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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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The President and the Board of Directors of the Kansas Bar Association Political Action Committee (KSBAR PAC) Cordially Invite you to Attend the Inaugural KSBAR PAC Annual Reception.

Wednesday, June 17, 2009

The Sheraton Overland Park Hotel
6100 College Blvd., Cottonwood Three
Overland Park, Kansas

Cocktails ........................................ 8 p.m.

$50 Contribution Suggested

Supreme Court News

From the Office of Chief Justice Robert Davis

Since Friday, April 10, a description of the petitions for review process, with a link to actions taken by the Kansas Supreme Court on April 7, has been posted at the court’s Web site: http://www.kscourts.org/.

That site has multiple links to the description from various locations: From the “What’s New” section of the home page, the “Legal Community” section of the home page, the “Cases & Opinions” drop-down menu under the masthead, and the Supreme Court section’s left sidebar.

Within the description, there is a link to the actions themselves, which also contain links to the published opinions that were the subject of individual petitions, and links to the Kingsley and Rebel opinions, which had an impact on several pending petitions as noted.

In the future, after the next petitions conference, there will be two links in the description – one to the new actions, which will be posted, and one to previous actions, which will be added to cumulatively going forward.
Some years ago The New Yorker ran a cartoon of a man kneeling by the side of his bed, hands folded in prayer, saying “I’m not asking for much, but I am asking that whatever I get be really good quality.” While it’s easy to laugh at such “extreme consumerism,” people do believe that they deserve quality. Members of the Kansas Bar Association certainly deserve quality services and they receive it. Since this is my last column I want to give credit where it is due. My hat is off to Jeff Alderman and the staff of talented, hardworking folks. Here is a list of the Bar employees that you should thank. By the way, most Bar associations of our size have much bigger staffs than we have in Kansas.

Jeffrey Alderman, Executive Director
Katherine Appel, Member Services Coordinator
Krista Bright, Senior Member Services Coordinator
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Dawn Ramer, CLE Program Planner
Alana Seelbach, Receptionist
Kathy Slawson, CLE Program Planner
Beth Warrington, Publications & Marketing Administrator
Meg Wickham, Manager, Public Services

Looking back at the promises I made in the first column, it looks like most of them were kept. We did change to an electronic format for meetings of the Board of Governors. Board members get their material earlier — cheaper, too.

Legislative issues were considered much earlier in the year as we promised. A legislative conference was held on Oct. 15, 2008, with our member/legislature/leaders, John Vratil, Mike O’Neal, Paul Davis, and Jan Pauls playing to a packed house. This is something that I would strongly recommend as an annual event.

After several decades of trying, the Kansas Bar Association created a political action committee, the KSBAR PAC. It is officially registered and open for business. The KSBAR PAC has — in my opinion — a highly credible board of directors, four Republicans and four Democrats. Republicans Melissa Wangemann, Dick Bond, Dennis Jones, and Dick Honeyman, serve along with Democrats, Tom Wright, John D. Jurcyk, Rachel Pirner, and Susan Berson. The board will meet for the first time at the upcoming Joint Judicial Conference and 2009 Kansas Bar Association Annual Meeting, June 17–19.

It was a great pleasure for, my wife, Carole and I to attend the meetings of the Southwest Kansas Bar, the Wichita Bar, Johnson County Bar, and Topeka Bar. The ABA meetings in New York and Boston were fatteningly good. I will always treasure the memory of lunch with the Harper County Bar.

My wife suggested that I end the last column with uplifting thoughts learned in my years of practice. Here are three. But first I want to warm you up. If the total cost of a toy bat and ball is $1.10 and the bat costs $1 more than the ball, how much does the ball cost?

No. 1 – Never bad-mouth opposing counsel – even when it’s deserved. “You should write your opinions with crayons since they are incompetent and childish.” That is very close to what I once read in an exchange of correspondence between opposing counsel. We are professionals and if you are totally superior to opposing counsel it will be apparent in the end.

No. 2 – Once in a while you should take the time to help a beginning lawyer. It doesn’t need to be a formal mentorship. You can do it at a bar meeting or in the courthouse coffee shop. It feels great because it’s the right thing to do.

No. 3 – If the lawsuit you are contemplating filing or defending looks really straightforward and simple, then you probably do not understand the case. If, by the way, you said that the ball cost ten cents, you were wrong. The answer is 5 cents. You know, 5 cents plus $1.05 is $1.10.

I end this column with serious advice to the incoming President, Tim O’Brien. Tim, have fun. It will be over in a flash.
Each month I attempt to focus my topic of this column on the young lawyers of Kansas. But this month is different. I write about a topic that should be important to each of us. And not just attorneys – this column is relevant to all professionals. It is a topic that I believe is critical to success in your profession and in life. It is about a work-life balance. But more specifically, it is about being passionate about life, about those things you choose to do and about the things you choose to be. And if I may start with my conclusion, I believe those who choose to find passion in the things they do each and every day are those who also find success.

What is passion and how does it apply to a work-life balance? We all know that passion is something of emotion. Borrowing from Webster’s online dictionary, passion is an intense desire for or devotion to some activity, object, or concept. It is a concept I hope we all feel and can define for ourselves.

I give you my story by explaining what I am passionate about. I am a family guy. I more than simply enjoy spending time with my wife and son (For more on those topics, see last month's Young Lawyers column.). It is something I love to do. I love to maintain my home. I love to cook. I love to be with my family doing family things, such as taking a family trip or a family walk or run. I have a passion for my family that is beyond all.

I am a runner. It is something that I find time for each and every day. It is something that allows me to compete – not against others but against myself. It is something that allows me to release energy. It is something that allows me time to think. Most importantly, it is something that allows me time for me. This is something I am passionate about.

I love my job and I love my profession. I eagerly await Monday mornings just as I await Fridays. I live for the difficult project or the difficult argument. I strive to learn and expand my profession. I strive to help others learn and grow in their pursuit of this profession. I am passionate about my work, I am passionate about the concept of the law, and I am passionate about ensuring pride in this profession.

I believe all of these passions are related. Have you noticed those individuals who seem to be happy in all aspects of their lives? On the other hand, have you noticed those individuals who are unhappy with one aspect of their life, and that unhappiness permeates their existence? This is not coincidence. No doubt that both pleasure and misery bleed over to other aspects of our lives.

Do I have it all under control in my life? No, and I doubt any of us do. Does it mean that I love everything about my job, about my hobbies and about my life? No. But conceptually and pragmatically I enjoy those things about my life that I choose to do and those things I choose to be. While some people find family and kids stressful, find work demands stressful, or find home repairs stressful, I find these things sources of energy and passion in my life. I have found what I am passionate about and I am embracing all of it.

I believe there is something to be said for finding those things that you are passionate about and then pursuing those activities, objects, or concepts. And this doesn't mean you need to quit your job, leave your spouse, and retire to the beach. What I mean is that you need to consider what about life makes you happy and incorporate those things into your daily activities. My challenge for you is to find that something in your life that you are passionate about. Take from that activity, object or concept that you are passionate about and focus daily on why it makes you tick. And if you look deep and cannot find that something in your life that you are passionate about, branch out. Try something new. Chances are you have an entire set of passions just waiting to be tapped into.

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

By attending the upcoming KBA Annual Meeting.

Wednesday, June 17 thru Friday, June 19

www.ksbar.org
Achterberg to Receive Robert K. Weary Award

The Robert K. Weary Award recognizes “lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation.” This award was given for the first time in 2000 by the Board of Trustees of the Kansas Bar Foundation.

Despite Mr. Weary’s objection, the Board of Trustees of the Kansas Bar Foundation selected Mr. Weary as the initial recipient of the award in recognition of his decades of service to his community, the Kansas Bar Foundation, and the legal profession in Kansas. Mr. Weary was a member of the KBF’s Board of Trustees from 1994-2000 and served on the KBF Investment Committee. In 1997, Mr. Weary donated the lead gift towards the Kansas Law Center building campaign. Mr. Weary passed away in early 2001 and his counsel to the Kansas Bar Foundation is missed, but his legacy lives on.

Past recipients of this prestigious award include Frank C. Norton, to Justice Robert L. Gernon, to Mikel L. Stout, the award was presented posthumously to Daniel J. “Dan” Sevart, Judge Wesley Brown. In 2009, Constance M. Achterberg was unanimously chosen by the Board of Trustees to receive the Robert K. Weary Award.

“Connie is quietly efficient,” said former Foundation President and former Bar President Jack Dalton. “The Foundation would not be where it is without her trailblazing efforts.”

This year’s Robert K. Weary Award will be presented to Ms. Achterberg at the Kansas Bar Foundation’s Fellows Dinner Thursday, June 18th at the Lake Quivira Country Club in Lake Quivera.

Achterberg has been a KBA member since 1953. She served as Secretary-Treasurer for the Board of Governors of the KBA 1977–1980. She was the first recipient of the KBA Professionalism Award in 1993.

Constance M. Achterberg was one of five women in law school at the University of Kansas, from which she graduated in 1953. She was hired by the State Highway Department, which was just beginning to acquire land for the interstate highway system. Subsequently, she tried a lot of cases and spent a considerable amount of time in the Salina area while on the job. She decided to move to Salina and opened a law office in 1959, she was the only female lawyer in Saline County for the next 18 years or so. She acted constructively to improve the way for others by becoming a leader in many professional organizations, including the KBA. She chaired the Family Law Committee for many years, chaired the KBA Awards Committee in 1988, and worked on several other committees. She was one of the first to join the Kansas Bar Foundation, serving as president for two terms: 1987-1988.

She has been active in other state and community services. She was president of the Women’s Kansas Day Club, a chancellor of the Episcopal Diocese of Western Kansas and a member of the Supreme Court Nominating Commission and the state Civil Rights Commission.

Achterberg is currently a member of the American Association of University Women, member of Christ Episcopal Cathedral of Salina as well as on the board to create and open a Montessori School, and is currently serving on the Saline County Commission on Aging as a board member.

She is a Fellow Silver of the Kansas Bar Foundation and has received KBA awards including: the Outstanding Service Award, the Professionalism Award and the Distinguished Service Award in 1997.

The 2009 Fellows Dinner is scheduled for Thursday, June 18, 2009, at the Joint Judicial Conference and Kansas Bar Association Annual Meeting in Overland Park. Those added to the published roll of fellows and those who have reached a new contribution level will be honored at the dinner. This black-tie gala event of the year provides a wonderful opportunity to salute the new fellows, introduce new officers, and reminisce with colleagues. If you would like more information about the dinner, please contact Meg Wickham, KBA manager of public services, at (785)234-5696 or e-mail mwickham@ksbar.org.
The Kansas Bar Association (KBA) offers several affinity programs as benefits to our members. Affinity programs by their very nature are designed as a two-way program: They offer discounts to members of an organization while also allowing the member to help the organization. The affinity programs offered through the KBA all give a percentage of our members’ purchases back to the KBA. This is a wonderful benefit because it helps the member two-fold: Through the discounts offered by each program and by adding to the KBA’s revenue so more benefits may be offered. The three listed below are the KBA’s top three member benefits.

Office Depot

Office Depot is the newest affinity program offered by the KBA. By contacting Shelley Klein at Shelley.klein@office depot.com or by going to the KBA Web site at www.ksbar.org/officedepot a member may sign up for this free program. The benefits of the program include a list of 200 most-ordered supply items at highly discounted prices; 5 percent off Office Depot’s everyday low prices on all other items (excluding technology); ordering by phone, Internet, fax, or at an Office Depot near your firm and reporting capabilities that will allow the office manager to process and manage your firm’s office supply expenditures.

Go Next

Go Next is one of the KBA’s more popular benefits since it offers discounted travel excursions. Each year the KBA sponsors several trips through Go Next to exotic places, such as China and the Mediterranean. If you would like to learn more about upcoming trips or would like help planning your next vacation go to www.gonext.com.

KBA Visa Card with Rewards — COMING SOON!

The KBA Visa Card with Rewards is an older benefit that has been revamped for this year. Now members can sign up for a KBA Visa Card with Rewards. The card offers lower rates than in previous years and use of the card earns rewards. The KBA staff is always on the lookout for new and interesting member benefits. If you know of a benefit you would like to see offered, please contact Lisa Montgomery at lmontgomery@ksbar.org.
A Nostalgic Touch of Humor

A Case of Wine and Redemption

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

The house where my parents raised me and my four siblings has remained in our family for 42 years.

All childhood homes are special, but the residence at 3616 17th St. was different than most in two ways. The first, the back side of the house sits on a lake, a sandpit, and our backyard opened to a heaven's gate of outdoor adventures. This was Huck Finn meets Harold Ensley and everyday my brothers and I executed a new plan to catch a state record flathead, largemouth, crappie.

The second thing — across the street on the south side — is the Dominican Convent, founded in Great Bend in 1902. Our neighbors were nuns. Back then they dressed in full habit and symbolized everything holy. Their grounds are still almost 40 acres with religious statutes, meditational gardens, places of quiet reflection, and avoiding influences sent from the devil. Like those Keenan boys.

In the late 60s, their Mother Superior was Sister Francesca, and over dinner my parents used her name with the kind of reverence reserved for the Pope.

So needless to say, Larry and Mona admonished us to “avoid the convent — they need peace and quiet,” which had the same effect as, “Kids, don’t put beans in your nose.” You jammed them in, of course. In the fall, we played football in their manicured open field of thick bluegrass. In the winter we hid in their evergreen tree cover and lobbed snowballs at cars speeding by. In the spring we rode bikes along their walking trails, caught bullfrogs in their reflecting pool and lobbed snowballs at cars speeding by. In the spring we rode bikes along their walking trails, caught bullfrogs in their reflecting pool and lobbed snowballs at cars speeding by. In the spring we rode bikes along their walking trails, caught bullfrogs in their reflecting pool and lobbed snowballs at cars speeding by. In the spring we rode bikes along their walking trails, caught bullfrogs in their reflecting pool and lobbed snowballs at cars speeding by.

Minutes later an inspection dismissed any connection to the Dominicans. “But since you found it on the property, it belongs to the nuns now. Go inform the Mother Superior. They could use the wine for their masses.” Looking back, the notion of Boone’s Farm on an altar is akin to the Pope canonizing Pee-Wee Herman.

So we raced home to break the news to Larry. He was — and remains — a model of composure. Unflappable. Unmoved. Unfazed.

Marty flew into the kitchen and blurted out: “Dad, the nuns are drunks!” Dad glanced up from the newspaper, paused, and with a look that defied description said, “WHAT?” Marty, in one fell swoop, had insulted The Church, the Dominicans, its leaders, our neighbors, and most unthinkably, dad’s clients.

In 1971, Boone’s Farm was the hottest contraband around, the stuff of keg parties and Vietnam-era teenage stupidity. Stuff our older sister, Kate, knew well. Even today, adults fall into two categories: those who drank Boone’s Farm and puked, and those who merely gagged. Both had weeklong hangovers.

It would have been less shocking to find a corpse on the property. To that point in the history of the world, the words “Dominican nuns” and “Boone’s Farm” had never been used in the same sentence by anyone, anytime. Our minds raced. Could it be that Sister Francesca was mortal? Another thought involved our sister; she was familiar with Boone’s Farm, partial to Green Apple if I recall. But she would never, ever set foot on the convent grounds for fear of a sudden lightning storm.

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So we got a wagon and carried the goods to the back door of the convent. We rang the bell and waited. One of the sisters arrived, stared down at an 11- and 12-year-old with a rather curious cargo.

“Uh. Sister. We found this wine near the Fatima statute. Under the bushes. Our dad, Larry Keenan, said it’s not yours but you should have it.”

We shifted on our feet, waiting, waiting for a reply. She said nothing, for what seemed to be an hour, maybe two. And then she spoke. “Thank you.”

Redemption once again, was ours.

(Reprinted with permission from the Kansas City Star.)

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
The term “dual diagnosis” has begun to show up in the media. It refers to the situation where an individual has a mental health diagnosis (depression, bipolar disorder, and obsessive-compulsive disorder are examples) and at the same time is using mind-altering substances in a way that causes problems. People often describe their use of “recreational” drugs, alcohol, or prescribed medications in greater quantities than were prescribed as “self-medication,” that is to alleviate the symptoms of their emotional or mental pain or discomfort. Media presentations of these situations are often overdramatic or tragic. Many of us are too familiar with the cases that show up in the courtroom or at our practices. Jails and prisons are filled with severely mentally ill inmates who broke the law while under the influence of drugs or alcohol. All this drama gets the spotlight, while the pernicious tragedy often grows slowly and subtly in the lives of our own families or in our own experience.

Anyone who takes on a profession in the public arena has to have personal management skills: to achieve a practical level of professional competence one must be good at organized thinking. Research, management, presentation, argument all reflect this ability, as does our professional or personal image. Emerging problems in how we exercise our skills can alert us to possible mental health or substance abuse problems and the need for getting help in making lifestyle changes. Further, our culture has exacting requirements for how we show up in public. We often feel our credibility and reputation depend on our public presentation (or representation) of ourselves, and the disconnect between how we believe we are perceived and the way that others see us often marks the critical event at which our substance abuse problem, our mental or emotional dysfunction, or both, come to our attention or the attention of others.

Usually ours is not a dramatic public display of hysteria or drunkenness, but private anguish about holding up under the pressure of on-the-spot decision-making and trying to maintain a competitive advantage. When our mental biochemistry isn’t working right or we are triggered to recall devastating past experiences and pain, when we toss and turn at night and reach for the over-the-counter sleep aid hour upon hour or find ourselves emptying the vodka bottle after our guests leave: these are the moments when our deepest problems appear. And they are easily forgotten over coffee the next morning: this is an early manifestation of the process called denial. Most who have the cognitive ability to become professional in any capacity are also competent at masking their areas of instability or uncertainty, of “hiding the evidence” that they are at any time other than cool professionals. Convincing ourselves that there is no problem, that we are strong enough to handle the problem on our own is an early sign we are avoiding reality. Many who feel the need for this coverup, find solace in alcohol, marijuana, cocaine, etc. So begins the spiral of pain, chemical solution, decreased performance, and fear of discovery that can lead to crisis or to resolution. Problems associated with substance abuse never get better unless they get attention, and mild mental or emotional dysfunction can turn into psychotic behavior and hospitalization with even casual alcohol or drug use. Chronic substance abuse can of itself result in long-term psychotic disorder or in seriously impaired cognitive ability.

Healthy people are usually happy and productive; unhealthy people create problems and even danger for themselves and others: this pretty much sums up current thinking in behavioral health professions. Physicians, therapists, and counselors are becoming more competent at assessing and recommending proper treatment for substance abuse problems, and increasing numbers of substance abuse counselors are gaining sophistication in assessing mental health problems and making appropriate referrals for treatment.

Managing mental health is part of personal maintenance in our intense and fast-paced culture. Is it not better to seek advice and treatment at early signs of mental fatigue and decreasing ability to deal with stress rather than progress to mental illness and/or drug and alcohol abuse? The consequences of denial, avoidance, and delay far exceed the anxiety that you might feel about making changes or getting treatment. Temporary delay of achieving a goal might forestall the complete loss of a career. Getting help before mental illness and drug or alcohol abuse results in public humiliation, criminal charges, and loss of family and home is the only sensible solution. The hardest part for an independent professional is asking for help.

About the Author

Arnie Klassen left post-doctoral research at Harvard Medical School to work in public health at the Fenway Community Health Center in Boston. After owning a small business he returned to his roots in northern Colorado to deal with his alcoholism. This led to a new career, and he has been a substance abuse counselor at Valeo Recovery Center since 1998, where he specializes in treating clients who have co-occurring mental illness. He is past chairperson of the Ethics Committee of the Kansas Association of Addiction Professionals.
Members in the News

Changing Positions

Anne L. Alexander has joined Burlington Northern Santa Fe Railway, Topeka.

Dyanna Ballou has joined Intelligent Document Review Inc., Overland Park.

Brian G. Boos has joined Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park.

Derek S. Casey has joined Prochaska, Giroux & Howell, Wichita.

Traci L. Doering-Ferrell has joined Condray Thompson LLC, Concordia.

Bradley E. Haddock has joined Biggs Law Group LC as Of Counsel, Wichita.

Morgan L. Hall has joined Cook & Fisher, LLP, Topeka.

Katharine J. Jackson and Kitra R. Scharz have joined Morrison, Frost, Olsen & Irvine LLP as partners, changing the firm’s name to Morrison, Frost, Olsen, Irvine, Jackson & Scharz LLP, Manhattan.

Jared B. Johnson has become a shareholder with Clark, Mize & Linville Chtd., Salina.

Christopher J. Kellogg has been promoted to senior associate at Kennedy Berkley Yarnevich & Williamson Chtd., Salina.

Eric W. Lomas has joined Wiesner & Frackowiak LLP, Overland Park.

Aimee A. Minnich has joined Servant Christian Community Foundation, Olathe.

Linda K. Peterson is now with Conlee Schmidt & Emerson LLP, Wichita.

Michelle A. Russell has joined Spirit Aero Systems Inc., Wichita.

Susan G. Saidian has joined Case, Moses, Zimmerman & Martin P.A., Wichita.

Steven R. Smith has joined Gates, Biles & Shields P.A., Overland Park.

Kyle J. Steadman, Wichita, and Issaku Yamashii, Overland Park, have become partners with Foulston Siefkin LLP.

Christine A. Louis and Charles E. McClellan, both of Wichita, and Matthew D. Stromberg, Overland Park, have joined the firm as associates.

Lucas L. Thompson has joined Newman, Reynolds & Riffel P.A., Topeka.

MacKenzie C. Wagler has joined Kutak Rock LLP, Kansas City, Mo.

Karl L. Wenger has become an associate at McAnany, Van Cleave & Phillips P.A., Kansas City, Kan.

Kimberly J. Westhusing has joined Quitmeier Law Firm, Kansas City, Mo.

Changing Locations

The Christopher A. Bowers Law Office LLC has moved to 221 E. 11th St., Kansas City, MO 64106.

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

Colantuono Bjerg Guinn LLC has moved to 7015 College Blvd., Ste. 375, Del Sarto Bldg., Overland Park, KS 66211.


The Kansas City location of Kansas Legal Services has moved to Gateway Tower II, 400 State Ave., Ste. 1015, Kansas City, KS 66101.

Stephen D. Kort has formed his own practice at 7285 W. 132nd St., Ste. 340, Overland Park, KS 66213.

McKee & Ireland LLC has moved to 13480 Arapaho Dr., Olathe, KS 66062.

The Martinez Law Firm LLC has moved to 215 W. 18th St., Ste. 100, Kansas City, MO 64108.

Roger A. Riedmiller has moved to 532 N. Market, Wichita, KS 67214.

Rubin Law Firm LLC has a new office location, 7015 College Blvd., Ste. 375, Overland Park, KS 66211.

Jennifer L. Stultz has formed the firm of Law Office of Jennifer L. Stultz LLC, 131 N. Glendale, Wichita, KS 67208.

The Vermillion Law Office LLC has moved to 10 S. Hallock, Kansas City, KS 66101.

Miscellaneous

Thomas D. Arnhold, Hutchinson, recently completed the Boston Marathon in 3 hours 41 minutes. He is now qualified for the 2010 Boston Marathon.

Deena H. Bailey, Wichita, has been elected to the 2009 board of the Pregnancy Crisis Center.

Cliff L. Bertholf, Wichita, is on the board of directors for Breakthrough.

McAnany, Van Cleave & Phillips P.A., Kansas City, Kan., named Frederick J. Greenbaum, president, Carl A. Gallagher, secretary, and David F. Menghini, member for their 2009 board of directors.

Amy S. Lemley, Wichita, has been inducted as a Fellow of the American College of Trial Lawyers.

The Midivan Law Firm LLC is now Mdivani Immigration Law Firm LLC, Overland Park.

Hon. Kay McFarland and James W. Sloan were awarded honorary Juris Doctor degrees at the Spring 2009 Washburn University School of Law commencement ceremonies.

Timothy P. O’Sullivan, Wichita, is the 2009 President of the board of directors of Starkey.

Trisha A. Thelen, Wichita, is the 2009 chair of the executive committee of the Urban League of Kansas.

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.

“Dan’s Cartoon” by Dan Rosandich

“My son may be a bank robber your honor, but I hope you’ll take into consideration his brother is the D.A.!”

www.DansCartoons.com
Obituaries

H. Jay Gunnels Jr., 86, of Fairway, died Feb. 27 from complications of Parkinson’s disease. He was born Nov. 1, 1922, the son of Henry J. and Marie (Peterson) Gunnels in Paolo. He was a 1944 graduate of the University of Kansas School of Business and a 1948 graduate of the University of Missouri-Kansas City School of Law.

Gunnels retired as an attorney after 54 years of practice. He was a member of the Kansas, Missouri, Johnson County, Wyandotte County, and Kansas City Metropolitan bar associations and Lawyers Association of Kansas City. He was admitted to practice before the U.S. Supreme Court, 8th and 10th U.S. Circuit Court of Appeals, U.S. Internal Revenue, and U.S. Interstate Commerce Commission. He was a lifetime member of the Phi Alpha Delta fraternity, serving as president of Greater Kansas City Thomas Hart Benton Alumni Chapter and nationally as district justice for District 7.

He was a longtime member of the Civil War Roundtable of Kansas City, having served as president in 1971 and was awarded their Valiant Service Award in 2000. He was also a member of the Monnett Battle of Westport Committee. He was also a member of the Advertising and Sales Executive Club and received their Member of the Year in 1968 and received their Valiant Service Award in 2000. He was also a member of the Monnett Battle of Westport Committee. He was also a member of the Advertising and Sales Executive Club and received their Member of the Year in 1968 and received their Valiant Service Award in 2000.

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He was survived by his wife of 59 years, Frances; son, Mark A. Gunnels, Kansas City, Mo.; daughter, Janet L. Gunnels, Prairie Village; and a granddaughter.

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20 Years of the Lindsborg Conference

By Kelly J. Rundell, Deputy City Attorney, City of Wichita

On July 16-18, the Kansas Women Attorneys Association will be meeting in Lindsborg for the 20th time. The annual conference began in 1989, as an effort of the Women Attorneys Association of Topeka to network with other women across the state while obtaining CLE. Marla Luckert chaired the first conference. For a while, the women attorney groups in Wichita and Topeka alternated planning the conference. Eventually, the annual conferences lead to the creation of the Kansas Women Attorneys Association, which organizes the annual retreat. The theme this year is “It’s About Time,” in celebration of the 20th anniversary of the Lindsborg Conference.

The Lindsborg Conference has always been considered a fun weekend and is famously casual, with shorts and flip flops being perfectly appropriate. Those who attend enjoy all their meals together, adding to the collegial nature of the weekend. In addition to the CLE held on the campus of Bethany College, there will be a golf tournament, a fun run from Coronodo Heights, receptions hosted by the University of Kansas and Washburn law schools, and an early morning walking tour of picturesque Lindsborg.

Friday night dinner will be at the McPherson Country Club with entertainment provided by “The Crowsens,” followed by a silent auction to raise scholarship funds. Traditionally, Lindsborg’s downtown storekeepers stay open late and provide snacks for shoppers one night. At night, a large group from the Lindsborg Conference converges on the town’s lone watering hole, the Ol Stuga.

The keynote speaker is always the highlight of the conference. This year, Pulitzer Prize winner Ellen Goodman will be speaking Thursday night. She is the second-most read newspaper columnist in the country and the author of seven books. A gifted writer, Goodman specializes in illuminating the cultural debates that become national obsessions. She is generally considered a voice of reason in a changing world. Like other popular keynote speakers in the past, such as Harriet Lerner and the late Molly Ivins, Goodman’s presentation will be open to the public. Following the keynote address, there will be a reception at the Sandzen Art Gallery.

The Lindsborg Conference has never been limited to women. Men have regularly attended, sometimes as speakers and other times they have been attracted by the diverse CLE topics. The topics this year include litigation, bankruptcy, ethics, immigration, oil and gas, domestic, and other issues. Often multiple CLE classes are held at one time, which allows attendees to focus on the areas of most interest. For example, it would be possible to obtain up to 5 hours of ethics CLE, with specialized classes focused on concerns for solo and small practices, work-product issues, representing victims of domestic violence, and electronic communication. There will be a two-hour “Appellate All-Star Review” of notable state decisions of the past year, presented by Justices Luckert, Beier, Rosen, and Biles. Tenth Circuit Court of Appeals Judge Deanell Tacha will speak on feminist jurisprudence. Bankruptcy Judge Nugent and Court of Appeals Judge Steve Leben are also scheduled to make presentations. Retired Justice Kay McFarland will be a luncheon speaker.

Every year, approximately 200 people attend the Lindsborg Conference. Attendees regularly fill the local hotel rooms and many of the college’s dorm rooms. The chair of the conference this year, Linda Parks, is delighted that the college has a new apartment-style dorm, which will greatly improve the lodging options.

For more information about the Lindsborg Conference or attending Goodman’s presentation, visit www.kswaa.com.
I'll miss finals — the caffeinated surge that closed each semester. I’ll miss the all-consuming relief of handing in that last final, knowing whole days of sleep-filled, guilt-free, unaccountable purposefulness await. I’ll miss the days leading into the semester, stretching, taking a deep breath, bracing to go back, ready for the contest, ready to find the physical limit.

I’ll miss — impossibly — the 24 hours, the mad flurry of finishing the paper, submitting the brief, giving the presentation, and crushing at least one of three questions on a day I wasn’t even supposed to be up. I’ll miss that moment when the heavens open, the stars align, and all of Creation pauses as the Socratic method becomes transparent and for one exultant moment angelic choirs sing Te Deums and I know perfectly: Where the professor is going, what the next question is, what the right answer is, and what the hidden trap in that answer is.

I’ll miss 8 lb. casebooks.

I’ll miss individual cases like old friends — quirky, infuriating, trustworthy, flaky, dense-but-goodhearted, brilliant, enigmatic, or gladly left to years ago — Hadley v. Baxendale, Marbury v. Madison, Sherwood v. Walker, Erie, Palsgraf, Lochner, Mayo v. Satan. I’ll miss stunningly implausible Rules ... against Perpetuities, in Shelly’s Case, 1. I’ll miss boldly paradoxical statements of law: One who uses another’s property violates a sacred interest and must be called to account, unless he uses it persistently, consistently, openly, and with utter disregard for the true owner, then the property becomes his. I’ll miss random Latin and poorly pronounced French.

I’ll miss free Westlaw.

I’ll miss professors who care passionately about the most obscure and Byzantine provisions of law, but who also engage the broad themes and purposes of the law, who like teaching, who like their students, but who expect their students to push beyond self-imposed limits. I’ll miss the look of hope hinting in professors’ eyes as they see a difficult concept about to click in a student’s mind. I’ll miss the encouragement they offered as we then required second and third chances before getting it. I’ll miss professors who model the learned, courteous, selfless professionalism for which the Bar strives.

I’ll miss law review articles bluebooked to within an inch of their lives and annotated well past. I’ll miss friendly rivalries with sibling publications.

I’ll miss the space to scrutinize what I think the law is and what it ought to be. I’ll miss reconciling codified values with their everyday impacts on people otherwise trying merely to go about their lives. I’ll miss being an informed spectator to legal debates as they raged through agencies, courts, and legislatures. I’ll miss casual, wide-ranging conversations about the Constitution at Taco Bell or the rec center. I’ll miss having to look behind an argument to see why it’s made.

I’ll miss wearing flip flops on weekdays.

I’ll miss classmates and friends. I’ll miss the common cause of surviving. I’ll miss the impromptu escapes. I’ll miss the near-campouts in Green Hall. I’ll miss the long nights, barely remembered. I’ll miss celebrating one another’s job offers or victories or Computer-Assisted Legal Instructions or marriage or new sons or daughters. I’ll miss the ready consolation for “although your credentials are impressive” letters, for the bitter end of the curve, for the unforgiving math of class rank, for fiery trainwrecks of interviews, for the painful interventions of the world beyond the law school. I’ll miss coping humor. I’ll miss inside jokes that, even stale, bring a chuckle three years later. I’ll miss those moments when only borrowed strength kept me moving. I’ll miss returning the favor, lending strength when needed. I’ll miss the individuals, the characters, the people who made up each day.

And, yes, in practicing law, there will still be cases and statutes, impossible deadlines, worthwhile challenges, and achievements. There will still be the friendship of colleagues and the shared purposes of the profession. But never again as safe, the consequences of failure no longer mine alone. I’ll miss the comforting security of academic exercises.

But I came to law school intending to practice law. I came, in large part, because I wanted to have an impact on my community. With the chance to make a difference comes real risk. And law school has prepared me about as much as possible to be the advocate, counselor, and professional I hope to be.

About the Author

Daniel Morris, Wichita, received his Bachelor of Arts in language and literature from Sterling College. He graduated from the University of Kansas School of Law in May 2009. He is sitting for the Missouri bar this summer and anticipates sitting for the Kansas bar in February 2010.
Twitter Invades the Internet

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

Germany’s invasion of Poland on Sept. 1, 1939, forced Neville Chamberlain to retreat from his appeasement strategy and pushed him to invite Winston Churchill into the War Cabinet as First Lord of the Admiralty. Churchill accepted as Britain declared war on Germany and the Board of the Admiralty sent a telegram of the news to the Fleet: “WINSTON IS BACK.”

This notable event succinctly explains Twitter. Subscribers to the free site broadcast a 140-character message to a group of followers via text messaging from any mobile phone. It is an elegantly simple tool with a heritage as old as Morse code that has exploded in recent months to more than 25 million users. Twitter has so effectively captured the minds of the online community that Google may be negotiating to purchase users. Twitter has so effectively captured the minds of the online community that Google may be negotiating to purchase Twitter.com for as much as $250 million.

Starting with Twitter

Twitter’s popularity seems to come from the same sources as the rapid growth of Facebook, MySpace, LinkedIn, and other online communities. Internet users gravitate to communities of like-minded souls to gather in the public commons. Twitter makes that simpler by stripping away the distractions cluttering online communities and even strips away the computer used to access them.

To start, simply sign up for free at Twitter.com. Once your account is activated and your profile set, link the site to your mobile phone so you can send and receive updates (called tweets) away from your computer as easily as sending a text message. Use search to find friends, family, and colleagues whose tweets you want to follow and invite others to become followers of your tweets. If you want to see or join trends popping up in current Twitter conversations, Twitter’s search site can display the top 10 conversations in real time.

As simple as the service might be, it is evolving rapidly and a fuller explanation of some of its features is available at the Webdesignerdepot.com’s “Ultimate Guide for Everything Twitter.” (http://tinyurl.com/djnh06)

Mining Tweets for Value

Most lawyers still see Twitter’s value as advertising. For example, a lawyer might tweet news of the latest dramatic increase in court costs this July. Presumably, this stream of legal information creates a “brand” that potential clients will recall when they need counsel. Other lawyers believe knowledge of emerging technologies connects them with younger clients. A fresh law school graduate in the ABA TECHSHOW 2009 audience hung out his shingle on Twitter and attributed his first successful year to clients responding to his Twitter presence. I think Twitter becomes much more interesting to lawyers in the new collaboration methods it might allow. Many lawyers currently participate in Listservs where legal approaches and techniques are discussed. My experience reveals these listservs to have improved the quality of legal counsel and built better self-policing communities of lawyers. Twitter is a more readily available, real-time evolution of the Listserv. A lawyer at court could consult with a team of mentors in real-time in reaction to events at hearing — an interesting development.

Criticisms of Twits

If there is any fault with Twitter, it lies with how much pure noise is generated by its users (often called Twits). Much of our day-to-day lives are slow news days undeserving of broadcasting. Twitter only occasionally rises above those mundane missives when major events break out. For example, amateur coverage of the search for the lost Appalachian Trail hiker, Ken Knight, allowed unique access to an interesting story mostly generally unavailable in the news.

Credibility is still a major issue, however. The tweets streaming out of Twitter are virtually anonymous and disinformation spreads as readily as illumination. Twitter’s value at gauging current trends can also be questionable; the relatively small ABA TECHSHOW in April dominated Twitter’s top topics for two days — a feat that far exceeds its importance in the overall Internet world. Filtering all this newly available data and generating content is overwhelming.

Go Forth and Tweet?

If you enjoy Facebook or LinkedIn, Twitter is a simpler way to get at the content your friends and colleagues create. A site like Ping.fm can make managing all of them a breeze with one-stop updating — assuming there is something worth saying. Once I figure out something worthwhile to say, I may say it via ZimmermanLaw on Twitter should you want to follow along.

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.
When Not To Patent

By Marshall S. Honeyman, Lathrop & Gage LLP, Overland Park and KBA Intellectual Property Section president

When an invention is made by an employee, the company must decide whether to pursue a patent, or not. This decision-making is best managed according to a process of elimination. That process is addressed here, with each step expressed as a question – A through G – each of which begs a yes or no answer. A “no” at any point along the way is fatal, meaning that a patent should probably not be filed. Six straight affirmative responses, and it likely makes sense to file for a patent.

A. Does the invention include patentable subject matter?

The first potential stumbling block faced when addressing the patent-or-not issue is that the invention may not be something that is legally patentable from a subject matter standpoint. It is more likely for the company to improperly dismiss the patentability of the thing than to assume patentability where none exists. Not everything that is patentable is as tangible as the light bulb or the airplane. Virtually “anything under the sun that is made by man” qualifies. See Diamond v. Chakrabrabarty, 447 U.S. 303, 309 (1980) (quoting O’Reilly v. Morse, 56 U.S. (15 How.) 62 (1854)).

There are exceptions to this presumption. One exception regards laws of physics and mathematical formulae. Assume that Sir Isaac Newton lived today. One day he discovers the relationship that every object in a state of uniform motion tends to remain in that state of motion unless an external force is applied to it. Although this recognition may have tremendous scientific benefit, the discovery would not constitute patentable subject matter. Newton, in the hypothetical, has simply recognized an already existing physical relationship and has not involved the requisite hand of man in the process, and such things are not patentable. See, e.g., O’Reilly v. Morse, 56 U.S. (15 How.) 62 (1854).

Another exception relates to natural phenomena. Anything that occurs in nature without the hand of man intervening is not patentable. See Ex parte Grayson, 51 USPQ 413 (Bd. App. 1941). For example, assume that an explorer machetes his way deep through foliage into a secluded location in the Amazon forest. There he finds a spectacularly colored plant that no man has ever seen before. It is then learned that the plant is unique to the area where it was discovered. Although the explorer may be able to reproduce the plant and commercialize it, the plant itself would not be patentable because it is naturally occurring. If, however, the explorer discovers that by boiling the plant in water to make a tea, which has medicinal benefits, then this process would be patentable subject matter because a contribution has been made by the inventor.

Abstract ideas are another exception. There has to be some level of concreteness in order to get patent protection. For example, you cannot patent a song, abstract works of art, or mere printed matter. See, e.g., In re Jones, 373 F.2d 1007, 153 USPQ 77 (CCPA 1967).

Though there has been legal wrangling over these exceptions, it is rare in practice that any of the above three exceptions come into the course of discussion. It is more common for a client to fail to recognize patentable subject matter than to submit an idea for patenting, which falls within one of the above-noted exceptions.

Two areas where inventors often incorrectly dismiss patentability are business methods and computer-related inventions. Business methods are patentable and subjected to the same legal requirements applied to other methods and processes. Thus, a particular method you use to run an online auction would be patentable from a subject-matter standpoint. So are computer-related inventions, and even computer programs so long as they are adequately tied to a computing device and/or manipulate the data in a way that produces a “tangible result.” The purely algorithmic aspects of a computer program may not be patentable, but the functions that program accomplishes in relation to some useful task are. See, e.g., AT&T Corp. v. Excel Communications Inc., 172 F.3d 1352 (Fed. Cir. 1999). Unfortunately some business owners summarily assume these types of methods can not be patented and thus, they miss out on what might have been a good business opportunity.

It should be understood that just because the invented something qualifies as patentable subject matter under this heading does not mean that it will necessarily be patentable. There are numerous additional legal requirements such as novelty, 35 U.S.C. § 102, and nonobviosness, 35 U.S.C. § 103(a) requirements, which must both be met in order to ultimately patent an invention, even if that invention includes patentable subject matter. Other legal requirements may deny coverage if the patent application is presented in improper form. See, e.g., 35 U.S.C. § 112; ¶ 2, which requires clarity and precision in claiming the invention. But these issues are the patent practitioner’s problem. A company should never dismiss something as unpatentable on its face unless it clearly falls into one of the exceptions noted above. So although the answer here will tend to be “yes,” a company should always present the “is-it-patentable” question to counsel to ferret out what is, and is not, patentable subject matter.

B. Is ownership established?

Before pursuing a patent, a company should first establish that it is the owner of the invention. The general rule is that an employee inventor owns the rights to inventions made in the course of that employment unless (1) there is some expressed obligation, e.g., a contract, which obliges the inventor to assign these rights to the employer, or (2) the inventor employee was specifically hired to invent the sort of thing at issue. See Hapgood v. Hewitt, 119 U.S. 226, 233-34 (1896). And whether an inventor was hired to invent depends on numerous factors, with cases often going against the company. Thus,
it is critical that a company require its employees to agree in writing to assign any inventions made within the scope of employment to the company. This is preferably established through specific provisions expressed in employment agreements when the employee is hired. Additionally, the employees should be required to sign assignments, which are submitted along with any patent application filed.

Where the company is able to establish ownership in one of these ways, it controls the patent before the U.S. Patent and Trademark Office. Thus, the company is able to pursue patent protection without the consent of the inventor/employee. This often comes as a surprise to ex-employee inventors who assume that their ex-employer is somehow dependent on them as a named inventor in a pending patent application. But unless the company has established ownership at some point, these controls will not be realized. Thus, it is critical to ensure ownership by agreement before filing a patent.

Looking at ownership from the inventor’s perspective, an employee interested in pursuing patent protection independent of his or her employer should carefully review any employment agreements before investing any personal resources in the patent process. Otherwise that employee may end up paying to get a patent which ultimately becomes the property of the employer. If the invention is made within the scope of employment, the company will have a higher likelihood of obtaining ownership – even if the inventor expended his or her own resources in development. For example, an employee who designs infrared emitters for an electronics company is not likely to lose rights in a garage he invents in his garage just because he is employed by the company. But if he develops an infrared emitter in his garage, he’s more likely to have ownership problems – even if he completely funded the project and the emitter was developed outside of working hours.

Regardless, the company or inventor interested in pursuing a patent should verify ownership before investing any resources. And if ownership cannot be established, an application should not be filed.

C. Has anyone engaged in conduct that would legally bar patenting?

Federal law provides that you will lose your patent rights if you: (1) sell, (2) offer for sale, (3) publish, or (4) publicly use your invention greater than one year before filing a patent application on that invention. See 35 U.S.C. § 102(b).

Thus, if your company wants to market products embodying the invention, you must have a patent application on file within a year from the date you first start marketing it or you lose any patent rights you might have had. The same is true if you disclose your invention in a journal, which is made publicly available more than one year before filing. Public use includes more than its plain meaning would suggest. For example, it would obviously include displaying your invention at a county fair in which the public was able to view it. Public use also, however, includes some private activities conducted in secret. For example, if you use a software program internally for its intended purpose, and the company is deriving benefit from the use, it would be considered public from a legal standpoint, thus beginning the clock on the one-year grace period.

Another important thing to consider is the effect sales, offers for sale, publication, and public use will have in foreign countries. In most foreign countries, i.e., all of Europe, China, Korea, and Russia, these activities will result in the immediate loss of rights. Exceptions to this are Japan, which offers a six-month grace period in which to file, and Canada and Australia, which each allow for a year. The rules for these countries, however, differ in terms of the circumstances in which the grace periods apply. Thus, a company having a primary objective of obtaining overseas patent protection will probably not want to file an application if the invention has already been published or commercialized.

D. Does the invention survive the search?

Before filing an application, the business should perform some sort of patentability research. This may be done internally, but the most common practice is to have patent counsel obtain a patent search from a professional searcher. The searcher is normally a specialist who is not only comfortable with the technological subject matter, but is also proficient using prior-art databases.

Searches are almost always a good idea where the company lacks a complete understanding of the prior art. Especially where the invention is new to, or unrelated to the company’s normal product offerings.

In other instances, a search may not be necessary. For example, where an inventor has vast understanding of what is conventional in his given field, the company may elect to rely on his or her personal knowledge. The rationale supporting this position is that if the invention already existed, the inventor would likely know about it. But this handling is risky. Any experienced patent practitioner knows that even the most knowledgeable inventors can be surprised by the relevant publications turned up by a crafty searcher.

The cost for the search should be relatively low, and an analysis of the publications returned will give the company a good estimation of what patent coverage might be available. If the potential coverage available is too narrow, an application should not be filed.
The up-front research may also turn up prior art patents, which are relevant from an infringement standpoint – even if irrelevant to patentability. If the proposed invention would infringe a valid claim of another’s patent, the company will not want to file a patent, and of course likely drop the project unless a license to the patented technology is available and affordable

E. Is a patent the best intellectual property alternative?

It should always be considered whether filing for a patent makes good business sense. Sometimes patenting, although an option, is not the best option. Sometimes secret inventions can be protected using agreements, e.g., confidentiality agreements and nondisclosure agreements, instead of patents. The agreements are relatively inexpensive and create trade secrets. This might be the best option if the inventor or company is able to maintain secrecy of the invention while still using it for economic advantage. For example, assume the invention is a secret chemical reaction, which occurs in a vessel in a factory and is used to produce a plastic product. In using the process, only a few trusted individuals need to know the secret steps, and assume further that the information cannot be derived by reverse engineering. In this case, secrecy alone will preclude copying because outsiders won’t be able to replicate the process. Because patent terms are limited to 20 years from the date they are filed, trade secret status, if maintainable, might be a better option than patenting because the invention is able to be exploited exclusively by the company indefinitely.

Protecting your invention by keeping it secret, however, can have numerous disadvantages. First, the company will always have to worry about leaks. Most inventions are difficult to keep secret. And, if a party other than those bound to the agreement discovers or learns of the invention by independent means, there may be no recourse for the theft of ideas. Further, trade secret cases are difficult to prove. Especially where the secret information has traveled from person to person before the leak is discovered. The issue becomes who blabbed and when – a difficult thing to investigate. And proving that the contracted party has actually caused the illegal disclosure can be even more challenging. Patents do not present these kinds of problem because they create a well-defined property right, which may be enforced. The scope of the property right in the patent is defined by the documents claims. Similarly to the way a property description in a deed carves out the landowners boundary lines, the patent claims will define what competitors can duplicate from the patented invention, and what things cannot. Thus, the patent owner as well as the potential infringer will be able to ascertain what activities will run afoul of the patent, and which ones will not.

Further, when a patent owner wishes to enforce his or her rights, the proof required is typically readily available. The investigation in some cases will involve merely purchasing the allegedly infringing product from a store. And liability will depend on whether that easily obtainable product falls within the scope of the claims of the patent, which is a publicly recorded document. Therefore, the evidentiary requirements are usually less burdensome in a patent litigation than in a trade secrets case.

Another benefit in filing a patent application is that the company is relieved of the obligation to keep the invention secret. Unlike with trade secrets, the patenting process requires disclosure to the public before patent rights are granted. This alleviates the burden on the company to continually update its contractual relations with those exposed to the invention. Copyrights may also be relied on as a patent substitute in some instances. For example, where the invention involves artistic contributions made by the inventor, e.g., a distinctive Web page layout, unique architecture, copyrights will exist in the particular work, and thus, might provide some useful intellectual property rights. Patents can, of course, be used in combination with copyrights and other forms of intellectual property.

F. Can the patent be used to accomplish a clear business objective?

The company should have a clearly focused business objective for every patent application it pursues. Perhaps the most suggested use is bringing an infringement action for damages and possibly injunctive relief. But the real-world usefulness of a filed patent is not limited to litigation. To derive benefit from a patent, the owner need not necessarily commit to bringing costly litigation in the face of infringement (as is suggested in some circles).

The benefit might instead be derived from cross-licensing. Sometimes by obtaining a patent, you can leverage yourself in a way that will later enable you to use another’s proprietary technology. For example, imagine a first company develops and patents a super-bright, light-emitting diode (LED). Even though the LED is proven as an extraordinary illuminator, it is not marketable because the materials used are unstable. A second company later develops and patents a new way to encapsulate the super-bright LED. The new version possesses all the lighting benefits existing in the original, but because the encapsulation provides the stability necessary, the product is now useable and sellable.

Under these facts, neither party will be permitted to manufacture the new encapsulated LEDs – the only ones that work – without the agreement of the
other. The first company can stop the second company from selling either version because of its fundamental patent coverage on the LED alone. The second company can stop the first company from producing because of the patent on the encapsulation process. Cross-licensing rectifies this situation. If both companies license their patent rights to the other, both can produce the new LEDs to the exclusion of nonparties.

Another business objective might be intimidation. Some companies create a patent briar patch around key products to scare away competitors. If the protection is extensive enough, a company may be able to dominate the market with respect to a particular product, or line of products, without being going to court, or being otherwise proactive. Consider, e.g., the ink-jet-printer-refill-cartridge business model. The major ink-jet printer companies sell printers at relatively low prices, but the originally included ink-jet cartridges soon run out. In order to replace the original cartridge, the consumer must purchase a replacement, which meets requirements of the printer. It is then discovered that the only replacement cartridge available is sold by the printer manufacturer, and at an astronomical price. Why don’t competitors market a low cost alternative forcing prices down? One reason, Patents. The printer manufacturer obtains patent protection for every conceivable feature of the device, e.g., the housing, the ports, the ink used. But the incredible cost for doing this is not without realized benefit. The intimidating effect created by the company’s patent thicket will prevent a competitor from copying or even designing around the patents for fear of costly litigation. Thus, the printer company is able to continue to sell its replacements at a healthy profit margin without the threat of competition.

Numerous other useful business objectives exist, but the importance is that the issue is breached at all. Too many times applications are filed in batch without careful thought given to what, if any, business objective is to be reached. And unless some clearly defined business objective exists, an application should not be filed.

G. Does the cost justify filing?

Ordinarily, filing a single patent application will cost between $4,500 and $15,000, and there will be significant prosecution costs after that. Thus, in addition to identifying a business use before filing, the company should decide whether the potential scope of protection available is worth the significant expense.

The preliminary patentability research discussed in step “D” is very helpful in making this determination. Any prior art obtained in the search will enable the patent attorney to compare the supposed novelty in the invention against the prior art disclosures and make a prediction of the possible patent coverage available. Assume, for example, that the invention is a golf club with a battery-operated weed-eater arrangement attached to the bottom. The weed-eater is useful when the golfer encounters high grass so that it can be cut down around the ball. Assume further that a patent search obtained reveals a prior art publication showing a golf club with a razor blade cutting device at the bottom of the club head. The razor edge is used to cut grass upon making a club swing. Because a cutting device at the bottom of the club exists in the prior art, the company knows it is not going to get patent coverage so broad to preclude others from making any sort of cutting device at the bottom of the club. But it is possible that the company would get coverage that would preclude the making of clubs having any sort of mechanized cutter. That said, the company must make the determination of whether the benefit realized from a patent having that scope of coverage will be worth the patent application prosecution costs. If the manual razor blade version is a substantially equal alternative to the invention, it will make little sense to file an application from a business standpoint. But, on the other hand, if the mechanized cutting mechanisms of the weed-eater version make it a superior and more profitable product, the company will surely want to file.

Conclusion

Only after successfully clearing hoops A through G should you file a patent. Getting a “no” answer can be disappointing, but it is best to receive the bad news before investing thousands pursing a worthless patent.

About the Author

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I. Introduction

Most clients never think about the tax consequences of a win or a settlement. For their lawyers who do, analysis of whether a recovery is taxable has become more complicated through Congress’ and the U.S. Supreme Court’s continual tinkering with tax laws. This article provides a step-by-step guide for determining whether an individual who receives a recovery is taxable and should help practitioners spot potential problems that may require tax planning to maximize the recoveries they achieve for their clients.

First Step: Everything is included in gross income, unless an exception applies

Under the Internal Revenue Code, taxability of income is the rule, exemption from tax the exception. If the cause of action that forms the basis of the recovery satisfies one of the exceptions outlined in Sections 104(a) (1) or (2), the recovery (or the exempt portion thereof) is not included in the client’s gross income and is not taxable. If no exception applies, however, the recovery is taxable.

ENDNOTES begin on Page 24.
Second Step: Is the recovery on account of personal physical injuries or physical sickness?

Before we move to complexities, two simple rules may be mentioned. 1) Damages that are punitive in nature, and therefore by definition noncompensatory, will generally be taxable. 2) Damages that are compensatory, but arise from no physical injury or physical sickness, will generally be taxable. However, even if the recovery constitutes compensation for physical injury or physical sickness, additional analysis of the underlying claims will be necessary to determine the tax consequences.

Personal injury recoveries

The basic exclusion for certain personal injury awards is found in § 104(a)(2), which provides that gross income does not include “the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or physical sickness.” Before a recovery can fall under this exclusion, the taxpayer must demonstrate that (1) the underlying cause of action giving rise to the recovery is “based upon tort or tort-type rights” and (2) the damages were received “on account of personal injuries or sickness.” State law controls for purposes of determining whether a tort-type injury exists. The requirement that damages be from “personal physical injuries or physical sickness” means that, if an action has its origin in a physical injury or physical sickness, then all damages (other than punitive) that flow from the action are treated as damages received on account of personal physical injuries or physical sickness, whether the physically injured or sick person is the one receiving the settlement or award. Moreover, if a tortious act causes physical injuries, which in turn cause other damages such as lost wages or pain and suffering, then all of the damages will be considered “on account of” physical injury.

Emotional distress recoveries

Confusion often surrounds how the tax code treats compensation for emotional distress. This is because emotional distress is not technically considered a physical injury or physical sickness. Nevertheless, emotional distress damages arising out of a physical injury or physical sickness are still excluded from the client’s income. Because all damages received on account of physical injury or physical sickness are excludable from gross income, any damages received on a claim of emotional distress that are attributable to physical injury or physical sickness is excludable.

Workers’ compensation claims

Generally, amounts received by employees on account of personal injuries or sickness incurred in the course of employment (i.e., occupational injuries), whether under a workmen’s compensation act or similar statute, are excluded from gross income. Yet this exclusion does not apply to a retirement pension or annuity to the extent it is determined by reference to the employee’s age or length of service, even if the employee’s retirement is necessitated by an occupational injury. Also, an exclusion under a workers’ compensation law is limited to the amount of recovery allowed in the applicable statute.

Age discrimination recoveries

Age discrimination recoveries are generally not excludable. Age claims commonly fail to satisfy the second prong of the “Schleier test,” that is, plaintiffs are typically unable to show that any part of the proceeds related to a personal injury.

Schleier v. Commissioner is an important case because it provided courts with definitive guidance before Congress took legislative action in 1996, with the passage of the Small Business Jobs Protection Act. Specifically, in Schleier, the Supreme Court had decided that for the § 104(a)(2) exclusion to apply, a recovery must satisfy two distinct requirements: (1) the amount must have been received in an action based upon tort or tort-type rights; and (2) it must have been received “on account of personal injuries or sickness.” This became known as the Schleier test. As length, the Court’s opinion discusses the requirement that in order to satisfy the “on account of a personal injury or sickness” criterion of (pre-1996) § 104(a2), there must be a direct link between the injury and the recovery. Thus, the two-part test of Schleier was born.

After the Schleier decision’s two-part test was handed down, Congress enacted the Small Business Job Protection Act of 1996. In essence, this legislation incorporated the Schleier test into § 104(a)(2).

Racial discrimination recoveries

As a rule, recoveries for claims arising under racial discrimination statutes are included in gross income. As with age discrimination claims, racial discrimination plaintiffs ordinarily cannot show that the recovery was paid on account of physical injuries or physical sickness.

Attorney’s fees

After paying legal fees, a plaintiff who must include the entire damage award as taxable income sometimes ends up having little or no money left. Do not assume that the client will be able to deduct the attorneys’ fees paid. Normally, attorney’s fees can be considered a miscellaneous deduction for taxpayers, subject to a 2 percent floor; that is, such deductions may be claimed only when they exceed 2 percent of the taxpayer’s adjusted gross income (which, for most taxpayers, is equal to their gross income). To the extent the taxpayer’s recovery is taxable, the taxpayer’s income increases, and the level of the 2 percent deductibility threshold also increases. This can eliminate any benefit that the taxpayer would otherwise get from later deducting the attorney’s fees. Despite the seeming unfairness, amounts for attorney’s fees and costs included in damage awards based on nonphysical injuries or sickness are not excluded from income.

Alternative Minimum Tax (AMT)

Because of a hole in current legislation, plaintiffs in non civil rights type claims, such as defamation, do not escape the AMT provisions if they are successful in cases involving contingent attorneys’ fees.

Third Step: Interest, an often overlooked component

As a general rule, amounts awarded as interest must be included in taxable income, regardless of the underlying cause of action. Unfortunately, practitioners often overlook this, especially when a case is settled following the entry of a judgment for the plaintiff that includes an award of interest. A settlement that states that “no interest” will be payable is insufficient, because case law suggests that the Internal Revenue Service (IRS) would require the client to include at least a pro rata amount of interest, in proportion to the other elements of the judgment that the client was initially awarded.
Legal Article: The Taxation of Tort...

A practical suggestion: Case law implies that, if the parties stipulate to a moderate amount of prejudgment interest from a specific date forward, it will be more difficult for an IRS challenge to succeed. When this is done, it is important for the interest to be reported separately to the taxpayer on a Form 1099-INT, rather than lumped in with the rest of a recovery.

**Fourth Step: Allocation of award between taxable damages and nontaxable damages**

Especially in a settlement, it can be difficult to decide what amount should be allocated to taxable damages and what to nontaxable. Unlike an itemized jury verdict, which makes the allocation easy, a settlement often requires analysis of the complaint, and sometimes even testimony of the plaintiffs’ attorney about the strengths and weaknesses of the underlying claims. Importantly, if challenged by the IRS, the taxpayer bears the burden of showing that the government erred in determining that the settlement proceeds are taxable.

An allocation in the settlement agreement, specifically stating how the recovery should be allocated among the elements of the claim (e.g., what amount should be allocated to the plaintiff’s claim for punitive damages) can help a client at tax time. However, while courts consider how the settlement agreement allocates the proceeds, they are not bound by this allocation. Generally, the court will, for tax purposes, uphold an allocation of proceeds in a settlement agreement when (1) the parties entered into the arrangement in an adversarial context, (2) the agreement was at arm’s length, and (3) the agreement was entered into in good faith.

As a matter of practice, it is recommended that the practitioner always include allocation provisions in the settlement agreement, and do so with specificity. While it remains possible that the IRS may challenge the allocation, its absence will wave a red flag, inviting an IRS dispute.

The following chart shows common types of damages, whether the client should treat the funds as taxable income, and the supporting authority a practitioner should consult.

<table>
<thead>
<tr>
<th>If the underlying type of claim and resulting damage is…</th>
<th>Include in taxable income?</th>
<th>Supporting Authority</th>
</tr>
</thead>
</table>
| Lost wages, including back and front pay arising from an employment cause of action | Yes | • 26 U.S.C. § 104(a)(2)  
| Compensatory damages for emotional distress, pain and suffering, but NOT associated with a personal physical injury and NOT including medical expenses from emotional distress | Yes | • 26 U.S.C. § 104(a)(2)  
• Burke v. United States, 504 U.S. 229 (1992)  
• Murphy v. IRS, 493 F.3d 170 (D.C. Cir. 2007), aff’d, 362 F. Supp. 2d 206 (2005), reh’g en banc denied, No. 05-5139 (D.C. Cir. 9/14/07) |
| Compensatory damages for emotional distress, pain, and suffering associated with personal physical injury | No | • 26 U.S.C. § 104(a)(2)  
| Medical expenses associated with emotional distress | No | • 26 U.S.C. § 104(a)(2)  
| Damages arising from a personal physical injury or sickness | No | 26 U.S.C. § 104(a)(2). |
| Attorneys’ fees and costs of suit associated with employment discrimination claims | No | 26 U.S.C. § 62(a)(20); (e) |
| Liquidated damages including recovery for causes of action involving FLSA, FMLA, ADEA | Yes | • 26 U.S.C. § 104(a)(2)  
Fifth Step: Form W-2 or Form 1099-Misc, reporting the taxable amounts

There are two choices concerning the method for reporting income from an award, damages or settlement: Form W-2 and Form 1099-MISC. On Form 1099-MISC, there are two additional choices, Box 3 and Box 7. Box 3 is for “other income,” including taxable damage awards. Box 7 is for “non-employee compensation” more than $600.

By way of example, assume that attorney achieves a settlement of $100,000 for a client. The attorney’s fee is $40,000, leaving $60,000, with $40,000 allocated to emotional distress and $20,000 to lost wages. For lost wages, deciding whether to use Form W-2 or Form 1099, box 7, depends on the facts and the client’s financial circumstances.

If a W-2 is used, the defendant-employer will deduct applicable taxes and withholding for Social Security and Medicare (FICA taxes) just as if issuing a payroll check. The defendant will also have to pay the employer’s matching taxes. As a result, the client will receive a check for less than the $20,000 allocated to lost wages.

On the other hand, if Form 1099, box 7 is used, the Defendant-employer will issue a check to the client for the full $20,000. No state, federal, or FICA taxes are deducted, nor does the defendant-employer pay any matching FICA taxes. At year’s end, the client will receive a 1099 with $20,000 reported in Box 7. The client will be required to pay all the taxes, including the defendant-employer’s 7.65 percent matching FICA tax, as well as the state and federal income taxes that were not withheld.

As a practical matter, deciding which choice is best often depends on whether the client will be in a financial position to pay the taxes at year end — if they are not taken out by the defendant-employer — and whether the client will remember to do so.

As to the $40,000 for emotional distress, this must be paid with a separate check, and reported in Form 1099-MISC, box 3, “other income.” Importantly, make certain the settlement agreement specifies that the payment must be reported in Box 3. It is common for a settlement agreement to state only that payment should be reported on a 1099, and then for the defendant incorrectly to complete Box 7, making the client pay self-employment taxes.

When an insurance company is issuing the funds, a W-2 is normally not issued to the client for any settlement amounts that are allocated to, or that are ultimately paid for, wage loss. In this situation, consider whether the defendant-employer can write the check for the wage-loss amount of the settlement, so that the client may receive a W-2 for it.

All payments to attorneys must be reported, even where the attorney did not provide legal services to the payor. This means that defendant-employer should complete an information return to the IRS about payments issued to the attorney. As a matter of practice, this means that, when a defendant-employer issues one check made out jointly to the attorney and client, a 1099 will be issued to the attorney showing the entire amount of the check, even though the attorney disbursed part (or most) of it to the client. If the attorney prepares a Form 1099 from the defendant-employer, in the actual amount of the attorney’s fee, then the attorney should be paid by separate check (It is a good practice, by the way, to keep a completed Form W-9 on file to provide with the signed settlement agreement).

II. Conclusion

As should be evident, clients with similar claims can receive different tax treatments of their tort recoveries. Plaintiff attorneys must become familiar with the possible tax consequences of any potential recovery. For example, if a client learns that a third of a settlement will go to the IRS, this may make an offer less attractive. Clients can also be financially affected simply by the method used to report their recoveries to the IRS. Likewise, attorneys need to be aware that their own taxes can be affected by how their fees are reported by judgment or settlement payors. Careful planning in all aspects of a client’s case will help to minimize the client’s tax burden while maximizing recovery.

About the Authors

Susan A. Berson is a partner in The Banking & Tax Law Group LLP in Leawood. Berson began her legal career as a trial attorney with the U.S. Justice Department Tax Division in Washington, D.C., where she was responsible for litigating cases on behalf of the Internal Revenue Service. She is also the author of the treatise “Federal Tax Litigation” (Law Journal Press 2001), and “The Model Rules of Personal Finance for Professionals” (ABA 2008).

ENDNOTES

1. Recoveries for defective products that do not cause personal injury or property damage are beyond the scope of this article.
2. I.R.C. § 61 (Gross income “means all income from whatever source derived except amounts specifically excluded.”)
3. Unless otherwise stated, all references are to sections of the Internal Revenue Code (1986), as amended, found at Title 26 of the U.S. Code.
4. Murphy v. IRS, 493 F.3d 170 (D.C. Cir. 2007), aff’d, 362 F. Supp. 2d 206 (D.C. Cir. 2005), rev’d en banc denied, No. 05-5139 (D.C. Cir. Sept. 7, 2007) (Murphy had received an award for compensatory damages of $70,000, $45,000 of which was for past and future emotional distress and $25,000 of which was for injury to her reputation. Upholding the constitutionality of taxing compensatory damages, the D.C. Circuit held

that gross income, as defined by § 61, includes compensatory damages for nonphysical injuries, and that imposing a tax upon such damages is within the Congress’ taxing power. The court also sustained the district court’s holding that the taxpayer’s compensation, which arose from an administrative action brought against her former employer, was not received on account of personal physical injuries); See also Ballmer v. Comm’r, Tax Court (T.C.). Memo 2007-295; Hawkins v. Comm’r, T.C. Memo 2007-286.
5. Plaintiffs’ attorneys may be tempted to submit a jury instruction concerning the tax consequences of a recovery, in the seemingly logical hope that, a jury might tailor its verdict to maximize the nontaxable elements. Even where such instructions are allowed, plaintiff’s counsel should keep in mind that, if the case settles, the instruction (whether
proposed or even only requested) may constitute plaintiff's written admission that the recovery is fully taxable (perhaps as wages, thus subject to withholding and employment taxes), and will likely be considered by the IRS if an audit occurs.

6. I.R.C. § 104(a)(2) (To give some context, historically, what constituted “personal” physical injuries was a hotly contested issue between the IRS and taxpayers. Before 1996, the Internal Revenue Code merely required “personal” injuries as a threshold for excluding a damage award from taxable income. Yet, during the ’80s and ’90s, courts had created a split in the circuits by somewhat haphazardly using the “personal” characteristic as an umbrella for extending the exclusion to awards that did not have a physical injury or sickness element at all, such as damages for the deprivation of the right to free speech in Bent v. Comm’r, 87 T.C. 236 (1986), aff’d, 835 F.2d 67 (3rd Cir. 1988). Then, in 1995, the Supreme Court decided to tackle the matter when it accepted certiorari of the Comm’r v.Schleier case (discussed in further detail by this article under Age Discrimination Recoveries). Providing a definitive two-part test for § 104 applicability and, at the same time, halting the ever-expanding definition of what could be excluded from taxable income, the Supreme Court’s Schleier decision was the precursor to Congressional action. In 1996, Congress decided to significantly amend the Internal Revenue Code by enacting the Small Business Job Protection Act, signed by President Clinton on Aug. 20, 1996. As amended, § 104(a)(2) excludes from taxable income only damages for physical injuries or physical sickness. Translation: If an action has its origin in a physical injury or physical sickness, then all damages — other than punitive damages — flowing from the injury are treated as payments received on account of personal physical or physical sickness whether or not the recipient of the damages is the injured party.

7. See Comm’r v. Schleier, 515 U.S. 323 (1995)(In ruling that a recovery under the Age Discrimination Employment Act (ADEA) constituted taxable income, the Supreme Court set forth a two prong test as the standard for § 104 exclusions. Specifically, the Supreme Court said that a recovery can be excluded under § 104 when it is both: (i) received through prosecution or settlement of an action based on tort or tort-type rights; and (ii) received on account of personal injuries or sickness. This has become known as “the Schleier test.”)

8. See e.g. Brabson v. United States, 73 F.3d 1040, 1044 (10th Cir. 1996).

9. O’Giviele v. United States, 519 U.S. 79 (1996) (Punitive damages are not excludable from income). It should also be mentioned that the Internal Revenue Code does not define “punitive damages,” only case law does.

10. H.R. Conf. Rep. No. 104-737, at 201 (1996), reprinted in 1996 U.S.C.C.A.N. 1474, 1589. (“For example, damages (other than punitive damages) received by an individual on a claim of loss of consortium due to the willful violation, since the ADEA did not permit a separate recovery of compensatory damages for pain and suffering or emotional distress. The district court held that the airline had committed a willful violation of the ADEA. After United appealed, obtaining a reversal of the judgment in favor of Schleier, the parties settled the case: Schleier would receive $145,629, which was attributed one-half to back pay and one-half to liquidated damages. On Schleier’s tax return, he included the back pay portion of the recovery in income, but excluded the liquidated damages. The IRS issued a deficiency notice, arguing that the liquidated damages should have been included in Schleier’s gross income. Schleier filed a petition in Tax Court, alleging that not only were the liquidated damages excludable, but also the back pay portion of the award. Schleier won in Tax Court, with the 5th Circuit affirming. The Supreme Court granted certiorari.)

21. In re Oyelola v. Comm’r, 309 F.3d 1074 (7th Cir. 2003); Johnson v. United States, 76 Fed. Appx. 873 (10th Cir. 2003), cert. denied, 124 S. Ct. 2888 (2004) (Where plaintiff was a guard at a juvenile detention center who suffered injuries while restraining an inmate, the court did not allow him to exclude the damages received. Damages were awarded on a claim brought under the Americans with Disabilities Act after the employer failed to accommodate the employee’s physical limitations, which resulted from the physical injury. The court found that Johnson’s recovery was on account of unlawful termination rather than personal physical injuries or physical sickness.)

17. See Comm’r v. Schleier, 515 U.S. 323 (1995) (Schleier had been a United Airlines pilot. He was fired pursuant to airline policy that, when pilots reach age 60, their employment must be terminated. Schleier alleged that his termination violated the ADEA of 1967, which broadly prohibited arbitrary discrimination in the workplace based on age. The specific relief provided by ADEA included “without limitation judgments compelling employment, reinstatement or promotion,” as well as recovery of lost wages and an additional equal amount as liquidated damages. It should be mentioned that the liquidated damages, however, could only be awarded in cases of willful violation, since the ADEA did not permit a separate recovery of compensatory damages for pain and suffering or emotional distress. The district court held that the airline had committed a willful violation of the ADEA. After United appealed, obtaining a reversal of the judgment in favor of Schleier, the parties settled the case: Schleier would receive $145,629, which was attributed one-half to back pay and one-half to liquidated damages. On Schleier’s tax return, he included the back pay portion of the recovery in income, but excluded the liquidated damages. The IRS issued a deficiency notice, arguing that the liquidated damages should have been included in Schleier’s gross income. Schleier filed a petition in Tax Court, alleging that not only were the liquidated damages excludable, but also the back pay portion of the award. Schleier won in Tax Court, with the 5th Circuit affirming. The Supreme Court granted certiorari.)

22. Oyelola v. Comm’r, T.C. Summ. Op. 2004-28 (Noting that, after the 1996 Act, exempt recoveries require the personal injuries or sickness be physical in nature, Tax Court ruled that taxpayer failed to prove that the recovery was received on account of personal physical injuries or physical sickness; Cates v. Comm’r, T.C. Summ. Op. 2003-15 (Regardless of whether the cause of action was based upon tort or tort-type rights, the resulting recovery was not paid on account of personal physical injuries or physical sickness. Hence, the recovery was not excludable from gross
income under § 104(a)(2) because racial discrimination alone does not constitute a personal physical injury. Consequently, Tax Court ruled that the taxpayer’s recovery was fully taxable under § 61(a).


24. See, e.g., Spina v. Forest Pres. Dist. of Cook County, 207 F. Supp. 2d 764 (N.D. Ill. 2002) (Plaintiff who won a sex discrimination case against her former employer ended up paying $99,000 more in federal income tax than she recovered).

25. Section 212 allows attorneys fees to be deducted as a “miscellaneous itemized deduction,” to be taken “below the line.” The deduction for the attorneys’ fees is then subject to the limitations imposed by § 67 and § 68. Section 67 reduces the total of miscellaneous itemized deductions by 2 percent of adjusted gross income. Adjusted gross income equals gross income for all taxpayers. Therefore, the deductible amount of all miscellaneous itemized deductions is the portion thereof that exceeds 2 percent of gross income. A large damage award typically increases the adjusted gross income, thus increasing the 2 percent floor. This operates to reduce the allowable amount of attorneys’ fees that can be deducted. Finally, § 68 operates to impose an overall limitation that reduces the amount of the below-the-line deduction still further. (2008 limitation for adjusted gross income more than $159,950 or $79,975 if married filing separately.)

26. Comm'r v. Banks, 543 U.S. 426 (2005) (In a nonphysical injuries context, the Court held that a successful plaintiff was required to include the full amount of a damage award in income, including attorneys’ contingent fees). Congress enacted § 62(a)(20) as a legislative cure to provide that attorneys’ fees and court costs paid in connection with unlawful discrimination suits may be deducted above the line. The problem is that Congress did not account for damage awards arising from contract claims or common-law torts. Congress thus has yet to provide relief to plaintiffs who receive awards based on nonphysical injuries or sickness.

27. Though Congress cured the Alternative Minimum Tax (AMT) problem for many claims, it did not do so for § 62(e) claims. Section 62(e) defines unlawful discrimination claims; these include violations of any various federal civil rights statutes, including Fair Housing, Fair Labor Standards and Employment Retirement Income Security Act. Compare § 62(a)(20), which provides that attorneys’ fees deducted for claims listed under 62(a)(20) are not added back for AMT purposes.

28. Brabson v. United States, 73 F. 3d 1040 (10th Cir. 1996) (Taxpayer must include mandatory prejudgment interest in income even though the damage award itself was excludable. Court determined that the prejudgment interest was awarded to compensate the taxpayer for the time value of money, and hence could not satisfy the second prong of Schlesier.

29. See, e.g., Rapp v. United States, 154 F.3d 1 (1st Cir. 1998).


31. Knuckles v. Comm’r, 349 F. 2d 610, 613 (10th Cir. 1965), aff’d T.C. Memo. 1964-33, 23 T.C.M. (CCH) 182 (1964) (Should the settlement agreement fail to expressly allocate the proceeds, the most important factor is what motivated the payor to pay the settlement amount.). Barnes v. Comm’r, 73 T.C.M. (CCH) 1754 (1997) (Tax Court allocated half of proceeds to punitive damages based on complaint and plaintiffs’ attorney’s testimony about strengths and weaknesses of causes of action); See also Church v. Comm’r, 80, T.C. 1104, 1107 (1983).


33. See, e.g., Priv. Ltr. Rul. 200401022 (Damages that the taxpayer received from her employer’s unwanted physical contacts, to the extent these caused no observable bodily harm, were not considered to have been received on account of personal physical injuries or sickness. Consequently, § 104(a)(2) did not apply, and these damages were taxable. However, the damages received for pain, suffering, emotional distress, and reimbursement of medical expenses after the first assault, which left observable bodily harm, were attributable to physical injuries and thus excludable under § 104(a)(2)).


35. Robinson v. Comm’r, 70 F. 3d 34, 37 (5th Cir. 1995).

36. Upon an IRS audit, if there is no express allocation in the settlement agreement, the IRS will likely attempt to treat the entire amount of the settlement as taxable.

37. threshold v. Comm’r, 87 T.C. 1294, 1306-1307 (1986), aff’d 848 F.2d 81 (10th Cir. 1988).

38. Importantly, if the client earns more than $98,600 per year, careful tax planning will be needed. This is because under current law employees do not need to pay Social Security tax on annual income more than $98,600. So, if the client earns $100,000, Social Security taxes are paid only on the first $98,600 of salary. Medicare taxes are, however, paid on the entire $100,000. The amount of the client’s wages can become important in the decision whether to report Form 1099, box 7. Even if none of the $20,000 allocated to wage loss is subject to Social Security tax, the Defendant-employer issuing the W-2 may mistakenly deduct Social Security tax from this amount, resulting in a Social Security tax overpayment. Of course, the client can apply for a refund, but, without professional advice, may not know this.

39. 26 C.F.R. § 1.6045-5 (Sets forth various examples of how to report attorneys’ fees in different factual situations).

40. Form W-9 is a request for taxpayer ID number, and it is used by the attorney to provide the payor with the firm’s Taxpayer Identification Number.
ISSUE: Constructive trusts
HELD: Court found a confidential relationship existed because Clark made an agreement with Ethel, upon his death he left his assets to her, and he trusted her to comply with the agreement for the benefit of his sons. Court stated that an implied duty of good faith and fair dealing applied to Ethel’s agreement to leave three-quarters of her estate to Clark’s sons and that Ethel removed more than $1 million in assets from her estate and left $10,000 to be distributed to Clark’s sons. In light of the trust Clark reposed in Ethel and the agreement they reached, her giving away virtually all of her assets to others thwarted the intent of the agreement and violated the duty of good faith that Ethel owed to Clark. Court stated that Clark’s sons, not the estate, were the intended third-party beneficiaries under the antenuptial agreement and therefore Clark’s sons had a claim against Ethel to the extent she failed to fulfill her contractual obligations. However, a beneficiary claim was not the only permissible course of action. Court held that the administrator could bring this action, the action was not a claim against the Estate, and the action was not barred by the failure to bring a claim against the Estate within the period of the nonclaim statute. Court found the action was filed well within the statute of limitations.

STATUTES: K.S.A. 20-3018; K.S.A. 58a-410, -416; K.S.A. 59-1401, -2239, -6a201, -6a204, -6a205; and K.S.A. 60-511, -512, -513, -515, -2101

DECEDENT’S ESTATES, CONSTRUCTIVE TRUSTS, STATUTE OF LIMITATIONS, AND NONCLAIM STATUTE
NELSON V. NELSON
SEGWICK DISTRICT COURT—AFFIRMED
COURT OF APPEALS—AFFIRMED
NO. 97,664—APRIL 17, 2009

FACTS: After 33 years of marriage, Margaret and Albert Nelson II divorced in 1975. The property settlement agreement provided that Albert II would execute a will creating a testamentary trust funded by his entire estate. Albert III and Markeyta, adult children, were one-half beneficiaries. Albert II married Doris three years after his divorce and remained married to her until his death in 2003. Albert III and Markeyta complained about substantial donations Albert II made to Oklahoma State University and gifts he made to Doris. They argued Albert II’s gifts/donations violated the clear meaning of the property settlement agreement and should have been included in Albert II’s entire estate in trust for their benefit. At the time of his death, Albert II’s estate plan consisted of two inter vivos trusts and a pour-over will, as opposed to the will and testamentary trust contemplated by the settlement agreement. The inter vivos trusts, one a living trust, and the other an irrevocable trust were funded.
with corporate stock. Albert III and Markyeta were informed of the will and living trust, but Albert II’s attorney did not reveal the irrevocable trust. They did not learn of its existence until they received the estate’s tax return. Albert III and Markyeta sued Doris for the money they claimed was due under the 1975 property settlement agreement and subsequent income. They did not take any action to file a petition for administration of an estate in Kansas and had not filed a claim against Albert II or his estate in Florida. The district court and the Court of Appeals held the decedent’s assets were not subject to a constructive trust because a claim had not been made against the decedent’s estate within the period of limitations imposed by the Kansas nonclaim statute, K.S.A. 59-2239.

ISSUES: (1) Decedent’s estates, (2) constructive trusts, (3) statute of limitations, and (4) nonclaim statute

HELD: Court stated the appellants failed to include a claim of constructive fraud in pretrial orders and the appellants consequently failed to assert a claim of either actual or constructive fraud. Court held the district court and Court of Appeals correctly determined that appellant’s claim was for breach of contract of the 1975 property settlement agreement. Court clarified the law in Kansas concerning constructive trusts. Court concluded the view that actual or constructive fraud must be established before the remedy of a constructive trust can be granted is contrary to widely accepted analysis of the remedy and is not justified by Kansas’ law. Court stated that any case holding that actual or constructive fraud is the exclusive basis for the remedy of a constructive trust is disapproved. Court held that the appellants as third-party beneficiaries asserted a claim against the estate by alleging that Albert II’s transfers of assets to the trusts were a breach of the property settlement agreement and, therefore, the transfers were void. This claim against Albert II’s estate was barred by the appellants’ failure to exercise the right of appeal. District court did not err in granting partial summary judgment and dismissed their counterclaim. Tilzefor transferred to make a timely claim as required by K.S.A. 26-508. Defendants appealed, claiming in part the district court erred in refusing to instruct the jury that fair market value could not be determined by the summation of two different valuation approaches.

STATUTES: K.S.A. 26-504, -508, -513(c), -513(d), -513(e), and K.S.A. 60-226, -226(b)(6)(B), -226(e)(2), -230(b)(5), -230(e), -445, -2101(b)

JUDGMENT – PRETRIAL PROCEDURE
TILZER V. DAVIS, BETHUNE & JONES
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 99,678 – APRIL 3, 2009

FACTS: “Tilzers” hired Davis law firm in Missouri action against drug manufacturers for negligently enabling pharmacist to dilute cancer drugs. Tilzers opted into confidential Global Settlement agreement, but objected to the amount awarded. Pharmaceutical companies filed motion to enforce the agreement and obtain dismissal of Tilzers’ claim; Davis filed motion to enforce attorney’s lien in the case; and Tilzers filed counterclaim against Davis for malpractice. Missouri court granted Davis’ motion on the attorney lien, granted enforcement of the settlement agreement finding the Global Settlement was not an aggregate settlement within meaning of Rule 4-1.8(g), and found no misconduct by Davis. Tilzers did not appeal, and dismissed their counterclaim. Tilzers then filed malpractice action against Davis in Kansas, arguing Davis failed to comply with disclosure requirements of Rule 4-1.8(g) in making the aggregate settlement agreement. Pharmaceutical companies intervened to ask all documents and material regarding terms of the confidential Missouri settlement be held under seal. District court granted Davis’ motion for summary judgment, interpreting the Missouri compulsory counterclaim rule as requiring Tilzers’ malpractice claim to be asserted in the Missouri action. Alternatively, it found Tilzers were collateraly stopped from relitigating the aggregate settlement question. It also reasoned the Missouri agreement was not an aggregate settlement contemplated by the rules of professional conduct because Davis did not and could not have known the information required to be disclosed. Tilzers appealed.

ISSUES: (1) Compulsory counterclaim, (2) collateral estoppel, (3) aggregate settlement, and (4) sealed documents

HELD: Kansas court erred in interpreting Missouri’s compulsory counterclaim rule as requiring Tilzers to assert their legal malpractice claims as a response to Davis’ motion to enforce attorney’s fee lien in the underlying Missouri lawsuit. Summary judgment on issue of claim preclusion is reversed.

Missouri collateral estoppel factors are reviewed. Kansas’ district court erred in applying doctrine of collateral estoppel in this case.

Neither Kansas nor Missouri has any law specifically defining an aggregate settlement. A recent tentative draft in an American Law Institute project is discussed. Unavailability of information, required to be disclosed by Rule 4-1.8(g), did not establish a nonaggregate settlement, but rather corroborated that it was an aggregate settlement and rendered it impossible for Davis to obtain informed consent under the rule. District court’s ruling to the contrary was erroneous.

Kansas’ district court’s order sealing documents containing confidential information about the Missouri settlement agreement was not an abuse of discretion. The sealing of these documents did not prejudice Tilzers in the prosecution of their legal malpractice action.

STATUTE: None

EMINENT DOMAIN
U.S.D. NO. 232 V. CWD INVESTMENTS
JOHNSON DISTRICT COURT – AFFIRMED NO. 97,581 – APRIL 17, 2009

FACTS: School district condemned approximately 18 acres for use as an elementary school in a proposed residential development of more than 130 acres. Court-appointed appraisers valued the partial taking at $626,859. Landowner defendants appealed the award to the district court. District court granted school district’s motion for partial summary judgment and struck claims for lost profits (through unbuilt homes and distribution of amenity costs), which defendants had not linked to fair market value of the land. District court also granted school district’s motion in limine to exclude evidence of damages that had not been timely and/or adequately disclosed in discovery. Jury found fair market value of property was $718,100. Defendants appealed, claiming in part the district court erred in (1) granting partial summary judgment to bar several of defendants’ damage claims because defendants failed to come forward with evidence and (2) granting motion in limine to bar damage claims not timely or adequately disclosed.

ISSUES: (1) Summary judgment in eminent domain appeal and (2) discovery responses

HELD: Rules of summary judgment apply in an eminent domain appeal under K.S.A. 26-508 where neither party bears the burden of proof on the issue of damages. Under facts in this eminent domain appeal, district court did not err in granting partial summary judgment to school district to bar several of defendant landowners’ damage claims for their failure to come forward with evidence.
Supp. 12-105b(d).

FACTS: This case arises out of a collision between a Burlington Northern and Santa Fe Freight (BNSF) train and a truck owned by Dodge City Implement Inc. (DCI). BNSF filed suit in federal court against DCI and its employee driver, Justin Slattery. After that action was settled, plaintiffs DCI and Slattery pursued this suit against defendants Barber County (County) and Moore Township (Township) under negligence and implied indemnity theories because of an alleged failure to construct and maintain a safe grade crossing. The district judge granted defendants’ motion to dismiss, (1) plaintiffs’ comparative implied indemnity claim was dismissed on the basis that the defendants herein were not named defendants or joined pursuant to K.S.A. 60-258a(c) in the previous related federal lawsuit brought by BNSF, (2) plaintiffs’ negligence and negligence per se claims for property damage in the amount of $92,313.34 was dismissed on the basis that plaintiffs’ notice of claim filed with defendants did not substantially comply with K.S.A. 12-105b(d) regarding this claim and thus no jurisdiction, (3) plaintiffs’ implied contractual indemnity claim was also dismissed. Plaintiffs appealed the dismissal of their $3 million comparative implied indemnity claim as barred by the “single action” rule and the dismissal of their negligence and negligence per se claims as barred by failure to comply with the notice statute. They did not appeal the dismissal of their implied indemnity claim.

ISSUES: (1) Railroad crossing, (2) comparative implied indemnity, and (3) negligence

HELD: Court held that Kansas’ law requires defendants seeking to minimize their liability in comparative fault situations not involving a chain of distribution or similar commercial relationship to do so by comparing the fault of other defendants in order to reduce their own share of liability and damages. If a defendant chooses to settle and obtain release of common liabilities involving other parties whom the plaintiff did not sue, the defendant does not have an action for comparative implied indemnity or post-settlement contribution. Under Kansas’ comparative fault procedure, such a remedy is not necessary, and such an action defeats the policy of judicial economy, multiplying the proceedings from a single accident or injury. Court also held letters failing to identify the correct claimants, to give their addresses, to set forth the name and address of their counsel, and failing to state the extent of damages sought do not substantially comply with the notice provisions of K.S.A. 2008 Supp. 12-105b(d).

STATUTES: K.S.A. 12-105b(d); and K.S.A. 60-214, -258a(c), (d), -513

CRIMINAL

STATE V. COTT
SHAWNEE DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 97,955 – MAY 1, 2009

FACTS: Cott charged with offenses, including driving under the influence, K.S.A. 2005 Supp. 8-1567(h), and aggravated endangerment of child, K.S.A. 2005 Supp. 21-3608a, who was in car when Cott was arrested. District court granted defense motion to dismiss the felony endangerment count, finding 8-1567(h) dealt more specifically with the conduct at issue in this case than felony provisions of 21-3608a. Court of Appeals reversed, 39 Kan. App. 2d 950 (2008), holding as matter of first impression that 8-1567(b) did not preclude application of 21-3608a(a)(1). Supreme Court granted Cott’s petition for review.

ISSUE: Statutory preclusion

HELD: Issue of first impression. Kansas Court of Appeals correctly concluded the two statutes created independent crimes and neither prevented application of the other. K.S.A. 2005 Supp. 8-1567(h) and K.S.A. 2005 Supp. 21-3608a(a)(1) are aimed at preventing different types of behavior and there is no evident legislative intent to preclude state from holding the defendant responsible under both statutes when facts are present to support both crimes.


STATE V. PENNINGTON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 100,261 – APRIL 17, 2009

FACTS: After Pennington’s conviction for second-degree murder was affirmed, he filed motion to correct an illegal sentence pursuant to K.S.A. 22-3504 claiming pretrial error, including amendment of the information rather than dismissing and refiling the amended information with a new preliminary hearing and new arraignment. District court summarily denied the motion. Pennington appealed.

ISSUE: (1) Motion to correct sentence imposed without jurisdiction

HELD: Under facts of case, Pennington not entitled to relief under K.S.A. 22-3504. As in State v. Smith, 225 Kan. 796 (1979), defendant’s failure to timely object resulted in no appealable error. Even if timely objection had been made, no particular prejudice was articulated or shown.

STATUTE: K.S.A. 22-3504, -3601(b)(1)

STATE V. SPOTTS
HARVEY DISTRICT COURT – AFFIRMED
NO. 100,084 – MAY 1, 2009

FACTS: Spotts convicted on two counts of rape of 12-year-old girl and sentenced to consecutive terms of life without possibility of parole for 620 months and 300 months. On appeal, Spotts claimed sentences were cruel and unusual under Section 9 of Kansas Bill of Rights and claimed district court abused its discretion in denying motions for downward durational departure.

ISSUES: (1) Constitutional challenge to sentence and (2) discretion in sentencing

HELD: As in State v. Thomas, 288 Kan. 157 (2009), and State v. Ortega-Cadelan, 287 Kan. 157 (2008), Spotts may not constitutionally challenge his sentence for the first time on appeal. Claim that his consecutive life sentences constitute cruel and unusual punishment is not properly before the appellate court.

Under facts of case, district court did not abuse its discretion by denying Spotts’ motions for downward durational departure sentences under K.S.A. 2006 Supp. 21-4643(d)

STATUTES: K.S.A. 2006 Supp. 21-4643, -4643(a)(1), -4643(d) (1)-(6); and K.S.A. 21-3502(a)(2), -3502(c); and K.S.A. 22-3601(b) (10)
**Appellate Practice Reminders . . .**

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

**Actions on Petitions for Review – New on the Web site at www.kscourts.org**

Elsewhere in this issue under “Supreme Court News,” there is a description of links to Supreme Court actions on petitions for review. This feature contains information on all actions taken on petitions for review on a given date. It will be posted simultaneously with mailing of written orders from the Clerk's Office.

**Additional Briefs After a Petition is Granted**

When a petition for review has been granted and parties submit additional copies of the original briefs, exact copies of the original briefs should be submitted, including the original certificate of service. Pursuant to Supreme Court Rule 8.03(g)(2), these additional copies are due in the Appellate Clerk’s Office within 10 days of the date of the order granting review. These additional copies are for the Supreme Court’s use and do not need to be served on opposing counsel because no changes have been made since the original filing.

These additional copies of briefs already on file should be distinguished from the supplemental briefs referenced in Supreme Court Rule 8.03(g)(3), which are due within 30 days after the date of the order granting review. Supplemental briefs are filed at the parties’ discretion if it appears that further argument would be helpful to the Supreme Court in considering the case on petition for review. Copies of supplemental briefs must be served on opposing counsel.

**Supreme Court Rule 8.03 (Recently Amended)**

On March 18, 2009, Supreme Court Rule 8.03(a)(1) was amended to make clear that timely filing of a petition for review 30 days after the date of the decision of the Court of Appeals is jurisdictional. The service requirement remains the same, 30 days after the date of the decision of the Court of Appeals, but it has been moved to Rule 8.03(a)(2) to make clear that service is not jurisdictional.

For questions about these or other appellate procedures and practices, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.

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**Reminders from the Kansas CLE Commission ...**

The Kansas Continuing Legal Education Commission is the office that tracks and reports your CLE credits to the Kansas Supreme Court for annual compliance. Noncompliance could result in additional fees and even the suspension of your license to practice law. The annual CLE requirement in Kansas is 12.0 hours of CLE credit, including 2.0 hours of professional responsibility by June 30, 2009.

The Kansas CLE Commission 2009-2010 Registration and Annual CLE Remittance Form was mailed to your address of record in late April. **This is the only notice you will receive.** If you have misplaced your copy, you may contact our office for another form. The registration form must be returned with payment by **July 1, 2009**, for your CLE record to reflect compliance. Credit cards, debit cards, and EFT cannot be accepted. Please note that incomplete forms will be returned and may result in a delay of processing your annual registration. Fees received in the CLE Commission Office on or after August 1 of the year in which due shall be accompanied by a $50 late payment fee.

If you have enrolled for online access to your record, you can access your online transcript of hours. This information is available free-of-charge, 24 hours a day.

**IMPORTANT – DON’T MISS – DATES:**

**June 30 — End of CLE Year**

All CLE hours must be attended by this deadline to avoid further penalties.

**July 1**

Annual CLE Registration fee due.

**July 31**

Last day to file 2008-2009 hours.

**Note:**

All paperwork must be received in our office before 5 p.m. of July 31 to avoid late filing penalties.

Fax and e-mail submissions will NOT be accepted.
CIVIL

ADVERSE POSSESSION
RUCKER PROPERTIES V. FRIDAY
GREENWOOD DISTRICT COURT – AFFIRMED
NO. 98,646 – APRIL 10, 2009

FACTS: Rucker Properties (Rucker) owned Tract A and leased Tract B from Fridays and Fridays’ relatives. When relatives gifted Tract B to Fridays, Rucker filed action to quiet title to Tract B and enforce their right in the lease of first refusal to buy Tract B. Fridays filed cross-claim for title to Tract C, a disputed portion within Tract A, claiming they owned it through adverse possession. In bench trial, district court ruled in favor of Fridays on all issues. Rucker appealed, arguing in part the judgment granting adverse possession should be reversed because it blocked their access to Tract A via a road on Tracts B and C, and should be remanded to consider access and ingress concerns.

ISSUES: (1) Right of first refusal, (2) adverse possession, and (3) implied easement

HELD: Because the conveyance between the relatives and Fridays was an intrafamily gift and not a sale and no ownership was transferred to anyone outside the lease agreement, the right of first refusal was not triggered.

Substantial evidence supports district court’s conclusion that Fridays adversely possessed Tract C. Adverse possession claim not defeated by fact that the decision cut off Rucker’s only suitable access to its property.

Rucker did not present any claim in the district court for a road easement, and may not do so on appeal.

STATUTE: K.S.A. 60-503

ARBTRATION
HEMPHILL V. FORD MOTOR CO.
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 98,966 – APRIL 17, 2009

FACTS: Mark and Monessa Hemphill filed suit against Ford Motor Co., Fenton Motors (a Ford dealer), and DaimlerChrysler Services North America LLC (a car-financing entity doing business as “Chrysler Financial”) for claims arising from the Hemphills’ purchase of a Ford Mustang convertible. The purchase was financed through an agreement between the Hemphills, Fenton Motors, and Chrysler Financial, and the finance agreement contained an arbitration clause. When the Hemphills filed suit, all three defendants moved to compel arbitration, and the district court granted that motion and stayed the suit pending arbitration. The arbitrator issued an award granting some of the Hemphills’ claims against Fenton Motors but also, in an amended award, granted Chrysler Financial’s cross-claim against the Hemphills for a deficiency judgment on amounts still owed on the purchase. After the district court confirmed the arbitration award without objection, the Hemphills appealed, challenging the decision to compel arbitration and the arbitrator’s authority to amend the arbitration award. As to Fenton Motors, the Hemphills claimed that because the initial purchase order didn’t include an arbitration provision, Fenton Motors cannot require arbitration based on an arbitration provision signed later in a financing document. As to Chrysler Financial, the Hemphills claimed that the arbitrator had no authority to issue an amended award. Thus, because the arbitrator’s initial award omitted the deficiency judgment for what the Hemphills still owed on the car, they contend that the arbitrator could not later amend the award to grant the deficiency judgment to Chrysler Financial. As to Ford Motor Co., the Hemphills claimed that because Ford was not a signatory to the financing contract, it cannot require arbitration.

ISSUE: Arbitration

HELD: Court did not reach the merits of the Hemphills’ appeal regarding Fenton Motors and Chrysler Financial. In both cases, the Hemphills did not preserve their appellate rights.

After arbitration, Fenton Motors paid the Hemphills the money awarded by the arbitrator, and the Hemphills acquiesced by cashing the check. The Hemphills waived any right to appeal the arbitrator’s authority to amend the award in favor of Chrysler Financial: They did not raise the issue in the district court and did not object to a motion to confirm the award. Court found that the Hemphills did not acquiesce in the judgment in favor of Ford, the Hemphills did not recover a money judgment against Ford, and their acceptance of payment from Fenton Motors does not logically relate to whether the Hemphills’ claims against Ford are subject to arbitration. But because the Hemphills’ claims against Ford were inextricably intertwined with their substantive claims against Fenton Motors and Chrysler Financial, the parties to the arbitration agreement, court concluded that the Hemphills were estopped from avoiding arbitration with Ford. Court held that the Hemphills did not acquiesce in any judgment against Ford, and they were not barred by the doctrine of acquiescence from pursuing an appeal of the district court’s decision to require arbitration of their claims against Ford. Court next concluded that the purchase contract and the financing contract were sufficiently related that Fenton Motors, a party to both agreements, could compel arbitration regarding a dispute arising out of either agreement. Court held that because the claims against Fenton Motors and Chrysler Financial were closely intertwined with those against Ford, the Hemphills could not stop Ford from having the claims against it resolved along with the claims against the other defendants. Last, court held the Magnuson-Moss Warranty Act does not prohibit arbitration of claims arising under that statute.

STATUTES: K.S.A. 5-412; and K.S.A. 50-623, -645

COMMERCIAL REAL ESTATE AND MAKE-WHOLE PREMIUM
SANTA ROSA KM ASSOCIATES LTD V. PRINCIPAL LIFE INSURANCE CO.
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 100,041 – APRIL 24, 2009

FACTS: In September 1991, Dennis Eskie was the owner of the Santa Rosa Shopping Center in Olathe. He borrowed $6,375,000 from Principal and gave Principal his promissory note in that amount. The note was secured by a mortgage on the property. The note contained a make-whole premium. Both the note and mortgage contained liquidated damages provisions that applied if the holder of the note accelerated payment due to the borrower’s default. In that event, liquidated damages were to be calculated using the same make-whole premium used in instances in which the debtor prepays the note. The note also contained a promise by the debtor to pay ”all reasonable costs and expenses, including attorney’s fees, incurred by the holder [of the note] in connection with any default or in any proceeding to enforce any provision of this note or any instrument by which it is secured.” Santa Rosa is a Florida real estate investment company. Fred Chikovsky, the president of Santa Rosa, is a lawyer and real estate investor. In February 1998, Santa Rosa purchased the shopping center from Eskie and assumed his note and mortgage. The assumption required Principal’s consent. In April 2005, Santa
Appellate Decisions

Rosa considered an early pay-off of the outstanding $4,865,142.24 principle balance on the note. Principal informed Santa Rosa that under the formula in the promissory note the make-whole premium would be $1,163,268.96. As a result, Santa Rosa commenced this declaratory judgment action seeking a declaration that the make-whole premium was invalid and unenforceable. Principal defended its validity and asserted a counterclaim for attorney fees. In the course of discovery, Principal acknowledged through its corporate representative, Todd Everett, that upon prepayment of a loan the proceeds are normally reinvested in a manner that exceeds the U.S. Treasury bill rate of return. The court entered summary judgment, declaring the make-whole premium provision to be valid and enforceable. While the court found Principal's claimed attorney fees to be reasonable, it denied relief on Principal's counterclaim because Santa Rosa presented a "legitimate question for a declaratory judgment suit" and because K.S.A. 58-2313 allows attorney fees only in collection actions.

ISSUES: (1) Commercial real estate and (2) make-whole premium

HELD: Court held that under the facts presented, the commercial lender's prepayment premium in a promissory note and supporting mortgage is designed to avoid a "heads I win, tails you lose" outcome when the election to prepay the loan is entirely in the borrower's hands. In a period of rising interest rates, it is in the borrower's interest (and to the lender's disadvantage) to continue making payments at the favorable interest rate on the existing loan. ("Heads I win.") In a period of falling rates, it is in the borrower's interest (and to the lender's disadvantage) to refinance the debt at a lower interest rate, thus forcing the lender to invest the proceeds at a lower rate of interest. ("Tails you lose.") The prepayment premium, here called the make-whole premium provision, has the effect of offsetting the downside risk when the borrower, after enjoying a favorable interest rate on the loan during periods of rising interest rates, unilaterally elects to prepay the loan when interest rates fall. Court stated that rather than offending public policy, such a prepayment provision lends stability and predictability to loan transactions, particularly in commercial loans involving a sophisticated and experienced borrower. It preserves the benefit to the lender of the bargain made at the time of the loan. It commits the borrower to that same bargain independent of fortuitous fluctuations in interest rates. Court under the facts presented, the amount of the prepayment premium does not, in and of itself, establish unconscionability. Court held that in spite of the fact that the provision for attorney fees in the note and mortgage given by the original borrower violated the prohibition against the assessment of attorney fees in debt instruments as provided in K.S.A. 58-2312 at the time the loan was made, the amendment of the statute to allow attorney fees, which occurred prior to the current borrower entering into a new contract with the lender in which the new borrower assumed the debt and ratified the provision for attorney fees, rendered the provision for attorney fees valid and enforceable. Under the facts of the case, the assessment of attorney fees was not against public policy because of any prohibition found in K.S.A. 58-2312 and the provision for attorney fees applies to the successful lender in a declaratory judgment action in which the borrower unsuccessfully challenged the validity and enforceability of a prepayment premium provision in a commercial loan transaction.

STATUTES: K.S.A. 16-207; K.S.A. 16a-2-507; K.S.A. 58-2312, -2313; and K.S.A. 60-1701, -1703

DEFAULT JUDGMENT AND LIQUIDATED DAMAGES
FIRST NATIONAL BANK IN BELLEVILLE V. SANKEY MOTORS INC. ET AL.
REPUBLIC DISTRICT COURT
REVERSED AND REMANDED
NO. 100,114 – APRIL 3, 2009

FACTS: In 2004, First National Bank (Bank) entered into a financing agreement with the Sankeys and Sankey Motors (Dealership), in which the Bank provided operating funds and purchase money for automobiles and real property for the Dealership. The Sankeys and the Dealership eventually defaulted on their financing arrangements with the Bank. In January 2006, the Bank sued the Dealership, the Sankeys, Chrysler, and Republic County (tax lien). In Count II, the Bank claimed that the Dealership had an $80,700 account receivable due to it by Chrysler. Chrysler's registered agent was served with the petition. Chrysler failed to answer and default judgment was granted against the Sankeys and the Dealership. Later, default was also entered against Chrysler and determined that the Bank had a perfected security interest and was entitled to the account receivable from Chrysler. Eventually, Chrysler moved to set aside the default judgment based on excusable neglect because the registered agent had miscoded the action as a foreclosure action. Chrysler also insisted the Bank's claim appeared to be for unliquidated damages and was voidable. The trial court determined that Chrysler could not meet its burden to establish excusable neglect. The trial court further determined that Supreme Court Rule 118(d) had no application to the instant case because the specific sum of $80,700 recited in the petition represented liquidated damages. Moreover, the trial court noted that Chrysler had been notified by mail that the Bank had intended to proceed to obtain a default judgment. The trial court found that the default judgment was not entered until three months later, which gave Chrysler ample opportunity to investigate and respond to the Bank's motion for default judgment.

ISSUES: (1) Default judgment and (2) liquidated damages

HELD: Court agreed with the trial court that Chrysler failed to show that there was excusable neglect to warrant setting aside the default judgment under K.S.A. 60-260(b)(5). Court also stated that K.S.A. 60-260(b)(5) was inapplicable to this case because the Bank's money judgment against Chrysler did not have prospective application and because there was no change in conditions occurring after the entry of default judgment that would make continued enforcement of the judgment inequitable. However, court held that because the damages requested in the Bank's petition were unliquidated, the Bank's failure to comply with Supreme Court Rule 118 (2008 Kan. Ct. R. Annot. 200) makes the default judgment voidable. Court stated there was nothing in the record to establish the date on which the damages claimed in the Bank's petition became due and the actual amount that Chrysler owed the Bank. Court determined that the damages claimed in the Bank's petition represented an unliquidated amount and rendered the default judgment voidable. Court stated that because Chrysler had successfully challenged the entry of default judgment, the judgment was void.

STATUTE: K.S.A. 60-254, -260(b)

HABEAS CORPUS
FISCHER V. STATE
HAMILTON DISTRICT COURT
REVERSED AND REMANDED
NO. 100,248 – APRIL 17, 2009

FACTS: After his felony convictions were affirmed on direct appeal, Fischer filed K.S.A. 60-1507 motion alleging ineffective assistance of counsel. District court conducted an evidentiary hearing, but over Fischer's objection, allowed Fischer to participate in the hearing only by phone. District court denied the 60-1507 motion. Fischer appealed.
ISSUE: Presence of movant at K.S.A. 60-1507 evidentiary hearing

HELD: Where an evidentiary hearing is conducted in a 60-1507 proceeding and substantial issues of fact exist as to events in which the petitioner had participated, the petitioner must be allowed to be present. The presence of the petitioner under these circumstances is not a question subject to the court’s discretion. Mere telephonic participation in an evidentiary hearing generally does not enable the movant to hear and observe witnesses, attorneys, or the judge, and certainly does not enable the manner of assistance to his or her counsel that could be critical to such a hearing. Under facts of this case, Fischer was entitled to be present at his 60-1507 evidentiary hearing; his telephonic participation was no substitute.

CONCURRENCE AND DISSENT (Leben, J.): Concurs on issues of appellate jurisdiction and application of civil discovery rules. Disagrees with majority’s decision that remand is needed. Journal entry failed to notice was the Wichita-Sedgwick County Metropolitan Area Planning Commission. With new counsel, Park City obtained three oral extensions of time to file post-judgment motions. District court denied Park City’s post-judgment motions filed under 60-259(f) as untimely filed, and under 60-260(b) as providing no basis for changing its conclusion that notice to PCPC was required. Park City appealed, arguing in part the “unique circumstances doctrine” should be applied to allow appellate review of trial court’s summary judgment decision.

ISSUES: (1) Appellate jurisdiction and (2) post-judgment relief

HELD: There is no jurisdiction over Park City’s appeal of underlying case. History and application of the “unique circumstances doctrine” is examined, and precedent value of two Kansas cases is questioned. In this case, the doctrine could not be applied to extend the appeal period for a party who erroneously believed that a trial court’s unauthorized extension of the 10-day period for filing a post-trial motion under K.S.A. 60-259(f) had the effect of tolling the appeal period while the post-trial motion was judicially determined.

Appeal from the denial of post-judgment relief under 60-260(b) was timely filed. No abuse of discretion in denying the motion. Park City’s argument that its previous trial counsel failed to sufficiently litigate issues did not demonstrate excusable neglect warranting the setting aside of the summary judgment order.

STATUTES: K.S.A. 2008 Supp. 6-206(b); K.S.A. 2006 Supp. 12-520a(d)(6), -530, -530(b), -538; and K.S.A. 60-207(b), -259(f), -260(b), -260(b)(1), -2103(a) (Ensley 1983)

JUDGMENT AND REAL ESTATE

LEWIS V. R & K RANCH LLC ET AL.

GOVE DISTRICT COURT – AFFIRMED

NO. 98,989 – APRIL 3, 2009

FACTS: In 2001, Larri and Teresa Lewis signed a five-year lease with R & K Ranch for about 1,000 acres. The lease required the Lewises to pay $9,525 twice per year. In 2004, the Lewises agreed to buy 316.64 acres of the farm ground from R & K and to pay $90,000 in installments of $9,000 due each year. The contract contained a forfeiture clause and a buy-back provision. In 2004, a new lease was signed calling for payments of $7,275 twice per year. In May 2004, the Lewises paid $9,525 in rent, but the Lewises never made the initial $9,000 contract payment. The district court found that the Lewises never made any payment toward the land purchase. In September 2004, R & K entered into a sales contract with K & K Farms for the same acreage that the Lewises had agreed to buy. Because the Lewises had made no payment toward the purchase, the district court concluded that R & K was entitled to proceed to void the sale to the Lewises and sell the land to another party. The district court noted that R & K was not required to make any payment to the Lewises because the Lewises had not made any payment.
toward the purchase. Thus, the contract’s buy-back provision allowed R & K to take the property back without making any payment to the Lewises. The district court granted judgment to R & K after only the plaintiffs had presented evidence.

ISSUES: (1) Judgment and (2) real estate

HELD: Court applied a directed verdict standard of review and determined whether the district court’s findings were supported by substantial evidence and whether those findings were sufficient to support its legal ruling. Court stated that the real estate sales contract in this case contained a buy-back provision under which the seller could buy back the property, before full payment had been made, by returning any sums paid toward the purchase to the buyer. Court held that the district court properly held that the seller was entitled to reclaim the property without payment because the buyer had made no payment to the seller. Court rejected the Lewises’ equitable title argument. Court held as a general rule, the buyer in a contract-for-deed sale of real estate gains an equitable ownership interest that must be foreclosed upon. But when the buyer makes no payment on the contract, has made no substantial contribution to the real estate, and has entered into a contract that has forfeiture and buy-back provisions that have been utilized by the seller, the seller is not required to bring a foreclosure action against the buyer.

STATUTE: K.S.A. 60-250, -252(c)

LIEN, NOTICE, AND DUE PROCESS

CITIFINANCIAL AUTO INC. V.
MIKE’S WRECKER SERVICE ET AL.
RILEY DISTRICT COURT – REVERSED AND REMANDED
NO. 100,272 – MAY 1, 2009

FACTS: Citifinancial had a lien on a 2004 Ford Mustang purchased and titled in Nevada. After local police discovered the Mustang abandoned without any tags in Manhattan, Kan., they called Mike’s to tow and store the car. Pursuant to K.S.A. 8-1101 et seq., Mike’s claimed a lien on the Mustang for the value of its services. After requesting verification of the last registered owner and any lienholders from the Kansas Department of Revenue, Division of Vehicles (division of vehicles), and receiving a response of “no records found,” Mike’s published notice in the local newspaper of its intent to auction the Mustang. Citifinancial did not receive notice of the sale. Mike’s purchased the Mustang, valued between $11,000 and $12,000, at its own auction for a $500 bid. Citifinancial sued Mike’s to recover the value of its lien in the amount of $8,641.52. The district court granted summary judgment in favor of Citifinancial and found that Mike’s failed to make a reasonable effort to notify Citifinancial of the sale.

ISSUES: (1) Lien, (2) notice, and (3) due process

HELD: Court agreed with the district court that under the circumstances, especially given the value of the Mustang, Mike’s efforts to notify Citifinancial of the sale may not have been reasonably calculated to satisfy due process. However, court stated that under constitutional guarantees of due process, any judicial process can be made effective only on sufficient notice to parties concerned. For notice to satisfy due process in any proceeding, which is to be accorded finality, the notice must be reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. Without such notice, due process is denied and any resulting judgment rendered is void. Consequently, court remanded concluding that the evidentiary record was insufficient for the district court to resolve the due process issue on summary judgment and further proceedings in the district court were necessary.

STATUTE: K.S.A. 8-1101, -1102, -1103, -1104, -1105, -1107

NURSING, ALCOHOL TESTING, NEGLIGENCE, AND KANSAS CONSUMER PROTECTION ACT

BERRY V. NATIONAL MEDICAL SERVICES INC. ET AL.
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 99,953 – APRIL 3, 2009

FACTS: Judith Berry was a registered nurse that struggled with alcohol dependency. In August 2003, she agreed to participate in the Kansas Nurses Assistance Program (KNAP) pursuant to which she agreed to refrain from consuming alcoholic beverages and to submit to random testing to confirm her abstinence. National Medical Services (NMS) contracted to provide alcohol testing for nurses in KNAP. In January 2005 and June 2005, Berry tested positive for having consumed alcohol. Berry denied consuming any alcoholic beverage that would account for the positive test results. In August 2005, the state nursing board revoked Berry’s nursing license. Berry filed a negligence action against NMS alleging among other things that NMS was negligent in establishing cutoffs over which test results would be reported as positive that were arbitrary and scientifically unreliable and invalid. Berry also claimed that NMS knew Berry was a participant in KNAP and that her license to practice nursing would be in jeopardy if she tested positive. Berry claimed the conduct also constituted deceptive acts and practices contrary to the Kansas Consumer Protection Act (KCBA). Without analysis or explanation, the district court sustained NMS’s motion to dismiss.

ISSUES: (1) Nursing, (2) alcohol testing, (3) negligence, and (4) KCBA

HELD: Court found that Berry only argued that NMS set the threshold for positive test results at a level that was arbitrary and scientifically unreliable. She made no claim that NMS mishandled her sample or misreported the presence of alcohol in her sample. Instead, Berry claimed that because alcohol is present in everyday products like hand sanitizers she used, NMS owed her a duty to avoid false reporting by adopting a minimum threshold, which accurately indicated alcohol consumption instead of incidental exposure to alcohol. Court held that Berry alleged a breach of a recognizable duty and she pled a cause of action for which relief could be granted. Court stated that nowhere in her amended petition did Berry allege facts one could characterize as her exchanging anything of value with the NMS to secure their services. Court held the district court correctly dismissed Berry’s KCBA claim as she failed to demonstrate a consumer protection claim that arose from a consumer transaction.

DISSENT (Buser, J.): Concluded in the dismissal of the KCBA claim, but would have affirmed the district court’s dismissal of the negligence claim as well.

STATUTES: K.S.A. 50-623(b), -624, -626(a); K.S.A. 60-208(a); K.S.A. 65-1114(a), -1120; and K.S.A. 77-621(c)

PRIVATE CLUB MEMBERSHIP

POLLOCK V.
CRESTVIEW COUNTRY CLUB ASSOCIATION
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,941 – MAY 1, 2009

FACTS: Pollock joined Crestview Country Club Association in the early 1980s. He received written censures in 1992 and 1995 for loud and offensive language. On each occasion Pollock was warned that such behavior could result in expulsion from the club. In March 2006, Pollock was in the Mens’ Grill at Crestview seated at a table by himself having a cocktail. When Dennis Gillen walked into the Mens’ Grill, he called Gillen a condescending asshole. Gillen did not respond nor did he complain. Another member, Grant Nutter, filed a complaint about Pollock’s conduct. In July 2006, the board met and voted to expel Pollock from membership in Crestview. Pollock then sued Crestview claiming breach of contract, breach of the
implied duty of good faith and fair dealing, fraud, deprivation of due process, and civil conspiracy. The district court granted a summary judgment to Crestview finding the Club had provided Pollock with “due process” and that “there is no evidence of bad faith on the part of [Crestview]”. The judge also stated from the bench: “[I]t just appears ... this private club made a decision. It’s based on evidence that they considered and a judgment [was] made by the board. The court’s not going to substitute its judgment for that of the board.”

ISSUES: Private club membership

HELD: Court stated that courts will not interfere and take jurisdiction of cases involving the discipline, suspension, or expulsion of members of a private social club, organized as a nonprofit corporation where it appears that disciplinary proceedings were in substantial compliance with the bylaws of the club, and such bylaws are reasonable, consistent with the charter of the organization and not in violation of fundamental concepts of due process of law. Proceedings based upon proper bylaws of a voluntary association constitute due process of law as to members of such association. Court held that under the uncontested facts of this case, the district court did not err in granting summary judgment to Crestview because the club conducted disciplinary proceedings to expel Pollock from the club in substantial compliance with its bylaws, rules, and regulations. Accordingly, as a matter of law, there was no violation of due process, breach of contract, or breach of the implied duty of good faith and fair dealing.

STATUTES: None cited.

REAL ESTATE, KANSAS CONSUMER PROTECTION ACT, AND CONDEMNATION

KNOP ET AL. V. GARDNER EDGERTON UNIFIED SCHOOL DISTRICT NO. 231

JOHNSON DISTRICT COURT – AFFIRMED

NO. 100,054 – APRIL 10, 2009

FACTS: U.S.D. No. 231 purchased land from the plaintiffs under threat of condemnation for the stated purpose of building a school. Less than two years later, without building a school on the land, U.S.D. No. 231 sold the property to a developer for a profit of more than $1 million. Plaintiffs filed a petition for breach of contract against U.S.D. No. 231 and sought to recover the profit. The district court granted the school district’s motion to dismiss. The district court determined the petition failed to state a claim for breach of contract. The district court agreed with U.S.D. No. 231 that its statement in the contract concerning the purpose for buying the land was merely a general purpose clause expressing the school district’s intent at the time the contract was executed and it did not place a condition or covenant on the land that restricted its use. Furthermore, the district court rejected the plaintiffs’ argument that because they sold their land to U.S.D. No. 231 under threat of condemnation, the school district’s acquisition of the land constituted a taking under the Eminent Domain Procedure Act, and, as a result, K.S.A. 72-8212a applied to the transaction.

ISSUES: (1) Real estate, (2) Kansas Consumer Protection Act, and (3) condemnation

HELD: Court concluded that U.S.D. No. 231’s statement of purpose for buying the land did not create a restrictive covenant running with the land and the school district did not breach the contract when it resold the property to a developer without building a school. As this was the plaintiffs’ only claim in their petition, court held the district court did not err in dismissing the petition for failure to state a claim under a breach of contract theory. Court held the Kansas Consumer Protection Act (KCPA) was clearly inapplicable to the transaction between the plaintiffs and U.S.D. No. 231. The plaintiffs were not seeking to acquire property. Instead, they entered into a contract to sell their land to U.S.D. No. 231. Plaintiffs were not “consumers” under K.S.A. 50-624(b), U.S.D. No. 231 was not a “supplier” under K.S.A. 50-624(j), and their transaction was not a “consumer transaction” within the meaning of K.S.A. 50-624(c). Last, court held that under the facts of this case, when the school district purchased land under the threat of condemnation for the stated purpose of building a school, this did not constitute a taking under the Eminent Domain Procedure Act, K.S.A. 26-501 et seq., and K.S.A. 72-8212a did not apply to grant the sellers an option to repurchase the land at the contract price when the school district failed to build a school.

STATUTES: K.S.A. 12-105b; K.S.A. 26-501, -504, -507, -508, -511(a); K.S.A. 50-624(b), (c), (j), -626(a), (b), -627(a); K.S.A. 60-209(b), -212(b)(6); K.S.A. 58-2202; K.S.A 72-8212a; and K.S.A. 75-6101, -6102(b)

TERMINATION OF PARENTAL RIGHTS AND INDIAN CHILD WELFARE ACT

IN RE M.F.

JOHNSON DISTRICT COURT

REVERSED AND REMANDED WITH DIRECTIONS

NO. 100,845 – MAY 1, 2009

FACTS: In November 2006, Child in Need of Care (CINC) proceedings were filed involving M.F. The state had no knowledge that M.F. had Native American heritage. The state requested temporary custody of M.F. because of S.F.’s homelessness and possible drug use, because S.F. abandoned M.F. at the hospital, and because there was a question of paternity and whether the alleged father could care for M.F. The district court later became aware of M.F.’s possible Native American heritage and sent a notice of the CINC proceedings to the Northern Arapaho Tribe (Tribe). After receiving notice, the Tribe requested to be notified of all hearings and actions in the matter. Because S.F. had not stipulated M.F. was a CINC, the district court scheduled a hearing to make that determination. The district court found the evidence was clear beyond a reasonable doubt M.F. was in danger and out of home placement was immediately necessary for the child. M.F. was determined to be a CINC. The court held there was good cause to depart from any Indian placement because neither parent could care for the child, no family had come forward, and the Tribe had done nothing but indicate a desire to intervene. Importantly, the district court never issued a journal entry adjudicating M.F. a CINC. Eventually, the state filed a motion to terminate the parental rights of S.F. and D.J. (proven father), or for appointment of a permanent custodian. S.F. filed a motion to transfer jurisdiction to the Tribal Court of the Northern Arapaho Tribe (Tribal Court). The district court denied S.F.’s motion to transfer. At the hearing on the issue of termination of parental rights, S.F. appeared. Before evidence was presented, the district court noted a representative from the Tribe had contacted the district court and requested to participate in the trial by telephone, but the court was unable to arrange for such participation. S.F.’s counsel again argued the district court was not complying with the Indian Child Welfare Act (ICWA). Testimony was taken from Lindsey Howes, a case manager who had been involved in M.F.’s case since M.F. was placed in state custody. Ultimately, the district court entered an order terminating the parental rights of S.F. and D.J. to M.F.

ISSUES: (1) Termination of parental rights and (2) ICWA

HELD: Court held there was “good cause” to deny the transfer to the tribal court because the proceedings were at an advanced stage; the motion was untimely, and the case could not be presented in the Tribal Court without undue hardship to the parties and witnesses. However, the court reversed based on failure to follow provisions of the ICWA. Court stated that before an Indian child can be placed in state custody. Ultimately, the district court entered an order terminating the parental rights of S.F. and D.J. to M.F.

ISSUES: (1) Termination of parental rights and (2) ICWA

HELD: Court held there was “good cause” to deny the transfer to the tribal court because the proceedings were at an advanced stage; the motion was untimely, and the case could not be presented in the Tribal Court without undue hardship to the parties and witnesses. However, the court reversed based on failure to follow provisions of the ICWA. Court stated that before an Indian child can be placed in foster care, it must be determined, based on clear and convincing evidence including testimony by a qualified expert witness, that continued custody of the child by the parent “is likely to result in serious emotional or physical damage to the child.” 25 U.S.C.
§ 1912(e) (2006). Before parental rights may be terminated, there must be a determination made, supported by evidence beyond a reasonable doubt including testimony of a qualified expert witness, “that the continued custody of the child by the parent ... is likely to result in serious emotional or physical damage to the child.” 25 U.S.C. § 1912(f). Furthermore, when the state is seeking to place an Indian child in foster care or is seeking termination of parental rights to an Indian child under state law, the state must “satisfy the court that active efforts have been made to provide remedial services and rehabilitative programs designed to prevent the breakup of the Indian family and that these efforts have proved unsuccessful.” 25 U.S.C. § 1912(d). Court held that none of the above ICWA provisions were followed by the district court in this case despite S.F.’s counsel repeated requests the district court comply with the ICWA.

STATUTE: K.S.A. 38-1501, -1502, -1503, -2201, -2203

TERMINATION OF PARENTAL RIGHTS
IN RE S.D.
GEARY DISTRICT COURT - AFFIRMED
NO. 101,596 – APRIL 17, 2009

FACTS: S.D. was taken into protective custody on Feb. 6, 2007, on suspicion she was the victim of physical abuse. That day, mother’s live-in boyfriend, A.Q., brought 2 1/2-year-old S.D. to the Geary Community Hospital. S.D. had multiple injuries, including a cut lip; injuries to both thighs; an injury to her right leg, which had a shoe print on it; marks on her neck; and what appeared to be belt marks on her back. A.Q. had been taking care of S.D. while mother was at work. S.D. was placed in the custody of Social and Rehabilitation Services (SRS), which placed S.D. in an out-of-home placement. A hearing was held April 4, 2007, on the state’s petition alleging S.D. was a child in need of care. At the hearing, mother stipulated to the allegations of the petition, including S.D. had been physically abused. Thereupon, the district court found S.D. was a child in need of care. SRS’s investigation into the physical abuse led to a substantiated finding of child abuse as to both A.Q. and mother. The mother was convicted of aggravated child endangerment and given probation. A.Q. pled guilty to a reduced charge of attempted child abuse. The mother’s initial case-plan goal was reintegration. However, the mother continued contact with A.Q. despite a dual no contact order between S.D. and A.Q. The mother eventually also gave birth to A.Q.’s son. The mother was eventually sent to prison for three counts of violation of a Protection from Abuse and felony obstruction of official duty. A.Q. was also sent to prison. At the conclusion of the trial, the district court terminated mother’s parental rights to S.D. The court found the state had proved by clear and convincing evidence that mother was unfit by reason of conduct or condition that rendered her unable to properly care for S.D. and such conduct or condition was unlikely to change in the foreseeable future. The district court further found, considering the physical, mental, or emotional health of the child, termination of mother’s parental rights was in S.D.’s best interests.

ISSUE: Termination of parental rights
HELD: Court held there was no evidence in the record that the mother suffered from battered woman syndrome. Court rejected the mother’s argument that mere inaction, such as the failure to protect a child from abuse, is sufficient to terminate parental rights. Court found that in Kansas a parent’s failure to protect a child from abuse is sufficient to support termination and that a parent’s failure to protect their child from abuse constitutes conduct toward a child of a physically, emotionally or sexually cruel or abusive nature. Court also held the mother’s incarceration on a felony conviction was sufficient to support termination because the mother’s only effort to maintain contact with her child while imprisoned was a request for a picture. Court also found the evidence in the record was sufficient to establish the mother demonstrated a lack of effort to adjust her circumstances and conduct to meet the needs of her child. Court held that a rational factfinder could have found it highly probable that mother was unfit by reason of conduct or condition that rendered her unable to properly care for S.D. and the conduct or condition was unlikely to change in the foreseeable future. Court agreed that termination was in S.D.’s best interests, in light of her physical, mental, and emotional needs.

STATUTES: K.S.A. 21-3608, -3608a; and K.S.A. 38-2269

TRADE SECRETS
PROGRESSIVE PRODUCTS INC. V. SWARTZ
CRAWFORD DISTRICT COURT
REVERSED AND REMANDED
NO. 99,550 – APRIL 17, 2009

FACTS: Progressive Products Inc. (PPI) manufactures and sells Ceram-Back, a ceramic coating for pipe elbows that significantly lengthens the life of the pipe. Tom Swartz, Marvin Robarts, and Calvin Bunney are former PPI employees who left PPI to start VIN Manufacturing LLC (VIN), a competing company. PPI sued, alleging misappropriation of trade secrets and requesting relief in the form of a permanent injunction. After a bench trial, the district court determined Swartz, Robarts, Bunney, and VIN misappropriated PPI’s trade secrets but found a permanent indefinite injunction inappropriate under the circumstances. To that end, the district court permitted VIN to continue manufacturing and selling ceramic coating for pipe elbows but ordered VIN to refrain from divulging, selling, or advertising any part of PPI’s trade secrets for a period of three years. The court further ordered VIN to pay a 20 percent royalty on all sales for the next three years. PPI appealed, arguing the district court erred in imposing royalty payments instead of a permanent injunction. Swartz, Robarts, Bunney, and VIN (Appellees) filed a cross-appeal, arguing there was insufficient evidence to support the district court’s finding that a trade secret had been misappropriated in the first place.

ISSUE: Trade secrets
HELD: Court held there was sufficient evidence that PPI engaged in reasonable efforts to maintain the secrecy of the Ceram-Back ingredients, insufficient evidence that the mixing process qualified as a trade secret, sufficient evidence that PPI’s batch method constituted a trade secret, the price sheets were not trade secrets as a matter of law, and insufficient evidence that PPI used reasonable efforts to maintain the secrecy of the Ceram-Back formula and its batch method. Court reversed the trial court’s remedy. Court found (1) no evidence of an overriding interest that would prejudice the public if the misappropriators were enjoined, (2) no evidence that the trade secret at issue was acquired in good faith, and (3) no evidence of any other exceptional circumstance as required by K.S.A. 60-3321 to support the district court’s decision to issue a royalty injunction conditioning future use upon payment of a royalty. Because there was no evidence to support the district court’s decision to issue a royalty injunction, the appropriate disposition here is a remand for the district court to determine whether an alternative order of injunction prohibiting use is necessary to “eliminate [any] commercial advantage that otherwise [was] derived from the misappropriation.” K.S.A. 60-3321(a). In making this determination on remand, the district court should consider to what extent Appellees’ improper use of PPI’s trade secret information allowed Appellees to truncate the time that otherwise would have been required, through experimentation and adjustment, to arrive at a process that yielded a product they could take to the marketplace.
WORKERS’ COMPENSATION AND CHRONIC PAIN
ADAMS V. BALL'S FOOD STORES
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 99,065 – MOTION TO PUBLISH
OPINION FILED OCT. 3, 2008

FACTS: Adams worked in the meat department at a Price Chopper Ball's Food Store from 1992 until February 2004. She had a work-related injury in 1999 for which she had carpal tunnel surgery in 2001 on both hands. She returned to her meat-wrapping job after that, but scar tissue was then discovered and attributed to her continued repetitive work activities. Dr. Galate, to whom she was referred by Ball's Food, said that her work in the meat department was making her condition worse. Ball's Food then moved her to a position that involved pricing. But Adams still felt that she was unable to perform these duties for substantial time periods because of severe pain. Ball's Food tried to accommodate her with light-duty work, eventually in a position that included giving out food samples. But Adams said she was ultimately unable to do that job as well because of chronic, severe pain. Ball's Food disputes her inability to work and points out that several medical doctors had limited her to lifting no more than 15 pounds and had said she should limit repetitive movements. But these doctors had not said she was unable to work at all. In addition, the doctors added that vocational experts had not concluded that she was unable to perform all the job tasks. Dr. Robert Barnett, a clinical psychologist, testified that Adams' ability even to do a light-duty job, like providing food samples in the grocery store, would be significantly impaired by her condition. He said that she could not be reliably depended on to perform even a part-time, light-duty job. The Workers’ Compensation Board (Board) concluded that Adams testified she was “unable to work as a result of her chronic pain,” testimony the board as fact-finder certainly found credible. “Although her physical restrictions would not prevent her from working,” the Board concluded, “it is the chronic pain that prevents her from working.” The Board then relied on the testimony of Dr. Bickelhaupt and Dr. Barnett. Each doctor testified that in his opinion Adams could not maintain gainful employment, even part-time. So the Board concluded that Adams was permanently and totally disabled.

ISSUES: (1) Workers’ compensation and (2) chronic pain

HELD: Under the facts presented, when a worker suffers the amputation of his arm in a work-related accident, resulting in hospitalization and loss of work for about three weeks for which he received temporary total disability benefits during his healing period, and the worker is awarded benefits for his permanent partial disability as a scheduled injury pursuant to K.S.A. 44-510d(a)(13), court concluded that the $50,000 benefit cap in K.S.A. 44-510f(a)(4) does not apply to Roberts because he was paid TTD for a healing period (as permitted by K.S.A. 44-510d and K.S.A. 44-510c) in addition to the maximum number of weeks for his amputation. Further, his award was not based on “functional impairment only.” Rather, the $100,000 cap in K.S.A. 44-510f(a)(3) applied because it relates to cases in which “permanent or temporary partial disability, including any prior [TTD benefits are] ... paid or due.” Court concluded that the Board erred in applying the $50,000 compensation cap to Roberts’ award of benefits.

STATUTE: K.S.A. 44-510c, -510d(a)(13), (21), (23), -510e, -510f(a)(3), (4)

WORKERS’ COMPENSATION AND SCHEDULED INJURIES
ROBERTS V. MIDWEST MINERAL INC.
WORKERS’ COMPENSATION BOARD
REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,090 – APRIL 3, 2009

FACTS: Edward Harold Roberts was the plant superintendent for Midwest Mineral Inc. He was responsible for supervision of Midwest’s various quarry operations. His average weekly wage was $930. While making adjustments on a belt conveyor at the Coffeyville quarry, his right arm was caught in the machinery, resulting in the amputation of his arm 3 inches below the shoulder. Roberts was taken to the Coffeyville Regional Hospital where he was stabilized and then sent to St. John's Hospital in Tulsa, Okla., for treatment. He was hospitalized for about five days. He was then fitted with a prosthetic and returned to work about three weeks after the accident. The administrative law judge (ALJ) found that Roberts’ injury was compensable as a scheduled injury under K.S.A. 44-510d(a)(13). Midwest paid Roberts 3.29 weeks of temporary total disability (TTD) for his actual healing period and $72,378.35 in medical expenses. The parties stipulated that Roberts was entitled to compensation for traumatic amputation of his right arm (including shoulder musculature) for 225 weeks. The ALJ awarded Roberts TTD benefits for 3.29 weeks followed by 225 weeks of permanent partial disability (PPD) compensation for his scheduled injury. However, the ALJ limited the PPD award to $50,000 based on the monetary cap in K.S.A. 44-510f(a)(4), which, the ALJ found, applied to all scheduled injuries. Roberts appealed to the Workers’ Compensation Board (Board). The Board, by a 3/5 majority, affirmed the ALJ’s order limiting Roberts’ award to $50,000 pursuant to K.S.A. 44-510f(a)(4). The dissent noted, among other things, that the $50,000 cap in K.S.A. 44-510f(a)(4) applies only “for permanent partial disability where function impairment only is awarded.”

ISSUES: (1) Workers’ compensation and (2) scheduled injuries

HELD: Under the facts presented, when a worker suffers the amputation of his arm in a work-related accident, resulting in hospitalization and loss of work for about three weeks for which he received temporary total disability benefits during his healing period, and the worker is awarded benefits for his permanent partial disability as a scheduled injury pursuant to K.S.A. 44-510d(a)(13), court concluded that the $50,000 benefit cap in K.S.A. 44-510f(a)(4) does not apply to Roberts because he was paid TTD for a healing period (as permitted by K.S.A. 44-510d and K.S.A. 44-510c) in addition to the maximum number of weeks for his amputation. Further, his award was not based on “functional impairment only.” Rather, the $100,000 cap in K.S.A. 44-510f(a)(3) applied because it relates to cases in which “permanent or temporary partial disability, including any prior [TTD benefits are] ... paid or due.” Court concluded that the Board erred in applying the $50,000 compensation cap to Roberts’ award of benefits.

STATUTE: K.S.A. 44-510c, -510d(a)(13), (21), (23), -510e, -510f(a)(3), (4)

CRIMINAL

STATE V. BOEHMER
SEDGWICK DISTRICT COURT – DISMISSED IN PART, REVERSED IN PART, AND REMANDED
NO. 99,090 – APRIL 3, 2009

FACTS: Boehmer charged with driving under the influence (Count I), driving while suspended, and transporting an open container (Counts II and III). District court granted Boehmer’s preliminary hearing motion to dismiss Count I and denied state an opportunity to amend the defective charging document. State dismissed the case and refiled on all three counts. District court granted Boehmer’s motion to dismiss all three counts with prejudice, based upon its reading of the record. State appealed, arguing excusable neglect for untimely appeal from dismissal of Count I and abuse of the trial court’s discretion in dismissing Counts II and III with prejudice.

ISSUES: (1) Appellate jurisdiction and doctrine of excusable neglect and (2) dismissal of charges with prejudice

HELD: There is no appellate jurisdiction over dismissal of Count I. State’s notice of appeal was untimely. Under facts of case, where court made it clear from the bench that the motion for dismissal of Count I with prejudice was sustained, and where court specifically
REFERENCED THE STATE'S RIGHT TO APPEAL, AND WHERE COURT FILED A MOTION MINUTE SHEET OF RECORD WITHIN TWO DAYS OF THE HEARING CLARIFYING AN INTENT TO DISMISS COUNT I WITH PREJUDICE, THESE ARE NOT CIRCUMSTANCES WHERE IT IS APPROPRIATE TO APPLY DOCTRINE OF EXCUSABLE NEGLECT UNDER K.S.A. 60-2103(a) TO PERMIT A BELATED APPEAL OF THE RULING.

BASED UPON BENCH COMMENTS AND WRITTEN MOTION MINUTE SHEET, IT IS CLEAR THE INITIAL DISMISSAL OF COUNTS II AND III WAS INTENDED TO BE WITHOUT PREJUDICE. WHERE THE ONLY REASON GIVEN BY DISTRICT COURT FOR A DISMISSAL WITH PREJUDICE HAS BEEN SHOWN TO BE ERRONEOUS, THE DISMISSAL WITH PREJUDICE WAS AN ABUSE OF DISCRETION. REVERSED AND REMANDED FOR RESTATEMENT OF THESE TWO CHARGES.

STATUTE: K.S.A. 60-2103(a)

STATE V. COX
WOODLEY DISTRICT COURT – AFFIRMED
NO. 99,943 – APRIL 24, 2009

FACTS: OFFICER Sigg stopped Cox for a window tint violation. Sigg asked Cox to produce proof of motor vehicle liability insurance, and when Cox was unable to do so, he was arrested for violating K.S.A. 40-3104(d). During the subsequent pat-down search of Cox, Sigg felt a bulge in Cox's pants pocket. Sigg removed a sunglass case and discovered it held two baggies containing a substance Sigg believed to be methamphetamine. Subsequent laboratory testing confirmed Sigg's belief. Cox was charged with possession of methamphetamine with intent to sell, possession of drug paraphernalia, and failure to provide proof of insurance. The district court denied Cox's motion to suppress, finding Cox's failure to provide proof of insurance was an arrestable offense and the evidence found on his person was admissible as it was obtained in a search incident to a valid arrest. The district court convicted Cox on stipulated facts and sentenced him to 18 months' probation, with an underlying prison term of 15 months.

ISSUES: (1) Vehicle stop and (2) search and seizure

HELD: COURT HELD THE LANGUAGE OF K.S.A. 40-3104, WHEN CONSIDERED IN PARI MATERIA, REVEALS THAT A LAW ENFORCEMENT OFFICER IS AUTHORIZED TO EITHER ISSUE A CITATION OR ARREST AN INDIVIDUAL WHO FAILS TO PROVIDE PROOF OF MOTOR VEHICLE LIABILITY INSURANCE. THEREFORE, COX'S ARREST WAS LAWFUL, THE SUBSEQUENT SEARCH OF HIS PERSON WAS INCIDENT TO THAT VALID ARREST, AND THE DISTRICT COURT DID NOT ERR IN DENYING COX'S MOTION TO SUPPRESS THE FRUITS OF THAT SEARCH.

STATUTES: K.S.A. 8-2118; K.S.A. 22-2401(d); and K.S.A. 40-3104(d), (e), (g), -3105(2)

STATE V. DALTON
MIAMI DISTRICT COURT – AFFIRMED
NO. 99,111 – MOTION TO PUBLISH OPINION FILED AUG. 8, 2008

FACTS: Dalton plead nolo contendere to one count of possession of red phosphorus with intent to manufacture methamphetamine. He was sentenced to a presumptive 49-month prison sentence. Dalton argued he should have been sentenced for possession of drug paraphernalia.

ISSUES: (1) Sentencing and (2) methamphetamine


STATUTES: K.S.A. 2006 SUPP. 21-4717(a)(1)(D); K.S.A. 21-4721(e)(3); K.S.A. 2006 SUPP. 65-4150(c), -7006(a); and K.S.A. 65-4150(c), -4152(a), (c), -4159, -7001, -7003(1)(17), -7006(a), (e), -7015

STATE V. DEAL
COWLEY DISTRICT COURT – AFFIRMED
NO. 98,292 – MAY 1, 2009

FACTS: Deal convicted of second-degree murder. On appeal he claimed there was insufficient evidence to convict him of unintentional second-degree murder and claimed the trial court erred in instructing jury on "no duty to retreat" and in denying a continuance on Deal's motions for new trial. He also claimed the introduction of prior crime evidence violated in limine order, and claimed the trial court violated Deal's constitutional rights by imposing aggravated sentence in applicable sentencing grid box, and by using Deal's criminal history to increase the sentence.

ISSUES: (1) Sufficiency of evidence, (2) jury instruction, (3) continuance, (4) prior crimes evidence, and (5) sentencing

HELD: UNDER FACTS OF CASE, WHERE EVIDENCE SHOWED DEAL KILLED THE VICTIM WHILE HEATING HIM WITH A TIRE TOOL WITH INTENT TO SEVERELY INJURE HIM, THERE WAS SUFFICIENT EVIDENCE FOR JURY TO FIND DEAL GUILTY BEYOND A REASONABLE DOUBT OF DEPRAVED HEART SECOND-DEGREE MURDER. CASE COMPARED TO STATE V. ROBINSON, 261 KAN. 865 (1997).

"No duty to retreat" rule is discussed. Although facts of this case did not warrant such an instruction, the instruction did not prejudice Deal's substantial rights.

Under circumstances detailed in the opinion, including allegations of ineffective assistance of counsel in motions for new trial, no abuse of discretion in trial court's denial of Deal's motion for a continuance.

Evidence at trial violated in limine order, but consideration of this issue is precluded by Deal's failure to make contemporaneous objection, and no objection before videotape was played to the jury.

Appellee courts lack jurisdiction to consider prescriptive sentence, even if sentence is longest term in presumptive grid box for a defendant's conviction. Kansas Supreme Court precedent defeats Deal's constitutional claims regarding his sentencing.

CONCURRENCE (Leben, J.): Joins majority opinion with minor caveat as to whether evidence necessarily leads to conclusion that the victim struck first blow. Even so, sufficient evidence supports jury's verdict, and no error in giving a legally accurate self-defense instruction given the conflicting evidence presented to the jury.
STATE V. JONES
JOHNSON DISTRICT COURT
REVERSED, SENTENCE VACATED, AND REMANDED
NO. 97,976 – APRIL 17, 2009

FACTS: Jones convicted of carjacking in Kansas. Evidence involved another carjacking in Missouri. During jury’s deliberations, jury asked about fingerprint evidence on the gun in the Kansas carjacking, and trial court answered there was no evidence. Jones appealed, claiming the court’s response was erroneous because a detective testified that fingerprints of another person involved in both carjackings, and no others, were on the handgun. Jones appealed. State argued Jones waived appellate review by failing to contemporaneously object.

ISSUES: (1) Preservation of issue for appellate review and (2) response to jury question

HELD: Waiver of right to appeal a trial court’s response to a jury question under K.S.A. 22-3420(3) will not be presumed from a silent record that does not show the defendant and defense counsel were present at the hearing to confer regarding the jury’s question and in the courtroom when the trial court advises the jury of its response.

Under facts of case, trial court’s response to jury’s question was an erroneous statement regarding the trial evidence. Because jury’s question was specifically directed at a critical issue in the case, which was highly controverted, and trial court’s response was adverse to theory of the defense, the response was prejudicial. To not reverse the conviction and vacate the sentence would be inconsistent with substantial justice.

STATUTE: K.S.A. 22-3420(3), 60-261

STATUTES: K.S.A. 21-3218, -3218(a), -3401(a), -3401(b), -4721(c); K.S.A. 22-3501(2); K.S.A. 60-404; and K.S.A. 21-3211 (Furse 1995)

STATUTES: None

STATE V. SCHAD
STAFFORD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 99,445 – APRIL 24, 2009

FACTS: After pleading no contest to one count of aggravated indecent solicitation of a child in violation of K.S.A. 21-3511, Schad was placed on 60 months’ probation. Based on his criminal history, Schad was ordered to serve 60 months of probation. As part of the conditions of his probation, the trial court ordered Schad to: (1) register with the sex offender registry for the state of Kansas; (2) refrain from having contact with any person under 18 years of age who was not his wife, child, or immediate family member; (3) not commit any other offenses; (4) not drink alcohol or use any drug; (5) report to the probation officer monthly; (6) allow the probation officer to conduct a drug test; (7) allow the probation officer to conduct a physical examination; (8) attend counseling and participate in any other treatment programs; (9) allow the probation officer to enter his home at any reasonable hour to supervise Schad during his probation period; and (10) not possess any sexual materials. Schad appealed, claiming the court’s order was invalid and the trial court lacked the statutory authority to order Schad to register with the sex offender registry.

ISSUE: Conditions of probation

HELD: On Schad’s right to privacy claims concerning the signs, the court reversed and remanded to the trial court to sever these conditions from the order of probation on the basis that they exceeded the trial court’s express and implied statutory authority where they were not reasonably related to the rehabilitative goal of probation or to the protection of the victim and society. Court did not address the constitutional law contentions. Court disagreed with Schad that the trial court lacked the statutory authority to order him to serve 60 months of probation. However, the court agreed with Schad that the trial court failed to make the necessary findings to increase his term of probation to 60 months. Court remanded to the trial court to determine whether there were substantial and compelling reasons to impose the 60-month term of probation. If there were not substantial and compelling reasons for the 60-month term of probation, the trial court is limited to imposing the recommended 36-month term of probation under K.S.A. 21-4611(c)(1). Concerning the prohibition against grocery shopping, court determined that under K.S.A. 21-4603(b), the trial court could not impose a probation condition that constituted a deprivation of an essential activity. Court found the trial court in this case never made the necessary inquiry and appropriate findings as to whether Schad...
was able to obtain food by other means. As a result, court remanded the case with instructions that the probation condition prohibiting Schad from grocery shopping should be severed from the order of probation unless it can be shown on rehearing that grocery shopping was not an essential activity. Court rejected Schad’s claim that the trial court violated his constitutional rights in sentencing him to the aggravated number in the sentencing grid box.

STATUTES: K.S.A. 21-3438(a), -3511, -4603d, -4603b(d), -4610(c), -4611(c), -4704b(f), -4716, -4721(c)(1); K.S.A. 22-3504, -4907, -4909; and K.S.A. 60-412(c), (d)

STATE V. TOLER
JOHNSON DISTRICT COURT – APPEAL SUSTAINED
NO. 99,236 – MAY 1, 2009

FACTS: Toler drove car to school to run with dog while school was not in session. Officer approached about dog not being on a leash, and arrested Toler for possession of gun in Toler’s car. District court acquitted Toler, finding no violation of K.S.A. 21-4204(a)(5) because school was not in session. State appealed on question reserved, K.S.A. 22-3602(b)(3), for interpretation of statute.

ISSUE: Interpretation of K.S.A. 21-4204(a)(5)

HELD: State’s appeal on question reserved is entertained. Under plain language of K.S.A. 21-4204(a)(5), a person may be found guilty of criminal possession of a firearm on school property, even when school is not in session or children are not present on the school property at the time the offense is committed. District court placed too much weight on fact that K.S.A. 2008 65-4161 and K.S.A. 2008 Supp. 65-4163 expressly provide that school not be in session for offender to commit crime of possession of drugs within 1,000 feet of school property. Absence of this language from K.S.A. 21-4204(a)(5) does not establish legislative intent that school must be in session to violate criminal possession of firearm statute.

STATUTES: K.S.A. 2008 Supp. 65-4161, -4163; K.S.A. 21-4204(a)(5), -4204(b); and K.S.A. 22-3602(b)(3)
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Thursday, July 16, 9 – 10:40 a.m. and 1 – 2:40 p.m.
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