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Focus

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Susan McKaskle, KBA Communications Director
1200 SW Harrison St.
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Will the Annual Meeting Survive?

In last month’s column, I mentioned the recently completed annual meeting of the Kansas Bar Association (KBA). This meeting provides opportunities to meet new people, renew old acquaintances, play golf, and just have some time away from home and the office. When judges attend the meeting, there is a lot of time to exchange information, personal and professional, between judges and the lawyers who practice before them. I have always believed that the KBA convention was a vital component in being a “player” in the practice of law. But apparently fewer KBA members see it that way.

Attendance at the annual meeting is low and on the decline. At the 2009 Overland Park meeting, only 140 members signed up for the entire meeting, with an additional 113 attending only part. Thus, with more than 6,500 KBA members, we were only able to attract about 1/4 of 1 percent of our membership. Most of us planning the meeting thought that with the first joint meeting with the judges in many years, attendance would be up significantly. We were probably naïve as we failed to recognize that many of the younger lawyers have no idea what a great professional opportunity it is to get to know the judges.

The meeting takes a tremendous amount of our limited and very valuable staff time and resources. On top of that, hundreds of hours are spent by our attorney volunteers with the planning committee, the CLE presentations, and other tasks. Many resources are needed to pull off a meeting of this size and quality. And the monetary cost of the convention is very significant. Are we wise to use these resources for a small but prominent gathering of Kansas lawyers? Or should we devote those resources to other projects that benefit our members?

Make no mistake about it: I am one of the biggest fans of the annual meeting. As a young lawyer at Shook, Hardy & Bacon, my senior partners, including Gene Balloun, David Waxse, Bill Sampson, and Ron Bodinson, encouraged the associates to attend and develop relationships with our colleagues from around the state. All of them took the opportunity to introduce us to judges and senior lawyers they knew. And with contemporaries like Matt Keenan from Great Bend and Jeff Nelson from Salina, I met lots of young lawyers from across Kansas. Many of those professional relationships are renewed each year at the convention. (The photo of the O’Brien, Nelson, and Keenan boys is proof of some of the fun we had at the 1993 annual meeting in Vail, Colo.) Moreover, some of my lasting memories of the Bar come from watching Jesse Jackson deliver a moving speech and receiving a standing ovation, seeing Buck O’Neil put a bear hug on former Chief Justice Kay McFarland, and listening to the words and music of Kinky Friedman. The annual meeting is a great experience.

One suggestion has been made to go to the format of the Southern Conference of Bar Presidents (which the KBA hosts this October). At those meetings, there are interesting sessions in the morning offering both legal and general interest topics followed by afternoon activities that are fun. For example, in October we will offer golf and excursions to the Truman Library, Liberty Memorial, and Allen Fieldhouse.

Others have suggested that we follow the lead of some of our sister associations in making the event more family-oriented. For example, Alabama’s convention features a kids’ golf scramble, ping pong and tennis tournaments, fishing trips, boating excursions, bingo, and a poolside ice cream social. As we face such competing demands of our time, perhaps a hybrid vacation/meeting would be attractive to more of us. While those types of changes are certainly worth considering, will they really change the mindset of Kansas lawyers? Or are we missing something more fundamental? You will have the chance to share your views when we conduct a survey. Watch for it in the eJournal.

Today, like it or not, I have become one of the “senior” lawyers mentioned above. It is now my responsibility and that of my counterparts to encourage young lawyers and friends to attend. Our more senior bar colleagues also need to continue to reinforce their insistence on the advantages of bar attendance. If we don’t find a way to draw more lawyers, I fear that the time and money resources being committed to putting on the meeting will be diverted to other programs. Perhaps this is the natural course of events. But for the good of the profession, I hope not.

Tim O’Brien may be reached by e-mail at tobrien@ksbar.org, by phone at (913) 551-5760, or post a note on our Facebook page at www.facebook.com/ksbar.
A movie character,* over confident in his fame, made a fool of himself in trying to impress an attractive woman at a party. The character's efforts to impress the lovely partygoer resulted in this guy looking and sounding like a fool! When the lady didn't recognize him, he was quite offended and told her, “I don't know how to put this, but I'm kind of a big deal. People know me. I am very important, I have many leather bound books and my apartment smells of rich mahogany.”

Sound like any lawyers you know?

Unfortunately, I think all of us can think of lawyers – young and old – who consider themselves “a big deal.” I’ve been told about vacation homes in exotic locations, bar exam scores, law school rankings, million dollar verdicts, and more than any other one … just how much busier that lawyer is than me. Never mind that most of these discussions occurred the first time I met said lawyer(s). This month's column is dedicated to making sure that most of the young lawyers reading this article don’t become that lawyer.

First things first. Be proud of your accomplishments. You graduated from college and were admitted into law school. You managed to learn enough about the Rule Against Perpetuities to pass Property. Then you passed the bar exam. After all of that, you moved on to a career as in-house counsel, working for the government, or in private practice, to name just a few career options. Truly, these are all accomplishments that you should be proud of. But when bragging comes into play, leave that to your parents.

A lawyer once told me to take my work seriously, very seriously, but not to take myself too seriously. So in heeding the first part of that advice, consider the work that lawyers do. You may be responsible for ensuring your client has parenting time with their children. You might be trusted with a person's ability to sustain their livelihood or their freedom. You may be the person ensuring that a party receives appropriate compensation for their losses. The Model Rules of Professional Conduct require that lawyers be competent and diligent. There's a good reason for that. Each case and situation is most likely one of the most important things going on in that client's life.

The work of all lawyers is very important. If you miss an important case when researching an issue, your credibility with the court can be affected. If you fail to return a phone call in a reasonable time, your client's trust in you may be affected. You might be trusted with a person's ability to sustain their livelihood or their freedom. You may be the person ensuring that a party receives appropriate compensation for their losses. The Model Rules of Professional Conduct require that lawyers be competent and diligent. There's a good reason for that. Each case and situation is most likely one of the most important things going on in that client's life.

The work of all lawyers is very important. If you miss an important case when researching an issue, your credibility with the court can be affected. If you fail to return a phone call in a reasonable time, your client's trust in you may be affected. There is certainly no question that our jobs can be stressful. With so much on the line, you have to make sure you always bring your “A” game.

Even on the days when life outside of work is hectic or stressful, a good lawyer focuses his or her efforts while at the office. Do your best to figure out what you are good at and focus on developing those strengths. When you are tempted by friends to skip out early and hit a happy hour, make sure your desk is under control before you go. In other words, take your work seriously. What is just another research project to you could be the most important question in your client's life at that time. The moment you begin to lose perspective on just how important your work can be, you can begin to take your work too lightly and perhaps even fail to be as diligent as the rules of professional conduct require.

The second half of the advice I received was “don’t take yourself too seriously.” Some of the most accomplished lawyers I’ve ever met are the most humble. These lawyers allow their work and their reputation to speak for them. Since most young lawyers can’t fall back on countless jury trials to bolster their credibility, the young lawyer is best served by simply working as hard as possible to ensure they are completing all of their work in a timely fashion with a quality work as high as possible.

Chances are that no one you meet wants to hear about your bar score or your new and very expensive car. It will not intimidate anyone or make them more likely to settle their case with you. It will only sour what could otherwise be a great working relationship. Considering that you might be dealing with opposing counsel for months (or years) to come, it’s best to start that relationship out with mutual respect and professionalism.

The law is a calling and a profession that must be practiced with reverence and respect. The law is bigger than any single lawyer. But most importantly, keep in mind that “winning” is not about you, it’s about achieving a good result for your client. So no matter how big of a deal you think you are, remember there are bigger things at stake than your own personal achievements.

*First one to e-mail me with the correct name of this movie character gets a free Black's Law Dictionary!

Jennifer Hill may be reached at (316) 263-5851 or by e-mail at jhill@mtsqh.com.
The IOLTA Program Hits the Mark

By John D. Jurcyk, McAnany, Van Cleave & Phillips P.A., Roeland Park, Kansas Bar Foundation president

IOLTA stands for Interest on Lawyers’ Trust Account. These programs were first established in Australia and Canada in the late 1960s and early 1970s. In the United States, Florida was the first bar association to establish an IOLTA program. That program was launched in 1981. In Kansas, the IOLTA program was approved by the Supreme Court in 1984 and is primarily aimed at funding programs that provide civil legal services for low-income people and law-related charitable public service projects. In the past, 70 percent of the funds have gone for civil legal services to low-income people, with the largest share going to provide direct legal services for victims of domestic violence. This truly meets one of the goals of the program, which is to increase access to the judicial system for those who can least afford it.

Today, all 50 states, the District of Columbia, and the U.S. Virgin Islands operate IOLTA programs. The legal cloud over the legality of the programs has been resolved. In March 2009, the U.S. Supreme Court upheld the legality of IOLTA programs in Brown v. Legal Foundation of Washington.

Lawyers are required to maintain trust accounts by our ethical rules. The lawyer in possession of a client’s funds and property is a fiduciary. The lawyers’ obligations regarding keeping these funds and properties are set out in the Kansas Rules of Professional Conduct. Traditionally, those accounts, which held trust funds that were nominal in amount or kept for short periods of time, paid no interest. The establishment of an IOLTA program allowed the interest to move to charitable works of the Bar rather than being retained by the financial institutions.

In 2009, the Kansas Bar Foundation (Foundation) awarded more than $260,000 in grants from funds generated through the IOLTA program. All grants are reviewed by the Foundation’s IOLTA Committee, which is made up of appointees from the Foundation, the Kansas Bar Association (KBA), the Kansas Supreme Court, the Kansas Association for Justice, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the Foundation’s Board of Trustees for final approval. The need for funds in Kansas at this time is acute. The request for funding exceeded three-quarters of a million dollars and many worthwhile programs did not receive funding because of the lack of availability of funds. Despite this acute need, the program provided benefits to a wide variety of needy citizens throughout the state.

Funding was provided to the Kansas Coalition Against Sexual and Domestic Violence. The grant helped with the cost of printing and Spanish translation of materials, which increases access for the needy. Court Appointed Special Advocates (CASA) programs in Shawnee and Sedgwick County also received assistance from the IOLTA program. CASA protects the young and vulnerable and are a needed resource for the children to have meaningful access to the judicial process. To educate young people, the Topeka Youth Project and the Olathe Youth Court Program received partial funding for their needs, and the KBA Young Lawyers Section Mock Trial Program was also supported by your IOLTA dollars.

In connection with the courts, IOLTA dollars are funding the Rule of Law Civics Education Program, as well as the KBA Law-Related Education Program. That program funds the publishing of Law Wise, which is made available on request at no cost to K-12 school teachers or anyone interested in law-related education. These programs meet the IOLTA goal of education.

These are just a few of the good works IOLTA supports. As the economy continues to improve, the needs of our citizens remain high. Unfortunately, IOLTA proceeds are not constant and fluctuate with the amount of dollars flowing through trust accounts and the available interest rates. What can we do?

The biggest thing every lawyer can do to assist those in need is to participate. The effort and work necessary to maintain an IOLTA is no more than that involved in management of all other ethically mandated trust accounts. Ask your banker to participate in IOLTA. The application to convert an existing trust account to an IOLTA is available on the KBA Web site under the Kansas Bar Foundation link. The staff at the KBA will be happy to offer any assistance and answer any questions your banker may have.

With questions about the constitutionality of IOLTA programs being completely resolved, every lawyer should take this small step to assist the needy by participating in the process.

About the Author

John D. Jurcyk, McAnany, Van Cleave & Phillips P.A., 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.

www.ksbar.org
Are you a member of a section? Do you receive your membership renewal notice each year and think, “Maybe I will join a section this year?” Or, do you ask yourself, what has my section done for me? If so, it is time to look at the Kansas Bar Association (KBA) sections in a new light.

Currently, the KBA offers 22 sections ranging from administrative law to tax law to our young lawyers section. It can be argued that the KBA offers something for everyone when it comes to a section and section membership has many benefits. They provide a forum for members to pursue their respective interests in specific areas of law and foster collegiality among members. Sections allow members to expand their knowledge, network with colleagues and take control of each individual’s professional advancement. How? Through meetings, newsletters, and continuing legal education seminars.

Each section executive committee meets at least four times a year. The meetings are normally by conference call, but some sections meet formally before or after a section-sponsored CLE. The minutes of these meetings are posted on the member’s only portion of the KBA Web site at www.ksbar.org/members under each section’s heading. The section executive committees work hard to plan activities and CLEs that will be of interest and useful to their membership.

Each section also produces at least one newsletter each year and several sections produce up to four. The newsletters are sent via e-mail to each section member and may be accessed in the member’s only portion of the KBA Web site. The newsletter articles are timely and help to further understanding of the law and the changes that are occurring within a specific legal area. Some articles are often chosen to be reprinted in the Journal of the Kansas Bar Association.

Last, but certainly not least, all KBA sections sponsor a CLE each year. The topics relate to the practice of law in that section’s legal area so that members may stay informed of changes and possible issues that arise. Deana Mead, the KBA CLE director, points out that KBA section members are offered registration discounts on section-sponsored seminars within their concentration area(s).

Since CLEs are so important to the sections, each executive committee has a CLE liaison position and Mead said, “The Kansas Bar Association’s Continuing Legal Education Department relies strongly on our section officers’ expertise and contacts within their specific areas of practice to assist us throughout the program planning process. The section CLE liaisons play an integral role as members of the KBA CLE Committee. They are asked to attend three meetings per year as KBA representatives in legal education development across the state.”

Each executive committee plans and secures speakers for CLEs that will educate and interest their members while working with the KBA CLE Department.

“The CLE Department begins planning the various CLEs well in advance of the program dates. We are quite flexible within our scheduling parameters to set up a seminar if we receive notice of a timely topic, a new law being passed, or mandatory regulation dates strongly impacting the practice of law. Our seminar calendar consists of live programs, teleconferences, and video replay offerings throughout the year,” said Mead.

The executive committees work to meet the goals of providing a forum for members to pursue their interests in specific areas of law, foster collegiality among members, allow members to expand their knowledge, network with colleagues, and take control of each individual’s professional advancement. They also work toward ensuring that section membership has its benefits. Mead could not have put it better when she said, “Our section officers and faculty for Kansas Bar Association seminars are volunteers in service to the profession. Their generous contributions of time, talent, and energy are what make our programs successful. We appreciate their dedication and service to the members of the Kansas Bar.”
By Nate Hill, University of Kansas School of Law

Lessons on Surviving Life and Law School

By Nate Hill, University of Kansas School of Law

My wife and I agreed that KU Law’s summer start option was the right choice despite her being seven-and-a-half months pregnant and living 1,300 miles away from Lawrence. By the time school started I was too shell shocked to wrap my mind around the fact that our first final exam was at the same time as our son’s due date. Law school and parenthood were coming at me at warp speed and I didn’t think I would survive either of them. My wife went into labor two days before the exam and luckily (depending on how you look at it), labor took more than 23 hours and my son bought me some study time. I hunkered down for the duration and held my wife’s hand with my left and a torts flash card with my right. We went through this same drill 16 months later with our second son. The only difference was that this time I held her hand with my right and some law review article in my left. Even though these experiences have come pretty fast, I have learned a few lessons that have helped me get this far. With my last year of formal education in front of me, I have two healthy boys, a wonderful wife, and a few thoughts that may help anyone survive both life and law school.

Hold the applause — I haven’t done anything. Apparently children have been springing up for quite some time. Lawyers also seem to have been spontaneously appearing since before recorded history. So, why is there a problem if both babies and attorneys simultaneously proliferate? When people learn that I go to law school and have small children they usually raise their eyebrows as if small children and law school were a contradiction. People often express concern that my life has somehow devolved into a paradox for which they have no explanation. The contradiction between children and law school comes down to simple arithmetic — law school demands 18 hours a day and small children demand 24. Although difficult and confusing, paradoxes are also known to reveal a deeper meaning. Hopefully these lessons reveal a deeper meaning that will help us all weather the storms of life and law school.

First, everyone needs a break from school. For me, family life is how I unwind. Sure, there is crying, early morning bottles, endless diapers, and Disney movies eternally playing in a loop, but that’s only a small part of the action. Few moments replace a two-and-one-half-foot monster chasing you around the house with jelly all over his face, yelling “tickle Dadda, tickle Dadda” — especially after a long day at Green Hall. Getting through law school requires finding some way to get away from law school. If you don’t figure that out now, you may go a few years into your career, but eventually you’ll end up in a Professional Responsibility casebook as the bad example.

Second, no one lives on easy street. In my first year I thought just about everyone without kids had it easy. They were going out when I was staying in, or they were studying longer when I needed to head home and give my wife some relief from diaper duty. But I finally realized that almost everyone has something in life that distracts them from law school. People are planning weddings, some are taking pets to the emergency room, a few are surviving serious illness, several are commuting long distances on weekends, but most certainly, everyone has something other than just law school. Although my distractions came in easy-to-carry rear-facing car seats, I was both selfish and naïve to think I had it harder than anyone else. Life and law school get a lot easier if we remove the comparisons and appreciate what we have.

Third, never underestimate the kindness of others. It may be because we are in Kansas, but my wife and I have been shown a tremendous amount of generosity. Friends give toys and clothes, babysit, and invite us to dinner. Faculty and staff want to see pictures and hear all about our children. Classmates share notes and tirelessly review material I may have missed, and neighbors give encouragement as they reminisce about life and the children they had in law school more than 40 years ago. These kindnesses, given almost in passing, have had the most profound effect on my family and me. The law school community has become our family while we are away from home and we feel obliged to pay it forward. Life and law school can be a lot easier if we allow ourselves to become part of our communities, open up to the kindness of others, and give back where we can.

Looking forward, life after law school may have new challenges and experiences that will make me wish I was back in the middle of an eight-hour Civil Procedure exam. Working at a law firm this summer has shown me that billable hour requirements, stinker clients, and court dockets are less forgiving than the Socratic method, moot court briefs, or Professor Dickinson’s tax problems. Having learned that life goes on in spite of law school, I’m certain it will go on after law school. When that time comes, I hope that I will remember these lessons, but most importantly, remember the people I learned them from.

About the Author

Nate Hill grew up in Orem, Utah, where he attended Timpanogos High School. He graduated from Brigham Young University (BYU) with a Bachelor of Arts in philosophy. He met his wife, Laura, while at BYU and she graduated with a Bachelor of Science in accounting. Together they have two boys and enjoy an active lifestyle.
From the Editor: “The Diversity Corner” is a new column dedicated to answering questions KBA members may have about diversity in the work place.

Dear Kelly,

I’m the youngest associate in my office. Generally, I get along well with the other attorneys, but I feel like they sometimes focus on my age too much, and I don’t know how to handle it. For example, they frequently call me “junior” or “kid” and imply that I have less of a work ethic because “young people these days don’t work hard like we used to.” I conduct myself in a very mature manner, and I am often among the last to leave for the day, so I don’t think these criticisms are accurate. Conversely, I would be accused of age discrimination if I were to call them “old,” so why is it acceptable for them to comment on the age of younger workers? What can I say in return that will prevent these comments in the future without making things awkward and uncomfortable?

Young Esq.

Answer:

Assumptions based on age can be very hurtful and unfair, regardless of whether recipients are youthful or more seasoned. I am not discounting your feelings, but I suspect the older attorneys mean no harm by these comments. Since your question does not indicate that you are kept from working on certain cases and other assignments due to your age, I see this as an even clearer indication that they are probably speaking in jest. I think they may be teasing you, not realizing the sting of their words. They most likely see you as a pleasant, eager rookie, while you probably feel pressured to prove yourself and work hard — especially in this economy — and these comments understandably make you feel singled out for a trait you cannot change, which is a very important element of diversity.

I suggest two possible plans of action. First, you might want to privately consult with a mentor in the firm to share your feelings, emphasizing your concerns about preventing an “awkward and uncomfortable” environment. Second, you could test the waters with a lighthearted response or action that adds to (and thereby deflates) their attempted humor. As an example, I knew of a colleague at a former job who was called a “youngster” by attorneys more senior, and she gently deflected their comments by bringing in a jar of baby food along with a sandwich for a brown bag meeting. When she pulled the jar from her sack, everyone looked in surprise, and she smiled and commented, “We youngsters need to eat our fruits and vegetables.” The other attorneys got the message, and she was seen as a good sport.

Most importantly, keep producing good work and remember that it’s only a matter of time before another new, younger attorney joins the firm, which may shift the “rookie” comments in his or her direction. When that happens, remember how you’re feeling now, and try not to repeat the behavior.

Call for Questions

The Diversity Corner seeks questions about diversity issues for future columns. Names will be withheld by request. Please forward questions to: Lisa Montgomery, Member Services Director, Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612, or send an e-mail to lmontgomery@ksbar.org.

About the Author

Kelly Lynn Anders, associate dean for Student Affairs at Washburn University School of Law, is the 2009-10 chair of the KBA Diversity Committee and author of “The Organized Lawyer” (Carolina Academic Press, 2009).
Getting to Know the Judge Is a Plus!

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

It is said that there are two kinds of lawyers: Those who know the law and those who know the judge. And 40 years ago in Barton County, yet 25 years removed from the Bar Exam, I knew the judge, Judge Herb Rohleder.

We weren’t close buds. He thought my name was “little fella.” And my connection wasn’t a product of being on the receiving end of a bailiff declaring “will the defendant please rise.” You see, I knew the judge because my dad, Larry, was his campaign manager, which meant I did the dirty work, and Larry got all the credit. And back then, dirty work had nothing to do with the stuff of Watergate plumbers. You handed out brochures and walked in parades and served as the go-to guy to get the fliers out to people who had no interest in receiving one. We also slapped “Re-elect Rohleder” stickers on every flat surface in Barton County. We licked stamps, addressed envelopes, knocked on doors, hammered yard signs everywhere but in yards — along hi-ways, on light poles. The campaign team was all Keenan — Matt, Marty, and Tim.

Barton County, and the 20th Judicial District, still elects its judges, but back then the campaigning consisted of fliers, signs, using toddlers (for cuteness) and middle-school kids (for sweat equity). And in case you were at the Labor Day Parade in Hoisington in September 1968, I was that loser dressed in the red polyester T-shirt with huge lettering that blared “Elect Rohleder” handing out fliers. If you rejected what I tried to hand you, you had lots of company. Most kids my age that day in Hoisington were riding the Ferris wheel, slurping down snow cones, shoveling down a funnel cake, or trying to kiss Pam Brown. They sure had fun.

Today, between the vanishing jury trial and a metropolitan practice, knowing the judge poses a more daunting task. Yet, the expression still has truth — know the judge, know the law, but you better know one. And between the two, the former has more appeal to most clients. When I hire local counsel in far-away states, there is always one question. Does he or she know the judge? And how well?

Which brings me to this year’s Bar Convention. It was different than previous years. The place was packed with judges, state and federal. It was a joint meeting and a great opportunity to not only hobnob with the judges but learn the law too. A twofer that is just right for these economic times.

And if the notion of social networking is a dying breed, the last time I checked, judges do decide cases, and having a connection can only help your cause. For example, Larry tells me that thanks to my dirty work, Judge Rohleder was shockingly accessible when Larry’s client got tossed in the slammer and needed an OR bond at midnight. Occasions like that, let’s just say sometimes the law gets trumped by the judge. Rohleder, it’s worth noting, never lost an election and served on the bench for more than 20 years. Judge Laughlin — another 20th Judicial Circuit judge — had the good sense to enlist Larry as his campaign manager too. He too, had a winning track record. His campaign workers? See above.

And if this sounds like a rally cry for the Bar and what it does for you and the profession, then add to your skill set, perceptiveness. This year’s convention was more than a mix and mingle. The Bar Show was fun. And those in attendance included another member of the Kansas Bar — the governor. So let the word go forth — next year’s convention is another joint Bench/Bar meeting in Wichita, and you owe it to yourself and your clients to attend. Save the date: June 9-11, 2010. And if your judicial district elects judges and you need someone to work the parade route — I’ve got a conflict.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Washburn University School of Law and Maastricht University Collaborate on Study and Intern Program

By Scott Curry-Sumner, Professor of Law, Maastricht University, The Netherlands

Washburn University School of Law and Maastricht University are about to embark on an exciting new internship program. This program needs your support to achieve its full potential. For those unfamiliar with Maastricht University, it is situated in the old city center of Maastricht, in the south of The Netherlands. To understand the significance of Maastricht, you need to understand its past. It is the oldest continuously inhabited city in The Netherlands. Celts lived here 500 years before the Romans. Over the centuries, the city has been held by Spain, France, Germany, and The Netherlands. In 1992, the Maastricht treaty was negotiated and signed here, leading to the creation of the European Union and, following that, the Euro.

Due to its international background, most people in Maastricht speak two languages and many speak three or more. Those in the city have a reputation for having an understanding of and interest in international trade, commerce, culture, and law.

Established in 1976, Maastricht University has more than 13,000 students and is ranked 111th in the world out of some 40,000 universities. The Maastricht law faculty offers bachelor and master programs in both English and Dutch. It is renowned internationally for its European Law School, a program that focuses on European, international and comparative law. Using practice-oriented teaching in small-scale groups, the Maastricht law faculty satisfies the labor market’s increasing demand for lawyers who are trained to solve European and cross-border legal problems.

The internship program has been set up in conjunction with the European Law School, which has two tracks: one track is taught in English, the other predominantly in Dutch. I cur- currently teach in both tracks, but helped design and work most closely with the English track.

During a recent visit to Kansas, I started wondering if it might be possible to start a legal internship program that would match our third year or master’s program Dutch students with Kansas law firms, businesses and/or government agencies.

Rachael Pirner of Triplett, Woolf & Garretson, Wichita, became interested in the idea and suggested that the Kansas Bar Association is willing to help facilitate the success of the program.

At about the same time, after speaking with Professor Nancy Maxwell of Washburn School of Law, the idea of an internship in Kansas for Dutch students was broadened to include a semester of study at Washburn School of Law before the internship commences. As it stands now, Maastricht students will spend a semester studying at Washburn, after which they will be eligible to start their six-week internship.

What we hope to achieve, from Maastricht’s perspective, is a way to inform, familiarize, and integrate our students through a hands-on learning experience with the common law system. Learning the practical side of how their common law counterparts work will help prevent misunderstandings that can, and frequently do, occur when lawyers from common and civil law systems work together drafting contracts, resolving disputes, or trying to prevent future problems for their clients.

For Washburn and those involved in the U.S internship, the program will hopefully be an interesting experiment that may lead to fresh perspectives that come from working with young lawyers who most frequently approach problems from a somewhat different angle than their American counterparts. We hope the experience will be a true exchange, leaving all those who participate with a broader outlook and understanding of the law.

Eventually, we would like to extend the internship possibilities to Washburn students who would like to experience an internship in The Netherlands.

Until then, in order for this internship program to work in the United States, we need the help of a few lawyers, judges, and/or other members of the bar who also think this is an interesting idea and would like to take part in it. We’re looking specifically for two things. The first is a place in your firm, office, or business for a student intern from Maastricht. The second is a place for the intern to stay while they are participating in the internship portion of the program. It is not imperative that both an internship and housing are offered. If you are only able or interested in providing one of the two, let us know.

This year, the first five students from Maastricht will participate in the program. They will arrive in Kansas in December 2009 or January 2010, then study at Washburn until the end of the spring semester. At that time, their internships will begin. The internships will last for at least six weeks, but there is no set time that they must end.

If you’re interested and able to help, or if you would like more information, please contact Rachael Pirner at (316) 630-8100 or e-mail at rkpirner@twgfirm.com or Scott Curry-Sumner at 1-011-31-30-214-5750 or e-mail at s.currysumner@maastrichtuniversity.nl.

About the Author

Scott Curry-Sumner

It was said by someone a couple of hundred years ago, and this is a paraphrase, that “I spent a year in London, and although I didn’t learn much about London, I learned a lot about my own country.” The saying rang true for me after I spent the summer of my second year studying with Washburn’s London program. The comparative aspects of the program taught me more about our system than the system of England.

After graduating from Washburn School of Law in 1997, I practiced in Wichita, mainly with a focus on gay, lesbian, and transgendered issues. The insights I obtained from my summer abroad frequently nuanced the advice I gave to my clients and also my approach to my legal practice.

In 2004, I moved to The Netherlands and shortly, thereafter, began teaching law at Maastricht University. I obtained the equivalent of tenure in January 2009.

The program I’ve been working with most recently and described in this article comes out of my relationships with Kansas and The Netherlands, Washburn School of Law, and Maastricht University.

www.ksbar.org
Changing Positions

Alene D. Aguilera has joined Powell, Brewer & Reddick LLP, Wichita.

Michael J. Burbach has joined Lathrop & Gage LLP, Kansas City, Mo., as an associate.

Brian L. Burge has joined Sanders, Warren & Russell LLP, Kansas City, Mo., as an associate.

Erie E. Clark has joined the Litigation Department of Shaffer Lombardo Shurin P.C., Kansas City, Mo., as an associate.

Emily N. Davis has joined Tripplett, Woolf & Garretson LLC, Wichita.

Matthew M. Dwyer has joined the Sedgwick County District Attorney’s Office, Wichita.

Suzanne R. Dwyer has joined Case, Moses, Zimmerman & Martin P.A., Wichita.

Chad D. Giles has joined the Cowley County District Attorney’s Office, Arkansas City.

Daniel D. Gilligan has joined Kansas Legal Services, Hutchinson.

Ted R. Griffith has become a municipal court judge for Division IV for the city of Wichita.

Jeffrey B. Hurt has joined Foulston Siefkin LLP, Wichita.

Judd L. Herbster has started his own firm, Herbster Law Firm LLC, 1022 Main St., PO Box 283, Sabetha, KS 66534.

Robert M. Pitkin has been elected president of Levy & Craig P.C., Kansas City, Mo.

Joseph P. O’Sullivan has joined Branine, Chalfant & Hill, Hutchinson.

Nicole M. Romine has joined the Douglas County District Attorney’s Office, Lawrence.

Charles L. Rutter has joined Bever Dye L.C., Wichita.

Jon P. Whitton has joined the Shawnee County District Attorney’s Office, Topeka.

Wendel W. Wurst was appointed by Gov. Mark Parkinson as a district judge of the 25th Judicial District, Garden City.

Changing Locations

David P. Eron has started his own firm, Eron Law Offices, 404 E. Central, Wichita, KS 67202.

Judd L. Herbster has started his own firm, Herbster Law Firm LLC, 1022 Main St., PO Box 283, Sabetha, KS 66534.

Timothy E. Keck has started the firm of Arnold & Keck LLC, 525 E. Kansas City Rd., Olathe, KS 66061.

Tracy M. Vetter has moved to 7300 W. 110th St. Ste. 410, Overland Park, KS 66210.

Miscellaneous

Morris Birch, Margaret Mathewson, James Robinson Jr., Kari Schmidt, and Marcia A. Wood were recipients of the 2009 WBA’s President’s Award.

Thomas C. Boone, Hays, belatedly received his 50 Year Certificate of Service as an Attorney and Counselor at Law from the Kansas Bar Association.

Jack Focht, Wichita, received a Lifetime Achievement Award at the Washburn University School of Law luncheon held during the 2009 KBA Annual Meeting.

Jay F. Fowler, Wichita, has been elected to a four-year term on the Kansas Supreme Court Nominating Commission.


Sarah J. Loquist, Wichita, is now the president of the Kansas School Attorneys Association.

Jack S. McInteer, Wichita, has been awarded the Wichita Bar Association’s 2009 Howard C. Kline Distinguished Service Award.

Daniel E. Monnat, Wichita, has been re-appointed by Gov. Mark Parkinson to serve a second term on the Kansas Sentencing Commission.

Fred C. Patton, Topeka, was re-elected by the North Topeka Business Alliance to its board of directors as president.

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

“Dan’s Cartoon” by Dan Rosandich

“All right Spottie, bark once for ‘yes,’ twice for ‘no’ and five times if you wish to take the 5th.”

www.DansCartoons.com
Richard L. Ankerholz

Richard L. Ankerholz, 80, died July 9 at Promise Regional Medical Center in Hutchinson. He was born March 19, 1929, in Chase, the son of Henry G. and Lena Blank Ankerholz. He was a longtime Lyons resident.

Ankerholz was an attorney in Lyons from 1956 to 1980, having his own private practice. He was Rice County attorney for eight years. Prior to his private practice, he served as a special agent in the FBI from 1954 to 1956 in Los Angeles.

He was an undergraduate of the University of Kansas in 1950 and graduated from the University of Kansas School of Law in 1954. He was a U.S. Army veteran serving in the Counter Intelligence Corps. Ankerholz was a member of the Kiwanis Club; was currently serving on the Lyons State Bank Board, having served more than 20 years; and was a member of the Kansas and Rice County bar associations.

He is survived by his wife, Marian K. Finch, of Lyons; son, Rian Ankerholz, of Overland Park; daughters, Teal Yoxall, of Littleton, Colo., and Amber Brownrigg, of Boulder, Colo.; brother, Edward Ankerholz, of Ellsworth; and sisters, Irene Kennedy, of Longmont, Colo., and Joyce Cheuvront, of Lenexa. He was preceded in death by his brothers, Herman, Lloyd, and Lawrence; and sister, Katherine Burns.

Ron R. Gooding

Ron R. Gooding, 56, of Topeka, died July 4. He was born May 11, 1953, in Topeka, the son of Alfred P. and Lila C. Beneke Gooding. He was a graduate of Topeka West High School and Washburn University School of Law. Gooding operated Gooding Law Office and Reality LLC.

Survivors include his parents; one daughter, Brianna Gooding, of Topeka; his siblings, Alan, of Lawrence, Sherri Rokey, of Sabetha, and Tammi Pierce, of Topeka; three nieces; and two nephews. He was preceded in death by one daughter, Ashley.

John Elliott Shamberg

John Elliott Shamberg, a veteran Kansas trial lawyer of Prairie Village whose legal career extended more than 60 years, died July 9; he was 95. He was born in Fremont, Neb., on July 15, 1913, the son of Bernard (Barney) and Matilda (Tilley) Shamberg.

At an early age, he moved with the family to Hutchinson, where he was raised. He attended the public school system there and then attended Washburn University and its law school in Topeka. He graduated from Washburn Law in 1937 with an LL.B. degree, later converted to a juris doctorate. He was president of the law school student body during his senior year. Following graduation from law school, he engaged in private practice for a short time. In June 1939, the Hon. Walter A. Huxman, former Kansas governor from 1936 to 1938, was appointed a judge to the 10th U.S. Circuit Court of Appeals and selected Shamberg as his first law clerk. A position he held until he was drafted into the U.S. Army in March 1942.

Shamberg served four years in the armed forces during World War II, including 19 months overseas in the Pacific Theater. Following basic training at Fort Leonard Wood, Mo., he attended officer candidate school at Fort Belvoir, Va., in the Corps of Engineers, where he was commissioned as a second lieutenant. During his wartime service, he rose to the rank of major and was awarded the Bronze Star for his service in the Pacific Theater. He was also awarded the following decorations:

- World War II Victory Medal
- Air Medal
- Philippine Liberation Medal
- Philippine Liberation Ribbon
- Asiatic-Pacific Service Medal
- American Service Medal

Following his military service, Shamberg resumed the practice of law in Kansas City, Kan., in 1949. In 1966, he reorganized the firm in which he was practicing to Schneider, Shamberg & May, which would later become Shamberg, Johnson & Bergman Chtd. in 1995. Shamberg served as personal counsel to two-term Kansas Gov. Robert B. Docking in the 1970s.

He served as a lawyer member of the Kansas Supreme Court Nominating Commission from 1985 to 1993, served on the Kansas Bar Association Board of Governors from 1969 to 1972 and from 1980 to 1990, and served on the Board of Governors of both the Kansas and American trial lawyers associations. He was a member of the Wyandotte County Bar Association and was a fellow of the International Academy of Trial Lawyers. Shamberg was the first Kansas-based lawyer to be selected by the Kansas City Metropolitan Bar Association to receive the Dean of the Trial Bar Award in 1997, received the KBA Distinguished Service Award in 1989, and was the first recipient of the KTALA Arthur G. Hodgson Distinguished Service Award. As an alumnus of his law school, he was elected president of the Washburn Law School Association for two terms from 1965 to 1970. For his service as a leader to the association, he was awarded the Distinguished Service Award in 1970 and, in 1984, Washburn University honored Shamberg with an honorary Doctor of Laws.

Survivors include his brother’s wife, Angela, of Ashtabula, Ohio; his niece, Barbara Musser, of Kentfield, Calif., and her children, Jake and Jane Musser; and his nephew, Jerome Zien, of New York, and his wife, Suzanne, and their children, Halley and Zoe Zien. Shamberg was preceded in death by his parents; sisters, Helen Shamberg Beutler, of Hutchinson, and Phyllis Shamberg Zien, of Milwaukee; and his brother, Daniel A. Shamberg, of Ashtabula, Ohio.

Floyd Dale Sorrick Jr.

Floyd Dale Sorrick Jr., 81, Washington, Kan., died May 31, at Washington County Hospital. He was born Aug. 29, 1927, in Osage City, the son of Floyd Dale Sr. and Lola Groff Sorrick. In 1930, the family moved to Blue Rapids.

Sorrick grew up in Blue Rapids. In December 1945, he was drafted in the U.S. Army Air Corps. He re-enlisted in June 1946 and was shipped to the Aleutian Islands, where he served as a control tower operator. He graduated from Kansas State University and enrolled at Washburn University School of Law, where he graduated with a juris doctorate in 1955.

Sorrick moved to Washington in 1955, where he opened his law office and served 16 years as county attorney. In 2005, he became a lifetime member of the Kansas Bar Association. He was a member of the Masonic Frontier Lodge No. 104, where he served as master for five years and district deputy grand master for one year. He served as president of the Washington Rotary International.

Survivors include his wife, Joan, of Washington; one son, Brad Sorrick, of Lecompton; two daughters, Cindy Sorrick, of Manhattan, and Linda Newby, of Winfield; one brother, Jerry Sorrick, of Houston; and four grandchildren.
Law Practice Management Tips & Tricks

Year of the Netbook

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

Year of the Netbook

Computer hardware has become a boring commodity and it shows in sales and prices. Despite bargain basement prices on everything from servers to laptops, sales of virtually all computer categories have flattened over the past two years. The relatively new netbook category appears to be bucking that trend, however. Forecasts predict more than 33 million netbook sales in 2009 leading to some wild speculation that 2009 will be Year of the Netbook.

What is a Netbook?

Netbooks were born of the efforts of MIT Media Lab tinkerer, Nicholas Negroponte, and his One Laptop per Child project. Negroponte hoped to put rugged, kid-sized laptops and Internet connectivity into the hands of children in developing markets of the third world. Creating a laptop for Negroponte’s target price of $100 required much cheaper hardware and freedom from Microsoft’s licensing for the Windows operating system and the XO-1 was the result (available at www.laptop.org).

Computer maker Asus saw a potential for a similar computer in the consumer market and began designing its own ultra-portable laptop. In fall 2007, Asus released its first EeePC. It had Wi-Fi, a small 7-inch color screen, 4 GB of flash memory instead of a hard drive, and a lean version of the Linux operating system. The primary purpose of the inexpensive EeePC was to handle connecting to the Internet for surfing and email while allowing just enough power and storage for offline document and spreadsheet work. The netbook category was born.

Tool or Toy?

I purchased one of the first 350,000 EeePCs looking for a cheaper, lighter, and smaller computer for travel and use away from the office. While it was cheaper ($250), lighter (2 pounds), and smaller (6.5” x 8”) than my Thinkpad, my experience with it was disappointing. The battery could only hold out for a paltry two hours. The keyboard and trackpad were too tiny even for my hands. The 7 inch screen was adequate for documents but too cramped for spreadsheets and Web pages. The final frustration was with the Linux operating system. It was fast (only 15 seconds to boot) but updates and configuration required digging through online forums for command line instructions. Its shortcomings probably account for its 35 percent return rate.

The Next Generation

The netbook category sparked customer interest, however. Prior attempts to redefine portable computing like the Tablet PCs or the UMPCs stumbled on their high price point and attempts to replace the familiar keyboard interface. Consumers appeared willing to give netbooks another try based on the low cost and familiar form factor. Before long, Asus had competition from HP, Dell, Acer, MSI, and even Lenovo in the rush to correct the first EeePC’s faults.

My latest netbook, a Toshiba NB205, is that next step in netbook evolution. It’s a bit bigger at about 7” x 10.5” and 3 pounds with a beautiful 10” screen. The battery delivers a stunning nine hours of power even with Wi-Fi and audio in use. The keyboard is almost 95 percent the size of a full size laptop’s and the design of the keys make full-speed touch typing possible. Linux was pushed aside for Windows XP Home, which boots and shuts down three times as fast as my Thinkpad or MacBook Air. The one fault of the NB205 is its $400 price tag, which puts it on par with a low-end laptop.

Netbook or Laptop?

On store shelves next to my $400 netbook were $400 (or less) laptop offerings from Gateway, HP, and Toshiba. The laptops each had a full-size keyboard, 15” screen, DVD drives, faster processors, more RAM, and audible speakers. Unfortunately, the laptops also were out of battery power in two to four hours and weighed as much as 6 pounds with an extra pound for the power cord.

At the end of the day, the only clear advantage offered by netbooks is size. Too few have battery life much beyond a laptop and the lack of a DVD drive bothers many. The primary purpose of the netbook is as a cheap, portable second computer for Internet use but competition from smart phones and cheaper laptops may dull the netbook’s future. For now, however, it’s the Year of the Netbook and the category provides the only excitement in the computer hardware industry.

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.

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The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for April through June 2009. Your commitment and invaluable contribution is truly appreciated.

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J. Nick Badgerow, Spencer Fane Britt & Brown LLP, Overland Park
Thomas J. Bath Jr., Bath & Edmonds P.A., Overland Park
Courtney K. Blasi, South & Associates P.C., Overland Park
Stephen J. Blaylock, Law Office of Stephen J. Blaylock Chtd., Wichita
Michael L. Blumenthal, Seyferth Blumenthal & Harris LLC, Kansas City, Mo.
Hon. Edward Bouker, Ellis County Courthouse Division 1, Hays
Kevin J. Breer, Polsinelli Shughart P.C., Overland Park
Mert F. Buckley, Adams Jones Law Firm P.A., Wichita
Emilie Burdette, Consumer Protection and Antitrust Division, Office of the Kansas Attorney General, Topeka
Hon. Kevin Burke, Hennepin County District Court, St. Paul, Minn.
Micki Buschart, McCrummen Immigration Law Group LLC, Kansas City, Mo.
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Jonathan James de Jong, Hinkle Elkouri Law Firm LLC, Wichita
Patrick H. Donahue, Western Professional Association, Lawrence
Hon. Daniel Duncan, Wyandotte County District Court, Kansas City, Kan.
Diana Edmiston, Edmiston Law Office LLC, Wichita
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Evan Fitts, Polsinelli Shughart P.C., Overland Park
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Hon. Janice M. Karlin, U.S. Bankruptcy Court, Topeka
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Land Description Errors: Recognition, Avoidance, and Consequences

By John C. Peck & Christopher L. Steadham

Endnotes begin on Page 31
I. Introduction

The legal description of a parcel of land is an important element in a real estate transaction. The land sales contract, mortgage, and deed are the three obvious places a description appears. Descriptions also appear in correspondence, real estate brokerage listing contracts, leases, options, puts, rights of first refusal, auction advertisements, subordination agreements, oil and gas leases, water rights documents, appraisals, lawsuit pleadings and judgments, divorce settlement agreements, mechanic’s lien notices, and legal notices in newspapers. Transactions involving personal property must also contain accurate descriptions of the property, but one element involved in real estate that distinguishes it from personal property is the fact that real estate does not move, and each land parcel sits next to neighboring parcels. A mistake in the description of one parcel might leave a strip between the two parcels or might create an encroachment.

Legal description errors are common and can cause serious problems for buyers, sellers, mortgagors and mortgagees, optionors and optionees, condemnors and condemnees, title insurance companies, abstractors, and others. Ultimately it can become a problem as well for the lawyer who makes a mistake in a land description. Even judges make errors writing opinions about errors in legal descriptions. In Cities Service Oil Co. v. Dunlap et al., a federal case from Texas that went to the U.S. Supreme Court and involved an apparently valuable strip of land, the federal appeals court from Texas made at least five errors in the opinion itself — e.g., misstating chains for yards, making errors in distance measurements, and misstating lot numbers.

Land lawyers must understand legal descriptions in order to read, check, and draw legal descriptions in legal documents. Lawyers in other areas of practice need to know when to call in a land lawyer or surveyor with expertise in reading and drawing legal descriptions. We say lawyers need to know how to “read, check, and draw” legal descriptions, not to “write” or “draft” them. Kansas statutes on rules governing the establishment and practicing of the technical professions, including land surveying, appear to limit the drafting of “original descriptions of real property for conveyance or recording” to licensed land surveyors. Although these statutes are not entirely clear on this limitation, the question of the lawyer’s versus the land surveyor’s rights in the arena of drafting land descriptions is not the focus of this article, but could be in another article.

The purpose of this article is to provide some information to help avoid these errors. We first give a brief overview and review of the standard methods of describing land. The article then presents information about how and where land description errors occur. To demonstrate the consequences of making these errors, we summarize several cases on errors in land descriptions and include issues raised in the area of a lawyer’s professional responsibility. Lastly, we make several simple and modest suggestions for ways to avoid the errors and their consequences. This article is not meant to be a treatise on surveying or land description methods. Perusing some classic texts reveals how complicated these surveys can be. We hope this article will serve as a beginning point for a new land lawyer and a review for an experienced lawyer.

II. Land Description Methods

We briefly present four land description methods used by surveyors and lawyers — metes and bounds, the U.S. Government Survey System (sometimes referred to as the Rectangular Survey System), the angular or surveyor’s method, and the plat reference — but leave it up to the reader who needs more information to obtain it elsewhere. Depending on geographical location within the United States, a combination of these methods may occur in one land description. For example, a description of a parcel of land in Kansas or Nebraska could employ metes and bounds, U.S. Government Survey, and the angular methods.

A. Metes and Bounds

This method, used often in the states of the original colonies, is much like the way a person would informally direct another person to trace the boundaries around a parcel of land. The person would be told where to start at a point and then where to go, point by point, with a series of “calls” or operating commands to trace the entire parcel. From a point of beginning, the person goes from various “monuments” (either natural monuments like trees, or artificial monuments like iron rods) around the perimeter and back to the beginning point. A call typically contains distances and directions. Sometimes a call contains an “adjoiner,” which is a boundary statement like iron rods) around the perimeter and back to the beginning point. A call typically contains distances and directions. Sometimes a call contains an “adjoiner,” which is a boundary statement of an adjacent land owner or of a river or road. Typically, the description contains a general location in the region (e.g., “approximately two miles west of Batesville, Va.”) and ends with an approximate area notation, in acres or square feet.

The area described should “close,” i.e., all of the calls should take one from the point of beginning around the tract and end at the point of beginning, with no missing lines. If it does not close there is a problem, unless the description is meant to be two-dimensional, like a line (e.g., the centerline of a pipeline easement).

B. U.S. Government Survey

Much of the United States lying west of the original 13 colonies, except Texas, is covered by the U.S. Government Survey. To understand this system, one must have an understanding of “meridians” and “base lines,” as these are the framework upon which the system is built. A “meridian” normally refers to a north-south line passing through the North and South Geographic Poles. A “base line” is a line that runs straight east and west. Throughout the country, there are principal meridians and base lines that intersect them (depending on one’s reference material, there are from 35 to 37 principal meridians in the United States).

The Kansas reference point is located near Belleville at the intersection of the “6th Principal Meridian” (6th P.M.) and its base line, the Kansas-Nebraska border. The point at this intersection, the so-called “initial point,” controls legal descriptions in Kansas and Nebraska, as well as parts of Colorado, Wyoming, and South Dakota. See the cover page.

For each principal meridian and base line in the country, township lines are run east and west and six miles apart, both north and south of the base line, forming 6-mile-wide strips of land running east and west throughout the area being surveyed, referred to as “townships.” Range lines are run north and south and six miles apart, both east and west of the prin-
principal meridian, forming 6-mile-wide strips of land running north and south throughout the area being surveyed, referred to as “ranges.” The resulting 6-by-6-mile squares are sometimes referred to as “townships” or “congressional townships.” Because all land in Kansas is south of the base line (i.e., the Kansas-Nebraska border), the first township south of the base line is designated as Township 1 South, the next township as Township 2 South, etc. There are 35 townships in Kansas extending to the Oklahoma border. Likewise, ranges are numbered east and west of the 6th P.M. (i.e., Range 1 East, or Range 2 East, etc., or Range 1 West, or Range 2 West, etc.). There are 25 ranges east and between 41 and 43 ranges west of the 6th P.M. in Kansas, depending on location.

Each 6-mile square township in Kansas has both a “township” designation running south of the 6th P.M., and a “range” designation running either east or west of the 6th P.M. Townships to the south and east of the 6th P.M., for example, are numbered as Township 1 South, Range 1 East; Township 2 South, Range 2 East, etc. Townships to the south and west are numbered as Township 1 South, Range 1 West; Township 2 South, Range 2 West, etc. Figure 1 shows a close-up of the 6th P.M. and township numbering in townships in the vicinity of the 6th P.M.

The location of the 6th P.M. was not chosen as a logical point, like “the intersection of the 100th Meridian and the Kansas-Nebraska Border.” According to an article in the January 1937 Kansas Abstracter magazine, the surveying team was instructed to take their horses, wagons, and surveying instruments and proceed west from the Missouri River along the Kansas-Nebraska border, to construct earthen mounds every few miles, to go west until they “struck the desert,” and then to go “one full day’s march into the desert and establish the Sixth Principal Meridian.” Which they did. Based on these instructions, today one would imagine that the 6th P.M. should be located in, say, Utah, but, instead, it runs north and south through Kansas and is generally located straight north of Wichita (it runs along Meridian Street in Wichita to approximately one mile west of Solomon, Kan.) and today can definitely be pinpointed as having a longitude of 97 degrees, 27 minutes west of the Greenwich Meridian.

Old maps show the “Great American Desert” to start at about the 100th Meridian. A marble obelisk monument to the establishment of the 6th P.M. was erected near the site and dedicated on June 11, 1987. See the cover page.

Townships contain roughly 36 square miles. They are six miles on a side, divided into 36 “sections,” which measure one mile by one mile. Political townships are different, but often have boundaries that coincide with the surveyed township. Sections are numbered internally starting in the northeastern-most section, running west 1 through 6, then down and back east 7 through 12, and then down and west again, etc., with Section 36 being in the southeastern-most corner of the township. See Figure 2.

Each section (1 mile by 1 mile) contains 640 acres. Sections are divided into four quarter sections (often abbreviated NW 1/4 or NW/4, NE 1/4 or NE/4, etc.) each containing 160 acres. Quarters may be further divided into halves of quarters or quarter quarters, or quarter quarter quarters. The following are examples: E/2 of the NW/4; E 35 acres of the N/2 SW/4 (imply “of the” between the N/2 and the SW/4); NW/4 SW/4 SW/4 SE/4. See Figure 3.
The early surveyors understood that the earth’s curvature presented problems. While lines running east and west may be parallel, lines running north and south converge and ultimately meet at the North and South Poles. The system created “correction sections” on the north and west tiers of each township. While the other interior 25 sections are reasonably true (i.e., one mile by one mile), the “correction sections” contain the errors necessitated by the convergence problem. These sections have “government lots,” which generally contain slightly less than 40 acres. See Figure 4.

Another type of government lot is found along rivers and streams where the surveyors had to “meander” the lines. See Figure 4. A third type of lot is found in the subdivided land of cities and counties in the plat reference system, described below.

C. Surveyor’s or Angular Description

This method employs angles deviating east or west from a line running either north or south from the point of reference, coupled with a distance, to reach the next point. An example is “thence North 37 degrees 46 minutes 57 seconds East 657.3 feet.” See Figure 5. The method usually uses angles of less than 90 degrees, but larger angles are sometimes seen: S 118 degrees East 438.3 feet.

The lawyer drawing such lines can envision the beginning point of each line having superimposed on it a circle with its 360 degrees. Each degree is divided into 60 minutes, and each minute is divided into 60 seconds. Sophisticated surveying instruments can read these small measurements, but the typical protractor used by the lawyer in the office would be accurate only to about half a degree. Using a 0.5 mm lead pencil, however, the lawyer can draw the line quite accurately. The line S 47 degrees 42 minutes 01 seconds would be a line tending to 48 degrees. A one-degree deviation of a 700-foot long line on a sheet of paper being drawn to a scale where one inch equals 660 feet would only be about 0.02 inches long on the drawing. In the field, however, that deviation is more than 12 feet long. So it is important and meaningful in the field, but not so important in a rough drawing done for a client by a lawyer.

D. Plat Reference

The Plat Reference method is used for original town sites or undeveloped land in or near a city, or in a county, when the land is “platted”— i.e., streets, blocks, lots, etc., are first developed and produced as a drawing in the office by a land surveyor, civil engineer, or developer. The developer presents the plat for approval to city or county planning officials and then to the appropriate governmental body for approval. Once the plat is approved and the land surveyed and staked to show the location of the lots and blocks, the developer sells the tracts of land using the plat reference of the land description, no longer the U.S. Government Survey. In the corner of the plat, however, will be a description of the outside perimeter of the entire platted area, setting the land within the U.S. Government Survey system. An example of a plat reference description would be “Lot 3 and the North 10 feet of Lot 4, Block 2, Athletic Court Addition to the City of Lawrence, Douglas County, Kansas.” See Figure 6.
E. Miscellaneous Points

1. Lines measured horizontally

Distances in a land description are horizontal distances, not distances on a slope. A line going up a hill with a 6 percent slope, for example, would measure 1,729.4 feet on the horizontal and 1,732.5 feet on the slope.

2. Curved lines

Curved lines appear in nature on rivers and streams, and they are used in designs for highways in the country and streets in towns and subdivisions. Curved lines on rivers or lakes are surveyed by “meandering” the curve, i.e., by making a series of very short straight lines that approximate the curve. Curved lines for highways and in subdivision plats, however, are created first on paper or the computer by the surveyor, land planner, or engineer, and then taken to the field to be laid out. To understand curves, one must review terms and concepts learned in high school geometry – terms such as tangent, point of tangency, chord, radius, length of curve, and central angle. In a nutshell, a curve is an arc of a circle as tangent, point of tangency, chord, radius, length of curve, and central angle. The beginning and end points of a curve are tangent to straight lines or other curves. The central angle, i.e., the angle formed by the radii of the arc at the points of tangency, determines the extent of curve: the larger the central angle, the shorter the radius and the “rounder” the curve; the smaller the central angle, the longer the radius and the “flatter” the curve.

Without understanding these terms and their use by surveyors and engineers in drawing curves, the lawyer cannot detect errors. A lawyer would not be expected to see small errors, but a lawyer who understands the concepts could spot obvious errors, such as mistakes in the central angle or in arc or chord distance.

3. Tools of the trade

A good tool chest for a lawyer required to draw legal descriptions would include a fine-tipped mechanical pencil (preferably 0.5 mm diameter lead); a ruler marked off in tenths of inches (not fourths, as is more common with rulers); grid paper; a calculator; colored pencils for shading different areas; stencils of numbers for overlaying section numbers and of small shapes (squares, triangle, and circles) for showing locations of various things, such as wells, cities, etc.; “French curves” (plastic templates for drawing lines of various curvatures); and maps. Prior to the Internet, hard copy maps were available from various sources, such as the Kansas Department of Transportation (KDOT).тб The KDOT still sells such maps, but the KDOT Web site is an excellent source for obtaining county maps that include section, township, and range designations; roads, both major and minor; and other detail, such as rivers, streams, reservoirs, and federal and state lands.

4. A suggested method of drawing descriptions

A lawyer is not a surveyor or engineering draftsperson and is not expected to draw land descriptions with the perfection required of those other professionals. However, a lawyer can enhance an opinion letter or report by including drawings of land descriptions to show locations of easements and other items of interest. The following is one method of drawing a description.

Use grid paper containing an 8-by-8-inch square that is divided into 64 1-inch squares, if possible. Create a standard form on the word processor for reuse. If the paper is divided finer than one inch, it should be divided into units divisible by 10, such as 10 units, 20 units, or five units – but not four. Select a scale that is appropriate for the land description. For example, for the grid paper suggested above, the entire grid could represent one section, which is one mile (5,280 feet) on a side. Or, it could represent four sections, which means that the top of the grid would be two miles. Or, each small square could represent a section. In any case, once one decides the scale, then one should write down within one square the distance across the square. If the entire square, 8 inches on a side, is to be one mile on a side, the top side would be 5,280 feet long and each square would represent 660 feet (5,280/8 = 660). If the entire square is to be two miles on a side, or 10,560 feet, each 1-inch square would be 1,320 feet on a side (10,560/8 = 1,320). If one is dealing with a description that is not part of a section of land, one might choose some other scale, such as 1 inch equals 50 feet or 1 inch equals 175 feet. Whatever is chosen, the scale should be written on the page so it can be referred to for all lines drawn.

Any line in the land description can now be easily drawn using the chosen scale, the ruler with the 6-inch side that divides inches into tenths, and a calculator. Using the first example above, where one square, i.e., one inch, is 660’ across, assume that the length of the line given in the land description is 837.6 feet. Divide 837.6 by 660 to get a line 1.27 inches long. This line can be drawn almost exactly by marking out with your ruler a line that is between 1.2 and 1.3 inches long. If the scale was 1,320 feet to the inch, then a line 837.6 feet long would be 0.63 inches long. If the scale was 50 feet to the inch, the line would be 16.75 inches long, which would be too long for the page. If the scale was 175 feet to the inch, then a line 837.6 feet long would be 4.79 inches long. Using conventional measurements such as 660 feet/inch or 1,320 feet/inch is helpful.

5. Some typical quantities and conversions

For distance measure: one rod equals 16.5 feet; one chain equals four rods or 66 feet; one chain also equals 100 links. A pole can mean a distance of varying length depending on locality; it can mean a rod; or it can mean an area measurement of a square rod. For area measure: one acre equals 43,560
square feet (which can be understood as a square roughly 208+ feet by 208+ feet, or roughly the size of a football field). For volume of water for water rights: one acre feet (one foot of water depth on an acre) equals 325,861 gallons.

III. Types of Errors and Their Recognition

A. Types of errors

Land description errors can occur in many forms. We briefly discuss the following types of errors: informal descriptions; ambiguous descriptions; metes and bounds descriptions with missing calls; U.S. Government Survey descriptions with misstated sections or parts of sections or with wrong township designations; descriptions that are correct in and of themselves, but are not the parcels intended by the parties; and errors in descriptions of platted land. But, there are other types of errors as well.19

1. Informal descriptions

Of the many variations of informal descriptions appearing in cases,20 we select one – the use of a street address rather than a full legal description in a contract or other document.21 The Statute of Frauds requires that land sale contracts be in writing, be signed by the person against whom the contract is being enforced, and contain sufficient information to identify the subject matter of the transaction.22 Requiring a full legal description rather than a mere street address could be justified in a sale of a platted lot in a city that, for example, is divided into quarters and where the same street address could conceivably exist in two or more quarters. In Washington, D.C., for example, 1508 16th Street is a valid address in both Washington, D.C., NW, and Washington, D.C., SW. Another justification is that a mere street address may not indicate ownership of adjacent parts of a neighbor’s platted lot in addition to the primary lot on which a house or other building is situated.

Yet the general rule is that “a designation of real estate by street number appears to be at least prima facie sufficient where the state and municipality (or the town) are specified in the writing.”23 The state of Washington is an exception to the rule, however. In Martin v. Seigel,24 in a real estate sales contract the parties described the parcel as “real property: at 309 E. Mercer ... in the City of Seattle, County of King, State of Washington.” The buyer sued for specific performance when the seller backed out, and the seller defended on the Statute of Frauds, claiming more specificity was required.25 The court agreed, holding that to be enforceable under the Statute of Frauds in Washington, the land sales contract for platted property must include a legal description containing the lot, block, city, county, and state, in this case “Lot 1 and the North 10′ of Lot 2, Block 32, Pontius Addition to Seattle, King County, Washington.”

Like most other states, Kansas appears to follow the more lenient rule of allowing extrinsic evidence to show that the street address in the contract matches the platted reference description of the parcel owned by the seller and intended by the seller to be sold. The critical element seems to be that the property must be able to be identified clearly from the contract and other evidence. In the 1923 Kansas case of King v. Stephens;26 for example, a son (King) had signed an installment contract in Lawrence to purchase “the house located at 418 Elm Street, owned by Mary L. Stephens [his mother].” At the time of her death Mary was the legal owner of the house. The administrator challenged the contract as being “so ambiguous and uncertain in its terms”27 as to be unenforceable. The Kansas Supreme Court reversed the trial court and upheld the contract, because “there was not the slightest uncertainty as to what property was covered by the contract.”28 Even without the name of the city, county, and state, in the contract, extrinsic evidence showed that this was the only property owned by the decedent and the place where she had reserved a room for herself.

On the other hand, the Court did not uphold a contract in Ross v. Allen.29 In that case, not only had the seller not signed the contract, but the memorandum had failed to indicate any state, county, or city. In addition, the language “for property number 617 and 619 Delaware street, block 74, city proper” was not even clear that it was real estate being sold and not personal property.

2. Ambiguous descriptions

One test of the clarity and correctness of a land description is whether it can be drawn into a geometric shape. The land description in a 2004 Illinois case was “approximately five hundred (500) feet of river frontage ... located in Calhoun County, on the right descending bank of the Illinois River, just below Hardin, Ill. (approximately mile 20).” In Westpoint Marine v. Prange,30 the court held the description inadequate when the lessee in a 25-year lease attempted to exercise a right of first refusal to purchase the leased premises – this, despite the fact that the parties had performed under the lease for six years before the right of first refusal was triggered by an offer to purchase from a third party. Both the lessee and the lessor knew what land was being used by the lessee, but this fact did not persuade the court’s majority.

Another example of an ambiguous description is “[a]ll that tract ... of land lying ... in 3rd district and second section of said county, 2 acres of land, of lot No. 1101 ..., on the east side of Orange and Roswell Road, near the center of said lot.” The Georgia Supreme Court in Bruce v. Strickland31 held that this deed description, on which petitioner had relied in seeking to enjoin defendant from trespassing, was too indefinite to identify the land, thus precluding the action in trespass.

3. Errors in metes and bounds description: Missing calls

As stated above, a drawing of the land tract based on a description must close. A common cause of a failure of a description to close is a missing call. The following is a description found in a legal notice in the Lawrence Journal World32 for a determination of descent lawsuit: “Beginning 1320 feet North of the Southwest corner of the Northeast Quarter ... thence North 330 feet; thence South 330 feet; thence West 660 feet to the point of beginning ...” A drawing of this legal description would be a backwards “L,” not a rectangle measuring 330 feet by 660 feet, as intended. Missing was the second call “thence East 660 feet.”

Another case involving the omission of one side of a rectangle was State v. City of La Porte,33 a 1965 Texas Supreme Court case. The description read: “Beginning at a point where...
the South right-of-way line of Spencer Highway intersects the center line of the ... R.R. right-of-way. THENCE ... [westerly] ... along the South right-of-way line of Spencer Highway to a point for corner in the East line of the W.M. Jones Survey, A-482; THENCE westerly along the South line of the W.M. Jones Survey A-482 to a point in the East right-of-way line of Red Bluff road for a corner ... A call was missing between the two lines heading westerly, a call for a line running south a distance of 1 1/3 miles.


U.S. government survey errors come in many forms. In *City of Leawood v. City of Overland Park*, the phrase “of the Southeast quarter” was omitted in a description that should have read “all ... the Southwest quarter of the Southeast quarter of Section 10 ...” Figure 7 shows drawings of the correct and the incorrect figures. In *Thayer v. Knote*, a journal entry in a mortgage foreclosure action misdescribed the land as the “N.E. 1/4 of section 29, township 29, range 5 E.” The land actually covered by mortgage was the S.E. 1/4 of Section 29. The clerk’s order of sale and the sheriff’s deed also used the mistaken description. Another type of error occurs when insufficient information is provided in the deed. The description “A Forty (40) acre tract in the Northeast Quarter (NE/4) of Section Five (5) ...” needs to specify which 40-acre tract in the northeast quarter the grantor is conveying (e.g., “the northwest quarter of the northeast quarter” or if necessary a metes and bounds description of the 40-acre tract).

Some mistakes appearing to the untrained eye as minor mistakes can in fact make a big difference. For example, the petition for annexation in *City of Lenexa v. City of Olathe*, located the tract in “Township 13.” The ordinance for annexation said “Township 14.” The land described in the petition was located six miles north of the land described in the ordinance.

5. Accurate description in and of itself (clear and containing no patent errors), but larger, smaller, or different tract than intended

In a 1990 case from Arizona, *Hill-Shafer Partnership v. Chilson Family Trust*, the contract described a larger piece of land than the parties had bargained for. In *Whorley v. Koss*, the land described in the sales contract included some land not owned by the seller, and it excluded land owned by seller intended to be sold. In a 2005 Ohio case, *Werts v. Penn*, the parties intended that the seller’s rental property be sold. The land described in the contract, however, was the seller’s residence. In *Nilson-Newey & Co. v. Ballard*, a 1988 case arising in California, less land than intended was described in a land sales contract. A Kentucky case in 1971 dealt with a description that was “erroneous in that it covers more area than the sellers owned, and the house plaintiffs thought they were buying is not on the property they bought but is on property belonging to [someone else] ...”

In an old Iowa case, the correct description for land in a mortgage was “the S 1/2 and the W 1/2 of the N 1/2 of the S.E. 1/4 of section 25.” In a special execution, the court clerk mistakenly described the tract as the “S 1/2 of the W 1/2 of the N 1/2 of the S.E. 1/4 of section 25.” Figure 8 shows the difference between the correct and incorrect versions. In *City of Leawood v. City of Overland Park*, the description in a publication notice left out the bracketed language in the following description: “All that part of the Southwest quarter [of the Southeast quarter] of Section 10, Township 14 South, Range 25 East, Johnson County, Kansas.” Figure 7 shows the difference.

6. Plat reference errors

Three types of errors arise with plat references. First, the description itself may be wrong on its face. In the 2004 Colorado case of *Guaranty Bank & Trust Co. v. LaSalle Nat’l Bank Ass’n*, the mistaken description in the deed of trust was “Lot 29, Castle Pines Filing 1-A, County of Douglas, State of Colorado.” The correct description was “Lot 29, Block 4, Castle Pines Filing 1A, County of Douglas, State of Colorado.”

A second error is to use a street address rather than a complete plat description. Such informal descriptions, as shown above in the *Martin v. Siegel* case, may in some cases be found to violate the Statute of Frauds.

A third error is the use of an inaccurate metes and bounds description when a plat description is the correct one under the circumstances. An example is a 1999 New Mexico case, *Selby v. Roggow*, which involved a legal malpractice claim resulting from a mortgage foreclosure. When one bank refused to renew a mortgage, the developer obtained a mortgage from a new lender, which also agreed to pay off the old mortgage. But the new mortgage “contained the same metes and bounds description as the ... [original] ... mortgage, even though the property had been subdivided and some of the lots in question had been previously sold to third parties.”

On the other
hand, the note and the loan worksheet described the property as “51 lots, VALLEY GARDENS SUBDIVISION. LOT 1 Block 3 IMPROVED HOUSE.” In foreclosing, the bank used the metes and bounds description even though the description was inaccurate and included “more property than the security interest actually possessed by the Bank.”50 This error was not really an error per se with the plat description; the error lay in not using the plat description, which led to describing more land than was actually owned by the mortgagor.

B. Judicial canons and aids of construction

Some types of errors apparently arise commonly enough in cases that over time courts have developed “canons of construction” as aids in decision making. In their book “Principles of the Law of Property,” Cribbet and Johnson list 10 such canons.51 For example, “[t]he construction prevails which is most favorable to the grantee, i.e., the language of the deed is construed against the grantor.”52 That rule follows the parallel rule from contract law that an ambiguity is construed against the grantor.53 A canon for ambiguities rule from contract law that an ambiguity is construed against the grantor. For example, in the 1965 Texas case, LaPort, the court found mutual mistake and permitted the contract to be reformed.56 The last canon listed by Cribbet and Johnson is that a deed manifested an intention to the contrary.55 Take, for example, a description that reads in part “from point A north to Mill Creek; thence southeasterly along Mill Creek approximately 750 feet to point B; thence south 500 feet to point C ...” The question is whether the described land be construed to include part of the bed of the stream, or just to the edge of the stream as the description seems to intend. Application of the canon would result in including the bed of the stream to the middle of the stream. This would be the case in Kansas for land adjoining non-navigable streams, because riparian owners own the beds of non-navigable streams.56 If the stream described were the Kansas River (a navigable river, the bed of which is owned by the state) and not Mill Creek, the riparian owner would not own the bed and the canon would not apply. The intent of the canon is to preclude nonintentional retaining of strips of land in the deed grantor that would then pass to heirs of the grantor on the grantor’s death.

The last canon listed by Cribbet and Johnson is that a deed includes an appurtenance to a tract even though it is not specifically mentioned in the deed. Appurtenances would include easements over access roads across adjoining property, physical structures, and water rights.57

Still other general rules of construction and approaches show up in cases. For example, in the 1965 Texas case, State v. City of LaPort,58 the court made a presumption that a boundary line between two points is a straight line. This presumption would not always hold. An example is a description that reads “thence to the east right-of-way of the AT&SF R.R., thence southwest-

IV. Consequences of Errors

Legal description errors can produce problems for the various parties and entities involved in real estate transactions. We list and comment briefly on some of these below.

A. Problems for buyers, sellers, and other parties directly concerned with real estate matters and transactions

1. Buyers and sellers, deeds

In the 2008 Illinois case Wheeler-Dealer Ltd. v. Christ,59 the sales contract described property as the “east 165 feet of Lot 4” while the deed conveyed all of lot 4 (roughly 50’ north and south by 220’ east and west). The east part of the lot contained a metal garage, the west part an advertising sign. The buyer had purchased the property at auction. Claiming mutual mistake, the plaintiff seller sought to reform the deed. The defendant buyer denied that there was a mutual mistake and that the parties had intended to sell less than the entire lot. The seller’s lawyer admitted to making a drafting mistake. The lower court’s decision for the defendant was affirmed on appeal. The person seeking reformation must show by clear and convincing evidence that the parties agreed on the description alleged. A mutual mistake is one in which the mistake is common to both parties. Here, there was no mutual mistake because the buyer never intended to purchase less than the entire tract.

In a 2007 Iowa case, Orr v. Mortvedt,60 neighbors owning land on a lake disputed their boundary. Both neighbors had obtained deeds from a common grantor, the original owner of the entire tract, after a survey. Orr sued to quiet title to a strip along the lake. Mortvedt counterclaimed requesting reformation of their deed, claiming Mortvedt owned the strip. The survey had a notation with a dotted line showing “edge of water,” and the deed to Mortvedt from the seller had described the land in part as “including all land west and north of [the] water.” The court held that the deed could not be reformed except as between the original parties to the deed and those that have notice of relevant facts. Here, a reasonable person would conclude from the Mortvedt’s deed and the survey that the Mortvedt’s boundary did not extend to the water’s edge, and thus no deed reformation was allowed.

2. Parties to land sales contract

In Whorley v. Kois,61 plaintiff sellers owned 2,400 acres in one county in Montana, which they desired to sell. The land described in the sales contract included some land not owned by seller and excluded land owned by seller intended to be sold. The plaintiffs sued to reform the contract. The court found mutual mistake and permitted the contract to be reformed.
As indicated above in Martin v. Seigel, the state of Washington allowed a seller to get out of a contract due to the statute of frauds, when the parties had used a street address rather than a plat reference description in a land sales contract.

3. Mortgagees and mortgagors

An example of a mortgage claimed to be invalid due to a land description error is found in a 2004 Colorado case, Guaranty Bank & Trust Co. v. LaSalle Nat'l Bank Ass'n. The deed of trust read “Lot 29, Castle Pines Filing 1-A, County of Douglas, State of Colorado,” thereby leaving out “Block 4” in the plat description. The court ruled that the description had given constructive notice despite the error, in part because in the subdivision there was only one “Lot 29.”

4. Cities

State v. City of La Porte, involved a Texas city’s attempt to annex land through an ordinance that contained a land description that left out a call for a north-south line of approximately 1 1/3 miles in length. The court refused to employ rules of construction (running the calls in reverse, and presuming that the boundary line between two points is a straight line) to correct the problem, and held that the attempted annexation was void.

In City of Lenexa v. City of Olathe, a petition for annexation described land as being in Township 13; the published ordinance for annexation described the land as being in Township 14. Another city challenged the annexation in part due to this mistake. The court noted that publication notice is important in annexation because it is intended to advise the public. This mistake was “no ordinary typographical error” -- the public had no way of knowing of the error because the city could have annexed land in Township 14. The annexation was voided as were others that occurred thereafter because the subsequent annexations thus did not cover land adjoining the city.

In City of Leawood v. City of Overland Park, one city challenged the annexation by another city. The description in the publication notice had left out the bracketed language in the following description: “All that part of the Southwest quarter [of the Southeast quarter] of Section 10, Township 14 South, Range 25 East, Johnson County, Kansas.” See Figure 7. While the court observed that the tract was not properly annexed due to the mistake in the publication notice, the challenging city had no standing to object.

5. Other parties and situations

It is not uncommon to find legal description errors in divorce cases, either when the property being divided between the litigants is described or when there is no description at all. Title Standard 8.2 of the Kansas Bar Association implies that to transfer title, the decree and the property settlement agreement, if there is one, must include a legal description. Failure to provide a legal description requires a nunc pro tunc order.

Deeds transferring title to trusts are also commonly found to contain legal descriptions of real estate previously conveyed by the grantors, which can result in clouds on title and errors in indexing in county records and offices.

Land description errors also find their way into bankruptcy cases. Often losses are involved with no opportunity to fix the problem.

B. Problems for lawyers

Lawyers making land description errors may be subject to claims for either malpractice or professional ethics violations, or both. The cases discussed below have varying results on liability, but the fact that the cases have even been brought should serve as warning to lawyers working with land descriptions.

1. Potential malpractice case examples

A 2005 Ohio case, Werts v. Penn, involved a seller who had provided the lawyer with a land description of rental property the seller wanted to sell, along with a sample contract containing the description of the seller’s residence. The lawyer prepared a land sales contract for the seller, but the lawyer’s secretary used the description for the seller’s residence, not the description of the rental land intended to be sold. Quiet title actions were required to cure the defect, costing the seller $2,500. The seller sued the lawyer for malpractice. The court stated that to establish malpractice, a plaintiff must show there was a duty owed by the attorney to the plaintiff, there was a breach of the duty in failing to conform to the standard required by law, and there was a causal connection between the conduct and the resulting damage. Here, the fact that the seller had provided both descriptions and that the lawyer’s secretary had typed the wrong description did not absolve the lawyer of negligence, as lawyers are responsible for their secretaries. There was an issue of whether the seller had merely instructed the lawyer to insert the land description provided by seller to complete the land contract. The case was ultimately reversed in favor of the lawyer, because the seller had failed to present expert testimony on the standard of care required to determine whether the lawyer had a duty to confirm the property description.

In Nilson-Newey & Co. v. Ballou, a California buyer hired a lawyer to do title work for the purchase of 700 acres of land for $250,000. The lawyer’s title opinion stated that the land description was inaccurate and that it was therefore impossible to determine acreage without a survey. The actual purchase resulted in the buyer receiving only 363 acres. The buyer sued the lawyer for malpractice. The court found that the lawyer had either ignored or concealed the acreage problem and held the lawyer liable in negligence for damages of $375,000. The lawyer violated the lawyer’s professional obligation to his client. An exculpation clause is of no avail to a lawyer who has reasonable grounds to suspect the actual existence of defects not mentioned in the opinion letter, because the average layman is not familiar with land descriptions. If the lawyer is put on notice of a defect, it is the lawyer’s duty to investigate.

In the Selby v. Roggow case mentioned above, a New Mexico lawyer was sued for malpractice in a case in which the lawyer had represented the mortgagor in a mortgage foreclosure action. The mortgagee’s petition had stated that the original mortgage had erroneously described more land than was intended to be covered by the mortgage. The lawyer worked with the mortgagee to revise the description in the foreclosure action to the proper one. But the mortgagor then sued the lawyer in malpractice, claiming the lawyer should have counterclaimed against the mortgagee in the foreclosure action to avoid the mortgage action entirely, due to the error. The court held that an inaccurate description in a mortgage does not automatically invalidate the instrument, if there are rules of construction permitting the ascertaining of the proper
description. The counterclaim would have failed, and therefore there was no valid legal malpractice claim.

An old Iowa case also cited above, Latimer v. Jones,74 involved the mistake shown in Figure 8. The correct description for the land in a mortgage was “the S 1/2 and the W 1/2 of the N 1/2 of the S.E. 1/4 of section 25.” In a special execution, however, the court clerk had mistakenly described the tract as the “S 1/2 of the W 1/2 of the N 1/2 of the S.E. 1/4 of section 25.” The attorney for the mortgagee in the mortgage foreclosure action had used the correct description in the petition. While this was not a direct attorney malpractice case, the court in dicta stated that the attorney would not be liable for not being aware of the clerk’s mistake.

Finally, in the case from Kentucky mentioned above, Owen v. Neely,75 the plaintiff buyers sued their lawyer in malpractice for giving a report certifying clear and merchantable title to property. The legal description to which the report referred (the survey description) differed from the description contained in the record (the record description), which was the correct description for the contract. The survey description referred to land that was larger in size than the record description. The survey description contained more land than the sellers owned, and it did not contain land on which the house sat that the buyers were buying; that house sat on the neighbor’s property. The plaintiffs relied on the lawyer’s certification of title, paid $7,500 for the property, improved the property to the extent of $2,034, and sustained other damages. The lawyer had qualified the certificate by stating that it was “subject to any information that would be revealed by an accurate survey ... and subject to any information that would be revealed by a personal inspection of the premises.”76 The trial court sustained the lawyer's motion for summary judgment. The appeals court reversed for additional fact finding. The court stated that “a lawyer may protect himself by reservations and disclaimers expressly set forth in a certificate of title, but only if he has no reasonable grounds to suspect the actual existence of defects not mentioned. The average layman is not familiar with and ordinarily does not understand legal descriptions, and if his lawyer, accidentally or otherwise, receives information that should reasonably put him on notice of a defect we think it is his duty to investigate or report it to his client.”77

2. Potential code of professional responsibility violations

In addition to facing malpractice actions, a lawyer making a mistake in a land description faces potential violations of the Code of Professional Responsibility: Rule 1.1 on competence, Rule 1.2 on scope of responsibility, and Rule 5.3 on overseeing nonlawyer assistants. These rules read as follows:

Rule 1.1: “Competence: A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.”

Rule 1.2: “Scope of Representation: * * * (c) A lawyer may limit the scope of the representation if the limitation is reasonable under the circumstances and the client gives informed consent.”

Rule 5.3: “Responsibility Regarding Nonlawyer Assistants: With respect to a nonlawyer employed ... a lawyer * * * (c) a lawyer shall be responsible for conduct of such a person that would be in violation of the rules of professional conduct if engaged in by a lawyer if: (1) the lawyer orders or, with the knowledge of the specific conduct, ratifies the conduct involved ...”

Unlike a Canadian rule78 that expressly requires the lawyer dealing with title insurance to make sure the “legal description is correct,”79 our rules do not speak directly to the problem. But in a number of cases, lawyers were found to have violated the rules when they made mistakes in land descriptions.

One example is In the Matter of Wilkes.80 A South Carolina lawyer was disbarred for numerous ethics violations, including incompetence for doing a number of things wrong. The lawyer had filed a deed with an erroneous property description and had allowed a nonlawyer assistant to file a similar erroneous deed. In another South Carolina case, In re Addison,81 a lawyer was charged with nine violations of professional ethics, including one in which the lawyer had incorrectly described land and conveyed all of a complainant’s property instead of a smaller tract intended. In another violation, the lawyer had drafted a mortgage that did not include property intended. The lawyer was disbarred for incompetence and for failure to oversee a nonlawyer employee adequately.

In In re Kagele,82 a lawyer in the state of Washington was charged with numerous ethics violations. One alleged violation was that the lawyer had filed a complaint for a client against a neighbor that had contained an incomplete or inaccurate legal description regarding an easement in dispute, which resulted in preventing the client from using a driveway. The state suspended the lawyer for one year for some other violations and reprimanded him for violating the competence rule because of the inaccurate description.

3. Problems for surveyors

Surveyors can also be liable for professional malpractice. In a 1975 Colorado case, Doyle v. Linn,83 the plaintiff land owner contracted with the defendant surveyor to conduct a boundary line survey. Relying on the survey, the plaintiff built a house. Later the United States sued for trespass on the basis that the house had been built on national forest land. The plaintiff had moved the house at a cost of more than $14,000. The plaintiff successfully sued the surveyor for negligence.

Cornforth v. Larsen,84 a 2002 case from Colorado, involved a developer who sued a surveyor for a defective survey of a 600-acre tract to prepare for the platting of a subdivision. The court held the surveyor liable for the error and would not permit the surveyor to assert a statute of repose defense.

Similarly, in the 1969 Illinois case Rozny v. Marmul,85 the defendant surveyor had prepared a survey for a developer who had sold the lot to a builder. The builder constructed a house, after which the surveyor then did a “plat of survey” showing the location of the building. The plaintiff purchased the land from the builder. The plaintiff relied on the recorded plat of survey in constructing a garage, which when finished encroached on the adjacent lot. The plaintiff sued the surveyor for the $13,350 it cost to remove the garage. The court held for plaintiff, stating that a third party can hold a surveyor liable on an inaccurate survey when the surveyor knows that his representations will be relied on by a limited group and when they are so relied upon.
But three Missouri cases illustrate various defenses available to surveyors. In the 1992 case, *Pasta House Co. v. Williams,* the plaintiff landowner had contracted with the defendant to survey land. The plaintiff’s building subsequently constructed based on the survey was found to encroach on the building set-back line, causing plaintiff to remove part of the building. The plaintiff sued the surveyor, who testified that the plaintiff had told him not to worry about the set-back line because “the line was going to be moved forward.” The court held that there was no negligence because the defendant had completed the work in accordance with the contract.

In a 1991 case, *Gipson v. Slagle,* the plaintiffs’ neighbor had hired the defendant surveyor to survey their boundary. The surveyor made a mistake. The plaintiffs relied on the mistaken survey and removed trees and a retaining wall. When the plaintiff sued the surveyor, the court dismissed the case on the basis that plaintiffs, having no contractual privity with the surveyor, were not within the class of protected persons intended to be protected by the statutes involving standards for surveyors.

And, in *Baublit v. Barr & Riddle Eng’g Co. Inc.*, the plaintiff landowners sued a surveyor for making a mistake in a survey that ended up costing the landowners the loss of a water well. But the landowners had not contracted with the defendant surveyor for the survey. The court stated that privity of contract is a general requirement to sue a surveyor, but that there are many exceptions to the rule. One exception is that the surveyor may be liable for negligent misrepresentation if the surveyor “should have reasonably known that the complaining party would rely on the survey.” Here, the plaintiffs did not show to the court’s satisfaction that the plaintiffs had relied on the defendant’s survey. In addition, the statute of limitations barred the claim.

V. Avoidance of Errors

Avoiding errors requires first that the lawyer know the land description methods, as well as some of the legal rules found in the cases described above. For example, regardless of the rule in a state as to use of a street address in the land sales contract, a prudent lawyer given a chance to help draft the contract should include the proper legal description rather than a street address. This practice not only obviates the potential Statute of Frauds claim, but it also provides information about ownership of partial lots.

Other suggestions for avoiding problems: Use good drawing tools; practice reading and drawing land descriptions (replace crossword and Sudoku puzzles with land description problems); take pride in your work product; befriend a good surveyor to have on call for difficult issues; attempt to spot obvious errors; carefully read and draw descriptions; hire and train good personnel; once your confidence and competence level is up, you can begin to add your drawings to client memos; and, finally, proofread, proofread, proofread. Lastly, a suggestion for lawyers is to have the local title company prepare an informational title insurance commitment to confirm legal descriptions as well as current ownership, tax, lien, and incumbrance information.

VI. Conclusion

Real estate lawyers should know the various land description methods in order to read and check them, and to make drawings. Knowing these methods will help the lawyer avoid errors that can lead to problems for all the parties involved, including the lawyer. The ability to draw a sketch of the land that is the subject matter of the transaction, and view it pictorially on paper, aids not only the client, but also the lawyer, in fully understanding the deal.

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1. Thanks to Sara Stieben, University of Kansas School of Law graduate, May 2008, for her valuable research in preparing this outline. Thanks also to Roy Worthington and Todd Sheppard of Charleston & Wilson, Bonded Abstractors Inc., Manhattan, for their helpful substantive comments, insight, and suggestions. This outline is based upon Agriculture, and to Richard Seaton of Seaton, Seaton & Gillespie LLP, Manhattan, and a member of the Journal of the Kansas Bar Association Board of Editors, for his helpful edit. This article is based in part on a Recent Developments in the CLE program given by Professor Peck at the KU Law School on May 29, 2008.


3. Professor Peck has found legal description errors in newspaper legal notices, which he uses as examples in his land transactions class. He also readily admits routinely making such errors himself, in class and out.

Leonard Hall, a lawyer with the City of Olathe Legal Department for more than 28 years, estimates that on average “approximately 5 to 15 percent of . . . surveys or documents [being provided to the Land Department to be inserted in the deed or esasment documents] contain errors in the legal descriptions.” In one project, we found errors in the legal description on 20 percent of the tracts being submitted for land acquisition. . . . These descriptions are “usually, but not always” reviewed by numerous people. Hall attributes some of the problems to over-reliance on computers. When Hall once asked an engineering firm to “sit down and plot out the legal description by hand to determine if the legal description is correct,” the reply was that the computer cannot be wrong.

4. 100 F.2d 294 (5th C.A. 1938), rev’d 308 U.S. 208, 60 S. Ct. 201, 84 L. Ed. 196 (1939) (hereinafter Cities Services). The later court of appeals opinion is found at 115 F.2d 720 (1940).

5. See K.S.A. 74-7001 et seq., especially -7001(a), -7003(j), -7003(k), -7034, -7035, and -7036.

6. If, for example, a farmer owns the entire section 5, can the farmer or the farmer’s lawyer draft a deed that purports to convey the NW4/4 of Section 5, the NW/4 of the SW4 of Section 5, or even successively smaller fractional parts of the section without hiring a land surveyor to describe that tract? It may depend on what points in the section the original land surveyor established. If just the outside four corners, one could argue that the statutory restriction would prohibit them from doing so. According to the book CLARK ON SURVEYING AND BOUNDARIES, 7th ed., ch. 10, “Subdivision of Sections,” §§ 10.03 – 10.05, (hereinafter CLARK) Congress authorized the division of sections into quarter-quarter sections (40 acres) in an act in 1832. The publication Instructions to the Surveyors General of Public Lands of the United States for those Surveying Districts Established in and Since the Year 1850 (1855) (reprinted by the Kansas Society of Land Surveyors, 1996) (hereinafter Instructions), at 6, states that “[t]he half quarter section boundary is not marked in the field, but is regarded by the law as a point intermediate between the half mile or quarter section corners.” If those corners are in fact established in a section, it would seem that a lawyer could legally draft a legal description of a quarter-quarter section without having a new survey. Any smaller fractional part would seem to require a surveyor’s description, and any irregular part of these units would definitely require a surveyor’s description. An attorney general’s opinion conforms with the latter view, but not necessarily with the former view. The opinion in 93 Op. Att’y Gen. Kan. 57, at 2-3 (April 26, 1993), stated that there is a difference between a “fractional division” (one that is divided fractionally, like the NW/4 of the SW4) and a “measured division” (one where markers are referenced and distances noted). A farmer or the farmer’s lawyer could prepare a deed to convey a fractional part, but not a measured part. The opinion’s example was a quarter-quarter section, but it did not expressly limit the size of the fractional part to which the rule would apply.

There seems to be no annotated Kansas cases on the issue, but there are at least three other attorney general opinions besides the one cited in the precede one the rule would apply. A farmer or the farmer’s lawyer could prepare a deed to convey a fractional part, but not a measured part. The opinion’s example was a quarter-quarter section, but it did not expressly limit the size of the fractional part to which the rule would apply.

7. For the interested reader, a text used by surveyors is GURDON H. WAT~LES, WRITING LEGAL DESCRIPTIONS IN CONJUNCTION WITH SURVEY BOUNDARY CONTROL (Wattles Publications 1979).


9. At least three other methods are used. First, a “description by fractional part” might say “the northwest 1/4 of my farm.” But such a description is ambiguous because it requires knowledge of what “my farm” is and it is not clear exactly what the “northwest 1/4” represents, especially if the farm is not a square or rectangle. See CURTIS J. BERGER, QUINTIN JOHNSTONE & MARSHALL TRACHT, LAND TRANSFER AND FINANCE, CASES AND MATERIALS, 5th ed., at 374 (Wolters Kluwer, 2007). Second, the “plane coordinate” method uses “a reference to a conceptual grid of lines running north and south, east and west, from . . . several stations.” Id. at 377. A third method is shown in a legal notice in the LAWRENCE JOURNAL WORLD. In a 1983 legal notice of a rezoning request, the method described the parcel with a series of calls that directed the reader to follow the boundaries as if the person were in the field: for example, “beginning at point A, thence north 100’ to point B; thence on a deflection to the right of 105 degrees for a distance of 555 feet; thence on a deflection to the left of 38 degrees, 47 minutes for a distance of 1,295.3 feet . . . .” This one differs from the surveyor’s method, described in the text below. In the method used in this legal notice, the reader starts at a point and pretends to walk the first course; then, continuing to face along that line, the reader turns in the direction of the next call, here 105 degrees to the right, and then walks the distance of 555 feet on that line; then from the line of that direction, the reader turns to the left 38 degrees, 47 minutes and walks 1,295.3’, etc.

10. Some people would classify the surveyor’s or angular method described below as a type of the metes and bounds description.


12. THE KANSAS ABSTRACTOR, id. at 6-7.

13. The appellation “The Great American Desert” can apparently be attributed to Stephen H. Long, whom the United States commissioned in 1819 to gather information on the land between the Mississippi River and the Rocky Mountains. His map included “The Great American Desert” across what is now known as the Great Plains. He called this land “unfit for cultivation . . . and uninhabitable by people depending upon agriculture for their habitation.” STANLEY K. SCHULZ & WILLIAM T. TISHLER, AMERICAN HISTORY 102, CIVIL WAR TO THE PRESENT, Topic 3, p. 2 (online at http://us.history.wisc.edu/hist102/weblect/ec03/03_preamble.htm).

14. The corner of each platted lot is typically identified by an iron bar or rod driven in the ground.

15. “The surveyor is at times required to run meander lines either in making a new survey or in retracing an earlier one. A meander line is a line run by the government for the purpose of defining the sinuosities of the shore only.” See note 6.
16. An excellent reference in the form of a simple diagram showing a number of curves joined together, along with symbols and terminology for reading curves, is found at Curtis M. Brown, Donald A. Wilson, and Walter G. Robillard, Brown’s Boundary Control and Legal Principles, 4th Ed., Section 6.10, at 107 (John Wiley & Sons Inc. 1995). A good narrative description along with figures and diagrams can be found online at http://books.google.com/books?id=ZWE0AAAAYAAJ&pg=PA151&dq=PA151&dqovy=curved+lines&source=bl&ots=RB07P0tibV3&sig=t2D1_0nopTM_sXC30HdNcbPtBQ&hl=en&sa=X&oi=bo ok_result&resnum=4&ct=result#PPA156,M1.

17. See http://www.ksdot.org/maps.asp. Click “county maps” and then “pdf file” format. The county map can be enlarged up to 6,400 percent to obtain great detail, and the enlarged portion can be printed or saved as a separate document.


20. Informal descriptions come in many different forms, such as by popular name, ownership, occupancy, source of title, general location, distinguishing features including size or acreage, or adjoining land. For a discussion of other types of informal descriptions, see id.

21. Professor Casner notes that while many informal land descriptions including street addresses “may be good anywhere where land is thus described,” “it is subject to … objections” Casner, American Law of Property, § 12.104 (1952).

22. K.S.A. 33-106; Restatement 2d Contracts, §§ 110, 125-129.


25. See Restatement of Contracts, 2d, § 131, which states that “… a contract within the Statute of Frauds is enforceable if it is evidenced by any writing, signed by … the party to be charged, which (a) reasonably identifies the subject matter of the contract … and (c) states with reasonable certainty the essential terms of the unperformed promises in the contract.”


27. Id. at 560.

28. Id. at 561.


32. LAWRENCE JOURNAL WORLD, June 11, 1983.

33. 386 S.W.2d 782 (Tex. 1965).


35. 59 Kan. 181, 52 P. 433 (1898).

36. Thanks to Roy Worthington and Todd Sheppard of Charleston & Wilson, Bonded Abstracters Inc., of Manhattan, for the material presented in this section. E-mail from Roy Worthington to John C. Peck dated Saturday, Dec. 13, 2008, at 2:06 p.m.; e-mails from Todd Sheppard to Roy Worthington dated Thursday, Dec. 4, 2008, at 12:58 p.m. and 1:35 p.m.

37. Id. at 1373.

38. 777 P.2d 830 (Kan. 1989), cited at notes 34 and 44, supra.

39. Thanks to Roy Worthington and Todd Sheppard of Charleston & Wilson, Bonded Abstracters Inc., of Manhattan, for the material presented in this section. E-mail from Roy Worthington to John C. Peck dated Thursday, Dec. 4, 2008, at 12:58 p.m. and 1:35 p.m.

40. Kansas Title Standards, 7th ed., Kansas Bar Association (2005), Section 8.2 “No Legal Description in the Divorce Decree – What Requirement?”

41. “Often real estate attorneys, bankers, and agents figure that if there is a little typo, well we can fix that and reflie everythong or an affidavit, but as [some bankruptcy case]s show when it comes up to a bankruptcy court trying to allocate assets among multiple creditors the results can be harsh.” See supra note 68, Sheppard’s 1:35 p.m. e-mail, citing In re Colon, 376 B.R. 22 (Bankr. Kan. 2007) (bankruptcy trustee, as a BFP, was not put on constructive notice of a defective legal description contained in a mortgage and not required to take the steps a title insurance company would take). The Tenth Circuit, however, reversed. See In re Colon, 563 F.3d 1171 (10th C.A. 2009). See also In re Easter, 367 B.R. 608 (Bankr. S.D. Ohio 2007) (street address in mortgage did not put Trustee on notice of a potential encumbrance such that he lost his status as a bona fide purchaser).

42. See supra note 40, supra.


44. 839 P.2d 1711 (6th C.A. 1988).

45. 975 P.2d 379 (N.M. App. 1999), cited at note 48, supra.

76. Id. at 707.
77. Id. at 708.

78. This rule is found in a publication from the Law Society of Upper Canada, titled “Residential Real Estate Transaction Practice Guidelines.” It is located online at http://rc.lsuc.on.ca/jsp/residentialRealEstate/.

79. The Guidelines state that “lawyers should follow [the Guidelines] when acting for clients in residential real estate transactions.” Under the heading of Title Insurance, the Guidelines state: “The lawyer should review the draft title insurance policy or binder/commitment, to ensure the following: * * * Is the legal description correct? Since only the lands described are insured, there may be off-site lands that should be included in the description, so that easements or rights-of-way located on other properties, but benefitting the subject property, and encroachments from the subject property onto other lands, will be covered by the insurance.” Canada’s Rule 2.01, a rule similar to our Rule 1.1, also requires the lawyer to be competent.

82. 149 Wash. 2d 793, 72 P.3d 1067 (2003).
84. 49 P.3d 346 (Colo. 2002).
85. 43 Ill. 2d 54, 250 N.E.2d 656 (1969).
86. 833 S.W.2d 460 (Mo. App. E.D. 1992).
87. Id. at 461.
89. 768 S.W.2d 233 (Mo. App. W.D. 1989).
90. Id. at 236.
91. Suggested by Roy Worthington. See note 36, supra.
CIVIL

CITY ORDINANCE, INITIATIVE, AND REFERENDUM
MCALISTER V. CITY OF FAIRWAY
JOHNSON DISTRICT COURT – AFFIRMED
NOS. 99,808 AND 99,809 – JULY 24, 2009

FACTS: Beginning in 2001, the governing body for the city of Fairway (City) began discussing the need for a new city hall building and those discussions spanned the next few years. James McAlister, Klaus Ulrich, and James Kernell are residents of the City. They prepared two proposed city ordinances and organized supporting petition drives in an effort to invoke the statutory initiative and referendum process set out in K.S.A. 12-3013. It is undisputed the required petitions accompanying these proposed ordinances were in proper form and carry sufficient genuine signatures from qualified local electors. The first proposed ordinance sought to restrict the City’s ability to relocate its city hall facilities to certain locations within the City’s boundaries. The second proposes to not allow the use of rezoning, eminent domain, and condemnation, as well as restricting commercial, business, apartment, condominium, or mixed-use development to certain locations within the City. The City refused to adopt the ordinances or advance them for public vote on the basis of K.S.A. 12-3013(e)(1), which states: “The provisions of this section shall not apply to: (1) administrative ordinances.” On cross-motions for summary judgment, the district court agreed with the City and determined both proposed ordinances were administrative.

ISSUES: (1) City ordinance and (2) initiative and referendum

HELD: Court found the appeal was not moot even though the City had entered into a lease agreement locating its city hall facilities outside the area proposed to be restricted by the petitions. Court espoused the guidelines for determining whether an ordinance is legislative or administrative. In weighing the four guidelines to the City Hall Petition, Court found it was principally executive or administrative in nature. Court did so because: (1) its broad restrictions pervasively intrude into various matters of statewide concern by attempting to impact rezoning and eminent domain authority by the City and other entities that have been delegated that authority by the Legislature; and (2) the sweeping scope of the restrictions covering more than 90 percent of the City’s geographic area has the effect of permanently locking the City into its current zoning plan, which is a decision requiring specialized knowledge and training to fully comprehend its impact.


MENTAL HEALTH

IN RE CARE AND TREATMENT OF COLT
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 98,105 – JULY 10, 2009

FACTS: Colt challenged his indefinite civil commitment as a sexually violent predator under K.S.A. 59-29a01 et seq. On appeal he argued: (1) his jury should not have been permitted to consider evidence of his prior crimes, particularly those having no sexual component; (2) state’s expert based his opinion on inadmissible evidence in violation of K.S.A. 60-456(b); and (3) insufficient evidence supported the jury’s verdict. Court of Appeals affirmed, 39 Kan. App. 2d 643 (2008). Colt’s petition for review granted.

ISSUES: (1) Admission of evidence of prior crimes, (2) K.S.A. 60-456(b), and (3) sufficiency of the evidence

HELD: Issue controlled by decision in In re Care and Treatment of Miller, decided by Kansas Supreme Court this same date, K.S.A. 59-29a03 does not explicitly limit types of offenses about which evidence can be admitted in a sexually violent predator commitment proceeding. On facts in this case, district judge did not err in rejecting Colt’s effort to exclude proof of his prior crimes on relevance grounds. On facts of this case, admission of all other crimes or civil wrongs did not undermine constitutionality of K.S.A. 29-59101 et seq. Double jeopardy doctrine does not apply to this civil proceeding. On facts of this case, Colt’s stipulation dispensed with usual prerequisite of admission of records relied upon by an expert, pursuant to K.S.A. 60-456(b).

Sufficient evidence supported jury’s determination.

DISSENT (Rosen, J., joined by Standridge, J.): Dissents for reasons stated in Miller.

STATUTES: K.S.A. 59-29a01 et seq., -29a02(a), -29a02(e), -29a03
MENTAL HEALTH
IN RE CARE AND TREATMENT OF MILLER
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 97,273 – JULY 10, 2009

FACTS: Miller challenged his indefinite civil commitment as a sexually violent predator under K.S.A. 59-29a01 et seq. (Act). On appeal he argued the district court erred in denying Miller’s motion to stipulate to his 1980 sex crime conviction. He claimed district court erred in admitting evidence of Miller’s other prior crimes or civil wrongs, including those having no sexual component, were cumulative, or were dismissed for lack of evidence or misidentification. He also claimed that after jury determined Miller qualified as a sexually violent predator under the Act, district court erred in entering judgment when Miller had never been diagnosed with a sex-related abnormality or disorder. Court of Appeals affirmed, 39 Kan. App. 2d 905 (2008). Miller’s petition for review granted.

ISSUES: (1) Motion to stipulate, (2) evidence of other prior crimes or civil wrongs – K.S.A. 60-455, (3) evidence of other prior crimes or civil wrongs – nonsexual, (4) evidence of other prior crimes or civil wrongs – cumulative, (5) evidence of other prior crimes or civil wrongs – not proved, (6) general rather than sex-related abnormality or disorder

HELD: No abuse of discretion in district court’s denial of Miller’s motion to stipulate to prior sexual offense. The evidence was neither unduly prejudicial nor cumulative.


Issue of first impression in Kansas. Relevance to be determined in each case by particular facts of each case, by how those facts fit together, by the diagnosis or competing diagnoses, by how that diagnosis or diagnoses affect the expert opinion or opinions, and by the jury focus outlined in the Act. Under facts of this case, Miller’s nonsexual prior crimes and civil wrongs were both probative and material, and were not unduly prejudicial.

On facts of this case, no abuse of discretion to allow expert witness testimony about Miller’s burglary conviction, in addition to testimony from burglary victim.

Uncharged prior crimes may be admissible against a respondent in a sexually violent predator commitment proceeding. On facts of this case, evidence of a prior charge that was dismissed for lack of evidence or misidentification did not mislead the jury, and misdirection of the jury’s attention was temporary and corrected before the jury began to deliberate.

K.S.A. 59-29a02 does not define mental abnormality as a sex-related disorder, and the statutory definition does not offend due process.

DISSENT (Rosen, J., joined by Standridge, J.): Disagrees with majority’s holding that prior conduct or allegations, even dismissed charges of criminal wrongdoing proven to be perpetrated by someone other than the respondent, are relevant and admissible when court or jury is determining whether a person is a sexually violent predator. Majority’s holding undermines procedural safeguards enacted by Legislature concerning involuntary commitment proceedings, and ignores core purpose and underlying rational of 60-455.

STATUTES: K.S.A. 59-29a01 et seq., -29a02, -29a02(c), -29a07, -29b59, -29b66, and K.S.A. 60-455

OFFENDER REGISTRATION AND FAILURE TO REPORT IN RE C.P.W.
ELLSWORTH DISTRICT COURT – APPEAL SUSTAINED
NO. 101,017 – JULY 24, 2009

FACTS: C.P.W. is a registered sex offender. C.P.W. was charged with failing to report in person to the office of the Ellsworth County Sheriff to have his photograph taken during the month of his birthday. C.P.W. did not appear in November 2006. Rather, he appeared at the sheriff’s office six months later in May 2007 and complied with the reporting requirements. The Kansas Legislature added more reporting constraints effective July 2006. The district court found this violation was a specific intent crime and C.P.W. had no specific intent to violate the law as charged in the complaint. The district court concluded C.P.W. was not guilty and acquitted him. The state appealed a question reserved.

ISSUES: (1) Offender registration and (2) failure to report

HELD: Court found consideration of the question reserved was necessary for interpretation of a statute that has widespread application. Court held that K.S.A. 22-4903, which subjects to criminal liability “[a]ny person who is required to register as provided in the Kansas Offender Registration Act who violates any of the provisions of such act,” does not identify or require a particular intent beyond the general intent required by K.S.A. 21-3201 for all crimes. Consequently, specific intent is not necessary for there to be an offense committed under K.S.A. 22-4903.

STATUTES: K.S.A. 8-1567, -1567a; K.S.A. 20-3018; K.S.A. 21-3201, -3419, -3420, -3435, -3503, -3511, -3612, -3701, -3715; and K.S.A. 22-4901, -4903, -4904, -4907

CRIMINAL
STATE V. BELLO
FINNEY DISTRICT COURT – CONVICTIONS AFFIRMED,
SENTENCES VACATED, AND CASE REMANDED FOR RESENTENCING
NO. 99,225 – JULY 2, 2009

FACTS: Bello was convicted of aggravated criminal sodomy and aggravated indecent liberties with a child. The trial court sentenced him to a hard 25 life imprisonment sentence. Bello contends that the district court erred by excluding evidence on the basis of noncompliance with the time constraints of the Rape Shield Statute; that the state failed to charge and the district court failed to instruct on an essential element of the crimes, violating his constitutional rights; and that his disproportionate sentence violates the Eighth Amendment to the U.S. Constitution and Section 9 of the Bill of Rights of the Kansas Constitution.

ISSUES: (1) Rape Shield Statute and (2) element of crime – age of victim

HELD: Court held the trial court did not abuse its discretion in excluding the evidence under the Rape Shield Statute. Bello argued the Rape Shield Statute contemplates a voluntary, consensual act by the victim. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request. Court stated the evidence did not support a reasonable inference that the victim had been previously abused or traumatized and without that foundation, the expert’s opinion regarding the behavior of previously abused children had no relevance. Court also held that the state presented no evidence during the trial as to Bello’s age, and cannot now complain that the trial court granted that request.

STATUTES: K.S.A. 8-1567, -1567a; K.S.A. 20-3018; K.S.A. 21-3201, -3419, -3420, -3435, -3503, -3511, -3612, -3701, -3715; and K.S.A. 22-4901, -4903, -4904, -4907
criminal sodomy were to be found in the Kansas Sentencing Guidelines Act nondrug offense sentencing grid along the lines for a severity level 3 felony and a severity level 1 felony, respectively. To increase the penalty beyond that, i.e., to sentence Bello for an off-grid offense under K.S.A. 21-4643, the fact that Bello was 18 years or older at the time he committed the offense needed to have been submitted to the jury and proved beyond a reasonable doubt. Court found it unnecessary to address the Eighth Amendment issue.

STATUTES: K.S.A. 21-3504, -3506, -3525, -3701, -4643, -4706; and K.S.A. 22-3601(b)(1)

STATE V. GONZALES
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, SENTENCE VACATED, AND REMANDED
NO. 99,657 – JULY 24, 2009

FACTS: Gonzales convicted of offenses including aggravated indecent liberties with a child under the age of fourteen. Jessica’s Law sentence imposed, K.S.A. 21-4643, without possibility of parole for 25 years and with postrelease supervision for life. Prior to sentencing, Gonzales sought a new trial, alleging ineffective assistance of trial counsel. After appointing new counsel for sentencing and for hearing on the motion, district court denied the request for a new trial. Gonzales appealed, claiming ineffective assistance of trial counsel denied him a fair trial. He also claimed trial court lacked jurisdiction to sentence him under K.S.A. 2006 Supp. 21-4643 because charging instrument failed to allege he was over 18, an element of the crime also not included in the jury instructions. He also claimed his disproportionate sentence violated his constitutional rights.

ISSUES: (1) Motion for new trial, (2) defendant’s age – defective complaint, (3) Apprendi and sentencing

HELD: No error in denying motion for new trial based on claim of ineffective assistance of counsel. Substantial competent evidence supports district court’s factual findings and conclusion of law that trial counsel acted within wide range of reasonable professional judgment. Specific claims examined that counsel failed to communicate with Gonzales, failed to consider witnesses suggested by Gonzales, failed to adequately cross-examine a child victim, and failed to thoroughly review police reports with Gonzales and advised Gonzales not to testify in his own defense.

Under circumstances and nearly identical facts in State v. Gracy, 288 Kan. 252 (2009), Gonzales was adequately informed of his crime charged and penalty. Based on facts of case and limited standard of review, failure to specifically allege in the complaint that Gonzales was 18 years-of-age or older did not invalidate his conviction. Nor is reversal of Gonzales’ conviction required, applying State v. Bello, 288 Kan. __ (July 2, 2009), K.S.A. 21-3504, which defines elements of aggravated indecent liberties with a child, makes the defendant’s age an element of the crime when the crime is charged as an off-grid severity level offense. Omitting the defendant’s age from a complaint or from jury instructions does not eliminate the existence of that crime of aggravated indecent liberties with a child or invalidate a conviction for that offense – the crime severity level is merely characterized as the applicable sentencing guidelines severity level stated in K.S.A. 21-3504(c) rather than as an off-grid offense.

Under reasoning in Bello, when a defendant is charged with an off-grid severity level offense of aggravated indecent liberties with a child, the defendant’s age is an element of the crime that must first be submitted to the jury and proved beyond a reasonable doubt in order for a defendant to be sentenced for an off-grid severity level offense under K.S.A. 21-4643. Sentence imposed on Gonzales is vacated and case is remanded for resentencing on this count as a felony on Kansas Sentencing Guidelines Act nondrug sentencing grid.


STATE V. HOUSTON
WyANDOTTE DISTRICT COURT – AFFIRMED
NO. 98,373 – JULY 17, 2009

FACTS: The Houston family and the Johnson family had an ongoing feud involving acts of violence and confrontations. On the day of Johnson’s death, Houston allegedly threw a bottle that flew across the windshield of Houston’s vehicle. A heated argument ensued, but as several bystanders gathered, Houston drove away. Houston dropped his kids off at home and retrieved his shotgun. Houston shot and killed Johnson in front of Johnson’s house. Houston alleged that Johnson swung his car door open, forcing Houston to swerve his own car. Houston then stopped his car in the middle of the street. He testified that he got out and approached Johnson’s car. According to him, by then Johnson was almost completely out of his car. Houston testified that he shot Johnson because Johnson was reaching behind him for a weapon. Houston did not make either of these allegations when he turned himself in to the police. A jury convicted Houston of the lesser-included offense of second-degree intentional murder. The Court of Appeals reversed and remanded for a new trial. Upon remand, the state amended the complaint and charged Houston only with second-degree intentional murder. At the retrial, he contended that he shot Johnson in self-defense. After being instructed on second-degree intentional murder, voluntary manslaughter, and self-defense, the jury again convicted Houston of second-degree intentional murder.

ISSUES: (1) Theory of defense; (2) prosecutorial misconduct, (3) admission of evidence, (4) lesser-included jury instruction, (5) cumulative error, and (6) Apprendi

HELD: Court outlined the testimony presented to the jury and held the record clearly established that Houston was able to adequately present his theory of defense. Court held the prosecutor did not commit reversible misconduct when he elicited testimony from Houston that he had been to Larned State Hospital. Court found the prosecutor’s line of questioning was not gross and flagrant but responded to Houston’s attempt to introduce evidence about his state of mind in the years before the shooting and there was no evidence of prosecutorial ill will. Court rejected Houston’s argument that the trial court erred in admitting from the victim’s mother that the victim had called her an hour before the shooting and told her to be careful that Houston had a gun. Court agreed that the issue had not been preserved for appeal, but that any error was harmless because it was undisputed that Houston was armed with his shotgun on the evening of the shooting. Court found no error in the trial court’s refusal to instruct on involuntary manslaughter as a lesser-included offense. Court concluded that no rational jury could have found that Houston did not intend to kill Johnson. Court also held that the errors, if any, were harmless both singly and collectively and the totality of the circumstances did not substantially prejudice Houston or deny him a fair trial. Court found no error in his sentence to the aggravated sentence in the appropriate sentencing grid box.

STATUTES: K.S.A. 21-3403(b), -3404(c); K.S.A. 22-3414(3); and K.S.A. 60-261, -401(b), -404, -2101(b)
STATE V. RAIBURN
ELK DISTRICT COURT – COURT OF APPEALS DISMISSING THE APPEAL FROM THE DISTRICT COURT IS AFFIRMED IN PART AND REVERSED IN PART, AND THE CASE IS REMANDED TO THE COURT OF APPEALS WITH INSTRUCTIONS.
NO. 95,794 – JULY 24, 2009

FACTS: Raiburn was found guilty of possession of marijuana and received a probation sentence. Raiburn appealed his conviction. During his appeal, Raiburn absconded from probation and his whereabouts were unknown. Court of Appeals stated that an appellate court has the discretion to refrain from addressing issues brought by appellants who, because of their fugitive status, will not be affected by any judgment the court may issue. Court of Appeals held that in a case where the appellant has absconded, an appellate court would dismiss the appeal.

ISSUE: Fugitive disentitlement doctrine

HELD: Under the facts of this case, where the defendant appears to have absconded while on probation, something more than a mere allegation by the state in its brief that the defendant has failed to report to his probation officer is necessary to invoke the fugitive disentitlement doctrine. We hold that the burden is upon the state to raise the issue to the appellate court by filing a motion to dismiss the appeal alleging grounds that the defendant is a fugitive. In the absence of such a motion, the appeal should proceed normally. Court stated that the fugitive disentitlement doctrine has been recognized in Kansas for more than 100 years. It remains a valid method of dismissing an appeal when a defendant has chosen to thwart the appellate process by absconding from the jurisdiction of the courts. In this case, however, the state has done no more than raise the possibility that the defendant is a fugitive in its brief. That allegation is an insufficient basis on which to deprive the defendant of his statutory right to an appeal. Court remanded to the Court of Appeals with instructions for further proceedings consistent with the opinion.

STATUTE: K.S.A. 60-1507

STATE V. RANSOM
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,794 – JULY 24, 2009

FACTS: Ransom convicted of felony murder and attempted aggravated robbery. On appeal he claimed evidence seized from search of house in which he was living and was present should have been suppressed because his girlfriend either did not consent to the search or her consent was not knowing and voluntary, or because officers did not seek his consent. He also claimed admission of evidence of blood-stained clothes and air gun found in search of house was irrelevant and unduly prejudicial, and claimed he should have been permitted to strike a prospective juror for cause.

ISSUES: (1) Motion to suppress, (2) admission of evidence regarding items found in search of residence, and (3) refusal to strike jury panel member for cause

HELD: On record of case, substantial competent evidence supports district judge’s factual findings that Ransom’s girlfriend consented to search of house, and police were not required to consult with Ransom on whether he consented to search of house in which he lived. Court of Appeals’ analysis and application of Georgia v. Randolph, 547 U.S. 103 (2006), in State v. Chilson, 38 Kan. App. 2d 338 (2007), is approved.

On record of case, state’s admission of evidence regarding items found in search of house was not reversible error. Evidence of blood stained clothing and air gun was neither irrelevant nor unduly prejudicial. Admission of this evidence was not inconsistent with substantial justice, did not affect Ransom’s substantial rights, and no likelihood it affected outcome of trial.

On record of case, district judge’s refusal to strike for cause a prospective juror who acknowledged difficulty in honoring presumption of defendant’s innocence was not an abuse of discretion.

STATUTE: K.S.A. 21-3301, -3401, -3427, 60-261, -401(b)

STATE V. RICHMOND
CRAWFORD DISTRICT COURT – AFFIRMED
NO. 100,074 – JULY 24, 2009

FACTS: Richmond convicted of first-degree premeditated murder in shooting death of victim. Hard 50 sentence imposed. On appeal, Richmond claimed: (1) trial court erred in admitting a statement Richmond made two years before the shooting, (2) he was denied right to present a defense by trial court’s ruling that state could present evidence of Richmond’s 1995 convictions if Richmond’s testimony provided an innocent explanation for his presence at shooting scene, (3) trial court erred in admitting specific instances of Richmond’s drug dealing as evidence of motive and knowledge of local drug culture, (4) numerous instances of prosecutorial misconduct, (5) cumulative error denied him a fair trial, and (6) imposition of hard 50 sentence without submitting aggravating factors to jury for proof beyond a reasonable doubt violated U.S. Constitution.

ISSUES: (1) Admission of prior statement, (2) right to present a defense, (3) evidence of specific instances of drug dealing, (4) prosecutorial misconduct, (5) cumulative error, (6) constitutionality of hard 50 sentence

HELD: Richmond’s statement did not concern evidence of prior crimes for purposes of exclusion under K.S.A. 60-455, and arguments raised under K.S.A. 60-445 and 60-447 are not considered for first time on appeal.

Under facts of case, Richmond’s fundamental right to a fair trial was not denied where failure to testify was allegedly because of pretrial evidentiary ruling, which could have allowed evidence of his prior convictions to be admitted into evidence under certain circumstances during rebuttal. Luce v. United States, 469 U.S. 38 (1984), has similar facts and is controlling.

Drug culture testimony was relevant to material fact of motive. No challenge on appeal to trial court’s identification of knowledge as another material fact allowing this testimony. No abuse of discretion in trial court’s probative determination, or in its finding that probative value of Richmond’s drug dealing outweighed its prejudicial nature.

Five claims of prosecutorial misconduct are separately examined, finding error in one claim that prosecutor’s questions were generally leading and suggestive or assumed facts not in evidence. Under facts of case, this error was harmless.

Record does not support claim of cumulative error.

Prior cases defeat Richmond’s challenge to constitutionality of Kansas’ hard 50 sentencing scheme.

STATUTES: K.S.A. 22-3414(3), -3601(b); and K.S.A. 60-261, -404(b), -447, -455

STATE V. SALAS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 99,830 – JULY 10, 2009

FACTS: Five years after Salas was convicted, he filed motion for DNA testing under K.S.A. 21-2512. District court denied the motion, finding the statute did not allow testing of person convicted of intentional second-degree murder. Court of Appeals affirmed in unpublished opinion. Supreme Court granted review on Salas’ claim that K.S.A. 21-2512 violates Equal Protection Clause because it allows testing of persons convicted of premeditated murder but not of persons convicted of substantially similar offense of intentional second-degree murder.

ISSUE: Equal Protection and K.S.A. 21-2512

of premeditated first-degree murder and intentional second-degree murder are distinguished by the premeditation element. Salas failed to establish he is similarly situated to those who have a right to DNA testing under K.S.A. 21-2512.

STATUTE: K.S.A. 21-2512, -3401(a), -3401(b), -3402(a), -3502

STATE V. SCHULTZ
SHAWNEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART
AND REVERSED IN PART
NO. 98,727 – JULY 24, 2009

FACTS: Schultz charged with drug charges based on evidence found in search of his apartment. Schultz moved to suppress that evidence, as well as statements made prior to Miranda warnings. District court found Schultz’s initial spoken consent to search was voluntary, but the encounter transformed into custodial interrogation when marijuana was discovered and officers began to treat Schultz as a suspect, directed him to sit at dining room table, and denied his girlfriend’s request to leave. District court suppressed all physical evidence found after custodial interrogation began, and all incriminating statements made after that point until Miranda warnings given at police station. State appealed. Court of Appeals affirmed in unpublished opinion. State’s petition for review was granted.

ISSUES: (1) Custodial interrogation, (2) suppression – incriminating statements, and (3) suppression – physical evidence

HELD: Substantial competent evidence supports district judge’s legal conclusion that Schultz was subjected to custodial interrogation in his apartment. Wisest course for officers would have been to give Miranda warnings as soon as they restricted his free movement from their presence and before they began to ask questions.

District judge correctly suppressed incriminating statements made by Schultz during custodial interrogation without Miranda warnings.

United States v. Patane, 542 U.S. 630 (2004), not previously applied in Kansas cases, controls question whether physical evidence that comes to light because of an warned custodial interrogation must be suppressed. Wong Sun Fruit of the poisonous tree doctrine does not apply to exclude such physical evidence. Because Schultz’s initial spoken consent was voluntary and unrevoked, and absence of Miranda warnings did not convert authorized search into an unauthorized one as matter of law, it was not necessary for officers to obtain a second consent to search.


STATE V. VENTRIS
MONTGOMERY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 94,002 – JULY 24, 2009


ISSUES: (1) Admission of other crimes evidence and (2) sentencing

HELD: Under facts of case, other crimes evidence at issue was not admissible under K.S.A. 60-455 because it did not establish any material fact in dispute, but error was harmless.


STATUTES: K.S.A. 60-261, -455

STATE V. WHITE
SALINE DISTRICT COURT
REVERSED AND REMANDED
NO. 100,264 – JULY 17, 2009

FACTS: White was charged with sexual crimes against young girls, some acts occurring before the passage of Jessica’s Law and some acts occurring after. Jessica’s Law increased the severity level for indecent liberties with a child under 14 to an off grid crime and increased the penalty to a life sentence. White pled guilty to one count of aggravated indecent liberties occurring after the passage of Jessica’s Law. Before sentencing, White moved to withdraw his plea arguing his plea was not knowing and voluntary and that at age 69 he did not receive any bargain benefit for entering a plea. The district court denied his motion finding he had received the advice of several attorneys, he was not pressured to enter the plea, more than 10 months had passed before the motion to withdraw the plea, and that the evidence presented by one of the child victims was articulate and succinct. The district court sentenced White to life imprisonment without the possibility of parole for 25 years.

ISSUES: (1) Motion to withdraw plea and (2) ineffective assistance of counsel

HELD: Court concluded that the factual findings regarding whether White was advised of the possible penalty are not supported by substantial competent evidence. Court reversed the decision to deny the motion and remanded for a hearing on the motion. Court found that paragraph 9 of the written plea agreement incorrectly stated the maximum penalty White could receive was less than 25 years rather than accurately stating that the maximum penalty he could receive was life in prison. Court stated that the district court did not recognize the misstatement and instead, in referring to paragraph 9 of the written plea agreement, observed, “I don’t know what could be clearer than that.” Court disagreed with the district court’s finding that paragraph 9 clearly stated the maximum penalty and the court’s conclusion that the written plea agreement accurately informed White of the maximum sentence. Consequently, the written tender of plea is evidence that defense counsel gave White incorrect information — in other words, that counsel’s advice was unreasonable and ineffective and there was no contrary evidence provided. There is not substantial competent evidence to support the district court’s factual findings that paragraph 9 clearly informed White of the possible penalties or that the colloquy clearly explained the consequences of the plea. Because substantial competent evidence did not support the district court’s findings, Court reversed the denial of the motion to withdraw the plea. Court reversed for the district court to make a determination on whether White received ineffective assistance of counsel.

STATUTES: K.S.A. 21-3504(a)(3), -4643; and K.S.A. 22-3210(a)(2), (d), -3601(b)(1)
Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

The Court of Appeals Motions Panel

Because of the volume of motions filed in the Court of Appeals (approximately 10,000 annually), a standing motions panel is assigned. Currently, Judges Tom Malone, Richard Greene, and Stephen Hill are members of the Court of Appeals assigned to indeterminate tenure on the motions panel. The presiding judge designation rotates monthly among those three judges.

The three-judge panel considers complex motions, such as applications to take civil interlocutory appeals. Routine motions, such as those to extend time for filing a brief, are considered by that month’s presiding judge. The presiding judge and members of the panel are assisted by a staff attorney who is assigned specifically to work on motions. Chelsey Langland, an experienced staff attorney, currently serves in the position.

Motions are sent daily from the Appellate Clerk’s Office to the motions attorney, and the motions attorney meets with the judges twice each week, which minimizes the time a motion is held before the court acts on it.

First and second motions for extension of time to file briefs move more quickly than other motions because the court has delegated action on them to the Clerk’s Office if the motions are unopposed. Third motions for extension of time go to the motions panel at the present time although that practice is subject to change. Fourth motions have always gone to the motions panel and should contain detailed reasons for the requested extension. Truly exceptional circumstances would have to exist to obtain a fifth motion; they are routinely denied in the Court of Appeals.

If a brief is overdue, within three weeks the court will issue a suspense order giving the party 15 days from the date of the order to file the brief. If an appellant’s brief is not filed, the appeal will be dismissed. If an appellee’s brief is not filed, the case will proceed without that party’s brief.

Docketing should occur in a timely fashion; however, on occasion an attorney will need to file a motion to docket out of time. Greater specificity in terms of the reason for the delay in docketing will enhance the possibility the motion will be granted. The length of delay in docketing will also be carefully considered; file as soon as possible after the missed deadline.

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

civil

alternative dispute resolution

packard v. credit solutions of america inc.

wyandotte district court

reversed and remanded

no. 100,231 – july 31, 2009

facts: packards sued credit solutions of america (csa), a texas corporation, claiming csa engaged in deceptive practices in violation of kansas consumer protection act (kcpa) and failed to register in kansas as a credit services organization in violation of kansas credit services organization act (kcsoa). csa moved to compel arbitration as required by the agreement between the parties, or alternatively to dismiss the action for lack of jurisdiction and/or improper venue pursuant to forum selection provision, which provided for dallas as venue of dispute resolution. csa argued the federal arbitration act controlled. packards countered that claims were brought under kcpa and kcsoa and did not arise out of the agreement, and argued the agreement was void. trial court denied csas motion to dismiss or compel arbitration. csa appealed.

issue: arbitration

held: federal arbitration act (act) pre-empts conflicting state law, which exempts enforcement of arbitration agreements involving interstate commerce, thus the act pre-empts k.s.a. 5-401, which prohibits arbitration of tort claims. pursuant to buckeye check cashing inc. v. cardenga, 546 u.s. 440 (2006), packard’s challenge to the legality of an entire agreement should first go to an arbitrator. reversed and remanded with directions to grant motion to compel arbitration. issue of forum selection clause not addressed by trial or appellate court.

statutes: 9 u.s.c. §§ 1-16 (2006) and k.s.a. 5-401

child in need of care

in re l.c.w.

clay district court – affirmed

no. 101,528 – july 10, 2009

facts: the state filed child in need of care proceedings involving l.c.w. based on complaints from the paternal grandmother. the paternal grandmother was given temporary custody. at an adjudication hearing, the district magistrate judge found l.c.w. to be a child in need of care. on review, the district court reversed and concluded that the state failed to prove by clear and convincing evidence that l.c.w. was a child in need of care. the state appeals arguing the district court applied an erroneous standard of review and ignored or discounted evidence that adequately supported the magistrate’s decision.

issue: child in need of care

held: court addressed a jurisdictional issue of the timely filing of an order of adjudication. court stated that the 60-day time constraint of k.s.a. 2008 supp. 38-2251(c) for entry of an order of adjudication after removal of a child from his or her home is directory rather than mandatory. the time constraint is important, however, and the better practice dictates compliance with it. regarding the standard of review, the district court reviews an order of a magistrate judge in a child in need of care adjudication under k.s.a. 2008 supp. 38-2273(b), (c) and does so on the basis of the record, unless no record was made. in its review under this statute, the district court makes its determination de novo, but the procedure is governed by k.s.a. 20-302b(c) and k.s.a. 60-2103a. when called upon to review the decision of a district court that has sat in review of the magistrate judge, we apply our appellate standard of review to the district court’s decision. in this case, the court applied a negative finding standard of review. when an appellate court reviews a district court’s determination that a child is not a child in need of care, this is a negative finding that may not be reversed unless there was an arbitrary disregard of undisputed evidence or the district court’s ruling was a result of bias, passion, or prejudice. court held there had not been an arbitrary disregard of undisputed evidence, nor could the court conclude the ruling was the result of bias, passion, or prejudice. court was convinced that a rational factfinder could have found by clear and convincing evidence that l.c.w. was not a child in need of care, and court did not perceive that the trial court erred in concluding the state failed to meet its burden.

statutes: k.s.a. 20-302b; k.s.a. 38-1501, -1561, -1581, -1591, -2201(b), -2202(d), -2250, -2251, -2273; and k.s.a. 60-2103a

contract and medicaid

10th street medical v. social and rehabilitation services

shawnee district court – affirmed

no. 100,746 – july 2, 2009

facts: in 2000, the social and rehabilitation services (srs) ended a contract with 10th street medical inc., to provide durable medical equipment to medicaid recipients under the kansas medicaid program based on some complaints from its customers. 10th street medical pursued an administrative appeal of this termination and won, thus gaining the restoration of its contract, but ended up filing bankruptcy. about four years later, 10th street medical filed this lawsuit seeking damages in excess of $75,000 for termination of its medicaid provider status under theories of breach of contract, promissory estoppel, and negligence. the district court granted summary judgment to srs, ruling some of 10th street medical’s claims were unavailable as a matter of law and that by not pursuing the kansas act for judicial review of civil enforcement of agency actions (kjra), their breach of contract claim was time barred.

issues: (1) contract and (2) medicaid

held: court held that because a claim for damages could have been made in district court under the kjra and 10th street medical did not make such a claim, summary judgment was proper. court stated that the 1993 provider agreement established the duties between the 10th street medical and srs. under the termination provision of that agreement, 10th street medical’s breach of contract claim challenges srs’s failure to perform its contractual duty. the contractual duty is essentially regulatory in nature and based on an agency action. therefore, 10th street medical’s requested relief from its breach of contract claim fell within the exclusive authority of the kjra. court found 10th street medical’s claim for promissory estoppel was inapplicable. court also agreed with the district court that 10th street medical couldn’t pursue a tort remedy since there was no duty independent under the 1993 provider agreement.

statute: k.s.a. 77-501, -601, -602, -603, -606, and -622

contract and reformation

law v. law company building associates et al.

sedgwick district court

reversed and remanded

no. 100,497 – july 10, 2009

facts: law’s ex-husband founded the law company building associates (lcba). as part of divorce proceedings, lcba became obligated to pay law certain economic benefits as a substitute for divorce obligations. law and lcba entered into a financing agree-

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ment in 1984 to preserve Law's interest in the company's building and financing of a new corporate headquarters called the Riverview Building. Key to the financing agreement was Law's equity participation in the amount of 11 percent of the liquidation proceeds of the Riverview Building upon expiration of the term in 2004 or earlier dissolution. In 2002, LCBA extended the partnership until December 2024 and Law's equity participation was not paid in any amount. Law sued LCBA claiming the refusal to pay the equity participation was a breach of contract under the financing agreement, LCBA breached an implied covenant of good faith and fair dealing by not paying the equity participation in a timely fashion, requesting a reformation of the financing agreement to reflect the true intent of the parties, and that she was entitled to immediate liquidation of the equity participation. The district court granted a dismissal of Law's lawsuit finding that Law's claims were barred by the five-year statute of limitations.

ISSUES: (1) Contract and (2) reformation

HELD: Court concluded that Law's claim for relief based on an implied covenant of good faith and fair dealing should not have been “collapsed” into her reformation claim. Court stated that it was heavily influenced by the fact that LCBA's extension of the partnership for another 20 years placed any discharge and realization of Law's equity participation to a timeframe where Law would be 103 years old and there would be no bar to further if not indefinite extension at that time. Court held Law's claim for breach of the implied covenant of good faith and fair dealing was subject to a five-year statute and began to run on the date of the breach, which was 2005, making Law's claim timely. Court held that Law's claim for breach of contract survived in part for the claim that Law's equity participation had been unjustifiably valued by LCBA by debits that were not authorized by the agreement. Court also held that the line of cases in Kansas applying the unique rule of accrual at execution for reformation claims and barring any tolling of the statute of limitations until time of discovery should be limited to claims for the reformation of a deed or recorded instrument of conveyance, and it should not be applied to an executory contract between the original parties. The beneficial effects of the unique accrual rule for claims for reformation are particularly inapplicable where the instrument sought to be reformed is an executory contract between the original parties and where an essential aspect of the agreement for performance after 20 years has allegedly been delayed if not entirely destroyed by one of the parties.

DISSENT: (Pierron, J.) dissented arguing the majority's opinion is an attempt to reform a contract, which was executed almost 30 years ago. J. Pierron would affirm the district court.

STATUTE: K.S.A. 60-256(e), -306, -511

CONVERSION
SNIDER ET AL. V. MIDFIRST BANK ET AL.
LANE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART AND REMANDED WITH DIRECTIONS NO. 100,399 – JULY 10, 2009

FACTS: MidFirst was the mortgage holder of residential property purchased by Snider and her son. MidFirst foreclosed on the property and evicted Snider. MidFirst hired Safeguard to assist with the eviction. The remaining personal property in the residence was inventoried and taken to a storage facility. Safeguard sent notice to the address of the foreclosed property attempting to inform Snider where the personal property was taken and that Snider had 30 days to claim the property or it would be sold. Representatives from Safeguard testified that in a garage or yard sale, they ended up with $500 from the sale of Snider's possessions. Snider sued MidFirst and Safeguard for conversion. The district court granted summary judgment in favor of MidFirst and Safeguard because the Snider trust was not a real party in interest because the conversion action was not assign-able from Snider's son and that no genuine issue of material fact existed with respect to the conversion.

ISSUE: Conversion

HELD: Court held that under the facts of this case, there were no allegations of an implied contract or bailment; Snider's claim was clearly and exclusively pled as one of conversion, and intentional tort claims are simply not assignable in Kansas. Court concluded the district court did not err in holding that Snider was not the real party in interest to prosecute conversion claims as to her son's property. However, she had standing to prosecute such claims with regard to her own property and that of the trust. Regarding joiner of the real party in interest, court held that under the facts of this case, a motion for joiner or ratification was not necessary to preserve issues for appeal surrounding compliance with K.S.A. 60-217. Here, it would have been futile to seek joiner given the district court's contemporaneous entry of summary judgment both as to standing and on the merits of the conversion claim. There was no practical reason to join the real party in interest given that the conversion claims had been terminated on their merits, subject only to appeal. Court held the granting of summary judgment was improper based on the existence of genuine issues of material fact involving proper notice to Snider and also the inadequacy of uncontroverted facts to support the court's decision.

STATUTES: K.S.A. 60-217, -303; and K.S.A. 84-7-209, -210(b)

HABEAS CORPUS – POST-CONVICTION MOTION ALFORD V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED NO. 100,665 – JULY 31, 2009

FACTS: After Alford's conviction of criminal threat against detention officer was affirmed in unpublished decision, he filed K.S.A. 60-1507 motion. District court appointed counsel, held a non- evidentiary hearing, and dismissed the motion. Alford appealed, claiming his 60-1507 counsel was ineffective.

ISSUE: Statutory right to effective assistance of counsel in 60-1507 proceeding

HELD: Under facts of case, where claims contained in Alford's 60-1507 motion either were conclusory, were not properly submitted, lacked an evidentiary or legal basis, or should have been raised on direct appeal, Alford unable to establish legal prejudice by counsel's deficient performance at the preliminary non evidentiary hearing. Similarity to State v. Hemphill, 286 Kan. 583 (2008), is noted, but legal prejudice standard in Robertson v. State, 288 Kan. 217 (2009), controls.

STATUTE: K.S.A. 22-4506(b); and K.S.A. 60-1501, -1507

TAX APPEAL AND PROPERTY CONSUMED IN THE PROVIDING OF SERVICES FOR ULTIMATE SALE AT RETAIL IN RE TAX APPEAL OF GENESIS HEALTH CLUBS KANSAS BOARD OF TAX APPEALS – AFFIRMED NO. 99,772 – JULY 2, 2009

FACTS: Genesis is a private, for-profit health club with four locations in Wichita, Kan. Genesis sells memberships that allow either all-inclusive or limited access to its various locations and services. A membership entitles the member to access Genesis’ facilities and to take part in the services offered, depending on the membership class. Some services require an additional prepaid fee. Beyond these membership and prepaid fees, members are not charged for their actual use of specific facilities or any aspect thereof. Genesis charged, collected, and remitted Kansas’ retailers sales tax on all monthly dues for services offered subject to Kansas’ sales tax. On Dec. 2, 2002, Genesis filed refund claims with Kansas Department of Revenue (KDR) for taxes paid on certain items purchased by Genesis from November 1999 through August 2002, including: (1) electricity, (2) natural gas, (3) water, (4) pool chemicals, (5) laundry detergent, (6) soap and dishwashing liquid, (7) baby formula, and (8) vitamins. KDR dismissed in part and remanded with directions.

STATUTES: K.S.A. 22-4506(b); and K.S.A. 60-1501, -1507

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Casco was decided well after Scheidt's body, permanent partial general disability that the parties agreed have been a scheduled injury rather than the 22.5 percent whole-body permanent and totally disabled for ongoing medical treatment. For future medical expenses where no evidence demonstrated a need for ongoing medical treatment. Cases: Herrera-Gallegos hurt her back badly while moving a heavy box for H & H Delivery. Both the administrative law judge and the Workers' Compensation Board (Board) concluded that she was permanently and totally disabled, meaning that she was unable to engage in any substantial or gainful employment. Her employer argues that the Board's decision was based on flawed evidence, that her failure to seek out other employment opportunities negates her right to an award, and that she shouldn't have been given an award for future medical expenses where no evidence demonstrated a need for ongoing medical treatment.

ISSUES: (1) Workers' compensation, (2) standard of review, and (3) permanently and totally disabled

HELD: Court stated that it reviews the Board's factual findings to see whether substantial evidence supports them, and sufficient evidence showed that Herrera-Gallegos was unemployed due to her chronic pain and that she needed additional pain-management treatment. Court stated that nothing in the workers' compensation law requires a person who is permanently and totally disabled to try to find a job or lose workers' compensation benefits.

STATUTES: K.S.A. 44-510(c), -556(a); and K.S.A. 77-601, -62

WORKERS' COMPENSATION, WHOLE-BODY DISABILITY, AND SCHEDULED INJURY
Scheidt v. Teakwood Cabinet & Fixture
WORKERS' COMPENSATION BOARD – AFFIRMED
NO. 100,988 – JULY 2, 2009

FACTS: Scheidt received a final workers' compensation award in 2002. At the time of his settlement hearing, Scheidt had no wage loss because he had gone back to work for Teakwood. But Teakwood closed in 2005, and Scheidt couldn't find work at a comparable wage to his past employment. Had the Kansas Supreme Court's opinion in Casco v. Armour Swift-Eckrich, 283 Kan. 508, 154 P.3d 494 (2007), been applied to Robert Scheidt's 2002 settlement award with Teakwood Cabinet & Fixture, his injury to both arms would have been a scheduled injury rather than the 22.5 percent whole-body, permanent partial general disability that the parties agreed upon in their settlement. But Casco was decided well after Scheidt's award became final, and the award was left open for coverage of further medical treatment and possible modification. The Workers' Compensation Board (Board) held that Scheidt demonstrated an increase in work disability meriting a modification.

ISSUES: (1) Workers' compensation, (2) whole-body disability, and (3) scheduled injury

HELD: Court held that one modification available under Kansas' law for a whole-body disability – but not for a scheduled injury – is a work-disability award to compensate in part for future wage loss deemed attributable to the work-related injury. When Scheidt requested modification of his award to account for wage losses, Teakwood attempted to apply Casco's holding with the effect that Scheidt's injury would be a scheduled injury and thus not eligible for a work-disability award for his lost wages. Court concluded that the Board correctly held that Scheidt's original award became final in 2002, so it was not subject to redetermination, and that Scheidt had shown an increase in his work disability meriting the modification, which was likewise correctly calculated. Court also held that because substantial evidence supported the Board's finding that Scheidt didn't have substantial gainful employment from the lawn-care business before his April 2001 injury, the Board did not err by relying upon the testimony of Scheidt's physician about Scheidt's task loss, even though the task list he used didn't include tasks related to the lawn-care business.

STATUTES: K.S.A. 44-510(c), -528, -556; and K.S.A. 77-621

CRIMINAL
STATE V. CASEY
GEARY DISTRICT COURT – SENTENCE VACATED AND REMANDED FOR RESENTENCING
NO. 100,176 – JULY 17, 2009

FACTS: Casey convicted of possession of cocaine, with presumptive sentence of probation subject to mandatory drug abuse treatment pursuant to K.S.A. 21-4729 and K.S.A. 21-4603d(n). Because Casey had been arrested while on felony bond, trial court instead sentenced him to prison term pursuant to K.S.A. 21-4603d(f)(3). Casey appealed.

ISSUE: Interpretation of K.S.A. 21-4729, K.S.A. 21-4603d(f)(3), and K.S.A. 21-4603d(n)


STATUTES: K.S.A. 2008 Supp. 21-4705(f), -4705(f)(1)-(2); K.S.A. 2008 Supp. 75-52,144; K.S.A. 21-4601 et seq., -4603d(a)(m), -4603(f)(1), -4603(f)(3), -4603(g), -4603(n), -4608, -4705(f), -4729, -4729(c); K.S.A. 65-4160, -4162; and K.S.A. 2003 Supp. 21-4603d(g), -4603d(n), -4729

STATE V. CISNEROS
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 99,614 – JULY 31, 2009

FACTS: District court revoked Cisneros' probation, ordered service of the underlying 155-month prison sentence, and found it lacked jurisdiction to reduce that prison term. Cisneros appealed. State claimed there was no appellate jurisdiction for appeal from a presumptive sentence.

ISSUES: (1) Appellate jurisdiction and (2) lesser sentence upon revocation of probation
Held: Under facts of case, K.S.A. 21-4721(c)(1) is not a jurisdictional bar to Cisneros’ appeal.

Pursuant to K.S.A. 22-3716(b), upon finding a defendant has violated terms of probation, district court may require defendant to serve sentence imposed or any lesser sentence. Under facts of case, where district court expressed belief at Cisneros’ probation violation hearing that it had no power to reduce the term of Cisneros’ sentence, case is remanded to district court to consider its authority under K.S.A. 22-3716(b).

STATUTES: K.S.A. 21-4721(c)(1) and K.S.A. 22-3716(b)

STATE V. DIAZ-RUIZ
GEARY COUNTY DISTRICT COURT – AFFIRMED
NOS. 100,926/100,927 – JULY 17, 2009

FACTS: Diaz-Ruiz and Diaz-Gomez each charged with drug charges based on marijuana found in bed of truck after trooper stopped truck to check on ladder in the truck. District court granted motion to suppress the evidence, concluding the initial traffic stop was justified based on trooper’s concern that ladder was not secure, but trooper’s subsequent questioning of the defendants and review of documentation unlawfully extended scope of the stop. Even if search not unlawfully extended, district court alternatively concluded defendants’ consent to search was involuntary. State appealed. Appeals consolidated.

ISSUES: (1) Extension of lawful traffic stop and (2) consent to search

Held: Under circumstances of case, when trooper stopped defendants’ truck based upon a suspicion that ladder in the truck was not secure, but dispelled his suspicions as soon as he approached the truck, trooper unlawfully extended scope of the stop by questioning defendants regarding their travel plans and requesting identification. Kansas and Tenth Circuit cases discussed.

District court correctly found the state failed to establish a sufficient break between the unlawful detention and the consent to search. Record on appeal is sufficient for taint analysis. Under facts of case, when defendant’s subsequent consent to search was not sufficiently attenuated from the prior unlawful detention so as to purge the taint of the illegality, district court properly suppressed evidence discovered during search of the vehicle.

CONCURRENCE (Malone, J.): Agrees that scope of stop was unlawfully extended, but more rigorous examination of consent is necessary. Under facts of case, there was no voluntary consent to additional questioning by the trooper, thus the unlawful detention continued.

STATUTES: K.S.A. 2008 Supp. 65-4163(a)(3); K.S.A. 8-133, -1906, -1906(c); K.S.A. 60-2103(h); and K.S.A. 79-5204(a), -5208

STATE V. HOVHANNISYAN
MCPEHERSON DISTRICT COURT – REVERSED AND REMANDED
NO. 101,334 – JULY 24, 2009

FACTS: Hovhannisyan charged with drug possession offenses, based on evidence found in residence searched by probation surveillance officer. District court granted Hovhannisyan’s motion to suppress evidence from that search, finding search of residence was unreasonable because state had no reasonable belief that Hovhannisyan’s home was connected to illegal activity. State filed interlocutory appeal, arguing district court imposed standard more stringent that reasonable suspicion.

ISSUE: Search of probationer’s residence

Held: Officer had reasonable suspicion that illegal activity was occurring at Hovhannisyan’s home, consistent with standard required for searches of probationers. Under facts of case, district court essentially and improperly imposed probable cause standard. Reversed and remanded for further proceedings.

STATUTES: None

STATE V. JOHNSON
RENO DISTRICT COURT – AFFIRMED
NO. 100,152 – JULY 24, 2009

FACTS: Johnson appeals the district court’s revocation of his probation and order to serve his underlying prison sentence. Johnson contends the district court failed to consider placing him at the Labette Correctional Conservation Camp as required by K.S.A. 21-4603(d)(g) before ordering him to serve his underlying prison sentence.

ISSUE: (1) Labette Correctional Conservation Camp

Held: Court held the Kansas secretary of corrections has provided notice that the Labette Correctional Conservation Camp has ceased to operate as of June 30, 2009, for both male and female offenders. The facility is no longer available as a sentencing disposition for offenders who are subject to possible placement at the facility pursuant to K.S.A. 21-4603(d)(g).

STATUTES: K.S.A. 21-4603(d)(g); K.S.A. 60-409(b); and K.S.A. 75-43

STATE V. REESE
RILEY DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED
NO. 100,531 – JULY 31, 2009

FACTS: Reese convicted of sexually violent crime. District court ordered him to register as sex offender for life because Reese had a prior juvenile adjudication for a similar offense.

ISSUE: (1) Sex offender registration and (2) prior juvenile adjudications

Held: Kansas Offender Registration Act, K.S.A. 22-4901 et seq., requires sex offenders to register for 10 years on a first conviction and for life on a second or subsequent conviction. Because Legislature knows the distinction between juvenile adjudications and adult conviction and has set up a separate registration protocol for juvenile offenders, a juvenile adjudication does not qualify as a conviction for purposes of K.S.A. 22-4906(a). Based on State v. Boyer, 288 Kan. __, (2009), Reese’s sentence is vacated and case is remanded for resentencing.

STATUTES: K.S.A. 21-4704(j) and K.S.A. 22-4901 et seq., -4906(a), -4906(h)(1), -4906(h)(2)(A)

STATE V. SMITH
DOUGLAS DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,655 – JULY 24, 2009

FACTS: Smith was charged with robbery of a convenience store. Surveillance cameras captured the robbery on video. From the cashier’s description, the surveillance video, and still shots taken from it, the investigating officers recognized Smith as a possible suspect. A week before Smith’s trial, defense counsel moved to withdraw because he had viewed the surveillance video and there was no doubt in his mind that Smith was the person in the video and defense counsel also stated that he believed Smith was dishonest because Smith had been receiving workers’ compensation benefits contrary to Smith’s stated purpose for the robbery. The trial court denied Smith’s request finding that Smith’s objections would apply to any lawyer the court appointed. A jury found Smith guilty of robbery and the trial court sentenced him to 57 months in prison.

ISSUE: Appointment of new counsel

Held: Court held that defense counsel was obviously correct in moving to withdraw under the circumstances because (1) he believed that Smith was being dishonest, (2) he and Smith could not agree on how the case should be defended, and (3) his belief that Smith was guilty prevented him from utilizing potentially relevant

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defense evidence. Under the facts of this case, court found that an irreconcilable conflict existed between Smith and his attorney and the trial court abused its discretion in denying the defense’s motion to withdraw. Court reversed for a new trial.

STATUTES: No statutes cited.

STATE V. SUROWSKI
GEARY DISTRICT COURT
REVERSED AND REMANDED
NO. 100,121 – JULY 17, 2009

FACTS: Surowski filed motion to dismiss felony charge of possessing a schedule II narcotic under K.S.A. 65-4107(b)(1)(N), arguing she only possessed Lortab, a schedule III narcotic under K.S.A. 54-4109(d)(4), which is a misdemeanor. District court dismissed the felony charge and invited state to refile. State appealed.

ISSUE: Possession of Lortab as a felony or misdemeanor

HELD: Several statutes are examined and discussed. Lortab, which contains the narcotic hydrocodone, a schedule III drug listed in K.S.A. 65-4109(d), is not included among the drugs whose unlawful possession is classified as a misdemeanor under the controlled substance statutes. Under plain language of K.S.A. 2008 Supp. 65-4160(a), possession of narcotics is a felony. Because Lortab contains the narcotic hydrocodone, unlawful possession of Lortab is a prescribed felony under K.S.A. 2008 Supp. 65-4160(a). If the charge remains the same on remand, complaint must be amended to charge felony possession of the narcotic drug Lortab, a schedule III substance identified at K.S.A. 65-4109(d)(4), in violation of K.S.A. 2006 Supp. 65-4160(a).

STATUTES: K.S.A. 2008 Supp. 65-4160(a); K.S.A. 2006 Supp. 65-4160, -4160(a); K.S.A. 21-3701(a)(1); and K.S.A. 65-4107, -4107(b)(1)(N), -4109, -4019(b), -4109(c), -4109(d), -4109(d)(1), -4109(d)(3), -4109(d)(4), -4109(e), -4109(f), -4109(f)(1), -4109(g), -4113, -4160(a), -4162, -4164
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SEPTEMBER

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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 in Difficult Economic Times
DoubleTree, Overland Park

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

Tuesday, September 22, 9 a.m. – 4 p.m.
THE CYBERSLEUTH’S GUIDE TO THE INTERNET:
Super Search Engine Strategies and Investigative Research Strategies for the Legal Professional*
Co-sponsored by the UMKC School of Law
The Sheraton, Overland Park

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

Thursday, September 24, 9 a.m. – 4 p.m.
THE CYBERSLEUTH’S GUIDE TO THE INTERNET:
Super Search Engine Strategies and Investigative Research Strategies for the Legal Professional*
Co-sponsored by the UMKC School of Law
Kansas Law Center, Topeka

Friday, September 25
Recreation Law & Clay Shoot*
Co-sponsored by Whitney B. Damron P.A.
Flint Oak Resort, Fall River

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

OCTOBER

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Friday, October 2, 9 a.m. – 3:45 p.m.
Getting a Tune-Up for Your Practice*
Kansas Law Center, Topeka

OCTOBER (CON’T.)

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Friday, October 2, 9 a.m. – 3:45 p.m.
Lesbian, Gay, Bisexual, and Transgender Legal Issues*
Stinson Morrison Hecker LLP, Kansas City, Mo.

Tuesday, October 6, Noon – 1 p.m.
FMLA Update*
Co-sponsored by the Kansas Human Rights Commission
Richard A. Olmstead, Kutak Rock LLP, Wichita
Telephone CLE

Tuesday, October 13, Noon – 1 p.m.
Background Checks and Other Pre-Employment Issues*
Co-sponsored by the Kansas Human Rights Commission
Stacia G. Boden, Kutak Rock LLP, Wichita
Telephone CLE

Friday, October 16, 9 a.m. – 3:45 p.m.
Employment Law*
Holiday Inn, Lawrence

Friday, October 16, 9 a.m. – 4:35 p.m.
Agricultural Law*
Co-sponsored by the Kansas Farm Bureau Legal Foundation for Agriculture
Kansas Farm Bureau Headquarters, Manhattan

Tuesday, October 20, Noon – 1 p.m.
Sexual Harassment: A Legal Update*
Co-sponsored by the Kansas Human Rights Commission
David P. Mudrick, Henson, Hutton, Mudrick, and Gragson LLP, Topeka
Telephone CLE

Friday, October 23, 9 a.m. – 3:35 p.m.
34th Annual KBA/KIOGA Oil and Gas Conference*
Hyatt, Wichita

Tuesday, October 27, Noon – 1 p.m.
Employee Handbooks: It All Comes Down to Policies*
Co-sponsored by the Kansas Human Rights Commission
Carol R. Bonebrake, Law Office of Carol Ruth Bonebrake, Topeka
Telephone CLE

Tuesday, October 27 thru Thursday, October 29, 9 a.m. – 12:35 p.m.
Intellectual Property Law for the Non-Intellectual Property Attorney
Holiday Inn Express, Garden City (10/27/09)
Ramada, Hays (10/28/09)
Ramada, Salina (10/29/09)
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- Overview of Chapter 12
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