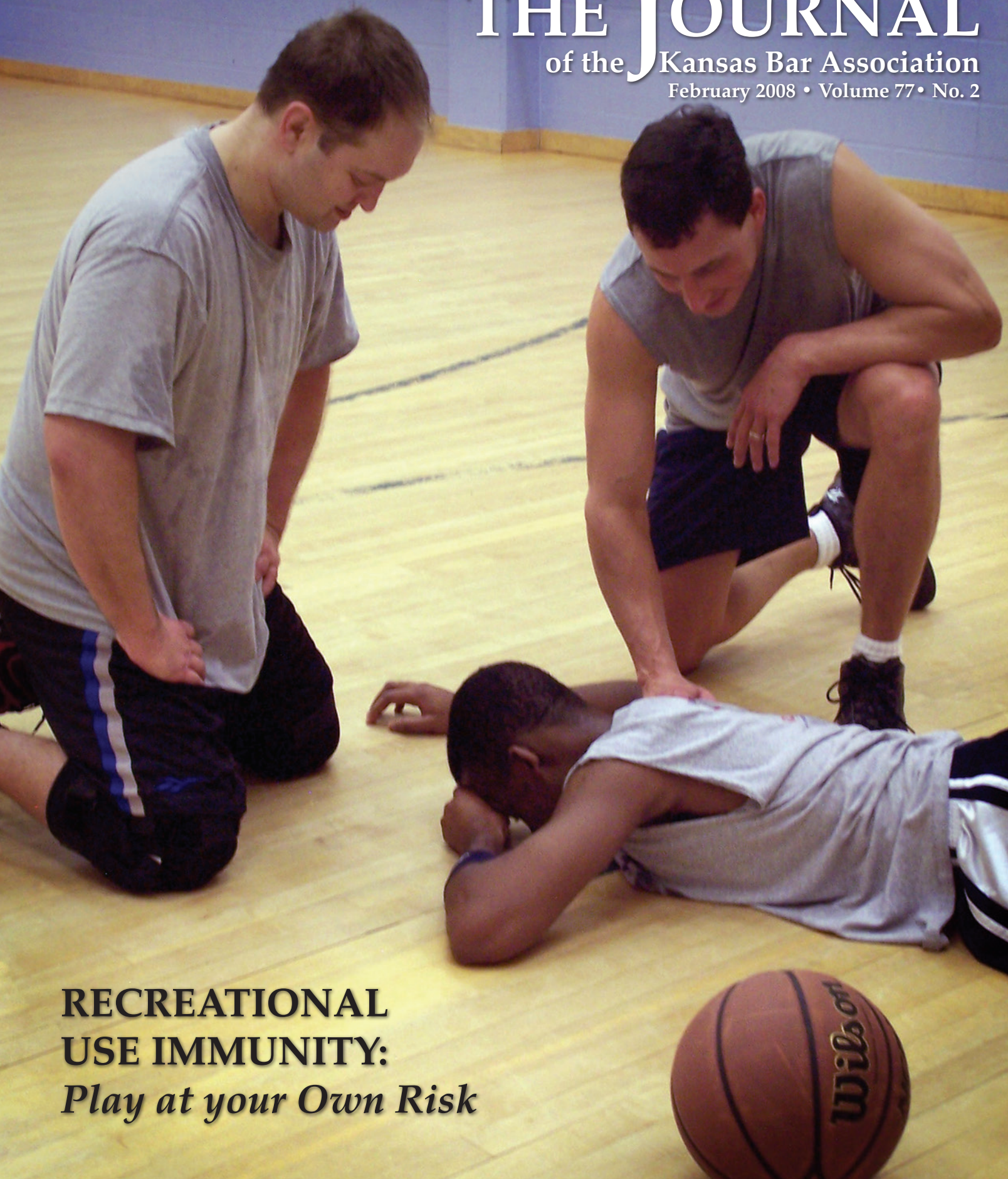


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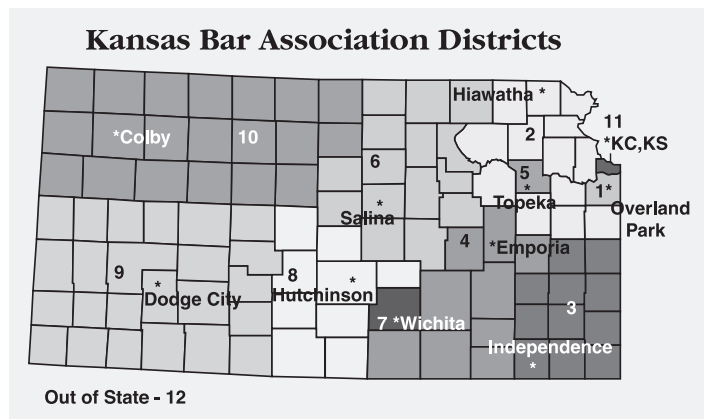
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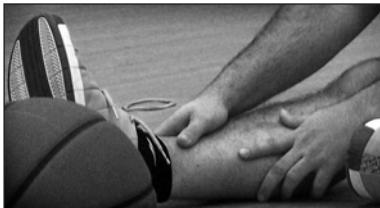
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FROM THE PRESIDENT

LINDA S. PARKS

No Reform is Needed

In the 1930s President Franklin Roosevelt, angry about rulings by the U.S. Supreme Court, had a bill introduced in Congress to restructure the appointment system of the Court. Recently, in support of conservative lawmakers upset by two recent decisions of the Kansas Supreme Court, University of Kansas School of Law professor Stephen Ware has published a so-called “white paper” in which he argues that the Kansas system should be revamped to give politicians more power and control.

Roosevelt was wrong with his ax grinding. So are those pursuing politically motivated change in the Kansas judicial system.

As most of you know, we have a Supreme Court Nominating Commission (Commission) of nine members with term limits. Five are lawyers, one from each congressional district in the state and one who serves as chair, who are elected by a vote of all lawyers licensed and living in Kansas. Four commissioners are nonlawyers and appointed by the governor.

Applicants for appellate court positions submit their names to the Commission. The Commission deliberates long and hard and narrows the list to the three most qualified applicants and submits those names to the sitting governor to make the appointment to the court. After appointment, members of the appellate courts come before the citizens in regular elections to decide whether they will be retained on the court.

Our system is based on merit, not on politics. But sometimes members of the party in power prefer politics — especially when they disagree with the court.

In Ware’s paper, which was produced by the Federalist Society, although we do not know the source of the funding, it has been suggested that we change the system to have the governor select candidates for the appellate court and then have those candidates face Senate confirmation. That means more power to politicians — and potential political gridlock. But that’s the proposed “improvement” to our system.

Ware argues that under his more political system the process would be improved simply because currently the lawyers have

too much power. He suggests that because the meetings of the Commission are private, there must be something underhanded about them. He ignores what the Commission really does: It interviews and discusses matters typically discussed in an employment setting. Those matters should be private. Likewise, it is vital that the commissioners be candid in their discussions about the applicants. That would be impossible if the discussions were broadcast to the world.

Ware seems particularly upset by the fact that there is a bare majority of lawyers serving on the Commission. Imagine that,

lawyers on a commission that discusses lawyers and their qualifications for a job about which lawyers know the most. Even Ware admits, “Lawyers, because of their professional expertise and interest in the judiciary, are well suited to recognize which candidates for judgeship are especially

knowledgeable and skilled lawyers.” That’s exactly why lawyers serve on the Commission. If you have a serious medical condition, you don’t turn to a neighbor or a politician to find a specialist.

The proponents of politically motivated change like to throw around pejorative phrases. Ware talks about “secret” meetings. And those who support the current system are “good ol’ boy lawyers.” I suppose the hope is that this will catch on with the public by bringing to mind smoke-filled rooms and arm-twisting tactics, while nothing could be further from the truth. As you might guess, I find the reference to good ol’ boys particularly offensive. Surely law professors, in particular, should realize we are past those days.

The current system is fair, inclusive, and eliminates the raw politics that would otherwise taint the process. No reform is needed because the current system works well. So as our Legislature begins its session this year, hopefully you, the lawyers of the state of Kansas, can help to educate the general public and your representatives about the quality of our system and the integrity of its lawyers. ■

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The Challenges of Maternity/Paternity Leave for Attorneys

By Amy Fellows Cline, Triplett, Woolf & Garretson LLC, Wichita, KBA Young Lawyers Section president



Amy Fellows Cline

In the past few years, I've encountered an increasing number of associate attorneys who have tackled the challenges of maternity/paternity leave. While members of many professions face this challenge, the practice of law brings a unique set of circumstances. I thought I'd share advice I've received with those of you who may take an extended leave from the practice of law in the future or work with a colleague who does. While this article focuses on maternity/paternity leave, most of the advice can be just as useful for someone taking time off to recover from a surgery or illness.

Just as pregnancy has three trimesters, maternity/paternity leave issues can be categorized into three stages — preparing to take leave, staying in touch while on leave, and returning to work. Each of these stages can be uniquely problematic. In this article, I'll touch on issues to consider when preparing for such leave, perhaps because a significant amount of my own time is currently being spent preparing for maternity leave I intend to take at the end of the month for the arrival of my second child.

To begin with, the attorney preparing to take leave must determine the best time to address the issue with partners, staff, and clients. The timing of these discussions can be impacted by many factors. With my first pregnancy, I informed my partners a little earlier than the traditional time frame because they were in the midst of planning and budgeting for the year in which I intended to take leave. The issue also came up fairly early in discovery conferences during which I requested extensions of certain deadlines to accommodate my intended leave. These extensions prompted me to address the issue with certain clients earlier than I'd intended, since I wanted them to approve the amended litigation schedules.

As the end of the pregnancy approaches, attorneys must consider when to stop taking on new matters and who should monitor their case load while they are on leave. I'm fortunate to have a number of litigators in my firm who can assist with my case load. Other attorneys I know have associated with attorneys outside of their firm who practice in their area or returned to work after a short leave with a flexible, part-time schedule.

Keeping file materials, substitute attorneys, and clients up-to-date can be crucial, as unexpected complications can cause you to take leave sooner than anticipated. Making daily updates to a spreadsheet containing information about matters on which you are working can be helpful for those managing your practice while you are on leave. You should also determine how you intend to communicate with your office, clients, and opposing counsel while you are out of the office.

Inevitably, your productivity in the last month or so will take a huge hit. Between weekly doctor appointments, health issues, introductions and updates with substitute counsel and clients, combined with an inability to take on many new matters, you may not be able to bill much at all. You and your

firm should take this into consideration when budgeting your billable hour goal for the year in which you take leave. However, some flexibility in your practice can help maximize your productivity during this time. While you may not be able to take on many new projects, you may be able to perform piecemeal drafting or research projects for other attorneys. You may also be able to complete preliminary work on motions, discovery, or expert preparation that can streamline your transition back into the practice when you return to work.

Today's technology offers tremendous benefits for those on leave. E-mail can be vital for keeping in touch with your practice, especially when handling the unpredictability of a newborn. If your firm doesn't currently have the technology to allow you to connect to its computer system from home, you should address this issue with your partners and technology department. For example, with sufficient security systems, your staff can scan and e-mail the paper mail you receive while on leave. Also, if you prepare an electronic signature, you can continue to draft necessary documents and mail while out of the office. While such technology can be expensive, the investment will most likely be repaid by your ability to address clients' and partners' needs while out of the office. It can also be helpful to other partners while they are on vacation or working from home on the weekends.

Obviously, I've just touched on the many prickly issues faced by those preparing for maternity/paternity leave. Even if you don't plan to take such leave, I hope I've opened your eyes to the challenges faced by attorneys who do. And, if you intend to take this leave, I encourage you to contact other attorneys — especially those in your practice area — who have handled this challenge, so you can learn from their experience. While your pregnancy may not go according to schedule, you will certainly be better prepared for any contingency if you address the issues raised above as early as possible. ■

Amy Fellows Cline may be reached at (316) 630-8100 or at amycline@twgfirm.com.



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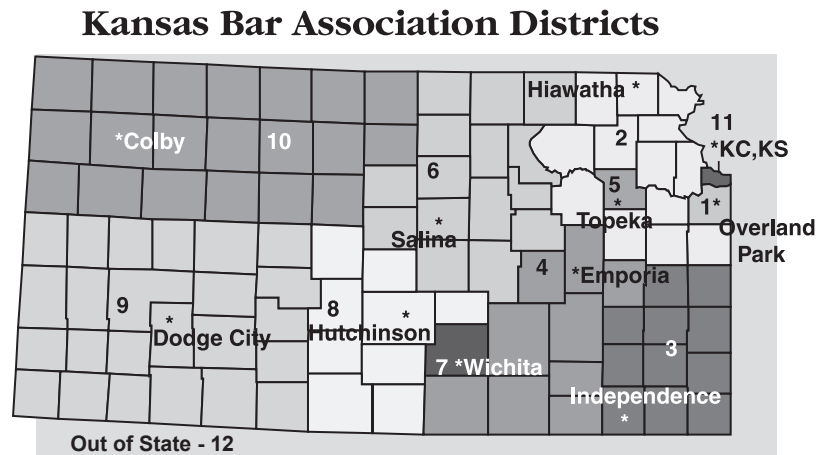
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A Reminder! KBA Officer and Board of Governors Elections in 2008; Petitions due by March 9

KBA President-Elect
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KBA Secretary-Treasurer

The KBA Nominating Committee, chaired by immediate past president David Rebein, Dodge City, met on Jan. 25, to consider nominations for KBA officers. Those nominations were not available at press time, but can be obtained by calling KBA Executive Director Jeffrey Alderman at (785) 234-5696. In addition to being nominated by the Nominating Committee, individuals can submit a petition, signed by 50 KBA members, to run for a KBA officer position. Petitions are due by March 9, and can be obtained from Becky Hendricks at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.



BOARD OF GOVERNORS

There will be six positions on the KBA Board of Governors up for election in 2008. Candidates seeking a position on the Board of Governors must file a nominating petition — signed by at least 25 KBA members from that district — with Jeffrey Alderman by Friday, March 7, 2008. If no one files a petition by March 7, the Nominating Committee will reconvene and nominate one or more candidates for open positions on the Board of Governors. KBA districts with seats on the Board of Governors up for election in 2008 are:

- **District 1:** Incumbent Lee M. Smithyman is eligible for re-election. Johnson County
- **District 3:** Incumbent Dennis D. Depew is eligible for re-election. Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, and Woodson counties
- **District 5:** Incumbent Teresa L. Watson is eligible for re-election. Shawnee County
- **District 7:** Incumbent Mary Kathryn Webb is not eligible for re-election. Sedgwick County
- **District 8:** Incumbent Gerald L. Green is eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties
- **District 12:** Incumbent Christopher J. Masoner is eligible for re-election. Kansas City, Mo.

KBA Delegate to ABA House of Delegates: Hon. David J. Waxse is not eligible for re-election.

In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

For more information

To obtain a petition for the Board of Governors, please contact Becky Hendricks at the KBA office at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.

If you have any questions about the KBA nominating or election process or serving as an officer or member of the Board of Governors, please contact David Rebein at (620) 227-8126 or via e-mail at drebein@rebeinbangerter.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org. ■



2008 Kansas Bar Association Awards

The KBA Awards Committee is seeking nominations for award recipients for the 2008 KBA Awards. These awards will be presented at the KBA Annual Meeting in Topeka, June 19-21. Below is an explanation of each award, and a nomination form can be found on Page 9. The Awards Committee, chaired by Anne Burke Miller, Overland Park, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee's attention! Deadline for nominations is Feb. 29.

Phil Lewis Medal of Distinction: The KBA's Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- The recipient need not be a member of the legal profession or related to it, but the recipient's service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

Distinguished Service Award: This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

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

Outstanding Young Lawyer: This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Outstanding Service Awards: These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize:

- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;

- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

Pro Bono Award: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

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

Distinguished Government Service Award: This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award: The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council's request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient. ■

Note: Nomination form on Page 9.

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Nominee's Name _____

- Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.*

This image shows a single sheet of white paper with horizontal blue or grey ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Phone _____ **E-mail** _____

KBA Awards Committee
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The Kansas Bar Association YLS Mock Trial Competition Presented by Shook, Hardy & Bacon LLP Needs Volunteers

The Kansas Bar Association Young Lawyers Section (KBA YLS) is once again privileged to organize and sponsor the Kansas Bar Association YLS Mock Trial Competition. Presented by Shook, Hardy & Bacon LLP, this 11th annual event is a statewide mock trial competition for Kansas high school students, where student teams participate in mini-trials that are judged by attorneys. The student teams consist of three to four student attorneys and three student witnesses. The student attorneys present opening statements, closing arguments, and direct- and cross-examination of three witnesses. The competition consists of two regional (Wichita and Olathe) competitions and one state competition (Wichita). The KBA YLS provides a scholarship for the state champion to compete at the national competition, which will be held this year in Wilmington, Del.

The benefit to students is significant. Mock trials have proven to be an effective method of providing young people with an operational understanding of the law, legal issues, and the judicial process. The project imparts knowledge about how the legal system and lawyers operate so that high school students, regardless of their ultimate career choices, will be better educated with regard to the law. While obtaining this knowledge, young people develop useful questioning, critical thinking, and oral advocacy skills, as well as significant insight into the area of law relevant to the problem in question. By exposing students to the rules of evidence, as well as advice and critiques from actual attorneys, the students receive an experience that is genuinely comparable to the legal system and the role of lawyers in it. Mock trials

help students gain a basic understanding of the legal mechanism through which society chooses to resolve many of its disputes. The student attorneys have fun in preparing for, and participating in, a simulated trial.

Volunteers are essential. Involving judges, attorneys, and other members of the legal community to take part in the mock trial will help bridge the gap between the simulated activity and reality. This involvement will also give student attorneys an opportunity to gain knowledge and experience from members of the legal community. While essential, volunteering is also rewarding. Each year volunteers share comments about being “wowed” by high school students who travel across the state to compete in this worthwhile program.

So how can you be involved? The KBA YLS need judges for the 2008 High School Mock Trial Competition. The regional competition will be held March 1 in Wichita at the Sedgwick County Courthouse and in Olathe at the Johnson County Courthouse. The state competition will be held April 5 at the Sedgwick County Courthouse. We will need at least 12 judges per round — TRANSLATION: WE NEED A LOT OF VOLUNTEERS! — You will be on a panel with two other attorneys, judging a “mini-trial.” Each side puts on three witnesses and presents opening statements and closing arguments. If you are interested in judging at any of the competitions, contact Scott Hill at hill@hitefanning.com (Wichita rounds) or Samantha Benjamin-House at sbenjamin@mvplaw.com (Olathe rounds). You can also contact Meg Wickham, manager of public services at mwickham@ksbar.org. ■

We need your help! Volunteer to judge at the 2008 KBA YLS Mock Trial presented by Shook, Hardy & Bacon LLP. Regionals: Saturday, March 1 in Olathe and Wichita; and State: Saturday, April 5 in Wichita. Contact Meg Wickham, manager of public services, at (785) 234-5696 for details.

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Southwest Airlines and Open Seating

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

Recently Southwest Airlines (Southwest) changed its boarding system. While keeping open seating, they have eliminated “first to stand” “first to board” rule. It’s designed to free up passengers’ time, so they can do other things people do in airports, like stare at terminal screens, which show flight delays and endless cancellations.

As someone who has spent half of his adult life on Southwest, someday I will serve as a storyteller to younger generations about what traveling was like during this era. The question posed will sound like this: “Grandpa, tell us about the days when airplanes were fun to fly on. When it was special.” And this is what I will tell them:

“You see, a long time ago there were a lot of different airlines. Airlines called TWA, Braniff, Pan Am, Vanguard, and Eastern Airlines. Back then, passengers were treated much differently than today. They were like, well, customers. Flying was special, a privilege. Flight attendants treated you accordingly. They served meals and soda in a can. And then something happened. I’m not sure what it was. The airlines got too big and started losing money. Airlines went out of business like every other week. And soon there were only 10 airlines. And then a couple years later there were only five. And of the five, there was one that did things differently than its competitors. That was Southwest.”

“What was different about them, grandpa?” “Well son, for one, they made money. So they stayed in business. Two, they were cheap. No frills. So a lot of families flew on them. It was very popular with parents whose children had crying disorders. Especially those seated next to me. And Southwest had one thing no other airline had. It was called open seating.” “What’s that grandpa?”

“You see, no one had an assigned seat.” “Like at the movie theater?” “Exactly. But this was no Disney movie. It was like the field trip you took to that farm — remember those cattle herds? This has three groups of livestock — A, B, and C, — which meant the order you boarded. With other airlines, those who boarded first were in first-class. That was for people with money who wanted to pay more for a better experience. But with Southwest first-class meant something completely different. It wasn’t about being rich and there was certainly no Pinot Grigio served. First-class was reserved for those who got to the gate first and got their ticket first. Those people sat near the front, so they could exit first, which is very important on these flights. Sometimes these customers got there four, five hours early, and they stood at the gate, waiting and waiting.”

“Here is the weird thing. You had to hold your place in line. So huge lines formed at the gate. Like the woman’s bathroom at Arrowhead in the fourth quarter. But there were three lines, and they got co-mingled, which caused anxiety for the people in the A line. I could always tell the lines apart. First-class was screaming babies, second-class was the college students, and third class, well that was all the business travelers, like me.”

“So I boarded last, and there was rarely room for your bags, and then you got a middle seat. That meant that when people

on both sides got tired and slept, they used your shoulder as a pillow.”

“And if you didn’t have a seat for A, B, or C, then you had something called stand by.” “What’s that grandpa?” “It’s the lowest form of human life. You stood by while the entire free world boarded. The last seat on the plane was yours. Where no one else wanted to sit.” “But grandpa aren’t all the seats the same size?” “Yes, but all the passengers aren’t. Usually it was the seat between the two people who needed two seats but paid for one. One time I flew standby from St. Louis to Kansas City. The plane had some serious weight and balance issues, around my row, if you know what I mean. I couldn’t breathe but I could drink. I used four drink coupons in a 40-minute flight. The guy next to me had a really cushy shoulder.”

“Wow. What else happened a long time ago?”

“The Kansas City Royals won a World Series.” “No way, Grandpa!” “And you know about the Super Bowl? The Chiefs played in it twice and won it once.” “Oh Grandpa, stop!” ■

About the Author



Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 21 years, Keenan has practiced with Shook, Hardy & Bacon. He may be reached at mkeenan@shb.com.

Mark Your Calendars

KBA Annual Meeting June 19-21, 2008

Capitol Plaza Hotel, Topeka



Teaching an Old Dog

By Steve Anderson, University of Kansas School of Law

During my daughter's last semester in high school, I was getting ready to become an empty nester with my wife. I wondered what I would do to fill my time. At the same time, I was looking for resources to better understand the issues faced by my elderly trust company clients. I discovered that the University of Kansas School of Law offered classes in elder law. As I explored further, I realized that the classes were part of a Master in Elder Law program. After reviewing the requirements and timetable for earning the degree I obtained my letters of recommendation, participated in a phone interview, and committed to the degree requirements. When I was accepted into the program the adventure began.

In August 2007, I attended my first law school class since the spring of 1981.

Besides being the oldest student, by far, I saw how out-of-step I was in being a law school student. Out of the 24 students in my two classes I was only one of two that did not come to class with a laptop computer. As the computer literate students took notes and checked on their e-mails in class, I made notes in my old-fashioned paper notebook. This old habit will be hard to break.

My elder law research project threw me into the unfamiliar territory of online research. During my law school days I remember doing almost all of my legal research the old fashioned way: looking through case reporters and statute books, reviewing digests, using the paper version of the Guide to Periodical Literature, and Sheppardizing through paper sources. During law school I did some online research, but I was not very good at using the appropriate terms and limiting my search. Now law students do most legal research online. In doing my assignments, I discovered the many Internet sites containing relevant information, the databases available through government Web sites, and the many ways to do research through paid services. However it seemed to take me forever to complete simple research assignments because of my unfamiliarity with online research.

I enjoyed taking Introduction to Elder Law. Professor Craig Reaves explained the legal, financial, and medical case and statutory law that impact elderly clients and their families. In addition, I was able to walk through the options available to my wife, the caregiver for her mother, who has gone from living at home to an Alzheimer's unit at a nursing home. Finally I was able to see the maze of law that makes it hard for the elderly to live at home and pay for necessary expenses.

Taking a law school final for the first time since 1981 was a challenge. I found it much harder to memorize items and prepare an outline for the class than 26 years ago. Luckily I had only one final instead of the four or five most law school students take. In addition I was glad the test was only two hours long; I do not think I could have held up for a three-hour test. I struggled budgeting my time during the final. Luckily I finished on time.

I am registered to take three hours in the spring. So my wife will again have her son, daughter, and oldest child in college. This semester I will prepare a bibliography and term paper. In addition at some point I will need to write a thesis. All of those requirements will be challenges. I am not certain how long it will take me to complete the Master's in Elder Law degree. However, I am enjoying the learning process and see its relevancy to my family and clients. So all I can do is repeat to myself the adage of the Little Engine Who Could: "I think I can, I think I can." ■

About the Author



Steve Anderson graduated from the University of Kansas School of Law in 1981 and is currently enrolled in the LL.M. Program in Elder Law. After practicing law for 20 years, he has been a trust officer at Commerce Trust Co. since 2001. Anderson and his wife, Carole, have been married for 28 years and have a 21-year-old son, Ryan, and an 18-year-old daughter, Lauren.



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Members in the News

CHANGING POSITIONS

Joseph W. Alfred has joined the Law Offices of John F. Roth, Olathe and **John C. Kennyhertz** has joined the firm as general counsel.

Jennifer C. Bailey, Scott R. Brown, Andrew G. Colombo, Michael M. Elbein, Christopher L. Logan, Thomas B. Lubbering, Jill D. Singer, and Stephen D. Timmons have joined Hovey Williams LLP, Overland Park.

Jason W. Belvea has joined Tenopir & Huerter, Topeka.

Eric R. Blevins has joined the Overland Park Prosecutor's Office as assistant city attorney, Overland Park.

Stacy A. Burrows has joined George Barton P.C., Kansas City, Mo.

Brian R. Carman has joined Stinson, Lasswell & Wilson L.C., Wichita, as an associate.

William Francis Deer II, has joined Tiger Financial Management, Wichita.

Jenny E. Deters has joined Gilmore & Bell P.C., Kansas City, Mo.

Blaine E. Dickeson has joined South & Associates P.C., Overland Park.

Karen L. Ebemeier has joined the 10th Judicial District Public Defender's Office, Overland Park, as the assistant district defender.

Andrew J. Ennis and **Jack D. McInnes V** have joined Shughart Thomson & Kilroy P.C., Kansas City, Mo., as associates.

Natalie F. Gibson has joined the Kansas Judicial Council, Topeka.

Nicholas R. Grillot has joined Woner Glenn Reeder Girard & Riordan P.A., Topeka.

Stephen C. Griffis has joined Atkins & Markoff, Oklahoma City.

Jeffrey D. Hanslick has joined Blackwell Sanders LLP, Kansas City, Mo.

Kathryn L. Harpstrite has joined Morris, Lang, Evans, Brock & Kennedy Chtd., Wichita.

Paul P. Hasty Jr. has joined Schmitt, Manz, Swanson & Mulhern P.C., Overland Park, and **Andrew C. Hronek** has joined the firm's Kansas City, Mo., office.

Jennifer R. Hays has joined Valentine & Zimmerman P.A., Topeka.

Andrew C. Hronek has joined Schmitt, Manz, Swanson & Mulhern P.C., Kansas City, Mo.

Michael S. James has joined Anadarko Petroleum Corp., Denver.

Casey A. Jenkins has joined Burns & McDonnell, Kansas City, Mo.

Zachary C. Jones, Mindy J. Olson, and Frank R. Smith have joined Foulston Siefkin LLP, Wichita, as associates, and **Charles E. Watson II** has been added as special counsel. **Kristopher M. Kellim** has joined the firm's Topeka office.

Linda J. Knak has joined Mitchel, Gaston, Riffel & Fiffel PLLC, Enid, Okla.

Timothy C. Klink has joined Polsinelli Shalton Flanigan Suelthaus P.C., Kansas City, Mo., as an associate, and **John M. Kratofil** has also joined the firm.

Matthew J. Koenigsdorf has joined Black & Veatch, Overland Park.

Sarah T. Lepak has joined Shook, Hardy and Bacon LLP, Kansas City, Mo.

Melissa M. Mangan has joined Hinkle Elkouri Law Firm LLC, Wichita.

Michael J. Mayans has joined Intrust Financial Corp., Wichita, as vice president and associate general counsel.

Karen Elise Reintjes McLeese has joined CBIZ Benefits & Insurance Services Inc., Leawood.

John B. McEntee Jr. has joined Horn, Aylward & Bandy LLC, Kansas City, Mo.

Katherine A. Moulthrop has joined the U.S. Air Force, Honolulu.

Timothy P. Price has joined Franke, Schultz & Mullen P.C., Kansas City, Mo.

Eleanor Psyk has joined Sprint Nextel, Overland Park.

Jean R. Seeber has joined Schlagel, Gordon & Kinzer LLC, Olathe.

John M. Shoemaker has joined Coventry Health Care of Kansas, Kansas City, Mo.

Michael J. Smith has joined the Kansas Office of the Attorney General, Topeka, as an assistant attorney general.

Ronald D. Smith has become a partner and shareholder with Smith, Burnett & Larson LLC, Larned.

Richard C. Stevens has joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.

Sarah T. Sullivan has joined Bryan Cave LLP, Kansas City, Mo.

Sheila M. Thiele has joined Levy and Craig P.C., Kansas City, Mo.

Amanda G. Voth has joined the Reno County District Attorney's Office, as an assistant county attorney, Goessel.

Matthew J. Wiltanger has joined QC Financial Services Inc., Overland Park.

Michael J. Wyatt has joined Klenda Mitchell, Austerman & Zuercher LLC, Wichita.

CHANGING PLACES

The Association in Dispute Resolution LLC has added a third office, 910 One Main, 4435 Main St., Kansas City, MO 64111.

David and Susan Berson have started their own firm, The Banking & Tax Law Group LLC, 4745 W 136th St., Ste. 70, Leawood, KS 66224.

The Law Offices of Hovey Williams LLP have moved to 10801 Mastin Blvd., Ste. 1000, Overland Park, KS 66210.

Jayne A. Pearman has started her own firm, Jayne A. Pearman L.C., 7007 College Blvd., Ste. 480, Overland Park, KS 66211.

(continued on next page)

"Jest Is For All" by Arnie Glick



OBITUARIES

Edgar William "Ed" Dwire

Edgar William "Ed" Dwire, 71, of Wichita, died Dec. 9. He was born Aug. 21, 1936, the son of Ray M. and Alice G. (McMillen) Dwire in El Dorado.

Dwire obtained an associates degree from El Dorado Junior College and went on to earn his bachelor's degree and juris doctorate from Washburn University. He was admitted to practice in 1963 and was active in numerous associations (including the Kansas Bar Association), boards, committees, and societies of law and education throughout his 44 years of practice. He served as a Wichita municipal judge and assistant attorney general. Dwire was an Army veteran and a member of the Army Rifle Team.

Survivors include his wife, Peggy; five children and seven step-children, Diana Dooms, Daniel, David, and John Dwire, Cheri Hoover, Robert Lawton, Dolly Wilson, Jay, Gary, and Hugh Gullic, and Carrie and Emily Osgood; and two sisters. ■

Members

(Continued from Page 14)

Christopher M. Reeht has started his own firm, Christopher M. Reeht P.A., 214 S. Chestnut, Olathe, KS 66061.

Smith, Shay, Farmer & Wetta LLC has moved to 200 W. Douglas, Ste. 350, Wichita, KS 67202.

Stramel Law Firm PA has moved to 480 N. Franklin Ave., Colby, KS 67701.

MISCELLANEOUS

Matthew D. All, Topeka, has been appointed chair of the Kansas Lottery Gaming Facility Review Board by Gov. Kathleen Sebelius.

John R. Bullard, Parsons, has been selected to be the new Labette County attorney by the Cherokee County Democratic Central Committee.

Kari D. Coultis, Wichita, has earned her designation of certified valuation analyst with the National Association of Certified Valuation Analysts.

Charles P. Efflandt, Wichita, has been elected a Charter Fellow and a Founding Regent of the American College of Environmental Lawyers.

The firm of **Parman & Easterday LLP** has changed to Seibel Law Firm LLC, Hays.

David M. Rapp, Wichita, has been selected as a fellow of the Litigation Counsel of America.

Mike L. Stout, Wichita, has been elected as president of The American College of Trial Lawyers.

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

Mark Your Calendars

KBA Annual Meeting June 19-21, 2008

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Lost

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

Hello. My name is Larry Zimmerman and I lose data — frequently. It happens when you tinker too much or when you share your office and tools with a hacker-minded 4-year-old. Together, there is little we can't break.

Lost – Deleted Files

Near the end of a family vacation my 4-year-old got her mitts on my digital camera and deleted a week's worth of snapshots. I, however, did not endure a drive across America with four kids in tow only to have all evidence of my endurance deleted with the press of a button.

Restoration to the rescue! Restoration is a free utility that can often recover deleted files. I simply removed the memory card from my camera, fired up Restoration, and selected the lost files to recover. You can download this free miracle worker with general tips on successful data recovery from www.aumha.org/a/recover.php.

Lost – Hard Drive Corrupted

Losing a hard drive is a harder task but recovery is still possible. My same nimble-fingered 4-year-old once managed to send my laptop into seizures. The operating system corrupted and the machine would not boot. I had not been faithful with backups so there was still data on that drive that I needed. (I have repented of that data sin with off-site backups of my data to www.mozzopro.com — \$4 plus 50 cents per gigabyte per month.)

My recovery of the corrupted drive used a specially formatted CD that allowed me to boot my laptop into a clean operating system that does not write to the hard drive. I selected a Linux operating system downloaded free from www.ubuntu.com. Once I burned Ubuntu Linux as an image to a CD, I simply loaded it in the CD tray of the laptop and turned it on. When Ubuntu loaded, I was able to simply drag-and-drop data files from the corrupted drive onto a USB drive.

A more robust approach specifically tailored to data recovery is GetDataBack from Runtime Software, www.runtime.org. This utility is not free (\$79) but it can be run in free mode first to determine if your data is recoverable from the drive. If you can see your data in free mode, you pay online and are sent an unlock code that allows you to save the recovered data. Runtime provides terrific technical support documentation and tutorials via YouTube as well as traditional phone and e-mail support.

Lost – Hard Drive Physically Damaged

Hard drives can physically fail when a head crash occurs — the read head in the drive scrapes across the platter. A head crash can be caused by such things as a power failure, physical shock, or wear and tear. Hard drives can also fail when the sophisticated electronics controlling the disk fail.

Manufacturers suggest failures occur at less than 0.80 percent of installed disks per year but a recent study by Carnegie Mellon finds it might more likely be 2-4 percent of installed disks failing each year. At either rate, it's likely you will have a hard drive physically fail at least once.

The best do-it-yourself solution to physical hard drive failure is a solid backup plan. Online backup is probably the easiest way to make sure it gets done on a regular basis. Backing up to a local network server or another networked PC can be quick and easy with free tools like Backup Server, www.backuptoserver.com or DriveImage XML, www.runtime.org.

Even a weekly backup to an external, USB hard drive is better than nothing and has saved me from lost data when my laptop crashed to the floor during shutdown. (Yes, there was a 4-year-old involved — how did you know?)

If you have no backup and you have got to get to the data on the damaged drive, there are services that may be able to help. They are not cheap and they are not overnight but they can often salvage most, if not all, your data. One such provider is ADR Data Recovery with offices in Overland Park (1-800-450-9282). Prices for such services are not printed on the menu so use that as a clue to their cost.

Found

The odds for recovery of lost data have improved to the point an amateur and his 4-year-old can usually fix their own mistakes. Of course, if an amateur can recover his own data, beware what the professionals can do in electronic discovery. ■

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 editor.

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.

Enlarging the Pie

By Diane E. Sherwood, Conflict Resolution Center, Wichita, and David P. Calvert, Wichita

There is a common misperception about mediators — that they must have some expertise in the law and subject matter of the mediation. While that may be helpful, it is not necessary, and, in fact, all approved mediators are trained in the skills to mediate any case. The practice of alternative dispute resolution (ADR) in Kansas has evolved over the years, beginning in Wichita with Judge Patrick F. Kelly's mediators in 1985 in federal court. He picked the brightest and the best litigators of the day with trial experience to start this new program. When Judge James G. Beasley began mediation in family court in 1995, he picked the brightest and the best family lawyers and therapists of the day with experience in family law to start this new program. Recently, Judge Michael Corrigan started mediation in probate court, and he picked the brightest and the best with probate experience to mediate probate issues.

The result is an unnecessary "categorization" of mediators. The perception is that civil mediators have no interest in family mediation, family mediators are not considered qualified for civil mediation, and probate mediators are not interested in either of the other two.

Practitioners who are choosing mediators want someone they trust. They look for a mediator who understands their issues and the consequences that their clients might face from participating in mediation and the legal process. That is a quality practitioner — someone who takes care of clients in mediation.

The mediators on Kelly's list were not trained, for there was no training available then in Kansas. In 1987, the Supreme Court adopted Rules Relating to Mediation (Rule 901 *et seq.*) that provided for training, ethics rules, and continuing education. The rules are continually evolving, just like in law.

ADR itself is an evolving art. All trained mediators have a similar repertoire of skills. We all start with a monologue designed to build rapport. We all frame and reframe the issues in a way more likely to result in settlement. We all have people skills that tend to promote peace and settlement as opposed to ire and discontent.

Beyond those basics, mediators all have their individual skills: some are more directive, some are more therapeutic, some are more logical, and some are more sensing. Every mediator brings his or her own personality to the table. All mediators can communicate the risks of litigation; they just do it in different ways.

In order to ensure the professional growth of individual mediators and the expansion of the number of mediators available for all types of cases, there are two major steps that may be taken. First, "specialty" practitioners can partner with trained mediators to co-mediate cases. The benefit to the parties is obvious, and the cross-training can be invaluable.

Another step is to utilize mediators who are perceived to be trained in other areas. Utilize approved mediators for types of cases they are not known for doing. For example, try using a mediator for a personal injury case even though the perception is that a particular mediator does only family law. A

"personal injury mediator" can mediate a probate case, and a "family law mediator" can mediate a boundary dispute. The benefit is that you may come up with a creative solution that a "specialty" mediator may not have thought of and you may find a great mediator whom you can use in other cases.

Lawyers have a responsibility to educate the mediator on both the law and the facts of the particular dispute and should not depend on prior knowledge of the mediator on any particular area of the law. You will find that the mediation "pie" will grow and your resource base will be more viable for future cases. Take advantage of the skill and expertise of trained mediators. You'll be glad you did. ■

About the Authors

Diane E. Sherwood, Conflict Resolution Center, Wichita, is a graduate of Colorado College (1983) and the University of Tulsa College of Law (1993). She is a member of the Kansas and Wichita bar associations, Mediation Center of Wichita, and Central Kansas Collaborative Family Law Group.

David P. Calvert, Wichita, has been in private practice since 1984. Prior to that he was deputy county attorney and a district judge for Sedgwick County. He is a member of the Kansas and Wichita bar associations, Kansas and American associations for justice, Wichita/Sedgwick County Access Advisory Board, U.S. Access Board Courthouse Access Advisory Committee, and is a member of the board of directors of the Kansas Assistive Technology Cooperative and Independent Living Resource Center Inc.

Editor's note: This article first appeared in the fall 2007 edition of the *Alternative Dispute Resolution Section* newsletter.

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In Memoriam *Donald Zemites* *1933 – 2007*

Passionate, elegant, articulate, headstrong, gentle, and just. A man of style and grace, Don Zemites spent his career helping other people.

Don Zemites died on Dec. 29, 2007, at the age of 74, survived by his wife, Lori; two daughters; one stepdaughter; two stepsons; eight grandchildren; three great-grandchildren; and many friends from everywhere. He had spent the last 18 years working for the Kansas Lawyers Assistance Program (KALAP), first as its chairman from 1990 to 2002, and then as its executive director until his death. Sober for more than 25 years, Don admitted to being an alcoholic. He dedicated these past 25 years to helping others see and walk toward the light at the end of the tunnel of dependence on alcohol, drugs, or gambling as well as those suffering from depression and other mental or emotional issues.

Don was born in 1933 in a Lithuanian neighborhood in Kansas City, Kan. That close-knit neighborhood, surrounded by family, friends and the church — St. Casimir's Catholic Church — formed the foundation for Don's life. Much of Don's later life revolved around his Lithuanian heritage, as he helped to form the Lithuanians of America organization, and he helped to save and preserve the bell from St. Casimir's Church after the church was closed.

Don received his bachelor's degree in social sciences and psychology from Pittsburg State University, served as an instructor in the U.S. Army, and worked as a claims manager for Safeco and then Farmers Insurance Companies. Don then earned his law degree from the University of Missouri-Kansas City in 1968 and launched his career as a lawyer.

He worked for eight years as a corporate attorney and employee relations director for Ethyl Corp., and then he practiced law — first as senior managing partner of Alder & Zemites (doing insurance defense work) and then as a solo practitioner (handling all manner of litigation and appellate matters), before becoming director of the KALAP.

Don was a man of contradictions. He was erudite and well-read. He was a fisherman, pipe smoker, and harmonica player. He was at home in the courtroom. He was at home in social settings. He was at home in the bookstore. He was smart and fun. He loved to tell stories and had one for every situation, some of which were true. As his stepson, Scott Crouse, said at the memorial service held for Don on Jan. 2:

Don would have been a great actor. He had a flare for the dramatic, big entrances into every room, with a booming and commanding voice that demanded everyone's attention. Come to think of it, he wore some pretty outrageous costumes and of course he loved his props — any combination of his many hats, sunglasses, harmonicas, and pipes.

He had a flare for comedy, he loved to laugh and loved being a clown. Don allowed the child-like quality that we all possess to roam freely and to play. You could see this particularly when he played with his grandchildren or when he hammed it up like Buster Keaton for a funny picture.

Actor, soldier, lifelong student, family man, trial lawyer — all of these names fit Don Zemites. But the culmination of Don Zemites' career was in his founding, and then leading, of KALAP. This organization is dedicated to helping those in need. As the program's Web site states:

In 2001, the Supreme Court of Kansas established the KALAP, pursuant to Rule 206 of the Kansas Supreme Court. KALAP is funded by the Supreme Court and staffed by a director and peer volunteers. It is empowered to provide for the identification, peer intervention, counseling, and rehabilitation of Kansas attorneys and law students who are having personal difficulties that adversely affect their practice of law. These difficulties include physical, or mental illness, substance abuse or emotional distress.

Don created this program, spearheaded its foundation and growth, helped locate and engage more than 140 volunteers statewide, and eventually became its full-time director and vocal advocate.

In Don's 2008 pocket calendar for the week of his death, there was a quote from Henry David Thoreau that sums up his character, "Be true to your work, your word, and your friend!" Don Zemites was a friend to many, and he saved many careers. More importantly, he saved many lives and families. If one more person in need were touched by his story, Don Zemites would consider it a success. ■



Donald Zemites
1933 – 2007

Apocalypse at Law: The Four Horsemen of The Modern Bar — Drugs, Alcohol, Gambling, and Depression

By J. Nick Badgerow

Dedicated to the Memory of Don Zemites

The purpose of this article is to shed light on some problems that plague the bar — as they plague general society. On the day before his untimely death, Don Zemites called the author to continue discussions about the republication of this article in *The Journal of the Kansas Bar Association*, as he believed the message bears repeating to an audience of Kansas lawyers. The *Journal's* editors have graciously accepted Don's recommendation that the article be republished.

Don Zemites was a lawyer of principle and conviction, a kind and empathetic man, who dedicated the last quarter century of his life to helping lawyers in need — lawyers who are lost in dependency, doubt, fear — and denial. He did this by publicizing the problem and lending a helping hand, an understanding ear, a caring voice, and a warm heart.

This article is dedicated to the memory of Don Zemites, with the hope and trust that his legacy lives on in the many lives he touched. May we all carry forward his message, and extend the hand of a brother to a brother or sister in need.

"Apocalypse at Law: The Four Horsemen of the Modern Bar — Drugs, Alcohol, Gambling, and Depression" by J. Nick Badgerow, published in *Professional Lawyer*, Volume 18, No. 3, 2007. Copyright © 2007 by the American Bar Association. Reprinted with permission.

*And power was given unto them over the fourth part of the earth, to kill with sword, and with hunger, and with death, and with the beasts of the earth.*¹

I. The Bar at Risk

As the number of practicing lawyers continues to grow, so does the number of complaints against lawyers for various violations of the applicable rules of professional conduct.²

There are many reasons for the type of conduct that leads to complaints by clients, opposing parties and counsel, and even judges, but to generalize about the causes is to invite criticism. Each case is as individual as the lawyer-respondent and the circumstances confronting him at the time.

However, there are certain factors that appear in an alarming number of cases. These involve lawyers' use of and dependence upon drugs and alcohol (See Sections II and III.), participation in gambling (See Section IV.), and descent into depression. (See Section V.)

Many are the cases and articles that chronicle the complaints about lawyers failing to return calls or communicate

adequately with their clients;³ lawyers failing to take action or meet deadlines, resulting in claims being lost;⁴ and lawyers acting inappropriately, ranging from outbursts of temper⁵ to propositioning sexual relations with clients.⁶ While not excusing this behavior, the respondent lawyers in those cases often cite one or more of these modern problems in mitigation: drugs, alcohol, gambling, and depression. These are the Four Horsemen of the Modern Bar. They cause lawyers to lose control of their lives and then to lose their licenses to practice, their families, their self-respect, and frequently, their lives. These four scourges — of drugs, alcohol, gambling and depression — acting alone or in concert, are endemic and increasing, and they represent a threat to the stability of an integral component of liberty and democracy — a free and independent bar.

The purposes of this article are to explore these four phenomena, discuss some of the cases that indicate their nature, and address some possible solutions in the hope of stemming their stampede. (See Section VI.) The first step is awareness. The next step is a resolve by all members of the bar to offer a helping hand.

FOOTNOTES

1. Revelation (hereinafter "Rev.") 6:8 (King James). This section of Revelation foretells a time before the "Last Days," when challenges will be made to God's Church and His people. The Revelator predicts that these challenges will come in the form of "Four Horsemen," with descriptions of riders and their horses. *Id.* at 6:2-8.

2. See, e.g., Thomas R. Tinder, *Legal Ethics*, W. VA. LAW., Aug. 2004, at 30, 30.

3. See, e.g., Kennard R. Strutin, *Client Communication: An Essential Element of Criminal Defense Practice*, N.Y. ST. B.J., Mar.-Apr. 1996, at 24, 28 n.7.

4. See, e.g., Drew A. Swank, *In Defense of Rules & Roles: The Need to Curb Extreme Forms of Pro Se Assistance & Accommodation in Litigation*, 54 AM. U. L. REV. 1537, 1577 & n.309 (2005).

5. See, e.g., Robert A. Juceam, *Safeguarding Against Criminal Prosecution and Malpractice in Immigration Law Practice*, 142 PLI/NY 179 (West) VIII.A.1.b (Aug. 13 & 24, 2004).

6. See, e.g., Jack W. Birtch, Jr., *Risks in Interviewing the Sexual Harassment Client*, 19 AM. J. TRIAL ADVOC. 563, 583-88 (1996).

II. Drugs — The White Horse

*And I saw, and behold a white horse: and he that sat on him had a bow; and a crown was given unto him: and he went forth conquering, and to conquer.*⁷

It is no stretch of the metaphor to call drugs the “white horse.” Indeed, heroin and cocaine have been called by this name for many years.⁸ As a modern poet has written, in “My Name is Cocaine”:

Remember, my friend, it's all up to you.
If you decide to jump in my saddle you better
ride me well;
For on the white horse of cocaine,
I'll ride you straight to HELL!⁹

The 1980s near-hit by the Danish band Laid Back, “White Horse,” said to have been written about heroin, repeatedly intones “Don't ride the white horse.”¹⁰

There is no doubt that drug use remains a problem in society, generally,¹¹ and lawyers are not exempt from the lure of this horse. Access to money, familiarity with those who have access to drugs, and perhaps a psychological tendency to seek a quick buzz, sometimes combine to lead a lawyer down the wrong path. Often, once this process has started, it spirals out of control. And the results can be devastating — for the lawyer's clients, as well as for the lawyer himself. Indeed, drug addiction in the bar has been called “A modern American tragedy.”¹²

An example of this is *The Florida Bar v. Heptner*.¹³ There the attorney solicited and used cocaine regularly over an 18-month period and accepted cocaine in exchange for legal services.¹⁴ The Court noted that before drug abuse may serve as a mitigating factor, “the addiction must impair the attorney's ability to practice law to such an extent that it outweighs the attorney's misconduct.”¹⁵ The Court rejected a proposal for a retroactive two-year suspension and ordered the attorney disbarred. The Court noted,

[The attorney] committed serious acts of misconduct. First, he engaged in felony criminal conduct with a client, involving the sale and use of cocaine. Second, he continued to practice law while suspended and, thus, intentionally violated an order of this Court. Third, Heptner has engaged in multiple acts of misconduct over an extended period of time.¹⁶

Such cases should serve as a warning of the destruction that accompanies this first horseman. The use of, and addiction to, drugs, such as cocaine, increases the danger that an attorney's misconduct poses to the lawyer's clients and to the public at large.¹⁷ Unlike the use of alcohol, which is legal, the use of drugs is illegal; since its use is a criminal act, the courts should not condone that use, particularly by members of the bar.¹⁸

A similar case is *In re Disciplinary Proceedings Against Schwimmer*,¹⁹ in which the attorney was addicted to drugs and alcohol and, among other crimes, misappropriated client funds.²⁰ The Court concluded that, under Washington law, “[t]here are no extraordinary mitigating factors present in this case. Although Schwimmer has indicated that he has little recollection of actually taking client funds and that he had addiction problems with alcohol and drugs, this does not mitigate his professional misconduct.”²¹

Sometimes a less draconian approach is taken by the Court, and addiction is considered as a mitigating factor, if the lawyer has pursued recovery. For example, in *Columbus Bar Ass'n v. Ashton*,²² the attorney took unauthorized expense-account advances from his law firm, failed to properly withdraw from a client's case, and failed to disclose to clients that he lacked malpractice insurance.²³ However, by the time of his hearing, the respondent had come to recognize his addiction to drugs and had taken steps to seek recovery. The Court stated:

[W]e attribute mitigating effect to the fact that a lawyer suffers from an addiction to drugs just as we do to the fact that a lawyer suffers from alcoholism or a mental disability. Moreover, even when a lawyer has committed serious misconduct in addition to illegal drug use, we have tempered our disposition when the lawyer has shown a commitment to recovery from drug addiction.²⁴

In either event, the pursuit of this white horse can jeopardize a lawyer's happiness, his livelihood and his life.

III. Alcohol — The Red Horse

*And there went out another horse that was red: and power was given to him that sat thereon to take peace from the earth, and that they should kill one another: and there was given unto him a great sword.*²⁵

The subtle lure of alcohol, the red wine that invites one in slowly — promising escape from tension and the cares of this

7. Rev. 6:2 (King James). The traditional view holds that this horse represents War. Four Horsemen of the Apocalypse, http://en.wikipedia.org/wiki/The_Four_Horsemen_of_the_Apocalypse (hereinafter “Wikipedia”).

8. HEROIN DRUG SLANG DICTIONARY, <http://parentingteens.about.com/cs/herpes/l/blsldicher.htm>.

9. Anonymous, “My Name is Cocaine,” <http://www.geocities.com/HotSprings/7585/coke.htm>.

10. Laid Back, “White Horse,” http://www.webfitz.com/lyrics/index.php?option=com_webfitzlyrics&Itemid=27&func=fullview&lyricsid=4707.

11. Office of National Drug Control Policy: Drug Use Trends – Fact Sheet, <http://www.whitehousedrugpolicy.gov/publications/factsht/druguse/>.

12. *Matter of Romano*, 104 N.J. 306, 309, 516 A.2d 1109 (1986).

13. 887 So.2d 1036 (Fla. 2004).

14. *Id.* at 1039-40.

15. *Id.* at 1043 (quoting *Florida Bar v. Wolfe*, 759 So. 2d 639, 644 (Fla. 2000)).

16. *Id.* at 1042.

17. *In re Jones*, 252 Kan. 236, 240, 843 P.2d 709, 712 (1992).

18. *See In re Stein*, 97 N.J. 550, 566, 483 A.2d 109, 117 (1984).

19. 153 Wash. 2d 752, 108 P.3d 761 (Wash 2005).

20. 108 P.3d at 763.

21. *Id.* at 766.

22. 108 Ohio St. 3d 37, 840 N.E.2d 618 (2006).

23. *Id.* at 619.

24. *Id.* at 622-23.

25. Rev. 6:4 (King James). The traditional view holds that this horse represents Pestilence. Wikipedia.

world — can lead to ruin. The classic film “The Days of Wine and Roses” depicts the depredations and losses that can ensue from that first innocent drink. As the film’s theme song says,

The days of wine and roses laugh and run away like a child at play
Through a meadow land toward a closing door
A door marked ‘nevermore’ that wasn’t there before.²⁶

Some people simply cannot control their urge to drink.²⁷ The red wine wields the sword of power over them. This loss of control results in a loss of peace and, sometimes, even the loss of life.

Lawyers are not immune to this risk; they are perhaps more at risk than most. Tensions, confrontations, disputes, hard work, the drive to succeed — all endemic to the profession — can lead one to seek an escape. The escape is often found in the quick, legal, and relatively inexpensive route of the bottle. But that escape can lead to the “door marked ‘nevermore’ that wasn’t there before,” so poignantly described in Johnny Mercer’s lyrics in the theme song quoted above.

Singer-songwriter Merle Haggard knew the cost of the “Days of Wine and Roses” from personal experience, and he was able to describe that cost in his song, “I Threw Away the Rose”:

But now I’m paying for the days of wine and roses
A victim of the drunken life I chose
Now all my social friends look down their noses
Cause I kept the wine and threw away the rose²⁸

Disciplinary cases and malpractice lawsuits that describe lawyers’ problems resulting from the red horse are legion.

A lawyer was placed on probation for three years in the District of Columbia case of *In re Brown*,²⁹ based on an array of actions and omissions resulting from alcoholism, including misappropriation of client funds, failure to maintain complete records, render appropriate accounts or notify client of receipt of funds, and failure to return any prepaid unearned fees to client until 13 years after representation ended.³⁰ The Court so held “because [the attorney’s] alcohol addiction was the substantial cause of the misconduct and because he is substantially rehabilitated.”³¹ However, Brown’s reinstatement was conditional on his continued satisfaction of restitution and sobriety monitoring conditions and repayment to clients of misappropriated funds.³²

In Oklahoma, addiction to alcohol is not itself enough to mitigate discipline.³³ In *Beasley*, the attorney failed to perform

legal services for clients, to communicate with clients, and to respond to bar association investigations by reason of his alcoholism.³⁴ The attorney was suspended for two years and one day.³⁵ To be reinstated, the attorney was required to “recognize the alcohol problem, seek and cooperate in treatment, and be willing to undergo supervision to assure sobriety.”³⁶

Similarly, by reason of her alcoholism, the attorney in *Disciplinary Counsel v. Hiltbrand*³⁷ was convicted of multiple counts of operating a motor vehicle while intoxicated, driving with a suspended license, and telephone harassment.³⁸ The attorney was suspended indefinitely, a judgment not to be reconsidered until the attorney “completed a sustained period of recovery from alcohol dependency.”³⁹

These are but just a few examples of the hundreds of disciplinary cases and civil actions that have resulted from a lawyer’s use, overuse, and misuse of alcohol. This is perhaps the most common and dangerous of the four horsemen.

IV. Gambling – The Black Horse

*And I beheld, and lo a black horse; and he that sat on him had a pair of balances in his hand.*⁴⁰

Gambling is a greater problem than it has ever been. Gambling no longer holds with it the tinge of “sin” it formerly carried, and outlets for legalized gambling make it much more accessible to nearly everyone.

Governments must look for ways to finance their operations, and no one likes tax increases. A tempting “no-lose” option for government is to legalize gambling. As gambling becomes more of an accepted, legalized, and prolific phenomenon in our society, its dangers increase. One may bet the red or black, but the odds are stacked in favor of the house. The rider of this black horse has the balances in his hands — and his thumb is holding down the left side. Even a promised return rate of “95 percent” still means that 5 percent of the money stays with the casino, time after time.

But the elation of winning, those few times it happens, causes a “high” that can lead to addiction.

Compulsive gambling is a progressive disorder in which the individual has a psychologically uncontrollable preoccupation with gambling. The problem gambler becomes obsessed with an overwhelming urge to gamble and, without intervention, will continue down a path of destruction, similar to alcohol and drug addiction.⁴¹

26. Johnny Mercer, “The Days of Wine and Roses,” http://music.yahoo.com/Johnny-Mercer/Days-of-Wine-And-Roses/lyrics/975624unsorted_lyrics/days_of_wine_and_roses.txt.

27. Centers for Disease Control & Prevention: Alcohol & Public Health – FAQs, <http://www.cdc.gov/alcohol/faqs.htm#3>.

28. Merle Haggard, “I Threw Away the Rose,” <http://www.lyricsdownload.com/merle-haggard-i-threw-away-the-rose-lyrics.html>.

29. 912 A.2d 568 (D.C. 2006).

30. *Id.* at 570.

31. *Id.* at 571.

32. *Id.*

33. *State ex rel. Oklahoma Bar Ass’n v. Beasley*, 142 P.3d 410, 417 (Okla. 2006) (citing *State ex rel. Oklahoma Bar Ass’n v. Doris*, 991 P.2d 1015, 1025 (Okla. 1999)).

34. *Id.* at 412.

35. *Id.* at 419.

36. *Id.* at 417, 419 (citing *State ex rel. Oklahoma Bar Ass’n v. Carpenter*, 863 P.2d 1123, 1130 (Okla. 1993)).

37. 110 Ohio St. 3d 214, 852 N.E.2d 733 (Ohio 2006).

38. *Id.* at 733-34.

39. *Id.* at 735.

40. Rev. 6:5 (King James). The traditional view holds that this horse represents Famine. Wikipedia.

41. James Howard, The Missouri Bar, “Compulsive Gambling,” <http://www.mobar.org/db52f915-ded4-4c86-8b16-a2f28656b664.aspx>.

So, with the funding benefit to governmental operations from gambling comes the downside — revenues leave the state, those who cannot afford to lose do lose, and those with a latent compulsion to gamble are given avenues to exercise and increase that compulsion, with all the financial and personal costs that entails.

Only a few short decades ago, legalized gambling was relegated to one state and the horse and dog tracks of only a handful of others. Now all states but three, — Utah, Hawaii, and Tennessee — allow legalized gambling of some sort within their borders. Thirty-seven states plus the District of Columbia offer lotteries; casinos legally operate in 28 states; and you can bet on the horses or the dogs in 43. ... So much has gambling been destigmatized that 'Monte Carlo nights' are a staple for many charitable fundraisers and even for after-prom gatherings of high school kids. In short, when the itch to 'test your luck' comes over you in 21st century America, you don't have to travel far to scratch it.⁴²

With the increased availability of gambling outlets at casinos, race tracks, and online, one who is inclined to gamble sees the temptation everywhere. This can lead to harmful individual results.

Problem and pathological gamblers can experience psychological difficulties, such as anxiety, depression, guilt, attempted suicide, or abuse of alcohol and drugs, as well as stress-related physical illnesses, such as hypertension and heart disease. Interpersonal problems include lying and stealing, resulting in a breakdown of relationships and divorce. Work and school problems include poor performance, abuse of leave time, and loss of employment. Financial consequences are substantial, including credit card debt, unpaid creditors, and impoverishment. Finally, pathological gamblers may resort to criminal behavior to finance gambling or pay gambling debts.⁴³

Lawyers are in a position to pursue a gambling penchant and to turn it into a harmful habit. With access to client funds in their trust accounts, and with access to settlement funds that belong to the client, lawyers can be tempted to take a temporary "withdrawal" to cover yesterday's losses and to fund today's bets. "After all," they dream, "this losing streak cannot continue, the cards will turn, the horse will come home, and then it can all be paid back." But the horse never reaches the finish pole, because the odds are stacked in favor of the house — no matter what the form of the gambling — and because the compulsive gambler cannot stop even when winning.

42. Tom Raabe, "Compulsive & Problem Gambling," <http://www.family.org/socialissues/A000000434.cfm>.

43. California Office of Problem Gambling, <http://www.adp.ca-gov/ops/>.



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Pathetically, however, there never seems to be a big enough winning to make even the smallest dream come true. When compulsive gamblers succeed, they gamble to dream still greater dreams. When failing, they gamble in reckless desperation and the depths of their misery are fathomless as their dream world comes crashing down. Sadly, they will struggle back, dream more dreams, and of course suffer more misery. No one can convince them that their great schemes will not someday come true. They believe they will, for without this dream world, life for them would not be tolerable.⁴⁴

When this black horse takes over, a lawyer can lose control of his life and, sometimes, his practice. It is often hidden, until its symptoms grow and eventually take over.

In a Nebraska case,⁴⁵ an attorney with an “uncontrollable gambling habit” was disbarred for misappropriating client funds and undertaking a “check-kiting scheme” whereby the attorney attempted to pay back some of the funds from a personal bank account with insufficient funds.⁴⁶ The Court agreed with the Iowa Supreme Court, which stated, “[u]nfortunately, [respondent’s gambling] is a matter, which, although regrettable and cause for sympathy, does not obviate the seriousness of the improper attorney conduct that has occurred.”⁴⁷

Gambling has also proven an insufficient defense elsewhere. In *In re Reinstatement of Fraley*,⁴⁸ the attorney resigned from the state bar with no explanation. The undisclosed reason was that the attorney’s employer discovered that the attorney had routinely gambled at a race track and misappropriated client funds to cover his losses.⁴⁹ The Court denied the attorney’s application for reinstatement.⁵⁰ While the Court could have remanded the case to the Professional Responsibility Tribunal to supplement the record with respect to the attorney’s prior misconduct and the particulars of the original offense, the Court “[felt] no compulsion” to remand the matter given that the “paucity of [the] record” was a direct result of the attorney’s withholding of germane information.⁵¹

In the case of *In re Mendelson*,⁵² the attorney’s gambling compulsion led him to convert client funds and issue a check on his escrow account payable to cash. The Court noted that

[r]espondent submits credible medical evidence that his misconduct was caused by compulsive and pathological gambling induced by the medication he was taking for Parkinson’s Disease. Since the adjustment of the medication, respondent asserts that he no longer gambles. Petitioner does not disagree with either contention. Under all the circumstances, we conclude that respondent’s condition mitigates the misconduct herein but does not excuse it.⁵³

The attorney was suspended for one year, but the suspension was stayed on the condition that the attorney refrained from further misconduct.⁵⁴

Indeed, finding excusable compulsion to gamble appears to be rare — and quite difficult for courts and disciplinary authorities to do. Thus, a lawyer who gambles, particularly with client funds, gambles with his life and career as well.

V. Depression – The Pale Horse⁵⁵

*And I looked, and behold a pale horse: and his name that sat on him was Death, and Hell followed with him.*⁵⁶

Pale and wan, the depressed lawyer fights a daily battle. The highs of a victory are swallowed up in the lows of a loss. Clients take their files to other lawyers. Feelings of self-doubt and insecurity set in. As Hank Williams pointed out so clearly:

On that judgement day; you’ll weep and you’ll cry
When the Pale Horse and his rider goes by?⁵⁷

At least two causes for depression in lawyers relate to the “eat-what-you-kill” mentality brought on by the increasing commercialization of the practice: the Loaded Desk and the Empty Desk.

The Loaded Desk: One lawyer, highly successful in her business and marketing efforts, finds herself with more clients and cases than she can handle. Her desk is stacked high with files. Her inbox is full of unanswered mail, including “Golden Rule” letters and other demands for discovery and threats of motions for sanctions. Her phone is hidden by message slips. Her computer and Blackberry are overloaded with e-mails.

44. Gamblers Anonymous, “What is the Dream World of the Compulsive Gambler?” <http://www.gamblersanonymous.org/qna.html>.

45. *State ex rel. Counsel for Discipline of Nebraska Supreme Court v. Reilly*, 271 Neb. 465, 712 N.W.2d 278 (Neb. 2006).

46. *Id.* at 466-68.

47. *Id.* at 278 (quoting *Iowa Supreme Court Attorney Disciplinary Bd. v. Reilly*, 708 N.W.2d 82, 85 (Iowa 2006)).

48. 115 P.3d 842 (Okla. 2005).

49. *Id.* at 845.

50. *Id.* at 854.

51. *Id.*

52. 9 A.D.3d 677, 780 N.Y.S.2d 801 (N.Y. App. Div. 2004).

53. *Id.* at 802.

54. *Id.*

55. “The Greek word [for pale] is *chlooros*, which we recognize as the origin of such English words as ‘chlorine,’ ‘chloroform,’ and ‘chlorophyll.’ It technically refers to a greenish-yellow color found in nature in the pale green of just-sprouted grass or new leaves ... In ‘The Iliad,’ Homer describes fearful men’s faces with this term, suggesting a pallid, ashen color,

and in other instances, it is the pale golden color of honey or the gray bark of an olive tree. Sophocles writes that it is the color of sand, while Thucydides applies it to the skin color of those suffering from plague.” Richard T. Ritenbaugh, Church of the Great God, “The Four Horsemen (Part Five): The Pale Horse,” <http://cgg.org/index.cfm/fuseaction/Library.sr/CT/PW/k/933/The-Four-Horsemen-Pale-Horse.htm>. A “pale” horse is sometimes called a cremillo, “very pale cream with pink skin and blue eyes.” Ann T. Bowling, University of California-Davis Veterinary Genetics Laboratory, “Color Coat Genetics,” <http://www.vgl.ucdavis.edu/services/coatcolor.php#senec>. These horses are also called “perlino or albino. Typically, such horses are the product of the mating of two dilute-colored animals, such as palominos or buckskins.” *Id.*

56. Rev. 6:8 (King James). The traditional view holds that this horse represents Death. Wikipedia, http://en.wikipedia.org/wiki/Four_Horsemen_of_the_Apocalypse#Pale_Horse.

57. “The Pale Horse and His Rider,” by Johnny Bailes, Ervin Staggs, Zeke Clements, and Muriel Deason Wright. Available online at <http://www.sing365.com/music/lyric.nsf/THE-PALE-HORSE-AND-HIS-RIDER-lyrics-Hank-Williams/8B472679BC052B0348256981000E2482>.

Motions to compel go unanswered. Orders to compel remain unresolved. Sanctions ensue.

The lawyer does not know where to start, how to pick up that first letter in the stack and work through it. She goes into brain freeze, overloads — and fails. The problem compounds itself and leads to missed deadlines and statutes of limitations, client complaints, discipline — or worse.

The Empty Desk: Another lawyer, having not been so well trained in marketing, is not so successful in developing business. He arrives at work each day to find his desk still bereft of work. He checks his phone, computer, and Blackberry to make sure they are still working — so long has it been since he received a call or a nonspam e-mail. He stares at the empty desk, does not know where to turn or how to act — and fails. Those few matters that the lawyer is handling get ignored, deadlines get missed, the problem compounds itself, and leads to client complaints and discipline — or worse.

The courts and disciplinary authorities have been somewhat more understanding and flexible in the case of depression.

An understanding description of depression and its relationship to the practice of law may be found in *Board of Professional Ethics v. Grotewald*,⁵⁸ where the respondent was given a 60-day suspension for misappropriation and misrepresentation violations, which generally would result in discipline ranging from “a public reprimand to a six-month suspension.”⁵⁹

Clearly, misrepresentation is the most serious violation in this case. ... Yet, against the backdrop of depression, misrepresentation can take on added meanings, as can neglect. This backdrop complicates the imposition of discipline and requires us to fully examine the impact of depression.

The evidence in this case reveals that serious depression often results from chemical imbalances in the brain that cause those afflicted to be plagued by growing and overwhelming feelings of hopelessness and despair. It also reveals that depression can take hold of a person without his or her knowledge or understanding of the need for treatment.⁶⁰

Because depression is a condition best diagnosed by symptoms,

Unethical professional conduct can double as a symptom of depression. See Beck [“Lawyer Distress: Alcohol Related Problems and Other Psychological Concerns Among a Sampling of Practicing Lawyers,” 10 J.L. & Health 1, 1-60 (1995-96)] at 2. Moreover, these symp-

toms too often appear before the disease is diagnosed and treatment is sought. See Bakke [“Brainstorm, My Experience with Depression.”] 61 THE IOWA LAWYER, Mar. 2001, at 5-6.⁶¹

The Court went on to conclude that respondent’s “growing state of depression” was “a mitigating factor in the imposition of discipline”⁶² and therefore imposed discipline of a 60-day suspension.⁶³

The attorney in *In re Mooers*⁶⁴ was disbarred — but disbarment was stayed and a three-year probation was imposed — when the attorney utilized client funds for personal and business expenses as a result of his depression.⁶⁵ “[R]espondent candidly admitted and took full responsibility for his actions, he cooperated with Bar Counsel, and ... [was] continuing to obtain treatment for his depression, which ... [was] considerably improved, and [did not] ... impair his ability to practice law.”⁶⁶ The reduced punishment was conditioned on satisfactory reports every 90 days from the attorney’s psychiatrist.⁶⁷

Finally, as with any mental impairment in a discipline case, respondent must establish a causal connection between his depression and his ethical violation.⁶⁸

Although emotional or psychological disability may serve to reduce the actor’s ethical culpability, it does not immunize one from imposition of discipline that is needed to protect the public. There must be a sufficient causal connection between the respondent’s ethical lapse and the depression. ... Our responsibility in a bar disciplinary proceeding is not to punish but to inquire into the lawyer’s continued fitness with a view toward safeguarding the interest of the public, the courts, and the legal profession.⁶⁹

VI. Help is Available

*And I saw another mighty angel come down from heaven, clothed with a cloud: and a rainbow was upon his head, and his face was as it were the sun, and his feet as pillars of fire.*⁷⁰

Of course, there is a positive resolution in the Book of Revelation. The threats imposed by the Four Horsemen are repelled and destroyed.⁷¹ And there is hope for redemption for the lawyer who finds himself challenged by the Four Horsemen of the Modern Bar.

The first step is to see the problem and deal with it. If one has a friend, an acquaintance — even an opponent — who exhibits the symptoms of dependence on drugs, alcohol,

58. 642 N.W.2d 288 (Iowa 2002).

59. *Id.* at 294 (quoting *In re Inquiry Concerning McCormick*, 639 N.W.2d 12, 17 (Iowa 2002)).

60. *Id.* (citing Gary L. Bakke, *Brainstorm, My Experience with Depression*, THE IOWA LAWYER, Mar. 2001, at 5, 5-7).

61. *Id.* at 294-295.)

62. *Id.* at 296.

63. *Id.*

64. 910 A.2d 1046 (D.C. 2006).

65. *Id.* at 1046.

66. *Id.*

67. *Id.* at 1046-47.

68. *State ex rel. Oklahoma Bar Ass’n v. Hummel*, 89 P.3d 1105, 1110 (Okla. 2004) (citing *State ex rel. Oklahoma Bar Ass’n v. Schraeder*, 51 P.3d 570, 580 (Okla. 2002)).

69. *Id.* (citing *State ex rel. Oklahoma Bar Ass’n v. Adams*, 895 P.2d 701, 704 (Okla. 1995)).

70. Rev. 10:1 (King James).

71. Rev. 21:4 (King James) (“And God shall wipe away all tears from their eyes; and there shall be no more death, neither sorrow, nor crying, neither shall there be any more pain: for the former things are passed away.”).

gambling, or the symptoms of depression resulting from those causes or others, one should be an “angel” and do something about it: reach out a helping hand, offer to talk, even consider an intervention.

If you see in yourself this morning some signs that one or more of these horsemen has visited you, admit it — and do something about it. Seek help — before it is too late. Do the “Barney Fife” thing: “Nip it in the Bud.”⁷²

A major resource for lawyers is the Lawyers’ Assistance Program available through most state bar associations and many local lawyers’ associations. These committees are staffed by lawyers who know (many from first-hand experience) about the problems these horsemen can cause. Those lawyers can communicate, listen, empathize, and suggest solutions. Personal support helps show a sufferer he is not alone and that help is available.

In addition, national and local organizations are available to provide resources, information, meetings and one-on-one help. These include:

Narcotics Anonymous.⁷³ This organization provides assistance to those who are addicted to drugs. Carrying forward the analogy to the “White Horse,” its first booklet was called the “White Pamphlet.” The basic premise of Narcotics Anonymous is set forth in its Web site:

Narcotics Anonymous provides a recovery process and support network inextricably linked together. One of the keys to N.A.’s success is the therapeutic value of addicts working with other addicts. Members share their successes and challenges in overcoming active addiction and living drug-free productive lives through the application of the principles contained within the [12] Steps and [12] Traditions of N.A. These principles are the core of the Narcotics Anonymous recovery program.⁷⁴

Alcoholics Anonymous.⁷⁵ This is an older organization, perhaps because man’s struggle with alcohol is so longstanding. Like Narcotics Anonymous, this organization offers aid through fellowship, understanding and support.

Alcoholics Anonymous is a voluntary, worldwide fellowship of men and women from all walks of life who meet together to attain and maintain sobriety. The only requirement for membership is a desire to stop drinking. There are no dues or fees for A.A. membership. ... A.A. is a program of total abstinence. Members simply stay away from one drink, one day at a time. Sobriety is maintained through sharing experience, strength, and hope at group meetings and through the suggested Twelve Steps for recovery from alcoholism. ... Anonymity is the spiritual foundation of A.A. It disciplines the Fellowship to govern itself by principles rather than per-

sonalities. We are a society of peers. We strive to make known our program of recovery, not individuals who participate in the program. Anonymity in the public media is assurance to all A.A.s, especially to newcomers, that their A.A. membership will not be disclosed.⁷⁶

Gamblers Anonymous.⁷⁷ A more recently created organization, Gamblers Anonymous provides similar support to compulsive gamblers through abstinence and steps towards recovery. Its creed is quite similar to that of Alcoholics Anonymous:

Gamblers Anonymous is a fellowship of men and women who share their experience, strength and hope with each other that they may solve their common problem and help others to recover from a gambling problem. ... The only requirement for membership is a desire to stop gambling. ... Our primary purpose is to stop gambling and to help other compulsive gamblers do the same. ... Most of us have been unwilling to admit we were real problem gamblers. No one likes to think they are different from their fellows. Therefore, it is not surprising that our gambling careers have been characterized by countless vain attempts to prove we could gamble like other people. The idea that somehow, some day, we will control our gambling is the great obsession of every compulsive gambler. The persistence of this illusion is astonishing. Many pursue it into the gates of prison, insanity, or death.⁷⁸

As with the other support organizations, Gamblers Anonymous guides compulsive gamblers to the self-recognition that is essential to dealing with the illness realistically.

We learned we had to concede fully to our innermost selves that we are compulsive gamblers. This is the first step in our recovery. With reference to gambling, the delusion that we are like other people, or presently may be, has to be smashed. We have lost the ability to control our gambling. We know that no real compulsive gambler ever regains control. All of us felt at times we were regaining control, but such intervals — usually brief — were inevitably followed by still less control, which led in time to pitiful and incomprehensible demoralization. We are convinced that gamblers of our type are in the grip of a progressive illness.⁷⁹

Depressed Anonymous.⁸⁰ This organization, too, provides education and support, to help those in need, and to prevent the spread of depression.

72. Barney Fife, http://en.wikipedia.org/wiki/Barney_Fife.

73. <http://www.na.org>.

74. Facts About Narcotics Anonymous, <http://www.na.org/basic.htm>.

75. <http://www.alcoholics-anonymous.org/>.

76. A.A. at a Glance, http://www.alcoholics-anonymous.org/en_information_aa.cfm?PageID=10.

77. <http://www.gamblersanonymous.org/>.

78. About Gamblers Anonymous, <http://www.gamblersanonymous.org/about.html>.

79. *Id.*

80. <http://www.depressedanon.com/>.

Depressed Anonymous ... was formed to provide therapeutic resources for depressed individuals of all ages. We work with the chronically depressed and those recently discharged from health facilities who were treated for depression. ... We also seek to prevent depression through education and by creating a supportive and caring community through support groups that successfully keep individuals from relapsing into depression.⁸¹

The structure and function of Depressed Anonymous are similar to those of the support groups for those dependent on drugs, alcohol, and gambling.

Depressed Anonymous has been formed with the idea that mutual aid empowers people and is a therapeutic healing force. Our organization helps to form groups or circles of support for persons depressed.

We offer depressed individual information on how to gain and use the tools for overcoming depression. Groups have been formed throughout the United States and several have been successfully organized in other international communities as well.

These groups are similar in methodology and goal, to those used by Alcoholics Anonymous in its work in helping alcoholics recover from alcoholism. Our members learn that they have a choice to stay depressed or to take responsibility for themselves and leave the prison of depression.⁸²

So, both within the bar and in the general walks of society, help and understanding are available.

This is not an issue of morality. Perhaps it is or is not an issue of disease — conditions that are endemic to the individual. But, either way, it still comes down to choices — choosing not to drink, to take drugs, to gamble, to give in to depression. Lawyers — and people generally — must all recognize the risks of certain behaviors, and learn the lessons of precedent. Not only the case books, but also the history books and the fiction books, are filled with tales of destruction arising from the unloosing of the Four Horsemen — destruction to self, family, clients, and the public.

The first step is to realize the existence of the risk, and then to engage in some honest introspection. Then, one should reach out for help, or extend a hand to offer help. With all of the resources available, the Four Horsemen may be corralled or at least avoided. ■

About the Author

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81. *Id.*

82. About [Depressed Anonymous], <http://www.depressedanon.com/about.html>.

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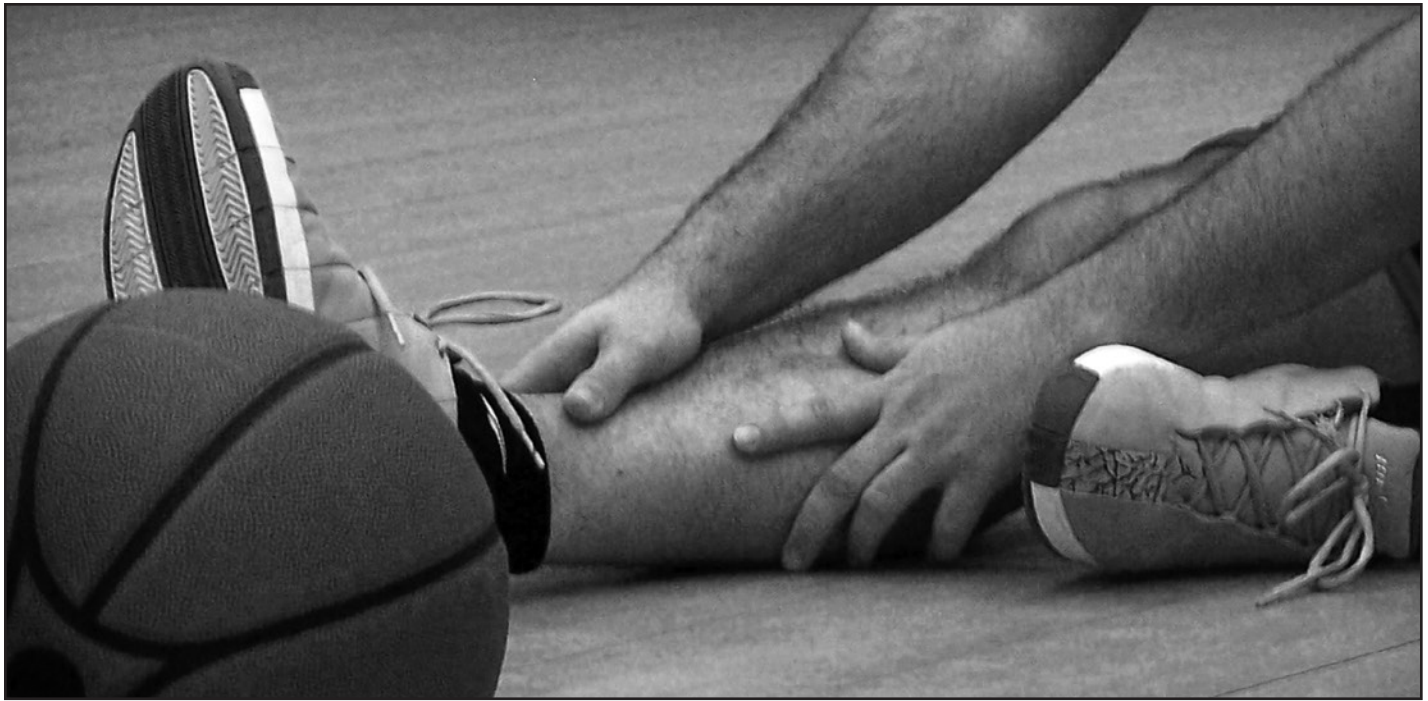
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RECREATIONAL USE IMMUNITY: *Play at Your Own Risk*

By Wm. Scott Hesse and Christopher F. Burger

While some schoolchildren are playing tag in a playground, one of them slips while being chased by another child and gets severely injured from broken glass on the ground. In the same way that the child may have been immune from “getting tagged” by confining himself to “base,” the location where the child suffered his injury may be a governmental entity’s “base” and prevent it from being “tagged” with any liability for the injury.

The location where an injury occurred can have *everything* to do with whether there can be a recovery for an injury. The subject of this article is to review the coverage and development of the recreational use immunity provision of the Kansas Tort Claims Act (K.S.A. 75-6101 *et seq.*) that permits governmental entities to construct, operate, own, and use property that is used by the public for recreational purposes with little fear of liability.¹

I. Immunity in General

Governmental entities have immunities not available to private entities. “State sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected.”² “Absent violation of constitutional rights, the [L]egislature

may control governmental immunity,”³ and a state may therefore waive any or all aspects of its sovereign immunity.

Immunity from suit is a fundamental aspect of the sovereignty that states, including the state of Kansas, enjoy.⁴ Governmental entities can be absolutely immune from suit or can be immune from liability. The difference between immunity from suit and immunity from liability is significant. When a sovereign is immune from suit, it is immune from all the rigors of litigation, including discovery, and is entitled to have a case immediately dismissed. When a sovereign is immune from liability, it may have to participate in specific litigation until the sovereign can satisfy its burden to the court that it meets the conditions necessary for immunity from liability.

The state of Kansas, through the Legislature, has waived its sovereign immunity from suit in state court by passing the Kansas Tort Claims Act (KTCA).⁵ The KTCA is an open-ended act where liability is the rule and immunity the exception.⁶ After passage of the KTCA, governmental entities are not immune from suit; however, governmental entities may still be immune from *liability* under the right circumstances. In order to avoid liability, a governmental entity now has the burden of proving that the claim falls within one of the enumerated circumstances listed in K.S.A. 75-6104.⁷

FOOTNOTES

1. K.S.A. (2006 Supp.) 75-6104(o). All references to the recreational immunity provisions of the Kansas Tort Claims Act shall be to the 2006 Supplement. See annotations to former K.S.A. 75-6104(n) for early cases involving recreational use immunity.

2. *Coll. Sav. Bank v. Florida Prepaid Postsecondary Educ. Exp. Bd.*, 527 U.S. 666, 682, 119 S. Ct. 2219, 144 L.Ed. 2d 605 (1999); see also *Alden v. Maine*, 527 U.S. 706, 119 S. Ct. 2240, 144 L.Ed. 2d 636 (1999); *Schall v. Wichita State Univ.*, 269 Kan. 456, 7 P.3d 1144 (2000).

3. *Brown v. Wichita State Univ.*, 219 Kan. 2, 7, 547 P.2d 1015, 1021 (1976).

4. *Alden*, 527 U.S. at 713, 119 S. Ct. at 2247.

5. K.S.A. 75-6103(a).

6. *Hopkins v. State of Kansas*, 237 Kan. 601, 609, 702 P.2d 710, 318 (1985).

7. *Barber v. Williams*, 244 Kan. 318, 320, 767 P.2d 1284, 1286 (1989).

II. Recreational use Immunity Under the Kansas Tort Claims Act

In K.S.A.75-6104, the Legislature has retained specific types of immunity from liability. The Legislature has also extended sovereign immunity under the KTCA to include other governmental entities. In the exception that is the subject of this article, the Kansas Legislature has retained immunity from liability for governmental entities and their employees for injuries to persons and property resulting from the recreational use of public property, absent gross and wanton negligence.⁸ K.S.A. § 75-6104(o) states:

75-6104. Liability of governmental entities for damages caused by employee acts or omissions, when; exceptions from liability. A governmental entity or an employee acting within the scope of the employee's employment shall not be liable for damages resulting from:

(o) any claim for injuries resulting from the use of any public property intended or permitted to be used as a park, playground, or open area for recreational purposes, unless the governmental entity or an employee thereof is guilty of gross and wanton negligence proximately causing such injury.

A. Immunity from liability for negligence occurring on recreational use property – Location, location, location.

Recreational use immunity applies to all activity located on recreational use property, regardless of the location of the property. For example, the immunity has been applied to injuries at indoor⁹ and outdoor¹⁰ facilities, on a school playground,¹¹ at swimming facilities,¹² on a green space open to the public used for unsupervised sledding,¹³ on a city-owned baseball diamond during a supervised baseball game,¹⁴ to fans¹⁵ and players at NCAA sporting events,¹⁶ and in a wrestling room used for noncompulsory wrestling practice.¹⁷ The application centers around the location of the injury.

"In order for a location to fall within the scope of K.S.A. 75-6104(o), the location must merely be 'intended or permitted to be used ... for recreational purposes.' The injury need not be the result of 'recreation.'"¹⁸ As explained in more detail

below, recreational use immunity protects a governmental entity and its employees from simple negligence on recreational use property. Stated another way, a person who is injured on recreational use property will not recover damages for his or her injuries caused by simple negligence, period.

The leading cases on recreational use immunity are the *Jackson v. U.S.D.* 259 cases.¹⁹ In *Jackson* several junior high students were horsing around after physical education class, but prior to hitting the showers. The students were using a springboard to dunk a basketball. The plaintiff fell and suffered compound fractures in his right forearm. The plaintiff successfully argued that the gymnasium where he was injured was used at the time of the injury for physical education classes. However, this argument was insufficient for the plaintiff to avoid immunity under the recreational use exception to the KTCA. Under K.S.A. 75-6104(o), if a school gymnasium is used for recess, extracurricular events, or other recreational, noncompulsory activities, K.S.A. 75-6104(o) applies, provided that the recreational use was more than incidental.²⁰ The case was remanded back to the district court for a factual determination whether the school gymnasium is intended or permitted to be used for recreational purposes.²¹ Upon remand, the defendant school district moved for summary judgment. The school district presented substantial competent evidence the gymnasium in question was used for noncompulsory recreational purposes, such as basketball, soccer, arts, crafts, and cheerleading, even though the injury occurred during a compulsory physical education class. The district court found the gymnasium was permitted to be used for more than incidental "recreational purposes."²² On appeal,²³ the Court of Appeals affirmed the district court decision finding the gymnasium where Jackson was injured was a "recreational use" facility.

The Supreme Court took its ruling in *Jackson* one step further in *Wilson v. Kansas State University*,²⁴ where the Court held immunity under the recreational use exception of the KTCA extends to restrooms integral to public property intended or permitted to be used as a park, playground, or open area for recreational purposes. The plaintiff in *Wilson* alleged that she was injured while sitting on a toilet seat in a Kansas State University stadium while taking a pause from spectating at an intercollegiate football game. The high court concluded

8. K.S.A.75-6104(o).

9. *Jackson v. Unified Sch. Dist. No. 259*, 268 Kan. 319, 995 P.3d 844 (2000); *Wright v. Unified Sch. Dist. No. 379*, 28 Kan. App. 2d 177, 14 P.3d 437 (2000).

10. *Nichols v. Unified Sch. Dist. No. 400*, 246 Kan. 93, 785 P.2d 986 (1990).

11. *Lanning v. Anderson*, 22 Kan. App. 2d 474, 921 P.2d 813 (1996).

12. *Gonzales v. Bd. of Shawnee County Comm'rs*, 247 Kan. 423, 799 P.2d 491 (1990); *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.2d 821 (2002).

13. *Boaldin v. Univ. of Kansas*, 242 Kan. 288, 747 P.2d 811 (1987).

14. *Willard v. City of Kansas City*, 235 Kan. 655, 681 P.2d 1067 (1984).

15. *Wilson v. Kansas State Univ.*, 273 Kan. 584, 44 P.3d 454 (2002).

16. *Molina v. Christensen*, 30 Kan. App. 2d 467, 44 P.3d 1274 (2002).

17. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

18. *Jackson*, 268 Kan. at 326, 995 P.3d at 849. Justices Lockett and

Allegrucci dissent from this part of the holding. The dissent would require the property be intended or permitted to be used for recreational purposes and further require the injury occur as the result of a recreational activity. The dissent contends that under the majority opinion a governmental entity is immune in the case of a worker injured fixing a light bulb at a recreational facility. *Jackson*, 268 Kan. at 335, 995 P.3d at 854 (Lockett & Allegrucci, JJ., concurring in part and dissenting in part).

19. *Jackson v. Unified Sch. Dist. No. 259*, 26 Kan. App. 2d 111, 979 P.2d 151 (1999), *rev'd*, 268 Kan. at 319, 995 P.3d at 844; *Jackson v. Unified Sch. Dist. No. 259*, 29 Kan. App. 2d 826, 31 P.3d 989 (2001) (appeal following remand).

20. See *Jackson*, 268 Kan. at 333, 995 P.3d at 853 (Lockett & Allegrucci, JJ., concurring in part and dissenting in part).

21. *Jackson*, 268 Kan. at 333, 995 P.2d at 853.

22. *Jackson v. Unified Sch. Dist. 259*, No. 96-C-2325 (Sedgwick County, Kan., Dist. Ct., Oct. 13, 2000).

23. *Jackson*, 29 Kan. App. 2d at 826, 31 P.3d at 989.

24. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.

while restrooms independently have a nonrecreational usage, they serve no purpose but for the recreational nature of the public property, and thus, they are “necessarily” connected to the property by plan, rather than being “incidentally” connected.

In *Lane v. Atchison Heritage Conference Center*,²⁵ the Kansas Supreme Court reversed a decision of the Court of Appeals that would have raised additional hurdles to recreational use immunity.²⁶ The Atchison Heritage Conference Center (AHCC) is a multi-use facility. On the night of the accident that spawned the lawsuit, the AHCC was used for a New Year’s Eve dance, a clearly recreational use. The plaintiff was a member of the band who slipped and fell on ice while loading his equipment after the dance. The allegations were that a negligent employee of the facility dumped water on the loading dock that froze and caused the plaintiff to slip and fall. The district court found recreational use immunity was applicable and granted summary judgment. The Court of Appeals

reversed holding the “primary purpose” of the AHCC was not recreational.

On review, the Kansas Supreme Court refused to follow the “primary purpose” doctrine articulated by the Court of Appeals. The Court stated the recreational use immunity statute should be read “broadly” and “Kansas courts should not impose additional hurdles to immunity that are not specifically contained in the statute.”²⁷ A particular facility must be viewed collectively to determine whether it is used for recreational purposes, so that the facility qualifies for recreational use exception to tort liability under the KTCA.²⁸ It found immunity under K.S.A. 75-6104(o) does not depend upon the “primary use” of the property but rather depends on the character of the property in question.²⁹ The correct test to be applied is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged.³⁰

The Kansas Court of Appeals has taken the rebuke of the Kansas Supreme Court in *Lane*³¹ to heart with its latest ruling. In *Poston v. Unified School District No. 387*,³² a parent of a child who was playing basketball at a school gymnasium came to school to pick up the child from practice when one of the brackets on a door located at the entrance to the school came loose, and the door fell on the plaintiff as he left the building injuring him. The door, located between the outside of the building and the school commons area, was not the entrance to the gym. The district court reasoned, and the Court of Appeals affirmed, that the commons area was “an ‘appendage’ to the gymnasium such that it qualified under the recreational use exception.”³³ The Court of Appeals concluded it was following the Supreme Court ruling in

*Wilson*³⁴ and the Court of Appeals ruling in *Robison*³⁵ when finding that the commons area was essentially part of the recreational use area.

Judge Patrick D. McAnany issued a respectful dissent.³⁶ He concluded that recreational use immunity should not apply because the plaintiff was injured going through a door that was between the outside of the school and the school commons area, neither of which were used for recreational purposes. In his opinion, the fact the person was injured in an area “adjacent” to a recreational area was not sufficient to invoke the protections of K.S.A. 75-6104(o). Based on the tone of his dissent, McAnany may have come to a different conclusion if the injury had occurred in a doorway between the commons area and the gymnasium where the property was used for recreational purposes.

In *Wright v. U.S.D. 379*,³⁷ the issue was whether a wrestling room at the Clay Center Community High School was used for recreation or for educational purposes. The plaintiff was a member of the school wrestling team who was injured during wrestling practice. The wrestling room, weight room, and gymnasium were part of the high school’s physical education facility. During the school day, these facilities were used by the school for physical education activities. When the facilities were not used for physical education, the wrestling room, weight room, and gymnasium were open to the public for weightlifting, aerobics, and wrestling. The facilities were used for professional wrestling matches, twirling, alumni basketball, kids’ wrestling, and pep rallies. Being a member of the school wrestling team was found to be a noncompulsory, extracurricular, and recreational activity. The Court of Appeals

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25. *Lane v. Atchison Heritage Conf. Ctr.*, 283 Kan. 439, 153 P.3d 541 (2007).

26. *Lane v. Atchison Heritage Conf. Ctr.*, 35 Kan. App. 2d 838, 134 P.3d 683 (2006), *rev’d*, 283 Kan. 439, 153 P.3d 541 (2007).

27. *Lane*, 283 Kan. at 445, 153 P.3d at 546.

28. *Id.*

29. *Id.*

30. *Id.*, 283 Kan. at 447, 153 P.3d at 547.

31. *Id.*, 283 Kan. at 445, 153 P.3d at 545.

32. *Poston v. Unified Sch. Dist. No. 387*, 37 Kan. App. 2d 694, 156 P.3d 685 (2007).

33. *Id.*, 37 Kan. App. 2d at 695, 156 P.3d at 687.

34. *Wilson*, 273 Kan. at 584, 44 P.3d at 454.

35. *Robison v. State of Kansas*, 30 Kan. App. 2d 476, 43 P.3d 821 (2002).

36. The Kansas Supreme Court will hear oral arguments in *Poston* on Jan. 29, 2008 at 9 a.m.

37. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

concluded "that the wrestling room was permitted to be used for recreational purposes and that such use was more than incidental."³⁸ Recreational use immunity, therefore, applied.

The *Poston* case illustrates the difficulty posed when the injury occurs on property with multiple uses, including recreational use. The Supreme Court rejected the "primary purpose" test suggested by the Kansas Court of Appeals. On the other hand, *Wright* suggests the analysis litigants should use when determining whether recreational use immunity applies to multiple use property. The litigants and the courts will have to review the issues on a case by case basis to determine whether K.S.A. 75-6104(o) is applicable. The participants will have to sift through every fact involving recreational use of the property for the court to determine if recreational use immunity is applicable. Only when the recreational use of the property is "incidental" to the property's overall use can plaintiffs make a claim for simple negligence.

B. Unsuccessful attempts to limit the scope of recreational use immunity.

Attempts to limit recreational use immunity have not been well received by the Kansas Supreme Court. Many attempts have been made, but very few have gained any traction in our highest state court.

1. "Public property" is "public" even if it is not open to all.

Recreational use immunity is granted to public property for the public to use for recreational purposes. A governmental entity may restrict access in various ways without altering its public character. For example, public swimming beach operators can charge an admission fee, yet the beach remains a public area under K.S.A. § 75-6104(o);³⁹ a baseball field is public under the recreational use

immunity statute, even though the "public is excluded from the field while games are in progress";⁴⁰ theaters charging admission are eligible for immunity;⁴¹ and user fees do not prevent a governmental entity from asserting immunity pursuant to K.S.A. 75-6104(o).⁴²

2. "Open areas" can be confined, closed spaces.

Plaintiffs have unsuccessfully attempted to limit recreational use immunity by urging the courts to define the words "open area" in K.S.A. § 75-6104(o) to include only accidents that occur out of doors. The appellate courts have ruled that recreational use immunity applies to all public recreational property whether inside or out. Examples include enclosed school gymnasiums,⁴³ wrestling rooms,⁴⁴ theaters owned by governmental entities,⁴⁵ and swimming pools.⁴⁶

3. Recreational use immunity is not limited to "sporting events."

Most people assume that recreational immunity applies only to incidents involving athletic or sporting events. Such is not the case. Recreational use immunity is not restricted to incidents where the participant is involved in athletic contests. The Kansas Court of Appeals has applied the recreational use exception to include theaters where a thespian was stabbed in the buttocks with a ginsu knife during a 1997 Halloween performance of the play "The Persecution and Assassination of Jean-Paul Marat as Performed by the Inmates of the Asylum of Charenton under the Direction of the Marquis de Sade."⁴⁷ The plaintiff was an actor participating in a play, for fun, who received neither college credit nor pay for her performance. The play took place on an inside stage. The court did not have any difficulty applying recreational use immunity to an injury, which occurred during a stage performance.

4. The "condition of the property" need not cause the injury.

The injury need not have been caused by a condition of the property. In *Nichols v. U.S.D. 400*⁴⁸ the plaintiff argued that recreational use immunity should be limited to instances where a person is injured based on the condition of the property. In rejecting the plaintiff's argument, the Supreme Court found:

The plain language of the statute makes it clear that immunity exists for any claim for negligently caused injuries resulting from the use of public property intended for recreational purposes. ... Where a statute is plain and unambiguous, this [C]ourt must give effect to the intention of the [L]egislature as expressed rather than determine what the law should or should not be.⁴⁹

(continued on next page)



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38. *Id.*, 28 Kan. App. 2d at syl 2, 14 P.3d at syl 2.

39. *Gonzales v. Bd. of County Comm'rs of Shawnee County*, 247 Kan. at 423, 799 P.2d at 491.

40. *Bonewell v. City of Derby*, 236 Kan. 589, 693 P.2d 1179 (1985).

41. *Tullis v. Pittsburg State Univ.*, 28 Kan. App. 2d 347, 16 P.3d 971 (2000).

42. *Gruhin v. City of Overland Park*, 17 Kan. App. 2d 388, 836 P.2d 1222 (1992).

43. *Jackson*, 268 Kan. at 319, 995 P.3d at 844.

44. *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

45. *Tullis*, 28 Kan. App. 2d at 347, 19 P.3d at 971.

46. *Robertson*, 30 Kan. App. 2d at 476, 43 P.3d at 821.

47. *Tullis*, 28 Kan. App. 2d at 347-348, 19 P.3d at 972-973. We cannot make up facts like this. We only litigate them.

48. *Nichols*, 246 Kan. at 93, 785 P.2d at 986.

49. *Id.*, 246 Kan. at 95, 785 P.2d at 988.

The Supreme Court ruled on the argument the injury must occur because of the condition of the premises in a similar manner. "To require an injury to be the result of a condition of the premises is too restrictive a reading of the recreational use exception statute. K.S.A. 75-6104(o)."⁵⁰

5. "Supervision" of an injured person is immaterial.

The fact a person was supervised or unsupervised at the time of injury is immaterial to the scope of recreational use immunity. In *Nichols*, the plaintiff argued that recreational use immunity should be restricted to instances where the injured person is not being supervised by a third person, such as a coach. "Nowhere in the statute does the language distinguish between activities, which are supervised or unsupervised. Where a statute is plain and unambiguous, this [C]ourt must give effect to the intention of the [L]egislature as expressed rather than determine what the law should or should not be."⁵¹ Recreational use immunity protects a governmental entity and its employees who supervise persons using recreational use property from liability based on allegations of simple negligence.

6. Recreational use immunity is not restricted to "personal injury."

The injury to the plaintiff need not be a personal injury. Recreational use immunity has been applied to property loss. The Ellis County District Court was faced with alleged damage to "Dunny," the world's smartest cutting horse.⁵² A professor at Fort Hays State University (FHSU) was floating the horse's teeth in a stall at the FHSU Rodeo Pavilion when Dunny reared up and the professor rammed a file through the top of Dunny's mouth, breaking several teeth. The plaintiff claimed both physical and emotional damages to the horse. The FHSU Rodeo Pavilion is the arena where competitive intercollegiate rodeos are held and the team practices. There are bleachers for fans to watch rodeo action. The court ruled that Dunny was injured in the locker room of the FHSU Rodeo Pavilion and the university was entitled to recreational use immunity.

7. "Recreation" is nearly anything diverting.

"Recreational purposes" have been identified in a multitude of factual situations involving numerous activities at various sites. The identification generally begins with the meaning of "recreation." The Kansas Supreme Court states:

Recreation is defined as 'refreshment of the strength and spirits after toil: DIVERSION, PLAY' Webster's Third New International Dictionary, 1889 (1986). Play 'suggests an opposition to work; it implies activity, often strenuous, but emphasizes the absence of any aim other than amusement, diversion, or enjoyment.'⁵³

Obviously, this definition is very broad.

8. Governmental entities and their employees are immune for simple negligence.

The Legislature intended for the state,⁵⁴ cities,⁵⁵ counties,⁵⁶ school districts,⁵⁷ and all other governmental entities that have property intended or permitted to be used for recreational purposes to be immune from simple, ordinary, or mere negligence.⁵⁸ Employees of a governmental entity acting within the scope of their employment are also afforded immunity under K.S.A. § 75-6104(o).⁵⁹ The exception, however, does not afford protection to either governmental entities or their employees when an injury arises from gross and wanton conduct.

III. Recreational use Immunity Does not Apply to Gross and Wanton Negligence

The recreational immunity exception to the KTCA applies to instances where there is "mere," "ordinary," or "simple" negligence. However, K.S.A. 75-6104(o) provides the immunity shall not apply when "the governmental entity or employee thereof is guilty of gross and wanton negligence proximately causing such injury." "Qualified immunity, as found in K.S.A. § 75-6104(o), means that the defendant is immune, regardless of any common-law duty, absent a showing of gross or wanton negligence."⁶⁰

A. What is "gross and wanton negligence"?

K.S.A. 75-6104(o) does not apply to instances of "gross and wanton negligence." In order for a plaintiff to prove gross and wanton negligence "it is sufficient if the defendant evinced that degree of indifference to the rights of others, which may justly be characterized as reckless."⁶¹ Recklessness is a stronger term than negligence. To be reckless, conduct must be such as to show disregard of or indifference to consequences, under circumstances involving danger to life or safety of others. "Proof of a willingness to injure is not necessary [in establishing gross and wanton negligence] because a wanton act is something more than ordinary negligence but less than willful injury."⁶²

50. *Id.*, 246 Kan. at 97, 785 P.2d at 989.

51. *Id.*, 246 Kan. at 95, 785 P.2d at 988.

52. *Barringer v. Fort Hays State Univ.*, Case No. 00-C-28 (Ellis County, Kan., Dist. Ct., May 7, 2001).

53. *Jackson*, 268 Kan. at 330, 995 P.3d at 851-852, quoting *Ozuk v. River Grove Bd. of Educ.*, 281 Ill. App. 3d 239, 243-44, 217 Ill. Dec. 18, 666 N.E. 2d 687 (1996).

54. K.S.A. (2006 Supp.) 75-6102(a); *Gragg v. Wichita State Univ.*, 261 Kan. 1037, 934 P.2d 121 (1997).

55. K.S.A. (2006 Supp.) 75-6102(b), (c); *Gruhin*, 17 Kan. App. 2d at 388, 836 P.2d at 1222.

56. K.S.A. (2006 Supp.) 75-6102(b), (c); *Gonzales*, 247 Kan. at 423, 799 P.2d at 491.

57. K.S.A. (2006 Supp.) 75-6102(b), (c); *Jackson*, 268 Kan. at 319, 995 P.3d at 844.

58. Mere negligence is insufficient to establish a basis for liability when a defendant asserts immunity pursuant to K.S.A. 75-6104(o). *Willard*, 235 Kan. at 660, 681 P.2d at 1070.

59. K.S.A. (2006 Supp.) 75-6102(d); *Wright*, 28 Kan. App. 2d at 177, 14 P.3d at 437.

60. *Jackson*, 268 Kan. at 331, 995 P.2d at 851.

61. *Reeves v. Carlson*, 266 Kan. 310, 314, 969 P.2d 252, 256 (1998).

62. *Lanning*, 22 Kan. App. 2d at 474-75 syl. 6, 921 P.3d at 815 syl. 6.

In the employment law context, the Kansas Supreme Court follows the dictionary definition of “gross.” The Court defines “gross” as:

‘Glaringly noticeable usually because of inexcusable badness or objectionableness.’ Webster’s New Collegiate Dictionary 507 (1973). Black’s Law Dictionary 702 (6th ed. 1990) defines ‘gross’ as ‘[o]ut of all measure; beyond allowance; flagrant; shameful; as a gross dereliction of duty, a gross injustice, gross carelessness, or negligence ...’

Such conduct as is not to be excused.⁶³

Thus it can be concluded that “gross” conduct in the context of recreational use immunity is of such “inexcusable badness” that “such conduct as is not to be excused.”

“Wanton conduct is distinguishable from the mere lack of due care involved in negligence because the actor realizes the imminence of injury to others from his acts but takes no steps to prevent the injury.”⁶⁴ “Wantonness refers to the mental attitude of the wrongdoer rather than a particular act of negligence.”⁶⁵ Wanton conduct is defined as “an act performed with a realization of the imminence of danger and a reckless disregard or complete indifference to the probable consequences of the act is a wanton act.”⁶⁶ “The keys to a finding of gross and wanton negligence are knowledge of a dangerous condition and indifference to the consequences.”⁶⁷ “Without knowledge of a dangerous condition, indifference to the consequences does not become a consideration.”⁶⁸

When the meanings of “gross” and “wanton” are placed into the words used in K.S.A. 75-6104(o), the burden on a plaintiff to establish liability is very high.

B. A person injured on recreational use property must plead “gross and wanton negligence.”

“K.S.A. 75-6104(o) is a complete defense to actions where the plaintiff alleges only ordinary negligence.”⁶⁹ This pleading requirement may not be magical, but its absence can be fatal. For example, in *Willard v. Kansas City*,⁷⁰ a plaintiff alleged in his petition that a city’s installation of a certain type of fencing around a baseball field was negligent. The Supreme Court affirmed summary judgment in favor of the defendant. Twice in its opinion, the Court emphasized the plaintiff had only alleged the city was “negligent.” The reason for this emphasis is reflected in the Court’s holding that “mere negligence on the part of the [c]ity, which was all that was alleged by the plaintiff in his pleadings, was insufficient to establish a basis for liability under the KTCA.”⁷¹ In theory, a case can be dismissed by a district court for failure of the plaintiff to allege gross and

wanton negligence. In reality, the district courts have exercised their discretion by allowing the plaintiff to amend the pleadings prior to the close of discovery to include allegations of gross and wanton negligence.

Many attorneys are not aware of the need to allege gross and wanton negligence in order to recover damages in the face of K.S.A. 75-6104(o). Numerous claims based on accidents on recreational use property are pleaded as simple negligence and proceed through discovery on that theory. In one case, an attempt by plaintiff to amend her pleadings, after the close of discovery and the submission of dispositive motions, from ordinary negligence to include a count of “gross and wanton negligence” was denied by the district court, and the appellate court held such denial to be within the sound discretion of the district court.⁷² In another case, an attempt by plaintiff to argue “gross and wanton negligence” for the first time on appeal was not allowed by the Court of Appeals.⁷³ Gross and wanton negligence must be pleaded in the petition for any accident that occurs on recreational use property owned by a governmental entity.

C. Evidence of “gross and wanton negligence” is needed to survive a motion for summary judgment.

A plaintiff must establish through evidence in the record the knowledge of employees of the governmental entity that a recreational facility was imminently dangerous in order to survive a motion for summary judgment. While the appellate courts have reversed several cases where the plaintiff lacked evidence to support a claim of gross and wanton negligence, there has been only one instance where the appellate courts have found the standard satisfied.

1. Cases citing lack of evidence to support claim of “gross and wanton negligence.”

The facts must be read to be believed. In *Lee v. City of Fort Scott*⁷⁴ the Supreme Court found that the city of Fort Scott did not commit “gross and wanton negligence” when its employees stretched unmarked steel cables between trees to keep persons from trespassing on the municipal golf course. The plaintiff attempted to drive his motorcycle on the golf course. The plaintiff hit the cables, was injured, and later died. In finding the city was immune from liability, the Supreme Court found the plaintiffs “had failed to offer any evidence that the city realized the imminence of danger and exhibited a complete disregard of the consequences.”⁷⁵

The Court of Appeals reached a similar decision in *Lanning v. Anderson*.⁷⁶ In *Lanning* the plaintiff was a track athlete who was walking across a playground on the way to the showers after practice. The discus throwers were practicing on the playground and hit the plaintiff on the head with a discus.

63. *Jones v. Kansas State Univ.*, 279 Kan. 128, 150, 106 P.3d 10, 25 (2005).

64. *St. Claire v. Denny*, 245 Kan. 414, 423, 781 P.2d 1043, 1049 (1989).

65. *Reeves*, 266 Kan. at 314, 969 P.3d at 256.

66. PIK 3d 103.03.

67. *Lanning*, 22 Kan. App. 2d at 481, 921 P.3d at 819.

68. *Id.*

69. *Dunn v. Unified Sch. Dist. No. 367*, 30 Kan. App. 2d 215, 225, 40 P.3d 315, 323 (2002).

70. *Willard*, 235 Kan. at 655, 681 P.2d at 1067.

71. *Id.*, 235 Kan. at 660, 681 P.2d at 1071.

72. *Tullis*, 28 Kan. App. 2d at 347, 16 P.3d at 971.

73. *Molina*, 30 Kan. App. 2d at 467, 44 P.3d at 1274.

74. *Lee v. City of Fort Scott*, 238 Kan. 421, 710 P.2d 689 (1985).

75. *Id.*, 238 Kan. at 425, 710 P.2d at 692.

76. *Lanning*, 22 Kan. App. 2d at 474, 921 P.2d at 813.

The record indicated that the discus throwers had thrown in the same place at least 10 times before the accident. The testimony of the coaches indicated that if they had known of the danger they would have acted differently. The district court found there was evidence of “gross and wanton negligence” on the part of the coaches, allowed the case to trial, and a verdict was returned for the plaintiff. The Court of Appeals reversed the judgment of the district court. Based on the coach’s testimony, the Court of Appeals found “that there is no evidence to support a finding that the coaches realized the imminence of danger or that the coaches had reason to believe someone would be injured at track practice.”⁷⁷ In a later unpublished decision, the Kansas Court of Appeals explained why the *Lanning* court did not find the realization of the “imminence of danger” by school employees. The court explained: “[A] failure to foresee a combination of elements leading to an accident is not gross and wanton negligence, as wantonness indicates an indifference to *known* circumstances.”⁷⁸

In *Molina v. Christensen*,⁷⁹ the plaintiff alleged simple negligence on the part of Wichita State University for a personal injury at its baseball stadium. The plaintiff was the lead-off batter in a Missouri Valley Conference baseball game between Evansville University and Wichita State University (WSU). The plaintiff was standing approximately 25 feet from home plate “timing” pitches thrown by the starting pitcher in violation of NCAA Baseball rules. The WSU pitcher threw a baseball toward the plaintiff at approximately 95 miles per hour intending to “brush back” the plaintiff. The WSU pitcher, Ben Christensen,⁸⁰ missed his target and hit the plaintiff in the eye. During discovery “Christensen maintained that his actions were motivated by instructions given to him by one of the WSU coaches. According to Christensen, his actions had something to do with keeping the batter from getting too close to home plate.”⁸¹ The court identified problems with this rationale because “the game had not started, the plaintiff had every right to be where he was, and Christensen had no right whatsoever to be throwing a baseball anywhere near him.”⁸² “Despite the defendants’ unconscionable tactics, the plaintiff’s petition alleged only simple negligence on the part of [WSU employees].”⁸³ WSU reserved the defense of recreational use immunity. The case proceeded to pretrial conference with no allegations by the plaintiff of gross and wanton negligence by WSU. The district court found there were no allegations of “gross and wanton negligence” and granted summary judgment to the defendant Wichita State University. The Court of Appeals in affirming the district court ruling stated:

The fact of the matter is that despite how fervently the plaintiff may wish it were not so, his petition alleged simple negligence on the parts of Stephenson and Kemnitz, who are WSU employees. ... As we have demonstrated, absent gross and wanton negligence, WSU is immune from liability under the recreational use exception of the KTCA for events that took place at Rusty Eck Stadium.⁸⁴

Molina teaches us that a plaintiff must both *allege* gross and wanton negligence in the petition and *show* facts in the record amounting to gross and wanton negligence to survive a motion for summary judgment.

In *Robison v. State of Kansas*,⁸⁵ the Court of Appeals reviewed a district court decision granting summary judgment to the Department of Social and Rehabilitation Services (SRS) for a slip-and-fall accident that occurred in a hallway going from a swimming pool to a locker room at the Parsons State Hospital. SRS allowed the Labette County Community College to use the pool for recreational purposes. The plaintiff alleged “gross and wanton negligence” in its petition for damages. The plaintiff, however, failed to develop facts during the course of discovery that indicated SRS employees knew a dangerous situation had arisen. The Court of Appeals found the plaintiff “failed to present any evidence of the mental attitude of a wrongdoer, which would establish gross and wanton conduct. There was no evidence to establish that any of the defendants’ employees knew about an excess amount of water in the hallway, which might cause a fall.”⁸⁶ SRS employees knew that wet mats in the hallway between the swimming pool and the locker room had been removed. However, SRS employees did not know that water had pooled in the hallway to create a hazard. Therefore, there was not any realization of a negligent situation and no “gross and wanton” negligence.

In *Jackson v. City of Norwich*,⁸⁷ the plaintiff attempted to attribute “gross and wanton negligence” to a city where there was a hole in the ground in a city park, which contained a water valve. The plaintiffs argued the city had knowledge of the hole because a city employee mowed around the hole. The Court of Appeals applied the logic of *Robison* when it ruled that a city employee may have known of the hole, but the employee did not realize imminent danger caused by the hole and then disregard that danger. The court concluded plaintiff “has failed to come forward with any evidence that the city in this case had realized there was imminent danger but nevertheless recklessly disregarded concerns for probable consequences of how it maintained the area around the water valve.”⁸⁸

77. *Id.*, 238 Kan. at 482, 921 P.2d at 820.

78. *Winn ex rel. Winn v. City of Leawood, Kan.*, 2004 WL 835991, 87 P.3d 993 (No. 91,210, April 16, 2004).

79. *Molina*, 30 Kan. App. 2d at 469, 44 P.3d at 1276.

80. WSU Pitcher Ben Christensen was drafted by the Chicago Cubs in the first round of the 1999 Major League Baseball amateur entry draft. An arm injury limited Christensen’s playing time. He last played for San Antonio in the AA Texas League in 2004 as part of the Seattle Mariners organization.

81. *Molina*, 30 Kan. App. 2d at 469, 44 P.3d at 1276.

82. *Id.*

83. *Id.*

84. *Id.*, 30 Kan. App. 2d at 474, 44 P.3d at 1279-1280.

85. *Robison*, 30 Kan. App. 2d at 476, 44 P.3d at 821.

86. *Id.*, 30 Kan. App. 2d at 480, 43 P.3d at 824

87. *Jackson v. City of Norwich*, 32 Kan. App. 2d 598, 85 P.3d 1259 (2004).

88. *Id.*, 32 Kan. App. 2d at 601, 85 P.3d at 1261.

2. The case finding sufficient evidence to support a claim for "gross and wanton negligence."

*Gruhin v. City of Overland Park*⁸⁹ is the only instance where an appellate court found there could have been "gross and wanton negligence" on the part of a governmental entity. The accident in *Gruhin* took place on the Overland Park Municipal Golf Course. An injury was caused to a golfer by a large hole in the ground concealed in the rough. Golf course employees were notified of the hole. The employees took steps to warn golfers of the hazard by placing chalk marks around the hole but did no more to protect golfers from this dangerous condition. As time passed, the warning markings became imperceptible to golfers. The plaintiff was then injured when he drove his golf cart into the hole after the markings were no longer visible. The district court granted summary judgment to the city based on recreational use immunity, and the plaintiff appealed. In remanding the case to the district court for further proceedings, the Court of Appeals found "the facts do suggest, however, that reasonable minds could differ as to whether the preventative measure taken showed a reckless disregard for the danger posed by the hole."⁹⁰

For an injured person to establish "gross and wanton negligence" to overcome recreational use immunity, that person must establish the activity of the governmental entity or its employee was of such "inexcusable badness" that such conduct is not to be condoned. In addition, the injured person must show the governmental entity or its employee "knew" the activity was inexcusably bad. Needless to say, it will be very difficult for an injured person to show sufficient "inexcusable badness" on the part of a governmental employee or entity and its knowledge the activity was inexcusably bad to overcome recreational use immunity.

IV. Conclusion

Sovereign immunity is a fundamental, constitutional right held by the state of Kansas. The Legislature has the power

to control the state's sovereign right to immunity. The Legislature has waived some of the state's immunity from liability after balancing the state's right as a sovereign with the moral obligation the sovereign has to persons who are injured using recreational property. The Legislature has determined that all governmental entities, including the state and its cities, counties, and other municipal corporations, shall be immune from liability for ordinary negligence occurring on recreational use property. Conversely, the Legislature has determined governmental entities and their employees are not immune from liability for "gross and wanton negligence" on recreational use property.

The Legislature has clearly written the law granting governmental entities immunity for "mere," "ordinary," or "simple" negligence at any government owned property "intended or permitted to be used ... for recreational purposes." The Kansas Supreme Court has repeatedly indicated it will not restrict the effect of recreational use immunity. "If any future liability for ordinary negligence is to be created by such a distinction, it must originate with the [L]egislature."⁹¹ The general public and persons who use publicly owned recreational property shall reap the benefit of parks, gymnasiums, baseball diamonds, football fields, and music auditoriums. On the other hand, persons who use recreational use property owned by governmental entities play at their own risk. ■

About the Authors

Wm. Scott Hesse, Topeka, is an assistant attorney general for the state of Kansas in the Civil Litigation Division. He has served as an assistant attorney general under Attorney Generals Bob Stephan, Carla Stovall, Phill Kline, and Paul Morrison. Between tours of duty as an assistant attorney general, Hesse served as an assistant general counsel to the Kansas Corporation Commission, assistant Riley County counselor, and in the private practice of law with the law firm of Myers, Pottroff, and Ball, Manhattan. Immediately prior to rejoining the attorney general's staff, Hesse served as deputy state director to U.S. Sen-

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89. *Gruhin*, 17 Kan. App. 2d at 388, 836 P.2d at 1222.

90. *Id.* 17 Kan. App. 2d at 393, 836 P.2d at 1225-1226.

91. *Gonzales*, 247 Kan. at 428, 799 P.2d at 494-495.

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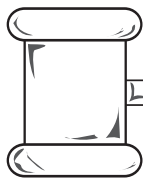
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Supreme Court

Attorney Discipline

***IN RE THOMAS T. O'NEILL
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION***

NO. 98,964 – DECEMBER 14, 2007

FACTS: Respondent, a private practitioner from Kansas City, Kan., was admitted to practice law in Kansas in 1986. His license was temporarily suspended in January 2006 after the Kansas Court of Appeals upheld his conviction of felony driving under the influence (DUI). A formal complaint alleging violation of KRPC 8.4(b) (misconduct involving a criminal act) was filed, but an amended complaint was subsequently filed, which added the allegation that respondent violated the predecessor rule in the Code of Professional Responsibility to the current KRPC 8.1(a) (false statement of material fact in bar application).

The hearing panel found clear and convincing evidence of multiple criminal arrests and convictions that were not disclosed on respondent's bar application as well as a final conviction of felony DUI. A violation of KRPC 8.1(b) (failure to disclose a fact necessary to correct a misapprehension in connection with a disciplinary matter) was also found when respondent admitted that he had failed to disclose a DUI arrest to the Kansas Impaired Lawyers Assistance Committee. Two members of the panel recommended indefinite suspension while one member recommended disbarment.

HELD: Respondent filed no exceptions to the panel's findings of fact and conclusions of rules violations. The Court found the appropriate discipline to be indefinite suspension, although a minority would disbar respondent. The Court directed the disciplinary administrator to check every aspect of respondent's petition thoroughly and hold a full hearing should respondent ever file for reinstatement to the practice of law.

***IN RE IRWIN S. TRESTER
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION***

NO. 98,103 – DECEMBER 7, 2007

FACTS: Respondent, a private practitioner admitted in Kansas in 1968, never practiced law in Kansas. Instead, he moved to California, took the bar examination four times but did not pass it. However, he "was not dissuaded and, for nearly 40 years, practiced law in California." He was eventually sued for legal malpractice and fraud by a client and was subsequently prosecuted for theft and the unauthorized practice of law. He entered a plea of no contest and was placed on probation with conditions.

A hearing panel in Kansas found violations of KRPCs 5.5 (unauthorized practice of law) and 8.4 (misconduct) and SCR 202 (grounds for discipline), found six aggravating and four mitigating factors and recommended indefinite suspension.

HELD: The Court reviewed other cases involving felony convictions and rejected respondent's request for published censure. The Court agreed with the panel that indefinite suspension was appropriate. However, a majority concluded that the order should apply retroactively to October 2005, the date of the criminal sentencing condition that "the defendant is not to practice law in the state of California whatsoever."

Civil

***CHILD IN NEED OF CARE AND PRO SE LITIGANTS
IN RE J.A.H.***

***SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 96,364 – DECEMBER 7, 2007***

FACTS: On the morning of trial to determine whether a child was in need of care, his father requested court-appointed counsel and a continuance. In denying the requests, the district court observed that almost 70 days earlier the father had released his court-appointed counsel and elected to proceed pro se. Accordingly, the trial proceeded with the father representing himself and the court finding that the child, J.A.H., was in need of care. The Court of Appeals affirmed.

ISSUES: (1) Child in need of care and (2) pro se litigants

HELD: Court held under the facts of this case, where two days after the filing of a child in need of care petition the father received court-appointed counsel pursuant to K.S.A. 2005 Supp. 38-1505(b); where 19 days later the father then voluntarily waived that right, counsel was allowed to withdraw, and the father elected to proceed pro se; where the father's desire to proceed pro se was reinforced 19 days later at the pretrial hearing, despite the court's warning that he might be disadvantaged; and where 69 days after the father's original waiver he requested appointment of counsel and a continuance on the morning of trial, the district court did not err in denying the requests and proceeding with trial. Court also held there was sufficient evidence to support the trial court's finding that the father was unable or unwilling to provide a safe and stable environment, that the father was not cooperative with the court in the proceedings, and that the health and welfare of the child was at risk under the circumstances.

STATUTES: K.S.A. 20-3018(b); K.S.A. 38-1501, 1551(a), -1555, -2250; K.S.A. 2006 Supp. 38-2201; K.S.A. 2005 Supp. 38-1502(a), -1505(b), -1534, -1585(a); K.S.A. 1980 Supp. 38-817; K.S.A. 59-2646; and K.S.A. 77-201

**HABEAS CORPUS
BELLAMY V. STATE
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 94,365 – DECEMBER 7, 2007**

FACTS: Bellamy entered guilty plea to rape of woman with brain damage, based on victim's incapacity to consent. He filed 60-1507 motion alleging ineffective assistance of counsel in advising Bellamy that victim was legally incapable of giving consent and claiming he would not have entered plea if he had known that victim's capacity to consent was a factual question for the jury to decide. District court appointed counsel, conducted a preliminary hearing and denied the motion without an evidentiary hearing. In unpublished opinion, Court of Appeals applied an abuse of discretion standard and affirmed. Bellamy's petition for review granted to determine whether Court of Appeals applied proper standard of review, and whether Bellamy should have received a full evidentiary hearing.

ISSUES: (1) Standard of review and (2) evidentiary hearing

HELD: Standards of review to be applied to 60-1507 motions decided summarily, after preliminary hearing, and after full evidentiary hearing are reviewed and stated. Statute does not support the conclusion that appellate courts may apply an abuse of discretion standard. In present case, Court of Appeals articulated the wrong standard of review and failed to fully apply the proper standard of review. Court of Appeals properly reviewed the district court's ultimate legal conclusions using a de novo standard, but did not address that court's factual findings to determine whether they were supported by substantial competent evidence or whether they were sufficient to support the district court's conclusions of law.

Court of Appeals incorrectly agreed with state's claim that favorable dispositional departure sentence did not satisfy prejudice prong of ineffective assistance of counsel, and incorrectly found evidence from the preliminary hearing was sufficient to convict Bellamy of rape based on force or fear. There are insufficient facts in the record to establish what advice Bellamy received from trial counsel prior to entering his guilty plea, or how that advice influenced Bellamy's decision to plead guilty. Matter is remanded for full evidentiary hearing.

STATUTES: K.S.A. 60-1507, -1507(b); and K.S.A. 2001 Supp. 21-3502(a)(1)(A) and (C)

**QUO WARRANTO AND REMOVAL
STATE EX REL. MORRISON V. PRICE
ORIGINAL ACTION IN QUO WARRANTO – REMANDED
TO COMMISSIONER WITH DIRECTIONS
NO. 96,481 – DECEMBER 7, 2007**

FACTS: Attorney general's office filed original quo warranto action to enjoin the alleged unauthorized practice of law by respondents David Martin Price, Janice Lynn King, Rosemary Denise Price, and Pro Se Advocates. Senior Judge Lively appointed as commissioner to investigate and make findings of fact and conclusions of law for the court's determination of the case. Respondents' second notice of removal was still pending in federal court when commissioner conducted hearing Dec. 5, 2006, at which respondents did not appear. Commissioner granted state's motion for sanctions, concluded that each respondent had engaged in the unauthorized practice of law, and entered permanent injunction and restrictions on any future filings. Commissioner also concluded that David Martin Price and Pro Se Advocates violated Kansas Consumer Protection Act (KCPA).

ISSUE: (1) Review of commissioner's findings and (2) conclusions of law

HELD: Respondents' notice of removal under 28 U.S.C. § 1446 automatically stayed the state court proceedings pending an order of remand by a federal judge. The Dec. 5 hearing should not have gone forward. Any action taken by commissioner as a result is a nullity. Commissioner's orders are not adopted and matter is remanded for further proceedings on allegations regarding Rosemary Denise Price, Janice Lynn King, and Pro Se Advocates. Also, record does not support the findings and conclusions regarding KCPA violations. Because David Martin Price engaged in unauthorized practice of law before the Supreme Court during oral argument on behalf of his fellow respondents, a permanent injunction is issued against him. Case remanded to commissioner for further proceedings against all other respondents.

CONCURRENCE AND DISSENT (McFarland, C.J.): Concurs with remand to commissioner, but dissents from majority's decision as to David Martin Price. Commissioner's orders arising from the Dec. 5 hearing are void as to all respondents. Would remand for further proceedings as to all respondents where David Martin Price could have full and meaningful opportunity to address whether his actions before Supreme Court constituted the unauthorized practice of law. Additionally, record does not support a conclusion that David Martin Price did any of the things for which he is now enjoined.

CONCURRENCE AND DISSENT (Buser, J.): Concurs with remand to commissioner, but dissents from majority's holding that David Martin Price's oral argument to Supreme Court was the unauthorized practice of law. Price appeared pro se and read collective statement of the other parties who were not clients. Justice would be better served if matter were remanded with respect to all respondents for further findings and conclusions as to all allegations of unauthorized practice of law. Additionally, injunction issued against David Martin Price goes beyond the Court's finding of unauthorized practice of law during oral argument to Supreme Court.

STATUTES: 28 U.S.C. §§ 1446, 1446(d) (2000); and K.S.A. 50-601 *et seq.*, 60-905(a)

**INJUNCTIONS, ATTORNEY FEES, AND
LITIGATION EXPENSES
IDBEIS ET AL. V. WICHITA SURGICAL SPECIALISTS
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 96,606 – DECEMBER 21, 2007**

FACTS: A prior appeal involved the enforceability of restrictive covenants that prohibited employees of Wichita Surgical Specialists (WSS) from competing against WSS. In the prior appeal, the Court affirmed the trial court's decision that the restrictive covenants in the surgeons' employment contracts were enforceable, but reversed the trial court's ruling grafting a liquidated damages provision into the contracts. On remand, WSS filed a motion for attorney fees and costs under K.S.A. 60-905(b). In its motion, WSS sought to recover as damages from the surgeons its attorney fees and expenses. WSS claimed a total of \$375,218.38. WSS argues it was entitled to the fees and expenses because it ultimately prevailed in the underlying action based upon this Court's ruling. The trial court granted the motion and determined the amount of attorney fees and expenses to be \$361,851.38 and entered judgment against each of the three surgeons for \$120,617.12.

ISSUES: (1) Injunctions, (2) attorney fees, and (3) litigation expenses

HELD: Court stated the appeal raised an issue of first impression: When a party who receives a temporary injunction and posts an injunction bond does not ultimately prevail in the action, is the party liable under K.S.A. 60-905(b) for the attorney fees and expenses incurred by the opposing party, including fees incurred during a

trial on the merits and during an appeal, even though the opposing party files a counterclaim and seeks a temporary and permanent injunction? Because damages payable by injunction bonds are generally limited to those actually and proximately resulting from the effect of the temporary injunction itself, as opposed to litigation expenses independent of the temporary injunction, we conclude that a party who files a counterclaim and seeks a declaratory judgment and injunction in addition to answering and opposing the entry of a permanent injunction in favor of the other party is entitled only to those fees incurred in seeking the dissolution of the temporary injunction and is not entitled to damages for fees that would necessarily have been incurred in pursuing the counterclaim and its attendant remedies. Court reversed for the district court to determine the fees directly and exclusively incurred in the dissolution of the temporary injunction.

STATUTE: K.S.A. 60-905(b)

**MANDAMUS AND VETERANS' PREFERENCE
STATE EX REL. V. CITY OF LEAVENWORTH ET AL.
LEAVENWORTH DISTRICT COURT
APPEAL AFFIRMED AND CROSS-APPEAL DENIED
NO. 96,414 – DECEMBER 14, 2007**

FACTS: Slusher and Sorrell worked for the city of Leavenworth Police Department (LPD). Both men were classified as veterans and met the qualifications for promotions, Slusher from sergeant to lieutenant and Sorrell from police officer to sergeant. Both men were the only veterans to apply for the respective promotions and each promotion ultimately went to a nonveteran individual. When confronted with the veterans' preference statute, the personnel director of the city of Leavenworth responded that the preference applied only to initial hiring. Slusher and Sorrell filed a petition for writ of mandamus in the district court alleging that each was denied promotion by LPD in violation of the veterans' preference statute. The district court dismissed the petition on grounds that the statute only applied to initial hiring and mandamus was not an appropriate remedy. In prior appeal, Court held the veterans' preference statute applied to internal promotions as well as to initial hiring and that mandamus was the proper remedy. On remand, district court found the remanded decision left open the possibility for consideration of the employee's competence or good reputation and such discretion precluded mandamus relief based on disputes as to employee's competence.

ISSUES: (1) Mandamus and (2) veterans' preference

HELD: Court found that in applying the veterans' preference of K.S.A. 73-201, the hiring authority is invested with the power to determine whether a veteran applicant possesses every quality essential to the prompt, efficient, and honest performance of the duties pertaining to the office to be filled. The determination of the appointing board or officer as to an applicant's qualifications involves official discretion, and, when made fairly and in good faith, the exercise of that discretion is not subject to control by the courts. Court held that since the employees were not awarded a judgment, they were not entitled to any damages. Court found no basis to award attorney fees. On the cross-appeal, Court found the veterans' preference statute was constitutional and that given the relief sought, the employee's failure to exhaust their administrative remedies was not fatal to their petition for writ of mandamus.

STATUTES: K.S.A. 60-802(c) and K.S.A. 73-201

**NEGLIGENCE
ROBBINS V. CITY OF WICHITA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 96,970 – DECEMBER 14, 2007**

FACTS: Robbins brought wrongful death action against city of Wichita, police chief, and officers for death of his wife who died

when her vehicle collided with police car in pursuit of an offender. District court granted summary judgment to defendants, finding they did not owe a duty of care to the victim. Robbins' appeal transferred to Supreme Court.

ISSUES: (1) Duty of care under K.S.A. 8-1506 and (2) reckless disregard

HELD: Majority and minority cases interpreting K.S.A. 8-1506 and *Thornton v. Shore*, 233 Kan. 737 (1983), are examined. Agreement with courts refusing to distinguish between the decision to pursue and the method of pursuing. Drivers of emergency vehicles are required to "drive with due regard for the safety of all persons. The act of driving involves both mental and physical components, including decision to pursue or to continue a pursuit of a fleeing law violator. Thus, that portion of *Thornton* and any prior case law exempting the decision by drivers of emergency vehicles to pursue or continue the pursuit of a fleeing law violator from the duty found in K.S.A. 8-1506 is overruled.

K.S.A. 8-1506(d) establishes "reckless disregard" as standard of care for evaluating whether driver of an emergency vehicle breached the duty to drive with due regard for the safety of others. Definition of reckless disregard in *Shawnee Township Fire District v. Morgan*, 221 Kan. 271 (1977), is rejected; proper definition is set forth in PIK instruction for crime of reckless driving. Under undisputed facts in case, Robbins failed to establish a prima facie case of breach. District court's reasoning is not adopted, but its grant of summary judgment is affirmed on other grounds.

STATUTE: K.S.A. 8-1506, -1506(d), 20-3017, 21-3201(c)

Criminal

**STATE V. ALDERETE
SUMNER DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,388 – DECEMBER 7, 2007**

FACTS: Alderete appealed his conviction of abuse of a child, alleging district court erred in refusing to give requested instruction for severity level 7 aggravated battery as a lesser included offense. In unpublished opinion, Court of Appeals reversed and remanded for new trial, finding aggravated battery is a lesser included offense of child abuse. Supreme Court granted the State's petition for review on this sole issue.

ISSUE: Lesser included offense

HELD: *State v. Allison*, 16 Kan. App. 2d 321 (1991), and *State v. Alderete*, Appeal No. 90535 (April 2, 2004) (unpublished opinion), are disapproved to the extent they hold battery to be a lesser included offense of abuse of a child. Elements of the respective offenses are compared, finding severity level 7 aggravated battery is not a lesser included offense of abuse of a child. District court correctly refused Alderete's request for such an instruction. Court of Appeals' conclusion to the contrary is reversed.

STATUTES: K.S.A. 2006 Supp. 21-3107(2), -3107(2)(b); and K.S.A. 21-3414(a)(1)(B) and (C), -3609

**STATE V. BROWN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 92,544 – DECEMBER 7, 2007**

FACTS: Brown convicted of first-degree murder in gang-related shooting. He appealed, claiming: (1) his confession was not voluntary, (2) the admission of several hearsay statements violated his right to confrontation and did not meet any hearsay exceptions, (3) error to admit gang evidence, (4) the jury should have been instructed on voluntary manslaughter as a lesser included offense, (5) trial court erroneously refused to admit evidence of a third-party's guilt, and (6) cumulative error required reversal of his conviction.

ISSUES: (1) Voluntariness of confession, (2) confrontation and admission of hearsay, (3) gang affiliation evidence, (4) heat of passion voluntary manslaughter instruction, (5) third-party evidence rule, and (6) cumulative error

HELD: Fact that Brown was handcuffed to a table for a 12-hour span during which several periods of interrogation occurred makes issue of voluntariness a close question. Under detailed examination of totality of circumstances, Brown's free will was not overborne and his confession was freely and voluntarily given.

Discussing and applying *Davis v. Washington*, 547 U.S. ___, 165 L. Ed. 2d 224 (2006), and *Crawford v. Washington*, 541 U.S. 36 (2004), statements made at scene and shortly after the shooting, by an unidentified emotional bystander to one of approximately 200 other bystanders, were not testimonial and thus did not violate Brown's federal or state right to confrontation. Open question remains as to whether the U.S. Supreme Court categorically excludes from definition of testimonial any statement made to or induced by someone who is not a government official. All but one of the statements were properly admitted under excited utterance hearsay exception. One double hearsay statement not properly admitted because no foundation laid for the included statement, but error was harmless under the circumstances which included Brown's confession and other eyewitness identifications of Brown as the shooter

No error to admit gang evidence. Evidence tied Brown and victim to rival gangs, and evidence of rivalry provided motive for an otherwise inexplicable crime. Trial court also gave a limiting jury instruction.

No evidentiary basis for giving voluntary manslaughter instruction. Brown interjected himself into fight that preceded the shooting, there was no showing of prior animosity between Brown and the victim, and the fight that preceded the shooting would not have placed a reasonable person in Brown's position in fear of great bodily harm or at risk of death.

No abuse of discretion to exclude speculative testimony tending to suggest a third party committed the shooting because no evidence actually tied an alleged third party to the crime.

Cumulative error doctrine not applicable because no multiple errors found in case.

STATUTE: K.S.A. 21-3403, 60-261, -401(b), 0404, -460(d)(2), -463

STATE V. GUTIERREZ
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 94,317 – DECEMBER 7, 2007

FACTS: Luz Gutierrez had obtained a protection from abuse order against Gutierrez (defendant), her estranged husband, because of a May 2004 incident in which he grabbed her by the neck and choked her until she nearly lost consciousness. He was charged with domestic battery, entered a diversion agreement, and then staked-out Luz's apartment. Gutierrez forced his way into Luz's apartment. After Luz's refusal to drop the charges, Gutierrez threw her to the floor, grabbed her by the throat and squeezed hard for 15-20 seconds. Luz lost consciousness and when she awoke, her children were crying and shaking her. Gutierrez turned himself into the police and denied any intent to kill Luz. The jury convicted Gutierrez of attempted voluntary manslaughter and aggravated burglary. The Court of Appeals affirmed the convictions.

ISSUES: (1) Aggravated burglary and (2) attempted voluntary manslaughter

HELD: Court held that although a rational factfinder may not have been able to conclude defendant was guilty beyond a reasonable doubt of aggravated burglary based on evidence of unauthorized entry contemporaneous with the heat of passion or sudden quarrel necessary for voluntary manslaughter, the evidence was adequate to

support defendant's formation of the necessary intent while he remained in Luz's apartment without authority. Once she told him to leave, an expression of sentiment defendant admits occurred, his presence was unauthorized even if previously permitted. Evidence of development of defendant's intent to commit a felony at any point between Luz's expression that he was unwelcome and his departure from the apartment was legally sufficient to support the aggravated burglary conviction. Court also held that attempted voluntary manslaughter is a legally viable crime in Kansas.

STATUTE: K.S.A. 21-3403(a), -3716

STATE V. NGUYEN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,416 – DECEMBER 14, 2007

FACTS: Nguyen prosecuted as an adult and convicted of felony murder and criminal discharge of firearm. On appeal he claimed: (1) prosecutorial misconduct in opening and closing statements, (2) district court conducting a preliminary hearing in conjunction with an adult certification hearing violated Nguyen's constitutional rights, (3) district court's failure to notify mother of hearing did not strictly comply with parental notification provision in K.S.A. 38-1636(c)(1) (later repealed), (4) insufficient evidence supported the adult certification, (5) his convictions were multiplicitous, (6) error to give *Allen*-type instruction, and (7) cumulative error denied him a fair trial.

ISSUES: (1) Prosecutorial misconduct, (2) combining preliminary hearing with adult certification, (3) parental Notification of Adult Certification, (4) evidence supporting certification, (5) multiplicity, (6) *Allen*-type instruction, and (7) cumulative error

HELD: A prosecutor's argument, which seeks to divert jury from the evidence, so as to obtain a conviction based upon sympathy for victim, is improper. Prosecutor's comments in this case examined in detail, finding no reversible error under facts of case.

At the time, K.S.A. 38-1636 (later repealed) authorized district court to follow the procedure utilized in this case with no violation of doctrine of unconstitutional conditions. Claim that rights to due process and self-incrimination were in conflict is not persuasive because same conflict would exist if hearing had been restricted to adult certification.

No dispute that district court violated the parental notification provisions of the statute. However, where one parent appears at adult certification hearing, a failure to prove the other parent was served will not be reversible error unless juvenile can show the absence of the one parent prejudiced the juvenile's ability to defend against the motion for adult certification.

Sufficient evidence supported the adult certification, even without the statutory presumption for adult prosecution of offender committing offense while in possession of a firearm.

The claim of multiplicity based on single act of violence/merger analysis is defeated by *State v. Schoonover*, 281 Kan. 453 (2006). Under Kansas law convictions for criminal discharge of a firearm and felony murder are not multiplicitous.

Consistent with *State v. Anthony*, 282 Kan. 201 (2006), there is no error when *Allen*-type instruction accompanies all of the rest of the instructions given before deliberations.

Nguyen received a fundamentally fair trial. Cumulative error claim has no merit.

STATUTES: K.S.A. 2006 Supp. 21-3436(a)(15); K.S.A. 38-1636 sections (a)(2), (a)(2)(A), (c)(1), (e), and (g) (repealed L. 2006, ch. 169, sec. 140); and K.S.A. 60-261

STATE V. SCOTT
RENO DISTRICT COURT – REVERSED
NO. 95,760 – DECEMBER 7, 2007

FACTS: Goodpasture consumed alcohol, including a concoction called “The Stoplight,” at Scott’s establishment. She was later assisted home where she first laid unconscious in the yard and was later taken into her living room where she was found dead the next day. Scott was charged and convicted of involuntary manslaughter. He appealed, claiming in part that insufficient evidence supported the conviction.

ISSUES: (1) Necessity of proof of causation and (2) sufficiency of the evidence

HELD: First instance of Kansas involuntary manslaughter statute being used to prosecute a bar owner or bartender on theory that violation of a statute regulating the dispensing of liquor resulted in fatal alcohol poisoning of a patron. Under K.S.A. 2004 Supp. 21-3404(c), the state must prove a defendant’s behavior was the proximate cause of the victim’s death.

On record in case and viewing evidence in light most favorable to state, evidence of proximate cause was insufficient to show that Scott’s conduct in serving “The Stoplight” caused Goodpasture’s death. Without such proof, his performance of a lawful act in an unlawful manner was not involuntary manslaughter under K.S.A. 2004 Supp. 21-3404(c).

STATUTE: K.S.A. 2004 Supp. 21-3404(a) and (c)

STATE V. STEVENS
CRAWFORD DISTRICT COURT – AFFIRMED IN PART
AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NO. 94,187 – DECEMBER 7, 2007

FACTS: When police arrived at a residence for a complaint of criminal trespass, they saw Stevens get out of a Jeep parked in the street. He walked toward the front door of the residence and officers told him the resident did not want him on the property. Stevens was obviously drunk. There were open containers in the Jeep, officers

testified that Stevens told them he drove to the residence, Stevens failed multiple field sobriety tests, and then blew a deficient sample with a 0.205 blood alcohol concentration. The trial court denied Stevens motion to suppress the breath test. Stevens was convicted of operating or attempting to operate a vehicle while under the influence of alcohol, but was acquitted of a charge of open container. The Court of Appeals affirmed in part, but reversed on a Board of Indigents’ Defense Service (BIDS) fee issue because a district court is unable to adequately determine a defendant’s ability to pay attorney fees to BIDS when it fails to first tax a specific amount claimed by BIDS.

ISSUES: (1) DUI, (2) breath test, (3) deficient sample, (4) alternative means, (5) confession, (6) sufficient evidence, (7) cumulative error, and (8) BIDS fees

HELD: Court held the district court did not err in failing to require the state to elect either (a) operating or (b) attempting to operate as the theory of prosecution. Stevens was not deprived of a right to a unanimous jury verdict. Court held the district court did not err in refusing to grant Stevens’ motion for a new trial based on the admission of the deficient breath test results. Court held the district court did not err in refusing to grant a continuance based upon the state’s failure to produce records of the deficient breath sample as well as the maintenance records of the Intoxilyzer 5000. Court held there was sufficient evidence to support Stevens’ conviction for DUI, and that Stevens’ conviction was properly admitted into evidence. Stevens was not deprived of his right to a fair trial by cumulative error. Last, Court held the district court erred in ordering Stevens to pay attorney fees to BIDS before taking into account his financial condition.

STATUTES: K.S.A. 2006 Supp. 8-1013(f)(1), (2), -1567, -1599; K.S.A. 8-1005, -1006; K.S.A. 20-3018(b); K.S.A. 2006 Supp. 21-3301; K.S.A. 21-3401; K.S.A. 2006 Supp. 22-4513, -4522, -4603d(i); K.S.A. 22-3215, -3421; K.S.A. 60-404, -460(f); and K.S.A. 65-4159

Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

The Mandate Demystified

Members of the Appellate Clerk’s staff are often asked when a mandate will issue and how that process works. K.S.A. 60-2106(c) provides that, when post-decision relief is concluded and the decision of the appellate court becomes final, a mandate shall be transmitted to the clerk of the district court, containing such directions as are appropriate under the decision. The Appellate Clerk’s Office calendars time for post-decision motions at the time an opinion is filed. *See* Supreme Court Rules 7.05 (Rehearing or Modification in Court of Appeals), 7.06 (Rehearing or Modification in Supreme Court), and 8.03 (Supreme Court Review of Court of Appeals Decision). If no post-decision motions are filed within the allotted time, work begins on the mandate. If post-decision motions are filed, issuance of the mandate is stayed until all motions are determined. In the case of a petition for review granted, the mandate does not issue until disposition of the case on review, including decision on a motion for rehearing or modification, if any.

Processing time varies, depending on the number of mandates to be issued. Generally speaking, mandates are mailed to clerks of the district courts within a few days after the decision is final. Issuance can be expedited if a party notifies the Appellate Clerk’s Office that time is of the essence in issuance of the mandate.

It is possible to advance the date of issuance of a mandate if no post-decision motions are to be filed and all parties move for early issuance of the mandate. Supreme Court Rule 5.01 on general motions practice should be followed.

Note that mandates are issued only to clerks of the district courts. *See* K.S.A. 60-2106(c). If an appeal is one from an administrative agency, there is no mandate issued, and the appellate file is simply closed after post-decision proceedings are concluded. The Appellate Clerk’s Office does, as a courtesy, send a certified copy of the opinion to the agency at the time the file is closed.

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Court of Appeals

Civil

ADOPTION IN RE A.F.

WYANDOTTE DISTRICT COURT – APPEAL DISMISSED NO. 97,929 – DECEMBER 7, 2007

FACTS: A.F. placed in Social and Rehabilitation Services SRS custody when she was born. At 16 months, parental rights were terminated and SRS was to find adoptive home. SRS placed A.F. with paternal grandmother for over a year, but then placed A.F. with foster family for potential adoption. Grandmother received court hearing to challenge this decision. District court found the grandmother had not been unfairly excluded from consideration as an adoptive parent. Grandmother appealed that decision.

ISSUE: Appellate jurisdiction

HELD: Under the Revised Kansas Code for Care of Children, right to appeal is provided only from orders of temporary custody, adjudication, disposition, finding of unfitness, or termination of parental rights. When order of disposition has been made granting custody of a child to SRS for purpose of adoption, there is no right to appeal from a district court judgment regarding the fairness of SRS orders placing the child with potential adoptive families. Grandmother's appeal does not fall within the four statutory categories. Appeal is dismissed for lack of jurisdiction. Similarity to *In re D.M.M.*, 38 Kan. App. 2d 394 (2007), is noted.

STATUTES: K.S.A. 2006 Supp. 38-2201 *et seq.*, -2243, -2251, -2255, -2258, -2258(a), -2269, -2270(a)(1), -2273(a), -2273(c); and K.S.A. 38-1566, 1584(b)(1)(A), -1584(d), -1591(e), 60-2103(a)

AUCTIONS, REAL ESTATE, AND STATUTE OF FRAUDS YOUNG V. HEFTON ET AL.

BUTLER DISTRICT COURT – AFFIRMED NO. 97,614 – DECEMBER 21, 2007

FACTS: The Hefton family hired an auctioneer to sell five tracts of land at public auction and listed a minimum price on each tract. Young was the successful bidder on tracts 3 and 4, and the auctioneer called, "Mark it down." On tract 3, the bid was \$925 per acre or \$275 per acre under the minimum established by the Heftons. On tract 4, the bid was \$780 per acre or \$30 above the minimum of \$750 per acre. Following the bidding, Young was told by the auctioneer that he could not buy tract 3 due to his bid being under the minimum of \$1,200 per acre, but that he could purchase tract 4. Young stated that he wanted both tracts, but he left the auction with the parties at an impasse. Five days later, Young tendered a check for both properties. The checks were returned. Young tried to purchase tract 4 at the bid price, but was rejected by a counteroffer of \$1,500 per acre, twice the original minimum. Young sued the Heftons for specific performance for both tracts. The district court found confusion concerning communications about minimums, but that there were several indications the sellers were retaining final approval. The district court found a meeting of the minds on tract 3, but not tract 4, and that Young was entitled to specific performance at the bid price on tract 4.

ISSUES: (1) Auctions, (2) real estate, and (3) statute of frauds

HELD: Court held that under the facts of this case, where the sales bill may be open to several interpretations but one interpretation is that all contracts are subject to final approval of the sellers for whatever reason, and where there were signs and indications before

and during this auction that the sellers were retaining some measure of final approval or control, the auction was conditional in nature and that no contracts were formed until the sellers' acceptances of the highest bids. Court also held that under the facts of this case, the statute of frauds is satisfied as to tract 4 because the Exclusive Right to Sell Listing Agreement identified the tracts of land to be sold and was signed by the sellers, together with the bid sheet information or bid receipt and check reflecting earnest money signed by the buyer. The land was adequately described in the Internet sales bill, the printed sales bill, and the listing agreement, and all terms and conditions of the sales were in the Internet sales bill and printed sales bill.

STATUTES: K.S.A. 33-105, -106; and K.S.A. 84-2-328

CHILD IN NEED OF CARE AND VAGUE STATUTE IN RE A.F., J.F., AND S.F.

WASHINGTON DISTRICT COURT – AFFIRMED NO. 98,329 – DECEMBER 7, 2007

FACTS: Joe and Debra had adopted A.F., J.F., and S.F. after the children had been removed from their biological parents because of neglect and abuse. Based on the unfortunate evidence of physical abuse by Joe and Debra, the three children were adjudicated to be children in need of care.

ISSUES: (1) Child in need of care and (2) vague statute

HELD: Court held there was sufficient evidence to find abuse and that the statute was not unconstitutionally vague. Court held that based on a review of the record, there was substantial evidence to support the district court's conclusion that J.F. sustained bruising all around his left ear from Debra striking him there with a 1-inch-thick wooden paddle. Court stated the statute is not so vague that a citizen would be unaware that you may not strike a child on the head with such a paddle.

STATUTES: K.S.A. 2005 Supp. 38-1502(a)(3), (11); and K.S.A. 2006 Supp. 38-2205(a), (b), -2234, -2243, -2245, -2250

HABEAS CORPUS MILLER V. MCKUNE LEAVENWORTH DISTRICT COURT REVERSED AND REMANDED

NO. 94,453

UNPUBLISHED OPINION FILED MARCH 10, 2006 PUBLISHED OPINION FILED DECEMBER 18, 2007

FACTS: Prison disciplinary adjudication against Miller for fighting was upheld in administrative appeal. Miller filed K.S.A. 60-1501 petition claiming he acted in self-defense and no witness had testified against him. District court conducted evidentiary hearing and granted the writ, finding hearing officer decided the charge only on the disciplinary report and not on any evidence developed during the disciplinary hearing. Warden and state officials appealed.

ISSUE: Due process in prison discipline

HELD: Sworn statement of reporting officer was valid and persuasive evidence just as if officer had appeared and testified in person. Under facts of case, there was "some evidence" showing petitioner's involvement in fighting in violation of prison regulation. District court's grant of the writ is reversed. Case remanded to deny the petition and to reinstate the disciplinary conviction.

STATUTE: K.S.A. 60-1501

**HABEAS CORPUS
WILKERSON V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 97,286 – DECEMBER 7, 2007**

FACTS: Wilkerson filed K.S.A. 60-1507 motion alleging ineffective assistance of counsel in connection to Wilkerson's original plea agreement and sentence. District court summarily denied the motion as untimely. Wilkerson appealed, claiming motion was timely filed within one year of final resolution in his appeal from second probation revocation. He also claimed he was entitled to an evidentiary hearing in order to prevent manifest injustice.

ISSUES: (1) State of limitations and (2) manifest injustice

HELD: Time limitation for K.S.A. 60-1507 motions is one year from final order of appellate court on direct appeal or termination of appellate jurisdiction, but a timely direct appeal of a probation revocation does not extend this limitation for motions challenging the initial plea, conviction, or sentence and must be related to matters surrounding the probation revocation proceeding. Here, Wilkerson did not pursue a direct appeal of his conviction and sentence in 2003, thus motion filed two years later is time barred as to matters surrounding the plea, conviction, or sentence.

Manifest injustice sufficient to extend time limitations of K.S.A. 60-1507(f) is generally fact sensitive in part and must be raised in the motion itself or at least presented to the district court or it will not be considered on appeal. Wilkerson failed to preserve this issue for appellate review.

STATUTE: K.S.A. 60-1507, -1507(f), -1507(f)(1)(i), -1507(f)(2)

**WORKERS' COMPENSATION AND POST-AWARD
EXPERT WITNESS FEES
HIGGINS V. ABILENE MACHINE ET AL.
WORKERS' COMPENSATION BOARD – AFFIRMED
NO. 97,649 – DECEMBER 7, 2007**

FACTS: Higgins was receiving a compensation award after sustaining a work-related back injury. Subsequently, his back became worse and he made application for post-award medical treatment. Evidentiary depositions were taken from two physicians to support claimant's need for additional treatment. At hearing, the administrative law judge (ALJ) granted claimant's application but would not award expert witness fees as costs. On appeal, the board upheld the decision of the ALJ. The board, with one dissent, interpreted K.S.A. 2006 Supp. 44-510k(c) to allow only traditional in-court statutory witness fees as costs, not fees charged by physicians for giving deposition testimony. The dissent would have allowed the award, reasoning that "if the cost of retaining an expert to testify on [claimant's] behalf is not considered a recoverable expense, it may deter a claimant from requesting additional medical benefits."

ISSUES: (1) Workers' compensation and (2) post-award expert witness fees

HELD: Court held that the Legislature has consistently recognized a distinction between expert witness fees and witness fees in various statutes. Court stated it would be unreasonable to adopt Higgins' interpretation of 44-510k(c) that would repudiate the will of the Legislature. The consistency of treatment in various legislative enactments makes clear 44-510k(c) is unambiguous and does not provide for an award of costs for expert witness fees. Court held that the board's conclusion that K.S.A. 2006 Supp. 44-510k(c) does not permit an award of costs for expert witness fees is reasonable and in conformity with legislative intent.

DISSENT: Judge Bukaty dissented arguing the statute grants the discretion to the ALJ to award such fees.

STATUTES: K.S.A. 2006 Supp. 16-1305; K.S.A. 28-125; K.S.A. 2006 Supp. 44-510k(c); K.S.A. 44-536(g), -553; K.S.A. 49-426(d); K.S.A. 60-2002(b), -2003; and K.S.A. 2006 Supp. 75-5672(c)

**WORKERS' COMPENSATION, WORK DISABILITY,
GOOD FAITH EFFORT, AND UNAUTHORIZED
MEDICAL EXPENSES
DEGUILLEN V. SCHWAN'S FOOD
MANUFACTURING ET AL.
WORKERS' COMPENSATION BOARD
AFFIRMED IN PART AND REVERSED IN PART
NO. 98,159 – DECEMBER 7, 2007**

FACTS: Deguillen was injured in October 2003, complaining of pain reaching into her upper arm, shoulder, and neck. She was put on light duty and then in an accommodated position. Schwan's claimed Deguillen was uncooperative and was terminated in June 2005 by letter stating they were unable to reasonably accommodate her work restrictions. The administrative law judge (ALJ) concluded that no amount of accommodation would have returned Deguillen to work and that she failed to make a good faith effort to return to work or find alternative employment. The ALJ awarded permanent partial disability based on a 14 percent whole body functional impairment, but denied any work disability. The board modified the award by granting work disability to Deguillen and also that she was entitled to \$500 in unauthorized medical expenses.

ISSUES: (1) Workers' compensation, (2) work disability, (3) good faith effort, and (4) unauthorized medical expenses

HELD: Court agreed with the board that in focusing on the letter of termination from Schwan's, there is no indication from that letter that Deguillen was terminated for cause or for her lack of good faith. Court stated there was evidence that Deguillen consistently reported to work after her injury and there was only one documented instance of a discipline problem that could be construed as bad faith. Court also held that the board honored the statutory workers' compensations formulas and the allowable maximum in its award to Deguillen and the calculation was affirmed. However, the court held the board erred in awarding \$500 in unauthorized medical expenses. Court stated that in order for an unauthorized medical examination to be eligible for reimbursement under K.S.A. 2006 Supp. 44-510h(b)(2), no impairment rating based upon that examination may be made a part of the record, upon penalty that the examination expense may not be reimbursed. Although employees are not prohibited from seeking independent advice on work-related injuries and may seek reimbursement for up to \$500, the clear intent of the Legislature is to prohibit such funds being applied to an improper impairment rating.

STATUTES: K.S.A. 44-510e(a), -510h(b)(2); and K.S.A. 77-621(c)(7)

**Criminal
STATE V. BORDEAUX
LYON DISTRICT COURT – AFFIRMED
NO. 98,161 – DECEMBER 7, 2007**

FACTS: Bordeaux was ordered at gunpoint to come out of an open garden shed in which he was hiding behind a mobile home where the owner had called the police to investigate a suspicious man in the neighborhood. Bordeaux admitted that the coat found in the shed was his. In the coat, the police found drugs. The district court suppressed Bordeaux's statement admitting ownership of the coat and the state appealed.

ISSUE: *Miranda*

HELD: Court held that based on the facts of this case, a person who was questioned by one police officer — while being patted down by another — immediately after he had been ordered at gunpoint out of hiding in a small, dark storage shed at night was in custody for purposes of *Miranda*. Under these circumstances, the pressures inherent in a situation dominated to that point by police force and physical restraint had not dissipated. Court also held that a

person, who had been found at night hiding in a small, dark storage shed where he had no apparent right to be present, was interrogated for purposes of *Miranda* when police asked him a question designed to tie him to a suspicious person reported earlier that evening in the mobile-home park where the shed was located. Under these circumstances, officers should have known that the question was reasonably likely to elicit an incriminating response.

DISSENT: Judge Malone dissented and stated that the officer's question to Bordeaux about the ownership of the coat was a general on-the-scene question asked by an officer during the factfinding process.

STATUTE: K.S.A. 22-3603

**STATE V. DENNY
BUTLER DISTRICT COURT – AFFIRMED
NO. 96,445 – DECEMBER 7, 2007**

FACTS: Denny prosecuted for involvement in activities that led to manufacture and consumption of methamphetamine and ultimately to fatal shooting of a sheriff. Jury convicted Denny of conspiracy to manufacture methamphetamine and acquitted on all other charges. He appealed claiming, (1) his joint participation in the drug activities was insufficient to support a conspiracy conviction, (2) prosecutorial misconduct denied him a fair trial, (3) district court erred in sentencing as a severity level 1 felony because conspiracy charge was identical to level 4 felony of use of drug manufacturing paraphernalia with intent to manufacture a controlled substance, and (4) consideration of his prior juvenile adjudications in determining his criminal history score violated *Apprendi*.

ISSUES: (1) Sufficiency of evidence, (2) prosecutorial misconduct, (3) severity level of sentence, and (4) juvenile adjudications in criminal history scoring

HELD: *State v. Harris*, 266 Kan. 610 (1999), and *State v. Simmons*, 282 Kan. 728 (2006), are discussed and distinguished. Sufficient facts support Denny's conspiracy conviction.

Under facts of case, where relatively isolated comments by prosecutor in closing argument denigrating defense tactics, responding to credibility attacks by the defense, and contrasting motives for truthfulness of witnesses, including the defendant; and where the comments do not appear to be gross and flagrant or reflective of ill will, the defendant was not denied a fair trial by reason of the comments

Elements in conspiracy to manufacture methamphetamine under K.S.A. 65-4159(a), which require an agreement are not identical to elements of possession of drug paraphernalia under K.S.A. 65-4152, thus rule in *State v. McAdam*, 277 Kan. 136 (2004), does not apply.

Pursuant to controlling Kansas Supreme Court precedent, juvenile adjudications are appropriately included in determining a defendant's criminal history score, and doing so does not violate *Apprendi*.

STATUTES: K.S.A. 2006 Supp. 21-3302, -3302(a); and K.S.A. 65-4152, -4159(a)

**STATE V. DURHAM
LYON DISTRICT COURT – AFFIRMED IN PART AND
VACATED IN PART
NO. 97,236 – DECEMBER 14, 2007**

FACTS: Durham convicted of forgery. After arrest and prior to plea, he swallowed razor blades and was hospitalized. District court ordered restitution, which included bank fee, Durham's medical expenses, and the overtime salary and lodging expenses incurred by sheriff's department while guarding Durham during medical treatment.

ISSUE: Restitution for medical costs and expenses

HELD: District court was authorized by K.S.A. 2006 Supp. 21-

4603d(a)(8) to order Durham to pay medical expenses in addition to bank charge. Statue is examined, finding terms "costs" and "expenses" are redundant, and term "medical" modifies both terms. Because hotel lodging expenses and overtime charges incurred by officers in guarding a hospitalized defendant are not "medical costs and expenses" under the statute, they may not be included in a restitution order. Order to pay medical expenses is affirmed, but non-medical expenses in the restitution order are vacated.

STATUTE: K.S.A. 2006 Supp. 19-1910, 21-4603d subsections (a)(8), (b)(1)

**STATE V. GREEN
JOHNSON DISTRICT COURT – AFFIRMED
NO. 95,487 – DECEMBER 14, 2007**

FACTS: Green was convicted of three counts of identity theft using the same person's identity, but at three different retailers over a two-day period. The court sentenced Green to an upward departure sentence after the jury agreed that the aggravating factors existed beyond a reasonable doubt.

ISSUES: (1) Identity theft and (2) departure sentence

HELD: Court held there are many ways to commit identity theft. Court stated there is sufficient evidence of each of Green's use of someone else's identity. Court held that each time an innocent person's identity is intentionally used for some fraudulent purpose it is a crime and that each use of another person's identity is a unit of prosecution for the crime of identity theft. Court held at least one of the aggravating factors was substantial and compelling and therefore the upward departure sentence was upheld. Court reaffirmed the statutory language that the list of statutory aggravating factors is a nonexclusive list. Court also held the criminal history of a defendant is not a jury question.

STATUTES: K.S.A. 2004 Supp. 21-3106(8), (10), -4018(a), -4716(c); and K.S.A. 21-4720(c)

**STATE V. MOSES
DOUGLAS DISTRICT COURT
REVERSED AND REMANDED
NO. 96,897 – DECEMBER 21, 2007**

FACTS: Moses entered into diversion agreement on charges of forgery and misdemeanor possession of marijuana. Later on stipulated facts, district court revoked diversion and found Moses guilty of both charges. Moses appealed, claiming the diversion agreement was invalid and unenforceable because it lacked a waiver of his right to a preliminary hearing as required by K.S.A. 22-2902(a).

ISSUES: (1) Compliance with K.S.A. 22-2902(a) and (2) effect of noncompliance with K.S.A. 22-2902(a)

HELD: Term "shall" in K.S.A. 22-2902(a) is mandatory rather than directory. While statute lacks negative language and does not specify penalty or other consequence for noncompliance, strict compliance is essential to preserve rights. Requirement that the defendant specifically waive certain rights is not simply a technical or procedural requirement, but is a condition required for formation of an enforceable diversion agreement. Because diversion agreement in this case did not contain a specific waiver of Moses' right to a preliminary hearing, the agreement was invalid and unenforceable.

No Kansas Supreme Court case addresses failure to comply with K.S.A. 22-2902(a). *Petty v. City of El Dorado*, 270 Kan. 847 (2001), is distinguished. Under circumstances of case, diversion agreement was invalid, thus district court erred in trying Moses based on stipulated facts in the agreement. Convictions are reversed and case is remanded for Moses to be placed in same position he would have been absent the diversion agreement.

STATUTES: K.S.A. 22-2902(a), 65-4162(a)(3); and K.S.A. 2003 Supp. 21-3710(a)(1)

STATE V. SPANGLER
OSAGE DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, SENTENCE VACATED IN PART,
AND REMANDED
NO. 96,326 – DECEMBER 21, 2007

FACTS: Spangler convicted of manufacture of methamphetamine, conspiracy to manufacture methamphetamine, possession of methamphetamine, and possession of drug manufacturing paraphernalia. On appeal she claimed: (1) trial court erred in allowing state to amend conspiracy charge at close of state's evidence, (2) insufficient evidence supported the manufacture and conspiracy convictions, and (3) she should be resentenced to drug severity level 4 felonies for manufacture and conspiracy convictions because manufacture of methamphetamine under K.S.A. 2006 Supp. 65-4159 is identical to use of drug paraphernalia under K.S.A. 2006 Supp. 65-4152(a)(3).

ISSUES: (1) Amendment of complaint, (2) sufficiency of evidence, and (3) sentencing

HELD: By changing complaint to charge specific overt acts sufficient for crime of conspiracy to manufacture methamphetamine, and by changing name of party who allegedly committed the overt acts, state was allowed to charge Spangler with a different crime than the crime alleged in the original complaint. Also, amendment of the conspiracy charge at the close of state's evidence prejudiced Spangler's substantial rights. Because the amendment should not have been allowed, Spangler's conspiracy conviction is reversed.

Sufficient evidence supported Spangler's convictions.

Spangler's sentence for manufacture of methamphetamine is vacated and case is remanded for resentencing as a drug severity level 4 felony. Applying analysis in *State v. Fanning*, 281 Kan. 1176 (2006), to facts of case, the manufacture of methamphetamine under K.S.A. 2006 Supp. 65-4159(a) is identical for sentencing purposes to use of drug paraphernalia under K.S.A. 2006 Supp. 65-4152(a)(3).

STATUTES: K.S.A. 2006 Supp. 21-3302, -3302(a), 22-3210(e), 65-4150, -4152(a)(3), -4159, -4159(a) and K.S.A. 21-3205(1), -4721(e)(3), 65-4107(d)(3), -4152(a)(3), -4159, -4159(a), -4161(a), -7006(a)

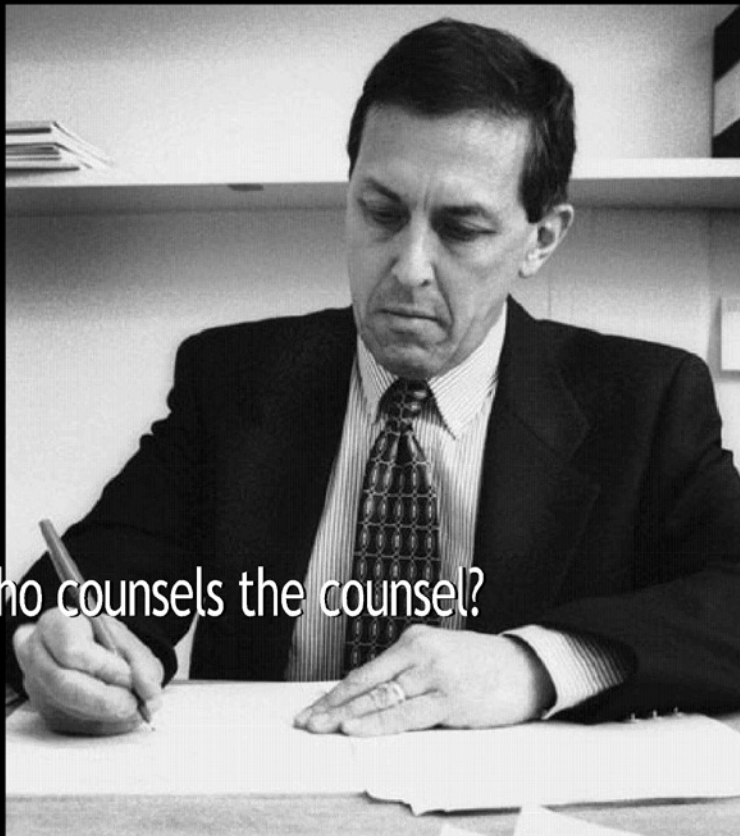
CITY OF NORTON V. WONDERLY
NORTON DISTRICT COURT – REVERSED
NO. 97,889 – DECEMBER 14, 2007

FACTS: A motorist reported the license plate number of a white Chevy truck that was swerving, spinning its tires, and traveling at a high rate of speed. Officers found the truck, but after three minutes witnessed no traffic infractions. Officers pulled the truck over and could immediately smell alcohol permeating from the driver's side window. Wonderly had bloodshot eyes, but complied with all the officer's requests without difficulty, including walking back to the officer's patrol car and taking a seat inside. Wonderly admitted to one or two drinks and his speech was fair, not particularly slurred. Wonderly agreed to a PBT and the result was an alcohol concentration higher than 0.08. Because of the weather conditions, officers told Wonderly that he would perform field sobriety tests at the sheriff's office, which was two blocks away. Based on Wonderly's performance on the field sobriety tests, officers arrested him. Wonderly blew a 0.174 on the Intoxilyzer 5000. The district court denied Wonderly's motion to suppress and he was convicted of DUI.

ISSUE: Driving Under the Influence

HELD: Court held the motorist's call provided reasonable suspicion, but that under the facts of this case, reasonable suspicion was not dispelled by the fact that the law enforcement officer followed the reported reckless driver for three minutes without observing any traffic infractions. Court also held that the officer's decision to transport Wonderly involuntarily in handcuffs to the sheriff's office to conduct field sobriety tests constituted an arrest. Court concluded the officer arrested Wonderly without probable cause, and the evidence seized thereafter violated his Fourth Amendment rights and must be suppressed.

STATUTE: K.S.A. 22-2202(4), -2402(1), -2405(1)



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