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Anthrax, Smallpox, and Flu, Oh My!
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For more details on what your KBA member benefits include, go to
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Naturalization Ceremonies Make Me Proud to be an American

Some of the most rewarding experiences in federal court are naturalization ceremonies. If you have not attended one, I would encourage you to attend one of these events. You will see and experience the sheer joy and hope emanating from our new citizens and their families.

This article is adapted from a speech I gave at a recent naturalization ceremony. My friend and chair of the Naturalization Committee of the Johnson County Bar Association, Anita Tebbe, encouraged me to turn it into an article. As an aside, like Anita, the following lawyers coordinate the naturalization ceremonies for their bar associations: Hon. Dan Duncan, Wyandotte County; Pedro Irigonegaray, Topeka; and Dayna Wilmot, Wichita. On behalf of the Kansas Bar Association and the court, we sincerely appreciate their efforts and those of the other civic groups who help.

The immigration debate continues in a very spirited fashion. The coalitions that form on immigration often pair interesting combinations of political bedfellows. While I leave those debates to the politicians, I wanted to highlight some facts that seem to go unnoticed.

Although a cliché, we are a nation of immigrants. What isn’t a cliché is that recent immigrants are vital to today’s American society. As the 2007 report of former President George W. Bush’s Council of Economic Advisors stated, immigrants, legal and illegal, are a “critical part” of the U.S. workforce. The chairman of the Bush’s Council, Edward P. Lazear, found that “our review of economic research finds immigrants not only help fuel the Nation’s economic growth, but also have an overall positive effect on the income of native-born workers.”

According to the Pew Hispanic Center, Washington, D.C., one-third of all immigrants are undocumented, one-third have legal status, and one-third are now citizens. Of those undocumented, almost one-half had visas to live here temporarily and overstayed. Immigrants are generally concentrated into two camps – low education/lowl skills and high education/high skills. In 2005, for example, 36 percent of all adult workers with less than a high school diploma and 26 percent of workers with Ph.D.s were immigrants. Both types of immigrants are necessary in our economy. It is estimated that by 2030, 76 million baby boomers will retire but only 46 million native workers will enter the workforce. According to the U.S. Bureau of Labor Statistics, many of these positions are difficult physical jobs undesirable or unsuitable for our aging workforce.

Our country is full of success stories. Yahoo, Intel, Google, and eBay have immigrant founders. Indeed, according to the Kauffman Foundation, Kansas City, Mo., entrepreneurial activity for immigrants is 40 percent higher than for natives. Some of our country’s biggest names in business (Levi Strauss, Andrew Carnegie, Liz Claiborne) and scholars (Albert Einstein, Alexander Graham Bell, Jonas Salk) were immigrants. Recent immigrants include Gov. Arnold Schwarzenegger, Salma Hayek, Wayne Gretzky, Wolfgang Puck, and Albert Pujols. (Perhaps not coincidentally, Albert Pujols, the great St. Louis Cardinal never made the All Metro team when he played at Fort Osage High School in Kansas City.) Ten U.S. astronauts are naturalized citizens. Frances X. “Mother” Cabrini, the founder of orphanages, first American Catholic saint, and patron saint of immigrants, was naturalized in 1909.

There have been 70 immigrant American Nobel Prize winners. Over the past 15 years, 30 percent of American winners have been immigrants. Dr. Mario Capecchi, the 2007 winner of the Nobel Prize in Physiology or Medicine, is an amazing example. His mother was sent to the Dachau concentration camp for protesting against the Italian government. Capecchi, who was 3 at the time, went to live with a peasant family. However, when that family ran out of money, he lived on the streets for the next four years. His mother amazingly survived, found her son and moved here. Capecchi won the Nobel Prize for his work manipulating gene sequences in mice. There are many similar stories of overcoming difficulty on the road to a better life in the United States.

Naturalization ceremonies, to paraphrase country music composer and singer Lee Greenwood, make me proud to be an American. Those naturalized are beaming with pride and the knowledge that they are now fully realizing their dreams. Their employment experiences range from data processors and greeters at Wal-Mart to Ph.D.s and medical doctors. They come from all over the world — almost 30 countries at a recent ceremony. In spite of the differences, they are now American citizens.

Of course, immigration policy presents challenges. For example, what is an appropriate level of legal immigration? How do we balance between skilled and unskilled people seeking entrance? What is the best way to curtail illegal immigration? While these are difficult issues, we must find a way to work together and solve them. Our immigrant ancestors, who no doubt experienced the same joy and pride as the naturalized citizens of today, would have expected nothing less.

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.
In Difficult Times, We Need the Organized Bar More Than Ever

It has now been more than a year since the latest stock market collapse and since that time, we have all been witness to significantly declining IRAs and pension investments; decreasing business opportunities; a major tightening of the financial markets; as well as the unrelenting stream of layoffs to family members, friends, and colleagues.

No one has been immune from this complex state of affairs or disrepair as many have opined.

Stressful times indeed.

Add to that studies by the American Bar Association and other think tanks which reveal that lawyers, and other professionals, are now working 1/3 more hours for 1/3 less compensation than their counterparts from several decades ago.

This emerging dynamic has undoubtedly eroded the temperament, skills, and the professionalism of the legal profession; leaving many attorneys, from newly admitted associates to senior partners, to become increasingly dissatisfied with their chosen vocation.

The virtues and hopes of law school are quickly being replaced by the rigors and reality of the real world.

Civility should be at the cornerstone of the profession, but it can often become lost in the chase. Competition and drive overcome cooperation in the search for the Almighty Dollar.

Recessions, however, often have a way of reminding people what is important in life, such as spending more time with family and friends.

My point is that lawyers, now more than ever, need the camaraderie and stability of the organized Bar.

Whether committing time to your local bar, a specialty bar, or the state bar, the rewards are immeasurable and will go a long way toward helping you to fulfill your professional life.

I have written previously that lawyers who become involved in Bar activities have a much higher satisfaction with the practice of law. Whether it’s committee or section involvement, attending the Annual Meeting, or seeking office on the KBA Board of Governors, we have numerous ways to get you started.

Making the Most of KBA Membership

For nearly 130 years, we have served as the largest and most comprehensive resource to Kansas attorneys. And, in today’s environment, it’s so important to utilize the wide array of money-saving benefits and guidance that the KBA can provide you with for your legal career.

Here are just a few to make the most of your membership:

- The new and improved online legal research tool Casemaker 2.1;
- Complimentary copies of the 2008, 2007, and 2006 Kansas Annual Surveys of Law (while supplies last);
- Discounted CLE and special pricing on all KBA Handbooks;
- Use of the newly expanded Kansas Law Center at no cost – Your home away from home;
- Access to the latest legal info with member-only Web content, including an Economic Survey of Law;
- Professional development and networking opportunities through committee and section involvement;
- KBA Annual Meeting – A truly united affair with all members of the Judiciary; and
- Free classified ads in the Bar Journal

Of course, for some, the cost of dues may be an impediment to maintaining a KBA membership.

KBA Financial Hardship Policy

The Kansas Bar Association does not want financial hardship to prevent those that are interested from becoming involved.

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

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

Requests for specific CLE programs must be received at least 14 days before the seminar.

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

Please note that this policy only applies to membership dues and CLE tuition for the Kansas Bar Association, and attorneys are responsible for paying all registration fees and fulfilling any Mandatory CLE requirements in any state they maintain a law license.

Requests should be sent directly to the KBA Member Services Director, Lisa Montgomery, at lmontgomery@ksbar.org or mailed to her attention at 1200 SW Harrison St., Topeka, KS 66612. No phone calls, please.

All requests remain confidential and the names of applicants are not disclosed to the Executive Committee or nonstaff members.

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Welcome to all of the newly sworn in attorneys! The practice of law is an outstanding profession and each officer of the Kansas Bar Association (KBA) Young Lawyers Section (YLS) is thrilled to have even more professionals join our ranks.

On behalf of the KBA YLS, I would like to take one month’s column to “preview” the year ahead. The young lawyer’s board recently met to outline the year. This outstanding group of leaders is ready to ensure that each YLS member has an opportunity to grow from their membership. This year’s officers include myself; Melissa Doeblin, president-elect; Vincent Cox, secretary/treasurer; Angel Zimmerman, CLE chair; Paula Langworthy and Brooks Kancel, newsletter editors; Daniel Back, pro bono chair/mock trial coordinator; Carly Farrell and Will Wohlford, social chairs; Amanda Kiefer, legislative liaison; and Scott Hill, past president/Kansas Bar Foundation liaison.

This year’s board has planned phenomenal events and continuing education; plans to create an award-winning newsletter (no joke, the KBA YLS newsletter won best newsletter at the ABA annual meeting in August 2009); will coordinate worthwhile and rewarding opportunities for service; and still provide you with the opportunities to network and meet other young lawyers. It is up to each of you to take advantage of the year’s events and to make the most of your YLS membership. While ideally each of you would join in many bar activities, we know that not every event will appeal to everyone. So here is your opportunity to calendar some dates and plan to join us for whatever suits your interests!

Because of how hardworking your board is, the first two events have occurred by the time you receive this issue of your Journal of the Kansas Bar Association.

• Sept. 19: KU vs. Duke Football Game/Law School Tailgate, Lawrence. Join current law students, fellow lawyers, and a whole lot of Jayhawk fans for a beautiful fall afternoon.

• Oct. 2: Learning CAR Maintenance, Topeka. A CLE, which is co-sponsored by the YLS, Law Practice Management, and Solo and Small Firm sections of the KBA. This CLE will discuss coverage (malpractice), conflicts, accountability, and recusals and is a MUST for all young lawyers deciding to hang a shingle either fresh out of law school or after time in a larger firm setting.

• Nov. 13: Four Corners Series, Pittsburg. The first of four meetings outside the usual KBA meeting places. All southeast Kansas young lawyers are welcome to attend a one-hour CLE and happy hour Friday afternoon.

• January 2010: KBA young lawyers launch the ABA young lawyers service project, “They Had a Dream Too: Young Leaders of the Civil Rights Movement.”

• Jan. 22, 2010: Four Corners Series, Salina. The second meeting of young lawyers. All north central Kansas young lawyers are welcome to attend a one-hour CLE and happy hour Friday afternoon.

• Spring, 2010: Johnson County Young Lawyers and KBA YLS will team up to host a fun social event in Kansas City for all KC Metro young lawyers wanting to connect with other young lawyers.

• March 2010: Regional Mock Trial Tournaments. Wichita and Olathe. Donate a little time to future litigators by judging the first rounds of the mock trial tournament. Local high schools put together teams to try a civil litigation problem.

• March 26, 2010: Four Corners Series, Dodge City. The third meeting of young lawyers around the state. All southwest Kansas young lawyers are welcome to attend a one-hour CLE and a lunch meeting.

• April 2010: Washburn Law School Social, Topeka. The KBA will discuss bar association involvement with Washburn law students, followed by a social hour.

• April 2010: State Mock Trial Tournaments, Wichita. Come see the best of the best as the final rounds will decide, which high school team will represent the state of Kansas at the national mock trial tournament.

• May 7, 2010: Four Corners Series, Hays. The fourth and final meeting of young lawyers around the state. All northwest Kansas young lawyers are welcome to attend a one-hour CLE and a lunch meeting.

• June 9-11, 2010: Joint Judicial Conference and KBA Annual Meeting, Wichita. This meeting will include a special social hour with KBA young lawyers and the Kansas Supreme Court! In addition, a separate social for all KBA young lawyers will occur during the meeting.

These events, specifically tailored to bring young lawyers together, will ensure a busy and exciting year for the section. It is our hope that all KBA YLS members look for one item on this list that they can plan to participate in.

All of these events are opportunities to make the most of your membership. Make sure to keep an eye out in the YLS newsletter and for e-mails for more details on these events.
We have all heard and we should know that a lawyer in possession of client funds and property is the fiduciary. A lawyer who holds the money of others must safeguard and segregate those assets. This obligation applies to all money and property of clients and nonclients, which come into lawyers’ possession during the practice of law. The most common and legally mandated method of segregating funds is with a lawyer’s trust account. A trust account is a special checking account and the rules require that it be maintained in an insured account in a financial institution located in the state of Kansas and approved by the disciplinary administrator’s office.

Because these funds do not belong to us, we are not allowed to receive interest on the deposits. The ethical rules require that large amounts of money or funds held for a long period of time that earn substantial interest be segregated so the interest can be paid to the owner of the funds. On deposits of small amounts or ones held for short periods of time, lawyers typically maintain a general trust account and pool the deposits with itemization. As a general rule, if the cost of opening and maintaining an account exceeds any interest which would be earned, it is properly placed in a general trust account.

General trust accounts are convenient for lawyers and meet the goal of safekeeping clients’ property. However, questions begin to arise about what happens to the interest banks earn on those pooled funds.

IOLTA stands for Interest on Lawyers’ Trust Accounts, and the programs were first established in Australia and Canada in the late 1960s. The first U.S. IOLTA program was in Florida and the program in Kansas was approved by the Kansas Supreme Court in 1984. It is a program aimed at funding programs that provide civil legal services for low-income persons with charitable law-related public service projects. Today, every state in the United States operates an IOLTA program. Between 1991 and 2003, IOLTA programs generated more than $1.5 billion nationally to ensure justice for our country’s most vulnerable residents.

There are three types of IOLTA programs. A mandatory program, where all lawyers in the jurisdiction who maintain client trust accounts must maintain an IOLTA account. There are opt-out states. This is the Kansas rule. Under that system a lawyer participates in an IOLTA program unless he or she affirmatively makes a choice not to participate. Finally, there are voluntary programs. Under these programs a lawyer must affirmatively elect to opt in and participate in the IOLTA program.

Now we get to the title of this column. The Kansas Supreme Court is currently considering a request to mandate IOLTA. We should not be afraid of mandatory IOLTA. First and foremost, the rule suggested to the Court for consideration does not mandate IOLTA for everyone. There are safeguards for attorneys whose participation in an IOLTA program would create an undue hardship. The rule under consideration would ensure that all possible interest earned on these accounts be pooled for the good of our most needy citizens. One must wonder why we are not a mandatory state. Why should we not require that interest earned on accounts be pooled for the needy?

I think the resistance is largely premised in the fierce independence of lawyers. Since the inception of the IOLTA program in Kansas, more than $3 million have been distributed for civil legal service and assistance to low-income citizens. However, 40 percent of our attorneys do opt out. Why do they opt out? There are several reasons that have been identified in writings. First, there seems to be a misconception that participation in an IOLTA program causes more work or additional accounting. This is not the case. Once you open an IOLTA account, its administration from the lawyers’ end is no different than the administration of any other general trust account. It is the bank, not the lawyer that maintains accountability for the interest and remits the interest to the IOLTA account.

There has been a great deal of confusion over the legality of IOLTA programs. This confusion has ended. The U.S. Supreme Court upheld the constitutionality of IOLTA programs. A third reason is a lack of information about the good the program does. Getting that information out is the responsibility of the Kansas Bar Association and the Kansas Bar Foundation, and we are making strides to improve that. We have taken steps to honor the banks that are the largest contributors to the IOLTA program, and it was gratifying to see the expressions on the faces of the bankers we dealt with when they learned about the good that the funds do. We are highlighting IOLTA programs in the Journal of the Kansas Bar Association and the number of requests for grants more than doubled last year over the previous year. The Bar staff has done an outstanding job of getting the word out and the number of applicants demonstrates the severity of the need.

While the Supreme Court has been asked to consider a mandatory IOLTA proposal, it is not too late to voluntarily participate. You can go to www.ksbar.org and under the “Kansas Bar Foundation” tab you can learn everything about IOLTA. There is a Notice to Financial Institution form, which can be filled out in a matter of minutes and would instruct your bank to pay the interest on your trust account to the IOLTA program. If your bank does not participate and you would like to get them involved, members of the KBA staff would be happy to work with your banker.

The final reason for mandatory IOLTA is that the proposal before the Court calls for uniformity of interest rates. This will also provide additional assistance to the people who do not have the financial ability to have good access to our courts.

Be not afraid. Stand up for the citizens of Kansas and encourage our Court to change the rule. Our profession does a lot of good, but we can do more.
The Diversity Corner

Addressing Persons in Same-Sex Relationships

By Kelly Lynn Anders

From the Editor: “The Diversity Corner” is a new column dedicated to answering questions KBA members may have about diversity in the work place.

Question:

Dear Kelly,

One of our clients is in a same-sex relationship, and he and his partner recently married in a state that recognizes gay marriage. What’s the best way to refer to them in conversational introductions and in written communications? We’re not sure whether they are “husbands” or “spouses,” and my assistant has repeatedly asked me how to address correspondence. I’m new to this sort of thing, and I fear I would stumble all over myself trying to find the right words to ask the couple directly. Are there any references that you can recommend for guidance?

Unsure Esq.

Answer:

Dear Unsure,

With an increasing number of states recognizing same-sex marriages, this issue will become more common in the years to come. Since same-sex marriage and civil unions are relatively new to many people, it’s sometimes challenging to try to use traditional terms in reference to couples who do not consist of a man and a woman. I think it’s very thoughtful of you to try so hard to ensure that you are addressing them properly.

Normally, I would suggest that the easiest way to handle this would be to ask them about their preferences directly, but since this would embarrass you, I will offer a few discreet ideas. One idea would be to listen carefully for how they refer to each other in conversation and in making introductions. They may say, “I’d like you to meet my (husband, spouse, or partner),” or they may instead say, “I’d like you to meet (first name).” Another suggestion would be to use an assumptive approach, such as “I’d like you to meet (first name) and (first name).” They’ve been great clients for years,” allowing the couple to clarify their status themselves.

In written communications, many business and social etiquette guides advise readers to include names of same-sex couples in alphabetical order by their last names. You might also consider placing their names in the order of the highest degree obtained, but using alphabetical order tends to be an easier rule of thumb, particularly in instances where the couple has identical degrees. However, if one spouse chooses to assume the last name of the other, few guides provide much clarity in how to proceed, so I would suggest maintaining the “alphabetical order” rule. As an example, if Jane Smith and Jill Adams kept their maiden names, they would be addressed in correspondence as “Jill Adams and Jane Smith,” but if Jane changed her surname to Adams after getting married, the couple would be known as “Jane and Jill Adams.”

As for suggested references, most business etiquette guides published in the new millennium provide information on communications with same-sex couples. Recommended resources include Emily Post’s “Etiquette” (17th ed. 2004) and Letitia Baldrige’s “New Complete Guide to Executive Manners” (2005). Exploring the Web, local bookstores, or the public library may produce other ideas.

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).

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Some things just don’t seem to change. Impaired lawyers are a continuing problem for the profession. An impaired lawyer is quite likely to find his or her way into the disciplinary system. At a disciplinary hearing the respondent often introduces evidence of an impairment from which he or she suffers. If the case results in discipline, the Court’s opinion will contain a discussion of a claimed impairment and whether that impairment is considered to be a mitigating factor in the lawyer’s disciplinary case. Disciplinary cases can be viewed on the Kansas Supreme Court’s Web site at www.kscourts.org.

The Court has responded to the impaired lawyer problem by establishing the Kansas Impaired Lawyers Assistance Program (KILAP aka Kansas Lawyers Assistance Program). KILAP was established in 2002. (Supreme Court Rule 206). There have always been lawyers willing to help other lawyers who are impaired, but KILAP is a well-funded program with volunteers and resources to help the impaired lawyer. Don Zemites and Wally Underhill were the first two directors of KILAP That position is now filled by Anne McDonald. I have had the pleasure of working with all three of these individuals and each of them were completely committed to helping impaired lawyers.

My first year working in the Disciplinary Administrator’s Office was in 1987. The fact that a lawyer might be impaired was rarely brought up by respondent or counsel to either the panel hearing the case or the Court. The first case I recall in which a lawyer suggested an impairment might have contributed to his misconduct involved a lawyer who admitted his alcoholism. The respondent testified at the panel hearing and told the Court in his appearance before the Court that his alcoholism contributed to the fact that he lacked diligence in handling his client affairs. No testimony from a medical professional or alcohol counselor was presented. The Court, in its opinion publicly censuring the respondent, noted that the respondent had acknowledged his lack of diligence in client matters. The Court held that the respondent attributed his problems to alcoholism and accepted the respondent’s assurances that he had his impairment under control.

Now, the assertion of an impairment by a lawyer in a disciplinary case would be handled much differently. At the panel hearing, the respondent would be given the opportunity to present evidence regarding the impairment. If evidence regarding the impairment is presented properly, the impairment can be considered a persuasive mitigating factor in the respondent’s disciplinary case. However, the respondent must prove, through professional testimony, that (1) an impairment exists, (2) a correlation between the impairment and the lawyer misconduct, (3) that the lawyer has experienced a sustained period of rehabilitation, and (4) that misconduct is not likely to reoccur. Evidence of impairment and subsequent recovery could result in the Court allowing the lawyer to continue to practice under some sort of supervision as opposed to suspension from the practice of law. In all likelihood, that supervision would be provided by a monitor from KILAP.

How do lawyers with impairments come to the attention of the Disciplinary Administrator’s Office or KILAP? Hopefully, the lawyer acknowledges the problem and directly contacts KILAP. KILAP has a 24-hour-a-day hotline at (888) 342-9080. A more likely scenario would be that the Disciplinary Administrator’s Office would receive a number of complaints in a short period of time against a lawyer. Usually, the issues raised in the complaints are diligence and communication. There may be allegations that the lawyer’s office is never open, mail has piled up, the phone has been disconnected, or the lawyer has missed court appearances. These are all signals that an impairment may be involved. Finally, lawyers across the state often tell me that they have a friend or colleague who they suspect has an impairment. In any instance where I suspect a lawyer is impaired, I will alert KILAP. Once alerted about an impaired lawyer, KILAP goes to work. An intervention will occur very quickly. KILAP will help the lawyer secure counseling and treatment for chemical dependency and other illnesses. By rule, KILAP’s purpose is to protect clients from harm caused by impaired lawyers, to assist impaired lawyers in recovery, and to educate the profession to causes and remedies for impaired lawyers.

An impaired lawyer can reveal information to a KILAP volunteer knowing that the information will be kept in confidence. (Supreme Court Rule 206(g)). Communications between a KILAP volunteer and a lawyer are treated as confidential communications between an attorney and a client. Also, KILAP employees and agents are relieved from the reporting requirements of Supreme Court Rule 8.3. A lawyer can reveal his or her entire problem so the situation may be addressed.

Please assist lawyers and the profession by contacting KILAP if you know of an impaired lawyer. Resist the temptation to think of yourself as “snitching” on someone if you provide information to KILAP. If you report information to KILAP, your name will be held in confidence. By providing information regarding an impaired lawyer to KILAP you may salvage a career or even save a life.

About the Author

Stanton A. Hazlett, Topeka, received his Bachelor of General Studies from the University of Kansas and his Juris Doctor from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997 he was appointed disciplinary administrator.
It’s that time again. Travel mysteries, part 2.

1. Airport security – Let’s start with the guys who examine IDs. The first line of defense for our world-class Transportation Security Administration department. What are they looking for with that tiny magnifying glass? If your response is “to see if your name matches your ticket” then explain why it takes two minutes for him to focus on four words while my plane boards? And what’s his training? If it’s that important, I want the guy examining IDs to be trained at The Hawk or The Wheel in Lawrence. Those guys know fake IDs. Unless it belongs to some coed named Buffy in a spaghetti strap top. Then maybe their detection skills take a vacation.

2. Airline credit cards – Who buys those credit cards, that, in return for paying 30 percent interest you get a free trip? Someone does, clearly. It explains why we have a trillion dollars in credit card debt. Honestly. I was on a plane a couple of weeks ago and the attendants tried to pitch a credit card that guarantees a free trip to Phoenix over July Fourth or Minneapolis-St. Paul for New Year’s Eve. The lady walked up and down the aisle trying to hand out the credit application that came from banks who gave mortgages to homeless people. The same banks now trading at 50 cents a share. Swallowing cyanide would be preferable.

3. The Puffer – Have you seen those machines that puff air around your body? The machines that look real high tech until you step in them and they blow air around your shoes while an automated voice says “if you have a bomb, please raise your hand.” Maybe it’s just me (and it probably is) but it seems like one more annoyance with zero proof hasn’t made anyone safer.

4. Airport lies – When the gate agent says your plane is on time, it’s actually delayed an hour. When she says there is a small delay while you wait for another crew member, what they really mean is the flight is canceled. When the plane hasn’t pushed back from the gate and the captain says “we’ve had a small delay from a paperwork problem,” look outside to the engine. It just fell off. When he says “we are going to get de-iced for a couple minutes and we’ll be on our way.” What he means is “the de-ice guys are playing pitch. Your connection is history.”

5. Open seating – What makes the seat next to me attractive to a nice lady enroute to a Weight Watchers convention? Experts say that in 2040, 100 percent of Americans will be obese. Imagine the joy of flying then.

6. Limo guy standing around the bell station – The oldest scam in the history of travel is the limo guy who wants to take you somewhere. The guy who offers you a ride instead of a cab. The guy who looks legit but whose socks don’t match and his tie has “Happy Meal” sauce. The guy who slips 10 bucks in the pocket of the bellman so he can get the plug. Yeah, that guy. When I ask for a cab, and the bellman says “you want to take a Lincoln?” I look back and say “No, I’m going with the cabdriver whose been waiting in a line for five hours for one customer. Not the limo guy who just bribed you to steer me to the restaurant that your brother-in-law just opened to scathing reviews.”

7. Airplane bathrooms – Why are airplane bathrooms devoid of fans? Why do I always seem to follow the guys who just finished their third vodka tonic and choose to hit the head during midair turbulence?

8. Denver’s airport – Who was the brain surgeon who decided to place it halfway to Goodland? Recently I took a cab from DIA to the Denver Tech Center, and it cost me $95 with tip. And the time it took? I finished “War and Peace” enroute. Consider this – it is actually cheaper and almost quicker to fly from KC to Denver on Southwest Airlines. No joke.

9. Extra charges, extra hassles – Extra bags, drinks, food, even pillows – no longer free. OK, I understand all that – but what about the rule that you can’t switch seats when the plane takes off. United says certain seats have to stay empty unless you pay for them. Not first class mind you; just seats near the exit. That’s wrong, folks. Once the plane is airborne, open seats are open, and you have every right to escape from the guy who is about to slobber on your shoulder.

There is, however, one mystery no one needs to solve for me: Why airlines are losing customers and money like never before.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Stress Relief

By Pamela Taylor, Washburn University School of Law

Starting law school at 48 can be a daunting experience, as it was for me. I worried that I would not fit in with other law students. I worried my grades would not be as good as my graduate and undergraduate grades. I worried about how to pay for law school. A friend even nicknamed me “very worried walrus.”

And, once I actually started classes, the worrying continued. But not to worry. I found out that most law students and lawyers have the same fears. With that knowledge, I decided to do a little research on how to alleviate worries and fears through stress relief. My research revealed several techniques to help limit the stress, such as positive thinking, exercise, focusing on the long-term goal, laughter, camaraderie, and even avoiding negative people and the negative consequences of harmful stress management.

The Mayo Clinic recommends positive thinking to reduce stress. If we fill our minds with worries, we will be stressed. Instead, try filling your mind with positive thoughts. Think about the blessings in life. Instead of worrying about grades or finding every single case on a topic, it is more productive to remember the positive path toward law school and passing the bar exam.

Putting a positive spin on negative thoughts can be difficult, but the Mayo Clinic offers some helpful examples:

<table>
<thead>
<tr>
<th>Negative Thought</th>
<th>Positive Spin</th>
</tr>
</thead>
<tbody>
<tr>
<td>I’ve never done it before.</td>
<td>It’s an opportunity to learn something new</td>
</tr>
<tr>
<td>It’s too complicated/difficult/convoluted.</td>
<td>I’ll tackle it from another angle, or I can ask my professor/associate/partner for clarification.</td>
</tr>
<tr>
<td>I’m not going to get any better at this.</td>
<td>I’ll give it another try.</td>
</tr>
<tr>
<td>I don’t have enough time.</td>
<td>I can reassess my time management.</td>
</tr>
</tbody>
</table>

I have always heard that exercise can relieve stress. Exercise can take many forms, from yoga to swimming and to jogging. Even taking small breaks from studying and working can get the blood flowing to help alleviate stress. Writing for the American Bar Association, attorney David Abeshouse recommends exercise and meditation, including music therapy. He also reminds us to eat nutritiously and to get plenty of sleep.

Personally, I enjoy laughter and camaraderie as a relief to my stress. I take study breaks with my friends, watch a sitcom on TV, or call my family, and my worries take a back burner. My friends and I have made a pact not to talk about our worries during these breaks. I admit, however, that at times I need to discuss a specific thought or activity that is bothering me. When we need to release worry, our rule is to explain the worry, fear, or roadblock, and then brainstorm solutions. This technique worked so well for me in my second semester of law school that my grades rose one grade in almost every class.

Another tactic to reduce stress is to keep an eye on long-term goals. When getting wrapped up in daily to-dos is claiming too much energy, looking at the long-term goal of graduating from law school can provide perspective.

The hardest action to take in managing stress is to avoid those people who provide a negative atmosphere. For instance, if there is a peer who continually complains, that person should be avoided. Avoiding someone and possibly hurting her feelings is extremely difficult, but in the long run, both you and the negative person will benefit. You will benefit by not having the continual negativity, while the other person will benefit from realizing that her negativity is not helping his or her own journey.

Unfortunately, sometimes we try to manage stress in harmful ways. For instance, substance abuse is a common stress management tool. Professor Larry Krieger, Florida State University, notes that lawyers exhibit very high levels of substance abuse, not to mention clinical anxiety, hostility, and depression at rates that range from eight to 15 times the general population. In law school, 20 to 40 percent of students suffer from clinical depression by the time they graduate. However, the negative consequences of abusing alcohol or drugs are not worth the fleeting stress relief. For lawyers and law students who need help, the Kansas Lawyers Assistance Program offers confidential services, including a 24-hour hotline at (888) 342-9080.

Becoming addicted or losing control are just two of the negative consequences of stress for lawyers and law students. One thing I find myself doing too much of is napping. For a temporary “zone out” of sleeping away stress, I lose time I need to spend on studying. Also, I miss out on positive stress-management techniques like exercising and being with friends.

In summary, all law students and attorneys are stressed no matter what their ages, but there are positive ways to alleviate stress and create a positive atmosphere. If “very worried walrus” can alleviate stress, anyone can. Take care of yourself.

About the Author

Pamela Taylor hails from Dallas and is a second-year law student at Washburn University School of Law. She received her Bachelor of Science in business from LeTourneau University in 1999, and received a Master in Business Administration from Texas Woman’s University in 2005. She plans to graduate from Washburn Law in December 2010.

2. Id. at p. 2.
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25 Years Old and Holding – The Women Attorneys Association of Topeka

By Mary Feighny, Office of the Kansas Attorney General

“One of the partners sent me to Lyndon to try a case. I was pleased that he had confidence in me. Unfortunately, opposing counsel kept calling me “girlie” and telling me that I must have missed something while I was out “getting my hair fixed.” I won the case but found out later that my boss had sent me to Lyndon to prove to the belligerent opposing counsel that the case was so open and shut that even a woman lawyer could prevail.”

(Journeys on the Road Less Travelled: Reminiscence by former Chief Justice Kay McFarland)

In 1982, women comprised approximately 7 percent of the legal profession in the United States. While there was a group of Topeka women attorneys who lunched regularly at Myron Green’s cafeteria, Topeka attorneys Cathy Reeder, Barb Rankin, and Lori Callahan believed that a formal association would better serve the needs of women attorneys by providing networking, education, and encouragement in seeking judicial, political, and other professional opportunities.

Twenty-five people attended the first organizational meeting in the fall of 1983. While not all were supportive, there was enough interest to move forward. In 1984, the Women Attorneys Association of Topeka (WAAT) was born. Cathy Reeder served as WAAT’s first president followed by Barb Rankin. In addition to Reeder, Rankin, and Callahan, Marty Snyder, Jill Michaux, Martha Hodgesmith, Alleen Castellani, and Marla Luckert were instrumental in developing an organization that sought to advance not only the interests of women attorneys but also the legal profession as well as evidenced by WAAT charter members Christel Marquardt and Marla Luckert assuming the presidency of the Kansas Bar Association.

WAAT engages in a variety of activities that not only meet its mission of supporting women attorneys but also raise awareness of issues important to women in the community. Those activities include:

- Initiating the [now] annual “Lindsborg” conference, which provides a medley of CLE, networking, fun, and friendship;
- Gathering the oral histories of women who practiced law in the 1950s and ’60s and publishing the book, “Journeys on the Road Less Travelled”;
- Bringing Sarah Buel, a nationally recognized attorney and expert on domestic violence, to Topeka to train the medical community, attorneys, social workers, and other professionals in the various aspects of domestic violence;
- Holding annually a “Just Desserts” fundraiser to support the Washburn Women’s Alliance;
- Establishing the “Read to Me” program aimed at encouraging young, disadvantaged mothers to read to their children;
- Developing a mentorship program for law students from Washburn University and the University of Kansas; and
- Providing affordable ethics CLE every spring.

Please celebrate with WAAT on Oct. 22, 2009, from 5:30-7:30 p.m. at the Kansas History Museum in Topeka at 6425 SW 6th. Remarks at 6:15 p.m. by Judges Deanell Tacha and Mary Beck Briscoe.
I came to fish

By Anne McDonald, Kansas Lawyers Assistance Program, executive director

The young lad was struggling out of the small lake, fully clothed, and dripping. A kindly passerby stopped to give him a hand, and then said, “But how did you come to fall in, my boy?” The boy allowed an expression of contempt to cross his face and said, “I didn’t come to fall in! I came to fish.”


I loved this joke/story when I came across it. It seems to describe most of us at one time or another in our lives: We find ourselves in some distressing situation we never expected and have to take the extended hand of a kind passerby to pull ourselves out. We didn’t set out, that day or that life, to fall into a pond of stress or addiction or illness. But here we are, floundering, dog paddling, maybe even gasping for breath and praying we won’t sink to the bottom. Did we think we’d just dip our toe in and then slip on wet rocks or grass? Did we indeed snap a big fish and get pulled in? Did a huge gust of wind blow us in? Of course, these are all metaphors for the possible stressors or tendencies (genetic or personality) or life events that can lead to our immersion in that pond of illness.

With these tough economic times there’s a lot of focus on depression. Medical professionals believe there is a genetic component to depression but that various life situations can also play a big part. As with other illnesses, there can be a lot of denial going on (“I can’t be having a heart attack – I don’t have time!”). Oh, and by the way, a major illness, such as heart attack or stroke, can be one of those life situations that triggers depression, so if you or someone you know, is recovering from something like that, be particularly aware of symptoms and learn about treatment options. Denial of an illness with a mental or emotional component can be particularly strong, probably because we don’t know much about it and anything unknown is scary, and there may still be a perceived stigma associated with it. Some of the symptoms of depression are:

- Loss of interest in normal daily activities;
- Feeling sad or down;
- Feeling hopeless;
- Crying spells for no apparent reason;
- Problems sleeping;
- Trouble focusing or concentrating;
- Difficulty making decisions;
- Unintentional weight gain or loss;
- Irritability, restlessness, easily annoyed;
- Feeling fatigued or weak;
- Feeling worthless;
- Loss of interest in sex;
- Thoughts of suicide or suicidal behavior; and
- Unexplained physical problems, such as back pain or headaches.

Many times a lawyer is struggling with several of these symptoms but just chalks it up to being too busy or too stressed and often blames herself/himself for even having the symptoms. Two indicators that are common but can be deadly are having trouble focusing or making decisions, which result in procrastination or inaction. Unfortunately, that can morph into a disciplinary complaint involving rules 1.3 – diligence and 1.4 – communication. Many disciplinary cases allege violations of these two rules in particular, and many of those cases also involve a lawyer struggling with addiction or depression. Most unfortunately, depression is a factor in many cases of suicide, so it’s not something to take lightly.

One recent disciplinary case noted that the lawyer failed to comply with annual registration requirements and even failed to open many of the envelopes from the clerk of the appellate court. The underlying complaint alleged that the respondent had failed to answer many telephone messages and to file notices of appeal in two cases. The opinion found depression as a mitigating circumstance, saying, “The Respondent has suffered from depression for many years ... the Respondent has struggled with attending to many seemingly routine business matters, paying bills, completing ... forms, etc. The Respondent’s depression directly contributed to his misconduct.” The Court imposed public censure and I believe one reason they did so is that they also found that the lawyer had addressed his depression and was successfully treating it with therapy and medication.

If any of this reminds you of a lawyer you know – or yourself – don’t suffer, seek help. A health professional can provide diagnosis and treatment. Depression will usually not get better on its own. The Kansas Lawyers Assistance Program can talk with you and help with a referral to a provider. Our volunteers are always delighted to partner with you on the road to recovery.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City Kansas Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.
**Members in the News**

**Changing Positions**

Corey A. Barash has joined EIP Corp., Overland Park.

Brian G. Boos and Carol A. Krstulic have joined Wallace, Saunders, Austin, Brown & Enochs Chtd., Overland Park.

Amy C. Coppola has joined Crow & Associates, Leavenworth.

Catherine M. Decena has joined the Franklin County Attorney’s Office, Ottawa.

John R. Dietrick has joined Creative Business Solutions, Topeka.

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

Mark L. Kovarik has joined the firm of Kovarik, Ellison & Mathis P.C., Gering, Neb.

Kevin J. McManus has joined Martin, Leigh, Laws & Fritzlen P.C., Overland Park.

Thomas J. Meek has been named vice president, general counsel, and secretary of Minerals Technologies Inc., New York.

Matthew C. Miller has joined the Social Security Administration as assistant regional counsel, Kansas City, Mo.

Benjamin R. Prell has joined Gaddy Geier & Brown P.C., Kansas City, Mo.

Peter L. Riggs has joined the U.S. Commodity Futures Trading Commission, Kansas City, Mo.

Ryan W. Rosauer has joined Weary Davis L.C., Junction City.

Mark A. Scott has joined the Law Office of Roger A. Reidmiller, Wichita.

Robert E. Shaver has joined New England Financial/MetLife, Wichita.

Amanda M. Spiker has joined Card Compliant LLC, Overland Park.

Jeffrey T. Tevis has joined Disability Advocates of Kansas, Wichita.

Jerrod A. Westfahl has been appointed president and chief executive officer of Purple Wave Auction, Manhattan.

**Changing Locations**

Leslie A. Boe is now with Hennessy & Boe P.A., 5940 Lamar Ave., Mission, KS 66202.

Leslie C. Byram has started her own practice, Leslie C. Byram P.A., 1251 NW Briarcliff Pkwy., Ste. 110, Kansas City, MO 64116.

Eric W. Collins has started the firm of Collins & Jones P.C., 895 E. Walnut St., Raymore, MO 64083.

Law Offices of Steven Ediger LLC has moved to 4310 Madison, Ste. 111, Kansas City, MO 64111.

Doster Guin LLC has changed its name to Doster Ullom LLC and moved to 6811 Shawnee Mission Pkwy., Ste. 310, Overland Park, KS 66202.

**Miscellaneous**

The Accident Recovery Team has changed its name to King, Brennan & Albin LLC, Wichita.

Anne E. Burke, Overland Park, was elected chair of the Kansas Supreme Court Nominating Commission.

Bradley E. Haddock, Wichita, was admitted as a member to the American Arbitration Association’s Roster of Neutrals.

Mark V. Heitz, Topeka, has been inducted into the Washburn Athletics Hall of Fame.

Todd A. LaSala and Tim A. Laycock, Kansas City, Mo., have earned Leadership in Energy and Environmental Design accreditation from the U.S. Green Building Council.

Craig Shultz, Wichita, was recently inducted into the International Academy of Trial Lawyers at their Mid-Year Meeting in San Francisco.

Michael P. Swisher, Lees Summit, Mo., has been named 2009 Civic Leadership Award Recipient by the West Gate Region of the Missouri Municipal League.

Robert V. Talkington, Iola, had his name set in the Sports Circle of Honor at Tyler (Texas) Junior College for being a star athlete more than 60 years ago.

Correction: Charles W. Mangrum and Danielle K. Schulte have joined Bever Dye L.C., Wichita. In the September issue of The Journal it was incorrectly reported that Charles L. Rutter had joined the firm.

The U.S. District Court for the District of Kansas is pleased to announce that Magistrate Judge Gerald B. Cohn joined the court on June 14, 2009. Judge Cohn will serve a one-year term in Wichita and focus primarily on Social Security cases during his tenure. Prior to his service in Kansas, Judge Cohn served as a magistrate judge in the District of Southern Illinois for 25 years and in the District of Tennessee for one year. Judge Cohn received a Bachelor of Arts degree from the Illinois College followed by a Juris Doctor degree from the University of Chicago School of Law. Following law school, Judge Cohn served six years in the U.S. Army. In his free time, Judge Cohn is an avid archaeologist.

**“Jest is for All” by Arnie Glick**

**GRILLED CHICKEN**

“So you admit that you really don’t remember what happened at the chicken coop on the night of August 4th!”

The Journal of the Kansas Bar Association 18 October 2009

www.ksbar.org
Obituary

Hugh D. Mauch

Hugh D. Mauch, 80, of Great Bend, died Aug. 5 at Central Kansas Medical Center in Great Bend. He was born June 22, 1929, in Nashville, Kan., the son of Adam and Della Suhler Mauch.

After graduating from Great Bend High School, Mauch went on to earn bachelor’s degrees in economics and history at Fort Hays State University. In 1956, he earned his law degree from Washburn University School of Law. While there, he was editor-in-chief of the law review and a member of the Phi Alpha Delta legal fraternity. He was a member of the Kansas Bar Association.

After working as a workers’ compensation examiner for several years, Mauch became a private practitioner in Great Bend, where he was associated with the Keenan Law Firm until 1986. In early 2009, he established the Hugh D. Mauch Law Scholarship to support western Kansas college students who plan to further their education at Washburn University School of Law.

Mauch is survived by his wife, Patricia White Engleman, of the home; a son, Dr. William Mauch, Salina; a daughter, Susan Mauch Wietharn, Topeka; a stepson, Greg Engleman, Austin, Texas; a stepdaughter, Jennifer Anderson, Sammamish, Wash.; five grandchildren; and four stepgrandchildren. He was preceded in death by his parents; a sister, Betty Gagelman; a stepson, Stacy Engleman; and his first wife, Kay Bryant.
“Good fences make good neighbors,” wrote Robert Frost in his poem “Mending Wall.” Nowhere is that more true than in our technologically connected age. Mobile phones, e-mail, and text messaging keep us in touch outside the home and office for good and bad. Good when a friend tracks you down for lunch. Not so good when a bad penny client intrudes on a quiet evening with family. Google Voice offers up free fence-building tools to let the good through and keep the bad at bay.

**One number to rule them all**

Google Voice offers a single telephone number that becomes Grand Central Station for all of your inbound phone calls and text messages. Hand out that one phone number instead of your multiple mobile, office, or home numbers. Callers are then routed to your various phones by configuring call groups. Set up a family group and load it with your family contact numbers to route their calls to your mobile phone. Put client contacts in their own group and they can be routed to your office phone. Personalized greetings and voice mail attendants are available for each call group as well.

The call groups can be easily reconfigured according to changing circumstances. If a client has a high-priority matter this week, you can move their contact to a “ring all” call group. Any call from that client would ring your office, mobile, and home number simultaneously. Once the emergency passes, return them to the call group that only rings your office. When you leave for vacation and do not want clients dumped to voice mail, a simple switch reroutes their calls to your partner. (Annoying solicitation calls can be routed to opposing counsel.)

**Voice mail as more than “Tag, you’re it!”**

Voice mail features of Google Voice provide new twists worth exploring also. One of the niftiest is transcribed voice mail. This feature will take dictation from your callers and e-mail or text the transcript to you. This is handy in cell-free areas where dialing in and picking up voice mail would be inappropriate. A glance at your e-mail or text can be a subtle way to find out why the partner called.

Voice mail transcription is also a quick-and-dirty way to handle dictation. Call and leave yourself a message to copy and paste to your document when you return to the office. Tests with the transcription prove it to work well when callers speak clearly and at moderate speed. Muffled callers and background noise can muddle the transcript though the audio voice mail is always preserved.

Call screening is strengthened by a call preview feature (ListenIn). Like old tape answering machines, you can listen in on a voice mail as it is delivered. If your caller just needed to pass on that a project is good to go and no interaction is needed, you hang up and let them finish the voice mail message. If eavesdropping on your own message convinces you to join the call, you can do that as well. Caller ID is quite robust on inbound calls to Google Voice but if a masked number comes through, the voice mail preview can assist in screening calls. You can even activate a recorder to preserve ongoing calls.

All text messages and voice mail (transcript and audio) is stored in a Gmail-style interface where they can be saved in folders, organized threads, or sorted to folders. Mobile applications also allow access from Blackberry or Android-powered phones. (As of the writing of this article, Apple refuses to allow the Google Voice application in its App Store.)

**Conference calling on the fly**

Prearranged conference calls are handy for many meetings but setting up the call conference provider and circulating access pass codes can be tiresome. With Google Voice, you can simply agree on a time for a conference call and as users dial in, you can listen in and approve attendees. There is a limit to four callers, however.

**Good fences**

Google Voice is a valuable tool in putting up a phone fence around your time and attention. Taming the flow of inbound phone calls is a cheap and easy way to make your phone a good neighbor who never drops by at inopportune moments.

**About the Author**

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
2009 Amendments to the Kansas Administrative Procedure Act and the Kansas Judicial Review Act

By Mary Feighny, Office of the Kansas Attorney General

During the 2009 session, the Kansas Legislature enacted most of the changes to Kansas Administrative Procedure Act (KAPA) and Kansas Judicial Review Act (KJRA) recommended by the Judicial Council’s Administrative Procedure Advisory Committee (Committee).¹ The Committee had spent the previous two-and-one-half years reviewing the acts and taking into consideration comments from the private bar, government attorneys, appellate court decisions, proposed changes to the Revised Model State Administrative Procedure Act, and bills under consideration by the Legislature. Some of the changes were prompted by legislative concern whether a state agency’s role in investigating and prosecuting violations of its laws is compatible with the agency’s role as a fair and impartial adjudicator.² The Committee’s recommendations were designed to “strengthen the protections for fair and impartial judgments without sacrificing agency expertise or interfering with policy making responsibilities.”³

This article highlights the substantive changes, which can be found at L. 2009, Ch. 109.

KAPA Amendments

Confidentiality/crime victims:⁴ In KAPA proceedings, the presiding officer may, under certain circumstances, keep crime victim contact information out of the public record. Public records providing contact information may also be discretionarily closed under the Kansas Open Records Act (KORA).⁵

Computation of time:⁶ When calculating time periods, some practitioners relied upon the time computation rule in the Rules of Civil Procedure.⁷ Under the 2009 amendments, calculating time periods is specifically provided. “Day” means calendar day and, therefore, intermediate Saturdays, Sundays, and legal holidays are included. “Business day” is any day that is not a Saturday, Sunday, or a legal holiday.

Serving as presiding officer/advisor to presiding officer:⁸ In general, a person cannot be a presiding officer if that person served in an investigatory or prosecutorial capacity in a proceeding arising out of the same event nor can a person serve as a presiding officer if he or she was supervised by someone who served in that capacity. Additionally, a person cannot provide confidential legal or technical advice to a presiding officer if that person either served in an investigatory or prosecutorial capacity in a proceeding arising out of the same event or was supervised by someone who served in that capacity.

Default orders: KAPA authorizes presiding officers to issue default orders. However, once the default order is issued, it was unclear what the next procedural step was. Now, if the presiding officer is authorized to issue final orders, then a default order is deemed a final order. If not, the default order is deemed an initial order.

Petitions for intervention: Time computation is measured in “business” days – not calendar days. “Business day” is defined at § 4 of L. 2009, Ch. 109.

Hearing:¹¹ The 2009 amendments clarify that hearings are not “meetings” for purposes of the Kansas Open Meetings Act. KAPA has always allowed hearings to be open to the public. However, the 2009 amendments authorize the presiding officer to close parts of the hearing if a statute requires or authorizes closure.

Ex parte communication:¹² The ex parte prohibition now precludes communication between the presiding officer and someone who has investigated or prosecuted the matter that is the subject of the proceeding.¹³

Review of initial orders:¹⁴ Agency heads can review initial orders on a “de novo” basis on the record.¹⁵ The Committee noted that this broad review sometimes resulted in a lack of deference to the independent hearing officer’s decision, especially when the decision was based upon witness demeanor and credibility.¹⁶ Now, agency heads must give “due regard” to the hearing officer’s observations and credibility determinations. Agency heads who disagree with a decision should be

FOOTNOTES
1. 2009 SB 87.
5. § 2 amends KORA by providing for discretionary closure of contact information for all crime victims. See also L. 2009, Ch. 143, § 17(a) (47). However, another amendment to KORA allows for discretionary closure only for victims of stalking, domestic violence, and sexual assault. L. 2009, Ch. 125, § 1(a)(47).
7. K.S.A. 60-206(a) ("When an act is to be performed within any prescribed time period under any law of this state ... and the method for computing time is not otherwise specifically provided, the method prescribed herein shall apply.").
8. K.S.A. 77-520, as amended by L. 2009 Ch. 109, § 7.
10. K.S.A. 77-522, as amended by L. 2009, Ch. 109, § 11.
11. K.S.A. 77-523, as amended by L. 2009, Ch. 109, § 12.
13. The ex parte prohibitions do not apply to the Kansas Corporation Commission, the Insurance Commissioner, and the Director of Taxation.
prepared to cite to the record when disputing those observations and determinations. Petition for reconsideration of a final order: Findings of fact and conclusions of law are required in an order on reconsideration that changes a prior order but are not required in an order that merely states that the prior order will be reconsidered. When there are multiple parties and one party files a petition, the agency retains jurisdiction for any other timely filed petition.

Agency record: The agency record includes oral and written statements presented at the hearing but excludes certain “confidential internal communications.” Conference hearings: Prehearing conferences are now authorized for conference hearings.

Summary proceedings: The Committee’s initial recommendations provided that the burden of proof would remain with the agency where a hearing is requested. However, when the bill reached the Senate Judiciary Committee, an attempt was made to limit the use of summary proceedings. The House struck the Senate amendment and a conference committee resolved the issue by allowing summary proceedings only where there is an investigation of the facts and the agency has a good faith belief that the allegations will be supported by evidence. The 2009 amendments clarify that a summary order is not effective until after the time expires for requesting a hearing. If a hearing is timely requested, the order is not effective until a final order is issued.

KJRA Amendments

New name: The law formerly known as “The Act for Judicial Review and Civil Enforcement of Agency Actions” is now “The Judicial Review Act.” Despite its removal from the Act’s title, agency orders can still be enforced through the district court.

No application to sex predator cases: The KJRA does not apply to civil commitments of sexually violent predators, thereby legislatively overruling the holding in Williams v. DesLauriers, 38 Kan. App. 2d 629 (2007).

Exhausting administrative remedies: One of the Committee’s goals was to remove “unnecessary technical barriers to judicial review of agency action.” Noting that case law provides exceptions to the general rule requiring exhaustion of administrative remedies before proceeding to district court, the amendment now codifies this exception to the extent that administrative remedies “are inadequate or would result in irreparable harm.”

Petition requirements: Failure to include all of the information listed in K.S.A. 77-614 no longer deprives a court of jurisdiction. Leave to amend shall be “freely given when justice so requires.” This amendment legislatively overrules Pittsburg State University v. Kansas Board of Regents, Bruch v. Kansas Dept of Revenue and Kuenstler v. Kansas Dept of Revenue. The requirement addressing entitlement to judicial review and identification of the issues for review are separate and distinct requirements.

Service requirements: Substantial compliance in serving process is now sufficient if the party served was aware that the petition or appeal was filed. The amendment is similar to service of process in the Rules of Civil Procedure and legislatively overrules Clauts v. Kansas Dept of Revenue.

Raising new issues: Prior to the 2009 amendments, a petitioner could request that an issue be reviewed notwithstanding that it was not raised before the agency in situations where the agency action occurred after administrative remedies were exhausted. Now, a petitioner can make a request when the issue arises from agency action that was not “first reasonably knowable” to the petitioner until after exhaustion of administrative remedies. This would cover, for example, ex parte communications discovered after a petition for judicial review was filed or issues involving the agency’s decision-making process.

20. K.S.A. 77-532, as amended by L. 2009, Ch. 109, § 17.
22. K.S.A. 77-534, as amended by L. 2009, Ch. 109, § 18.
23. K.S.A. 77-537, as amended by L. 2009, Ch. 109, § 19.
27. K.S.A. 77-601, as amended by L. 2009, Ch. 109, § 23.
28. K.S.A. 77-608 (interlocutory review of nonfinal agency service requirements).
29. K.S.A. 77-612, as amended by L. 2009, Ch. 109, § 25.
33. See also K.S.A. 77-608 (interlocutory review of nonfinal agency action permissible “if postponement of judicial review would result in an inadequate remedy or irreparable harm disproportionate to the public benefit derived from postponement.”) Friedman v. Kansas State Bd of Healing Arts, 287 Kan. 749 (2009) (party cannot circumvent exhaustion requirement by claiming interpretation of statute best determined by court).
34. K.S.A. 77-614, as amended by L. 2009, Ch. 109, § 26.
37. K.S.A. 77-614(b)(5).
38. K.S.A. 77-614(b)(6).
41. K.S.A. 77-614, as amended by L. 2009, Ch. 109, § 26(c).
42. K.S.A. 60-204.
44. K.S.A. 77-617, as amended by L. 2009, Ch. 109, § 27.
Standard of review: KAPA has always required a court to review the entire record when determining whether an agency’s facts are supported by substantial evidence. However, the practice has been to consider only the evidence favoring an agency’s decision and disregarding contrary evidence. This approach, according to the Committee, “accords excessive deference to the agency and erects a nearly insurmountable barrier for parties challenging agency action.”

The 2009 amendments now define “in light of the record as a whole” to embrace “all the relevant evidence in the record cited by any party” that both detracts from and supports the findings of fact, including “any determinations of veracity by the presiding officer who personally observed the demeanor of the witness.” In order to assuage concerns by agencies that a court will apply a de novo standard, the amendment codifies case law that courts won’t “reweigh” the evidence or engage in de novo review.

Herrera-Gallegos v. H & H Delivery Service Inc. considers the new definition in the context of workers’ compensation. In Herrera-Gallegos, the Court of Appeals reviewed the decision of the Workers’ Compensation Board (Board) that Herrera-Gallegos was permanently and totally disabled. In doing so, the court applied the following principles:

1. The Board’s factual findings are reviewed to determine whether substantial evidence supports the findings. “Substantial evidence” means such evidence as a reasonable person might accept as sufficient to support a conclusion.

2. The court determines whether the evidence supporting the Board’s factual findings is substantial when considered in light of all the evidence. This means that the court will consider the credibility determinations by the hearing officer. Should the Board disagree with its hearing officer, the Board should provide reasons for disagreeing.

3. The court will consider the Board’s explanation of why the relevant evidence in the record supports its material findings of fact.

4. In considering all of the evidence, including evidence that detracts from the Board’s factual findings, a court will examine whether “the evidence supporting the agency’s decision has been so undermined by cross-examination or other evidence that it is insufficient to support the agency’s decision.” In Johnson County Developmental Supports v. Kansas Dept. of Social & Rehabilitation Services, the court concluded that evidence that is not “relevant” need not be considered in determining whether an agency’s decision is supported by substantial evidence.

Standard of review/agency’s interpretation of statutes: The Kansas appellate courts have moved away from according “great” deference to an agency’s interpretation of its statutes. Now, where the facts are undisputed, an administrative body’s determination on a question of law is not conclusive. Although persuasive, it is not binding on the court.

Burden of proof: The Legislature rejected the Committee’s amendment that would have codified the burden of proof at “clear and convincing” in actions involving a person’s occupational or professional license. The Committee believes that this higher burden of proof – applied in attorney disciplinary cases – is appropriate in other licensing contexts. The Kansas appellate courts have not resolved the issue.

About the Author

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Among all the objects sought to be secured by government, none is more important than the preservation of the public health; and, an imperative obligation rests upon the state through its proper instrumentalities or agencies to take all necessary steps to accomplish this objective."
I. Introduction

Traditionally, the primary means of protecting public health was through preventing the spread of infectious diseases.\(^5\) Although the modern practice of public health extends far beyond infectious disease control, controlling the spread of infectious diseases remains one of the core functions of public health.\(^3\) This article will review the statutory and regulatory scheme in Kansas for preventing, controlling, and responding to infectious diseases that infect humans. The goal of the article is to provide readers with sufficient understanding of public health law so that they know:

- Who can exercise public health powers;
- What responsibilities, and rights, do individuals have when subjected to public health statutes or regulations; and
- What are the key statutes and regulations that address public health laws regarding infectious diseases.

While the primary audience for whom this topic is of relevance will be those attorneys working in the field of public health, as counsel to public health or other related governmental entities or to health care practitioners who diagnose and treat infectious diseases; attorneys who advise and represent persons directly affected by the exercise of governmental public health powers should also be aware of the source and scope of those powers, e.g., those persons subject to mandated reporting laws, or those clients who interact with other aspects of governmental public health authority. Many businesses and organizations are also subject to some form of regulation of infectious diseases, ranging from barbers to tattoo artists, so attorneys representing those clients may benefit from this article as well. Finally, all practitioners should at least have a basic understanding of this area of law because any client, whether individual, business or organization, may be subject to the exercise of the government’s public health power if necessary to prevent or control the spread of an infectious disease.

This article will focus on the control of infectious diseases that have been determined by the Kansas Legislature or the secretary of the Kansas Department of Health and Environment (KDHE) to require particular attention.\(^4\) There is the general class of designated infectious diseases that includes tuberculosis (in both its active or communicable form, as well as its latent or noncommunicable form), but excludes Acquired Immune Deficiency Syndrome (AIDS). Because tuberculosis, in its active form is subject to a specific act,\(^5\) as is AIDS, the specific laws regarding those diseases will be also reviewed. This article will also address a variety of laws regarding infectious disease control, as well as penalties for violating infectious disease laws.

The current state of the law of infectious disease control in Kansas is statutory and regulatory. There have been no reported Kansas court opinions regarding infectious disease control since the late 1940s, well before significant amendments and additions to the statutes and regulations regarding infectious disease control, as well as the increased protection for due process rights developed since the 1960s.\(^5\) Certain Kansas Supreme Court cases involving infectious disease and public health powers will be noted to the extent they may still provide persuasive authority.

II. Federal Authority

The full federal role in public health is beyond the scope of this article, but a brief overview of that role provides context. Any powers not enumerated for exercise by the federal government are reserved to the states by the 10th Amendment of the U.S. Constitution. The power to preserve the public health is part of the police power,\(^7\) which has not been given to the federal government, and is therefore reserved to the states.\(^8\) However, the federal government does have the power to address public health issues, including control of infectious disease, through its international and interstate powers, as well as by its spending power related to the general welfare.\(^9\)

The primary federal entities with public health powers regarding infectious disease control are the Department of Health and Human Services (DHHS), the Centers for Disease Control and Prevention (CDC)\(^10\) and the U.S. Public Health Service (PHS), which is headed by the surgeon general of the United States.\(^11\) In response to an infectious disease situation, the secretary of DHHS has the authority to declare a state of public health emergency exists.\(^12\) Once such an emergency is declared, the secretary may then provide funding to assist in the response to the situation.\(^13\) The declaration also triggers the ability of the Food and Drug Administration to issue Emergency Use Authorizations that allow unapproved use of products for response to the infectious disease.\(^14\) The secretary is also authorized to waive certain regulatory requirements, such as penalties for violations of the Emergency Medical Treatment and Active Labor Act, once a state of public health emergency has been declared.\(^15\)

The CDC and the PHS are agencies of DHHS.\(^16\) The CDC’s responsibilities “include population-based initiatives, __FOOTNOTES__

3. Id.
4. The diseases are listed in K.A.R. 28-1-2.
5. K.S.A. 65-116a \textit{et seq.}
6. A similar observation is made regarding public health statutes. Gostin, 99 Colum. L. Rev. at 101-118.
7. This power is defined as “the inherent power of government to take action, which promotes the public health, safety, welfare, or morals.”
9. Id., 11-12; 15.
10. The Centers for Disease Control and Prevention were previously known as the Center for Disease Control, hence the acronym CDC; after the agency was renamed it retained the use of CDC as its acronym.
12. 42 U.S.C.A. § 247d \textit{et seq.}
13. Id.
15. 42 U.S.C.A § 1395dd; § 1320-b.5.
such as childhood vaccination, prevention of chronic diseases and injuries, and emergency response to infectious diseases.”

If the CDC determines state or local public health authorities are not taking appropriate actions to prevent the interstate or international spread of disease, the director can take such measures he or she determines necessary to prevent the spread of disease. The surgeon general can issue and enforce quarantine regulations to prevent the introduction or spread of infectious disease into the United States from a foreign country, or between states.

III. Kansas State Government Authority

The Kansas Constitution assigns the responsibility of the exercise of the powers reserved to the states by the federal constitution to the Kansas Legislature. The Legislature has placed the general authority for protecting the public health with the secretary of the KDHE. The department is divided into two divisions, the division of environment and the division of health. The division of health is administered by a director who must be a licensed physician with experience and education in public health. The secretary of KDHE exercises “general supervision of the health of the people of the state” and has the authority to investigate diseases and prevent the spread of infectious disease. The secretary also has authority to issue regulations to carry out public health responsibilities. As discussed below, the frontline responsibility rests with the local board of health and local health officer; however, if local authorities fail to properly respond to infectious disease outbreaks, the secretary has the power to quarantine the area.

The secretary has identified specific diseases for mandated reporting, and requirements for isolation or quarantine conditions. These diseases include, but are not limited to, anthrax, cholera, leprosy, malaria, plague, and tetanus. In addition to the specific diseases listed in K.A.R. 28-1-2, the secretary has also designated for reporting “any exotic or newly recognized disease, and any disease unusual in incidence or behavior, known or suspected to be infectious or contagious and constituting a risk to the public health.” An example of a specified condition for isolation, regarding plague, is that persons infected with the plague have to remain in respiratory isolation until they have completed 48 hours of antibiotics. If the secretary has not specified the conditions for isolation or quarantine, the local health officer must order quarantine and isolation under appropriate conditions in light of the disease’s incubation period, the communicable period, and the usual mode of transmission.

A. Mandated reporting of designated infectious diseases

The Kansas Legislature has mandated reporting of suspected or known cases of infectious disease by:

- Persons licensed to practice the healing arts or engaged in a postgraduate training program approved by the state board of healing arts,
- licensed dentists,
- licensed professional nurses,
- licensed practical nurses,
- administrators of hospitals,
- licensed adult care home administrators,
- licensed physician assistants,
- licensed social workers,
- teachers,
- school administrators, and
- laboratories certified under the federal clinical laboratories improvement act pursuant to 42 C.F.R. Part 493.

If any of these individuals suspect or know that any person has contracted or has died from an infectious disease, the information, including the person’s name and address, is to be immediately reported to the local board of health or the local health officer.

Child care facilities, attendant care facilities for children and youths, and detention centers and secure treatment centers for children and youth must also report infectious disease cases to the local health department. The operator of any infant-toddler Individuals with Disabilities Education Act (IDEA) program must report any case of infectious disease, involving the operator, staff member, child, or youth in the program, to the local health department. Child care facilities and preschools must inform other parents of the nature of the disease if a child is absent due to an infectious disease.
Some of these mandated reporters may be subject to federal confidentiality requirements, such as health care providers who are covered entities under the Health Information Portability and Accountability Act Privacy Rule (HIPAA), or teachers and school administrators subject to the Federal Educational Rights and Privacy Act (FERPA). Both HIPAA and FERPA contain exceptions that allow persons subject to those acts to disclose information as required to protect the public health.43

B. Kansas confidentiality and privacy statutory requirements

There are specific confidentiality requirements regarding infectious disease reporting information imposed by Kansas statute. The information must be kept confidential and can only be disclosed in the following limited circumstances:

1. If no person can be identified in the information to be disclosed and the disclosure is for statistical purposes;
2. If all persons who are identifiable in the information to be disclosed consent in writing to its disclosure;
3. If the disclosure is necessary, and only to the extent necessary, to protect the public health;
4. If a medical emergency exists and the disclosure is to medical personnel qualified to treat infectious or contagious diseases (any information disclosed pursuant to this paragraph shall be disclosed only to the extent necessary to protect the health or life of a named party); or
5. If the information to be disclosed is required in a court proceeding involving child abuse and the information is disclosed in camera.44

The information also can, and must, be disclosed to the KDHE.45 Mandated reporters are shielded from civil or criminal liability for disclosure of the information, when the information is reported in good faith and without malice.46

C. Kansas local government authority

The board of county commissioners serves as the local board of health, except for those counties that have a joint city-county board of health, or that may have otherwise used home rule authority to adopt alternative provisions.47 Each board appoints a local health officer, who must be “a person licensed to practice medicine and surgery, preference being given to persons who have training in public health.”48 In counties with less than 100,000 residents, the local health officer can be a qualified local health program administrator, as long as a licensed physician or dentist is designated as a consultant.49 The local health officer serves at the pleasure of, and as an advisor to, the local board of health.50 The Kansas Supreme Court has noted that local boards of health may not necessarily have the legal capacity to sue or be sued, but that the board of county commissioners, as the governing body, is subject to suit.51

The local health officer must investigate, or have investigated, any case of smallpox, diphtheria, typhoid fever, scarlet fever, acute anterior poliomyelitis (infantile paralysis), epidemic cerebro-spinal meningitis, and such other acute infectious, contagious, or communicable diseases as may be required.52 The local health officer can use “all known measures” necessary to prevent the spread of infectious disease.53

Any local board of health or local health officer, once informed of a case of infectious disease, or of a death resulting from such disease, must immediately take supervision over the case to ensure the patient is properly cared for, and that any isolation, restriction of communication, quarantine, or disinfection requirements are complied with.54 The local board of health or local health officer must immediately communicate the information regarding existing conditions to the secretary of the KDHE.55 The local board of health or local health officer may close public gatherings if needed to control the spread of any infectious disease.56

D. The 2005 act

In 2005, the Kansas Legislature adopted a new infectious disease control act regarding the authority of the secretary of KDHE and the local health officer to respond to cases of infectious disease,57 notwithstanding the authority granted in K.S.A. 65-119 (general supervision of infectious disease cases), 65-122 (control of infectious disease in schools and licensed child care facilities), 65-123 (funerals of persons suffering from an infectious disease), 65-126 (KDHE authority to quarantine local areas where appropriate measures to control the spread of infectious disease are not being achieved), 65-128 (authority of KDHE to issue regulations regarding infectious diseases), and any regulations adopted under those statutes.58 This act applies when the secretary or a local health officer is “investigating actual or potential exposure to an infectious or contagious disease that is potentially life-threatening.”59

In those cases, the local health officer, or the secretary of KDHE, may issue the following orders under the stated conditions:

43. For the HIPAA Privacy Rule, the exception is found at 45 C.F.R. § 164.512(b). The Centers for Disease Control and Prevention have issued a guidance document concerning public health and HIPAA. MMWR (Morbidity and Mortality Weekly Report), May 2, 2003, available online at http://www.cdc.gov/mmwr/preview/mmwrhtml/ m2e411a1.htm (last checked June 29, 2009). The Federal Educational Rights and Privacy Act exception is found at 34 C.F.R. § 99.36, but is to be “strictly construed.”
44. K.S.A. 65-118(c).
46. K.S.A. 65-118(b).
47. K.S.A. 65-201 et seq. The act is nonuniform, and therefore counties can charter out under their home rule power and adopt alternatives to the local board of health act. Att’y Gen. Op. No. 99-63.
49. Id.
50. Id.
53. Id.
55. Id.
56. Id.
59. Id.
• an order requiring a person to be evaluated or treated, if appropriate and necessary, if the local health officer or the secretary has reason to believe the person has been exposed to an infectious or contagious disease;

• an order requiring a person exposed to an infectious disease to be isolated or quarantined, if the local health officer or the secretary determines it is medically necessary and reasonable to prevent or reduce the spread of the disease until the person “no longer poses a substantial risk of transmitting the disease or condition to the public”; and

• an order requiring a person to be isolated or quarantined if the person refuses vaccination, medical examination, treatment or testing under this act, until the person “no longer poses a substantial risk of transmitting the disease or condition to the public.”

An order for isolation and quarantine must be issued to the person or persons subject to the order. The order must state:

(1) The identity of the individual or group of individuals subject to isolation or quarantine;

(2) the premises subject to isolation or quarantine;

(3) the date and time at which isolation or quarantine commences;

(4) the suspected infectious or contagious disease causing the outbreak or disease, if known;

(5) the basis upon which isolation or quarantine is justified; and

(6) the availability of a hearing to contest the order.

Except as provided below, the order must be written and served on the person or persons before they are placed in isolation or quarantine. If the notice required under the act is impractical because of the number of persons or the areas involved, the local health officer or the secretary must fully inform the person or persons subject to the order using the best possible means available.

Any person or group isolated or quarantined under this law may request a hearing in district court, as provided by K.S.A. 60-1501 et seq. (the habeas corpus act), but the provisions of K.S.A. 65-129a et seq. apply to any order issued under the 2005 act to the extent there is any conflict between the 2005 act and the habeas corpus act. The request for a hearing cannot stay the isolation or quarantine order, and a court cannot enjoin enforcement of the order. The court is required to hold the hearing no more than 72 hours after receiving the request. However, the court may extend the time for the hearing upon request and a sufficient showing by the local health officer or the secretary that extraordinary circumstances justify the extension. The court should take into consideration, in reviewing the request for extension, the rights of the person seeking release, protection of the public, the health emergency severity and the availability of witnesses and evidence, if appropriate.

Any person whose freedom is restrained by a public health order, or a parent, guardian, or next friend of the person restrained, may seek a writ of habeas corpus. No docket fee is required, if the petitioner files a poverty affidavit. The petition must be verified and state:

(1) The place where the person is restrained and by whom;

(2) the cause or pretense of the restraint to the best of plaintiff’s knowledge and belief; and

(3) why the restraint is wrongful.

In the event that an individual cannot personally appear before the court, proceedings may be conducted by the person’s authorized representative and by any means that allows anyone else to fully participate. In any proceedings brought under this section, the court may order the consolidation of individual claims into group claims where:

(1) The number of individuals involved or affected is so large as to render individual participation impractical;

(2) there are questions of law or fact common to the individual claims or rights to be determined;

(3) the group’s claims or rights to be determined are typical of the affected individual’s claims or rights; and

(4) the entire group will be adequately represented in the consolidation.

The court must appoint counsel to represent petitioners not otherwise represented by counsel.

62. Id.
66. K.S.A. 2008 Supp. 65-129c(c)(2)(A). “If the order applies to a group of individuals and it is impractical to provide written individual copies under paragraph (1) of subsection (c), the written order may be posted in a conspicuous place in the isolation or quarantine premises.”
72. K.S.A. 60-1501(a).
74. K.S.A. 60-1502.
78. K.S.A. 60-1503.
The petition must be presented promptly to a district court judge and handled in the same manner as any other assignment of court business.78 The assigned judge must promptly examine the petition.79 If the examination plainly shows that the petitioner is not entitled to relief, the petition may be dismissed with costs assessed to the plaintiff.80 Otherwise, the judge should issue the writ with directions that the local health officer or secretary of the KDHE file their answer by the time fixed by the court.81 Although ordinarily the writ would require production of the person, because the quarantine or isolation order is not stayed during the pendency of the hearing, the court cannot order the person be allowed to attend the hearing.82 The writ may be served at anytime (i.e., on weekends or holidays) by the sheriff or any other person designated by the court.83

The answer by the secretary of local health officer must be verified and shall contain:

(1) A statement of the authority or reasons for the restraint,
(2) a copy of the written authority for the restraint, if any,
(3) a statement as to whom, the time, place, and reason for the transfer, if the custody of the party has been transferred, and
(4) a statement as to the reasons why the party cannot be produced, if it is claimed that the party cannot be produced for any reason.84

The contents of the answer, unless controverted by the petitioner or by the evidence presented, should be accepted as true.85 The court may appoint one or more competent physicians to examine the person, and report any findings to the court.86

The court should order release of the person from quarantine or isolation unless the court determines the order is “necessary and reasonable to prevent or reduce the spread of the disease or outbreak believed to have been caused by the exposure to an infectious or contagious disease.”87 In making the court’s determination, the judge may consider the means of transmission, degree of contagion, and the degree of public exposure to the disease.88 An order of the court authorizing the isolation or quarantine issued under this section shall:

(1) Identify the isolated or quarantined individual or group of individuals by name or shared characteristics;
(2) specify factual findings warranting isolation or quarantine; and

(3) except as provided in [K.S.A. 65-129c(c)(2)], be in writing and given to the individual or group of individuals.89

If the court finds the notice is impractical due to the number of individuals, or geographical area involved, the court, “using the best possible means available,” must ensure the persons subject to the order are fully informed.90 The court’s order authorizing continued isolation or quarantine is only effective for a maximum of 30 days.91 If the court upholds the order, the writ is dissolved with costs charged to the petitioner.92 Otherwise, the court must order the person be released or “make such other orders as justice and equity” require.93

If an appeal is filed, the court’s order releasing the person from quarantine or isolation may be stayed on such terms as provided for by the court,94 but an order upholding the quarantine and isolation, as noted previously, is not subject to stay under the 2005 act. The appellate court can order alternative scheduling deadlines for filing the record on appeal, “if there is a reasonable explanation for the need for such action.”95 Once the record is received in the appellate court, the appellate court can set any remaining scheduling, e.g., briefing or when the case is considered submitted.96 These cases, however, must “be heard at the earliest practicable time.”97 As in the district court, the petitioner-appellant is not required to attend and the matter is considered on the “law and the facts arising upon record.”98 The appellate court issues its judgment, including any orders that “the law and the nature of the case may require,” as well as any orders regarding the costs, including “allowing costs and fixing the amount, or allowing no cost at all.”99

E. The Active Tuberculosis Act100

This act authorizes the secretary of the KDHE, the secretary’s designee, and local health officers (all who are considered, for the purposes of the act, a “health officer”), to take certain actions when the health officer has a reasonable belief a person has active tuberculosis.101 The person may voluntarily consent to be examined; however if the person refuses, the health officer can order the person to be examined by a qualified physician.102 If, after examination, it is determined the person has active tuberculosis, the person must either be admitted to a treatment facility, or if the health officer determines “there is no danger to the public or other individuals,” the person may be treated on an outpatient basis.103 If the person is being treated as an outpatient, the health officer must inform the person what precautions must be taken to prevent the spread

79. Id.
80. Id.
81. Id.
83. K.S.A. 60-1503(c), (d).
84. K.S.A. 60-1504(c).
85. K.S.A. 60-1504(d).
86. K.S.A. 60-1505(b), as amended L. 2009, Ch. 103, § 13.
92. K.S.A. 60-1505(d).
93. Id.
94. Id.
95. Id., K.S.A. 60-1505(e)(1).
96. Id.
97. K.S.A. 60-1505(e)(2).
98. Id.
100. K.S.A. 65-116a et seq.
102. Id.
103. Id.
of the disease to others. The health officer must supervise the case to ensure the precautions are being followed.

If the person has either refused or failed to:
- be examined,
- be admitted to a treatment facility if necessary,
- follow precautions for outpatient treatment, or
- follow directions of his or her private physician,
the health officer may notify the county or district attorney to institute proceedings to enforce the requirements of the act. The act preserves a person’s right to choose the mode of treatment. If, however, in choosing a mode of treatment, the person continues to present a threat of infection to others, the local health officer can require the person be isolated at a treatment facility, or if isolated at home, the officer can order the person to follow any necessary precautions to prevent the spread of disease.

After proceedings are instituted in district court, the person may either plead guilty or not guilty. If he or she pleads guilty, or is convicted by the court of failing to comply, the court must commit the person to a qualified treatment facility. Upon commitment, if necessary, the person may be isolated from other patients, and may be restrained to prevent the person from leaving the facility. The person must remain at the facility until the director of the facility certifies the person no longer is a danger to others. The director must notify the state health officer that the person is being discharged. There is nothing in the act that precludes repeating the process where a person so discharged has become actively contagious again.

F. Acquired Immune Deficiency Syndrome Act

The Kansas Legislature has excluded AIDS and “any causative agent” of AIDS from the general class of reportable infectious diseases. The term “infectious disease” under the AIDS act is limited to AIDS. Any physician, administrator of a medical care facility, or lab director knowing a person has contracted AIDS, or has died from it, or that the person is infected with the Human Immunodeficiency Virus (HIV), must report the information directly to the secretary of the KDHE. Reports made in good faith are provided immunity from civil or criminal liability. After reporting, the information must be kept confidential and cannot be disclosed, even if subpoenaed except as otherwise authorized by law. Physicians are allowed to disclose information to corrections employees who may be placed in contact with the infected person’s bodily fluids, but the corrections employees are limited to using that information solely as necessary in providing treatment to the person. The act does not provide any quarantine or isolation authority, and expressly states the act does not create any duty to warn others.

G. Miscellaneous infectious disease statutes and regulations

No person with an infectious disease, that is dangerous to the public health, may attend any public, parochial, or private school, or licensed child care facility. The parent or guardian, the principal or other person in charge of the school or licensed child care facility all have a duty to exclude any child or other person having a known or suspected case of infectious disease until the prescribed period of isolation or quarantine for the particular disease has ended. An attending health care provider or local health officer, if they find after examination that the person is no longer infectious, may provide written certification to the person in charge of the school or licensed child care facility, at which time the person can be readmitted to the school or child care facility. As an additional measure against the spread of certain infectious diseases, children must be immunized before attending school. Exceptions to this requirement are allowed if a physician certifies the child’s health would be compromised if immunized, or a parent files a religion based objection to the required immunization.

The Legislature has also regulated the conduct of funeral services for persons who died with an infectious disease: the funeral must be conducted in compliance with any applicable KDHE regulations, if the disease required quarantine of contacts, the public funeral service must be a closed casket, and the contacts subject to quarantine who attend the funeral must be adequately isolated from the public. Ordinarily, funerals and burials are supervised by a licensed funeral director, but Kansas law allows a family or religious group to conduct burials, unless the death resulted from an infectious disease. Whenever a person dies from an infectious disease, the person transporting the body must be informed of the infectious disease cause of death, and in turn, when delivering the body, that person must inform the person to whom he or she is delivering the body of the same information. Failing to properly guard against the spread of infectious disease is grounds for any proceeding involving a minor.

105. Id.
106. K.S.A. 65-116d.
109. Id.
110. Id.
111. Id.
112. K.S.A. 65-128(b).
114. K.S.A. 65-6002(a); (b).
115. K.S.A. 65-6002(c); 65-6016(c).
116. K.S.A. 65-6002(d). The information can be disclosed if de-identified and is for statistical purposes, if the persons involved have consented to disclosure in writing, if necessary to protect the public health, in a medical emergency where necessary to protect someone’s health, or if disclosed in camera for any proceeding involving a minor. Id.
117. K.S.A. 65-6016(a).
118. K.S.A. 65-6016(b).
120. Id. The prescribed period for any particular disease can be found in K.S.A. 28-1-6, e.g., chickenpox cases require isolation for the lesser of either six days following the first crop of vesicles, or until the lesions have crusted.
121. K.S.A. 65-122.
122. K.S.A. 72-5209(a).
123. K.S.A. 72-5209(b).
124. K.S.A. 65-123.
125. K.S.A. 65-1713b.
126. K.S.A. 65-2438. The information regarding the infectious disease must be kept confidential and only disclosed as provided for in this statute. Id.
for disciplinary proceedings regarding mortuary licenses.127 Before a body can be cremated, the crematory must have a written authorization that includes a statement whether the death resulted from an infectious disease.128 Persons applying for an embalming license must show a reasonable knowledge of sanitation and disinfection procedures where death results from an infectious disease.129

Before an out-of-state association can place a child from out of state into a family home in Kansas, it must certify that the child does not have an infectious disease.130 When applying to register a private residence as an adult family home, the applicant must certify no resident has an infectious disease, and to provide a written statement from a physician, nurse practitioner or physician’s assistant that the applicant and any family members are free from infectious diseases.131 No person may maintain a child care facility or maintain a family day care home if they know therein resides, works, or regularly volunteers any person with an infectious disease.132 Adult care homes cannot admit residents with communicable diseases.133

Food care workers who have an infectious disease cannot work until they are no longer infectious.134 Operators of assisted living facilities, residential health care facilities, home plus facilities, adult day care facilities, or boarding homes must prohibit employees with infectious disease from coming into direct contact with a resident, the resident’s food, or the resident’s care equipment.135 Visitors to maternity centers must be screened for infectious diseases.136 Persons working or volunteering at any Infant-Toddler Services IDEA program must be free from any infectious disease.137 No employer can allow any person to work, nor can the employee work, in any building or vehicle used for producing, preparing, manufacturing, packing, storing, selling, distributing, or transporting food or drugs, if the employee has “any venereal disease, smallpox, diphtheria, scarlet fever, tuberculosis or consumption, typhoma, typhoid fever, epidemic dysentery, measles, mumps, German measles (Rothein), whooping cough, chicken pox, or other contagious disease.”138 Anyone handling, preparing, or manufacturing “soda water beverages” cannot have any infectious disease.139 Employees at lodging facilities must be free of infectious diseases that can be transmitted to other employees or guests in the course of employment, or who are carriers of organisms that can cause a communicable disease.140 Employees at nonmedical resident care facilities cannot work when they have an infectious disease.141

The state board regulating barbers can refuse to issue or re-new, or can revoke or suspend a barber’s license if he or she has an infectious disease.142 Persons screening newborns for hearing concerns, who are not licensed to screen infants for hearing problems, must be free from infectious diseases that are transmissible to newborns and infants.143 Before a person may be qualified as a driving school instructor, he or she must have a doctor’s certificate that they do not have any contagious disease.144 No licensee or apprentice at a school or training establishment for the practice of cosmetology can have an infectious disease, nor can a person be provided services if the person is known to have an infectious disease.145 The same rule applies to barber schools or shops, as well as tattoo or body piercing establishments.146 Any member of the board of barber examiners, or a health officer, may require a barber to submit to a physical examination if the barber is suspected to have an infectious disease.147

H. Enforcement of infectious disease law and penalties for noncompliance

The local health officer, or the secretary of the KDHE, under the 2005 act, “may order any sheriff, deputy sheriff or other law enforcement officer of the state or any subdivision to assist in the execution or enforcement of any order issued under” that act.148 If a person or the person’s immediate family member is under an isolation or quarantine order issued by the secretary of the KDHE or the local health officer, the employer, public or private, cannot discharge the employee where the sole basis for the discharge is the order of isolation or quarantine.149 It is also a crime to knowingly expose someone to a life threatening communicable disease through use of hypodermic needles or sexual intercourse.150

Violating any provision of the tuberculosis act, or of any rules or regulations of a tuberculosis treatment facility, or if a patient is disorderly, is a misdemeanor.151 Violating, refusing or neglecting to obey any AIDS act provision, including KDHE regulations adopted under that act, is a class C misdemeanor.152 For the general statutes regarding infectious disease control, violations of K.S.A. 65-118 (mandated reporting of infectious disease and keeping reported information confidential), K.S.A. 65-119 (duties and powers of local boards of health and local health officers), K.S.A. 65-122 (restriction of admittance to schools and childcare facilities), K.S.A. 65-123 (funeral conditions for infectious disease caused deaths), and K.S.A. 65-126 (KDHE enforcement of local quarantine) are punishable by fines of between $25

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129. K.S.A. 65-1701.
130. K.S.A. 38-315.
137. K.A.R. 28-4-819.
140. K.A.R. 28-36-75.
142. K.S.A. 65-1820a(b)(2).
143. K.A.R. 28-4-608(a)(3).
144. K.S.A. 8-276(d).
149. K.S.A. 65-1294.
150. K.S.A. 65-3435. This is a class 7 person felony.
151. K.S.A. 65-116g.
152. K.S.A. 65-6005. Disclosure of confidential AIDS-related information is a misdemeanor punishable by a fine between $500 and $1,000, and up to six months in jail. Id.
and $100 for each offense. Any person who violates, refuses, or neglects to comply with any regulation adopted by the KDHE regarding the “prevention, suppression, and control of infectious” diseases; who leaves an isolation or quarantine area while subject to a quarantine or isolation order; or who knowingly conceals any case of infectious disease may be guilty of a Class C misdemeanor.

I. Kansas case law involving infectious disease control

The Kansas cases essentially can be divided into two main categories: those involving who is responsible for paying for costs associated with infectious disease control and those involving the permissible scope of the government’s power to quarantine or isolate persons known or suspected to have an infectious disease. There are two other cases on the issue of injunctive relief and public health powers. Before the two classes of cases are discussed, the singular case of *Moody v. Wickersham*, 155 presents itself.

Elizabeth Moody was a hotel housekeeper in Independence, Kan., who on Feb. 14, 1918, was diagnosed with smallpox. These first facts are as testified to by Moody. Later that day, the Montgomery County health officer, Dr. E.C. Wickersham, responded, and gave her only 15 minutes to get ready before he escorted her to the isolation facility (referred to in the vernacular of the times as a “pesthouse”). “[I]n an open car on a very cold day,” they rode out to the pesthouse, and on the way passed a cemetery, where the doctor allegedly said:

You had better pick you a headstone, cause here’s where I’m going to take you next.

The conditions at the one-room pesthouse were described as “dirty and nasty,” with bedding so dirty it was blue. There was a box for a table, nothing in the way of cleaning tools or supplies, and two beds, one for the patient and one for the caretaker (described as “[a] very unkempt man”). The walls were not papered, with cracks that let the wind in, the floor was bare wood, the windows were small, and instead of a toilet there was a “slop jar.” There were no screens or curtains between the beds, and when the night nurse arrived, the nurse slept in the same bed as the patient.

Dr. Wickersham testified that on the drive to the pesthouse, the patient was dressed warmly, and his remark at the cemetery was jocular, which elicited a laugh from the patient. He agreed the pesthouse was crude and unsanitary but he knew of no other place to isolate the patient to protect the public. The jury returned a verdict, including $1,162.50 in punitive damages. The Kansas Supreme Court affirmed, noting:

A health officer, while required to obey his lawful orders and perform his official duty, it never excused for wanton conduct and inhumane treatment to patients suffering from serious illness. ... [P]ersons who act in [a governmental] capacity are required to treat other human beings in a reasonably humane and considerate manner. The law, no less than humanity, requires humane and decent treatment of those who must be segregated from their usual conveniences and friends, and whoever acts with utter disregard of this requirement renders himself liable.

There are three key cases involving the scope of the government’s power to quarantine persons with infectious disease: *Welch v. Shepherd*, 156 *In re Irby*, 157 and *In re McGee*. 158 All involved sexually transmitted diseases. All show significant deference by the Court to the local health officer. In particular, the *McGee* case involved a challenge to the decision of the local health officer as to where the patients should be isolated, to which the Court replied:

The [C]ourt knows of no law or rule of public policy or private right which requires a person who, for the protection of the public, must be isolated and treated for loathsome communicable disease, to be interned in the locality in which he may reside.

The petitioners also asserted they could be responsible for their own treatment, and the Court replied: “The answer is, the public health authorities are not obliged to take chances.”

The other category of cases, with varying results based on the facts and laws involved, addressed whether the county was responsible for the cost of the prevention of the spread of infectious diseases. In *City of Wichita v. Sedgwick County*, 159 the city sought reimbursement from the county for costs involved in response to a smallpox epidemic in 1917 and 1918. At the time, a statute authorized the city to take action to control the spread of smallpox, and then allowed the city to present the county commission with an itemized statement of expenses to be paid out of the county general fund. In light of the statute, the Court ordered

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156. 165 Kan. 394, 196 P.2d 235 (1948).
158. 105 Kan. 574, 185 P. 14 (1919).
159. 110 Kan. 471, 204 P. 693 (1922).
160. These statutes, as far as first-class cit-
the county to pay the expenses.\textsuperscript{160} A township trustee, however in an earlier case, seeking reimbursement from the county for expenses related to a smallpox outbreak, was denied compensation because there was no statute in 1874 that authorized the township to act and then bill the county.\textsuperscript{161}

In\textit{ Hawthorne v. Cherokee County},\textsuperscript{162} the local health officer ordered several family members suffering from smallpox to be isolated, and without waiting to consult with the county commission (acting as the board of health), the health officer hired a nurse to provide care for the family. The nurse submitted the bill to the county, who refused to pay, but on appeal to the Kansas Supreme Court, the Court noted that waiting for the board to convene and consider the matter would have been an unnecessary delay. The health officer, as an officer of the county, had the authority to bind the county for the services of the nurse.

A dissimilar result, under different facts, was reached in\textit{ Dykes v. Stafford County}.\textsuperscript{163} There a private physician consulted with the local health officer on a case, but the local health officer disagreed regarding the diagnosis of diphtheria. The private physician consulted another private physician, who agreed it was diphtheria, so the private physician provided care and treatment, and then billed the county for his services. Because the local health officer had not authorized the treatment, the county was not bound, and was not required to pay for the services.

In\textit{ Hessin v. Manhattan},\textsuperscript{164} an attempt was made to enjoin the city from using a park building for a temporary isolation facility during a smallpox outbreak in 1909. The Court noted that the city, in providing an isolation facility, was required to provide a suitable location and the “best care possible under the circumstances.” Due to the emergency nature of the matter, the city could not wait to locate and construct a suitable building away from everyone else, and therefore the Court dissolved the temporary injunction. Although not an infectious disease case, in\textit{ Dougan v. Shawnee County},\textsuperscript{165} the Court refused to vacate an injunction directed towards an imminent public health threat, finding public health authorities can take action before a public health threat actually materializes.

\section*{IV. Conclusion}

One of the great success stories in public health over the last century is the progress toward eliminating some infectious diseases (smallpox), significantly reducing the impact of others (polio), and in general reducing the spread of infectious diseases through immunization programs, effective reporting and surveillance, and appropriate use of public health powers, such as quarantine and isolation. But new diseases (severe acute respiratory syndrome – SARS), old diseases that evolve (multi-drug resistant tuberculosis), and diseases that seem innocuous (seasonal influenza) pose the threat of mutating into something very serious (pandemic influenza).\textsuperscript{166} Public health, while it remains a significant governmental obligation, is not something the government can do by itself. Simple steps, such as washing your hands and staying healthy by eating right and getting exercise, can benefit the individual and society as a whole by reducing the transmission of infectious diseases.

\section*{About the Author}

\textbf{Robert W. Parnacott} graduated with dean’s honors from the Washburn University School of Law in 1991. Following law school, he was a research attorney on the Central Staff for the Kansas Court of Appeals and, subsequently, for Justice Tyler C. Lockett of the Kansas Supreme Court. He then served as a staff attorney for the Kansas Corporation Commission and later for the Kansas Department of Health and Environment. Prior to joining the Sedgwick County Counselor’s Office, he was in private practice with Woodard, Hernandez, Roth & Day LLC, Wichita. He has represented the Sedgwick County Local Board of Health, the Local Health Officer, and the local health department since 2002. He also serves as the Sedgwick County HIPAA Privacy Officer. He has spoken on numerous occasions at professional conferences, classes and seminars on Kansas public health law. He has also previously published several articles in the Journal of the Kansas Bar Association on topics including appellate standards of review, civil procedure, and annexation.

\begin{itemize}
\item 160. Smith v. Shawnee County, 21 Kan. 669 (1879).
\item 161. 79 Kan. 295, 99 P. 598 (1909).
\item 162. 81 Kan. 669, 105 P. 44 (1909).
\item 163. 86 Kan. 697, 121 P. 1112 (1912).
\item 164. 141 Kan. 554, 43 P.2d 223 (1935).
\item 165. 150 Kan. 153, 105 P. 44 (1909).
\end{itemize}
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I Introduction

Kansas, in step with an American Bar Association-influenced national trend and as noted in the June 2007 issue of The Journal of the Kansas Bar Association,1 recently amended its rules for attorney discipline effective July 1, 2007. In the process, Kansas responded to the legal community’s adoption of the Internet as a principal medium for marketing legal services.

Although the new version of the Kansas Rules of Professional Conduct (KRPC/Rule(s)) related to attorney advertising contains only moderate restrictions, other states recent changes place greater emphasis on regulating attorney advertising on the Internet. Rules regulating now-familiar media, such as “Web sites, Weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, or instant messaging” impact attorney marketing strategies and the content of firm home pages in many jurisdictions.2

States, such as New York, Florida, Texas, and Connecticut, have drafted entirely new code sections relating specifically to regulating attorney presence on the Internet.3 Given the global nature of the Internet, where a potential client in New York or any other state easily could visit a Kansas lawyer’s Web site, may a Kansas attorney comply only with home state rules related to Internet advertising?

II. Regulation of Attorney Advertising: Constitutional Background

States have always had the right to regulate attorney advertising as commercial speech and have adhered to the core tenet that an attorney must not disseminate “false or misleading” information.4 The Internet, of course, is simply “another vehicle for conveying information, no different from an advertisement in the broadcast media, in a newspaper, or on a billboard.”5 The KRPC, for example, now state that “electronic media, such as the Internet, can be an important source of information about legal services, and lawful communication by electronic mail is permitted by this Rule.”6 Thus, it makes sense that states may regulate Internet-based attorney advertising, and the amended Kansas Rules meet that objective.

III. KRPC Amendments Related to Attorney Advertising on the Internet

The amendments to the KRPC do not add code sections or mandate any specific restrictions on attorneys’ use of the Internet (other than the disclaimer found in Rule 7.3, discussed below). However, the amendments do introduce the terms “writing” and “written” to denote “a tangible or electronic record of a communication or representation, including handwriting, typewriting, printing, photostating, photography, audio or video recording, and e-mail.”7 This change, clearly and for good reason, extends the scope of the KRPC to all attorney communications through any medium, including the Internet.

FOOTNOTES
4. See, e.g., KRPC 7.1.
6. KRPC 7.2, cmt. 3.
7. KRPC 1.0(o).
In further recognition of attorneys’ use of the Internet, Kansas amended the section of the Rules titled “Information About Legal Services.” Rule 7.1, that a lawyer shall not make a false or misleading communication about that lawyer’s services, remains the same. However, Rule 7.2(a), Advertising, now provides “[s]ubject to the requirements of Rules 7.1 and 7.3, a lawyer may advertise services through written, recorded or electronic communication, including public media.” (emphasis added)

Rule 7.3, related to client solicitation through direct contact, expands the prohibitions against such contact. The rule now applies to “real-time electronic” contact with clients, along with “in-person” and “live telephone” contact.8 The disclaimer in Rule 7.3(c), previously related only to solicitation by telephone and mail, is now expanded to Internet communications and provides that “[e]very written, recorded, or electronic communication from a lawyer soliciting professional employment from a prospective client known to be in need of legal service in a particular matter shall include the words ‘Advertising Material’ on the outside envelope, if any, and at the beginning and ending of any recorded or electronic communication, unless the recipient of the communication” is either another lawyer or someone with whom the lawyer has a close personal or familial relationship.9 (emphasis added)

In light of the amendments to the Kansas Rules, Kansas attorneys understandably may add the disclaimer required in Rule 7.3 and then not feel an urgent need to redesign their Web presence. The Rules simply now state what common sense indicated before: Kansas attorneys cannot disseminate false or misleading information on their Web sites or otherwise on the Internet. Unfortunately, without a definition of “electronic communication” and lacking specific requirements for attorney Web page content, the Kansas rules leave the ethical validity of many Internet transactions up for debate.

Rule 7.3 does make it clear that Kansas attorneys must not solicit clients via e-mail without including the disclaimer “Advertising Material” at the beginning and the end of any “electronic communication,” including e-mail.10 But does the “beginning” include the subject line of the e-mail, as that is arguably the beginning of the message? Rule 7.3 also probably prohibits attorneys from soliciting clients through blogging, instant messaging or other electronic communication initiated by the attorney on the Internet. But what about meta-tags, domain names designed to direct a Web visitor to a law firm’s Web site or other advertising gimmicks common on the Internet?

For example, just think about your firm’s homepage. Should the homepage contain the disclaimer set forth in Rule 7.3? If not, is a link to a disclaimer needed to avoid a violation of the rule against false and misleading advertising? How prominently should any disclaimer links be displayed? Once the link to the disclaimer is clicked, what information should the disclaimer page contain? What ethical considerations may arise when links on the homepage prompt visitors to provide their contact information and receive e-mail?

IV. New York’s Answers

In response to these and other issues, New York, a state with which Kansas has reciprocity, took drastic measures to curtail attorney advertising generally with many of the new provisions aimed at attorney advertising on the Internet. New York’s disciplinary administration went quite beyond the KRPC’s definition of “writing” to include Internet communications. New York defined “computer-accessed communications” to be “any communication made on behalf of a lawyer or law firm that is disseminated through the use of computer or related electronic device, including, but not limited to, Web sites, Weblogs, search engines, electronic mail, banner advertisements, pop-up and pop-under advertisements, chat rooms, list servers, instant messaging, or other Internet presence, and any attachments or links related thereto.”11

Now, constrained by that definition, New York attorneys’ communications with prospective clients are subject to the following limitations:

- Any Web site or real-time audio/video dissemination containing reasonable results the attorney can achieve, testimonials from prior clients, comparisons between the attorney and competitors, or other endorsements, must contain the following disclaimer: “Prior results do not guarantee a similar outcome.”12
- “Every advertisement” on the Internet “shall be labeled ‘Attorney Advertising’ on the first page, or on the home page in the case of a Web site. … In the case of electronic mail, the subject line shall contain the notation ‘ATTORNEY ADVERTISING.’”13
- A lawyer shall not utilize a pop-up or pop-under advertisement in connection with computer accessed communications, other than on the lawyer or law firm’s own Web site or other Internet presence, or meta tags or other hidden computer codes that, if displayed, would violate a disciplinary rule.14
- All advertisements shall include the name, principal law office address, and telephone number of the lawyer or law firm whose service is being offered.15
- Any of the above disclaimers must be “clearly legible and capable of being read by the average person, if written.”16
- Copies of the Web site used for advertising purposes must be made at least once every 90 days or immediately after any “major Web site redesign.”17
- A lawyer may utilize a domain name for a Web site that does not include the name of the lawyer or the law firm, provided that “all pages of the Web site clearly and con-

8. KRPC 7.3(a); KRPC 7.2, cmts. 1, 2, and 3.
9. KRPC 7.3(c); KRPC 7.3(a)(1) and (2) (emphasis added).
10. KRPC 7.3.
12. Id. at 1200.06(E)(3), Advertising.
13. Id. at 1200.06(F).
14. Id. at 1200.06(G)(1) and (2).
15. Id. at 1200.06(H).
16. Id. at 1200.06(I).
17. Id. at 1200.06(K).
spiciously include the actual name of the lawyer or law firm, the lawyer or law firm in no way attempts to engage in the practice of law using the domain name, the domain name does not imply an ability to obtain results in the matter, and the domain name does not otherwise violate a disciplinary rule.”

- The New York Rules of Professional Conduct (N.Y. Rules) note that a Web site is a “solicitation,” and subject to regulation as such, if it is “designed for and directed to or targeted at a prospective client affected by an identifiable actual event or occurrence by an identifiable prospective defendant.”

A. New York attorneys’ attempted compliance

To try to come into compliance, most New York law firms have added statements, such as “This Web site contains Attorney Advertising,” “Attorney Advertising,” and “Prior results do not guarantee a similar outcome” to their homepages. Virtually every lawyer practicing in New York with a Web presence has paid or is likely to pay this nominal price to achieve apparent home page compliance, as the disclaimers are usually tucked away at the bottom of the site and certainly do not overtly detract from the Web site’s appearance.

This labeling is in addition to, and places greater importance on, the “disclaimer” link many law firms provide for nonengagement purposes. That link’s content, generally used as a nonengagement device, is now more likely to include specific language, such as the following excerpt from Shook, Hardy & Bacon LLP’s “disclaimer” link:

Statement in compliance with Texas and Florida Rules of Professional Conduct: Unless otherwise indicated in an individual attorney’s biography, a lawyer resident in one of our offices is not certified by the Texas Board of Legal Specialization.

However, including a disclaimer link or disclaimers on a home page is not enough to comply with the N.Y. Rules in some circumstances. New York attorneys have concluded that even “client memos on the latest developments in the law sent by e-mail” are subject to the “Attorney Advertising” disclaimer required in the subject line.

Therefore, according to the N.Y. Rules, that disclaimer must be included on all e-mail communications with prospective clients, including those that might result from a Web visitor clicking on a link on a firm’s home page offering a “SIGN UP for legal updates” ad or similar offer. Naturally, lawyers are frustrated because, including the disclaimer “takes up a large part of the real estate on the subject line and one that can be trapped in the policed traffic of online mail,” preventing the intended recipient from ever receiving the communication.

To comply with these rules, the New York firm of WilmerHale had to take down a pair of marketing domain names, IPOLeader.com and M&ALeader.com, that would direct a Web visitor to the law firm’s Web site “because the rules forbid a redirect if the domain name implies an ability to obtain results” in violation of 1200.7(E). WilmerHale is surely not alone in modifying its marketing tactics, and the trend suggests at minimum that New York attorneys may not use a domain name that contains prohibited marketing words and phrases, such as “leader,” when that domain name leads to attorney contact information.

B. New York attorneys fight back

Ralph Nader-led Public Citizen is participating in litigation challenging the N.Y. Rules in James L. Alexander, Alexander & Catalano LLC and Public Citizen Inc. v. Cahill et al., in the Northern District of New York. In that case’s complaint, a New York law firm alleges that the restrictions on domain names as illustrated above impose “serious and unnecessary burdens on Internet-based speech” by forcing lawyers with established domain names “to relocate their Web sites to new domains at a significant expense.” The suit also claims that New York’s restriction prohibiting pop-up and pop-under advertisements on Web sites other than on the lawyer’s own Web site, as found in 1200.06(G)(1) and (2), injures New York consumers because it interferes with their ability to “learn about available legal services and their rights.” The complaint goes on to allege that “[t]here is no evidence that consumers are deceived or unduly influenced by pop-up or pop-under advertisements, which can be closed with a single click or eliminated with pop-up blocking software and are therefore at least as easy to dispose of as mail solicitations.”

In its July 23, 2007, ruling, the New York federal court sided with the attorneys and permanently enjoined enforcement of most of the challenged rules against attorney advertising, including rules against attention-getting techniques, the use of nicknames and mottos, the use of client testimonials, the portrayal of judges, and the use of Internet pop-up ads. The court held that the advertising at issue in the case was a form of speech protected by the First Amendment, and it categorically rejected New York’s argument that free speech rights did not cover advertising considered by the state to be trivial or irrelevant.

It also noted that the state had not produced any evidence that its restrictions on speech were necessary to protect consumers and found that the prohibitions were much broader than necessary to accomplish the state’s claimed objectives. In its conclusion, the court acknowledged that, although defendants have an interest in regulating the use of technology, including the Internet in promoting attorney services, such regulations must be “consistent with established First Amendment jurisprudence.” However, the defendants have ap-

18. Id. at 1200.07(E).
19. Id. at 1200.08(5)(ii).
22. Id.
23. Id.
24. Id.
26. Id., at para. 42.
27. Id.
pealed the ruling to the 2nd U.S. Circuit Court of Appeals, so this issue is not yet settled law.

**V. Do Out-of-State Attorney Advertisement Regulations Matter to Kansas Attorneys?**

In theory, any attorney Web site viewed anywhere could be construed as advertising, even if the attorney whose Web site is being accessed can’t practice in the jurisdiction in which the site is accessed. Although the lawyer may not be physically present in the state in which that attorney’s Web site is accessed, Pennsylvania attorney discipline authorities have opined that “a lawyer or law firm may be subject to personal jurisdiction of another state based on Internet activities.” Moreover, whether Internet access constitutes personal jurisdiction has been an issue before the Kansas Supreme Court. Thus, the argument might be made that Kansas attorneys, whether they are licensed to practice in other states, could be subject to the other states’ disciplinary rules simply by having a home page.

For the sake of some clarity, there is a growing push for an amendment to ABA Model Rule 8.5 [ABA MRPC “Disciplinary Authority; Choice of Law,” KRPC “Jurisdiction”] that would “subject the lawyer to the rules of the state in which the advertisement is created,” thereby applying the rules of the practitioner’s home jurisdiction to attorney advertising on the Internet. However, even the amendment of that rule would not necessarily make clear which jurisdiction’s rules would apply if, for example, an attorney were licensed in more than one jurisdiction or were to hire a Web developer from another state.

Based on the confusion as to which states’ rules apply to which states’ attorneys and despite the absence of an explicit mandate from the KRPC beyond the “Advertising Material” disclaimer in Rule 7.3, Kansas attorneys would be well-advised to place a disclaimer link on their home pages, as many have already done. Listing the disclaimer link alongside other links for the site, rather than at the bottom of the page where the privacy policy link is generally placed, would provide that information to the reader in a manner more likely to be noticed.

The site should clearly state in which jurisdictions the lawyer and any other members of the firm are licensed. It would be wise for attorneys to include an unobtrusive disclaimer stating “This site contains Attorney Advertising,” and if the site includes testimonials in a jurisdiction that allows them, stating that “Prior results do not guarantee a similar outcome,” also makes sense. These additions would be particularly necessary for the attorney licensed to practice in New York.

A tougher call is whether to include “attorney advertising material” disclaimers in e-mail subject lines directed to prospective clients, as opposed to the “beginning” and “ending” requirements of the KRPC. Ethics expert Stephen Gillers, a professor at New York University School of Law, was a consultant to the New York State Bar Association on that state’s amendments, but he believes that the requirement of placing a disclaimer in the subject line of all e-mail communications from a lawyer violates the First Amendment. “If your e-mail is not about the credentials of your firm, but an update on the law,” he said, “then that is news and you are a publisher. And you enjoy the protections of the First Amendment, just like a magazine or a newspaper.” Firms choosing or forced to add the subject line disclaimer also face the distinct possibility that their e-mails will be filtered away from their intended recipients.

If Kansas disciplinary authorities wanted to require the subject line disclaimer, they would have done so. However, what if a prospective client clicking on the “sign up” link on a Kansas lawyer’s Web page lives in Brooklyn? If a subsequent e-mail received by that Brooklyn resident does not contain the disclaimer on the subject line, could the attorney responsible for sending the responsive e-mail to the prospective client face an inquiry regarding violation of New York regulations? Resolution of such questions may have to await the results of state-by-state litigation if a uniform version of Rule 8.5 is not adopted in each jurisdiction.

**VI. The Facebook Revolution: May Attorneys Advertise on Social Networking Sites?**

First, it is likely that an attorney’s profile on a social networking site, which is essentially a Web site like any other, would be subject to the restrictions set forth above regarding attorney advertising on the Internet. While it would be unreasonable to subject such attorneys to those restrictions simply for listing their occupation as “attorney” on the descriptive information common on such sites, any content designed to attract business is arguably subject to regulation.

The more interesting question is whether communication initiated by the attorney for the purpose of advertising the attorney’s services on a social networking site is ethically prohibited. Although no case law on this specific issue has developed before or since the appellate ruling in Cahill supra, communications sent to the profiles of prospective clients on social networking sites, such as Facebook, MySpace, Twitter, or LinkedIn, could be considered a hybrid between e-mail solicitation and contemporaneous communications one would find in an Internet chat room, as members of the social networking sites have the capability to respond to messages more or less instantly.

“Direct electronic mail that is not sent to a news group or a mailing list is very similar to sending a letter through the United States mail,” and is thus regulated in a similar fashion. Therefore, “e-mail communications cannot be prohibited, but certain electronic mail communications to potential clients who are susceptible to being exploited, such as personal injury accident victims, could result in a violation by the attorney using electronic mail to communicate, just as a

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30. Id.
33. 1-10 Law of the Internet, Sec. 10.03, p. 9, Matthew Bender & Company Inc., Copyright 2008.
similar activity would be a violation while using U.S. mail, telephone, or in-person communications.\textsuperscript{34} States have also begun to regulate attorney advertising in Internet chat rooms and discussion groups, where contemporaneous communication takes place “between a number of people who may or may not be anonymous by typing messages that are sent to everyone participating in the discussion at that moment.”\textsuperscript{35} The consensus reached by states that have ruled on this issue can be summarized by the State Bar of Michigan’s Ethics Committee’s holding that “general, non-targeted information that is posted does not constitute solicitation.”\textsuperscript{36} However, “if an attorney participates in a real-time, immediate conversation over the Internet without invitation from the recipient, this is direct solicitation outside the bounds of ethical activities.”\textsuperscript{37}

Thus, it would appear that while attorneys may be able to post advertising material on their own social networking profiles, subject to the restrictions set forth above regarding attorney Internet presence, and even may be able to send messages to all the attorney’s “friends” on that particular site, direct unsolicited communication to members of the social networking site is likely an ethical violation, much in the way direct in-person solicitation is ordinarily a violation. Thus, it may be “dangerous to solicit clients using real-time discussions through the Internet or other online services.”\textsuperscript{38}

VII. Conclusion

Ultimately, Kansas attorneys should feel fortunate the amended Kansas Rules of Professional Conduct do not curtail attorney advertising on the Internet to the same extent as the N.Y. Rules. However, it is important to recognize the growing trend to regulate the Internet as well as the unsettled state of the law and consider whether or how Kansas attorneys licensed or permitted to practice out-of-state may need to comply not only with the KRPC, but also with rules elsewhere.

About the Author

Maxwell E. Kautsch is a solo practitioner in Lawrence handling criminal defense, landlord/tenant, civil litigation, and other matters. He graduated from Washburn University School of Law in 2003.

\textsuperscript{34} Id.
\textsuperscript{35} Id. at 10.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 11.
\textsuperscript{38} Id. at 10.
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AUTOMOBILE INSURANCE
PHILLIPS V. ST. PAUL FIRE & MARINE INSURANCE CO.
WYANDOTTE DISTRICT COURT – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 97,806 – AUGUST 28, 2009

FACTS: Phillips, an employee of the Unified Government of Wyandotte County and Kansas City, Kan., was injured when Robert Sengphong, an uninsured 13-year-old, ran his vehicle into Phillips’ truck. American Family provided insurance for Sengphong. St. Paul provided automobile insurance for Unified Government with $500,000 for each incident, but had previously only provided $50,000 in uninsured/underinsured (UM) motorist coverage. The district court granted partial summary judgment to Phillips finding $500,000 in coverage and denied St. Paul’s motion for a finding of $50,000 in coverage. The court found that the Unified Government purchased a new policy with St. Paul in 2003 and did not properly reject the excess UM coverage. Therefore, the court found that St. Paul refused to pay Phillips without just cause or excuse. It concluded, after taking into account the $100,000 paid by American Family, that the UM coverage available to Phillips under the policy was $400,000. After an arbitration hearing, Phillips was awarded $174,773.04 in damages and $69,990.21 in attorney fees. The district court affirmed the arbitration award. Court of Appeals found that St. Paul’s coverage was limited by the earlier rejection to $50,000. Court reversed because it held that under K.S.A. 40-284(c) the previous rejection of the higher benefit, under the statute, operated as a rejection of the higher benefit and cost in the new contract. Since St. Paul was correct in contending its coverage was limited to $50,000, attorney fees against St. Paul were not appropriate.

ISSUE: Automobile insurance

HELD: Court held that K.S.A. 40-284(c) is plain and unambiguous. When an insured has previously rejected a higher coverage limit for statutorily mandated underinsured motorist insurance, that rejection controls any subsequent policy issued by the same insurer to the same insured for such insurance, unless the insured has revoked the earlier rejection in writing. The subsequent policy need not be a renewal policy, and an intervening lapse in coverage or the business relationship of the insured and insurer does not automatically revoke an earlier rejection. Summary judgment in favor of St. Paul is required.

STATUTES: K.S.A. 40-284(c); and K.S.A. 44-510k(c)

DRIVER’S LICENSE REVOCATION AND JURISDICTION
MOSER V. DEPARTMENT OF REVENUE
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 96,734 – AUGUST 28, 2009

FACTS: Moser was involved in a car accident and he refused a breath test. Officers gave him notice that his license was suspended and that he had 10 calendar days to appeal. Moser did not request an administrative hearing and the Department of Revenue (KDR) sent him a suspension notice for 10 years based on a fourth occurrence of DUI. Moser filed an appeal in the district court more than 10 days, but less than 30 days after the effective date of the suspension challenging the constitutionality of the suspension. The district court determined the 10-day rule was inapplicable and that Moser’s petition was timely filed under the 30-day rule. However, the district court refused to consider the merits of the petition because Moser had failed to exhaust his administrative remedies. Court of Appeals held the 10-day rule applied to Moser and the district court erred in applying the 30-day rule. Court of Appeals found the district court had no jurisdiction and consequently neither did the Court of Appeals.

ISSUES: (1) Driver’s license revocation and (2) jurisdiction

HELD: Court stated that a petition for judicial review of a KDR order of suspension of driving privileges issued under the authority of any of the statutes comprising the implied consent law, K.S.A. 8-1001 et seq., must be filed within 10 days of the effective date of the order. Court held that a failure to file a petition for judicial review of an order suspending driving privileges within the time set by statute is jurisdictionally fatal. A petition for judicial review filed beyond the statutory time limit requires the district court to dismiss the action. Where the district court did not acquire jurisdiction to consider the merits of a petition for judicial review, an appellate court does not obtain jurisdiction to consider those merits on appeal. Court agreed with the Court of Appeals’ dismissal of the appeal.

STATUTES: K.S.A. 8-259(a), -1001, -1002(f), -1020, -2,142(a) (1)(D); and K.S.A. 77-601, -613

MORTGAGE FORECLOSURE AND NECESSARY PARTY
LANDMARK NATIONAL BANK V. KESLER
FORD DISTRICT COURT – AFFIRMED
NO. 98,489 – AUGUST 28, 2009

FACTS: Landmark National Bank brought a suit to foreclose its mortgage against Boyd Kesler and joined Millennia Mortgage Corp. as a defendant, because a second mortgage had been filed of record for a loan between Kesler and Millennia. When neither Kesler nor
Millennia responded to the suit, the district court gave Landmark a default judgment, entered a journal entry foreclosing Landmark's mortgage, and ordered the property sold so that sale proceeds could be applied to pay Landmark's mortgage. But Millennia apparently had sold its mortgage to another party and no longer had interest in the property by this time. Sovereign Bank filed a motion to set aside the judgment and asserted that it now held the title to Kesler's property. Millennia and MERS claim that MERS was a necessary party to the foreclosure lawsuit and that the judgment must be set aside because MERS wasn't included on the foreclosure suit as a defendant. The district court refused to set aside its judgment. The court found that MERS was not a necessary party and that Sovereign had not sufficiently demonstrated its interest in the property to justify setting aside the foreclosure. Court of Appeals affirmed.

ISSUES: (1) Plea agreement, (2) stipulated facts, and (3) Apprendi

HELD: Court agreed with the decisions of both the district court and the Court of Appeals that the failure to serve MERS as a defendant in the foreclosure action in which the lender of record has been served is not a fatal defect that the foreclosure judgment must be set aside. Court also stated that in a mortgage-foreclosure lawsuit, a district court does not abuse its discretion when it denies a motion to intervene that is filed by an unrecorded mortgage holder or its agent after the mortgage has been foreclosed and the property has been sold. Court held the district court was also well within its discretion in denying motions from MERS and Sovereign to intervene after a foreclosure judgment had been entered and the foreclosed property had been sold.

STATUTES: K.S.A. 58-2323 and K.S.A. 60-219(a), -224, -255(b), -260(b)

CRIMINAL

STATE V. CASE

DICKINSON DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 98,077 – AUGUST 7, 2009

FACTS: Case was charged with aggravated indecent liberties with a child and lewd and lascivious behavior. He entered an Alford plea to a count of aggravated endangering of a child. The court sentenced Case to 27 months of imprisonment and imposed an upward departure in viola-

ISSUES: (1) Plea agreement, (2) stipulated facts, and (3) Apprendi

HELD: Court held that Case merely stipulated that the state's facts presented to the court at the plea hearing provided a factual basis for his Alford plea. Case did not stipulate or agree that they were true, because this type of admission of guilt is contrary to the fundamental nature of an Alford plea. Since Case did not admit that his crime was sexually motivated, the district court's finding to this effect was improper and resulted in an increased sentence in viola-

STATUTES: K.S.A. 21-3608a, -4704(j); K.S.A. 22-3209(1), (2), -3210(a)(4), -3717(d)(1); and K.S.A. 60-2101(b)

STATE V. EASTERLING

SHAWNEE DISTRICT COURT – AFFIRMED
NO. 100,454 – AUGUST 7, 2009

FACTS: As part of a plea agreement, Easterling pled guilty to two counts of aggravated indecent liberties with a child under the age of 14. In exchange for his plea, the state agreed to recommend a durationall departure from the hard 25 life sentence mandated by K.S.A. 21 4643 (Jessica's Law) to a term of 118 months in prison. At sentencing, the district court declined to follow the joint rec-

ISSUES: (1) Sentencing, (2) due process, and (3) cruel or unusual punishment

HELD: Court held the district court took steps to safeguard Easterling's rights. It advised defense counsel in advance that the court was looking at the arrest report affidavit and made certain that counsel had a copy. The court made a determination on the record that the affidavit was reliable and trustworthy, at least with respect to accurately reflecting what Easterling and his wife said to the affi-

STATUTES: K.S.A. 21-4643, -4703, -4716(d)(4), -4721(c)(1); K.S.A. 22-3601(b)(1); and K.S.A. 60-460(j)

STATE V. LE Shannon

GEARY DISTRICT COURT
REVERSED AND REMANDED
NO. 99,725 – AUGUST 28, 2009

FACTS: District court dismissed criminal charges against Leshay, finding K.S.A. 22-2902a, authorizing the admission of forensic lab-

ISSUE: Constitutionality of K.S.A. 22-2902a

HELD: K.S.A. 22-2902a is not unconstitutional. Forensic re-


STATE V. TRUSSELL

BUTLER DISTRICT COURT – AFFIRMED
NO. 99,411 – AUGUST 21, 2009

FACTS: Trussell convicted of aiding and abetting first-degree murder and conspiracy to commit first-degree murder. On appeal he claimed there was insufficient evidence of premeditation, and that evidence warranted an instruction on use of force in self-
defense or in defense of other persons. Trussell also claimed trial court erred in admitting Trussell’s unwarned statement to a detective, in allowing state to ask leading questions in direct examination, and in not sustaining Trussell’s objection to trial court declaring a witness as a hostile witness.

ISSUES: (1) Sufficiency of evidence, (2) jury instruction, (3) suppression of statement, (4) leading questions, and (5) hostile witness

HELD: Under facts, more than sufficient evidence supported Trussell’s first-degree murder conviction.

Under circumstances, and absent a request for a self-defense or defense of others instruction, trial court was not obligated to give instruction inconsistent with Trussell’s theory of defense.

Under facts, district court correctly determined Trussell was not in custody, and that failure to give Miranda warnings did not mandate suppression of Trussell’s statements.

Record supports claim that prosecutor asked many leading questions to which defense did not object. Such errors were not preserved for review, and Trussell did not claim prosecutorial misconduct.

Trial court had sufficient foundation to make its ruling that witness was a hostile witness, and did not abuse its discretion in making that declaration.

STATUTES: K.S.A. 22-3414(3), -3601(b)(1); and K.S.A. 60-404

STATE V. MORNINGSTAR
SUMNER DISTRICT COURT
CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED
NO. 99,788 – AUGUST 14, 2009

FACTS: Morningstar convicted of offenses, including rape of a child under age 14, for which life sentence without parole for 25 years was imposed pursuant to Jessica’s Law. On appeal, Morningstar challenged that conviction and sentence because the jury did not determine he was 18 years or older at the time of the rape, and the rape instruction was clearly erroneous because it omitted his age as an element of the offense. Morningstar also claimed there was prosecutorial misconduct during closing argument.

ISSUES: (1) Age as element of rape under K.S.A. 21-3502(a)(2) and off-grid sentence under K.S.A. 21-4643 and (2) prosecutorial misconduct

HELD: State v. Bello, 288 Kan. __ (2009), and State v. Gonzales, 288 Kan. __ (2009), are applied. Omitting the defendant’s age from a complaint or from jury instructions does not eliminate the existence of the crime of rape of child less than 14 years of age, or invalidate a criminal conviction for that offense. But a defendant’s age must be submitted to the jury and proven beyond a reasonable doubt before a defendant can be sentenced for off-grid severity level offense specified in K.S.A. 21-4643. Morningstar’s conviction under K.S.A. 21-3502(a)(2) is upheld, but sentence imposed under K.S.A. 21-4643 is vacated and case is remanded for resentencing as a felony on the Kansas Sentencing Guidelines Act nondrug-sentencing grid.

No misconduct found in prosecutor’s comments, and no plain error prejudicing Morningstar’s trial even if prosecutor’s comments were improper.

STATUTES: K.S.A. 21-3414, -3501(a)(1), -3502, -3502(a)(2), -3502(c), -3504, -3506, -3608a, -3609, -3701, -4643, -4643(a), -4643(a)(1); and K.S.A. 22-3601(b)(1)
CIVIL

CHILD SUPPORT, DORMANT JUDGMENTS, AND ATTORNEY FEES
SRS V. CLELAND
NEMAH CURTIS COURT – AFFIRMED
NO. 101,181 – AUGUST 21, 2009

FACTS: In 1987, Cleland was ordered to pay $80 per month in child support to Thorne for support of the couple’s son, Jeremy. In December 1997, support was modified to $228.22 per month. There were numerous garnishments and withholding orders issued from 1989 through 2002. The last income withholding order was filed on Aug. 28, 2002, and delivered to Cleland’s employer on Sept. 3, 2002. In November 2002, Jeremy went to live with Cleland and it was agreed that Cleland’s child support obligation ended on Nov. 1, 2002, and he would receive a credit of $100 per month toward arrearage. Jeremy turned 18 in January 2005 and graduated in May 2005 and the $100 credit ended June 30, 2005. In May 2008, Thorne moved to reduce judgment the child support arrearage for postjudgment interest. The trial court found that the child support judgments were not dormant because less than five years had elapsed between collection proceedings. Concerning Cleland’s counterclaim for unpaid medical bills and income tax payments, the trial court found that Cleland’s claims were “plainly stale and out of date” and that the child support judgments were not subject to an offset by law. The trial court entered judgment against Cleland in the amount of $9,952.89, which included the unpaid child support and interest. In addition, the trial court awarded Thorne $1,000 in attorney fees.

 ISSUES: (1) Child support, (2) dormant judgments, and (3) attorney fees

HELD: Court held that the support enforcement proceeding was filed on Aug. 28, 2002, the judgments had not become void (or even dormant) as of July 1, 2007. Court stated that because the child support judgments against Cleland were not void as of July 1, 2007, they are not dormant and could be collected from Cleland. Court held the trial court did not error in its decision that the child support arrearage against Cleland were not dormant and the entry of judgment against Cleland in the amount of $9,952.89 for unpaid child support and interest was affirmed. Court also stated that a Feb. 23, 2003, agreed journal entry was in the nature of a support enforcement proceeding because it included an agreement by which Cleland’s child support arrearages were to be repaid in the form of a $100 credit against the arrearages each month. Because less than five years had elapsed between the filing of the Feb. 23, 2003, agreed journal entry and the filing of the Dec. 31, 2007, request for a hearing in aid of execution, the child support arrearages were not dormant judgments under K.S.A. 2008 Supp. 60-2403(a). Court also found the trial court did not err in rejecting Cleland’s argument for the application of laches. As for attorney fees, court held the trial court did not abuse its discretion in awarding $1,000 attorney fees based on the fact that Thorne’s attorney had to travel to Seneca for two hearings and that Cleland did not even show up for one of the hearings.

STATUTES: K.S.A. 60-1610(b)(4); and K.S.A. 60-2403(a), (b)

COURT OF APPEALS

CORPORATIONS
IN RE METCALF ASSOCIATES-2000 LLC
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 98,868 – AUGUST 14, 2009

FACTS: Pursuant to K.S.A. 17-76,117(b), Hayes SEC and IAS Partners petitioned for dissolution of Metcalf Associates-2000 LLC, claiming deadlock with Chambers who owned the other half of the company. District court dissolved the limited-liability company, finding it and the company’s manager (Manager Corp. owned by Hayes and Chambers) were deadlocked, and finding the deadlock threatened irreparable harm. District court also found the capital call Chambers made shortly before suit was filed was invalid, and denied Chamber’s recovery of litigation expenses on finding that Chambers acted in bad faith. Chambers appealed, arguing as matter of law that a company cannot be threatened by irreparable harm if it is still profitable, that district court abused its discretion in awarding interest on reimbursed funds at rate Chambers borrowed the funds, that district court erred in invalidating the capital call and in denying litigation expenses on finding that Chambers acted in bad faith, and that plaintiffs did not satisfy ownership percentage required to petition for dissolution. Hayes cross-appealed; claiming Chambers did not properly preserve his appeal, and had acquiesced in the district court’s judgment. Hayes also sought repayment of $28,000 finders fee awarded to Chambers’ attorney, and objected to provision in judgment that would reimburse Chambers for a loan-origination fee.

ISSUES: (1) Dissolution of limited-liability company, (2) interest on reimbursed funds, (3) authority to make capital call, (4) bad faith and breach of fiduciary duty, (5) capacity to petition for dissolution, (6) appellate jurisdiction and acquiescence, (7) recovery of finders fees, and (8) payment of loan origination fee

HELD: Statutory requirements for dissolution of a limited-liability company were met. A deadlocked company may be threatened with irreparable injury when its inability to conduct business opportunities causes potential liability to the company, even when it remains solvent. Lost profits, lost business opportunities, and failure to realize common expectations that had been part of a business plan may constitute irreparable harm in any given case. Ample evidence supports district court’s factual findings of deadlock and irreparable harm in this case. Chambers’ argument against judicial dissolution of a solvent limited-liability company should be addressed to Legislature.

No error demonstrated in district court’s award of interest on reimbursed funds.

No error demonstrated in district court’s finding that Chambers had no authority to make the capital call.

District court’s finding that Chambers acted in bad faith and breached his fiduciary duties is supported by substantial evidence.

Chambers waived any defense regarding Hayes’ ability to sue. Under facts of case, Chambers timely filed his appeal from district court’s final judgment, and Chambers’ cooperation with court-appointed custodian and Chambers’ assistance with court-supervised sale of property did not constitute acquiescence.

No authority to require repayment of finders fee to someone who is not a party.

Record does not show the loan-origination fee was ever paid to Chambers.

STATUTES: K.S.A. 16-204; K.S.A. 17-6301(a), -6305, -6305(a), -6516(a)(2), -7670, -7670(b), -7693(a), -76,117, -76,117(b); K.S.A. 58-3037; and K.S.A. 60-1305, -2103(a)
FACTS: Delmar and Alberta Brumley served as licensed foster care providers for many years until April 1993 when SRS did not renew their license. The Brumleys had fostered nearly 150 children. Jeremie was one of the foster children and the Brumleys later adopted him with the understanding that SRS would continue to provide financial support for support assistance with Jeremie’s mental and physical disabilities. In 2004, Delmar applied for affiliate status in order to become a paid provider for Jeremie. Johnson County Developmental Supports’ (JCDS) investigation revealed several reports of abuse made against the Brumleys, that the Brumleys’ daughter and husband were convicted of murdering one of the Brumleys adopted foster children. JCDS denied Delmar’s application for affiliate status. No appeal taken. Delmar attempted to obtain SRS approval of a care plan for Jeremie. Based on the information obtained in the investigation, JCDS determined that Alberta had a history of abuse and could not become an affiliate provider. Alberta appealed to several agencies. The director of SRS Community Supports Services overruled JCDS’ denial of Alberta’s affiliation application and directed JCDS to enter into an affiliation agreement with Alberta. JCDS obtained an administrative proceeding before an administrative law judge (ALJ). The ALJ agreed with SRS and affirmed the decision ordering JCDS to affiliate with Alberta. Both the State Appeals Committee and the district court affirmed the decision ordering JCDS to affiliate with Alberta.

ISSUES: (1) Foster care and (2) affiliation agreement

HELD: Court concluded the district court properly upheld SRS interpretation of the term “known” in K.A.R. 30-63-28(f) to require more than mere allegations or suspicions of abuse. Rather, as the district court found, the term contemplates allegations of abuse, neglect, or exploitation that have been substantiated or confirmed after the parties have had an opportunity to present evidence and a determination has been made from conflicting evidence. Because none of the allegations of abuse against Alberta Brumley were substantiated or confirmed in this manner, the district court did not err in affirming the agency’s decision directing JCDS to enter into an affiliation agreement with Alberta.

STATUTES: K.S.A. 60-2103(h); and K.S.A. 77-425, -601, -621

HABEAS CORPUS

LAPOINTE V. STATE

JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

NO. 100,028 – AUGUST 28, 2009

FACTS: LaPointe convicted of aggravated robbery and aggravated assault. In his direct appeal, he did not appeal the denial of motion for DNA testing. He filed post-conviction motion alleging four claims of ineffective assistance of counsel and again sought production of evidence for DNA testing at his expense, citing K.S.A. 60-234 and Brady. District court denied that motion, and denied the 1507 motion without conducting an evidentiary hearing. LaPointe appealed.

ISSUES: (1) Ineffective assistance of counsel and (2) discovery of evidence for DNA testing

HELD: District court should have held evidentiary hearing on three of LaPointe’s ineffective assistance of counsel claims — whether trial counsel was deficient in (i) failing to object to police officer’s improper comment on the credibility or reliability of eyewitnesses’ identification, (ii) including wrong address on notice of alibi, and (iii) not requesting DNA testing. No hearing is necessary on remand on fourth claim that counsel failed to object to prosecutorial misconduct. LaPointe failed to raise claim of ineffective assistance of appellate counsel in failing to raise this issue in direct appeal.

Civil discovery rules of K.S.A. 60-234 are not applicable in K.S.A. 60-1507 proceedings. Nor does Brady apply to a post-conviction proceeding. LaPointe did not appeal the denial of his motion in his criminal case for DNA testing. Until LaPointe establishes trial counsel was ineffective in failing to request DNA testing, whether he should be allowed to obtain evidence for DNA testing is not properly before the appellate court.

CONCURRENCE: (Malone, J.): Agrees with result that case should be remanded for an evidentiary hearing on ineffective assistance of counsel, but disagrees with majority’s reasoning. Agrees an evidentiary hearing is required on trial counsel’s handling of alibi witness, which compounded error in alibi address. Under facts, trial court was not deficient on the other three claims.

STATUTES: K.S.A. 21-2511(a), -2512, -2512(a); and K.S.A. 60-203, -226(b), -226(b)(6), -234, -234(a), -241(a)(1), -1507, -1507(b)

LOAN GUARANTEES AND SUBROGATION

EMPERSE BANK V. RUMISEK

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

NO. 99,963 – AUGUST 28, 2009

FACTS: Emprise Bank sued Drs. Gary S. Benton and John D. Rumisek to collect on personal guaranties they gave the bank to secure the debt of Mid America Surgical Associates LLC (MASA), the entity through which they conducted their specialty surgical practices. Benton and Rumisek, along with Drs. Badr Idbeis and Robert Fleming, owned and operated MASA. In response to the bank’s suit, Benton and Rumisek asserted third-party claims against MASA, Idbeis, and Fleming for reimbursement, subrogation, contribution, and indemnity. They also claim that the district court erred in granting summary judgment to the third-party defendants on all third-party claims. Benton and Rumisek appeal, claiming the district court erred in denying summary judgment in their favor on their claims for reimbursement, subrogation, contribution, and indemnity. The court also should have done so by weighing the equities inherent between a surety and his principal.” MASA contends that while the district court did not err in granting summary judgment in its favor on Benton and Rumisek’s subrogation claim on other grounds, the court also should have done so by weighing the equities and resolving the equities in favor of MASA.

ISSUES: (1) Loan guarantees and (2) subrogation

HELD: Court under the facts presented, Emprise’s actions to enforce personal guaranties, given to secure the debt of the limited liability company of which the guarantors were members, entitled the guarantors to be indemnified by the limited liability company against the bank actions. Court held the release signed by Benton and Rumisek did not release their claim for subrogation. Nevertheless, because Benton and Rumisek have not paid Emprise Bank for
MASA’s debt for which they gave their personal guaranties, they are not entitled to summary judgment on their subrogation claim but the third-party defendants are. The fact that Benton and Rumisek have no current subrogation right (i.e., the right to now stand in the shoes of the bank with respect to the bank’s rights against MASA, its debtor) is not predicated upon the balancing of equities, as third-party defendants claim in their cross-appeal. Under the circumstances, upon full payment of MASA’s debt to the bank Benton and Rumisek will have an inherent right of subrogation. Benton and Rumisek did not release their right to indemnity when they executed the Unit Redemption Agreement. Benton and Rumisek are entitled to indemnity from MASA with respect to the judgments the bank obtained against them on their personal guaranties of MASA’s debt. Benton and Rumisek were not entitled to contribution from Idbeis and Fleming at the present time. Idbeis owed no fiduciary duty to Benton for conduct after Benton surrendered his shares in MASA. Court stated there remain genuine issues of material fact with respect to Benton and Rumisek’s claim that MASA was merely Idbeis’ alter ego. Accordingly, the third-party defendants are not entitled to summary judgment on this claim, and court remanded this claim to the district court for trial.

STATUTES: K.S.A. 17-6305(a), -7670(a); and K.S.A. 60-208, -214

MENTAL HEALTH
IN RE CARE & TREATMENT OF MILES
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED
NO. 100,687 – AUGUST 21, 2009

FACTS: Miles involuntarily committed in 2001 to SRS custody as a sexually violent predator. In 2006 he petitioned for release from Sexually Predator Treatment Program (SPTP) without success. In 2008 he filed pro se petition for discharge or transitional release in connection with his annual review, and explained his pro se filing resulted from systematic problem with court appointed counsel not providing assistance to their SPTP clients. District court summarily denied request for appointment of expert to perform independent examination, and summarily denied the petition. Miles appealed.

ISSUES: (1) Summary denial under K.S.A. 2008 Supp. 59-29a11, (2) appointment of expert for independent evaluation, and (3) appointment of counsel

HELD: Statutory procedure for annual review of a person committed as a sexually violent predator is reviewed. Rights guaranteed by this statutory scheme are critical to the constitutionality of the entire statutory scheme. District court’s summary denial of relief in this case is insufficient for appellate review and is vacated.

K.S.A. 59-29a06 clearly provides that when a person seeks an expert’s independent evaluation, a finding must be made as to the necessity of the appointment of such an expert. Absent such a finding, or reasons to deny such an appointment, remand for statutory compliance is required.

When district court is advised that appointed counsel for a committed person under K.S.A. 59-29a01 et seq., is not engaged, not responsive, or otherwise not active, court is obligated to investigate or to appoint new counsel. Directions on remand include appointment of new and different counsel.

STATUTES: K.S.A. 2008 Supp. 59-29a08, -29a08(a), -29a08(c) (1), -29a11, -29a11(a); and K.S.A. 59-29a01 et seq., -29a06, -29a06(b)

WORKERS’ COMPENSATION
DOUGLAS V. AD ASTRA INFORMATION SYSTEMS LLC
WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 101,445 – AUGUST 14, 2009

FACTS: Ad Astra Information Systems appeals the decision of the Workers’ Compensation Board (Board) that Douglas’ lung injury arose out of and in the course of his employment with Ad Astra. Douglas, who worked as a computer support analyst for Ad Astra, was injured while racing a go-cart at an off premises event hosted by Ad Astra during regular work hours. Ad Astra claims that Douglas is not entitled to workers’ compensation benefits because his injuries were sustained during a recreational or social event as contemplated by K.S.A. 2008 Supp. 44-508(f). Accordingly, the ALJ found that Douglas’ injury arose out of and in the course of his employment with Ad Astra, rather than during a recreational or social event as contemplated by K.S.A. 2008 Supp. 44-508(f). After considering the evidence, the administrative law judge (ALJ) found that Douglas’ claim was compensable and awarded benefits for a 15 percent work disability. The Board found that the recreational event was a team building exercise to boost employees’ morale and energize Ad Astra’s sales. The Board found that those employees who attended were paid their regular salary, and the employees who did not attend were required to remain at work. The Board found that Ad Astra paid for all the food and rental fees for the exclusive use of the go-cart racetrack, which payments Ad Astra deducted as business expenses for tax purposes. The Board found that Ad Astra assigned and encouraged the teams to drive fast because there would be prizes for those teams with the fastest times. Although Ad Astra intended the event to be a fun way to thank its employees for their hard work, the Board found that Douglas and at least one other coworker felt pressured to attend.

The Board modified the ALJ’s award to reflect a functional impairment rather than a work disability and affirmed the ALJ’s award in all other respects.

ISSUE: Workers’ compensation

HELD: Court stated that while there was some evidence that the event primarily was intended to thank employees for their extra work and that attendance at the event was not mandatory, court held that in reviewing the evidence in light of the record as a whole, the court shall not reweigh the evidence or engage in de novo review. Given the evidence presented to the Board, court concluded the Board’s factual finding that Douglas was under ‘some duty’ to attend the event at the recreational facility is supported by substantial evidence when viewed in light of the record as a whole. Based upon this finding, the Board did err in concluding that Douglas’ injury arose out of and in the course of his employment with Ad Astra, rather than during a recreational or social event as contemplated by K.S.A. 2008 Supp. 44-508(f).

DISSENT: J. Green dissented arguing the record lacked substantial competent evidence that Douglas had a duty to attend the recreational event.

STATUTES: K.S.A. 44-501(a), (g), (h), -508(f), 556(a); and K.S.A. 77-601, -621

CRIMINAL

STATE V. COMAN
SEDGWICK DISTRICT COURT – AFFIRMED IN PART
AND DISMISSED IN PART
NO. 100,494 – AUGUST 28, 2009

FACTS: Coman pled guilty to charge of criminal sodomy, K.S.A. 21-3505(a)(1), for having sex with animal. Trial court sentenced him to six months in county jail, and ordered psychiatric treatment and registration as sex offender under Kansas Offender Registration Act (KORA). On appeal, Coman claims K.S.A. 21-3505(a)(1) is unconstitutional in criminalizing sex between human and animal, and claims his conviction did not require KORA.

ISSUES: (1) Constitutionality of K.S.A. 21-3501(a)(1) and (2) registration as sex offender
HELD: Constitutional challenge to the statute is dismissed because Coman did not appeal his conviction, entered a guilty plea, and filed no motion to withdraw his plea at trial.

Legislature’s omission of subsection (a)(1) of criminal sodomy statute from specified crimes listed and defined as sexually violent crimes in K.S.A. 22-4902(c)(1)-(11) does not indicate any intent to have convictions under K.S.A. 21-3505(a)(1) insulated from consideration for registration obligations under K.S.A. 22-4902(c)(14). Trial court correctly ordered Coman to register after finding beyond a reasonable doubt that Coman’s crime was sexually motivated.

DISSENT (Leben, J.): Catch-all provision in K.S.A. 22-4902(c)(14) should not be used to reach conduct specifically excluded by the Legislature. Criminal sodomy statute and KORA are examined in detail. Cases cited by majority are distinguished, and majority’s limitation on application of rule of lenity is criticized.

STATUTES: K.S.A. 21-3501(2), -3505, -3505(a)(1), -3502(a)(2), -3502(a)(3), -3505(c); K.S.A. 22-3717, -4901 et seq., -4902(b), -4902(c), -4902(c)(1)-(11) and (14), -4902(d); and K.S.A. 59-29a01

STATE V. CURRERI
FINNEY DISTRICT COURT – AFFIRMED
NO. 100,299 – AUGUST 21, 2009

FACTS: Curreri convicted of aggravated battery, criminal restraint, and domestic battery resulting from domestic altercations with live-in girlfriend. Curreri sentenced to presumptive 27-month prison term consecutive to a Nevada sentence for which he was on felony probation at time of crimes. On appeal Curreri claims: (1) insufficient evidence supported the criminal restraint conviction where restraint was incidental to commission of battery and did not pose a substantial interference with girlfriend’s liberty, (2) aggravated battery conviction not supported by evidence that girlfriend suffered great bodily harm, (3) Kansas domestic battery statute was unconstitutionally applied to an unmarried cohabitating couple, and (4) trial court erred in considering Johnson’s prior adult convictions for sentencing purposes without requiring them to be proven to a jury.

ISSUES: (1) Criminal restraint, (2) aggravated battery, (3) domestic battery and unmarried couples, and (4) sentence


Ample evidence supports the aggravated battery conviction. State did not have to prove victim suffered great bodily harm. K.S.A. 21-3414(a)(1)(B) focuses on potential that great bodily harm, disfigurement, or death can be inflicted upon the victim, not whether any of these consequences actually occurred.

Kansas’ domestic battery statute, K.S.A. 21-3412a, when applied to unmarried cohabitating couples, is not unconstitutional due to a conflict with Kansas’ Defense of Marriage Amendment to Kansas Constitution, art. 15, § 16 (2008 Supp.). Similar conclusion reached by Ohio Supreme Court is noted.


STATUTE: K.S.A. 21-3412a, -3412a(2), -3412a(c)(1), -3414(a)(1)(B), -3420, -3424, -4603d(f), and -4704(a)

STATE V. DEAN
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 100,120 – AUGUST 28, 2009

FACTS: Dean convicted of possession of cocaine based on evidence found in pat-down search of him during consensual search of his home. On appeal he claimed this search and seizure violated his constitutional right. He claimed trial court erred in denying motion to suppress by finding the pat-down search was justified for officer’s safety.

ISSUE: Motion to suppress evidence from pat-down

HELD: District court erred in denying motion to suppress. Under facts of case, investigating officer lacked objectively reasonable suspicion that Dean was engaged in illegal drug activity at the time he was detained for pat-down, and lacked objectively reasonable, individualized, and particularized suspicion that Dean was armed and dangerous at the time of the pat-down. Dean’s conviction is reversed and case is remanded.

STATUTES: K.S.A. 2006 Supp. 65-4160(a) and K.S.A. 22-2402

STATE V. HARDESTY
SEWARD DISTRICT COURT
AFFIRMED IN PART AND DISMISSED IN PART
NO. 100,571 – AUGUST 14, 2009

FACTS: A jury convicted Hardesty of identity theft and driving under the influence (DUI). The identity theft charge resulted after Hardesty was pulled over for suspected DUI and produced his deceased brother’s driver’s license. Hardesty argued identity theft applies only when the defendant possesses another person’s identification documents. Hardesty reasons that his deceased brother was not a “person,” and, therefore, the evidence was insufficient to support the identity theft charge. Hardesty challenges his DUI conviction, arguing the district court erred in admitting testimony regarding his refusal to take a preliminary breath test (PBT). Hardesty also challenges the district court’s imposition of an aggravated presumptive sentence of incarceration in violation of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

ISSUES: (1) Identity theft, (2) DUI, and (3) Apprendi

HELD: Court held the Legislature intended to include the theft of the identity of a deceased person within the scope of the “another person” requirement of K.S.A. 21-4018(a), as long as the remaining requirements of the statute are satisfied. Court concluded that when the defendant used his deceased brother’s identification to avoid officers knowing his real identity when he was stopped for DUI, the defendant intended to fraudulently procure a benefit from his use of “another person’s” identity as contemplated by K.S.A. 21-4018(a).

Court held Hardesty’s refusal to take a PBT was inadmissible at trial arguing the district court erred in allowing testimony regarding his refusal to take a preliminary breath test (PBT). Hardesty also challenges the district court’s imposition of an aggravated presumptive sentence of incarceration in violation of Apprendi v. New Jersey, 530 U.S. 466, 147 L. Ed. 2d 435, 120 S. Ct. 2348 (2000).

ISSUES: (1) Identity theft, (2) DUI, and (3) Apprendi

HELD: Court held the Legislature intended to include the theft of the identity of a deceased person within the scope of the “another person” requirement of K.S.A. 21-4018(a), as long as the remaining requirements of the statute are satisfied. Court concluded that when the defendant used his deceased brother’s identification to avoid officers knowing his real identity when he was stopped for DUI, the defendant intended to fraudulently procure a benefit from his use of “another person’s” identity as contemplated by K.S.A. 21-4018(a).

Court held Hardesty’s refusal to take a PBT was inadmissible at trial to prove the charge of DUI, and the district court abused its discretion in failing to exclude the evidence or give a limiting instruction regarding the defendant’s refusal to take the PBT as it related to the DUI charge. However, court held the overwhelming evidence made the error harmless.

STATUTES: K.S.A. 8-1012; and K.S.A. 21-207, -4018(a), (d) (3), -4721(c)(1)
FACTS: After Ragnoni's ex-wife reported to authorities that Ragnoni called and asked her to tell the kids goodbye for him, officers were dispatched to his home address and found nobody at home. Based on department policy, a welfare concern regarding someone who has been reported to be suicidal remains on the “hot sheet” until the individual is either located and determined not to be suicidal or taken to a hospital for evaluation. Three days later, Officer Chad McCary of the Salina Police Department reported for duty and was given a copy of the “hot sheet” that included the information about Ragnoni. The officer testified the department policy was that if he encountered the subject he was to contact him and determine whether he was suicidal. When Ragnoni drove past the officer, a vehicle tag check revealed this was indeed Ragnoni. The officer followed Ragnoni's vehicle to a driveway at a private residence, where Ragnoni and his three children exited the vehicle. Ragnoni confirmed his identity but denied he was suicidal. In the course of this short conversation, the officer observed indicators that Ragnoni was intoxicated, including slurred speech, bloodshot and watery eyes, slow behavioral responses, and the odor of alcohol on his breath. The officer then conducted a DUI investigation and thereafter arrested Ragnoni on suspicion of DUI. Ragnoni was subsequently charged with DUI and failure to submit to a breath test. Ragnoni was convicted of both counts in municipal court, but he perfected an appeal to district court. Prior to trial in district court, Ragnoni moved to suppress the stop and all activities thereafter, arguing this was not a valid public safety stop. The district court agreed, concluding only that “a public safety contact was not justified by Officer McCary and the defendant’s motion should be granted.”

ISSUE: Public safety stop

HELD: Court held under the facts of this case, a public safety stop was justified. The public concerns regarding safety and the need to contact and/or observe an alleged suicidal person are indeed grave and may often save the life of the subject and others. Where the subject was encountered within three days of a report of his potential suicidal intentions while in the yard of a private residence, the stop clearly advanced the public interest, and the severity of interference was minimal given that the officer’s encounter consisted of only a conversation restricted to those concerns and lasted only a few minutes until the officer gained reasonable suspicion that an unrelated crime may have been committed.

STATUTES: No statutes cited.

STATE V. TAPIA

SEWARD DISTRICT COURT – AFFIRMED

NO. 100,596 – AUGUST 28, 2009

FACTS: Tapia convicted of nonresidential burglary, vehicular burglary, and conspiracy to commit burglary. On appeal, he claimed the district court lacked jurisdiction to try him on the conspiracy charge because it failed to allege an overt act in furtherance of the conspiracy. He also claimed the district court erred in not giving jury an accomplice instruction, and claimed erred in using criminal history and aggravating factors not proven to a jury.

ISSUES: (1) Defective charging document, (2) accomplice jury instruction, and (3) sentencing


Under facts of case, no error in district court’s failure to give an accomplice instruction.

Sentencing claim defeated by controlling Kansas Supreme Court precedent.

STATUTES: K.S.A. 21-3302(a) and K.S.A. 22-3201(b)
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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 Institute
Holiday Inn, Lawrence

Friday, October 16, 9 a.m. – 4:30 p.m.
Agricultural Law Update
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
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David P. Mudrick, Henson, Hutton, Mudrick, and Gragson LLP, Topeka
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Friday, October 23, 9 a.m. – 3:35 p.m.
34th Annual KBA/KIOWA Oil and Gas Conference
Hyatt, Wichita

Tuesday, October 27, Noon – 1 p.m.
Employee Handbooks: It All Comes Down to Policies
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Carol R. Bonebrake, Law Office of Carol Ruth Bonebrake, Topeka
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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)

NOVEMBER

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Protection Order Law and Practice in Kansas
Co-sponsored by the Kansas Coalition Against Sexual and Domestic Violence
Gary West, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Telephone CLE

Thursday, November 5, Noon – 1 p.m.
Civil Legal Rights for Victims of Sexual Violence
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Laurel Klein Searles, Kansas Coalition Against Sexual and Domestic Violence, Topeka
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Friday, November 6, 9 a.m. – 3:35 p.m.
Elder Law Update*
Featuring a 2009 supplement to the Long-Term Care Handbook
Courtyard Marriott, Junction City

Tuesday, November 10, Noon – 1 p.m.
Immigration, Crimes, and the Noncitizen*
Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Overland Park
Telephone CLE

Friday, November 13, 1 – 3:50 p.m.
Corporate Counsel*
Crowne Plaza, Lenexa

Wednesday, November 18, Noon – 1 p.m.
When Victims are Charged with Crimes
Co-sponsored by the Kansas Coalition Against Sexual and Domestic Violence
Sara Rust-Martin and Pamela Burrough Jacobs, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Telephone CLE

Thursday, November 19, Noon – 1 p.m.
Recent Developments in Family Law
Co-sponsored by the Kansas Coalition Against Sexual and Domestic Violence
Sara Rust-Martin and Pamela Burrough Jacobs, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Telephone CLE

Friday, November 20, 9 a.m. – 4:35 p.m.
Alternative Dispute Resolution*
Co-sponsored by the Heartland Mediators Association
Airport Hilton, Wichita
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- Exemptions and Prebankruptcy Estate Planning
- Individual Bankruptcy and Income Taxes
- Overview of Chapter 12
- Preparation of Petition, Schedules, Statement of Financial Affairs, and Other Documents
- Representing Creditors in Chapter 7 Proceedings
- Representing Creditors in Chapter 13 Proceedings
- Representing the Debtor in Chapter 11: An Overview
- The Role of the Trustee in Chapter 7 Cases
- The United States Trustee

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