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2009 Legislative Update
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Cover photograph by Ryan Purcell

Do YOU have an idea for an article?
An idea you believe would be of interest to your colleagues in the practice of law in Kansas? Share your knowledge!

Lead articles should be oriented toward the interest of Kansas lawyers as distinguished from articles of general interest to the bar in the United States. They should deal more with what the law is than a discussion of what it should be (i.e., be practice oriented).

All articles or subject ideas for articles are reviewed by the Board of Editors. You may send a copy of the article or an outline of a proposed article to the Board for review. Mail or e-mail to:

Susan McKaske, KBA Communications Director
1200 SW Harrison St.
Topeka, KS 66612-1806
E-mail: smckaske@ksbar.org
Education, Collaboration, and Communication

At the end of the Annual Meeting, I succeeded Tom Wright as the president of this esteemed organization. I am excited to help guide our association this year for the benefit of the bench, the bar, and the public.

First, my background: I am a native Kansan and graduated from the University of Kansas twice; law school in 1983. I clerked for the Hon. Earl E. O’Connor, before joining Al Martin, Max Logan, and Nancy Roush in their boutique practice in Olathe. Shortly thereafter, we merged with Shook, Hardy & Bacon, where I practiced commercial litigation in the Kansas office for 23 years. In 2008, I left private practice to become the clerk of the Federal Court for the District of Kansas. Although I miss practicing, I am enjoying working with our great judges and staff on issues that are challenging, important, and rewarding. I have enjoyed the journey and am proud to be a Kansas lawyer.

In Tom Wright’s first column, he talked about the KBA’s need to focus inward, and listed the goals he wanted to achieve, which included forming a Political Action Committee (PAC). He accomplished his goals in grand fashion and left us with important work to do: The KBA must fund the PAC and increase our influence. Tom, thanks for a great job and your fine accomplishments.

My platform for this year continues Tom’s introspective focus and concentrates on three things: education, collaboration, and communication.

Education

We continue to face challenges educating our fellow citizens about the critical nature of judicial independence. As former KBA President Rich Hayse wrote in 2005: “The running joke is that an activist judge is one who decides the case in your opponent’s favor.” The public needs to be reminded that an unpopular decision is not a reason to get rid of a judge or change the selection process. This is especially true when the decision involves “hot” political issues of the day or the constitutionality of a bill passed by the Legislature. The Founding Fathers recognized that judicial independence is paramount, which is why they drafted the Constitution to give federal judges lifetime tenure.

In Kansas, our judges do not have life tenure; citizens can recall a judge that is not performing appropriately. We are fortunate that this right is rarely exercised. The KBA must continue working to ensure that judges have the ability to decide cases the correct way, not the popular way.

Recently, the Sandra Day O’Connor Project on the State of the Judiciary was formed to “stick up for the judiciary” by promoting judicial independence. The project leaders have since determined that the attacks on the judiciary are symptomatic of the lack of understanding about the workings of the three branches of government and the separation of power.

To quote Justice David Souter: “If a populace has absolutely no conception of the differences between what the executive, the legislators, and the judiciary is doing, then it makes no sense to argue to the populace that, in fact, the judiciary should be treated any differently from those elected branches. ... Without a conception of separation, without a conception of limitation, judicial independence is meaningless.”

In the coming year, we may face yet another challenge to our current system. Our bar association has traditionally led the efforts to keep politics out of judicial selection and we will continue to do so. To learn more about the KBA’s historical involvement, I recommend the article written by former Justice Hugo T. Wedell, Non-Political Selection of Judges, 25 J. Kan. Bar Assn 355 (1958). To be more proactive on education, we will design a program inspired by the Justice O’Connor project to help educate civic groups about government and, in particular, the judiciary.

Collaboration

Second, we want to expand our efforts to collaborate with those who share our goals. To aid this effort, I recently developed a KBA State and Federal Court Jurisdiction Committee to help the courts work together on projects of mutual interest like sharing records, disaster recovery planning, and the use and availability of translators. I appreciate the support of our Supreme Court and the federal judges in establishing the committee, which is being co-chaired by Justice Lawton Nuss and Chief Bankruptcy Judge Robert Nugent.

Additionally, I know from personal experience what great resources our local bar associations are and the KBA will encourage them to talk with us about how we can help them and work together. To launch this effort, in the coming months we will sponsor what we hope will be a fun and productive bar leadership summit for local and specialty bars.

Communication

Third, we all know that today’s methods of communicating are changing daily. We are challenged to maximize the coverage for the good things lawyers do in our communities and the essential nature of the rule of law. To this end, we will work with media outlets to improve our coverage in the press. This will help ensure our ability to better tell the story of lawyers and the justice system in Kansas.

Finally, civility and professionalism are usually displayed when lawyers and judges know and respect each other. The annual meeting is an excellent place for us to develop these relationships. It was great to meet together with the judges and we will do that again next year. I ask each of you to encourage your fellow lawyers to attend our next meeting in Wichita, June 9-11, 2010. I especially hope our seasoned lawyers and our judges will share with lawyers, especially young lawyers, the benefits of attending.

In conclusion, there is much work to do, and I look forward to working with you to take on these challenges. Please call or e-mail me if you have questions or comments on how we can together aid the profession. ■
Growing Up

By Jennifer M. Hill, McDonald, Tinker, Skaer, Quinn & Herrington P.A., Wichita

Each year the Kansas Bar Association dedicates a one page column of the Journal to its current Young Lawyers Section president. This year, despite my thought that this column space could easily be used for advertising, the KBA has chosen to reserve this space again for me, your humble young lawyers’ president.

For the next year, you’ll get to hear from me in each issue of the Journal. Hopefully, I provide each of you with some food for thought as it relates to your life and your practice as a Kansas lawyer. Seeing as this is my first article, allow me to formally introduce myself. As the year passes, if you have questions about my background or my perspective on certain issues, here’s your opportunity to look into my world.

My name is Jennifer Hill. I’m a Wichita native who grew up with two older brothers. I attended high school at Kapaun Mt. Carmel and then went on the University of Notre Dame, graduating with a degree in English and history, I attended Washburn University for law school and met my husband, Scott Hill. We married in 2002 and had our first child, Eliot, in January of this year. I started practicing law in Wichita in 2003 and have worked at McDonald, Tinker, Skaer, Quinn & Herrington P.A. since September 2005. I practice generally in the arena of insurance defense. I do a fair amount of personal injury work, contract disputes, employment law, and workers’ compensation. Outside of work, I have quite a few hobbies. I enjoy running, reading, cooking, all things musical, spending time with family and friends, and traveling. In another life, I’m an author or a pianist.

So now to this month’s column. Do you remember one moment in time where you became an adult? Is there a single moment that stands out in your mind where you went from being a kid to a grown up? I think for most of us, growing up is a process. I know that somewhere between ages 15 and 25, I became self-reliant. I learned how to support myself. I traded my dependency on my parents for independence. For me, it was a slow process with plenty of bumps along the way. Now, at 31 years old, I think I’m grown up. But every so often, I realize that growing up really just means figuring out how much you have left to learn!

Similarly, can you name the exact moment you stopped referring to yourself as a “young lawyer”? Are you still a young lawyer? When did you feel like you’ve “made it”? Was it when you got the first good result from a judge? When you struck a deal? When did you feel like you’ve “made it”? Was it when you got the first good result from a judge? When you struck a deal? When you felt like you’ve “made it”?

Most important, in those conversations I’ve had with “non-young” lawyers, I have realized that you never really truly get to the end destination. As with life, in the practice of law, the more you know, the more you realize you don’t know.

For the next year, you’ll get to hear from me in each issue of the Journal. Hopefully, I provide each of you with some food for thought as it relates to your life and your practice as a Kansas lawyer. Seeing as this is my first article, allow me to formally introduce myself. As the year passes, if you have questions about my background or my perspective on certain issues, here’s your opportunity to look into my world.

That observation helped me renew my commitment, to myself and to my clients. While I’m not exactly an accomplished or expert lawyer, I am on my way. I don’t exactly have a specialty but I’m becoming more and more familiar and adept at figuring out the strengths and weaknesses of any case. And, as I struggle to meet my billable hour requirements and struggle to get everything checked off my “to do” lists each week, I am working on those skills that will hopefully, someday, make me an expert … at something.

As each young lawyer struggles to “grow up,” I think it’s important to think about what kind of lawyer you want to be. Sure, each of us wants to be profitable, to be well-respected, to be professional, and to be good at our job. But more important than reaching your destination is the path that you take to get there. While no one wants to really consider it, there are no shortcuts to becoming a good lawyer. Hard work and dedication are truly the most important elements in each of our journeys.

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Fellow Kansas attorneys:

I know many of you were able to attend the Joint Judicial Conference and Kansas Bar Association Annual Meeting held in Overland Park this past June. With judges and attorneys from all over Kansas gathered under one roof, it was a terrific event. I would like to recognize the tremendous efforts of the co-chairs to the conference planning committee, Samuel P. Logan and the Hon. Stephen Hill, and the other committee members; KBA President Tom Wright; Judicial Administrator Dr. Howard Schwartz; and all of the members of the KBA and OJA teams who worked long hours putting the conference together and making it a success.

As I mentioned during my remarks at the conference, we in the Judicial Branch are working diligently to increase accessibility to the court system within our state. The Judicial Branch Web site (www.kscourts.org) provides a wealth of information for those who seek to keep abreast of recent developments in our courts — including information on the Self-Represented Study Committee; credit card acceptance within our district courts; appellate court decisions and orders; criteria for accepting petitions for review with information on those petitions granted, denied, or held; and our long-term project to implement e-filing of court documents. I encourage you to visit the Web site to find information on these and other efforts undertaken to ensure access to justice in Kansas.

However, the Judicial Branch’s efforts to provide these services are not without challenges. The most immediate challenge is our budget. During the wrap-up session of the 2009 Legislature, nearly $11 million was cut — without warning — from the Judicial Branch budget. That cut, coupled with other across-the-board cuts, and unfunded fringe benefits, represents a 13.8 percent reduction of our resources.

The $11 million cut has been recognized as a legislative mistake. The recommendation to cut funding was made under the mistaken assumption that the Judicial Branch Surcharge authorized by the 2009 Legislature was unlimited and could generate sufficient revenue to make up this cut. Neither assumption was correct — the Legislature had earlier placed a $10 limit on the surcharge and had further limited it to specified filings. We have made and will continue to make every effort to reduce expenditures as much as possible, but with almost 98 percent of our budget needed to pay our court personnel, savings of that magnitude are not possible other than by reducing salary expenditures.
By Randy M. Hearrell, Kansas Judicial Council

Earlier this year, the Kansas Judicial Council was the subject of a Journal of the Kansas Bar Association (JKBA) article by Professor Lyn Goering, “The Life and Times of the Kansas Judicial Council,” 78 J. Kan. B. Ass’n 19 (Feb. 2009). In that article, Goering described the history of the movement to create judicial councils nationwide and the history of the Kansas Judicial Council (Council) in particular. She also mentioned that the JKBA planned to publish a regular column highlighting the ongoing work of the Council and its advisory committees. This is the first installment of that column.

This first column will briefly describe meetings of the Council and the studies the Council agreed to undertake at its June 2009 meeting. K.S.A. 20-2202 provides in part, “The Judicial Council shall meet semiannually and more frequently, if necessary, upon the call of the chairperson.” The Council traditionally holds these statutorily required meetings in the first week of June and the first week of December. At its meetings, in addition to conducting the regular business of the Council, it considers requests from courts, judges, attorneys, citizens, the Council’s own advisory committees, and most frequently the Legislature, for the Council to study specific legal topics. If the Council agrees to undertake a requested study, the study is then assigned to an existing Council advisory committee. If an appropriate committee does not exist, a new advisory committee is appointed.

Generally, the Council’s advisory committees complete the studies requested by the Legislature and report to the Council at the December meeting following assignment of the study. If the advisory committee’s report is approved by the Council, the report is forwarded to the legislator or legislative committee that requested the study and posted on the Council’s Web site. If additional follow up is appropriate, such as requesting introduction of legislation, the Council will take that action. Occasionally, studies are complex enough that they cannot be completed in time for consideration at the Council’s December meeting. Reports of these studies are submitted for the Council’s consideration at the next meeting following the completion of the study.

At its June 2009 meeting, the Council referred studies requested by the Legislature to the following advisory committees:

- The Civil Code Advisory Committee was assigned the study of 2009 Senate Bill 32, which would prohibit a court from admitting expressions of apology, fault, or sympathy made by a health care provider as evidence of an admission of liability. In addition, the Committee was assigned the study of 2009 House Bill 2393, which provides for expungement of civil court records when the entry proposed to be expunged occurred because of mistaken identity, error or duplication, or when the case was dismissed prior to trial.

- The Death Penalty Advisory Committee was assigned to study 2009 Senate Bill 208, which would abolish the death penalty in Kansas. The Committee was directed to draft a workable bill to address technical problems that became apparent when the Senate debated the bill during the 2009 Session. In addition, the Committee was asked to review the cost to the state of imposing a death sentence versus the cost of sentencing a capital defendant to life in prison without parole; the effect of repeal upon a person convicted of a crime when the offense occurred while the death penalty was still in effect; and any constitutional questions related to those currently awaiting execution at the time of repeal. The Legislature has not sought the Council’s opinion on whether the death penalty should or should not be abolished.

- The Family Law Advisory Committee was assigned to study 2009 Senate Bill 27, which would amend K.S.A. 38-1114 concerning the presumption of paternity. The bill would allow the presumed father to request a genetic test and use the results to rebut the statutory presumption that he is the father. The bill would override current Kansas common law concerning the best interests of the child. As part of its study of Senate Bill 27, the Committee was also asked to review the Kansas Parentage Act as a whole. It is doubtful the latter portion of the study will be completed by December of this year.

(continued on next page)
The Council also assigned the Family Law Advisory Committee to study the 2001 and 2008 amendments to the Uniform Interstate Family Support Act made by the National Conference of Commissioners on Uniform State Laws. The Kansas version of the uniform act was last amended in 1997. This study request was made by a lawyer rather than the Legislature.

The Guardianship and Conservatorship Advisory Committee was assigned to study 2009 Senate Bill 235, which would adopt the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act. The Committee will recommend whether some or all of the Act should be enacted in Kansas.

The Juvenile Offender/Child in Need of Care Advisory Committee was assigned the study of 2009 House Bill 2208, which would require the Department of Social and Rehabilitation Services to provide the county or district attorney any information it receives concerning an apparent child in need of care.

The Council created a new advisory committee to study 2009 House Bill 2253, the Kansas Homeowners’ Association Act. The proposed Act sets forth numerous requirements for homeowners’ associations.

Unless otherwise noted, advisory committee reports on the assigned studies will be considered at the Council’s December 2009 meeting. If the Council decides to propose legislation as a result of the studies, the recommended legislation will be discussed in a future column.

All of the newly assigned studies described above are in addition to studies currently in progress by the advisory committees. For information about all current projects of the Council, see the Council’s Web site at www.kansasjudicialcouncil.org and check each specific advisory committee for that committee’s assigned projects.

The Council appreciates suggestions or comments about any matter being studied by the Council or any of its advisory committees, or any other matter that may warrant future study. Readers may contact the Judicial Council by e-mail at judicial.council@ksjc.state.ks.us.

About the Author

Randy M. Hearrell is the long-time executive director of the Kansas Judicial Council and, since 2006, has also served the Council as executive director of the Kansas Commission on Judicial Performance. He received his Juris Doctor from Washburn University School of Law in 1970. Prior to joining the Judicial Council in 1971, he was the recipient of a Ford Foundation Legislation Internship and worked briefly as an assistant revisor of statutes.

In Memoriam

John E. Shamberg

Our Leader, Partner & Friend

SHAMBERG, JOHNSON & BERGMAN
Trial Attorneys
2600 Grand / Suite 550 / Kansas City, MO 64108 / 816-474-0004
SJB.LAW.COM

July 15, 1913 - July 9, 2009
Greetings to members of the Kansas Bar Association. I am honored to have been nominated and appointed president of the Kansas Bar Foundation (KBF/Foundation) succeeding Sally Shattuck of Ashland, who provided the Foundation with excellent leadership. I want to take this opportunity to publicly thank her for her dedicated service to the Foundation.

I have practiced in the Kansas City area with the McAnany, Van Cleave & Phillips law firm since graduating from Washburn University School of Law in 1984. I am honored and humbled to take on the responsibility as KBF President.

I join Kansas Bar Association President Tim O’Brien’s call to foster increased communication between the Bar leadership and its members and the citizens of our great state.

The Foundation has an honorable story and envied history. The KBF was founded in 1957 as a 501(c)(3) charitable organization. The Foundation is supported by voluntary contributions from lawyers, the Foundation Fellows Program and the IOLTA Program. The mission of the KBF is clear. The Foundation serves the citizens of Kansas through the legal profession by the funding of charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving accessibility, equality, and uniformity and by enhancing the public opinion of the role of lawyers in our society.

The educational mission of the KBF has never been more important. Upon his retirement from the U.S. Supreme Court, Justice David Souter stressed the dire need of Americans being re-educated about how their government works. Justice Souter stresses that the lack of knowledge of the citizens not only threatens the judicial independence, but the republic itself. The Foundation distributes “Law Wise,” an educational publication to schools. The Foundation sponsors the Young Lawyers Mock Trial program and has supported Youth Court programs in various metropolitan areas. The Foundation provided funds for a statewide law-related education projects sponsored by the KBA in cooperation with the Kansas Supreme Court’s Law and Citizenship Project. These efforts are just some of the many ways we can and have answered the call of Justice Souter.

Perhaps the most important role of the Foundation today is enhancing the public opinion of the role of lawyers in our society. The image of our profession is formed by television and the popular media. The good works of our Association, our Foundation, and the individual members of the Bar seem to get a lot less attention than our mistakes.

At the recent KBF Fellows, dinner the Foundation honored several banks, which were leaders in IOLTA interest rates. The guests were honored by the accolades but the real lesson was their surprise and admiration when learning of the works done in the community with the funds generated from those accounts. The need in our communities has never been greater and our ability to serve those needs goes a long way toward enhancing the public opinion of the role of lawyers in our society.

One easy way to enhance the reputation of lawyers and the public opinion of our role in society is to support your Kansas Bar Foundation. The Foundation can be supported through the fellows program or with individual gifts. However, this article is not about a solicitation of funding. The good works lawyers do in our society are replete. Members of our profession are some of the most active in the charitable works of the community. Lawyers serve on every important charitable board in the state and the pro bono works of our profession often go overlooked.

I call on all members of the Bar to spread the word on the honor of our profession.

About the Author

John Jurcyk,  McAnany, Van Cleave & Phillips PA., Roeland Park, is a longtime member of the KBF and became a member of the Kansas Bar Association in 1984.

He represents employers and their insurance carriers in all areas of workers’ compensation and general corporate defense. He strongly defends owner-controlled and contractor-controlled insurance plans. He was the lead defense counsel for many contractors, including the Union Station renovation, the Nelson Gallery expansion, Zona Rosa, Kansas City International Airport renovations, and the Federal Reserve and Internal Revenue Service complex in Kansas City.

Jurcyk successfully defended the employer and insurance carrier in Boucher v. Peerless Products, a Kansas Supreme Court case decision that denied permanent disability to any employee disabled from employment for less than one week. He convinced the Kansas Court of Appeals that fear of AIDS was not a viable cause of action and obtained dismissal of Reynolds v. Highland Manor Inc.
Conflict. Conflict is a very broad term. A conflict can be a simple disagreement or it can be a complicated internal struggle. Like many of my peers, I was unafraid of conflict upon entering law school. In fact, many of us entered law school due, at least in part, to the pleasure we derive from engaging in conflict. We sought conflicts that would make us better critical thinkers. What we found was that unhealthy conflict could be closely intertwined with attending law school itself—particularly with respect to the law school grading practice of curving most classes. Fortunately, Washburn has created a path that encourages healthy conflicts.

As an undergraduate, I studied human communications and wrote many papers on conflict and negotiation. In the law school setting, however, I now find myself practicing a conflict style I abhorred in many of those papers as often the least beneficial way of dealing with conflict. In my opinion, when it comes to grades, law students generally adopt an avoidant conflict style. As the term suggests, individuals who engage in an “avoidant conflict style” do all they can to evade a conflict rather than face it.

An avoidant conflict style is not always unhealthy; in fact, it is preferred when one is faced with a force likely to cause harm. The question then becomes, are our peers likely to cause us harm? I would like to think not. However, the law school tradition of curving grades pits student against student because we become fearful that our peers will outperform us, even if we ourselves achieve a degree of excellence. Many of us would rather share our most embarrassing childhood memory than our grades. If we receive an “A,” we fear others will resent us for taking away the opportunity to receive that “A” themselves; heaven forbid the “A” be for the “top paper” in the class. Likewise, if we receive anything lower, we fear judgment would this require all conflict to be removed from law school. In fact, conflict can be very healthy when dealt with appropriately. For instance, many of us find it invigorating to argue points from class or our legal writing topics. Often, the necessity of countering a peer’s position leads to the discovery of additional arguments in favor of one’s own position. An open and understanding approach to another’s opinions can diminish hostility and promote a healthy law school environment.

The practice of curving grades is not set in stone. I have witnessed some professors who enjoy the opportunity to reject the recommended curve because students have performed so well. In those instances, the class performance is higher than the recommended curve. I appreciate the possibility that the curve could be lower than the recommendation too; students should be judged on their own performance and should not benefit simply because the other students understood the material even less. When the curving standards have appropriate flexibility, professors can help to eliminate the avoidant conflict environment created by a strict curving system.

In my opinion, we should continue down a path that creates a more cohesive law school environment. By no means would this require all conflict to be removed from law school. In fact, conflict can be very healthy when dealt with appropriately. For instance, many of us find it invigorating to argue points from class or our legal writing topics. Often, the necessity of countering a peer’s position leads to the discovery of additional arguments in favor of one’s own position. An open and understanding approach to another’s opinions can diminish hostility and promote a healthy law school environment. I believe my first year involved an abundance of this healthy style of conflict at Washburn. For example, by taking positions contrary to a peer’s, with whom I often agreed, I created arguments I might not have otherwise discovered.

In the end, we must all remember that, while we should strive to do as well as we can in law school, 50 percent of lawyers graduate in the bottom half of their class. It is best we realize that we do not need to compete with one another, but should strive to improve each other through engaging in healthy arguments. The law school education system can be enhanced through the efforts of students and faculty. Therefore, I encourage everyone, student or otherwise, to engage in conflicts, but ensure they are mutually beneficial and healthy conflicts. Healthier conflict will be created by improving the way law school education is approached, and by improving ourselves and the way we approach our conflicts.

About the Author

Kelly Vrana received his Bachelor of Arts in communications from Arizona State University. He anticipates receiving his juris doctor from Washburn University School of Law in 2011 and is currently serving as a law clerk for the Kansas Court of Tax Appeals.
Thinking Ethics

Conflicts Checking When Lawyers Change Firms: Revelation of Client Confidences

By Professor Sheila Reynolds, Washburn University School of Law

Law firm A hears from its partner L that he wants to move to law firm B. Shortly thereafter firm B asks firm A to provide it with a list of names of all law firm clients for whom L has worked and a general description of the nature of the client’s matter. Knowing that ethics rules forbid disclosure of all information obtained in the course of representing a client, absent a clear exception, firm A’s first thought is to decline to provide the information, citing Kansas Rule of Professional Conduct 1.6. But in order to protect its clients from a conflict of interest created by L’s move, firm B also has an ethical duty to check for conflicts that may be imputed to the firm if L begins to work there. Such conflicts may arise both from substantially related matters L personally worked on while at firm A and matters other lawyers handled, but about which he has material, confidential information. To ignore this conflicts check could harm firm B’s clients and result in malpractice if the firm is later disqualified because of a conflict the firm failed to learn about.

When such a significant clash of ethical values occurs, lawyers expect the ethics rules to spell out a resolution. However, nothing in the ABA Model Rules or the Kansas Rules of Professional Conduct (KRPC) explicitly addresses this dilemma. Additionally, the law of attorney-client privilege, under which client identity is not generally protected, is not helpful because it is a matter of evidentiary law, governed by different principles and legal analysis than the law of ethics.

Kansas lawyers will find guidance on the dilemma posed above by Kansas Bar Association Ethics Opinion 07-01 (Opinion), which concludes on this issue that a law firm may not refuse to disclose a client list to another firm for the purpose of conflicts checking. The Opinion turns on recognition of how necessary it is to check for conflicts in today’s legal climate, where firms break up and lawyers frequently move from one law office to another. The ethical duty of avoiding conflicts of interest trumps the duty of protecting client information. The Opinion acknowledges reliance upon an excellent law review article on the topic, by Professor Paul R. Tremblay, which should be consulted by readers interested in an in-depth analysis of the limitations on information that a firm should provide.

The exception to the general duty not to disclose client information is found in KRPC 1.6(b)(2), which permits disclosure “to comply with requirements of law.” The ethical rules that prohibit lawyers from representing clients when there is a conflict of interest are “requirements of law” that necessitate a conflicts check. Thus, the Ethics Advisory Committee writing the Opinion based its decision on a specific exception to confidentiality that implicitly applies to conflicts checking when lawyers move from one firm to another.

The Opinion suggests that the best way to limit access to this conflict-checking information is through an intermediary, such as a retired partner or other middle-person associated with firm B who is not involved in client representation.

A more difficult issue not addressed by the Kansas Opinion is how to check for conflicts on firm A client matters the moving lawyer did not work on, but about which he may nonetheless have acquired material confidential information. This would involve at minimum a list of all clients firm A represented while L was with the firm, to be compared with firm B’s clients to determine if any are adverse parties. L would then need to review the list of potential conflicts to ascertain if he remembers anything about the matter that would be material and confidential. Presumably if he does and client consent to waive the conflict is not obtainable, L’s move to firm B would not be feasible. The actual details of the material, confidential information should not be shared with firm B in any event, because that information is precisely what creates a conflict of interest.

The Tremblay article also points out that firm A conflict-checking information that is extremely sensitive and could injure a client if disclosed should not be shared through this typical process. An example would be a law practice limited to representing lawyers in disciplinary matters, some of which have remained confidential. Even to reveal the client’s identity would injure such a client. In such a situation, an alternative should be considered, such as L checking firm B’s client list to try to determine whether L recognizes any former client as an adverse party.

About the Author

Professor Sheila Reynolds is a law professor at Washburn University School of Law where she teaches Professional Responsibility and in 2008-09 served as associate dean for academic affairs. She has served on the Kansas Bar Association (KBA) Legal Ethics Advisory Committee, the KBA’s Ethics 2000 Commission, and co-authored two chapters of the KBA’s Kansas Ethics Handbook (1996 and Supp. 2001) and the chapter on “Ethical Considerations in Representing an Impaired Client” for the KBA’s Kansas Long-Term Care Handbook (1999 and 2008).

Footnotes

1. KRPC 1.9 prohibits lawyers from representing clients adverse to their former clients in the same or substantially related matters or from representing clients adverse to a former law firm’s clients if the lawyers know material confidential information about the case. These conflicts are imputed to all members of a law office by KRPC 1.10.


3. The Kansas Opinion cites the comment to Rule 1.6, “A lawyer may not disclose [information protected by 1.6] except as authorized or required by the Rules of Professional Conduct or other law.”
Members in the News

Changing Positions

Peter K. Andreone has joined the Law Offices of Brian Timothy Meyers, Kansas City, Mo.
Richard L. Becker has become a shareholder with Levy & Craig, Overland Park.
Michael L. Bennett has joined the city of Lawrence.
Steve C. Blanck has joined MeLeod & Heinrichs, Kansas City, Mo.
Megan E. Bray has joined Waddell & Reed Financial Inc., Overland Park.
Brian L. Burge has joined Sanders, Warren & Russell LLP, Overland Park, as an associate.
Chad E. Chase has joined the Trust Company of Manhattan.
Thomas M. Dawson was hired as the new city attorney and city prosecutor for the city of Leavenworth.
Matthew P. Dykstra has joined the Muir Law Firm LLC, Overland Park.
Brian P. Duncan and Susan G. Saidian have been joined Case, Moses Zimmer & Martin PA, Wichita, as associates, and Tammy M. Martin was added to the firm’s name.
Paige J. Eichert Zolotor has become an associate with Scott, Quinlan, Willard, Barnes & Keeshan, Topeka.
Jason E. Geier has joined the Shawnee County District Attorney’s Office, Topeka.
Joseph G. Herold has joined Garcia & Antosh LLP, Dodge City.
Jeffrey B. Hurst has joined Foulston Steffkin LLP, Wichita, as special counsel.
Stephen M. Johnson has joined the office of John P. Hastings, Attorney at Law, Overland Park.
Rebecca L. Kurz has joined Morgan Pilate LLC, Olathe.
Eric K. Lau has become a shareholder of the Hallbrook Law Firm P.C., Prairie Village.
Kurt A. Level has joined Koch Companies Public Sector LLC, Wichita.
Jonah W. Lock has joined Singer, Tarpely & Jones P.A., Overland Park.
David S. Lockett has joined McDowell, Rice, Smith & Buchanan P.C., Overland Park, as an associate.
Corey J. Mertes has joined Shapiro, Protzman & McMullen P.A., Overland Park.
Stacey Meyer Bowman has joined Husch Blackwell Sanders LLP, Kansas City, Mo.
Alexandria S. Dunn Morrissey has joined her father’s firm, Edward S. Dunn, Holton.
Kendra M. Robben has joined Secure Financial Management, Ardmore, Okla.
Nicole M. Romine has joined the Douglas County District Attorney’s Office, Lawrence.
Samuel L. Schuetz has joined Sac & Fox Nation Casino, Hiawatha, as their attorney.
Robert E. Shaver has joined New England Financial/MetLife, Wichita.

Changing Locations

Julie A. Anderson has started her own firm, Anderson Law LLC, 2301 Burlington St., Ste. 270, North Kansas City, Mo. 64116.
David P. Eron has started his own practice, Eron Law Offices, 404 E. Central, Wichita, KS 67202.
The G. Thomas Harris Law Office has moved to 111 E. Cherokee, Sedan, KS 37361.
Amy C. Henderson has moved to Polinelli Shughart P.C.’s Kansas City office, 700 W. 47th St., Ste. 1000, Kansas City, MO 64112.
Rick E. Hodge has started his own firm at 350 R.H. Garvey Building, Wichita, KS 67202.
The office of Abogada Ericka Jurado-Graham P.A. has moved to 151 S. 18th St., Ste. D, Kansas City, KS 66102.
Stephen D. Kort has started his own practice, 7285 W. 132nd St., Ste. 340, Overland Park, KS 66213.
The Law Office of Ray A. Kowalczewski has moved to 8700 Monrovia, Ste. 310, Lenexa, KS 66215.
McCaulcy & Roach LLC has moved to 8080 Ward Pkwy., Ste. 206, Kansas City, MO 64114.

Miscellaneous

Jay S. Emles, McPherson, received the Alumni Award of Merit at the Annual Alumni Recognition Banquet of Bethany College.
Incoming 2009 Wichita Bar Association President J. Michael Kennalley and Executive Director Karin Kirk attended the ABA Bar Leadership Institute in Chicago.
Stephen M. Kerwick of Foulston Steffkin, Wichita was inducted into the Litigation Counsel of America at the LCA’s Spring Conference and Induction of Fellows in San te Fe, N.M.
Midland Professional Associates has changed to Disability Professionals, Wichita.

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.

“Jest Is For All” by Arnie Glick

“It’s not always possible to prepare for what’s going to happen at court, but I’m good at winging it.”
Robert Ellsworth Upp

Robert Ellsworth Upp, 92, of Hutchinson, died May 22 at Mennonite Manor in South Hutchinson. He was born April 9, 1917, in Ottumwa, Iowa, the son of Jay Glenn and Clarissa H. Porter Upp. He was a 1939 graduate of Carleton College in Minnesota and a 1952 graduate of the University of Missouri-Kansas City School of Law.

He practiced law in Hutchinson from 1952 to 2008, and was admitted to practice law before the Kansas Supreme Court, the U.S. District Court for the District of Kansas, and the 10th U.S. Circuit Court of Appeals. He was a member of the Reno County, Kansas, and American bar associations. In 2002, the KBA honored Upp with a 50-year membership recognition.

Upp was a member of the YMCA Board of Hutchinson and was active in the campaign to build the indoor swimming pool and, for many years, was involved in the YMCA Camp Wood at Elmdale. He was also active with the Hutchinson Kiwanis Club, the Kiwanis Foundation, and the Salvation Army Board. In 2000, Upp and his wife, Neva Jane, co-chaired the Capital Campaign for the new Salvation Army’s building. He was elected to the Hutchinson City Commission in 1963 and served two terms, during which he served as city mayor in 1967.

George D. Wagstaff

George D. Wagstaff, 88, of Tecumseh, died May 11 at his farm. He was born Sept. 20, 1920, and grew up in the Tecumseh area. Wagstaff served in the U.S. Marines from 1942 to 1946 and was stationed at Fort Pendleton, Calif., and in China and Okinawa. He was honorably discharged as a staff sergeant.

Wagstaff received his bachelor’s and law degrees from Washburn University. He was city attorney for Topeka, an attorney for the State Board of Tax Appeals for the state of Kansas, and was in private practice for a number of years.

He is survived by his wife, Fern; son, Stan, Topeka; two grandchildren; two great-grandchildren; and a sister, Kay Pooley, Oklahoma City.
Law Practice Management Tips & Tricks

Supreme Court Appoints Committee to Study E-filing

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

**Kansas electronic filing first steps**

Last year in this column I wrote of Nebraska’s initial report on its e-filing pilot project and appealed to our state’s competitive streak in begging for a new Kansas e-filing initiative. I am thrilled my hopes for e-filing are being realized with the first tentative steps toward a statewide e-filing system. The announcement in press releases and on the Kansas Judicial Branch Web site proclaim, “The Supreme Court Electronic Filing Committee (Committee) has been appointed to study electronic filing of court cases and documents in Kansas. The Committee is being chaired by Justice Marla J. Luckert, with Justice Dan Biles serving as vice chair.”

Technology has advanced far beyond what was available in 1997 when Shawnee County District Court went online with its e-filing project. Hardware is now so cheap it is virtually disposable, software capabilities have exploded, and standardization around formats and platforms have all contributed to a situation in which technology experts can provide us with anything we would want in an e-filing system. Therein lies the biggest challenge to the project – how does Kansas pick and choose what it wants now while predicting the future to ensure lasting viability of any e-filing investment?

**Electronic filing committee formation**

The Supreme Court answers the challenge by reaching out to those who will eventually use the system. One of their first steps was to circulate notice of an online e-filing survey asking attorneys and the public to participate in sharing thoughts about e-filing. That survey is available, as of June, through a link on the Kansas Judicial Branch Electronic Filing site, www.kscourts.org/Cases-and-Opinions/Electronic-Filing. Responses to this survey are given to Justice Luckert’s committee which, “In addition to judges, court administrators and clerks, attorneys specializing in collection matters and other members of the legal community, the committee includes the chairs of both the House and Senate Judiciary Committees.”

Three subcommittees have been established to examine particular issues with this technology initiative. The Policy & Procedure group is charged with making recommendations about procedures to make e-filing work efficiently including any recommended statutory or local rule changes. The Technology group (of which I am a member) is charged with evaluating and recommending standards, tools, and vendors. Finally, the Finance group has the unenviable task of figuring out a means by which such a project could be funded. (This group will, presumably, also take some time to investigate the cost-savings e-filing can provide.)

The primary task of the Supreme Court Electronic Filing Committee is to conclude its efforts with sound recommendations to the Supreme Court regarding a deployable and efficient e-filing system. However, anyone familiar with law practice management and technology is acquainted with the hope that a project can be leveraged to solve multiple problems. The current e-filing effort has components, which could certainly be valuable in addressing more than paper-shuffling in our legal system.

**Leveraging law practice management and technology lessons**

The Committee’s foundation has been built on openness and collaboration. The public survey is a small thing to implement but acknowledges the public’s interest in how the courts operate and make decisions. More dramatic has been the formation and functioning of the committee itself. A broad spectrum of participants in the legal system has been invited to review and comment on court administrative issues, which were once held close to the vest. The meetings have even included the press and observers who can freely report their observations.

This degree of collaboration is encouraging. The Supreme Court and Office of Judicial Administration have reached out to participants in the legal system for input about a system, which may eventually affect each of us. It would be interesting to see a similar panel to publicly and collaboratively address judicial funding. The perennial focus on funding through “user fees” (on top of taxes) is as absurd for the judicial branch as it would be for the legislative or executive branches. Imagine how filing fees for bill introduction, surcharges on testimony, or 900-numbers for calls to the governor or legislators would be received.

Of course, that practice management issue is beyond the scope of the Supreme Court Electronic Filing Committee’s mission. Until then, my hope is that Kansas can take the lead in e-filing with a system that aids all participants and roundly trounces all competing systems.

**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.
Volunteers are Ordinary People Who Accomplish Extraordinary Things Through Service

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

How fitting that National Volunteer Week in America began on April 19 – the day that Cliff “Teno” Ratner died. The theme was “Celebrating People in Action” and the purpose each year is to honor individuals who take action and help solve problems in their community.

This is to honor and celebrate the volunteers who serve Kansas Lawyers Assistance Program (KALAP) and their fellow lawyers, with focus on a special person who was an outstanding volunteer in the community of Wichita, and in the legal community of the state of Kansas, Cliff “Teno” Ratner.

Our understanding of alcoholism has grown and evolved over the years from the idea that it was a reprehensible moral weakness to the understanding that it is a disease and can be successfully treated. For most of the last century, alcoholic lawyers went steadily downhill until often the last resort was disbarment. It wasn’t until 1935 that Alcoholic Anonymous was begun by Bill, a stockbroker, and Dr. Bob, a physician. And it wasn’t until the mid-1970s that lawyers in Kansas adopted the AA method of one person talking with another in an effort to get or stay sober. Teno Ratner was the initial moving force in Wichita in 1973. He got sober on July 12, 1972, and then began working with other local lawyers who had a drinking problem. The Wichita Bar Association Committee on Impaired Lawyers came directly out of that effort and carries on to this day, with a long record of success. Within months of Teno’s initial reaching out, other men — now old-timers — began a similar endeavor in Topeka and Kansas City and soon a network grew.

Teno took action to help solve first his own problem and then those of others in his community. Although he didn’t limit his help to lawyers, he invested incalculable time and labor to help his fellow lawyers when they needed it. There were countless meetings over the years, thousands of words of camaraderie or encouragement or wisdom; and the occasional prodging when indicated. This is what volunteers are doing today as well as giving of themselves and their time to help others. Presently there are approximately 180 KALAP volunteers who, with the best interests of their colleagues and the profession at heart, give their own time and support to fellow attorneys who may be struggling with an addiction, depression, stress, and other conditions. They call them, they meet with them, they share their experience, strength, and hope. And there are many, many other volunteers within the legal profession who also give their time and expertise in too many ways to list here; but we celebrate them and thank them.

There were two postings on the online guest book that captured the aspect of the Teno we are celebrating here:

April 23, 2009
“Judge Ratner was one of my favorite judges. He would always take the time to talk. He treated everyone with respect and I will truly miss him!”

April 22, 2009
“In 1975 Tino sentenced me to 1yr in jail and a $500 fine for drunk and disorderly. He let me go on probation for 1yr. if I attended AA. I have been there since. I owe him my life and thank the Lord for his influence on mine. He helped me to get my record cleared and set me on a new path. I will miss him dearly.”

Generosity is a hallmark of those who volunteer and in Teno’s personal history, other traits were endurance, longevity, and dependability. He didn’t go all out for a year or two and then fade when the newness and glamour wore off – he was in it for the long haul. He endured frustrations and disappointments with people and circumstances but kept his eye on the prize: Maintaining his own sobriety and helping others in their own program of personal growth. Teno’s generosity led him to sacrifice his own anonymity. Normally members of Alcoholics Anonymous, as well as those associated with KALAP in any way, honor confidentiality absolutely. But Teno was willing to help people and if that meant he revealed his own struggles and achievements, that was what he did.

Volunteers are ordinary people who accomplish extraordinary things through service. We do not know how many lives or careers Teno himself saved, or how many have been turned around and helped by all those lawyers who followed him, made a commitment and renewed a culture of service that has shaped America, the legal profession and the people of Kansas.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City Kansas Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception.
Chief Justice Kay McFarland, retired, of Topeka, has a career as a jurist that spans some 37 years and includes some notable firsts. McFarland was born in Coffeyville, but grew up in Topeka, where her late father, Dr. Kenneth McFarland, was the former superintendent of Coffeyville and Topeka schools and was a nationally known lecturer and public speaker.

In her youth, McFarland had great interest in Tennessee walking horses, a breed known for its graceful movements. Midnight Secret was undefeated in the three years she showed him, winning the biggest horse shows in the country. McFarland regularly competed and, in 1958, she was world amateur champion. In 1963, she won two major events at the National Celebration in Shelbyville, Tenn., the breed’s equivalent of the World Series. Later, she was successful raising and showing Irish Wolfhounds.

McFarland graduated from Washburn University, magna cum laude, with dual majors in English and history/political science in 1957. She graduated from Washburn University School of Law in 1964 and was admitted to the Kansas bar that same year. While in law school, she owned and operated a nationally advertised mail-order quilt business.

Following law school, she was in private practice until 1971, when she challenged the incumbent judge of the probate and juvenile courts in Shawnee County. With McFarland’s win, she became the first woman elected to a judgeship in Shawnee County. McFarland delivered the court reforms pledged in her campaign and reduced serious juvenile offenses by more than half in the two years she held office. In 1973, McFarland became judge of the newly created 5th Division of the Shawnee County District Court in Topeka, thereby, becoming the first woman to be a district judge in the history of Kansas. Her election to this office came after her victories over opponents in both the primary and general elections.

On Sept. 19, 1977, McFarland was appointed by Gov. Robert F. Bennett to be a justice of the Kansas Supreme Court, having the distinction of being the first woman to hold that office. She became chief justice of the Supreme Court on Sept. 1, 1995, upon the retirement of the Hon. Richard W. Holmes.

McFarland retired from the Kansas Supreme Court on Jan. 12, 2009. In May 2009, she was awarded an honorary doctorate of laws by Washburn University. Since her retirement, she continues to pursue her many interests, which include water gardening, wildlife conservation, and world travel.

David J. Rebein is a partner at the Dodge City firm of Rebein Bangerter P.A., where he practices personal injury and litigation. Since beginning his legal career, Rebein has represented individuals and companies ranging from the world’s largest agri-businesses to small businesses and individual men and women. He has advocated for his clients in both the state and federal court systems, arguing many times before the Kansas Supreme Court.

Rebein has been involved with the Kansas Bar Association since the early 1990s, when he was president of the Litigation Section. Since then he has served as a member of the Journal Board of Editors and is a current member of the Bench-Bar Committee, Ethics Advisory Committee, and Ethics Grievance Panel. In 1997, Rebein was appointed to fill the vacant seat for the District 9 Governor position on the KBA Board of Governors. Since that initial appointment, he has served in various capacities on the board, ultimately serving as president of the KBA in 2006.

Rebein served on the Kansas Supreme Court Nominating Commission from 2002 to 2006, where he worked to help select candidates to fill open positions on the Kansas appellate courts, and served as president of both the Kansas Association of Defense Counsel and the Ford-Gray County Bar Association.
He is a member of the International Association of Defense Counsel, American and Southwest Kansas bar associations, American Association of Justice, and Kansas Trial Lawyers Association. He is a fellow of both the American and Kansas bar foundations and recently elected a fellow to the American College of Trial Lawyers.

His service to the community is long. It includes serving as past chair to the Dodge City Area Chamber of Commerce; past president of the Dodge City Community College board of trustees; past member of the Dodge City Community College Endowment Board, Manna House board of directors, Kansas Association of Commerce and Industry board of directors, Citizenship Advisory Committee of the Kansas Sunflower Foundation, and Manor of the Plains Advisory Board; member and former vice president of the Dodge City Rotary Club; member of the Kansas Agricultural and Rural Leadership board of directors; and vice president of the New Chance board of directors.

He earned his Bachelor of Arts, summa cum laude, from Washburn University in 1977 and his Juris Doctor from the University of Kansas School of Law in 1980.

OUTSTANDING SERVICE AWARD

The Outstanding Service Award is given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the Kansas Bar Association and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA. This year, six recipients have been chosen to receive this award.

J. Nick Badgerow is a partner and trial lawyer with the Overland Park office of Spencer Fane Britt & Browne LLP. He serves as a member of the Kansas Judicial Council and as chairman of the Council’s Civil Code Advisory Committee, which is currently involved in a two-year project to rewrite the Kansas Civil Code. He is also a member of the Kansas State Board of Discipline for Attorneys, chairman of the Kansas Bar Association’s Ethics Advisory Opinion Committee, and chairman of the Johnson County Ethics & Grievance Committee, a position he has held for the past 20 years. Badgerow was chairman of the Kansas Ethics 2000 Commission, which spent two years rewriting the Kansas Rules of Professional Conduct.

An original member of the Earl O’Connor American Inn of Court, Badgerow served as its secretary, counsel, and president. He has published more than 30 legal articles and he is co-author of the KBA’s Kansas Employment Law Handbook. He was an author of the original Kansas Ethics Handbook and its first supplement, and he is an author and co-editor of the recently published second edition.

Badgerow is an honors graduate of The Principia College and received his juris doctorate from the University of Missouri-Kansas City.

Gary Kretchmer is the director of Domestic Court Services for the 10th Judicial District in Johnson County. His office provides mediation, evaluations, educational programs, monitored exchanges, and supervised visitation. He has been with the 10th Judicial District for 31 years. He and his staff have worked hard to support the court’s Family Division with a problem-solving philosophy.

Kretchmer has taught mediation and conflict resolution in the region for many years, including more than 10 years for the Kansas Bar Association. He has a master’s degree in counseling from the University of Missouri-Kansas City and is a licensed clinical professional counselor in Kansas.

His proudest accomplishment is being one of three honorary lifetime members of the Johnson County Bar Association.

Dan C. Peare is a member of Hinkle Elkouri Law Firm LLC, located in Wichita, where he chairs the firm’s Trusts and Estates practice group. Under his leadership, the trusts and estates practice has expanded to be one of the top estate planning practices in the state. He has extensive experience in high-net worth estate planning, asset planning, and planning with family businesses. Peare has also assisted hundreds of business owners, farmers, and ranchers in the preservation and succession of their businesses.

Peare has made numerous presentations relating to trusts, estate planning, and business succession planning on the local and regional level. He has also had numerous articles published in support of this practice area. He is active in the local, state, and national bar associations, including serving as CLE liaison on the Kansas Bar Association’s Real Estate, Probate, and Trust Law Section executive committee.

Besides using his experience and knowledge to serve his clients, Peare serves on the board of directors for the Wichita State University (WSU) Foundation, the Kansas Sports Hall of Fame, and the WSU Shocker Athletic Scholarship Organization. He is also a member of the University of Kansas and WSU alumni associations.

Peare earned his bachelor’s degree, cum laude, in finance from Wichita State University in 1982, his master’s degree with a finance emphasis from WSU in 1985, and his juris doctorate from the University of Kansas School of Law in 1988.
The Hon. Janice D. Russell is a senior district court judge in Johnson County whose general civil docket includes commercial, tort, and domestic litigation. Prior to her judicial appointment, Russell served as a research attorney for the Hon. Joe H. Swinehart of the Kansas Court of Appeals from 1977 to 1979, assistant Johnson County district attorney from 1979 to 1981, and had a general private practice from 1981 to 1985.

Russell earned her Bachelor of Arts in Spanish and Latin American area studies in 1971 from the University of Kansas, a Master of Liberal Arts in Spanish from the University of Kansas (KU) in 1973, and a Juris Doctor from KU Law School in 1977.

She is a member of the Kansas and Johnson County bar associations, Kansas Women Attorneys Association (KWAA), and the Kansas District Judges Association. Russell serves on the Pattern Instructions for Kansas Civil and Criminal committees, Kansas for Simple Justice Coalition, Kansas Inns of Court, and the Johnson County Bar Association Civil Bench-Bar Committee. She has previously served as president of the KWAA and served on Johnson Countians for Justice. She also is an adult member of Boy Scouts of America and served on the Olathe Youth Services Advisory Board, Community Violence Action Council, and Johnson County Substance Abuse Services board of directors and is past president.

The Hon. Thomas Kelly Ryan is a district court judge handling cases in the Family Court in Johnson County. Prior to his appointment in November 2008, he was a partner in the Overland Park firm of Gates, Biles, Shields & Ryan P.A., where his main areas of practice included family law, civil litigation, adoption, workers’ compensation, and criminal defense representation. Ryan also served as an assistant district attorney in Johnson County from 1985 to 1988.

Ryan was city prosecutor for the city of Edgerton from 1992 to 2005 and returned to that city as the appointed municipal court judge from 2007 until his appointment to the district court. He also served as assistant city prosecutor in the municipal court of Fairway from 2007 to 2008.

He was the Kansas Bar Association Family Law Section CLE liaison to the KBA CLE Committee from 2002 to 2006 and later served as the Family Law Section president from 2007 to 2008. Ryan is a member of the Kansas and American (member, Family Law Section) bar associations, as well as the Johnson County Bar Association (member, Family Law Section and Family Law Bench-Bar Committee), where he served as president of the Young Lawyers Section in 1990.

Ryan earned his Bachelor of Arts degree from Creighton University and his Juris Doctor from Washburn University School of Law. He recently completed the General Jurisdiction course of studies at the National Judicial College in Reno, Nev.

Brian M. Vazquez is the deputy general counsel for the Kansas Health Policy Authority (KHPA) in Topeka. His primary duties involve oversight of the KHPA’s legal support for the Medicaid program in Kansas. He continues to be the administrator of the Estate Recovery Unit for Kansas, a position he has held since the program was established by the Kansas Department of Social and Rehabilitation Services in 1992.

Vazquez previously served as a U.S. Air Force judge advocates general officer, a Westlaw attorney, an assistant city attorney for the city of Topeka, and has been in private practice. He contributes his time to continuing legal education through writing and making CLE presentations, including being a contributing author on the Kansas Bar Association’s Kansas Long-Term Care Handbook.

Vazquez earned his bachelor’s and master’s degrees from Kansas State University and his law degree from Washburn University School of Law. He has more than 29 years of legal experience.
The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus, bringing credit to the legal profession. Past award recipients include a lawyer accepting the representation of a client challenging the application of the Kansas sexual predator law, a judge for his courage in the face of controversy after his decision on state public school funding thrust him into the public eye, and a deputy staff judge advocate for meritorious legal services he often performed while in Iraq, often under fire, attack, or high pressure. This award is only given in those years when it is determined that there is a worthy recipient. The 2009 recipient of the Courageous Attorney Award is Dean Thomas J. Romig of the Washburn University School of Law.

Dean Romig, a native of Manhattan, rose to the rank of major general and served four years as the 36th Judge Advocate General of the U.S. Army. He led and supervised an organization of more than 9,000 personnel comprised of 5,000 active and reserve military and civilian attorneys and more than 4,000 paralegal and support personnel spread throughout 328 separate offices in 22 countries. During his career, Dean Romig prosecuted felony and misdemeanor criminal cases in Texas and taught international law at the Judge Advocate General’s School in Charlottesville, Va.

While serving as judge advocate general, he issued an opinion to Secretary of Defense Donald Rumsfeld that proposed the use of waterboarding and other extraordinary methods of interrogation at Guantanamo Bay and Abu Graihb were in violation of the Geneva Convention, international law, and the Uniform Code of Military Justice. In October 2005, Dean Romig retired from the Army JAG Corps after 34 years of service, a few weeks after reaffirming his opinion on interrogation methods during a U.S. Senate hearing that was broadcast on national television. His military service and leadership have earned him numerous decorations and badges.

Prior to joining Washburn, he served as deputy chief counsel for operations and acting chief counsel for the Federal Aviation Administration. Dean Romig became dean of Washburn University School of Law in 2007.

He received his bachelor’s degree in social sciences from Kansas State University, where he was commissioned as a lieutenant through the Army ROTC program. After serving six years as a military intelligence officer, he was selected for the Army Fully Funded Law School Program, and graduated with honors from the Santa Clara University School of Law, where he served as an editor on the Santa Clara Law Review and as a member of the Honors Moot Court Board.

(Continued on next page)
**Professionalism Award**

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

James M. “Jim” Milliken opened his St. Francis law office in the back of the old Cheyenne County State Bank (now First National Bank) on July 1, 1969. He shared a secretary with a real estate loan agent, an attorney-abstractor, and an attorney banker. Soon after opening his first office, a branch office was opened in Bird City.

Milliken’s practice expanded and grew from an income tax client base that now includes estate planning; probate; real estate; litigation; corporate, domestic, and commercial law; and many other areas. He served on the Board of Governors of Washburn University from 1988 to 1998.

He attended Kansas State University for two years before attending Baker University. While at Baker, he was selected to be an International Four-H Youth Exchange student and went to the Philippines for six months. After returning from the Philippines, he completed his undergraduate studies at Washburn University. After the 1966 tornado came through the Washburn University campus, Milliken awaited notice of acceptance or rejection by Washburn University School of Law. However, he was accepted and completed law school with the distinction of being a member of the only class to complete law school in “Trailer Village.”

After passing the bar in 1969, under the tutelage of the Hon. Alex Hotchkiss, Milliken decided to move to St. Francis and set up his law practice. He served as Cheyenne County attorney from 1971 until 1979 and did so again in a time of need for the county from 1996 to 1997. Currently, he, Kari Milliken Gilliland, and Kevin Berens are practicing as James M. Milliken Chtd., where his philosophy has always been to provide quality legal work at a fair price.

**Diversity Award**

The Diversity Award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans that include the following criteria:

- A pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate in a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Adoption of plans to continue to improve diversity with the law firm or organization.

The first recipient of the Diversity Award is AT&T Kansas.

At AT&T, diversity and inclusion are essential to the company’s culture and business success. Today, AT&T’s 50-state workforce is 44 percent female and 39 percent people of color. Women make up 41 percent of AT&T’s managers and 30 percent are people of color.

AT&T is also known as a pioneer and a national leader in developing and implementing supplier diversity best practices. In 2008, AT&T marked the 40th anniversary of its Supplier Diversity Programs, which began in 1968 with the creation of AT&T’s Minority Business Enterprise Program. In 2008, AT&T spent $6 billion with diverse suppliers, representing 12 percent of its procurement base. In the past 10 years, AT&T spent more than $32 billion with diverse suppliers, an increase of 272 percent.

At AT&T Kansas, two-thirds of the attorneys in the legal department were members of minority groups in 2008, including the lead general attorney. Additionally, 50 percent of the department’s support staff are members of minority groups. AT&T’s corporate Legal Department Diversity Committee is chaired by the AT&T Kansas general attorney. The committee supports Law Firm Diversity, encouraging law firms to increase the number of women and minorities assigned to AT&T matters and also the Law Intern Program, a summer intern program that seeks minorities and women as law interns.

AT&T continually reaches out to diverse organizations in Kansas; it has participated at networking events at Washburn University School of Law, including a presentation in November 2008 geared toward women and minority law students. AT&T Kansas legal appreciates and recognizes the importance of expanding diversity within their profession and is leading the way to promote diversity within the community at large.
The Outstanding Young Lawyer Award recognizes the efforts of a Kansas Bar Association Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Angel R. Zimmerman, of Topeka, is the managing attorney for the collection law firm of Valentine & Zimmerman P.A., where her husband, Larry Zimmerman, is a partner. At the firm, she and Larry employ more than 20 individuals, handling approximately 70,000 open files at any given time.

While maintaining her collections practice, she is an active member of many professional associations, including the Washburn Law Board of Governors, Kansas Women Attorneys Association, Women Attorneys Association of Topeka, J.

Reuben Clark Law Society Women in Law Kansas/Missouri, incoming president of the HUBNET national software users group for 2010, and appointed to the Government Affairs Committee for the National Association for Retail Collection Attorneys.

She was the inaugural president of the Kansas Bar Association’s Law Practice Management Section and is co-editor of the Young Lawyers Section’s “The YLS Forum” newsletter. Zimmerman received her law degree from Washburn University School of Law in 2006.

(Continued on next page)
This year’s Pro Bono Award is given to the Kansas Elder Law Hotline, who, since 1996, has provided advice to more than 27,600 senior citizens.

In 2008, 66 volunteer attorneys provided nearly 150 hours of direct service to this project. In order for this program to work, attorneys agree to clear their schedule for four hours about every other month. They work from their office from anywhere in the state and accept calls that have been screened by Kansas Legal Services. The 480 clients served in the past year had legal problems in all areas of law, with collection concerns, home ownership and landlord-tenant matters, and wills heading the list. A Kansas senior can call a toll-free number any weekday and speak to an attorney, obtaining crucial and timely legal advice.

The Kansas Bar Association assists in recruiting for this program each year and brought in six new attorneys in 2008. The Elder Law Hotline receives no federal or state funds, even though it was originally set up with Administration on Aging money. It continues to operate only because of the generosity of the volunteer attorneys in the program.

In addition to the Pro Bono Award given out each year, the Kansas Bar Association awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are not employed full time by an organization that has as its primary purpose the provision of free legal service to the poor;
- Lawyer who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

Seven individuals have been awarded Pro Bono Certificates of Appreciation.

**Lynda A. Cleveland**, who serves as counsel to Embarq, has been a volunteer with the Kansas Legal Services’ (KLS) pro bono program since 2008. Cleveland, of Overland Park, was a child and family therapist prior to graduating from the University of Missouri-Kansas City School of Law in 1999. Her friend from law school, Victoria “Vicky” Battle, who passed away on Sept. 21, 2001, was a dedicated philanthropist who demonstrated the importance of community service work in her daily life. Her influence is credited for Cleveland’s interest in community service work since 2000 and, in 2008, she began taking pro bono cases with KLS in Wyandotte County, where the cases were family law matters, usually involving domestic violence.

**Karl G. Johnson** is a solo practitioner in Fairway with a civil practice, handling domestic law, Social Security disability, and family law mediation and collaborative divorce cases.

Prior to his private practice, Johnson was an attorney with Kansas Legal Services (KLS). Initially hired as a staff attorney in the Horton office in 1978, he practiced civil law throughout northeast Kansas, although his primary focus was representing Native Americans in district courts in rural counties and before the Bureau of Indian Affairs. From 1981 to 1984, he practiced in KLS’ Topeka office and focused solely on domestic violence cases and served as legal liaison to the Battered Women’s Shelter; from 1984 to 1988, his practice included tenant’s rights representation in private and public housing, public benefit, and consumer law; from 1988 to 1998, he was the managing attorney in the Olathe office, where he received funding for the first mediation grant from the 10th Judicial District and successfully received funding for a domestic violence project funded by the United Way of Olathe; and, from 1998 to 2004, he was the manager of KLS’ Kansas City, Kan., office, in addition to the Olathe office, where his legal practice was in the areas of elder law, adult and children’s Social Security disability work, and Chapter 7 bankruptcies.

Johnson has been a Kansas Supreme Court certified mediator since 1997, primarily doing family law mediations. He received his law degree from Washburn University School of Law.
Paula D. Langworthy, who grew up in Tahlequah, Okla., is an attorney with the Wichita firm of Tripplett, Woolf & Garrettson LLC, where she practices business litigation and contested estate litigation. She attended Northeastern State University, Tahlequah, where she received her bachelor’s degree in 2000 and graduated with honors from Washburn University School of Law in 2005. She currently serves as co-editor of the Kansas Bar Association Young Lawyers Section newsletter, “The YLS Forum.” Langworthy serves on the Derby Economic Development Board, the Wichita Cultural Arts Steering Committee, and is chairperson of the board of trustees for the Mid-America All-Indian Center in Wichita (MAAIC), where she has witnessed tremendous progress toward the revitalization of the MAAIC.

In 2006, Langworthy was appointed to MAAIC’s board of trustees and elected chairperson in 2007. She was reappointed in 2008 and 2009. During her time as chairperson, the board of trustees has reorganized itself and is now operating with 14 members. In addition, MAAIC amended its outdated bylaws, created and adopted policies and procedures, established an operating plan, and developed and implemented a successful marketing and membership plan, increasing membership from 19 to 199 in one year’s time. The board also created a Mission Circle group to allow better access to MAAIC by groups and organizations that share the same mission as MAAIC. Currently, the board is in the process of creating and implementing cultural classes and programs, renovating the Indian encampment exhibit, and developing a fundraising plan for the center. Financially, MAAIC is in the best position that it has been in a long time; it has retired all debt that was owed to the city of Wichita.

Professor Lynette F. Petty is an associate professor at Washburn University School of Law, who has taught in the Washburn Law Clinic since 1992. She worked for Kansas Legal Services in both the Topeka and Kansas City offices and was project director before joining the Clinic staff. Prior to attending law school, Petty taught in public schools and was a house parent for dependent-neglected teenage boys. Her experiences fueled her interests in representing children in the foster care system, people with disabilities, and clients in domestic relations cases.

Kari S. Schmidt is the managing partner at the Wichita firm of Conlee, Schmidt & Emerson LLP, where her practice areas include employment law, probate, business law, and federal criminal defense. When requested by the U.S. District Court to accept reduced fee criminal appointments because of the lack of women on the federal criminal appointments list, Schmidt did so willingly and has served in that capacity for many years. She has also handled numerous pro bono cases for ARC of Sedgwick County. Schmidt is active in the Kansas, Wichita, and American bar associations; Wichita Women Attorneys Association; Chamber Music Barn; and the Wichita Association for Motion Picture Arts, which sponsors the Tallgrass Film Festival. She also sits on the Institutional Review Board of the Wichita Medical Research and Educational Foundation.

She is an adjunct instructor in the Barton School of Business at Wichita State University, the Master’s Program at Webster University, and the Master’s in Business Law Program at Friends University. She has taught courses in consumer transactions, legal research and writing, law and banking, and employment law. She is also an instructor for the Center for Management Development and frequently speaks at continuing legal education seminars. Schmidt is a graduate of the University of Kansas and its School of Law.

Shea E. Stevens was raised in Pratt and attended Kansas State University, where she received her Bachelor of Science in psychology and women’s studies. She attended the University of Tulsa School of Law, where she received her Juris Doctor in 2004. She originally practiced in the area of business contracts and mergers with SprintNextel and NovaStar Mortgage. In 2008, she began to focus her attention on family law and established her own practice, The Law Office of Shea Stevens LLC. Her practice focuses primarily in the area of matrimonial law; however, Stevens uses her corporate law experience and advises clients in the areas of contracts and simple business entity formation. Stevens has been an active participant in a Johnson County Probate Bar program to assist families of adult disabled children in obtaining guardianships.

James T. Ward, Junction City, has been in private practice since 2007 when he joined the firm of Weary Davis L.C. He is being recognized for his pro se representation of an indigent person upon the bequest of a judge. Ward is a member of the Kansas, Riley County, Geary County, and American bar associations. He attended Missouri Southern State University and graduated with a Bachelor of Science in 1999 and graduated from the University of Kansas School of Law in 2007.
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Golf

Closest to the Pin Contest
Hole #3  Paul Davis
Hole #8  Tucker Poling
Hole #13  Kathy Webb
Hole #17  Dave Markham

Flag Prizes
Hole #1 – Straightest Drive
Greg Hough
Hole #2 – Longest Drive
Paul Davis
Hole #10 – Longest Putt
Doug Lattimer
Hole #18 – Longest Putt
Rachel Reiber

Golf Tournament Winners
1st Place – 1st Flight
Hon. Jeffery Jack
Hon. Dave Rogers
Hon. Dan Creitz
Hon. Fred Lorentz

2nd Place – 1st Flight
Steve Tilton
Glenn Braun
Scott Johnson
Jeff Jones

1st Place – 2nd Flight
Pat Salsbury
Les Diehl
Larry Bork
Mary Christopher

2nd Place – 2nd Flight
Hon. AJ Wachrer
Hon. Ben Burgess
Hon. Jeff Goering
Hon. Warren Wilbert

Sporting Clays

Ed Brown
Whitney Damron
Steve Doering
Aaron Gunderson
Hon. Jerry Hellmer
Ryan Hellmer
Tom Hendrickson
Mike Kirkhoff

Tom Lemon
Hon. Joe McCarville III
Hon. Gary Nafziger
Blake Nelson
Hon. Gunnar Sundby
Hon. Allen R. Slater
Mark Temaof
Doug Witteman

Judge Champion Score
Hon. Gary Nafziger (83)

Lawyer Champion Score
Tom Lemon (68)
The 2009 Legislative Session will most likely go down as one of the most stressful sessions in Kansas history. Unprecedented budget shortfalls, the reshuffling of the governor’s office, and the rampant political posturing for the 2010 elections all contributed to above normal anxiety levels in Topeka.

With all this being said the budget still took center stage for the majority of the session. The session opened on a gloomy note due to the state’s dismal financial tenor. Legislators were tasked with revising the FY 2009 budget before even attempting the near impossible task of balancing the FY 2010 budget. In early February the Legislature adopted a $325 million rescission bill for FY 2009 (July 1, 2008 through June 30, 2009). The governor made a number of line-item vetoes and the Legislature adjusted to those changes. However, poorer than anticipated tax revenues has eaten away at the 2009 balance. The revenue numbers continue to slide with a reported shortfall of $125.8 million. This effectively replaces the positive FY 2009 projected ending balance of $79 million with a $47 million deficit. To cover the $47 million red figure the governor delayed tax refunds and payments to state vendors and agencies. These payments will be carried over to the FY 2010 budget.

The Judicial Branch was caught up in the budget woes with the misfortune of losing $11 million in funding due to a mischaracterization of the newly authorized docket fee increase. The Legislature previously approved a law that allows the Supreme Court to increase docket fees on certain cases by $10. When crafting the Omnibus Appropriations bill it was mistakenly believed that the new docket fee increase would cover a budget cut, it will not. If this oversight is not corrected we could see a furlough of judiciary employees starting in January. To his credit, Gov. Mark Parkinson has stated that if the court can’t cover a budget cut, it will not. If this oversight is not corrected we could see a furlough of judiciary employees starting in January. To his credit, Gov. Mark Parkinson has stated publicly that this issue would be taken up very early in the 2010 session.

Despite the dismal economic picture, the Kansas Legislature found time to enact a number of bills that will have significant legal ramifications. We hope this information will prove useful in familiarizing yourself with the new laws that impact your practice. For full text of the bills, please visit the Kansas Legislative Research Department’s home page at www.kslegislature.com. All bills are effective July 1, 2009, unless otherwise indicated.

Administrative Law

S.B. 34 extends the existence of 30 statutory exceptions to the Kansas Open Records Act (KORA) until July 1, 2014. They include K.S.A. 44-706, which states that a person is not disqualified from receiving benefits if she or he left work voluntarily due to circumstances resulting from domestic violence. No evidence of domestic violence experienced by an individual, including the individual’s statement and corroborating evidence, shall be disclosed by the Department of Labor unless consent for disclosure is given by the individual. K.S.A. 8-240 extends the KORA exception on applications for drivers’ licenses and instruction permits, each applicant is required to list his or her Social Security number (SSN). The statute provides that the SSN will remain confidential, except as provided in K.S.A. 74-2012, which allows disclosure under proper judicial order; and K.S.A. 38-1008, which allows the

Interstate Commission for Juveniles to exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests.

S.B. 87 amends the Kansas Administrative Procedure Act (KAPA) and the Act for Judicial Review and Civil Enforcement of Agency Actions, commonly known as the Kansas Judicial Review Act. Among other things the bill adds a new section to KAPA to authorize the presiding officer to omit the name, address, or other contact information of an alleged victim of crime from any required notice, order, or public record when it is alleged that the health, safety, or liberty of the alleged victim would be jeopardized by the disclosure of such information. The bill also amends the KORA by adding to an existing exception: A public agency would not be required to disclose the name, address, or other contact information of an alleged victim of crime. In addition, the bill clarifies that a presiding officer may close parts of a hearing pursuant to a provision of law requiring confidentiality or expressly authorizing closure. It also clarifies that any hearing under KAPA is not a meeting pursuant to the Kansas Open Meetings Act.

S.B. 135 makes a technical amendment to the Kansas Open Meetings Act (KOMA). The bill substitutes the phrase “interactive communications” in a series for “meetings in a series” to clarify that serial meetings, except for legislative meetings as provided by Section 22 of Article 2 of the Constitution of Kansas, are required to be open under KOMA.

Senate Sub. for H.B. 2099 amends the KORA, adding the provision that a public agency would not be required to disclose the name, address, or other contact information of an alleged victim of stalking, domestic violence, or sexual assault to an existing exception.

Consumer Protection

S.B. 154 amends the Requirements for Sale of Cigarettes Act to provide enhanced enforcement of the Master Settlement Agreement (MSA) escrow statutes to ensure continued receipt of MSA payouts.

S.B. 163 amends the Kansas Consumer Protection Act (KCPA) to establish definitions for the terms “lender” and “mortgage trigger lead” and to establish a deceptive act or practice under the Act. A “mortgage trigger lead” means a consumer report obtained under the federal Fair Credit Reporting Act where the issuance of the report is triggered by an inquiry made with a consumer reporting agency in response to an application for credit.

The bill also requires that in oral and written solicitations for products or services based on a mortgage trigger lead, the solicitation must clearly and conspicuously state that the solicitor is not affiliated with the lender or broker with which the customer initially applied, and that the solicitation is based on personal information about the consumer that was purchased, directly or indirectly, from a consumer reporting agency without the knowledge or permission of the lender or broker with which the consumer initially applied. Further requirements for written solicitations define “clear and conspicuous” to include legible type in contrast by typography, layout, or color with other printing on the first page of (continued on Page 32)
A few memories from this year’s Annual Meeting...
correspondence. Additionally, any solicitor making either an oral or written solicitation will be required to be in compliance with the provisions of the Kansas Mortgage Business Act, unless otherwise exempted from the Act, and any other law or regulation. Failure to comply with this requirement will be considered a deceptive act or practice under the KCPA.

S.B. 237 amends the law concerning the regulation of scrap metal under the KCPA. It is unlawful to sell regulated scrap metal unless the seller provides to the scrap metal dealer, or employee or agent of a dealer the seller’s sex, date of birth, and an identifying number from an official U.S. government document, such as the seller’s driver’s license, state or military identification card, or passport. A legible fingerprint is required of a seller using the identifying number from an official governmental document from outside of the United States. It also requires scrap metal dealers, or employees or agents of a dealer, to accurately and legibly record information of the transaction and of the parties to the transaction, as specified in the bill. It makes it unlawful for any scrap metal dealer, employee, or agent of a dealer to purchase regulated scrap metal without obtaining a signed statement from the seller that the seller is the owner of the scrap metal, the scrap metal is free of encumbrances, and the scrap metal is not stolen; or a signed statement from the seller that the seller is acting on behalf of the owner and has the owner’s permission to sell the scrap metal. It also makes it unlawful for any scrap metal dealer, employee, or agent of a dealer, to purchase any junk vehicle from a seller without inspecting the vehicle and recording the vehicle identification number and obtaining an appropriate vehicle title or bill of sale.

H.B. 2292 amends security freeze provisions in the state Fair Credit Reporting Act (FCRA). Among the amendments to the FCRA, the bill deletes a requirement in existing law that the consumer placing a security freeze on his or her consumer report must be a “victim of identity theft” and the related requirement for having a police report. The bill adds regular mail, secure Web site, and telephone if the consumer agency does not have a secure Web site in a method that a consumer may use it to contact a consumer reporting agency requesting a security freeze.

Additionally, the bill changes a requirement in existing law to be permissive, allowing a third party to treat the application as incomplete. The bill adjusts the compliance by consumer reporting agencies with a request to lift a temporary freeze to include a provision for postal requests (no later than three business days) and electronic contact (15 minutes, if received during a certain time frame). Exceptions are specified for those occurrences, which could prevent the lifting of the freeze within the 15-minute time frame.

The bill also allows a fee to be charged, not to exceed $5, for placing, temporarily lifting, or removing each freeze or for replacing a previously requested personal identification number. The consumer reporting agency will not be allowed to charge a fee for the replacement of a previously requested personal identification number nor to a documented victim of identity theft.
The bill allows persons who suspect they are victims of identity theft to contact local law enforcement. Local law enforcement will be required to receive complaints and take a police report of the matter, even if the jurisdiction for investigation is elsewhere. The report could then be provided to a law enforcement agency in another jurisdiction. Finally, the bill provides that violations of the provision governing the temporary freeze (15-minute reporting requirement) are to be the exclusive authority of the attorney general.

Corporate Law

S.B. 85 amends four business entity statutes to require the Kansas Secretary of State to return a copy of any document, which is required to be recorded in an electronic medium. A certified copy of the document is to be returned to the customer. The electronic document becomes the original document.

S.B. 86 amends current law to delete the requirement that the secretary of state charge a corporation a fee for a letter of good standing. A letter of good standing is an uncertified statement issued by the Kansas Secretary of State’s Office stating that a business entity, at the time of the request, is qualified and in good standing, having met all the requirements governing this type of business in the state of Kansas.

S.B. 132 enacts the Business Entity Transaction Act (BETA) to provide comprehensive statutory authority for business entities (corporations, partnerships, limited partnerships, and limited liability companies) to perform mergers, conversions, interest exchanges, and domestications with similar or dissimilar business entities. Additionally, the bill codifies procedures for business entities to accomplish these transactions. The bill excludes insurance companies, banks, trust companies, credit unions, and professional corporations from participating in transactions under BETA. Public utilities, however, are subject to the general business entity provisions, unless the provisions are inconsistent.

S.B. 156 amends current law to coordinate the number of allowable members in a close corporation from 30 to 35 to conform to the number with other Kansas statutes and the U.S. Securities Act of 1933.

Courts

S.B. 19 authorizes, under certain circumstances, prosecutors, while engaged in the duties of their employment or any activities incidental to such duties, to carry concealed firearms and to exempt those prosecutors from the crime of discharge of a firearm. The prosecutors authorized by this bill include the U.S. attorney for the District of Kansas or any assistant U.S. attorney for the District of Kansas if authorized by the U.S. attorney for the District of Kansas, the Kansas Attorney General, or any Kansas assistant attorney general if authorized by the Kansas attorney general; and any district attorney or county attorney, or any assistant district attorney or assistant county attorney if authorized by the district attorney or county attorney by whom such assistant is employed.

The bill clarifies that the chief judge of any judicial district may determine any restrictions or prohibitions concerning firearms in the courthouse or court-related facility of that judicial district.

The bill also allows the county commissioners to opt-out of the provisions of this bill by resolution if the courthouse or court facility has adequate security measures to ensure no unauthorized weapons are carried into such facility, has adequate measures to store and secure lawfully carried weapons, has a written policy that requires securing weapons and posts a “No Fire Arms” sign in a conspicuous location at the facility.

S.B. 66 addresses change of venue; Judicial Branch Surcharge, Prosecuting Attorneys’ Training Fund, Kansas Criminal Code Recodification Commission, and Court of Appeals.

The bill authorizes the district court issuing the order to change venue in care and treatment cases for mentally ill persons and in care and treatment cases for persons with an alcohol or substance abuse problem. It also amends current law to allow the Kansas Supreme Court to establish a surcharge of up to $10 per fee (for a series of fees) for costs for nonjudicial personnel. This surcharge would be the only surcharge that the Kansas Supreme Court could charge during the time period from July 1, 2009, through June 30, 2010. Garnishments, hearings in aid, executions, and expungements are subject to the surcharge.

The bill would also increase the amount of the district court docket fee credited to the Prosecuting Attorneys’ Training Fund from $1 to $2 for each docket fee assessed in a criminal case. The bill also increases the docket fee in criminal cases by $1. In addition, the bill authorizes the Kansas Judicial Council to use its fee funds to pay for the Kansas Criminal Code Recodification Commission for another year. The bill also removes the requirement that the Commission on Judicial Performance evaluate the performance of retired senior judges who are employed on a part-time basis by the Supreme Court. Finally, the bill delays the continued expansion of the Court of Appeals until Jan. 1, 2011.

S.B. 68 establishes the retirement age for judges, including justices of the Supreme Court, at age 75 rather than 70. When the age of 75 is reached, the judge may finish serving the current term.

H.B. 2111 extends the sunset provision on the Kansas Commission on Judicial Performance to June 30, 2013. The bill also deletes the provision in prior law that would have decreased docket fees, generally, by $2 on or after July 1, 2010. The decrease is set to take effect on and after July 1, 2013.

Criminal Law

Sub. for S.B. 28 adds unlawful dog fighting, possession of dog fighting paraphernalia, unlawful cockfighting, unlawful possession of cockfighting paraphernalia, prostitution, promoting prostitution, and patronizing a prostitute as criminal offenses that could lead to civil forfeiture of assets.

S.B. 44 creates a civil cause of action for perpetrating a specified fraudulent claim on the state government or affected political subdivision under the newly created Kansas False Claims Act; amends current law on summary proceedings in a habeas corpus action; and amends the rules of evidence regarding the admission of prior acts or offenses in cases where a defendant is accused of a sex offense or another criminal offense.
Habeas corpus action

The bill amends current law on summary proceedings in a habeas corpus action to restore the statute to current law except it allows the judge to appoint one instead of the original two competent physicians to make an examination of the person.

Admission of prior acts or offenses

The bill also amends the rules of evidence regarding the admission of prior acts or offenses in cases where a defendant is accused of a sex offense or another criminal offense. In a criminal action where a defendant is accused of a crime other than a sex offense as specified in the bill, evidence of a prior crime is admissible to show the mode of operation is so similar that it is reasonable for a finder of fact to conclude the same individual committed both acts. In a criminal action where a defendant is accused of a sex offense as specified in the bill, evidence of a prior act or sexual misconduct is admissible if it is relevant and probative, i.e., tending to prove or actually proving a fact. If the prosecution intends to offer evidence under this rule, the prosecuting attorney must disclose the evidence to the defendant, including statements of witnesses, at least 10 days prior to trial or at a later time when allowed by the court for good cause. This rule should not be construed to limit the admission or consideration of evidence under any other rule or to limit the admissibility of evidence of other crimes or civil wrongs in another criminal action. The bill will take effect upon its publication in the Kansas Register.

H.B. 2059 amends the crime of receiving or acquiring proceeds derived from a violation of the Uniform Controlled Substance Act (UCSA) to include proceeds derived from violations of similar offenses from another jurisdiction. Previous law made it illegal to receive or acquire proceeds derived from violations of the Kansas UCSA rather than from violations in any jurisdiction.

H.B. 2060 addresses several different topics (actually it is several bills combined.) (1) It creates a special rule for battery on a law enforcement officer that results in bodily injury; (2) enhances the sentence of drug crimes where a firearm is discharged in the furtherance of such crime; (3) amends the crime of unlawful conduct of cockfighting; (4) amends the crime of unlawful conduct and attendance of dog fighting; (5) amends the sentence for a third or subsequent drug conviction; (6) amends the statutes on authorized disposition for crimes committed on or after the adoption of the Kansas Sentencing Guidelines Act and to add an administrative driver’s license suspension for transporting a controlled substance or controlled substance analog in a vehicle; (7) amends the crime of fleeing and eluding; (8) amends the crime of criminal threat and aggravated criminal threat; (9) requires the Kansas Parole Board to make available to the newly created Joint Committee on Parole Board Oversight redacted documents, records, and reports concerning 30 cases selected by the secretary of corrections; and (10) resolves any conflicts in the recodification of drug crimes bill (H.B. 2236).

Senate Sub. for H.B. 2096 creates the Kansas Driving Under the Influence (DUI) Commission (Commission), amends current law on DUI of alcohol or drugs and DUI penalties, amends the duties of the municipal court, and creates statewide driver improvement clinics.

The Commission is required to submit a preliminary report of its findings by the first day of the 2010 Legislative Session and a final report by the first day of the 2011 Legislative Session. The Commission would have the assistance of the staff of the Office of the Revisor of Statutes and the Kansas Legislative Research Department. The Commission has a total membership of 23 individuals who are entitled to receive per diem compensation, except the public members of the Commission who would be entitled to receive compensation commensurate with compensation a legislator would receive.

H.B. 2098 amends what is commonly referred to as the “Rape Shield” law. The bill adds aggravated trafficking and electronic solicitation to the list of crimes in which evidence of the complaining witness’ previous sexual conduct with any person, including the defendant, would not be admissible or referenced during the trial unless the defendant files a written motion to the court to admit the evidence and the court rules the evidence is relevant.

The bill also amends current law concerning electronic solicitation. The bill clarifies that enticing a person whom the offender believes to be a child 14 or more years of age but less than 16 years of age for an unlawful sexual act would be a severity level 3 person felony.

The bill is in effect upon the publication in the Kansas Register.

H.B. 2165 expands the crime of unlawfully hosting minors consuming alcoholic liquor or cereal malt beverage to include recklessly permitting a person’s land, building, structure, or room owned, occupied, or procured by such person to be used in such a manner that results in the possession or consumption of alcoholic liquor or cereal malt beverages by a minor.

The penalty is a class A person misdemeanor, with a minimum fine of $1,000. If the court sentences the offender to perform community service
work as a condition of probation, the court is required to consider ordering the offender to serve the community service at an alcohol treatment facility. The bill provides that no civil liability is created for any lodging establishment.

H.B. 2207 amends the current law to increase the maximum amount that could be assessed for supervision fees against an individual who is charged with a crime and released on supervision under the conditions of an appearance bond. The amount changes from $10 per week to $15 per week for supervision fees.

H.B. 2232 amends the current law to increase the limit of the number of members on the Corrections Advisory Board (Board) to at least 12 but not more than 15 members. Under current law, total Board membership is limited to 12. Of the total Board membership, the Board of County Commissioners would be authorized to appoint at least three but not more than six members to the Board. Currently, the maximum number of members the Board may appoint is three.

H.B. 2233 amends current law on an appeal by the prosecution, withdrawal of a guilty or no contest plea after sentencing, and selection of alternate jurors.

Appeal by the prosecution
The bill amends current law regarding appeals by the prosecution to clarify the term “an appeal by the prosecution.” The term includes appeals, interlocutory appeals, and appeals that seek discretionary review in the Kansas Supreme Court or the U.S. Supreme Court. Criminal defendants have a statutory right to a speedy trial pursuant to K.S.A. 22-3402. A criminal defendant would be discharged from further liability if not promptly brought to trial. The law provides for certain circumstances that can stop, the time counted for speedy trial purposes. K.S.A. 22-3604 tolls the time during the pendency of an appeal by the prosecution for speedy trial.

Withdrawal of a guilty or no contest plea
The bill also amends the statute on withdrawal of a guilty or no contest plea after a sentence has been imposed in a criminal case. The bill places a one-year limitation from the final order on the direct appeal in the case or when Kansas appellate jurisdiction terminates; or upon the U.S. Supreme Court’s (Court) denial to review the case or on the final order in the case if the Court granted review. The bill provides a provision to extend the time limitation upon an additional, affirmative showing of excusable neglect by the defendant. Under current law, there is no time limitation on when a defendant may withdraw a guilty or no contest plea after sentencing.

Selection of alternate jurors
The bill also amends current law to authorize selection of one or more alternate jurors in a criminal case to be selected at the same time as the regular jury is being selected. Under current law, the alternate juror or jurors are selected after the regular jury has been empaneled and sworn. The bill leaves it to the discretion of the judge to decide whether the alternate juror or jurors are selected at the same time as the regular jury or after the regular jury has been empaneled and sworn. The bill is in effect upon the publication in the Kansas Register.

H.B. 2236 moves the drug crimes from Chapter 65 (Public Health) to Chapter 21 (Crimes and Punishments) of the Kansas Statutes Annotated. In addition, the drug crimes are reorganized to group the crimes into the following categories: manufacture, distribution, possession, and paraphernalia.

H.B. 2311 adds licensed private detectives to the list of those people who could complete service of process in or out of state.

Family Law
S.B. 45 amends the Kansas Power of Attorney Act. The bill authorizes the principal, who is physically unable to sign a power of attorney document but who is competent and conscious, to appoint a designated adult to sign the principal’s name on the document in the presence of a notary public. The specific direction of the principal is required to be expressed in the presence of a notary public. The bill also requires an attorney-in-fact, acting under the power of attorney, to keep a record of receipts, disbursements, and transactions made on behalf of the principal. The attorney-in-fact is prohibited from commingling funds or assets of the principal with the attorney in fact’s funds or assets. The bill provides short form certificates of a notary’s acts.

S.B. 70 creates new law relating to the Uniform Principal and Income Act (UPIA). The bill authorizes a trustee, unless prohibited by the governing instrument, to convert or redefine income so that distributions to income beneficiaries (current and remainder beneficiaries)
are determined by a unitrust distribution formula. Under the formula, a trustee distributes a fixed percentage of the assets to the beneficiary each year as income.

S.B. 134 limits the court’s jurisdiction over a child in need of care and amends current law regarding placement of a child taken into custody. The bill limits the court’s jurisdiction over a child in need of care to the child’s 18th birthday or June 1 of the school year during which the child turns 18 if the child is still in high school, unless there is no court-approved transition plan. If there is no court-approved transition plan, the court retains jurisdiction over the child until a transition plan is approved by the court or until the child’s 21st birthday.

The bill amends the definition of “transition plan” to add education and employment to the list of services to be provided in an individual case. It further amends the definition of “transition plan” to clarify that it specifically provides for the support and any services for which an adult with a disability would be eligible including, but not limited to, funding for home and community based services waivers. Finally, the bill authorizes an 18-year-old child in need of care to make a written request to the court to cease its jurisdiction, which requires the court to give notice to all parties and cease its jurisdiction 30 days after the request. The bill also amends current law to authorize the Department of Social and Rehabilitation Services custody for a child 15 years or younger, a 16- or 17-year-old child if the child has no identifiable parental or family resources, or a 16- or 17-year-old child if the child shows signs of physical, mental, emotional, or sexual abuse.

S.B. 148 establishes the Kansas Silver Alert Plan to provide public notice of a missing elderly person. The bill authorizes, but does not require, a prompt broadcast or a timely search. The plan is required to be implemented by the Kansas Attorney General’s Office in collaboration with state and local law enforcement, and other public and private agencies and organizations. The bill is in effect upon publication in the Kansas Register.

Real Estate

H.B. 2092 enacts new law to specify that transfer fee covenants recorded on and after July 1, 2009, shall not run with the title to real property and will not be binding or enforceable in law or in equity against any subsequent owner, purchaser, or mortgagee of any interest in real property as an equitable servitude or otherwise. Additionally, the bill declares transfer fee covenants, on and after the effective date of this Act, to be against public policy and any such covenant will be void and unenforceable.

H.B. 2091 amends existing law to clarify that the provisions of the Kansas Manufactured Housing Act would not apply to modular homes. A “modular home” is defined elsewhere in the Act (K.S.A. 58-4202) to mean “a structure which is: (1) Transportable in one or more sections; (2) designed to be used as a dwelling on a permanent foundation when connected to the required utilities, and includes the plumbing, heating, air conditioning and electrical systems contained therein; and (3) certified by its manufacturer as being constructed in accordance with a nationally recognized building code.”
Special Notice

While it may be difficult to think about the 2010 Legislative Session when the 2009 Legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all proposals be submitted in final form by Sept. 1. While individual members, local bar associations, committees, and sections may submit proposals, the proposals will be reviewed by the appropriate section or committee before consideration.

Therefore, it is imperative that you begin drafting your proposal now and submitting it to the appropriate section.

The KBA Legislative Committee will meet after the Sept. 1 deadline to consider all legislative proposals for the upcoming session.

All proposals should be mailed to: Joseph N. Molina, Kansas Bar Association 1200 SW Harrison St., Topeka, KS 66612; or e-mailed to Joseph N. Molina at jmolina@ksbar.org.

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, Molina was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act.

Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.

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The New FTC Red Flags Rule Casts A Broad Net: Are You Prepared?

By Donald N. Peterson II and Sean M. McGivern, Withers, Gough, Pike, Pfaff & Peterson LLC, Wichita

The “Red Flags” Rule, codified at 16 C.F.R. 681, is a new Federal Trade Commission (FTC) rule intended to prevent the growing problem of identity theft. Currently scheduled to go into effect on Aug. 1, 2009, the Red Flags Rule requires covered businesses to develop, implement, and administer “Identity Theft Prevention Programs.” The rule is quite broad and will apply to many different industries. The FTC indicates it intends the rule to cover “businesses that provide services and bill later, including many lawyers, doctors, and other professionals.” (FTC Press Release, “Red Flags Deadline Extension,” www.ftc.gov/opa/2009/04/redflagsrule.shtml, 4/30/2009).

The Red Flags Rule requires financial institutions and creditors with covered accounts to develop a written program to identify the warning signs of identity theft. A “creditor,” among other things, is one who regularly extends, renews, or continues credit. That seems innocent enough but, as they say, “the devil is in the details.” Here the relevant details include the extremely broad definition of the term “credit,” which is defined to mean an arrangement in which one defers payment of debts or accepts deferred payment for the purchase of property or services. A “covered account” is (a) an account used mostly for personal, family, or household purposes that involves multiple payments or transactions; or (b) an account for which there is a foreseeable risk of identity theft including, for example, a small business or sole proprietorship account.

Based on these definitions, the Red Flags Rule applies to most financial institutions and to many businesses that accept deferred payments. “Some examples of creditors are finance companies; automobile dealers that provide or arrange financing; mortgage brokers; utility companies; telecommunications companies; nonprofit and government entities that defer payment for goods or services; and businesses that provide services and bill later, including many lawyers, doctors, and other professionals.” (Id.).

The American Bar Association questioned whether the FTC exceeded its authority in making this determination and requested an extension for lawyers to prepare for compliance. (Letter from H. Thomas Wells, Jr. to Jonathan D. Leibowitz, www.abanet.org/poladv/letters/additional/2009apr24_ftc_1.pdf, 4/24/2009). The ABA also inquired about a different regime for “low risk” creditors. (Id.). It is unclear what things will look like when the dust settles but, at least right now, the Red Flags Rule will apply to many attorneys and many of our clients on Aug. 1, 2009.

Take time to familiarize yourself with the final rule and compliance requirements. An excellent guide to the Red Flags Rule is available at an FTC Web site dedicated to this topic: www.ftc.gov/bcp/edu/microsites/redflagsrule/index.shtml. The ABA also has materials at its Web site. While we attorneys struggle with the implications of how to comply with this new rule, we must not forget to alert our clients who may need to address these same issues as well.
FACTS: In 2002, Carrothers executed a contract with the city to construct a wastewater treatment facility for $5.618 million. The contract provided Carrothers should reach substantial completion of the project by July 15, 2003, and final completion by Aug. 14, 2003. The engineering company hired by the city, MKEC Engineering Consultants Inc. (MKEC), assisted in drafting the contract, which included a “time is of the essence” clause and a provision for liquidated damages. An MKEC employee, David Chase, performed the calculations for the liquidated damages provision. MKEC’s manager of environmental engineering, Lynn Moore, discussed the calculations with Chase and approved the provision. Although several change orders extended the deadlines for about a week, Carrothers did not reach substantial completion until Jan. 12, 2004. The city withheld $145,350 as liquidated damages. The district court granted summary judgment in favor of the city, finding the contract was unambiguous and the amount of liquidated damages was reasonable in relation to the potential injuries suffered by the city as a result of the delays in completing the wastewater treatment facility. The Court of Appeals agreed. Court of Appeals held that the amount of liquidated damages under the contract was reasonable when viewed prospectively and also when viewed in relation to the actual damages caused by the breach.

ISSUES: (1) Contract and (2) liquidated damages

HELD: Court held the district court and Court of Appeals did not err in determining July 26, 2003, was the date Carrothers was contractually required to substantially complete the project. In addition, Court found the district court and Court of Appeals correctly determined Jan. 12, 2004, was the date when substantial completion actually was achieved based on the undisputed facts in this case and the plain and unambiguous language in the agreement. Accordingly, it was not error to find Carrothers was 170 days late in substantially completing this project pursuant to these contract terms. Court also agreed the liquidated damage provision was not a penalty. Court stated it was clear from the facts the project engineer attempted as a part of the contract drafting process to calculate estimated damages if there were a breach. It also is clear a project with this level of complexity would present significant difficulties in trying to calculate actual damages. Under these circumstances, the parties legitimately could agree in the interests of necessity, economy, and convenience to set the damages level in advance, which is what they did. Court found the $850 per diem assessment for the one-day delay in achieving final completion was reasonable under the circumstances. Last, Court held liquidated damages may be authorized in a construction contract for completion delays occurring after the project owner had beneficial use of the facility.

STATUTE: K.S.A. 20-3018(b)
paid by the city, the Fricks appealed to an independent hearing examiner for an administrative hearing. The hearing examiner upheld the award made by the city. The Fricks appealed to the district court where the parties disagreed about the standard of review. The district court applied a substantial competent evidence standard of review, but ruled the Fricks would be permitted to present additional evidence relevant to fair and reasonable relocation payments. After an evidentiary hearing, the district court found substantial competent evidence supported the decisions of the hearing examiner, denied additional relocation benefits to the Fricks, and incorporated by reference the examiner's decisions into the court's order.

ISSUES: (1) Kansas Relocation Assistance for Persons Displaced by Acquisition of Real Property Act and (2) standard of review

HELD: Court held under K.S.A. 58-3509(a), which provides for an appeal to district court of an administrative hearing examiner’s determination of relocation benefits and states that any such appeal shall be a trial de novo only on the issue of relocation benefits, a district court should make independent findings of fact and conclusions of law regarding the question of relocation benefits based upon the record of proceedings before the hearing examiner.

CONCURRENCE: J. Johnson concurred in the majority’s result of a trial de novo on the issue of relocation benefits. However, Johnson disagreed with the majority’s limited reading of trial de novo and stated the Fricks should receive a new trial, not a trial on the record.

STATUTES: K.S.A. 8-259(a); K.S.A. 12-527; K.S.A. 26-501, -504, -505, -506, -508(a); K.S.A. 1967 Supp. 44-556; K.S.A. 44-1011(b); K.S.A. 58-3501, -3502, -3503, -3506, -3508, -3509(a); K.S.A. 75-5001; and K.S.A. 77-601, -602(a), (k), -603, -621(c)(7)

MUNICIPAL CORPORATIONS – STATUTES
RURAL WATER DISTRICT NO. 2 V. CITY OF LOUISBURG
MIAMI DISTRICT COURT
REVERSED AND REMANDED
NO. 100,332 – MAY 29, 2009

FACTS: Rural water district appealed district court’s decision affirming appraisers’ award of $133,200 for territory annexed by the City of Louisburg. Appeal transferred to Supreme Court. Five issues identified: (1) Were the appraisers and the district judge required as matter of law to consider or award going concern value in arriving at award amount? (2) What was the appropriate procedure to be followed in district court action challenging appraisers’ award under K.S.A. 12-527? (3) What standard of review or standard of proof applies to such an action in district court? (4) Whether proper review or standard of proof under K.S.A. 12-527 was sufficient to satisfy Fifth Amendment, and did Water District carry its burden of demonstrating the appraisers’ award amount was unreasonable?

ISSUES: (1) Going concern value, (2) procedure in district court, (3) standard of review or standard of proof, and (4)/(5) Fifth Amendment and discharge of burden

HELD: K.S.A. 12-527 examined and interpreted throughout the opinion. Going concern value is a potential component of reasonable value, as that term is used in K.S.A. 12-527. Going concern value should be considered for inclusion in any appraiser’s award and any reconsideration of same in district court.

Legislature’s use of nonspecific “institute an action” language in K.S.A. 12-527 endows a party dissatisfied with appraisers’ award with right to trial de novo in district court on issue of reasonableness of the award. Party challenging an appraisers’ award under K.S.A. 12-527 bears burden of demonstrating it to be unreasonable. Because Water District was not permitted a trial de novo in district court, district court’s decision is reversed and remanded for appropriate procedure to be employed.

District court factfinder, whether ultimately a judge or jury, must decide whether party challenging the award has carried its burden by a preponderance of the evidence, and if so, the correct reasonable value, based on all evidence presented in the district court proceeding.

Because case is reversed and remanded, there is no decision on Fifth Amendment requirements. Assuming arguendo the Fifth Amendment comes into play when a city annexes a territory served by a water district, the reasonable value contemplated by the statute is equivalent to just compensation under U.S. Constitution. Also no decision on whether Water District carried its burden of demonstrating the appraisers’ award was unreasonable.


WATER RIGHTS AND CONDEMNATION
SHIPE V. PUBLIC WHOLESALE WATER SUPPLY
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 100,556 – JUNE 26, 2009

FACTS: Public Wholesale Water Supply (Water Supply) sought permits to appropriate groundwater rights in the Kansas River basin between Lawrence and Eudora for its beneficial use. After unsuccessfully attempting to negotiate temporary easements with the Shipes and other landowners, Water Supply filed a petition for eminent domain. The district court found Water Supply had the power of eminent domain and that the taking was necessary to its lawful corporate purposes and gave Water Supply temporary access. The Shipes filed a motion for temporary injunction in the eminent domain proceeding and also the present separate action seeking an injunction. The Shipes refused to acquiesce in the damage award and in the temporary injunction action claimed Water Supply does not have the power to condemn their property and the ultimate purpose was to condemn their water rights and that Kansas law only extends the condemnation proceedings to real property interests in the land, not water rights. The district court denied the injunction and dismissed the action. The district court held that Water Supply sought only to obtain temporary easements for drilling test wells and evaluating the quality and quantity of available water. The district court also held Water Supply has the power to condemn water rights. However, the district court granted a temporary injunction pending outcome of the appeal.

ISSUES: (1) Water rights and (2) condemnation

HELD: Court concluded that the Shipes have standing to object to a temporary easement on their property, although they do not have standing to object to the condemnation of water rights which they do not possess. Nevertheless, the question of whether a water district can condemn water rights or property for the purpose of providing permanent access to a point of diversion for the use of water rights is not ripe for decision in this case because: (a) The landowners in this action do not hold the water rights, (b) the current eminent domain proceeding does not seek a permanent easement for a point of diversion, (c) it is not known if Water Supply will ever seek to condemn the property for the purpose of obtaining legal access to a point of diversion, or (d) if in the future Water Supply seeks a permanent easement for a point of diversion, it is not known if the current landowners will still possess an interest in the land or if a purchase could be successfully negotiated.

STATUTES: K.S.A. 19-3545, -3552; K.S.A. 26-501; and K.S.A. 82a-701, -702, -706, -706a, -707, -708a, -718, -733
FACTS: Williams became a patient of Dr. Lawton in January 2002 after complaining of a urological lesion that would not heal. Williams' medical history form did not specifically request information about diabetes, and no urinalysis was ordered by Lawton. Lawton performed an outpatient surgery on Williams. Williams was in Lawton's care until May 2002. Williams developed a host of complications. He sued Lawton in 2004 for medical negligence alleging that he failed to order a urinalysis prior to the surgery, which would have alerted the undiagnosed diabetes and that Lawton was negligent in treating the postoperative problems. Dr. Diggdon testified as an expert witness on Williams' behalf and testified that Lawton's failure to check for diabetes before surgery was a departure from the standard of care. The jury found Lawton 54 percent at fault and Williams 46 percent at fault. The jury awarded $200,000 for past and present pain and suffering and $7.75 million for future pain and suffering. The jury confirmed its verdict upon polling. Lawton filed multiple post-trial motions, including a motion alleging the verdict was reached by averaging all the jurors' opinions. The district court acted sua sponte in recalling the jurors for post-verdict interviews. Eight of the 12 jurors appeared for questioning. The district court ultimately granted Lawton's motion for a new trial based on jury misconduct having "substantially prejudiced" Lawton's rights. The district court granted an interlocutory appeal. Court of Appeals held the permissible scope of an interlocutory appeal is not limited to the precise questions that may have been certified by the district court, but rather the appeal should be limited to the order or orders implicated by the certified questions. Court found that all three certified questions in this case were derived from and were the lynchpins for the district court's order granting a new trial to Lawton. Court held that Dr. Diggdon properly qualified as an expert witness because at least 50 percent of his professional time within the two-year period preceding the incident giving rise to the action was devoted to actual clinical practice in the same profession that he was licensed. Court held the district court abused its discretion in granting a new trial to the extent it was based on jury misconduct. Court stated the abuse was inherent in the district court's following actions: Systematic juror by juror contact by counsel should not be undertaken without consent of the court, failure to seek corroborator prior to jury recall, sua sponte recall is contrary to Supreme Court Rule, the questioning of jurors by the court was not an abuse of discretion, but it may have invaded the mental processes of the jury, and the juror testimony was insufficient to show a quotient verdict. Court of Appeals reinstated the jury verdict.

ISSUES: (1) Scope of interlocutory appeal, (2) expert testimony, and (3) juror questioning on recall

HELD: Fundamental principles of statutory interpretation are stated and applied. An offender sentenced pursuant to K.S.A. 21-4729 who fails to participate in a drug treatment program is subject to immediate imposition of the underlying prison sentence once the district court has made the finding required by K.S.A. 21-4603d(n) of a pattern of intentional conduct demonstrating the offender's refusal to comply with or participate in treatment. Consideration of placement in Labette Correctional Conservation Camp or other nonprison sanctions under K.S.A. 21-4603d(g) is not required.

STATUTES: K.S.A. 8-1599, K.S.A. 21-4603d(g), -4603d(n), -4729, K.S.A. 65-4152, -4160(a), -4162(a)(3), K.S.A. 79-5204; and K.S.A. 2003 Supp. 22-3716(f), -4603d(g), -4603d(n), -4729, -4729(f)

STATE V. BOYER


ISSUE: (1) Juvenile adjudications and (2) K.S.A. 21-4704(j)

HELD: K.S.A. 21-4704(j) is interpreted. Court of Appeals' decision in this case is examined and found to be thorough and persuasive. Juvenile adjudications are not to be considered in the determination of persistent sex offender status under K.S.A. 21-4704(j). Boyer's sentences are vacated, and case is remanded to district court for resentencing.

STATE V. CASADY
DONIPHAN DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 99,023 – JUNE 26, 2009

FACTS: Casady entered guilty plea to drug charge. At sentencing, district court assessed court costs, drug testing fee, booking fee, and $100 Board of Indigents’ Defense Services (BIDS) administrative fee, and found Casady financially unable to pay BIDS attorney fees. On appeal, Casady challenged the BIDS application fee, claiming it violated an indigent defendant’s rights under U.S. and Kansas constitutions. Court of Appeals affirmed the assessment. 40 Kan. App. 2d 335 (2008). Casady’s petition for review was granted.

ISSUES: (1) BIDS application fee and (2) K.S.A. 22-4529

HELD: Indigent reimbursement statutes in other states are reviewed and synthesized. K.S.A. 22-4529 provides adequate safeguards to protect a defendant’s constitutional right to counsel. A district court is to determine the propriety of imposing the BIDS application fee at the time of the initial determination to appoint counsel. This assessment determination does not require any subsequent findings by the district court. In order to comport with constitutional standards, however, any enforcement of the obligation to pay the fee is to be deferred until the conclusion of proceedings in district court. If the defendant raises the issue of the ability to pay and demonstrates circumstances that preclude payment of the application fee, the district court may reduce or waive a previously imposed application fee.

STATUTE: K.S.A. 22-4513, -4529; and K.S.A. 65-4152(a)(2), -4152(a)(3), -4160

STATE V. DIXON
LYON DISTRICT COURT – AFFIRMED
NO. 97,020 – JUNE 19, 2009

FACTS: This appeal follows Dixon’s retrial after the decision in State v. Dixon, 279 Kan. 563, 112 P.3d 883 (2005). Dixon was involved in a series of events leading up to a July 29, 2001, explosion and fire at an Emporia apartment complex, which resulted in the deaths of Dana Hudson and her infant son, as well as injuries to other residents and those who attempted to assist at the scene. On remand, the district judge initially denied a defense motion to change venue but granted it after jury questionnaires were returned. The case was moved from Lyon County to Saline County. The charges at issue in the second trial mirrored those in the first: two counts of first-degree murder, aggravated arson, six counts of aggravated battery, two counts of burglary, felony theft, criminal damage to property,积极性 mistaken or approximated, and criminal possession of a firearm.

The state notified the court and Dixon of its intent to pursue the alternative charge of felony murder based on aggravated arson, anticipating correctly that the evidence in the second trial would be largely identical to the evidence in the first. Dixon challenges: (1) refusal to grant a mistrial because a juror saw Dixon in shackles; (2) refusal to give instructions on certain lesser included offenses; (3) refusal to give a unanimity instruction regarding the underling crime for the burglary charges; (5) adequacy of the felony murder, burglary, and criminal damage to property elements instructions; (6) admission of evidence that Dixon’s mother attempted to obstruct investigation of the explosion; and (7) cumulative error.

ISSUES: (1) Witness opinion, (2) defendant in shackles, (3) lesser-included offense instructions, (4) unanimity instructions, (5) elements of offense instructions, (6) obstruction evidence, and (7) cumulative error

HELD: Court found no reversible error in the opinion of the experts. Court stated that the reports from the other experts had put the defense on notice that there were questions about the position of the stove in the apartment at the time of the explosion. Court also stated the defense received full opportunity to cross-examine about the confusion of the position of the stove and there was no clear prejudice to defendant’s position in any significant respect and the discrepancy in the expert’s testimony gave the defense yet another tool to challenge the credibility of the expert.

Court found no error when one juror inadvertently heard or saw the defendant in shackles. Court stated the trial court gave a proper curative instruction and there was no prejudicial error.

Court held the evidence at Dixon’s trial persuaded the Court that the proof of each of the three alternative predicate felonies for the second burglary, which in turn underlay the felony murder charges, was sufficient to eliminate the requirement for the lesser-included instructions sought by Dixon.

Court held this was clearly an alternative means rather than a multiple acts case. Court stated that having already decided that the evidence of each of the alternative means of committing the second burglary was adequate, there was no need for a unanimity instruction.

Court stated the jury instructions for felony murder, burglary, and criminal damage to property were given according to the pattern instructions. They fairly and accurately stated the law and there was no possibility that this jury could have been misled. Any further refinement of the instructions or the verdict form was not necessary to protect Dixon’s rights.

Court held the admission of the obstruction testimony was not unduly prejudicial. Court stated that it certainly tended to inculpate Dixon rather than exculpate him, but given the largely consistent stories of his three accomplices about Dixon’s leadership role in the burglaries and other crimes, it was simply impossible that any juror’s vote on guilt turned on Dixon’s mother’s evidently misguided or malign effort to help her son.

Court held that having found there was no error under Dixon’s other appellate issues, there was no cumulative error.

STATUTES: K.S.A. 2006 Supp. 21-3401, -3410, -3414, -3415, -3420, -3423, -3701, -3719, -3720, -4204; and K.S.A. 60-401(b), -407(f)

STATE V. GARCIA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,997 – MAY 22, 2009

FACTS: Supreme court affirmed Garcia’s conviction for felony murder with rape or attempted rape as the underlying felony, but reversed a separate rape conviction and remanded to vacate rape sentence. State v. Garcia, 285 Kan. 1 (2007). In appeal from sentencing on remand, Garcia argued the district court inappropriately determined the felony murder was “sexually motivated,” requiring Garcia’s registration as a sexual offender. Garcia claimed the district court lacked jurisdiction on remand to reopen sentencing on the felony murder conviction, failed to find beyond a reasonable doubt that Garcia’s crime was sexually motivated, and violated Garcia’s constitutional rights when it increased punishment by requiring him to register as sex offender without proof to a jury beyond a reasonable doubt.

ISSUE: Sentencing on remand

HELD: Garcia’s arguments are rejected. District court’s action on remand was to clarify, not modify, its holding at the original sentencing hearing. Any objections to the 2005 sentencing and the resultant journal entry should have been raised in the direct appeal.

STATUTE: K.S.A. 21-3401(b), -4608(a), and K.S.A. 22-3601(b) (1), -4901 et seq., -4902(b), -4902(c)(1), -4904
STATE V. HENNING
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 98,118 – JUNE 26, 2009

FACTS: Henning as occupant of car was arrested on outstanding warrant. Police searched car, discovered drug evidence, and arrested driver and Henning on drug charges. District court granted motion to suppress the evidence, finding search was unconstitutional. State appealed, arguing K.S.A. 22-2501(c) as amended in 2006, to allow search to discover “fruits, instrumentalities, or evidence of a crime” rather than “the crime,” allowed the search. Court of Appeals reversed and remanded. 38 Kan. App. 2d 706 (2007). Review granted to address the significance of the 2006 amendment, and whether the current statute is constitutional in light of recent U.S. Supreme Court decision, Arizona v. Gant, 556 U.S. ___, 129 S. Ct. 1710 (2009).

ISSUE: (1) K.S.A. 22-2501(c) and (2) Fourth Amendment

HELD: The current wording of K.S.A. 22-2501(c) would permit search of a vehicle incident to an occupant’s or a recent occupant’s arrest, even if the purpose of the search is not focused on uncovering evidence only of the crime of arrest. Pursuant to Gant, however, K.S.A. 22-2501(c) is facially unconstitutional under the Fourth Amendment of the U.S. Constitution and under Section 15 of the Kansas Constitution Bill of Rights.

STATUTE: K.S.A. 22-2501(c), -2501

STATE V. HORN
BUTLER DISTRICT COURT – SENTENCE VACATED AND CASE REMANDED FOR RESENTENCING
NO 100,373 – MAY 8, 2009

FACTS: Horn convicted of attempted aggravated criminal sodomy, and sentenced pursuant to Jessica’s Law to life in prison with mandatory minimum 25 year prison term. Sole issue on Horn’s appeal from that sentence is which of two statutes plainly applicable to sentencing of attempted aggravated criminal sodomy controls.

ISSUE: Sentencing for attempted aggravated criminal sodomy

HELD: Applying rule of lenity, conflicting statutory provisions are resolved in favor of Horn. Aggravated criminal sodomy in violation of K.S.A. 21-3506(a)(1) is an off-grid felony. Pursuant to K.S.A. 21-3301(c), the separate crime of attempted aggravated criminal sodomy is ranked as a nondrug severity level 1 felony. Horn’s hard 25 life sentence under K.S.A. 21-4643 is vacated and remanded for resentencing for nondrug severity level 1 crime under Kansas Sentencing Guidelines.

STATUTE: K.S.A. 21-3301, -3301(a), -3301(c), -3302, -3303, -3449, -3450, -3506, -3506(a)(1), -3506(c), -4643, -4643(a)(1), -4643(a)(1)(D), -4643(a)(1)(G), -4643(a)(2)(B), -4706(d)

STATE V. PHILLIPS AND STATE V. WENZEL
RENO DISTRICT COURT – VACATED IN PART AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NOS. 96,754/97,548 – JUNE 19, 2009

FACTS: Wenzel appealed his conviction and sentence for third DUI conviction. He claimed breath test results should not have been admitted because the officer administering test did not testify that he had read the manufacturer’s operational manual for the testing instrument or personally determined that the test procedure complied with that manual. He also claimed the trial court failed to orally pronounce Board of Indigents’ Defense Services (BIDS) attorney and application fees during sentencing, thus these fees may not be assessed. Finally, he claimed the trial court erred in imposing minimum $1,500 fine without first considering Wenzel’s financial resources. Court of Appeals found an adequate evidentiary foundation for admission of breathalyzer test result. Court of Appeals also found inconsistency by appellate court panels on the BIDS fees issue. Court of Appeals stated that a district court’s failure to announce the assessment of BIDS fees at sentencing does not preclude their assessment. Court of Appeals vacated the BIDS application fee and remanded the matter to the district court to consider whether this fee should be waived for manifest hardship, and if not, district court may then assess the fee. Assessment of BIDS attorney fees is also vacated and remanded for district court to consider whether to assess those fees under K.S.A. 2-4513 and State v. Robinson, 281 Kan. 538 (2006). Court of Appeals also stated that when the district court assesses the minimum fine provided by statute for an offense, it need not give consideration to the defendant’s ability to pay it.

ISSUE: BIDS fees

HELD: Court rejected the defendant’s BIDS argument and found that the fees are not part of the sentence because they are not imposed for punishment but are taxed as costs in order to recoup expenses incurred by a unit of government in processing, prosecuting, or providing services for the defense of a criminal case. Further, although the fees are a judgment, K.S.A. 22-3803 provides that costs are to be taxed in a statement of costs issued at the conclusion of a criminal proceeding. Consequently, costs need not be stated as part of the judgment in open court, although the better practice is to do so. Nevertheless, Court agreed with the defendants’ alternative argument that due process requires a judge to make the findings necessary to support the allocation and assessment of any cost where the assessment or amount is not mandatory, i.e., where the Legislature has granted judges with discretion to impose costs or to determine the amount of costs. Because findings were not made regarding the discretionary amount of BIDS fees in Wenzel’s case, the BIDS’ orders in his case were vacated and the case was remanded to the district court. In Phillips’ case, the district judge made adequate findings and the imposition of costs was affirmed.

STATUTES: K.S.A. 12-16,119; K.S.A. 22-3405, -3422, -3424(a), -3425, -3426, -3801, -3803, -4504(a), (b), -4513, -4529, -4603(d); and K.S.A. 28-172a

STATE V. RANSOM
SEDGWICK DISTRICT COURT – AFFIRMED

FACTS: Ransom convicted of felony murder and attempted aggravated robbery. On appeal he claimed the trial court erred by: (1) denying pretrial motion to suppress a confession, which was coerced and unknowing, with no Miranda warnings given before second and third portions of Ransom’s interview; (2) allowing testimony regarding Ransom’s reaction to news broadcast about the murder; (3) failing to explain to jury the causation required for felony murder; (4) denying motion for mistrial when witness briefly referred to “gang officers” in violation of in limine order excluding such evidence; and (5) permitting state to amend the information after parties rested but before jury began deliberating. Ransom further claimed there was insufficient evidence to convict him of felony murder.

ISSUES: (1) Suppression of confession, (2) confrontation and hearsay, (3) proximate cause jury instruction, (4) motion for mistrial, (5) amendment of information, and (6) sufficiency of the evidence

HELD: Substantial competent evidence supports district judge’s factual findings. Under totality of circumstances, Ransom’s confession was voluntary. Applying State v. Mattiox, 280 Kan. 473 (2005), there was no need to re-Mirandize Ransom prior to second and third portions of his interview.

No violation of Ransom’s right to confrontation. Holding in U.S. v. Bruton, 391 U.S. 123 (1968), which applies only if a codefendant’s confession is admitted during a joint trial and the codefendant does not testify, does not apply because Ransom was sole defendant in this case. Applying factors in State v. Brown, 285 Kan. 261 (2007), spontaneous expression among friends watching television was not testimonial hearsay subject to holding in Crawford v.
**STATE V. RICHARDSON**  
**LYON DISTRICT COURT – REVERSED**  
**NO. 100,445 – JUNE 19, 2009**

**FACTS:** Richardson, infected with HIV, convicted of two counts of exposing another to a life-threatening communicable disease. On appeal he claimed: (1) district court erred in failing to treat K.S.A. 21-3435 as a specific intent crime; (2) K.S.A. 21-3435 is constitutionally vague; and alternatively (3) the evidence was insufficient to convict him of violating K.S.A. 21-3435. Appeal transferred to Supreme Court on its own motion.

**ISSUES:** (1) Specific intent crime, (2) constitutionality of K.S.A. 21-3435 as a specific intent crime; (2) K.S.A. 21-3435 is constitutionally vague; and alternatively (3) the evidence was insufficient to present his defense.

**Held:** Sufficient evidence supported Ransom’s conviction for felony murder. State did not have to prove that Ransom or an accomplice fired the shots that killed the victim.

**STATURE:** K.S.A. 20-3002(c), K.S.A. 21-3401(b), K.S.A. 22-3201(e), -3423, -3423(1)(b), -3423(1)(c), and K.S.A. 60-460, -460(h)(2)

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**STATE V. SHARP**  
**SHAWNEE DISTRICT COURT – AFFIRMED**  
**NO. 98,389 – JUNE 19, 2009**

**FACTS:** Sharp convicted of felony murder and kidnapping of homeless advocate. On appeal, Sharp claimed trial court erred in denying motion to suppress her unreliable and involuntarily confession in exchange for detective’s promise that she would not go to jail and assurances he would help her and her children. Sharp also claimed trial court erred in limiting defense cross-examination of an accomplice witness who had charges reduced in exchange for his testimony and still hoped for downward departure sentence. Sharp finally claimed trial court erred in admitting statements from two co-defendants under the coconspirator exception to the hearsay rule.

**ISSUES:** (1) Motion to suppress confession, (2) cross-examination, and (3) admission of co-conspirators’ statements

**Held:** Under totality of circumstances, Sharp’s confession was properly admitted into evidence as freely and voluntarily given. Substantial competent evidence supports trial court’s finding that at no time did Sharp appear to be under coercion or operating under any promises. Also, any purported promise of immunity was clearly conditioned upon Sharp not later doing or saying anything to incriminate herself. Any purported promise to help her find a place to stay was not made in exchange for her statement, and any purported promise to help her children find a place to stay was a collateral benefit and not a promise, which would overcome her will.

Under facts of case, no abuse of discretion to bar Sharp from cross-examining accomplice witness on accomplice’s hope for a downward dispositional or durational departure sentence.

No objection to admission of testimony by one co-conspirator. Statements of second co-conspirator were correctly admitted into evidence as they related to the subject or plan of the conspiracy, and were made during the pendency of the conspiracy. Language in State v. Roberts, 223 Kan. 49 (1977), and reiterated by its progeny, requiring statements of a coconspirator to be made outside the presence of the defendant in order to be admissible under K.S.A. 60-460(j)(2), is expressly disapproved.

**Dissent** (Johnson, J.): Not all of Sharp’s statements were the product of her free and independent will. Sharp followed detective’s suggested amendment of her statement after being promised she would not go to jail if she did not do something dumb and jamp herself. Does not accept premise that a promise to take care of one’s children was not made in exchange for her statement, and any purported promise to help her find a place to stay was a collateral benefit and not a promise, which would overcome her will.

**STATURE:** K.S.A. 22-3601(b)(1); and K.S.A. 60-460(f)(2)(B), -460(j)(2)

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**STATE V. VALLADAREZ**  
**FORD DISTRICT COURT – REMANDED WITH DIRECTIONS**  
**NO. 99,724 – MAY 8, 2009**

**FACTS:** Valladarez pled no contest to two felony charges before a district magistrate judge. On appeal, he claimed the district magistrate judge had no jurisdiction to conduct felony arraignments and accept guilty or no contest pleas to felony charges. He also claimed...
the sentencing judge committed reversible error by not asking him personally if there was any legal reason judgment should not be rendered. Appeal transferred to Supreme Court on its own motion.

ISSUES: (1) Arraignment jurisdiction and (2) allocution

HELD: Issue of first impression considered for first time on appeal. Applying rules of statutory construction to conflicting statutes regarding arraignment jurisdiction, a district magistrate judge assigned to conduct felony arraignments by the chief judge of the judicial district has jurisdiction to conduct a felony arraignment and to comply with due process requirements inherent in accepting a guilty or no contest plea, including determining if there is a sufficient factual basis to support the plea under K.S.A. 22-3210. Record in this case is insufficient to determine if such an assignment was made. Case is remanded with directions for further proceedings on that issue. To alleviate need to remand future cases in which this issue might be raised, chief judges are to consider the adoption of administrative orders or local rules stating whether that judicial district’s magistrate judges, either collectively or individually, have jurisdiction to conduct arraignments in felony cases.

Sentencing judge failed to ask Valladarez if there was any legal reason judgment should not be rendered, but no showing that Valladarez’s substantial rights were prejudiced by the sentencing court’s allocution error. Resentencing on remand is not required if it is determined the district magistrate judge had jurisdiction to conduct felony arraignments.


STATE V. YOUNGBLOOD

HARVEY DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 96,850 – MAY 8, 2009

FACTS: Youngblood convicted of drug charges, including possession of hallucinogenic drugs as a second offense. Youngblood moved to dismiss that felony charge, claiming the prior municipal court conviction used to elevate the severity level of his current crime was unconstitutionally obtained without counsel or valid waiver. Trial court denied the motion in part by interpreting State v. Delacruz, 258 Kan. 129 (1995), as requiring actual service of jail time to trigger Sixth Amendment right to counsel, and Youngblood had only been placed on probation for the earlier misdemeanor possession charge. Kansas Court of Appeals affirmed the conviction in an unpublished opinion, finding state failed to establish a valid waiver of Youngblood’s right to counsel, but Delacruz was still good law after Alabama v. Shelton, 535 U.S. 654 (2002). Petition for review granted on two part issue: (1) whether Youngblood effectively waived his right to counsel in the municipal court prosecution, and if not, (2) whether the un counselled municipal court conviction was unconstitutional so as to preclude its use to enhance the severity level of the crime in the subsequent prosecution.

ISSUES: (1) Waiver of counsel and (2) use of un counselled misdemeanor conviction

HELD: Under facts in case, Court of Appeals correctly found that state failed to carry its burden of proving that Youngblood was advised of his right to counsel and that a waiver of counsel was knowingly and intelligently made. Requirement in In re Habeas Corpus Application of Gilchrest, 238 Kan. 202 (1985), for waiver of counsel was not satisfied, and no written waiver form as suggested in Gilchrest was executed at the plea hearing.

Youngblood’s conviction for felony possession of drugs is reversed. Court of Appeals’ reliance on isolated portion of Shelton is misplaced. Delacruz is discussed. Youngblood was entitled to counsel when the municipal court found him guilty and sentenced him to prison time, even though the jail time was conditioned upon probation. The denial of that right to counsel rendered the un counselled misdemeanor conviction in municipal court unconstitutional under the Sixth Amendment, thus it could not be collaterally used in district court for sentence enhancement.

STATUTES: K.S.A. 21-4710(a); K.S.A. 65-4162(a), -4162(a)(3); and K.S.A. 1994 Supp. 21-4711(a)

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Recent Changes in Supreme Court Procedures

The Supreme Court recently amended its Fall 2009 argument schedule and changed its oral argument procedures. The new oral argument dates are:

September 14-18
October 26-30
December 7-11

If you argue frequently before the Court, mark your calendar to reflect these changes. Other single day arguments may be scheduled, but attorneys will have at least 30 days’ notice of argument.

Under the new procedure, cases will be argued in the morning beginning at 9 a.m. with the Court conferencing each afternoon. A case may be conferenced more than once, but attorneys should adjust their schedules to have any citation to additional authority under Supreme Court Rule 6.09(b) (2008 Kan. Ct. R. Annot. 47) on file prior to the day of oral argument.

The Court itself is moving toward greater use of electronic communication and encourages attorneys to take advantage of subsection (g) of Supreme Court Rule 6.07 (2008 Kan. Ct. R. Annot. 46), which allows filing of electronic briefs with hyperlinks to authorities cited therein and to the record on appeal.

If you have not already done so, visit the Supreme Court’s enhanced electronic information on petitions for review at www.kscourts.org. Follow the link from “Cases & Opinions” to “Petitions for Review.” The site lists criteria considered in reviewing petitions for review as well as the Court’s actions on petitions granted, denied, or held over on specific dates.

In the future the Court also plans to use the Web site to solicit comment on proposed rule changes as well as to survey attorneys on various subjects of interest. Check the Web site frequently for the latest information on Supreme Court activity.

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

ADMINISTRATIVE LAW AND RAISING A DEFENSE
KDHE V. THORSON
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 100,810 – JUNE 19, 2009

FACTS: Thorson kept a waste tire collection center at the Great Bend Airport. In December 2000, Kansas Department of Health and Environment (KDHE) revoked his permits and ordered him to stop all of his waste tire collection activities in Kansas. In November 2001, KDHE ordered Thorson to remove all of his waste tires and bales of processed tires from the airport. Thorson pursued his administrative remedies and at the district court level, Thorson filed a petition in April 2003. However in April 2004, the court dismissed Thorson’s petition after he failed to appear at a case management conference. KDHE contracted to clean up the waste tires and then billed Thorson $14,000 to cover the clean up. After Thorson refused to pay, KDHE sued Thorson. Thorson’s primary defense was to challenge the finality of the agency’s final order. However, the district court declined to consider the defense as proper in a civil enforcement action. The court granted summary judgment to KDHE.

ISSUES: (1) Administrative law and (2) raising a defense

HELD: Court held that an action for review of an agency action is distinct from an action for civil enforcement of agency orders. The actions have different goals, separate procedures and different defenses. Court stated that when an agency is acting in a judicial capacity, res judicata precludes a second administrative proceeding when the first administrative proceeding provides procedural protections similar to court proceedings. Court held that a party cannot collaterally attack a final agency order in an action seeking civil enforcement action. A party may only raise the defenses listed in K.S.A. 77-625. The remedies available under judicial review of agency actions are not available under a civil enforcement action.

STATUTES: K.S.A. 65-3418(a), -3424; and K.S.A. 77-601, -610, -617, -624, -625, -631

ADOPTION
IN RE ADOPTION OF A.A.T.
SEDGWICK DISTRICT COURT
AFFIRMED AND REMANDED
NO. 95,914 – MOTION TO PUBLISH
OPINION FILED DECEMBER 22, 2006

FACTS: Mother became pregnant while living in New York, at a time during which she claims to have been having sex exclusively with M.P. The unfortunate plight of the parties involved in this action resulted from the natural mother’s having blatantly lied to virtually everyone connected with this proceeding as to whether she lost the baby, who was the father, whether the father consented, improperly notified, etc. The adoptive parents were given temporary custody and took A.A.T. from the hospital. Unfortunately, the mother’s perjury was not discovered until four months after the challenged adoption decree was final. M.P. contacted Kansas counsel, who filed a petition to set aside the adoption. Before a Ross hearing could be held, M.P. submitted a memorandum arguing that a Ross hearing was not applicable to the facts of this case. Ultimately the court found that the best interests of the child test set out in Ross was not applicable to this factual situation and ordered that DNA testing be done without a Ross hearing.

ISSUE: Adoption

HELD: Court held that a validity, order of removing the child and his interest in not being a valid adoption in order for the adoptive father to be a presumed father. Last, Court stated that Ross cannot be stretched to a case where a man who faces displacement is an adoptive father who had no claim to being the child’s biological father.

STATUTES: K.S.A. 38-1110, -1114(a), -1118, -1132; and K.S.A. 59-2118, -2136(h), -2401(a)

ADOPTION
IN RE ADOPTION OF B.J.M.
MCPherson DISTRICT COURT
REVERSED AND REMANDED
NO. 100,823 – JUNE 5, 2009

FACTS: After marrying K.D.B. (mother), C.K.B. (stepfather) filed a petition to adopt her biological son, B.J.M. (the child). The child’s biological father, T.L.M. (father), an inmate at the Hutchinson Correctional Facility, objected to the adoption. The father did not attend the adoption proceedings and the trial court permitted the trial to proceed in the father’s absence. Mother testified how father was not involved during the pregnancy. Father arrived for the birth, stayed for a couple hours and then left. Father had intermittent contact with the child, the last contact in 2005. Father’s appointed counsel sought to admit an affidavit prepared by father in lieu of his testimony, but the trial court denied admission of the evidence, but assured father’s counsel it would consider the statements contained in father’s answer to the petition. Trial court ultimately granted stepfather’s adoption petition, finding father’s consent was unnecessary since father had failed to assume his parental duties in the two years preceding the filing of stepfather’s adoption petition. In addition, the district court found that father was an unfit parent.

ISSUE: Adoption

HELD: Court held that under the facts of this case, to determine whether due process requires a district court to transport a father to the stepparent adoption proceeding, the court must weigh the following factors: (1) the individual interest at stake; (2) the risk of erroneous deprivation of the interest through the procedures used and the probable value, if any, of additional or substitute procedural safeguards; and (3) the state’s interest in the procedures used, including the fiscal and administrative burdens that the additional or substitute procedures would entail. Court held the father clearly had an individual interest at stake. Court found great risk that father was unlawfully deprived of a fundamental liberty interest when prohibited from personally attending the adoption hearing, especially given the complete absence of any substitute measures to ensure that father had an opportunity to be heard at a meaningful time and in a meaningful manner. Court stated father was wholly deprived of the opportunity to testify — whether in person, by deposition, or by affidavit — regarding the efforts he made to assume his parental duties in the two years preceding the filing of stepfather’s adoption petition, as well as the actions taken by mother and stepfather to obstruct these efforts. Court also found father’s fundamental right to the care, custody, and control of his child and his interest in personally attending the adoption hearing were unmatched by any governmental interests at stake. Court held the trial court’s due process

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error was structural and father was entitled to automatic reversal.

STATUTE: K.S.A. 60-409(b)(4), -412(c)

CHILD SUPPORT
IN RE MARRIAGE OF WINSKY
COFFEEY DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND
REMANDED WITH DIRECTIONS
NO. 100,327 – JUNE 5, 2009

FACTS: Steven and Amanda Winsky are the divorced parents of three children. During the relevant time period, Amanda had residential custody and Steven paid child support. When the oldest child reached 18, Steven obtained an order reducing his support obligation by one-third. Amanda moved to set aside that order and have support for the remaining minor children calculated according to the Kansas Child Support Guidelines (KCSG). Steven objected but then argued at the same time that he should have benefit of the Multiple-Family Application (MFA) in the KCSG since he had children from a subsequent marriage. The district court sustained Amanda’s motion and ordered that support be recalculated under the KCSG but without the MFA as Steven requested.

ISSUE: Child support

HELD: Court held that after the oldest child reached 18 years of age and was no longer in high school, the district court had jurisdiction to determine whether the total child support for the remaining two minor children should simply be reduced by one-third or be recalculated under the KCSG. Court also held the parent having primary residency, in effect, sought an increase in child support when she sought to have support for the two remaining minor children recalculated under the KCSG after the oldest child turned 18 years of age and was no longer in high school. This entitled the parent without primary residency to have the benefit of the MFA contained in the KCSG in making the recalculations.

STATUTES: K.S.A. 23-4,111(a); and K.S.A. 60-1610(a)(1)

CONTRACTS, BROKERS, AND
ALTERNATIVE DISPUTE RESOLUTION
SANTANA V. OLGUIN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,767 – MAY 29, 2009

FACTS: Santana purchased real estate after getting property inspected, and discovered problems after closing. She filed action alleging negligence, fraud, and violations of Kansas Consumer Protection Act against seller, realtor, and inspection company. District court dismissed claims against inspection company based upon language in preinspection agreement, and dismissed claims against seller and realtor based upon Santana’s failure to comply with mediation provision in real estate purchase contract prior to filing her lawsuit. On appeal, Santana contends her claims were dismissed prematurely and contends district court erred in construing and applying language in both agreements.

ISSUES: (1) Preinspection agreement and (2) mediation requirement in agreement with seller and realtor

HELD: No error in dismissing inspection company as a defendant. Preinspection agreement is not ambiguous, and its release and limitation of liability language was valid and enforceable. Moler v. Melzer, 24 Kan. App. 2d 76 (1997), is discussed and followed in enforcing release and limitation of liability clauses in a real estate inspection agreement. Also, Santana failed to adequately demonstrate her unconscionability argument to defeat summary judgment. Candall v. Grbic, 36 Kan. App. 2d 179 (2006), is discussed and followed in dismissing litigation of claims arising under contract, which contains a provision requiring such claims to be submitted to mediation, even if mediation clause does not expressly provide for mediation to occur prior to filing suit.

STATUTE: K.S.A. 50-623 et seq.; and K.S.A. 60-212, -256, -256(e)

DIVORCE AND MAINTENANCE AGREEMENT
IN RE MARRIAGE OF SANDHU
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 100,655 – MAY 15, 2009

FACTS: Emrinder Kaur Sandhu, a native of India, married Paul Sarbjit Sandhu, a U.S. citizen, in November 2005, in Ludhiana, Punjab, India. To secure Emrinder’s entry into this country, Paul signed a federal affidavit of support. In the affidavit, Paul agreed to support Emrinder at or above 125 percent of the federal poverty level annual guidelines unless a terminating event occurred during the period in which the affidavit was enforceable. Paul later petitioned for an annulment or a divorce. The trial court granted an annulment and determined that neither party was entitled to maintenance. With respect to the affidavit of support, the court found that it was unnecessary to reach the issue of jurisdiction because Emrinder was earning $316 per week when the case was heard. This amount was more than 150 percent of the 2008 U.S. poverty level guidelines. Emrinder asserts that she is entitled to an award of attorney fees as well.

ISSUES: (1) Divorce and (2) maintenance agreement

HELD: Under the facts of this case, the appellee agreed to support the appellant at or above 125 percent of the federal poverty level annual guidelines unless a terminating event occurred during the period in which the affidavit was enforceable. While the appellant is correct that the appellee is bound by the terms of the federal affidavit of support, the appellant did not allege and did not show that her income was below 125 percent of the federal poverty level annual guidelines when the hearing was held. As a result, the appellant’s request to enforce the affidavit of support was denied.

STATUTES: No statutes cited.

DRIVERS LICENSE REVOCATION
RIVERA V. KANSAS DEPARTMENT OF REVENUE
FORD DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED
NO. 100,279 – MAY 8, 2009

FACTS: Officers certified that Rivera’s breath alcohol concentration tested at 0.08 or greater, that he was caught backing out of a driveway, he smelled of alcohol, failed field sobriety tests, slurred his speech, had bloodshot eyes, had poor balance or coordination, failed a preliminary breath test, and admitted consuming alcohol. The Kansas Department of Revenue (KDR) affirmed the administrative suspension of his license. Rivera filed for judicial review in the Ford County District Court. The KDR filed a motion to dismiss Rivera’s petition for lack of subject matter jurisdiction, alleging that Rivera’s petition failed to comply with the pleading requirements of K.S.A. 77-614(b)(5) and (b)(6), and the petition failed to state a claim within the limited issues set forth in K.S.A. 8-1020(h)(2). The district court found that Rivera’s petition for judicial review failed to comply with the pleading requirements set forth in Bruch v. Kansas Dept. of Revenue, 282 Kan. 764, 148 P.3d 538 (2006).

ISSUE: Driver’s license revocation

HELD: Court held the district court generally dismissed Rivera’s petition because it failed to comply with the pleading requirements set forth in Bruch. Pursuant to the Supreme Court’s clarification in Kingsley v. Kansas Department of Revenue, 288 Kan. ___ , 204 P.3d 562 (2009), of the pleading requirements of a petition for judicial review, the court concluded that Rivera’s petition satisfied the pleading requirements of K.S.A. 77-614(b)(5) and (b)(6). Court further concluded that Rivera exhausted his administrative remedies sufficiently to confer subject matter jurisdiction by filing a timely request for an administrative hearing and by filing a timely petition for review. Court concluded the district court erred in dismissing for lack of subject matter jurisdiction. Court also held the district court did not err in denying Rivera’s claim concerning an unlawful stop, erred in dismissing his claim of incorrect advisories, and should have conducted an evidentiary hearing on Rivera’s claims of improper
breathtaking testing procedures and lack of reasonable grounds to believe Rivera was driving under the influence.

STATUTES: K.S.A. 8-1020(h)(2), -1567a; and K.S.A. 77-611, -612, -613, -614(b)(5), (6)

**KANSAS BOILER SAFETY ACT**  
**BOARD OF COUNTY COMMISSIONERS OF GRAHAM COUNTY V. KANSAS DEPARTMENT OF LABOR GRAHAM DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**  
**NO. 99,648 – MAY 8, 2009**

FACTS: The County Commissioners (county) and the Kansas Department of Labor (KDL) argued over whether the water heaters in the Graham County Courthouse were subject to the Kansas Boiler Safety Act (KBSA). The KDL informed the county that the heaters were not in compliance with the KBSA and needed to be replaced. A KDL officer dismissed the county's request for a variance, finding the KDL lacked subject matter jurisdiction because the water heaters were not boilers as defined in the KBSA. On review, the secretary of the KDL reversed the decision and ruled the KDL had jurisdiction to consider the county's request for a variance. The secretary found the configuration of the four water heaters tied together for the sole purpose of providing comfort heat in the courthouse, transformed the configured unit into a boiler. The trial court reversed the secretary and found the water heaters as configured did not meet the definition of a boiler under the KBSA and that the KDL lacked subject matter jurisdiction.

ISSUE: Kansas Boiler Safety Act

HELD: Court held there was no evidence to support the trial court's decision. Court stated that the hot water produced in the configured unit was not used externally – it was circulated among the network of water heaters. The configured unit was used solely to provide comfort heat for the courthouse. The hot water produced was not used externally to the system and thus the unit was not eligible for exemption from the KBSA as a hot water supply boiler. Court held there was a rational basis for the secretary's interpretation of the KBSA and it should be upheld.

STATUTES: K.S.A. 44-913, -914, -915, -917; and K.S.A. 77-621

**MECHANIC'S LIEN AND PROPER NAME NATIONAL RESTORATION COMPANY V. MERIT GENERAL CONTRACTORS INC. JOHNSON DISTRICT COURT – AFFIRMED**  
**NO. 99,936 – MAY 22, 2009**

FACTS: Merit General Contractors Inc. (Merit) was the general contractor for construction of a Dillon's Store's Supermarket in Overland Park. Goss Service Company Inc. (Goss) was a subcontractor supplier to Merit on the Dillon's project. From April 2003 through Aug. 7, 2003, Wichita Sheet Metal Supply (WSM) provided materials to Goss for the Dillon's project. In December 2003, WSM filed a mechanic's lien on the Dillon's property for $97,029.90, plus interest, costs, and fees, which was for materials furnished through Aug. 7, 2003, under WSM's contract with Goss. In the mechanic's lien statement, Merit Construction Company Inc. (MCCI) was named as the general contractor on the Dillon's project. Merit later moved for summary judgment against WSM. Merit argued that WSM's mechanic's lien statement improperly named MCCI, instead of Merit, as the contractor on the Dillon's project. Merit further argued that WSM's mechanic's lien must fail because it included inappropriate and nonlienable items. In September 2007, the trial court issued its journal entry of judgment granting Merit's motion for summary judgment. The trial court determined that WSM's lien was fatally defective and unenforceable because the lien statement named the wrong general contractor. In responding to WSM's claims that it would be inequitable to enforce the lien statutes in such a rigid manner, the trial court found that no equity jurisdiction was available to it because WSM had a remedy at law. Finally, the trial court denied WSM's motion to amend its mechanic's lien statement in light of its findings that the lien was defective and unenforceable. The trial court determined that it had no authority to permit amendment of WSM's lien after the time for filing the lien had expired.

ISSUES: (1) Mechanic's lien and (2) proper name

HELD: Court held that WSM cannot be excuse from the contractor naming requirement of K.S.A. 60 1103(a)(1) when the claimant had actual knowledge of the correct general contractor before it filed its mechanic's lien but failed to name the proper general contractor within its lien statement. Court stated the trial court did not err in granting summary judgment even though discovery was not completed because there was a material fact in dispute concerning the trial court's ruling – Merit was the actual contractor on the Dillon's project and that WSM failed to name Merit in its mechanic's lien statement.

STATUTE: K.S.A. 60-215(a), -1103(a)(1), -1105(b)

**NEGLIGENCE, PUNITIVE DAMAGES, MEDICAL EVIDENCE, AND JUROR MISCONDUCT**  
**ADAMSON V. BICKNELL CRAWFORD DISTRICT COURT – DISMISSED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS**  
**NO. 99,503 – MAY 15, 2009**

FACTS: Adamson was stopped in traffic at a railroad crossing and noticed a truck rapidly approaching from behind. Adamson tried to move, but the truck, driven by Bicknell, impacted her vehicle and forced her to also collide into the rear of another vehicle in front of her. Officers smelled both burnt and raw marijuana in Bicknell's vehicle. Bicknell apparently entered a diversion agreement for DUI and participated in a drug treatment program. Adamson sued Bicknell for negligence. The trial court failed to address Bicknell's motion for an order of protection of deposition before trial. The trial court denied Adamson's motion to amend for a claim of punitive damages. Regarding Bicknell's motion in limine, the trial court ultimately permitted introduction of expenses paid by Medicaid, Personal Injury Protection benefits, and Adamson's out-of-pocket expenses. A trial was held on the sole issue of damages. Bicknell claimed Adamson's injuries were not caused by the accident. The jury found that Adamson sustained damages of $11,100 in medical expenses, $7,500 in economic loss, and $5,000 in present noneconomic loss, for a total award of $23,600. The trial court denied Adamson's motion for a new trial on juror misconduct, prejudice by Bicknell's counsel, denial of punitive damages, and exclusion of medical evidence.

ISSUES: (1) Negligence, (2) punitive damages, (3) medical evidence, and (4) juror misconduct

HELD: Court held that presented with evidence that Bicknell willfully drove a vehicle under the influence of drugs, regardless of the level of impairment, there was a probability that a jury would have found by clear and convincing evidence that Bicknell evinced that degree of indifference to the rights of others, which may justly be characterized as reckless disregard. Given the evidence presented, no reasonable person could find otherwise and the court abused its discretion on punitive damages. Court affirmed the trial court's decision on medical evidence. Court stated there was sufficient evidence to support a finding that the medical evidence of adjustment was related to Medicaid reimbursement and the trial court did not err in excluding evidence of the Medicaid write-off. Regarding the motion for protective order for deposition, the court held Bicknell's cross-appeal was moot because the deposition went forward as planned and there is no longer a remedy available in law.

STATUTE: K.S.A. 60-3702, -3703
FRIESS V. QUEST CHEROKEE
LABETE DISTRICT COURT – AFFIRMED
NO. 100,050 – JUNE 5, 2009

FACTS: The Friess Trust (Trust) owns property being farmed by J.D. Friess and his son, Steven. Permian Land Co. (Permian) performed right-of-way acquisition of property for Quest Cherokee (Quest) to install a natural gas pipeline. In October 2004, the Trust received a proposed oil and gas lease, but Steven wanted a gas production lease as part of the deal. Permian claimed that Steven told them he was not going to hold up the pipeline. Steven denied such statements, but Permian told Quest they could begin installation of the pipeline and Permian sent the Trust a check for the initial offer for the easement. When Steven discovered the pipeline had been installed, he objected. The pipeline did not interfere substantially with the farming operations, but it disrupted the flow of waterways on the land. Unable to resolve their disputes, the Trust sued Quest for injunctive relief. After a bench trial, the district court found that Steven had neither actual nor apparent authority to consent to the easement to Quest and that the construction of the pipeline was a trespass on the Trust land. The court granted the Trust a mandatory injunction requiring removal of the pipeline, but declined to award punitive damages.

ISSUES: (1) Oil and gas and (2) injunctive relief

HELD: The court applied the four elements for granting a preventive or prohibitory injunction. Court held there was no adequate remedy at law for the Trust under the circumstances. Court held that where there has been shown an ongoing or continuing violation of a landowner’s rights by the construction of trespassing structures, the general rule is that legal remedies are inadequate and that injunctive relief is appropriate. Court stated the only legal remedy suggested by Quest, payment of the initial offer for an easement, failed to establish any true measure of damages where the payment was merely an initial offer and was clearly rejected as insufficient by the landowner. The district court did not err in concluding there was no adequate remedy at law for the Trust under these circumstances.

Court agreed with the district court findings that no easement was granted to Quest, that Steven Friess had neither express nor implied authority to consent for the pipeline construction, and that regardless of any such authority, there was never a meeting of the minds as to a pipeline easement because the Friesses demand for a remedy to grant consent for the construction of the pipeline was a trespass on the Trust land. The court granted the Trust a mandatory injunction requiring removal of the pipeline, but declined to award punitive damages.

STATUTES: No statutes cited.

REAL ESTATE LISTING AGREEMENTS
PREMIER REALTY LLC. V. I.T.J. INVESTMENTS INC.
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 99,991 – JUNE 19, 2009

FACTS: I.T.J. is a developer of new homes. I.T.J. entered into a listing agreement exclusive seller agency with Premier Realty and Thomas Lassely (real estate broker and real estate agent respectively) for properties identified as 12518 and 12534 W. Bitter Court in Sedgwick County. Premier sued I.T.J. for commissions owed, in the amount of $29,874, for the sale or transfer of the subject properties. Premier alleged that I.T.J. did not perform a condition precedent, was a disclaimer of representations and warranties, and therefore excused Premier's obligation under the listing agreement. The district court granted summary judgment in favor of I.T.J. and dismissed all of the plaintiffs’ claims.

ISSUE: Real estate listing agreements

HELD: Court disagreed with plaintiffs’ claim that they alleged facts sufficient to permit a recovery of a commission under Kansas law because they had substantially performed their obligation under the listing agreement to sell the residence at 12518 W. Bitter Court. Court held the record failed to show that the residence was sold, leased, or exchanged within the conditions and the time limit in the listing agreement. However, whether I.T.J. hindered or prevented the plaintiffs’ ability to perform their part of the listing agreement concerning 12534 W. Bitter Court by refusing to sign the transaction broker addendum and the purchase contract, and thus excused the plaintiffs’ nonperformance of a condition precedent, was a disputed question of fact involving performance of the contract and required a trial on the issue.

CONCURRING/DISSenting: J. McAnany concurred in the court’s decision that no commission was earned with respect to 12518 W. Bitter Court. However, McAnany dissented and would have affirmed summary judgment with regard to the 12534 W. Bitter Court property also. McAnany stated that plaintiffs breached their fiduciary duty to I.T.J. by attempting to consummate a sale of property for a price they knew was not the highest price the buyers were willing to pay for the property.


TAX EXEMPTION AND PRIVATE CHILDREN’S HOME
IN RE TAX APPEAL
OF GRACIOUS PROMISE FOUNDATION
BOARD OF TAX APPEALS – AFFIRMED
NO. 100,221 – JUNE 19, 2009

FACTS: Gracious Promise Foundation (Foundation) began a program called Grandma’s House designed to provide 24-hour care for children of incarcerated mothers. The Foundation is a Kansas nonprofit corporation that operates 13 programs designed to reduce criminal offender recidivism. Three lots in Wyandotte County were donated by various businesses for the future site of a house for the Grandma’s House program. 1st Choice Builders (1st Choice) agreed to build the house as a charitable donation to the Foundation, but the Foundation had to propose the property to 1st Choice and then after it completed construction, 1st Choice deed the property back to the Foundation on July 10, 2006. The Foundation requested tax exemption for the three lots starting April 1, 2005. In denying the exemption, the Board of Tax Appeals (BOTA) held that the Foundation did not meet the definition of a “private children’s home” and also failed to provide an explanation as to why the two adjacent lots qualified for tax exemption status.

ISSUES: (1) Tax exemption and (2) private children’s home

HELD: Court stated that K.S.A. 79–201 Second and Ninth are general tax exemption statutes, whereas K.S.A. 79–201b Third specifically applies to private children’s homes and that is precisely how the Foundation described the use of Grandma’s House. The Foundation failed to prove that K.S.A. 79–201b Third should not apply and BOTA did not err in applying the correct statute to Grandma’s House.

DISSENT: J. Malone dissented and held that Grandma’s House is not a private children’s home and the case should be remanded for application of K.S.A. 79–201 Second and Ninth.

STATUTES: K.S.A. 65–425(a); K.S.A. 75–3329(d); K.S.A. 77–621; K.S.A. 79–201 Second and Ninth; and K.S.A. 79–201b Third and Fourth

TERMINATION OF PARENTAL RIGHTS
IN RE J.S., K.S., A.A-S, S.D., AND C.D. IV
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 101,777 – JUNE 12, 2009

FACTS: A.A. is the mother of J.S., K.S., A.A-S, S.D., and C.D. IV. Some of the children were taken into custody after a domestic violence incident with the father of two of the children and the remaining children were taken into protective custody when police
discovered “unbearable” conditions in the home. The children were adjudicated to be children in need of care. After failure of repeated integration plans, the state filed a motion to terminate mother’s parental rights. The district court found the mother was unfit by reason of conduct or condition that was unlikely to change in the foreseeable future. Additionally, the district court found mother was presumed to be unfit as to four of the five children, pursuant to K.S.A. 2008 Supp. 38-2271. Specifically, the district court found that the mother was presumed unfit as to S.D. because S.D. had been in an out-of-home placement for more than two years, mother had failed to carry out a reasonable reintegration plan, and there is a substantial probability she will be unable to do so in the near future. The district court found the mother was presumed unfit as to J.S., K.S., and A.A.-S. because they had been in an out-of-home placement for more than one year and mother had substantially neglected or willfully refused to carry out a reasonable reintegration plan.

ISSUE: Termination of parental rights

HELD: Court found the state did not proceed on a presumption of unfitness, proved the mother’s unfitness at trial and the first time the presumption came up was at the end of the hearing when the district court noted it. Court stated that even if the issue would have been preserved, the district court relied on both the statutory presumption and a determination of the mother’s unfitness. Court held the district court failed to determine whether a presumption, in this case a presumption of unfitness, was a K.S.A. 60-414(a) or (b) presumption and the failure to do so is error. However, considering all the evidence in the record in the light most favorable to the state, court held 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 her children and that her conduct or condition was unlikely to change in the foreseeable future. Accordingly, the district court’s error in applying the presumption of unfitness does not require reversal since the district court’s decisions terminating mother’s parental rights is supported by a basis independent of the application of the presumption. Court also stated the district court found that termination was in the children’s best interests, in light of their physical, mental, and emotional needs.

STATUTES: K.S.A. 38-2269, -2271; and K.S.A. 60-252, -414

**TITLE OPINION**

SOUTHWIND EXPLORATION LLC V. STREET ABSTRACT CO. INC.

NEOSHO DISTRICT COURT – AFFIRMED

NO. 99,092 – JUNE 19, 2009

FACTS: Southwind Exploration (Southwind) sued Street Abstract Co. (Street) for negligence and breach of implied and express contractual warranties in the preparation of a certificate of title with respect to an oil and gas lease. Southwind alleged that Street failed to conduct an adequate title search and failed to identify the owner of a mineral lease interest in the property. Prior to trial, Southwind dismissed its contract claims and proceeded in tort. The case was submitted to the jury on a theory of negligence. The jury assessed no fault against Southwind but found Street to be 70 percent at fault and 30 percent fault on Williams Lacy, the attorney that hired Street to provide the title opinion. The jury found Southwind sustained damages of $329,043.47 and after reducing the award by the 30 percent, entered judgement against Street for $230,330.43.

ISSUE: Title opinion

HELD: Court held the trial court made no error in submitting the case to the jury on the theory of negligence. Court stated that an abstractor’s obligation to conduct a careful examination extends beyond the abstractor’s immediate contact, the requesting lawyer, or title insurance company. The obligation extends to those persons for whose benefit and guidance the abstractor intends to supply the information as well as those persons to whom the abstractor knows the recipient intends to supply the information. Court held that an abstractor who provides a certificate of title may be held liable in tort for the negligent nondisclosure of an interest in the subject property. Court found no abuse of discretion in the trial court’s use of expert testimony provided by Southwind. Court also stated Street failed to demonstrate that Southwind’s damage calculation was predicated upon conjecture and speculation and the damage claim was properly submitted to the jury.

STATUTES: No statutes cited.

**WORKERS’ COMPENSATION, EMPLOYEE OR INDEPENDENT CONTRACTOR, AND PENALTY**

HILL V. KANSAS DEPARTMENT OF LABOR

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

NO. 99,726 – JUNE 26, 2009

FACTS: Hill purchased OT Cab in April 2004. At the time, the company employed a full-time manager, a dispatcher, and full-time and part-time drivers. Due to decreasing profits, Hill terminated the employment of the dispatcher and part-time drivers. Hill retained the manager on a part-time basis and also retained two full-time drivers under service agreements purportedly changing the drivers’ status to that of independent contractors as of Jan. 1, 2005, and at the same time, Hill canceled his workers’ compensation insurance policy. An anonymous caller reported Hill’s cancellation to the Workers’ Compensation Division (Division) of the Kansas Department of Labor (KDOL). OT Cab reinstated its insurance policy as of Nov. 17, 2005. An administrative hearing officer held that OT Cab’s drivers were employees rather than independent contractors. The hearing officer also imposed a $10,000 civil penalty and held that Hill and OT Cab were jointly and individually liable for the penalties. The secretary of the KDOL affirmed the status of OT Cab’s drivers, but reversed for a finding by the hearing officer as to why the civil penalty was an amount other than $25,000. On remand the hearing officer again ordered the joint $10,000 penalty. The KDOL held the hearing officer’s order would constitute its order as well. The district court affirmed.

ISSUES: (1) Workers’ compensation, (2) employee or independent contractor, and (3) penalty

HELD: Court affirmed the district court’s determination that OT Cab’s drivers were employees rather than independent contractors. Court also found that K.S.A. 2008 Supp. 44-532(d) requires imposition of a civil penalty upon a finding that the employer has knowingly and intentionally failed to maintain workers’ compensation insurance in violation of K.S.A. 2008 Supp. 44-532(b). Court held that because the Division imposed a “discretionary” fine of $10,000 rather than the mandatory civil penalty required under K.S.A. 2008 Supp. 44-532(d), the case was remanded to the Division for imposition of the mandatory penalty of $25,000. Last, court held there was no basis in fact or law to disregard the corporate entity, and the court reversed the district court’s determination that Ted Hill and OT Cab were jointly and individually liable for the civil penalty. Upon remand, court directed the Division to find OT Cab solely liable for the $25,000 penalty.

STATUTES: K.S.A. 44-505, -508, -532(b), (c), (d), (f), -532a, -703; K.S.A. 75-5708; and K.S.A. 77-501, -527, -601, -621(a), (c)

**WORKERS’ COMPENSATION**

SAYLOR V. WESTAR ENERGY INC.

WORKERS’ COMPENSATION BOARD – AFFIRMED

NO. 100,012 – MAY 22, 2009

FACTS: Cory Saylor suffered from a degenerative condition in his left knee, which was aggravated by his job duties at Westar. In February 2006, Saylor’s condition worsened to the point that he needed knee replacement surgery. After telling his supervisor that his knee injury was work related, Saylor took leave from Westar un-
der the Family Medical Leave Act. Saylor issued a notice of intent to file a workers’ compensation claim to Westar. The administrative law judge (ALJ) found that Saylor’s knee injury qualified as an accident under the Workers’ Compensation Act. The ALJ also ruled that Westar was liable for all medical costs associated with Saylor’s knee replacement treatment. In a 3 to 2 concurring decision, the Workers’ Compensation Board (Board) upheld the ALJ’s rulings. Three of the Board members ruled the date of the accident was the day Saylor gave notice to Westar, March 28, 2006. Two of the Board members thought the date of Saylor’s accident should be his last day of work, Feb. 6, 2006. Westar argued that Saylor could not have been injured on the job since he was actually at home recuperating from knee surgery on the date of the accident and that Saylor did not give timely notice in order to preserve his workers’ compensation claim. Westar states that it should not be responsible for the medical bills associated with the knee replacement surgery since the procedure was not authorized.

ISSUE: Workers’ compensation

HELD: Court stated that in Kansas, the law allows a worker injured from repetitive use or cumulative trauma, to designate the date of his or her accident as the date on which the employee gives written notice to the employer of the injury. Court rejected Westar’s argument that it should not have to pay benefits to Saylor because on the date of the accident, Saylor was home recuperating from knee surgery and not working. Rather, court stated that the Workers’ Compensation Act (Act) directs the elements of an accident are not to be construed in a strict or literal sense but rather in a manner designed to effectuate the purpose of the Act, which is that an employer bears the expense of accidental injury. Consequently, court held the Board did not err by ruling the date of the accident was the day Saylor gave notice of injury to Westar. Court also rejected Westar’s argument that it was not responsible for the medical costs associated with Saylor’s left knee replacement, even though it was not authorized by Westar.

STATUTES: K.S.A. 44-508(d), -510(h)(a), (b)(2), -510(j)(h), -520, -534(a); and K.S.A. 77-621[c]

CRIMINAL

CITY OF WICHITA V. BANNON
SEDGWICK COUNTY – REVERSED AND REMANDED
NO. 100,977 – JUNE 19, 2009

FACTS: Bannon convicted of criminal trespass under city of Wichita ordinance, based on his entry to “dealers only” section of auto auction facility after being repeatedly told not to. See State v. Bannon, 37 Kan. App. 2d 522 (2007). Bannon appealed his municipal conviction to district court. Finding the stipulated facts did not constitute criminal trespass in light of State v. Hall, 270 Kan. 194 (2000), the district court granted motion to dismiss and also stated it was entering a judgment of acquittal. City appealed.

ISSUES: (1) Appellate jurisdiction and (2) criminal trespass

HELD: Regardless of how district court characterized its order, it was an order of dismissal and not a judgment of acquittal, thus City is entitled to pursue its appeal pursuant to K.S.A. 22-3602(b)(1).

Under facts, auto auction owner had the right to distinguish public areas from private areas. Recourse is proper under Wichita Municipal Code when a person knowingly and willfully disregards that distinction. Bannon entered an area that was clearly marked as reserved exclusively for others, after being personally and repeatedly told not to enter by auction security staff. Hall is distinguished. District court’s dismissal of this action is set aside, and case is remanded for trial.


STATE V. BRADLEY
ELLSWORTH DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 100,990 – JUNE 12, 2009

FACTS: Bradley arrested at accident and put in police car where officer, without giving implied consent advisory notices required by K.S.A. 8-1001, asked if Bradley would submit to breath test. Bradley refused. Once transported to law enforcement center, officer read the implied consent advisory notices and requested a breath test. Bradley again refused. After charging her with DUI, Bradley filed motion to suppress both refusals. Trial court granted the motion. State filed interlocutory appeal.

ISSUE: Suppression of refusal to submit to breath test

HELD: K.S.A. 2007 Supp. 8-1001 is analyzed and applied. Suppression of Bradley’s initial refusal to submit to a breath test is affirmed. Suppression of Bradley’s second refusal is reversed and case is remanded for further proceedings.

STATUTES: K.S.A. 2007 Supp. 8-1001, -1001(f), -1001(h), -1001(n), -1567(a)(3); K.S.A. 8-2,145(c); and K.S.A. 22-3603

STATE V. CURTIS
RENO DISTRICT COURT – REVERSED AND VACATED
NO. 99,474 – JUNE 19, 2009

FACTS: Curtis’ probation was to expire in November 2006. State filed similar motions to revoke Curtis’ probation in January and February 2006, which the court dismissed at the state’s request. State filed the same motion a third time in September 2006, which remained pending when state filed the same motion in January 2007. District court granted the January 2007 motion, and ordered Curtis to serve underlying prison term. Curtis appealed, arguing district court lacked jurisdiction to proceed on that motion because it was filed after the probation term had expired, and because state violated his right to due process in failing to act in a timely and reasonable manner.

ISSUES: (1) Timing of motion to revoke probation and (2) due process

HELD: Revocation proceedings were initiated in a timely manner, prior to the November 2006 expiration of Curtis’ probation term. State’s filing of an identical second motion in January 2007 did not constitute waiver or abandonment of the September 2006 motion.

No Kansas case addresses legal effect of a defendant’s procedural due process rights when identical motions in a probation revocation proceeding are filed, dismissed, and refiled. Analogous rule of law in speedy trial time limitations is applied. Alternative procedures in Kansas for establishing unreasonable delay, through a showing of prejudice to the petitioner, or by state’s waiver of its right to pursue the violation, are discussed with legal rules stated. Applied to this case with analogous speedy trial waiver principles, court finds Curtis affirmatively asserted his right to a timely adjudication on more than one occasion, and state demonstrated no legitimate reason for its approximate 13-month delay. State’s failure to act in a timely and reasonable manner represented an implied waiver to pursue the violation, thus district court’s decision to proceed with the revocation proceeding violated Curtis’ right to due process. The revocation of Curtis’ probation is reversed, and order to serve the underlying sentence is vacated.

STATUTE: K.S.A. 22-3402, -3716(d)

STATE V. DAVIS
BARBER DISTRICT COURT – AFFIRMED
NO. 99,992 – MAY 22, 2009

FACTS: Davis was arrested for DUI. At the law detention center, Davis consented to a blood test. The KBI lab report showed a blood alcohol level of 0.12. Davis challenged the admissibility of blood test by contesting the qualifications of the medical technologist that
drew the blood and her testimony that she could not remember that specific blood draw. The trial court found Davis guilty of DUI and also stated that the drawing of blood by a medical technologist who regularly works in that capacity at the local hospital using the equipment described is appropriate and reasonable.

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

HELD: Court stated there was no evidence presented suggesting the blood draw was conducted in anything other than a medically reasonable manner. Rather, the testimony showed the blood draw was conducted by a licensed medical technologist, using a kit provided by the KBI, in the sheriff's office. Court also stated that even though the technologist was unable to specifically remember the defendant's blood draw, such an inability is not unexpected when a routine blood draw is taken by someone who performs such draws on a daily basis. Court held the blood draw was taken in a medically reasonable manner, given there was no evidence suggesting the contrary.

STATE: K.S.A. 8-1001(c), -1555, -1567, -1599

STATE V. DEAN
RENO DISTRICT COURT – AFFIRMED AND REMANDED
NO. 99,354 – JUNE 5, 2009

FACTS: Dean convicted of drug charges and child endangerment charges based upon evidence found in his dresser in bedroom. District court continued on its own motion to continue Dean's jury trial based on scheduling conflicts with civil and criminal cases. Dean's trial conducted by another judge eight days later. On appeal Dean claimed: (1) he was denied a speedy trial, (2) insufficient evidence supported his convictions, (3) trial court erred in not granting a new trial because counsel failed to ask for jury instruction under K.S.A. 65-4152(a)(2) as lesser-included offense of K.S.A. 65-4152(a)(3), (4) right to unanimity violated because substantial evidence did not support alternative means of "causing" or "permitting" child endangerment and trial court failed to instruct jury on alternative means, and (5) trial court erred in order for payment of Board of Indigents' Services (BIDS) attorney fees.

ISSUES: (1) Speedy trial, (2) sufficiency of evidence, (3) motion for new trial, (4) alternative means jury instruction, and (5) BIDS attorney fees

HELD: No speedy trial violation. K.S.A. 22-3402 is interpreted. District court's sua sponte rescheduling of Dean's trial due to a busy docket complied with K.S.A. 22-3402(5)(d), which does not limit "other cases pending for trial" pending criminal cases.

Under facts in case, sufficient evidence supports all convictions. Sufficient facts to establish Dean's constructive possession of drugs in his dresser, the lack of tax stamps on the drugs, paraphernalia for drug use, and more than a faint or a remote probability that children could have accessed Dean's drugs. No merit to alternative argument that conviction for possession of drug paraphernalia was inconsistent with acquittal of possession of drugs with intent to sell within 1,000 feet of a school.


No evidence to support theory that Dean had authority or control over children, but ample evidence that Dean caused children to be placed in situation where they could be injured or endangered. Error to instruct jury on both alternative means of causing or permitting crime of endangering a child, but error was harmless in this case.

BIDS attorney fee judgment is vacated and remanded for compliance with K.S.A. 22-4513(b). At sentencing, district affirmatively waived Dean's BIDS fees, which included BIDS attorney fees, but subsequently imposed BIDS attorney fees in journal entry of judgment without reassessing Dean's ability to pay. STATUTES: K.S.A. 2006 Supp. 65-4152(a)(2), -4152(a)(3); K.S.A. 21-3608(a); and K.S.A. 22-3402, -3402(2), -3402(3)(c), -3402(5)(d)(1)-(2), -3402(3)(d) (Furse 1995), -4513(a), -4513(b)

STATE V. GAONA
FINNEY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, DISMISSED IN PART, AND REMANDED
NO. 98,822 – MAY 29, 2009

FACTS: Gaona convicted of two counts of rape and two counts of aggravated criminal sodomy. On appeal he claimed trial court erred in: (1) admitting testimony of a child abuse specialist as an expert witness, because she did not have training to understand or diagnose mental disorders, (2) failing to instruct jury on lesser-included offense of attempted rape, (3) failing to instruct jury on lesser-included offense of attempted aggravated criminal sodomy, (4) excluding Gaona's medical records from evidence, and (5) failing to determine if evidence that Gaona watched pornographic movies with the victim was admissible under K.S.A. 60-455 before admitting this evidence. Gaona also claimed: (6) cumulative error denied him a fair trial and (7) imposition of high end of sentencing grid without submitting grounds for aggravated sentence to a jury implicated his constitutional rights.

ISSUES: (1) Testimony of child abuse specialist, (2) jury instruction on attempted rape, (3) jury instruction on attempted aggravated sodomy, (4) exclusion of documentary evidence, (5) propensity evidence, (6) cumulative error, and (7) sentencing

HELD: No abuse of discretion in trial court's admission of testimony as to behavioral traits of sexually abused children. Under facts of case and despite lack of any medical or sociological degree or license, a witness possessing extensive experience in interviewing sexually abused children may testify to general behavioral traits observed in such interviews, so long as witness confines himself or herself to common traits without relating them to the specific victim, does not provide diagnostic testimony beyond his or her credentials, does not state or imply the victim had been abused, does not opine on victim's credibility, and does not suggest the defendant caused the traits observed.

One count of rape is reversed and case is remanded. Under facts, trial court should have given lesser-included instruction because it was possible the jury could have convicted Gaona of attempted rape on this count.

Under facts, no clear error in not instructing jury on lesser-included offense of aggravated criminal sodomy. Gaona's last minute submission of medical records violated discovery rules. Gaona failed to show the medical records were relevant, material, or probative, and he cannot establish any prejudice by the trial court's ruling.

Issue regarding admission of evidence with K.S.A. 60-455 determination was not preserved for appeal and is not considered. One error does not support reversal under cumulative effect rule. Sentencing claim defeated by State v. Johnson, 286 Kan. 824 (2008).

STATUTES: K.S.A. 21-3301, -3501(1), -3501(2), -3502(a)(2), -3506(a)(1); K.S.A. 22-3212(g); and K.S.A. 60-401(b), -404, -420, -421, -442, -445, -448, -455, -456(b)

STATE V. HAFFNER
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED
NO. 101,061 – JUNE 19, 2009

FACTS: Haffner convicted of drug charges. After being paroled, he tested positive for drugs in his urine in December 2007, and authorities received anonymous tips within two weeks that Haffner was involved in making drugs. A special enforcement officer (SEO) and law enforcement officers searched Haffner's home, find evidence of parole violation, including drug paraphernalia. A
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search warrant was obtained for further search, and Haffner was charged with drug offenses. District court granted Haffner's motion to suppress the evidence, finding the month old urine test and two anonymous tips did not establish reasonable suspicion of violation behavior at Haffner's home for the initial search. State appealed.

ISSUE: Reasonable suspicion for search of parolee's home

HELD: Exception to warrant requirement for search of a parolee's property is discussed. In Kansas, the search of a parolee's person or property is reasonable if supported by reasonable suspicion the parolee has violated a condition of release, and if the search is conducted by a SEO. Here, facts were sufficient to establish reasonable suspicion of a parolee violation, which is all that was required to search Haffner's home. District court's suppression of the evidence is reversed, and case is remanded for further proceedings.

STATUTES: None

STATE V. HOM
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 100,943 – MAY 29, 2009

FACTS: Holm was involved in a single-vehicle accident when he rolled his van into a ditch. Holm was not at the scene when authorities arrived. Authorities attempted to contact Holm. He did not return deputies calls for 22 hours after the initial accident report. Holm claimed he swerved to miss a deer. Holm was charged with three misdemeanors – leaving the scene of an accident, failure to report an accident, and no liability insurance. At a bench trial, the court dismissed the insurance charge and found Holm guilty of leaving the scene and failure to report.

ISSUES: (1) Leaving the scene of an accident and (2) failure to report

HELD: Court held that a reading of the criminal statutes appears to require remaining at the scene of a noninjury accident only if the property damaged by the damaging driver is attended by another person. Therefore, a single-car, noninjury accident does not require remaining at the scene unless the property of some other person is damaged. Court also held that K.S.A. 8-1606 only requires reporting requirements for noninjury property accidents if there is at least $1,000 in property damage. Court stated that K.S.A. 8-1606 fails to criminalize the failure to report accidents with property damage less than $1,000. Court held the state failed to introduce evidence to document an apparent $1,000 in damage to Holm's van or the ditch where it landed, although such damage may have occurred. Court reversed both of Holm's convictions for insufficiency of the evidence.

STATUTE: K.S.A. 8-1602, -1603, -1604, -1606

STATE V. LACKEY
SALINE DISTRICT COURT – AFFIRMED NO. 100,890 – JUNE 12, 2009

FACTS: Lackey convicted of first-degree murder and rape for crimes committed in 1982. On direct appeal, 280 Kan. 190 (2005), convictions affirmed and case remanded for resentencing. In 2007, Lackey filed pro se motion for DNA testing under K.S.A. 21-2512, arguing state presented incompetent DNA test results at trial. Trial court summarily denied the motion. Lackey appealed, claiming trial court erred in failing to conduct an evidentiary hearing on the motion.

ISSUE: DNA testing under K.S.A. 21-2512

HELD: K.S.A. 21-2512 is interpreted and applied. Bruner v. State, 277 Kan. 602 (2007), and Goldsmith v. State, 34 Kan. App. 2d 789 (2005), are distinguished. Under facts of case, Lackey not entitled to appointment of counsel and an evidentiary hearing on his motion for DNA testing where the record conclusively established that testing of the DNA evidence could not produce noncumulative exculpatory evidence.

STATUTES: K.S.A. 21-2512, -2512(a), -2512(a)(1)-(3), -2512(b), -2512(b)(1), -2512(c); and K.S.A. 21-3401(a), -3502 (Enskle 1981)

STATE V. MENDOZA
HARVEY DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 98,998 – MAY 22, 2009

FACTS: Mendoza convicted of 10 charges, including two counts of aggravated battery for stabbing a victim's body in two places, and three counts of criminal threat. On appeal, Mendoza claimed these two sets of convictions were each multiplicitous. He also claimed the trial court should have given a limiting instruction when it admitted evidence of Mendoza's prior crimes, and claimed the trial court incorrectly instructed the jury about heat of passion and prosecutor made improper comments about definition of voluntary manslaughter.

ISSUES: (1) Multiplicity – aggravated battery, (2) multiplicity – criminal threat, (3) evidence of prior crimes, (4) “heat of passion” jury instruction and (5) prosecutor's comments

HELD: Aggravated battery convictions are multiplicitous. Applying factors in State v. Schoonover, 281 Kan. 453 (2006), Mendoza's aggravated battery convictions arose from same conduct, at same location, and had a causal relationship. The statutory language defining aggravated battery is inflicted upon the “person.” The nature of the conduct proscribed appears to encompass all physical harms, disfigurements, and physical contacts inflicted upon the person. The statute does not state that harm to each individual body part constitutes a separate violation. The Legislature could have provided such language when enacting K.S.A. 21-3414 but chose not to do so. Thus the unit of prosecution is the person harmed. One aggravated conviction is reversed.

The challenged criminal threat convictions did not arise from the same conduct, and are not multiplicitous.

Issue regarding admission of extensive testimony about uncharged crimes was not preserved for appeal, and is not addressed.

Jury was correctly instructed that voluntary manslaughter is an intentional killing, and prosecutor's statement was harmless under facts of case.

STATUTES: K.S.A. 21-3301(a), -3401(a), -3414, -3414(a), -3419(a)(1), and K.S.A. 60-455

STATE V. MILLER
SALINE DISTRICT COURT – AFFIRMED IN PART, AND DISMISSED IN PART
NO. 99,232 – JUNE 5, 2009

FACTS: After mistrial in first trial, Miller convicted of rape, aggravated criminal sodomy, and aggravated indecent liberties with a child. District court denied Miller's pretrial motion to suppress statements made to officer. District court also determined a child witness was a victim but unavailable and disqualified because she was unable or unwilling to take oath, and entered pretrial order limiting testimony about what the child victim said. On appeal, Miller claimed: (1) second trial violated double jeopardy clause; (2) prosecutor improperly appealed to jury’s sense of compassion for the victim; (3) district court did not sufficiently investigate whether the child victim was disqualified as a witness, or alternatively, should have required the child victim to testify via closed-circuit television; (4) right to confrontation violated by admission of statements to nurse examiner without opportunity to cross-examine the child victim; (5) district court erred in sentencing him to aggravated sentence without proving aggravating factors or criminal history to a jury; and (6) cumulative error denied him a fair trial.

ISSUES: (1) Double jeopardy, (2) appeal to jury's compassion, (3) disqualification of child victim as a witness, (4) confrontation clause, (5) sentencing and criminal history, and (6) cumulative error
HELD: Although prosecutor violated pretrial order and caused mistrial to be declared, no evidence the state's conduct was deliberate, a product of ill will, or calculated to force Miller to move for mistrial. No double jeopardy violation in ordering a new trial.

Claims regarding prosecutor's questions during trial are not addressed because no contemporaneous objections. No prosecutorial misconduct in closing argument, where prosecutor was responding to Miller's closing argument.

Record does not support Miller's claim that district court failed to make required findings of disqualification. No identified Kansas authority requires a district court to order a child victim to testify via closed-circuit television.

With no clear direction from other jurisdictions or U.S. Supreme Court, issue is considered in light of factors in State v. Brown, 285 Kan. 261 (2007). As applied to facts in case, district court's admission of nurse examiner's testimony about statements made by the child victim violated Miller's right to confrontation, but error was harmless.

Appellate court has no jurisdiction to review sentence imposed within presumptive range. Criminal history claim is defeated by State v. Fessell, 286 Kan. 370 (2008).

No support in record for cumulative error claim.

STATUTES: K.S.A. 21-4704, -4721(e)(1); K.S.A. 22-3434, -3434(a)-(b), and K.S.A. 60-460, -460(dd)

STATE V. MONTES-MATA
LYON DISTRICT COURT – AFFIRMED
NO. 98,883 – MAY 29, 2009

FACTS: On Oct. 4, 2005, Montes-Mata was arrested and charged with multiple drug charges. He pled guilty to several counts. Prior to sentencing, the Lyon County Sheriff’s Department received an I-247 Immigration Detainer – Notice of Action from the U.S. Bureau Immigration and Customs Enforcement (ICE). Montes-Mata's attorney withdrew. He filed for continuance of sentencing in order to withdraw his plea. He filed the motion to withdraw plea and it was granted. Court held a suppression hearing and granted in part. The state appealed the suppression order, but it was affirmed. On May 14, 2007, Montes-Mata filed a motion arguing a violation of his speedy trial rights. The district court granted Montes-Mata's motion, concluding he was held for 111 days and the immigration detainer was not a "hold" as contemplated under K.S.A. 22-3402. Rather, the court found the notice served only to advise the Lyon County Detention Facility that upon Montes-Mata's release, "The Department of Homeland Security seeks custody of the defendant for the future purposes of arresting and commencing federal removalal proceedings against the defendant."

ISSUES: (1) Speedy trial and (2) immigration detainer

HELD: Court held the immigration detainer issued to the Lyon County Sheriff's Department merely expressed ICE's intention to seek future custody of Montes-Mata and requested notice from Lyon County prior to terminating Montes-Mata's confinement. The detainer did not, however, place a hold on Montes-Mata and he continued to be held in custody solely by reason of the instant charges. Consequently, the immigration detainer issued by ICE did not vitiate Montes-Mata's right to be brought to trial within 90 days under K.S.A. 22-3402. Court affirmed the district court's dismissal of the charges based on a violation of Montes-Mata's statutory speedy trial rights.

STATUTE: K.S.A. 22-3402

STATE V. PRESTON
JOHNSON DISTRICT COURT – AFFIRMED
NO. 98,629 – MAY 22, 2009

FACTS: Preston convicted on drug charges based on evidence discovered in car after officer stopped it for failing to properly signal a turn. On appeal Preston claimed: (1) the stop of his car and the resulting search of himself and the car were not valid; (2) trial court erred in admitting evidence of Preston's refusal to consent to search of car and in allowing prosecutor to comment on it during closing argument; (3) trial court erred in admitting evidence of Preston's prior drug conviction, and (4) error to impose higher sentence from grid box without jury determination of any sentencing aggravating factors.

ISSUES: (1) Stop of car and resulting searches, (2) evidence of refusal to consent, (3) evidence of prior convictions, and (4) sentencing

HELD: Preston preserved his challenge to the stop by lodging a continuing objection to the evidence seized from the stop and search. Because Preston failed to signal 100 feet before the turn, officer had legitimate reason to stop the car even though officer admitted the turn-signal violation was a pretext. Preston did not properly preserve challenge to officer's pat-down search. Facts in case justified the initial protective and pat-down search for weapons and the second search based upon smell of marijuana. Facts also established Preston’s standing to object to officer’s search of the car.

No published Kansas case addresses whether there is a constitutional right to refuse consent to search such that the state may not elicit testimony or comment on the defendant's refusal. Contemporaneous objection rule applies, and Preston failed to object to state's questioning of detective as to who said they could not search the car. Also, prosecutor's comments in closing argument did not amount to misconduct.

Under State v. Faulkner, 220 Kan. 153 (1976), evidence of Preston's prior conviction was relevant to prove both knowledge and intent.

Appellate court lacks jurisdiction to address Preston's claim of error in the presumptive sentence imposed.

STATUTE: K.S.A. 8-1548, -1548(b); K.S.A. 21-4502(1)(a), -4704, -4704(e)(1), -4705, -4707, -4708, -4721(e)(1); K.S.A. 60-404, -455; K.S.A. 65-4105(d)(16), -4107(b)(5), -4161(a), -4162(a); and K.S.A. 79-5201 et seq., -5208

STATE V. PRUITT
LYON DISTRICT COURT – REVERSED AND REMANDED
NO. 100,039 – JUNE 19, 2009

FACTS: Jury convicted Pruitt of attempted burglary of truck at officer's house, but acquitted Pruitt of battery of officer during scuffle as Pruitt fled the scene. On appeal, Pruitt claimed trial court erred in denying mistrial based upon prosecutor's violation of in limine order to not refer to prior criminal investigation of Pruitt, and prosecutor's comment on Pruitt's invocation of right to remain silent. Pruitt also claimed he was denied a fair trial by an improper instruction concerning a deadlocked jury, or in the alternative, cumulative error.

ISSUES: (1) Prosecutorial misconduct, (2) Allen jury instruction, and (3) cumulative error

HELD: Under facts, Pruitt was substantially prejudiced by prosecutor's questions and a witness' answer, which showed a willing violation of the in limine order, and by prosecutor's improper attempt to impeach Pruitt's credibility by introducing evidence of his post-Miranda silence.

Allen instruction in this case was misleading and contradicted another jury instruction. Because Pruitt objected to the instruction, the conviction must be reversed. State v. Salts, 288 Kan. 263 (2009), is distinguished as decided under a clearly erroneous standard.

Reversal also necessary for cumulative error, noting trial court abused its discretion in refusing to admit photographs of Pruitt's injuries based on lack of foundation. Person taking the photographs did not have to be the person identifying the photographs to establish foundation. Under facts of case, this error was not harmless.

CONCURRENCE AND DISSENT (McAnany, J.): Concurs that case must be reversed and remanded because Pruitt objected
to Allen instruction. Disagrees that prosecutor’s conduct required reversal. Failure to admit photos was harmless error.

STATUTES: K.S.A. 21-3301, -3412, -3715(c); and K.S.A. 22-3423(1)(c)

STATE V. QUINONES
FORD DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 99,748 – JUNE 5, 2009

FACTS: Quinones convicted of aggravated intimidation of a witness, K.S.A. 21-3833, based upon her throat slicing hand movements while a witness testified at criminal trial against her son. On appeal, Quinones claims trial court erred in denying motion for acquittal because state failed to prove the witness perceived Quinones’ threat, and failed to prove elements of general attempt statute. Quinones also claimed district court erred in instructing jury, in determining severity level of the crime, and in ordering her to pay Board of Indigents’ Defense Services (BIDS) attorney fees without considering her ability to pay.

ISSUES: (1) Witness’ perception of threat, (2) elements of general attempt statute, (3) jury instructions, (4) severity of crime and identical offense doctrine, and (5) BIDS attorney fees

HELD: Plain language in K.S.A. 21-3833 provides the crime may be committed by alternative means in sections (1) and (2). State not required to establish that the witness or the intended victim perceived the defendant’s threat when the state proceeds under section (2). Under K.S.A. 21-3833(2), state must prove the defendant acted knowingly and maliciously, attempted to persuade or dissuade the witness from giving testimony at a criminal trial, and the act was accompanied by an express or implied threat of force or violence against the witness or property of the witness.

Because an attempt to intimidate a witness is a specific and alternative means of committing aggravated intimidation of a witness as proscribed by K.S.A. 21-3833(a)(1), state was not required to prove elements of attempt under K.S.A. 21-3301.

No error in failing to instruct jury that state had to prove threat was communicated to the witness. Quinones did not request instruction on lesser included offense of attempted aggravated intimidation of witness, and no clear error in not giving the instruction because general attempt statute is not controlling.

Identical offense doctrine and penalty reduction provisions of K.S.A. 21-3301(c) do not apply because general attempt statute does not apply.

State concedes the district court failed to assess a specific amount of BIDS fees at sentencing. Remanded for compliance with K.S.A. 22-4513(b).


STATE V. WHITE
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,865 – MAY 8, 2009

FACTS: White pled no contest to one count each of identity theft, forgery, and attempted theft. He was granted a downward dispositional departure and given 18 months probation with an underlying prison term of 32 months. The district court revoked White’s probation solely for his failure to pay costs.

ISSUES: (1) Probation revocation and (2) failure to pay costs

HELD: Court held that when a motion is made to revoke probation for failure to comply with the financial conditions of probation, the trial court must find whether the probationer willfully refused or was responsible for the failure to pay or whether the probationer made a bona fide effort to acquire the resources to pay. If the trial court determines that a probationer made a bona fide effort or is not at fault in failing to comply with the financial conditions of probation, the court can then consider alternative measures of punishment to imprisonment. If the trial court finds that a probationer did not make sufficient bona fide efforts to meet the financial conditions of the probation, or that alternative punishment is not adequate to meet the state’s interests in punishment and deterrence, imprisonment would be a permissible sentence. Court reversed for the district court to make appropriate findings.

STATUTES: No statutes cited.

STATE V. ULREY
RENO DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 98,411 – MAY 29, 2009

FACTS: Ulrey convicted of drug charges based upon evidence discovered in car in which he was passenger that had been stopped for traffic violation. On appeal, Ulrey claimed the incriminating evidence was unlawfully seized after driver was arrested, and claimed trial court improperly allowed a KBI scientist to testify about laboratory tests performed by another KBI scientist.

ISSUES: (1) Search of car and seizure of evidence and (2) confrontation

HELD: Based on record, Ulrey lost standing to challenge the search of the car when he was released from his detention by the officer. Even if he still had standing to object, the officer had probable cause of criminal activity based on evidence he smelled and viewed in plain view in the car, thus the search of the car was lawful.

Since jury acquitted Ulrey on charges for which the evidence objected to was presented, this evidence did not change the result of the trial to Ulrey’s detriment. Charges he was convicted of were overwhelmingly supported by properly admitted evidence.

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AUGUST

Wednesday, August 5, 8:25 a.m. – 12:05 p.m. (Session I); 1:25 – 5:05 p.m. (Session II)
Legislative & Case Law Institute Video Replay
(Featuring the 2009 Kansas Annual Survey as seminar materials)
Kansas Law Center, Topeka

Wednesday, August 12, 9 – 10:40 a.m. and 1 – 2:40 p.m.
Brown Bag Ethics Video Replay
(Featuring Dean Sheila M. Reynolds, The Ethical Duty of Honesty: Exploring its Breadth and Limits, and Hon. Patrick D. McAnany, Applying Professional Ethics to a Cost/Benefit Analysis)
Kansas Law Center, Topeka
Kansas Corporation Commission, Wichita

Friday, August 21, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
(Featuring Dean Sheila M. Reynolds, The Ethical Duty of Honesty: Exploring its Breadth and Limits, and Hon. Patrick D. McAnany, Applying Professional Ethics to a Cost/Benefit Analysis)
Kansas Law Center, Topeka

SEPTEMBER

*Pending CLE credit approval

Friday, September 11, 9 a.m. – 3:45 p.m.
Insurance Law Institute
Kansas Law Center, Topeka

Friday, September 18, 9 a.m. – 4:35 p.m.
Construction Law*
DoubleTree, Overland Park

Friday, September 18, 9 a.m. – 3:45 p.m.
Litigation*
Holiday Inn, Wichita

Tuesday, September 22, Noon – 1 p.m.
Top 10 Biggest Kansas Practice Changes Under the “New” KRPCs*
Marty Snyder, Office of the Kansas Attorney General, Topeka
Telephone CLE

Wednesday, September 23, Noon – 1 p.m.
10 Pitfalls for the New Criminal Defense Attorney*
Thomas D. Haney Jr., Henson, Hutton, Mudrick, & Gragson LLP, Topeka
Telephone CLE

Friday, September 25
Recreation Law & Clay Shoot*
Flint Oak Resort, Fall River

Wednesday, September 30, Noon – 1 p.m.
Employee Retirement Income Security Act Nuts & Bolts*
Curtis Barnhill, Attorney at Law LLC, Lawrence
Telephone CLE

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Last published in 1990, a new Kansas Bankruptcy Handbook is coming. Its purpose is to provide guidance to those who do not “code speak” but also assist those who regularly practice in the area of bankruptcy.

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- Bankruptcy and Income Taxes
- Bankruptcy Overview
- Creditor Representation in Chapter 11 Cases
- Electronic Case Filing Made Easier
- Overview of Chapter 12
- Prebankruptcy Planning for Exemptions
- Preparation of Petition, Schedules, Statement of Financial Affairs and Other Documents
- Representing Creditors in Chapter 7 Proceedings
- Representing Creditors in Chapter 13 Proceedings
- Representing the Debtor in Chapter 11: An Overview
- The Role of the Trustee in Chapter 7 Cases
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