutor’s comment that the defendant “is no longer presumed innocent” was unequivocally a false and erroneous statement of law, and exceeded the limits of approved rhetoric. In context, however, there was no manifestation of ill will as it appears prosecutor was attempting to convey the state had overcome the presumption of evidence, and the misconduct was not so gross and flagrant as to constitute plain error. Any error was harmless under the facts of case.

No multiple errors support Decker’s cumulative error claim.

STATUTE: K.S.A. 60-261, -404, -455

STATE V. FISCHER

SEDGWICK DISTRICT COURT – AFFIRMED

NO 100,334 – MARCH 27, 2009

FACTS: Fischer convicted of two felony charges. She appealed to challenge use of her juvenile adjudications in criminal history score because she had no right to a jury trial in those proceedings, and because prior convictions used to enhance her sentence had not been proven to a jury beyond a reasonable doubt. Appeal transferred to Supreme Court.

ISSUES: (1) Appellate jurisdiction, (2) juvenile adjudications, and (3) prior convictions

HELD: State’s challenge to appellate jurisdiction is rejected. Issue raised is constitutional challenge to recognition of prior convictions and juvenile adjudications for criminal history scoring purposes. K.S.A. 21-4721(e)(2) grants authority to review that question in any appeal. State’s focus on appellate review preclusion provision of K.S.A. 21-4721(c)(1) to the exclusion of appellate review authority granted in K.S.A. 21-4721(e)(2) is misplaced.

Holding in State v. Hitt, 273 Kan. 224 (2003), remains valid for all juvenile adjudications, which were final on June 20, 2008, the date In re L.M., 286 Kan. 460 (2008), was filed, and may be included in an offender’s criminal history score pursuant to Kansas Sentencing Guidelines Act (KSGA). Because Fischer’s juvenile adjudications were final, they were “prior convictions” under Apprendi, and district court properly included them in Fischer’s criminal history scoring.

Until the U.S. Supreme Court decides otherwise, KSGA procedure for calculating an offender’s criminal history score does not violate the offender’s right to due process or right to a jury trial under the Sixth or 14th amendments.

STATUTES: K.S.A. 2008 Supp. 38-2301 et seq.; K.S.A. 20-
STATE V. KING
CRAWFORD DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
COURT OF APPEALS – AFFIRMED
NO. 95,088 – MARCH 27, 2009

FACTS: King convicted of rape and aggravated criminal sodomy. During trial, he did not object to prosecutor questioning him about his post-Miranda silence. On appeal, he raised the alleged violations of Doyle v. Ohio, 426 U.S. 610 (1976), as prosecutorial misconduct. In unpublished opinion, Court of Appeals held the Doyle claim was not preserved for review because there was no contemporaneous objection. King’s petition for review was granted on this issue and on a question involving restitution order pursuant to K.S.A. 21-4603d(b)(1).

Supreme Court requested supplemental briefing on (1) whether contemporaneous objection rule can be avoided when alleged violation is subject to characterization as prosecutorial misconduct and (2) whether prosecutorial misconduct analysis should distinguish between behavior involving admission or exclusion of evidence (such as questioning witnesses) and behavior involving direct communication with jury (such as voir dire and opening and closing arguments).

ISSUES: (1) Appellate review of evidentiary claims as prosecutorial misconduct, (2) prosecutorial misconduct in closing argument, and (3) restitution

HELD: Supplemental briefing prompted by potential conflict between court’s prosecutorial misconduct analysis and K.S.A. 60-404 in context of Doyle violations. State v. Manning, 270 Kan. 674 (2001), is re-examined. Disapproval of previous decisions that granted appellate review of a prosecutor’s questions and a witness’s answers to those questions during trial without objection by way of a prosecutorial misconduct claim. From today forward, evidentiary claims — including questions posed by a prosecutor and responses to those questions during trial — must be preserved by way of a contemporaneous objection for those claims to be reviewed on appeal.

King’s claim of prosecutorial misconduct during closing argument by implying King’s trial testimony was untruthful has no merit in this case, as in State v. Davis, 275 Kan. 107 (2003).

Review granted to underscore distinction between requirements for restitution under K.S.A. 21-4603d(b)(1) and requirements for reimbursement of fees to Board of Indigents’ Defense Services under K.S.A. 22-4513. District court was not required to make findings on the record regarding King’s ability to pay restitution before imposing order of restitution. K.S.A. 21-4603d(b)(1) is examined and interpreted.

STATUTES: 18 U.S.C. § 3664(a); K.S.A. 21-4603d(b)(1); K.S.A. 22-3414, -3414(3), -4513, -4513(b); and K.S.A. 60-404

STATE V. MARTINEZ
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 99,641 – MARCH 27, 2009

FACTS: Martinez convicted of premeditated first-degree murder and criminal discharge of a firearm at an occupied vehicle. On appeal he claimed he was denied right to a unanimous verdict by the trial court allowing a juror to continue in deliberations and judgment after two other jurors raised concerns to judge about that juror’s limited competence. Martinez also claimed his hard 50 sentence was unconstitutional because jury did not find existence of aggravating factors, claimed a jury instruction improperly shifted burden of proof, and claimed the jury should have been instructed on a lesser included offense.

ISSUES: (1) Jury and ex parte contact, (2) jury determination of aggravating factors for hard 50 sentence, and (3) jury instructions

HELD: Inquiry into mental processes of one of the jurors is contrary to Kansas’ law. Nothing in record establishes the existence of a mental impairment of a juror that deprived Martinez of his right to a unanimous verdict. No abuse of discretion to permit jury to continue deliberations notwithstanding voiced concerns of two jurors. Trial court erred in speaking ex parte with first juror reporting concerns, but error was harmless in this case.

Martinez’s Apprendi claim was rejected in State v. Reed, 282 Kan. 272 (2006).

No timely objection to instruction alleged to have shifted burden of proof, and same claim rejected in State v. Stone, 253 Kan. 105 (1993). Evidence, which included Martinez pointing a gun at someone and firing numerous rounds, did not support instruction on reckless second-degree murder.

STATUTES: K.S.A. 21-3402(b); K.S.A. 22-3405(1), -3412(c), -3414(3), -3601(b)(1); and K.S.A. 60-441

STATE V. MCREYNOLDS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 97,936 – MARCH 13, 2009

FACTS: McReynolds convicted of first-degree murder, aggravated robbery, and conspiracy to commit aggravated robbery. On appeal he claimed: (1) prosecutor improperly made inference of McReynolds’ guilt during voir dire and improperly impugned McReynolds’ honesty during closing argument, (2) trial court erred in admitting McReynolds’ audio taped statements to detectives on morning following the murder and three days later, (3) error to not grant motions for mistrial and for new trial based upon detective mentioning statements not introduced at trial, (4) cumulative error denied him a fair trial, and (5) sentence at high end of sentencing grid without submitting grounds for aggravated sentence implicated his right to jury trial.

ISSUES: (1) Prosecutorial misconduct, (2) admission of statements, (3) mistrial, (4) cumulative error, and (5) sentencing

HELD: Two-step analysis for prosecutorial misconduct applies to allegations of improper prosecutorial comments during voir dire. Prosecutor’s voir dire statement, which undermined the presumption of innocence by suggesting McReynolds was guilty before trial commenced, was technically inaccurate in isolation. In context, the entire statement clearly placed burden on state to prove guilt and clearly articulated the presumption of innocence. This statement did not warrant reversal. Also, because credibility of state witnesses had been challenged, the challenged credibility comments were within latitude allowed prosecutors.

Totality of circumstances supports trial court’s determination that McReynolds’ statements were freely and voluntarily made. Trial court’s comment on detective’s credibility was more in the nature of an independent compelling reason for admitting the statement.

McReynolds demonstrated no prejudice to his substantial rights as a consequence of the detective’s statements. No abuse of discretion in trial court refusing to grant mistrial.

No error supports the cumulative error claim.

Sentencing claim is defeated by State v Ivory, 273 Kan. 7 (2002), and the court’s subsequent decisions.

STATUTE: K.S.A. 21-3302, -3401, -3427

STATE V. RIOJAS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,196 – MARCH 27, 2009

FACTS: Riojas convicted of felony murder and aggravated robbery in stabbing death of victim. On appeal he claimed trial court erred in: (1) admitting witness testimony that Riojas had stated he had cut people in the past; (2) allowing 10 photographs of victim’s
body, bloody shirt, and medical treatment; (3) sentencing Riojas based on criminal history not proved to jury beyond reasonable doubt; and (4) assessing Board of Indigents’ Defense Services (BIDS) application fee without considering ability to pay or burden it would impose.

ISSUES: (1) Evidence of prior bad acts, (2) admission of photographs, (3) sentencing, and (4) BIDS application fee

HELD: No error in admitting witness’ statement. Riojas did not object to the witness’ statement, and no exception to contemporaneous objection rule applies in this case. Also, Riojas proceeded to discuss the statement during his own testimony, and may not now complain of action on appeal.

No abuse of trial court’s discretion in its weighing of probative value of photographs against potential undue prejudice. Photographs did not distort factual premises for which they were offered, were not introduced for primary purpose of inflaming passion of jurors, and were not unduly repetitious or cumulative.

Criminal history claim defeated by State v. Ivory, 273 Kan. 44 (2002), which remains good law.

State v. Haukins, 285 Kan. 842 (2008), distinguished BIDS application fee from BIDS attorney fees. Because application fee remained unpaid at sentencing, no error to include unpaid fee in sentencing order without additional findings.

STATUTES: K.S.A. 21-3401, -3427; K.S.A. 22-3601(b)(1), -4513, -4529; and K.S.A. 60-401(b), -404, -407(f), -455

STATE V. WOODWARD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,280 – MARCH 6, 2009

FACTS: Woodward convicted in 1991 on pleas to kidnapping, sexual exploitation of a child, rape, indecent liberties with a minor, and felony murder. Sentence affirmed in unpublished direct appeal. In unpublished opinion, Court of Appeals affirmed the summary denial of Woodward’s post-conviction motion. In 2007, Woodward filed motion to vacate his guilty pleas and dismiss the indictment, alleging state violated K.S.A. 22-2910 by using information, provided under detective’s promise of a proposed diversion, to charge Woodward and provide a factual basis for his subsequent guilty pleas. He also claimed the state reneged on the plea agreement. District court summarily denied the motion. Woodward appealed and filed pro se appellate brief in addition to brief filed by appellate counsel.

ISSUES: (1) Breach of plea agreement and (2) K.S.A. 22-2910

HELD: State did not breach plea agreement. Prosecutor made unequivocal recommendation that sentencing court impose sentence as provided in plea agreement. Nothing the prosecutor said at sentencing was intended to undermine state’s recommendation or to suggest the sentencing court impose a harsher sentence. Plea agreement did not require prosecutor to ignore defense attempts to minimize Woodward’s culpability to gain minimum sentence less than that recommended in the plea bargain.

Woodward’s pro se argument of K.S.A. 22-2910 fails for multitude of reasons. Issue was not raised in Woodward’s direct appeal or 60-1507 motion, and his recent discovery of this statute does not constitute “newly discovered evidence.” Woodward waived issue when he entered his guilty plea. Statute requires complaint to have been filed before diversion is proposed, and detective had no authority to propose diversion. Diversion agreements are expressly prohibited for defendants charged with A or B felony.


**Appellate Practice Reminders . . .**

*From the Appellate Court Clerk’s Office*

**Footnotes in Briefs**

Footnotes in appellate briefs are not favored. In fact, Supreme Court Rule 6.07(a) states that footnotes should be avoided. If the information is important, it should appear in the body of the brief and not be placed in a footnote.

Cites to the record on appeal should be placed at the end of the fact so cited. See Rules 6.02(d) and 6.03(c). This placement aids both opposing counsel and the appellate courts in being able to easily and quickly verify the cite and fact.

**Motions to Publish Opinions**

Regardless of which appellate court issues an unpublished opinion, the motion asking to have the opinion published is always directed to the Kansas Supreme Court. An original and eight copies of the motion, each with a copy of the unpublished opinion, must be filed with the Kansas Supreme Court. See Rules 7.04(c) and 5.01. The motion to publish, unlike many motions, may be filed by a party to the appeal or an interested person; however, all parties to the appeal must be served. See Rule 7.04(c)

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Each document sent via fax to the appellate courts needs to have a separate fax cover sheet. An example of the cover sheet can be found at Rule 1.08(c). The cover sheet is not counted in the page limit of 10 pages per fax; however, the pleading and all attachments or supporting documentation must not exceed 10 pages. See Rule 1.08(a). This cover sheet helps to ensure that each filing is kept separate and filed in the appropriate appeal.

For further information, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
CIVIL

CHILD SUPPORT AND DEPRECIATION OF ASSETS
WIESE V. WIESE
MITCHELL DISTRICT COURT – AFFIRMED
NO. 100,207 – MARCH 20, 2009

FACTS: Shannon M. Wiese and William E. Wiese divorced on Jan. 4, 2005. In their divorce agreement, William agreed to pay Shannon $511 per month in child support for their two children beginning Feb. 1, 2005. But in March 2007, Shannon moved to modify child support, alleging that William's income had increased since 2003. A section of the federal tax code, 26 U.S.C. § 179 (2006), allows sole proprietors to use accelerated depreciation and recover the entire cost of a capital asset in one year by subtracting that cost from gross income. William, a farmer and sole proprietor, used 26 U.S.C. § 179 depreciation to his advantage for several years when deciding his federal tax liability. But when Shannon sought an increase in child support, the district court used straight-line depreciation to fix William's income instead of accelerated depreciation. William argued the court must use the accelerated depreciation figure to reduce his income for purposes of setting child support because these assets materially affect his cash flow.

ISSUES: (1) Child support and (2) depreciation of assets

HELD: Court stated the narrow question before it was whether the district court abused its discretion in calculating William's § 179 deductions as straight-line depreciation. Unless William proved that the court abused its discretion in calculating his expenses using straight-line depreciation instead of accelerated depreciation, the court stated it would not modify the lower court's holding, i.e., was it within the district court's discretion to deduct § 179 property as straight-line depreciation (an amount divided over the life of the asset). Court found William's accountant, Smith, testified that they selected items within the depreciation expenses to elect under § 179, and outside that tax benefit, there was no significant difference between these two categories. Contrary to William's argument on appeal, § 179 does not distinguish its purchases of “section 179 property” in terms of cash or financing. Moreover, Smith provided corroborating testimony that he did not distinguish the manner in which the § 179 property was purchased. Court stated William's reliance on his cash-based argument was unpersuasive because it did not follow Kansas' approach in viewing depreciation for child support purposes. Court held the district court did not abuse its discretion in declining to deduct the full value of William's § 179 property from his gross income. Court also held that because this is a genuine issue raised by the appellant, the court declined to grant attorney fees to the appellee for the appeal.

STATUTES: No statutes cited.

COLLECTIONS AND NURSING HOME CARE
PIONEER RIDGE NURSING FACILITY OPERATIONS V. ERMET
DOUGLAS DISTRICT COURT
REVERSED AND REMANDED
NO. 100,095 – MARCH 6, 2009

FACTS: On Feb. 21, 2006, Ermey's mother, Neva Ermey, executed a general durable power of attorney appointing Ermey as her attorney-in-fact, giving him legal access to her income and resources. Neva was then admitted to Pioneer, where she resided from Feb. 22, 2006, until her death on June 25, 2006. Because Neva's status at the time of her admission to Pioneer was “Medicaid eligibility pending,” Neva was originally classified as a “private pay” resident. As a result, she was responsible for paying for her own care. Al-
test the time credited against the inmate's sentence. No evidence that Boyd ever requested a formal KDOC grievance form, and record does not support Boyd's claim that he did not have access to Kansas law. No showing that Boyd's complaints regarding calculation of his sentence was a special problem that could not be handled pursuant to the KDOC grievance procedure. District court correctly found Boyd failed to demonstrate exhaustion of administrative remedies, which was a predicate for the district court's subject matter jurisdiction, and correctly dismissed the petition as stating no actionable claim.

STATUTES: K.S.A. 60-1501; K.S.A. 75-52,138; and K.S.A. 76-3001 et seq., -3002 Article IV(c) and (e)

INSURANCE AND STATUTE OF REPOSE
KANSAS HEALTH CARE STABILIZATION FUND V.
ST. FRANCIS HOSPITAL
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 99,009 – MARCH 20, 2009

FACTS: In October 1987, Brower, a minor, had surgery to remove a spinal tumor and to correct a spinal defect. Following the surgery, Brower suffered partial paralysis, including the loss of bowel and bladder control. Brower sued the surgeon, but the trial resulted in a defense verdict. However, the district court granted Brower a new trial based on juror misconduct, and the surgeon settled with Brower for an undiscounted amount. In 1996, Brower sued St. Francis/Via Christi for negligence in somatosensory-evoked potential (SSEP) monitoring, fraud, spoliation of evidence, intentional infliction of emotional distress, and violations of the Kansas Consumer Protection Act (KCPA), because of alleged misconduct by Via Christi or its agents during the initial lawsuit. In April 1997, the district court granted Via Christi's motion for partial summary judgment on the negligence claim based on the statute of repose. In July 1998, Brower's new counsel moved to voluntarily dismiss remaining claims in the case without prejudice. However, later in 1998, Brower refiled her suit against Via Christi alleging all claims except the intentional distress and KCPA claims. In 2001, Via Christi formally tendered its liability limits to the Kansas Health Care Stabilization Fund (Fund) and requested the Fund to assume the defense of the litigation. However, Via Christi settled the suit for $3.3 million in a confidential settlement agreement, but the Fund did not participate in the settlement negotiations. Via Christi requested the Fund's contribution in the amount of $3 million plus attorney fees for defense costs. In a declaratory judgment action, the district court ruled that the negligence claims made 10 years after a defendant's acts or omissions give rise to a cause of action. Court held that because 14 years have elapsed since they purchased the building and failed to install a handrail, the statute of repose bars the plaintiff's negligence claim for personal injury arising from that failure. Court also held that the negligence of the Fund was not triggered, and the Fund was entitled to judgment on the Fund's counterclaim. Because Via Christi was self-insured for $200,000, the excess liability coverage of the Fund was not triggered, and the Fund was entitled to judgment on Via Christi's counterclaim.

STATUTES: K.S.A. 40-3401, -3403; and K.S.A. 60-208(c)

LANDLORD TENANT AND STATUTE OF REPOSE
O'NEILL V. DUNHAM
RILEY DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 99,529 – MARCH 20, 2009

FACTS: James and Evelyn Dunham bought an apartment building in Manhattan in December 1990. The building has two apartments: apartment 1 is upstairs and apartment 2 is downstairs. Apartment 2 has a 5 x 3 1/2 foot landing inside the apartment, not in a common area, with five steps descending from the landing into the apartment. The parties agreed that apartment 2 had no handrail when the Dunhams bought the building and that they have not installed one. Simon J. O'Neill, the plaintiff, attended a party in apartment 2 on the night of July 23, 2004. He was neither a tenant nor was he invited to the party. In his deposition, the plaintiff testified that while he was trying to get another beer, someone bumped him while he was on the landing and he then fell down the stairs and suffered a broken leg. Seeking damages for his personal injuries, O'Neill sued the Dunhams, making several contentions in his petition, all centering on the lack of a handrail and also claims based on the city code of Manhattan. The district court closed the case by granting summary judgment to the defendants based on the statute of repose.

ISSUES: (1) Landlord tenant and (2) statute of repose

HELD: Court stated that through enactment of the statute of repose, the Kansas Legislature has granted immunity to landlords for claims made 10 years after a defendant's acts or omissions give rise to a cause of action. Court held that because 14 years have elapsed since they purchased the building and failed to install a handrail, the statute of repose bars the plaintiff's negligence claim for personal injury arising from that failure. Court also held that the negligence of the Fund per se claims of the plaintiff arising from any alleged breach of the code of ordinances for the city of Manhattan have no merit as the code does not grant a private cause of action. However, because the Kansas Residential Landlord Tenant Act establishes a duty for every residential landlord to comply with the requirements of applicable building codes materially affecting safety, court remanded the case for the district court to determine if the landlords had knowledge, actual or imputed, of the requirement to install a handrail and if the plaintiff was on the premises with the consent of the tenants.

STATUTES: K.S.A. 58-2553(a)(1), (2), (3); and K.S.A. 60-513(a), (b)

MEDICAL MALPRACTICE AND SCREENING PANELS
WALKER V. REGEHR
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 97,181 – MARCH 6, 2009

FACTS: When the estate and heirs of a 17-year-old girl sued for wrongful death, the law allowed any party to ask the district court to call a medical malpractice screening panel to decide whether there was a departure from the standard of practice of the health care specialty involved in the case and, if so, whether that departure caused
the damages claimed. The court convened two such panels here —
one to consider the administration of anesthesia to the girl and the second panel to look into the performance of the surgeon. Both panels filed reports, which were admitted into evidence at trial. For many reasons, the panels took far longer to do their work than the 90-day period set out in the statute, causing a delay of the trial for more than a year, with the report about the surgeon being received during the third week of the jury trial. The reports advised that the screening panels found no deviations from the standards of care by the physicians. At the end, the jury returned a no-fault verdict.

ISSUES: (1) Medical malpractice and (2) screening panels

HELD: Court held the circumstances of this case were unusual with respect to the receipt of the surgery panel report during trial. But, based on these facts, any error in admitting the surgery panel's opinion into evidence was invited by the plaintiffs, precluding this court from reviewing the due process issue about the surgery panel on appeal. The plaintiffs led the district court into ruling that the surgery panel opinion would be admissible in trial. Thus, the plaintiffs cannot argue on appeal that the surgery panel opinion should never have been accepted. As far as plaintiffs' due process concerns involving the screening panels, court stated that in light of the fact that discovery was ongoing and all normal pretrial preparations were not stayed, we hold the district court did not abuse its discretion by continuing the trial for the purpose of receiving the screening panels' opinions. Since there was no abuse of discretion, we see no due process of law violation by the delay. Court also stated plaintiffs failed to cross-examine the members of the screening panel because they never subpoenaed any member. Court held plaintiffs failed to object to the trial court's ruling to the panel to include a finding of causation and it was not preserved for appeal.

STATUTES: K.S.A. 40-3403(h); K.S.A. 60-240(b), -2103(b); and K.S.A. 65-4901, -4902, -4904, -4905, -4908

PERSONAL JURISDICTION

MR. CINNAMON OF KANSAS INC. V. HALL
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,722 – MARCH 13, 2009

FACTS: Hall was a continuous and permanent resident of Kentucky since 1991. He was formerly an officer and shareholder of a Kentucky corporation known as A & H Tobacco. A & H was in the business of purchasing tobacco products from various suppliers for resale in Kentucky. James J. Aboud is the president of Mr. Cinnamon, a distributor of tobacco products located in Wichita. According to Aboud's affidavit, in the spring of 2003, while in his Wichita office, he talked with Tony Bryant, an employee of Tobacco Center Inc., of Miami, Fla., concerning the possible sale of a large quantity of Marlboro cigarettes owned by Mr. Cinnamon that were stored in a warehouse in Kansas City, Mo. According to Aboud, Bryant told him that A & H Tobacco, of Kentucky would purchase the cigarettes. On April 11, 2003, the cigarettes were shipped from Kansas City, Mo., to "A & H Tobacco/Chris Mead" in Kentucky, however, the invoice for the cigarettes, dated April 7, 2003, originated from "Mr. Cinnamon Tobacco Dist." of Wichita. When A & H received the shipment of cigarettes, it determined that many of the packages were counterfeit and most of the products were substantially damaged and unsuitable for resale. A & H paid $30,000 for the undamaged cigarettes and returned the rest. Mr. Cinnamon refused delivery of the damaged cigarettes. Mr. Cinnamon sued Hall and A & H in Sedgwick County District Court for damages of $166,350, representing the amount it was underpaid. The district court granted Hall's motion to dismiss, finding that Hall had insufficient personal contacts with the state of Kansas to expose him to the jurisdiction of the Kansas courts.

ISSUE: Personal jurisdiction

HELD: The court stated that A & H was an active corporation in

STATUTE: K.S.A. 60-3308(b)

PRODUCT LIABILITY

GAUMER V. ROSSVILLE TRUCK AND TRACTOR
SHAWNEE DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 99,990 – MARCH 6, 2009

FACTS: Gaumer's father purchased a used Case IH Big Round Hay Baler from Rossville Truck and Tractor (RT&T) in June 2003 for $1,700. Notably, the baler was sold with a safety shield having been removed, but the bill of sale indicated the sale was "as is." One week later, Gaumer was operating the baler when it malfunctioned, causing Gaumer to dismount the tractor and squat near the baler to observe its operation in an attempt to understand the malfunction. When he attempted to stand from his squatting position, he slipped and his left arm inadvertently entered an unprotected opening in the side of the baler, exposing the arm to the mechanism of the baler at a location previously covered by a safety shield. His injuries led to the amputation of his left arm just below the elbow. Gaumer originally brought suit against both the manufacturers and RT&T, but after settlement with the manufacturers, the suit proceeded only against RT&T. After expert designations and discovery, RT&T sought summary judgment against Gaumer, arguing his negligence claim could not be established without an expert on the standard of care for sellers, and his strict liability claim based on the sale of a used product was not supported by Kansas law. The district court agreed with RT&T and entered summary judgment against Gaumer on both claims.

ISSUE: Product liability

HELD: Court found the standard of care of the seller of a used hay baler is outside the ordinary experience and common knowledge of the jury and beyond the capability of a lay person to decide. Court held the district court did not err in granting summary judgment to RT&T given Gaumer's failure to designate an expert who could enlighten the jury on the applicable standard of care. Court disagreed with the dismissal of Gaumer's strict liability claim. Court disagreed with the trial court that any further expert opinion beyond that offered by Gaumer was required for a prima facie case of strict liability. Court stated that established principles of products liability in Kansas do not recognize any exception for sellers of used products. Court concluded the district court erred in terminating Gaumer's claims based upon elements of a defense that was not before the court on summary judgment and based upon an unrecognized exception to product liability for sellers of used products. Court reversed the district court's grant of summary judgment on Gaumer's strict liability claim and remand for further proceedings on that claim.

STATUTE: K.S.A. 60-3306
TORTIOUS INTERFERENCE WITH CONTRACT AND BUSINESS EXPECTANCY AND SPECIFIC PERFORMANCE
COHEN V. BATTAGLIA
JOHNSON DISTRICT COURT – AFFIRMED
NO. 99,793 – MARCH 6, 2009

FACTS: Prior to Aug. 30, 2005, Battaglia owned a 20 percent interest in Baron Development Co. LLC (BDC), a Kansas limited liability company, and 2,222 shares of common stock in The Baron Automotive Group Inc. (BAG). The remaining balance of the membership interest in BDC and the rest of the shares of common stock in BAG were owned by the Cohen Trust and Cass. On Aug. 30, 2005, the Cohen Trust and Cass purchased all of Battaglia’s common stock in BAG. Battaglia remained an employee of the company. At the same time as the BAG transaction, BDC redeemed Battaglia’s interest in BDC, paying Battaglia $419,809 in cash and issuing him a promissory note worth $1,259,434. By way of a ‘Pledge Agreement,’ the note was secured by a 20 percent first priority security interest in BDC. The promissory note provided that it would become due and payable in full if BDC or BAG were sold to an unrelated party. Cass and Cohen and BAG agreed to sell 100 percent of membership interests in BDC to Group 1 Automotive and BAG would sell all of its assets to Group 1. Battaglia demanded to know the details of the sale, but was denied access. Battaglia sued Cohen, Cass, BAG and BDC in Missouri district court. As a result, Group 1 contacted Cohen and expressed reservation about closing the sales and refused without including a supplemental indemnification agreement requiring $2.5 million be placed in escrow for the benefit of Group 1. Sale closed with Cohen receiving $2.5 million less than the agreed-upon purchase price due to the escrow. Cohen filed this lawsuit against Battaglia setting forth claims for tortious interference with a contract, tortious interference with a business expectancy, and specific performance. Battaglia filed a motion to dismiss the tortious interference claims, which the district court ultimately granted. In a separate order, the court, thereafter, declined to exercise subject matter jurisdiction over the claim for specific performance.

ISSUES: (1) Tortious interference with contract and business expectancy and (2) specific performance

HELD: Court held that Cohen had alleged sufficient facts that, if true, would constitute anticipatory repudiation by Group 1. Therefore, the district court did not err in ruling that Cohen had adequately alleged a breach of contract. Court also stated that the mere fact the sale closed may demonstrate the relationship between Group 1 and trustees did not terminate, but that fact alone does not show that trustees fully realized their expectancy of future economic benefit. Trustees alleged that they were required to pay substantial attorney fees and that the sale price was reduced as a result of Battaglia’s conduct. Therefore, court held that Trustees adequately pled that Battaglia interfered with their business expectancy. Court also held that the district court did not err in finding that Cohen was not required to allege that Battaglia had knowledge of the specific terms of the contract or the business relationship in order to adequately state a claim upon which relief could be granted. Court affirmed the dismissal of Cohen lawsuit finding that Cohen sufficiently alleged faxing of the lawsuit as a separate and distinct predicate act for tortious interference and that the deal was modified as a result of the conduct. However, court held Cohen attempted to impose liability on Battaglia for the conduct of his attorney in notifying Group 1 of the existence of the Missouri action. Court stated that the attorney’s conduct on behalf of Battaglia conveyed nothing but truthful information and, thus, is not actionable.

STATUTE: K.S.A. 60-2102a(a)(4)

WILLS
IN RE ESTATE OF LEAVEY
JOHNSON COUNTY DISTRICT COURT – AFFIRMED
NO. 100,283 – MARCH 6, 2009

FACTS: Following Leavey’s death in 2006, Eggeson petitioned for probate of a 1987 will. DeLuca petitioned for probate of a 2006 will and filed written defenses to Eggeson’s petition. District court granted DeLuca’s motion for a directed verdict, finding the evidence did not show the 1987 will was executed with statutory formalities required under K.S.A. 59-606. Eggeson appealed, arguing the scrivener’s initials in the lower right corner of the attestation page of the 1987 will, without the signature of one of the witnesses, was sufficient for the will to be admitted to probate. DeLuca also argued that Eggeson failed to offer any evidence of Leavey’s competency.

ISSUES: (1) Execution of will and (2) testamentary capacity

HELD: Kansas courts have never directly decided whether something less than actual signature by two or more competent witnesses would be recognized. K.S.A. 59-606 is interpreted. Under facts of case, Eggeson failed to establish by substantial competent evidence that Leavey’s 1987 will was attested to and subscribed in Leavey’s presence by at least two competent witnesses who saw Leavey subscribe or heard him acknowledge the will, as required by K.S.A. 59-606. Trial court properly denied admission of the 1987 will to probate.

Eggeson had burden to make prima facie case of Leavey’s capacity, and failed to do so. Appellate record demonstrates that Eggeson offered no evidence of Leavey’s testamentary capacity when he signed the 1987 will.

STATUTE: K.S.A. 59-606, -2201, -2213

WORKERS’ COMPENSATION
MITCHELL V. PETSWMART INC. ET AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 99,528 – MARCH 20, 2009

FACTS: Mitchell worked for Petsmart from July 2002 until July 2005. His duties included building store displays, assisting customers, and stocking merchandise, including 20-50 pounds bags of dog food. On Dec. 31, 2003, Mitchell fell at work and broke his left thumb. He had surgery and treatment on the thumb and was released from all medical restrictions in April 2004; however, he continued to lift primarily with his right arm because of continued swelling and stiffness in his left arm. In July 2004, Mitchell began experiencing numbness in both hands and sharp pain in his right shoulder and was diagnosed with right carpal tunnel syndrome, with pain into the right shoulder and a right shoulder rotator cuff sprain or tear. In October 2004, Mitchell notified Petsmart of pain in his left arm and shoulder. Mitchell had surgery on this right shoulder in January 2005. He was diagnosed with bilateral injuries in July 2005. Petsmart terminated Mitchell’s employment for poor attendance in July 2005. Mitchell underwent right carpal tunnel release in August 2005 and was given full release in September 2005. Petsmart changed insurance companies from Royal & Sun Alliance Co. to Travelers on Feb. 1, 2004. The administrative law judge (ALJ) concluded: (1) Mitchell sustained a single, work-related injury on Dec. 31, 2003, when he broke his left thumb; (2) Mitchell’s subsequent repetitive trauma injuries were the natural and probable consequences of the thumb injury; (3) Travelers and Royal were jointly and severally liable for all of Mitchell’s injuries; and (4) Mitchell made a good faith effort to find other employment after Petsmart terminated his employment. The ALJ gave Mitchell a disability rating resulting in an award of $85,354.09. The Workers’ Compensation Board (Board) concluded Royal was solely responsible for costs and compensation for Mitchell’s impairment to his left thumb and that it was a scheduled injury. The Board found Royal and Travelers jointly and severally liable for the medical treatment and the disability compensation relative to the repetitive trauma injuries.
STATE V. GOLSTON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,413 – MARCH 13, 2009

FACTS: Golston was the passenger in a vehicle initially stopped for a traffic infraction, and the police detained the driver and Golston while they waited for a drug dog to arrive. Golston argues that his rights under the Fourth Amendment to the U.S. Constitution were violated because the officers lacked reasonable suspicion specific to Golston to justify the length of his detention. Golston further argues that he was subjected to an illegal patdown for officer safety, which led to the discovery of marijuana in his shoe. Golston was convicted of felony possession of marijuana. Golston claims the district court erred by denying his motion to suppress the evidence.

ISSUES: (1) Search and seizure, (2) motion to suppress, and (3) traffic stop

HELD: Court agreed that under the totality of the circumstances, there was reasonable suspicion specific to Golston to justify the length of his detention. Although Golston had been in the car for only a brief period of time before the stop, Officer Padron still had reason to suspect that Golston was engaged in drug activity, based largely on previously gathered information. At the time the duration of the car stop was extended, Padron knew the following information about Golston: (1) He had just come from an Amoco known for drug activity and where several arrests for drug-related crimes had occurred over the past two years, (2) he was in the SPIDER database as a documented gang member, (3) he was with someone who was on supervised release from prison and had been involved in a prior stop involving drugs within the last two weeks, and (4) Anderson had just driven Cobos from the Amoco to a suspected drug deal and it now appeared that Anderson was driving Golston from the Amoco to another possible drug deal. Golston was lawfully detained for the duration of the stop. Court found the patdown search of Golston was lawful because examining all the evidence, the officer reasonably feared for his safety, consent is not required, and that the baggie in Golston’s shoe was in plain view.

STATE V. KRIDER
LABETTE DISTRICT COURT – AFFIRMED
NO. 98,621 – MARCH 6, 2009

FACTS: In second trial following mistrial when jury could not reach unanimous decision, Krider was convicted of intentional second-degree murder. On appeal he claimed district court erred in: (1) denying Krider’s motions for appointment of a venire expert and for change of venue, (2) granting prosecution’s motion in limine to exclude Krider’s alternative-perpetrator theory, which prevented Krider from presenting a complete defense, (3) denying Krider’s motion for new trial based on prosecutor misconduct of eliciting new information from witness after first trial, and withholding the new information from the defense, (4) instructing jury on lesser offenses and thus denying Krider’s all-or-nothing defense, (5) sentencing Krider to a maximum presumptive sentence, and (6) denying Krider’s motion for new trial based on newly discovered evidence.

ISSUES: (1) Venue issues, (2) alternative-perpetrator theory, (3) prosecutorial misconduct, (4) jury instructions on lesser offenses, (5) sentencing, and (6) newly discovered evidence

HELD: District court took care during voir dire and trial to en-
sure jurors were not prejudiced by publicity surrounding the case. In light of voir dire record as a whole and Kansas case law, Krider failed to show his substantial rights were prejudiced by the venue. No abuse of discretion by trial court in denying Krider’s motion for change of venue and motion to hire a venire expert.


Testimony at issue was inculpatory, thus prosecutor had no independent duty to disclose the evidence to Krider. State’s failure to disclose was not prosecutorial misconduct and did not prejudice Krider’s substantial rights to a fair trial.

Evidence supported district court’s instructions on lesser offenses of second-degree murder and voluntary manslaughter. Even if voluntary manslaughter instruction was erroneous, the error was harmless.

Sentencing claim is defeated by controlling Kansas Supreme Court precedent.

Even if newly discovered evidence of subsequent conviction of detective who served as primary custodial of evidence in this case was more than impeachment evidence, it was not material enough to make a different result on retrial likely. District court properly denied Krider’s motion for a new trial based upon this evidence.

STATUTES: K.S.A. 21-3401, -3402(a), -3403(a), -3716, -4701 et seq., -4721(c)(1); K.S.A. 22-2616(1), -3414(3); and K.S.A. 60-261

STATE V. LONG
FINNEY DISTRICT COURT – AFFIRMED NO. 98,736 – MARCH 20, 2009

FACTS: Long pled no contest to possession of methamphetamine. Long challenged his criminal history, which contained three misdemeanors that were combined to create one person felony in his criminal history. Long claimed the misdemeanor convictions were uncounseled and he served jail time for them. After a hearing, the district court included the misdemeanors in Long’s criminal history.

ISSUE: Criminal history

HELD: Court stated that although the record on appeal was sparse, it appeared that Long was sentenced to jail based on his willful failure to pay his fines and court costs. There was no indication from the municipal court records that Long was ordered to serve any jail time as a result of his battery convictions. Rather, the municipal court never imposed a jail sentence upon Long for any of his convictions. It is true that Long would have never faced a contempt charge had he not been initially convicted of battery. But this does not mean that Long’s battery convictions caused him to serve time in jail. If Long served any time in jail in either of his municipal court cases, the jail time was for being in contempt of court and not for the battery convictions. Court held the records from the municipal court as well as the testimony of the records clerk supported the district court’s finding that no jail sentence was imposed on Long for his uncounseled misdemeanor convictions and Long’s prior uncounseled misdemeanor convictions were properly included in his criminal history score.

STATUTES: K.S.A. 12-4106, -4405, -4510; and K.S.A. 21-3102, -4701, -4710(d)(11), -4711, -4715

STATE V. ROOSE
SHAWNEE DISTRICT COURT – REVERSED NO. 98,798 – MARCH 13, 2009

FACTS: Roose was convicted of burglary in 1978. In 2005, Roose was charged with an aggravated weapons violation under K.S.A. 21-4202(a)(2), which makes it unlawful to carry a pistol if you have previously been convicted of a person felony. The charge was based on Roose’s burglary conviction from 1978. After a bench trial on stipulated facts, Roose was convicted of an aggravated weapons vio-

STATE V. POLLMAN
MCPHERSON DISTRICT COURT – REVERSED NO. 93,947 – NOVEMBER 21, 2008 PUBLISHED VERSION FILED MARCH 4, 2009

FACTS: Pollman and wife were on motorcycles when officer pulled Pollman’s wife over to check for DUI. Wife was not arrested, but Pollman was when officer testified Pollman after talking to him about not moving away from the stop as the officer had directed. District court denied Pollman’s motion to suppress evidence obtained by the officer, and Pollman was convicted of DUI. In unpublished opinion, Court of Appeals reversed, finding circumstances would not have provided an objective officer with reasonable suspicion of DUI. Supreme Court granted state’s petition for review and reversed. 286 Kan. 881 (2008). Case remanded to address whether K.S.A. 2005 Supp. 8-1567(a)(2) is unconstitutionally overbroad and void for vagueness and whether the arrest was supported by probable cause. Pollman specifically claimed state failed to establish a sufficient foundation for admission of preliminary breath test (PBT) result.

ISSUES: (1) Probable cause for DUI arrest and (2) constitutionality of K.S.A. 2005 Supp. 8-1567(a)(2)

HELD: Under facts of case, and as in Leffel v. Kansas Dep’t of Revenue, 36 Kan. App. 2d 244 (2006), district court erred in admitting evidence of results of preliminary breath testing device at suppression hearing because state failed to show the device was approved by Kansas Department of Health and Environment. Without the incriminating PBT result, officer did not have a sufficient factual basis to conclude there was probable cause to believe Pollman was driving under the influence of alcohol. District court erred in not suppressing the incriminating evidence. Pollman’s conviction is reversed and sentence is vacated.

K.S.A. 2005 Supp. 8-1567(a)(2) is not unconstitutionally overbroad or vague.

STATUTES: K.S.A. 2007 Supp. 65-1,107(c); K.S.A. 2005 Supp. 8-1012(d), -1567(a)(1), -1567(a)(2), -1567(f); K.S.A. 8-1001, -1001(b); and K.S.A. 65-1,107, -1,107(d)

STATE V. PÉREZ-RIVERA

FACTS: Perez-Rivera convicted of felony domestic battery. On appeal, he claimed insufficient evidence supported the conviction because state failed to put on evidence to show victim was 18 years or older when the alleged incident took place. State conceded there was no direct evidence of victim’s age, but argued jurors could have inferred victim was 18 years or older based on her appearance and demeanor, and based on trial testimony.

ISSUE: Sufficiency of the evidence

HELD: Conviction is reversed. Jurors could not make inference concerning victim’s age based on their personal knowledge or observations. Juror’s inference can only be based on evidence presented at trial. State’s argument is rejected, as in State v. Star, 27 Kan. App. 2d 930 (2000).

STATUTES: K.S.A. 21-3410(a), -3412a, -3412a(1), -3412a(b)(3), -3412a(c)(1), -3420(1); and K.S.A. 65-4161(d)
ration. Roose argues that his burglary conviction from 1978 was improperly characterized as a person felony.

ISSUE: Sentencing

HELD: Court stated the critical distinction of the case was the standard of proof. In criminal history cases, the state is only required to prove that the structure in question was a dwelling by a preponderance of the evidence. K.S.A. 21-4711(d). Court stated that in Roose’s case, whether he committed a person felony was an element of the crime he was charged with, and, therefore, whether the structure he burglarized was a dwelling required proof beyond a reasonable doubt. Thus, what might have sufficed in other cases where a house was found to be a dwelling simply because it was described as a house is not sufficient to prove beyond a reasonable doubt that Roose’s 1978 conviction would be classified as a person felony. Because the burglary statute is worded in such a way that a house could be a dwelling or not, under the facts of the stipulation it is impossible to conclude beyond a reasonable doubt that Roose’s 1978 conviction was the equivalent of a person felony when the only facts known are that it was a burglary of a house. Court held without such proof, there was insufficient evidence to convict Roose of an aggravated weapons violation.

CONCURRENCE: Judge Greene concurred that he would decide the case based on the fact that Roose’s 1978 burglary conviction was not a “person” felony; thus, his conviction of an aggravated weapons violation was improper.

STATUTE: K.S.A. 21-3110(7), -3715, -4201, -4204(a)(2), -4711(d)

STATE V. SCHUFF

SALINE DISTRICT COURT – AFFIRMED

NO. 100,356 – MARCH 13, 2009

FACTS: Schuff convicted of possession of marijuana, based on evidence discovered when officer smelled marijuana when he checked on safety of car that had been reported by a caller. On appeal, Schuff claimed the officer had no lawful justification to stop and approach the car, thus district court erred in denying Schuff’s motion to suppress evidence.

ISSUE: Public safety stop

HELD: Under facts of case, officer expressed specific and articulable facts for approaching Schuff’s vehicle for public safety concerns. Emergency doctrine for justifying a warrantless search is distinguished. State’s alternative argument that the stop was justified as a voluntary encounter is not addressed.

STATUTES: None

STATE V. STEGMAN

LINCOLN DISTRICT COURT – AFFIRMED

NO. 100,375 – MARCH 20, 2009

FACTS: On Dec. 16, 2006, Stegman was arrested in Lincoln County for driving under the influence (DUI) of alcohol. After being provided the oral and written warnings under the Kansas Implied Consent Law, Stegman agreed to submit to a blood test. Merilynn McBride, a “medical assistant,” withdrew blood from Stegman using a kit furnished by the Kansas Bureau of Investigation (KBI). After she was done, McBride gave the sample to Trooper Ryan Wotting of the Kansas Highway Patrol, and he sent the sample to the KBI laboratory for testing. The results of the test showed that the alcohol concentration in Stegman’s blood was over the legal limit. Stegman was charged with DUI. He filed a motion to suppress the test results, arguing that McBride was not qualified under K.S.A. 2006 Supp. 8-1001(c) to withdraw his blood. The trial court determined that, as a matter of law, the medical assistant was not qualified to withdraw blood under the relevant statute and suppressed the blood test results.

ISSUES: (1) DUI and (2) blood draw

HELD: Court held that under the facts of the case, the state and the defendant stipulated that a medical assistant was neither a medical technician, an emergency medical technician, nor a phlebotomist and the stipulations of facts failed to show that the medical assistant was skilled or experienced in the withdrawal of blood from an individual, those stipulations of facts were binding upon the parties and the trial court properly determined that the medical assistant was not qualified under K.S.A. 8-1001(c) to withdraw blood.

STATUTES: K.S.A. 8-1001(c)(3), (4), (f), (v); K.S.A. 60-409; and K.S.A. 65-6111(8), (9), -6112(d), (g), (h), (i), (j), (n), (o)
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MAY

Friday, May 8, 9 a.m. – 4:20 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 P.C., 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 Pretrial Issue: Should the Defendant be Permitted to Make Comparative Allegations Contingent upon a Settlement or Dismissal with a Co-Defendant?
Jerry D. Hawkins, Hite Fanning & Honeymon LLP, Wichita
Telephone CLE

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

Friday, May 29, 9 – 11:45 a.m.
Kansas Ethics Handbook: A Closer Look
Washburn University School of Law, Topeka

JUNE

*Pending CLE credit approval

Friday, June 5, 9 a.m. – 3:45 p.m.
Lesbian, Gay, Bisexual, Transgender Update*
Stinson Morrison Hecker LLP, Kansas City, Mo.

Friday, June 12, 8:25 a.m. – 12:25 p.m.
(Session I): 1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Debut (Featuring the 2009 Kansas Annual Survey as seminar materials)*
Lenexa, Topeka, and Wichita

Tuesday, June 23 through Tuesday, June 30
Video Replay Week – Brown Bag Ethics, Consumer Protection, and Legislative & Case Law Institute*
Multiple sites statewide

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- Henry Goertz, Goertz Law Office, Dodge City

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