Gambling with Settlement Proceeds: Confidentiality after Amos v. Commissioner
# KBA Officers and Board of Governors

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Let Your Voice be Heard!
Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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Margaret Mead once observed, “If we are to achieve a richer culture, rich in contrasting values, we must recognize the whole gamut of human potentialities, and so we weave a less arbitrary social fabric, one in which each diverse human gift will find a fitting place.”

And so I turn to the subject of diversity. The Kansas City Metropolitan Bar Association (KCMBAA) was recognized by the National Conference of Bar Presidents (NCBP) Task Force on Diversity in 2004 for its diversity initiative program. In 2003, the KCMBAA initiated a comprehensive effort focused on increasing diversity in its legal community. The managing partners of 28 law firms met over an extended time to develop plans and policies to make the initiative work and to develop “best practices” to be implemented. In 2006, the Wichita Bar Association adopted a similar program and many firms signed on in support.

But what has the Kansas Bar Association (KBA) done to promote diversity in the legal world? Well, actually, in 1999, Zack Reynolds was the president of the KBA and his theme for the year was promoting diversity. He created and appointed a Diversity Committee. And the committee started the process of identifying what the KBA could do to increase diversity in the bar. The committee worked with the KCMBAA in some of its efforts, but then over the next few years, it faltered. Or at least it did not take off like I know Zack had planned.

My first year on the KBA Board of Governors was in 1999 and I remember how impressed I was with Zack’s efforts in bringing diversity issues to the forefront on a statewide level, where we are just not very diverse. And so it seems appropriate to pick up where Zack left off. I have attended and studied a number of diversity initiatives that are going on in other states, and we really can be much more proactive in this area.

Gwynne Birzer, a lawyer of color, who is with the Hite, Fanning & Honeyman firm and who practiced previously in Topeka is the new chair of the Diversity Committee. And she has energy. I like energy. The committee is just getting restarted but here are some of the things they are considering.

A summit. It would probably be held in conjunction with the KBA Annual Meeting in 2009. Their goal would be to gather managing partners, judges, deans, and heads of corporate and government law departments to participate and to devise ways to increase participation by people of diverse color and ethnicity in all aspects of the legal profession.

Possible proposals for the Kansas Bar Association to take action, which might increase diversity within its organization and its leadership include:

- The creation of a board position for a lawyer of color — perhaps to sunset after a certain number of years.
- Ex-officio positions for members of the Diversity Committee on certain committees of the KBA, i.e., the Nominating Committee, the Awards Committee, and the CLE Committee to assist in raising the level of awareness of the need for diversity in these areas.
- Identification of diverse lawyers — whether of color, women, or disabled — and a plan to either ask them to volunteer to serve on certain committees or provide their names to the KBA President so he or she could proactively invite them to serve. (In fact a few of our committees are in vital need of new blood. I encourage all readers to study the KBA committee structure and to consider volunteering.)
- A proposal to our Supreme Court that one hour of our continuing legal education include education on bias. I know, “Required” areas of CLE are generally not very well received. But this is an area from which we could all benefit from additional education.
- A proposal to our Supreme Court to consider collecting demographic information on sex and race with regard to Kansas lawyers. We need this information so we know how we are doing in terms of reflecting society in the bar. Lawyers could provide this information (on a confidential basis) in their registration cards, and it could be utilized by the committee to better assist the KBA in increasing diversity.

As I said, these are just ideas being considered. But in 2004, the NCBP challenged us to “enhance the diversity of [our] membership and leadership, to address issues confronted by lawyers of color in the profession, and to produce effective programs and activities to encourage students of color to consider a legal career.”

The time has come. If you have ideas or energy, or both, I encourage you to volunteer to serve on our Diversity Committee. In some ways they are just getting started, but it should be great fun, and rewarding, to be a part of it.

Linda S. Parks can be reached by e-mail at parks@hitefanning.com or by phone at (316) 265-7741.
Appearance Does Matter

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

In recent months, the national media has taken up the issue of associate attorney attire. Articles in both the New York Times and the American Bar Association Journal contained laments from partners and clients about the lack of professionalism in younger attorneys’ work clothing. More than 100 comments were posted online to these articles, demonstrating just how hotly contested this issue is. The posted remarks appear to be split between concurrence with the criticisms in the articles from attorneys who are more established in their careers and complaints from younger attorneys who believe it is not fair that they are judged, at least in part, on their appearance, rather than solely on their work performance.

Probably the most quoted passage from these articles came from a partner at a major law firm, who said her firm “passed over a brilliant associate for a plum assignment because he had refused suggestions to improve his attire. Instead the job went to someone who was more professional looking.” This is a sobering story. As much as we would like our achievements and personality to form the basis for others’ opinions of us, we simply cannot escape the fact that our appearance will also play a part in those opinions. Rather than ignore or bemoan this fact, we should simply accept it and take control of the impact our attire has on these judgments.

A number of Internet sources offer advice to young professionals on their business attire. One Web site I came across, http://amdt.wsu.edu/research/dti/General_Guidelines.html, even includes pictures of several examples of business attire (male and female) with comments from a variety of professionals regarding whether they felt the examples were appropriate for an interview or normal work day. It also includes general guidelines for workplace attire, as well as advice on shopping for professional clothing on a budget.

The sources addressing this topic repeat common themes, which are applicable in firms of 500 or five attorneys. One such theme is “dress according to your client’s expectations and comfort level.” While you may not have this information at your first meeting, you will rarely disappoint if you choose a suit rather than business casual. More formal dress can also help counteract the age bias with which young professionals must commonly contend. If a client is already uncomfortable working with an attorney younger than her or him, this discomfort will only increase if that attorney dresses more casually than the client. Like it or not, formality in dress signals maturity to some, especially our elders.

Some people—subconsciously or not—form predictions about the quality of our work product based upon our appearance. If your appearance is sloppy or too casual, they may believe your work will reflect the same carelessness. If you look put together, you may signal to others that you are meticulous in your work and will provide their matter with the same attention to detail. Someone who makes inappropriate clothing decisions may signal their judgment is flawed, causing a client (or partner) to believe the person will make inappropriate business decisions as well.

Some studies suggest attire subconsciously affects the wearer’s mindset. For example, certain people may be less disciplined in their work habits when dressed casually, and they will turn out a more professional work product when dressed the part. Certainly, our surroundings can significantly affect our concentration and attention to detail. I, for one, know I am much more efficient and productive working at the office than at home. It doesn’t seem a huge intellectual leap to presume more businesslike attire can similarly facilitate one’s productivity.

Another common piece of advice is “dress for the job you want, not the job you have.” If you want to become a partner in your law firm, ensure your attire reflects this desire. Take a cue from how your partners dress—especially those you view as role models. If you want to be invited to attend court appearances and depositions, and have more direct contact with clients, you should dress appropriately so your partners will not hesitate to extend impromptu invitations to such events. In some offices, this can be as simple as keeping a suit, tie, or jacket in your office (as long as your partners know such items are available to you on short notice).

You should also be prepared for more informal work activities, such as investigating a construction site or defective vehicle, if such opportunities may present themselves in your practice. I was once caught unprepared for an impromptu inspection of a section of forest, which was the subject of a dispute. The outing would have been much more enjoyable if I would have at least had a pair of sneakers to change into, rather than traipsing around the woods in my heels.

Whether we like it or not, we cannot avoid the fact that people make subconscious judgments based upon appearance. If you accept this fact, and view your workplace attire as another form of nonverbal communication, you may be surprised by the positive direction your career will take. It is worth a shot, especially considering this change is one of the few we can make in our professional lives, which does not erode more of our precious recreational time.

Amy Fellows Cline may be reached at (316) 630-8100 or at amycline@twgfirm.com.
Thanks to the *Journal of the Kansas Bar Association* for giving me an opportunity to respond to Kansas Bar Association President Linda Parks’ criticism of my paper on the Kansas Supreme Court selection process. The paper is available at www.fed-soc.org/publications/pubID.441/pub_detail.asp and I hope Kansas lawyers will read it themselves, rather than rely on Parks’ characterization of it.

Parks inaccurately accuses me of saying that “those who support the current process are ‘good ol’ boy lawyers.” What I actually wrote is quite different. I first noted that the phrase “good old boy club” was previously used by Melvin Neufeld, speaker of the Kansas House of Representatives, who said, “That setup that we now have has evolved to a good-old-boy club.” Commenting on Neufeld’s statement, I wrote:

A “good-old-boy club,” with its associations of exclusivity and privilege, is an apt description of how the [Supreme Court Nominating] Commission looks to many of those who are not members of the bar. This is a shame because of the good faith and hard work exhibited by those the bar elects to the Commission. But when a single interest group controls an important governmental process — and exercises that control in a largely-secret manner — outsiders can be excused for being suspicious and resentful.

I later added:

Those who hope to join the Kansas Supreme Court — often lower-court judges — know they must curry favor with the bar because that interest group holds the key to advancement. We should not be surprised if this system, controlled by a narrow few, begins to resemble a “good ol’ boys club” in which members of the club pick those like themselves, rather than being open to diversity and fresh ideas.

“Good ol’ boys’ club” could, if taken literally, mean a group of older males. And this would be an accurate generalization about those the bar elects to the Commission. But of course the usual meaning of “good ol’ boys club” is a group of people who have common interests and who look out for each other, rather than being open to outsiders. And this also accurately describes the bar’s role in the Supreme Court selection process.

How many members of the Kansas Supreme Court were appointed to the Court despite the opposition of the bar? I have yet to hear a single example given. We can easily imagine the appointment of justices opposed by the Kansas Contractors Association or the Kansas Bankers Association but it’s hard to imagine a justice opposed by the Kansas Bar Association. The bar is the interest group with a privileged position in the selection process.

Sure, lawyers tend to be more knowledgeable than contractors or bankers about judicial candidates so there’s a case for giving lawyers disproportionate power in the selection of judges. But lawyers — when they act in concert — are an interest group, just like contractors or bankers are when they act in concert. And, as the framers of the U.S. Constitution recognized, it is dangerous to concentrate power in a single group, or “faction” as they called it.

Kansas concentrates more power in the bar than any other state when it comes to judicial selection. Kansas is the only state that gives its bar majority control over its Supreme Court Nominating Commission. So those who defend our state’s current process are taking quite an extreme position. When Kansas lawyers defend this process, they’re saying — in effect — “I favor a process that gives me more power than people like me have in any of the other 49 states.” That doesn’t sound like the Kansas lawyers I know and respect.

The many Kansas lawyers I know and respect are reasonable, public-spirited people who would be reluctant to take more power for themselves than that held by lawyers in any other state. Some of these Kansas lawyers tell me privately that they agree with my views but cannot say so publicly because, as a wise lawyer once told me, “judges tend to favor whatever judicial selection process selected them.” So I know I cannot expect many lawyers who practice in our state’s courts to publicly criticize the process that selected the judges who sit on those courts.

But I’m a law professor, not a practicing lawyer, so I have the freedom to advocate reform publicly. Indeed, I believe my tenure at a state university obligates me to serve our state by working to improve its legal system, even if doing so requires me to challenge the special powers of a group of people towards whom I am quite fond personally.

I welcome dialogue and debate about our state’s judicial selection process and can be reached at ware@ku.edu.
Once again, Professor Ware misses the point. He ignores the many women who have served on the Supreme Court Nominating Commission and continues to defend his use of the phrase “good ol’ boys” to refer to the Commission and to lawyers, in general. He says we must be “good ol’ boys” because lawyers have a “common” interest or are a “special interest group.” Yet he fails to identify our common interest.

That is because he can’t. The only “single” or “common” interest lawyers have would be one shared by all informed individuals: to have a fair and independent judiciary. Aside from that, lawyers have no common interest. Indeed, I cannot think of a group with more diverse interests. Lawyers represent plaintiffs, defendants, criminals, the state of Kansas, employers, employees, businesses, consumer rights groups … you get the idea. As a result, it would be virtually impossible for lawyers to “act in concert” or have a “single interest.”

As for the idea that the lawyers “control” the Commission, I have heard Ware admit that he failed to interview any Commission members in reaching his conclusions. So he has no idea whether the nonlawyers who have served would tell him that this was far from a “good ‘ol boy” bunch of lawyers who manipulated the process and ignored their views to serve some fictional “single interest.” In performing his research he apparently avoided any sources, which might debunk his theories.

And his contention that Kansas gives more power to the lawyers than any other state is just plain wrong. Twelve states have the same balance of power as that followed by Kansas. The only difference is that one of the “majority” lawyers is also a judge. Newsflash, judges are members of the bar.

Ware would subject the Kansas selection system to political influence, either through having politicians appoint Commission members, having judicial appointees be confirmed by the Senate, or just turning the process over to electoral politics. None of these steps will “improve” the legal system. Instead, any of these steps will insure that the key strategy for judicial eligibility will be for candidates to curry favor with certain political views.

Professor Ware simply doesn’t care to understand equity of the current system. He would prefer that big business and big money should have big influence. That’s not a step toward fair and impartial judges. It is vital that we have judges whose allegiance is not to political agendas, or special interest groups, or political parties, but rather to the constitutions of Kansas and the United States.

Professor Ware acknowledges that he is not a practicing lawyer. And he wraps himself in academic freedom to defend his right to lawyer bashing. I acknowledge and even respect Ware’s right to academic freedom, but I object to his willful ignorance of a system that has worked so well.
Candidates for Kansas Bar Association Officers Positions

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Thomas E. Wright

President-elect:
Timothy M. O’Brien

Vice President:
Glenn R. Braun
Rachael K. Pirner

Secretary/Treasurer:
Hon. Benjamin B. Burgess

KBA Delegate to the ABA House of Delegates:
Hon. Christel E. Marquardt

Candidates for Kansas Bar Association Board of Governors

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Lee A. Smithyman

District Three:
Dennis D. Depew

District Five:
Teresa L. Watson

District Twelve:
Christopher J. Masoner

District Seven:
Matthew C. Hesse
David H. Moses
William L. Townsley III

District Eight:
Gerald L. Green
Matthew C. “Matt” Hesse is associate general counsel with the Via Christi Health System in Wichita. He represents and advises numerous health care providers and corporate entities throughout Kansas in all health care legal matters.

He is a member of the Kansas and Wichita bar associations and American Health Lawyers Association. He is also a member of the KBA Health Law Section, and is a member and former president of the Kansas Association of Healthcare Attorneys. He is also a Fellow of the Kansas Bar Foundation.

Rachael K. Pirner has 19 years of experience in private practice in Wichita and is a member of Triplett, Woolf & Garretson LLC. Her primary area of practice is probate litigation.

Pirner has served as District Seven Governor to the Kansas Bar Association (KBA) Board of Governors since 2003. She has been president of the KBA Litigation Section and has also served on the KBA Continuing Legal Education, Nominating, and Fee Dispute committees. She is a Fellow member of the Kansas Bar Foundation, a member of the American and Wichita bar associations, and is member and former president of the Kansas and Wichita women attorneys (WWAA) associations.

She has received the Louise Maddox Award from the WWAA. This award honors persons who have worked to advance opportunities for women in the law. She has also received a KBA pro bono certificate.

Pirner has long participated in the Lawyer’s Car Project through Kansas Legal Services. She has volunteered to represent women seeking Protection from Abuse orders and prepares advance directives for indigent persons in hospice care.

In addition to serving on the KBA Board of Governors, she also currently serves as president of the Community Council for Women’s Studies at Wichita State University, and on the boards for IOLTA and Kybele Inc., a nonprofit humanitarian organization dedicated to improving childbirth conditions worldwide.

Pirner received her Bachelor of Arts and Bachelor of Science degrees from the University of Kansas and her Juris Doctor from the University of Nebraska at Lincoln School of Law.

Glenn R. Braun, Hays, is a partner at Glassman, Bird, Braun & Schwartz LLP, where he has practiced law for the past 26 years. He represents plaintiffs in personal injury actions and handles domestic cases, felony criminal defense, and other areas associated with the general practice of law. He serves as the city of Hays prosecutor and previously was elected to two terms as Ellis County attorney.

Braun is a graduate of Kansas State University and received his juris doctorate with honors in 1981 from Washburn University School of Law, where he was the Student Bar Association president. He is a member of the Ellis County Bar Association, previously serving as president and secretary/treasurer. He is the District 10 Governor for the KBA, being elected in 2004 and re-elected in 2007 and has served on that association’s Executive Committee. He was twice-selected by the Supreme Court Nominating Commission for a position with the Kansas Court of Appeals. He was appointed to the Kansas Racing & Gaming Commission in 2003 and reappointed in 2008, where he serves as vice chair and chief hearing officer.

Braun has held a variety of positions within the community, including the board of directors of the CASA program, where he served as president in 1992; board of directors for Big Brothers/Big Sisters and St. John’s Rest Home Endowment Association; and Thomas More Prep-Marian High School Council of Education. He is presently the finance council chairman for Immaculate Heart of Mary Parish. Braun has also taught criminal law, criminal procedure, and introduction to law as an adjunct professor at Fort Hays State University and has participated in numerous presentations dealing with a variety of legal issues.

He has been active in the WBA, serving as president of the Wichita Young Lawyers and on the WBA Board of Governors. He has served as WBA secretary/treasurer and WBA vice president. He has served on many committees for the WBA including Medical Legal, Buildings Management, Unauthorized Practice of Law, Mentoring Program, and Summer Intern.

Hesse is also active in other community organizations. He recently concluded a four-year term on the District II Advisory Board for the city of Wichita. He serves on the board of directors for Gerard House Inc., a not-for-profit home for pregnant mothers, and as a member of the Advisory Board for the Children’s Miracle Network. He also serves on the board of directors for Kansas Health Ethics Inc., a not-for-profit organization dedicated to educating the public about health care
directives and ethics in quality of life decision making. He previously served two terms on the Washburn School of Law Board of Governors and was awarded an Outstanding Service Award from the KBA in 2002.

He received his bachelor's degree from Wichita State University in 1982 and his juris doctorate from Washburn University School of Law in 1985.

David H. Moses, Wichita, has been practicing law in Kansas since 1979. He is also admitted to practice before the 10th U.S. Circuit Court of Appeals and U.S. Tax Court.

A graduate of Washburn University School of Law in 1979, he serves as an adjunct assistant professor at Wichita State University and is a frequent speaker at CLE programs on ethics, education, and criminal law subjects.

Prior to joining Case, Moses, Zimmerman & Wilson P.A., he served as Sedgwick County assistant district attorney from 1979-1984 and Sedgwick County district attorney chief administrative attorney from 1984-1990. Immediately before becoming a member of his current firm, he was a partner at the Wichita law firm of Curfman, Harris, Rose & Smith LLP.


He is an active member of the Wichita Bar Association, where he was a member of the Board of Governors and serves on the Ethics, Unauthorized Practices, Criminal Law, and Technology committees.

He is a member of the Kansas Bar Association where he sits on the Continuing Legal Education Committee, serving as chair for three years; a member of the Ethics Committee, and a member of the Criminal Law and Employment Law sections. Moses is also a member of the American Bar Association as well as the American and Kansas Trial Lawyers associations.

Moses concentrates his practice in the areas of criminal law, business and consumer law, personal injury law, litigation, insurance defense, education, and school law.

William L. Townsley III, Wichita, is a member of Fleeson, Gooing, Coulson & Kitch LLC. He practices primarily in the areas of civil litigation and insurance defense litigation, including personal injury and workers' compensation claims. He also serves on Fleeson Gooing's executive committee.

He has practiced at Fleeson Gooing since his graduation, with honors, from Washburn University School of Law in 1989, where he was managing editor of the Washburn Law Journal and a member of the Order of Barristers. He received his undergraduate degree from the University of Kansas.

Townsley has been active in bar association activities since joining the Kansas, Wichita, and American bar associations in 1989. He has served as the president and as a member of the executive committee of both the KBA Litigation and the Insurance Law sections. He currently serves on the KBA Bench-Bar Committee and has previously served on other committees, including most recently the Annual Meeting Task Force. He is a Fellow of the Kansas Bar Foundation and currently serves on the Foundation's Planned Giving Committee.

Townsley has served the Wichita Bar Association as an officer, board member, committee chair, and member of many WBA committees. He is currently, and proudly, completing his term as WBA president. He serves also on the Wichita Bar Foundation board. In addition, he participates with the American Bar Association as a section and committee member, the National Council of Bar Presidents, and the Kansas Association of Defense Counsel.

He is active with many Wichita civic and charitable organizations including the United Way of the Plains, the Wichita River Festival, and the Greater Wichita Chamber of Commerce.

William L. Townsley III

Gov. Kathleen Sebelius appointed Thomas E. Wright to the Kansas Corporation Commission on May 23, 2007. He was elected chair of the three-member commission on June 20, 2007. Wright was a partner in the Topeka law firm of Wright, Henson, Clark, Hutton, Mudrick & Gragson LLP from 1992 to 2007.

Wright was on the KBA Board of Governors, 1998-2005, and currently serves as the KBA president-elect. From 1997-1989 he chaired the KBA Legislative Committee and the

Committee on Prevention of Legal Malpractice. He received the KBA Outstanding Service Award in 1989 and the Topeka Bar Association's Warren W. Shaw Distinguished Service Award in 2003.

Wright chaired the Topeka-Shawnee County Consolidation Commission in 2005 and the Governor's Gaming Committee in 2003. He was president of the Sam Crow American Inns of Court, 2004-2005.

While serving on the Kansas Supreme Court Nominating Commission, 1995-2003, the commission presented two governors with the majority of the current Kansas appellate courts members.

William L. Townsley III
Wright has taught at Washburn University School of Law, 2001-present, and at Loyola Law School in Chicago, 2005, as part of the National Institute for Trial Advocacy. In the early 1980s he served as an adjunct professor at Washburn in the Trial Techniques program.

He was a member and chairman of the Washburn University Board of Regents, 1986-1988, and is a current member of the American College of Trial Lawyers, Kansas Association of Defense Counsel, American Bar Association, and Kansas Bar Foundation.

O’Brien has long been interested in the diversity area. In 2000, he co-founded and served as chair of Shook, Hardy & Bacon’s Diversity Committee. Through recruiting, training, retention, and other awareness initiatives, the committee’s efforts were nationally recognized when the firm was twice awarded the Thomas L. Sager Award by the Minority Corporate Counsel Association.

He is co-author of the Employee Retirement Income Security Act chapter of the second edition of the KBA’s Kansas Employment Law Handbook.

He is a past chairman of the Board of Friends of Johnson County Developmental Supports, a 501(c)(3) organization for the developmentally disabled. He is also active in his church and his children’s school and sports endeavors.

Hon. Benjamin L. Burgess, Wichita, is a district judge for the 18th Judicial District, a position he was elected to in 2002. He was sworn in on Jan. 10, 2003.


He received his B.A. from Kansas Wesleyan University, Salina, and his juris doctorate from Washburn University School of Law. He is admitted to practice law in the U.S. Court of Appeals for the 10th Circuit and the U.S. District Court for the District of Kansas. He became a member of the Kansas Bar Association (KBA) in 1972.

Burgess served as District Seven representative on the KBA Board of Governors, 1998-2004, and currently serves as secretary treasurer. He served a number of years on the KBA Bench-Bar Committee and as chair, 2003-2006, and previously served on the Professional Ethics Advisory and Mentoring committees. He is a former president of the Wichita Bar Association, 1997-1998.

He serves on the board of directors of Big Brothers Big Sisters of Sedgwick County. He is a past president of the Wichita Crime Commission and past chairman of Project Freedom, a community anti-drug coalition. He is a former member of the board of directors of the Ethics Officer Association and of the National Association of Former U.S. Attorneys.

(continued on next page)
KBA DELEGATE TO ABA

The Hon. Christel E. Marquardt has been a judge on the Kansas Court of Appeals since 1995. Prior to her appointment to the court, Marquardt was a partner in the firm of Marquardt & Associates with her son, Andrew. She was previously a partner in two Topeka firms and was associated with a Kansas City firm.

Marquardt has served as president of the Kansas Bar Association in 1987 and the Washburn University School of Law Board of Governors. She has served on the American Bar Association’s Board of Governors, and is now the chair of the ABAs Justice Center Coordinating Council and serves as a delegate-at-large to the ABAs House of Delegates. Currently, she is a member of the Board of Regents of Washburn University and on the Topeka Symphony Board.

DISTRICT ONE

Lee M. Smithyman, Overland Park, practices corporate and insurance litigation with Smithyman & Zakoura Chtd. He earned his Bachelor of Science from Carnegie-Mellon University in 1970. In that year, he also received his master’s degree from Carnegie-Mellon’s Tepper School of Business. After serving four years as an Army officer in the Air Defense Artillery, he returned to Washburn University School of Law where he graduated cum laude in 1976. Smithyman is admitted to practice in Kansas, Missouri, the U. S. District Courts in Kansas and Missouri, the 10th Circuit Court of Appeals, U.S. Tax Court, and the U.S. Supreme Court.

He is a member of the Wyandotte County, Johnson County, and Kansas bar associations. He is certified as an arbitrator and mediator with the American Arbitration Association and is board certified in civil litigation by the National Board of Trial Advocacy. He is a Master Emeritus with the Earl E. O’Connor American Inn of Court, a member of the Johnson County Ethics Committee and the 10th Judicial District Nominating Commission, and serves as a member-at-large with the Kansas Board of Discipline. He has received the Missouri and Kansas Super Lawyer designation in business litigation each year since 2005 and enjoys a Martindale-Hubbell AV rating.

DISTRICT THREE

Dennis D. Depew, Neodesha, has been in private practice with the Depew Law Firm since 1983. His primary practice includes family law, estate planning, real estate, corporate, municipal, and alternative dispute resolution. His family’s law firm recently completed its 55th year of service to the Southeast Kansas area.

He received his Bachelor of Science in business administration in 1980 and his juris doctorate in 1983 from the University of Kansas School of Law.

Depew is a member of the Wilson County, Southeast Kansas, 31st Judicial District, and Kansas bar associations. He is admitted to practice with the Kansas Supreme Court, U.S. District Court for the District of Kansas, 10th U.S. Circuit Court of Appeals, and the U.S. Supreme Court.

He is a past president of the KBA Alternative Dispute Resolution (ADR) Section, a member of the KBA Family Law and Real Estate, Probate, and Trust sections and the former Domestic Case Management Committee. He is the state ADR Committee representative for the 31st Judicial District. Depew is an approved domestic case manager, an approved CLE presenter on the topic of practical ethics for attorneys, a Kansas Bar Foundation Fellow, and the assistant Neodesha city attorney.

He is an approved mediator for the Kansas Supreme Court; and an approved domestic case manager in the 11th, 13th, 14th, and 31st judicial districts. He has been appointed by judges in several judicial districts as Guardian ad Litem for children, appointed to Professional Negligence Screening Panels in the 31st Judicial District, and appointed by several judges as special master in the 14th Judicial District. He has been a member of the Kansas Board of Discipline of Attorneys since 1999, and has served as the District 3 representative on the KBA Board of Governors since 2005.

Depew was a 14-year board member, president, and vice president of USD 461; past member of the Kansas Association of School Boards (KASB) board of directors, National School Boards Association Federal Relations Network, Kansas School Attorneys Association and its board of directors; and past speaker at KASB conventions and seminars on school law and negotiation issues. He co-founded the Neodesha High School Alumni Association Scholarship Fund and the Neodesha Educational Foundation.
**Teresa L. Watson**, Topeka, is a partner in the law firm of Fisher, Patterson, Sayler & Smith LLP, where her practice includes civil rights and employment litigation, government liability, and appellate matters. She is a former research attorney for the Kansas Supreme Court and the Hon. J. Patrick Brazil, retired chief judge of the Kansas Court of Appeals. She also practiced with the firm of Polsinelli, White, Vardeman, and Shalton in its Topeka office.

She graduated summa cum laude from Washburn University with her bachelor’s degree in 1991 and magna cum laude from Washburn University School of Law with her juris doctorate in 1994. She served as notes editor of the *Washburn Law Journal*.

Watson has been active in state and local bar associations since 1994. She has served one term on the Kansas Bar Association Board of Governors representing District 5. She has served as president of the KBA’s Insurance Law Section and was one of the original members of the KBA’s Government Lawyers Section, serving as the section’s newsletter editor and secretary/treasurer. Watson has also been a member of the KBA’s Criminal Law Section and Media-Bar Committee. She has written and coordinated the opinions digest in the *Journal of the Kansas Bar Association* and has published two articles in the *Journal*. She has authored a number of articles in a variety of other legal publications.

Watson is currently the president of the Topeka Bar Association (TBA) and has served on the board of directors of the TBA for nearly eight years. She was the recipient of the TBA’s Outstanding Young Lawyer Award in 1998 and was editor of the TBA newsletter for three years. She is past president of the Kansas Women Attorneys Association and the Women Attorneys Association of Topeka.

She served for three years as an officer and director on the board of the Capital Area Chapter of the American Red Cross and served two years on the Mayor’s Commission on the Status of Women in Topeka. She has served as a Girl Scout troop leader or assistant leader for three years.

**Gerald L. Green**, Hutchinson, practices personal injury defense, general commercial and business litigation, employment law, and health care law with Gilliland and Hayes P.A., where he is a shareholder.

Green graduated summa cum laude with his Bachelor of Arts in political science and history from Washburn University in 1969. He earned his juris doctorate, summa cum laude, from Washburn University School of Law in 1976.

He is a member of the Kansas and Reno County bar associations, American Health Lawyers Association, Association of Defense Trial Attorneys, and Defense Research Institute and is a fellow of the American College of Trial Lawyers. He is a current member and past president of the Kansas Association of Hospital Attorneys and the Kansas Association of Defense Counsel.

Green is a past board member of the Hutchinson Community Foundation, an advisory board member of the Legal Assistant Program at Hutchinson Community College, and a past member of the Washburn University School of Law Association Board of Governors.

Green is also a member of the KBA Ethics Grievance Panel and a past member of the KBA’s Professional Ethics Grievance Committee, Ethics Grievance Committee, and the Judicial Resources Task Force.

**Christopher J. “Chris” Masoner** is a partner in the Kansas City, Mo., office of Husch Blackwell Sanders LLP, practicing in the firm’s Real Estate Department.

Masoner’s primary practice involves the representation of businesses in various types of real estate transactions, including acquisitions, sales, leasing, and financing — with a particular focus on the health care and transportation industries. He joined Blackwell Sanders Peper Martin in 2005 after practicing several years with the firm of Thompson & Associates P.A. in Lawrence.

He has been a member of the Kansas Bar Association since 1997, with active involvement in the Young Lawyers Section (president, 2005-2006) and on the Kansas Bar Foundation Board of Trustees (2003-2005, 2006-2007). He previously served on the KBA Board of Governors as president of the YLS and is the current District 12 representative.

Masoner obtained his juris doctorate in 1997 from Wake Forest University and his Bachelor of Arts in political science from Colorado College in 1994.
Become a Kansas Bar Foundation Fellow and Do Good

In 1957, a special committee of the Kansas Bar Association recommended the establishment of the Kansas Bar Foundation to the KBA Board of Governors. They foresaw an organization whose supporters would generously give time, talent, and contributions throughout the years to provide legal services for the disadvantaged, educate the public about the law, and foster the well being of the profession.

For more than 50 years, the Foundation has grown to become an organization of nearly 700 members with numerous programs that serve the public.

The Foundation forges partnerships between the bar, the courts, and the legal aid organizations in Kansas to improve our system of justice and to help low-income and disadvantaged members of our community by ensuring that they have meaningful access to the justice system to protect their rights. The Foundation places special emphasis on issues affecting children and families and also supports exceptional education programs for youth.

Since 1986, the Foundation has provided more than $3.5 million for public services. Through the years the Foundation has been instrumental in the following projects:

- Developing law-related education programs for youth, including the statewide mock trial competition for junior and high school students; conflict resolution programs to reduce in-school violence; legal rights and responsibilities booklets for teens; Law Wise, a school year publication sent to civics’ educators statewide complete with lesson plans and technology information; and a clearinghouse of law-related educational resources for educators;

- Administering the KBA’s reduced fee and pro bono programs; and

- Providing legal advice and representation for senior citizens, the poor, and victims of domestic violence.

In December 2007, the KBF gave its first scholarship to second-year University of Kansas School of Law student Michael T. Crabb of Overland Park. The Case, Moses, Zimmerman & Wilson PA. scholarship will be an annual gift of $1,000 to second-year law students attending University of Kansas School of Law, Washburn University School of Law, or Creighton University School of Law. The criteria of the award includes academic achievement, participation in community activities, as well as a bona fide intention to practice law in Kansas.

“We are excited to contribute to future Kansas attorneys, and hope this will also promote the work of the Kansas Bar Foundation to further the good deeds of the legal profession,” said David H. Moses, a shareholder in the Case Moses law firm.

KBF President Bruce W. Kent said, “We are very pleased to recognize the achievements of this deserving young man, and we wish him well as he continues his legal education.”

There are a number of ways you can help the Kansas Bar Foundation, and it all truly makes a difference. You can support the Foundation by participating in the IOLTA program, joining the Fellows program, or volunteering your time. The Fellows recruitment season is upon us and we want to grow. If you are interested in becoming a Fellow or increasing your level of giving, please contact Meg Wickham, manager of public services, at (785) 234-5696 or e-mail at mwickham@ksbar.org.

The 2008 Fellows Dinner is scheduled for Thursday June 19, 2008, at the KBA’s Annual Meeting in Topeka. Those added to the published roll of fellows and those who have reached a new contribution level will be honored at the dinner. This black-tie gala event of the year provides a wonderful opportunity to salute the new fellows, introduce new officers, and reminisce with colleagues. Invitations will be mailed. If you would like more information about the dinner, please contact Meg Wickham, KBA manager of public services, at (785)234-5696 or e-mail at mwickham@ksbar.org.
Wake Up, BlackBerry, Please Wake Up!

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

In 1998 Hollywood featured the movie “Armageddon.” If you never saw it, you have lots of company. Anyway, the world was on its final days thanks to an asteroid on a collision course with Earth. NASA decided to send some roughnecks on a spaceship to land on the asteroid, along with drilling equipment [light, sweet crude was obviously a lot cheaper back then]. Their instructions were to drill a deep hole, insert a bomb, and detonate the big rock. They did, and the movie ended but the world did not.

Roughly a decade later, on Feb. 12, technology nerds came close to their own version of Armageddon, and this story didn’t involve Bruce Willis. Because on that day, for 180 minutes, sales guys all over the world — and a few lawyers — got no e-mail messages. None. Research in Motion (RIM) servers went down. No BlackBerry e-mail for THREE HOURS!

The New York Times reported it this way: “BlackBerry addicts faced their second big outage in a year yesterday afternoon, when Research in Motion’s wireless service went dark for three hours, from about 12:30 to 3:30 p.m. PST, angering millions. RIM says no messages were lost during the outage, only delayed. The outage was not nearly as severe as the one that occurred in April last year and which spanned more than 12 hours of downtime. But while yesterday’s downtime may have lasted only three hours, it may have distressed consumers far more than the 2007 outage because it occurred in the middle of the workday.”

The Wall Street Journal’s article quoted a member of the Canadian Parliament for his take on the crisis. “Everyone’s in crisis because they’re all picking away at their BlackBerrys and nothing’s happening. It’s almost like cutting the phone cables or a total collapse in telegraph lines a century ago. It just isolates people in a way that’s quite phenomenal. The Journal article continued: “These mini-lifelines are addictive. The signs of the addiction are pretty apparent to those around the victims. Dinner conversations are via text messages instead of using a voice, sprained fingers from overuse of the tiny keyboard, tears springing up when looking for e-mail and finding none.”

The Journal quoted a sales guy in desperate need for perspective. “I cannot believe this happened again.” He says he gets 1,000 e-mails a day as director of field marketing. “I’m on the road 300 days a year. My entire life is in my BlackBerry — my family life, my professional life, my emotional life, everything. … They’re not allowed to do this to me!”

The Times and the Wall Street Journal invited readers to add their two cents, and they obliged. Some of the best comments included these:

- “I used to have a BlackBerry, and I became so addicted to it that I would basically run my whole life on it, then I lost it ... it really felt like I lost a limb. Now I just have a regular cheap cell phone, and I couldn’t be happier. Sometimes we just get WAY too dependent on technology.”
- “Anybody who is concerned about a three-hour-BlackBerry outage should be in rehab.”
- “Text voting for American Idol brought it down.”
- “My kids loved the outage. I actually talked to them.”
- “My boss had to make eye contact with me instead of scrolling through his BlackBerry while pretending to listen. Maybe with more outages he will be able to memorize my son’s name!”
- “Must ... have ... more ... connectivity.”
- “Somehow we survived. No e-mail on my BB for three hours. The horror. Somehow the human spirit rose to the occasion and we made it through. Such drama. Get over it.”
- “We don’t make fun of Crackberry users behind their backs. We do it to their faces. It’s just that they are staring so intently at the screen they don’t see us.”

Death by asteroid would be a preferred fate.

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 23 years, Keenan has practiced with Shook, Hardy & Bacon. He may be reached at mkeenan@shb.com.
I went to law school for an iPod.

That idea sounds strange, but it is true nonetheless. At various points in high school and college, I would try to picture what I wanted to do with my life, and occasionally I would toss around the idea of going to law school. It would certainly be challenging, but I never seemed to develop more than a cursory interest in the thought. During the fall semester of my senior year of college, I interned for a publishing company, I began a job search, and I contemplated applying to various graduate school programs. Yet, I still didn’t have a solid feeling as to where my life was headed, and I just couldn’t seem to figure it out.

In the midst of all my soul-searching, my dad was re-examining his own life. After being a photographer for 20-plus years, he was looking for something new. Law school always sounded fascinating to him, and by the time I started my senior year of college, he had signed himself up for the LSAT and was busy filling out law school applications. He kept encouraging me to apply to law school with him, but I wasn’t interested.

Around January of my senior year, I was starting to feel the pressure. Graduation was looming, and I was nowhere near having a job. What I did know now was that I really wanted an iPod. So, I made a deal with my dad. If I applied to a law school and got accepted, he would buy me the coveted iPod. My parents even offered to pay for my LSAT and application fees, so really, all that I had to lose was the time I would spend studying for and taking the exam. I distinctly remember that I registered for the LSAT on the last possible day for the February test, which was also the last test date before the law school application deadline at University of Kansas School of Law (KU). I had exactly one month to study for the test.

I managed to jump that hurdle, and a few short months later I received my acceptance letter from KU. I also received my iPod, and I figured since I got in, I might as well go ahead and actually give law school a try. My dad was accepted at KU as well, and in August 2005, we became the first parent-child duo to enter the University of Kansas School of Law in the same class.

Unfortunately, surviving law school was not as easy as getting that iPod. I’ll spare you the gory details of the first couple of semesters, but as nearly all law students discover at some point or another, law school is like nothing else you’ll ever experience. I felt like everyone around me knew exactly why he or she was in law school, while I had a hard time even deciding what I wanted to eat for lunch. That first year was a huge struggle, and between learning how to read a case and figuring out how to take a law school exam, I became frustrated and exhausted. I ended up coming down with pneumonia, and I absolutely dreaded going to class every day. Despite tremendous support from my friends and family, I seriously contemplated leaving law school.

Eventually, I found my niche, and slowly my outlook began to change. I discovered subjects for which I seemed to have more natural understanding than some of my first-year classmates, I found a job as a law clerk at a small firm in Lawrence, and I made some new friends. Instead of dreading my daily trek to Green Hall, I actually looked forward to going to Professor Westerbeke’s 8:30 a.m. workers’ compensation class. Through my job as a law clerk, I found that I could use the knowledge and skills I gained in law school to help people.

After graduation and the bar exam, I will be continuing my work at that same firm, trading in my law clerk duties for those of a full-time attorney. I got to spend the three years of ups and downs of law school with my dad, something that very few people have the opportunity to do. Perhaps most surprising of all, after months of vowing up and down that I would not date a fellow law student, the quiet guy in my first-year small section eventually became my fiancé.

I still have that iPod, though I rarely use it. Now that I think back on it, I had a job during undergrad, so I probably could have bought one for myself without the law school strings attached. I still don’t know why I felt compelled to make that deal with my dad on that January day, but I am very glad that I did.

About the Author

Aimee Richardson is a native of Lawrence. She received her Bachelor of Arts in English and sociology from the University of Kansas in 2005. She is currently enrolled in the elder law clinic and elder law certificate programs. She and her father, Earl Richardson, will graduate from the University of Kansas School of Law in May 2008. After graduation, she will join the Lawrence firm of Riling, Burkhead & Nitcher.
Members in the News

CHANGING POSITIONS
Victoria L. Austin has joined the Western District of the Missouri Court of Appeals, Kansas City, Mo., as a clerk, and Daniel P. Goldberg has joined as a judicial law clerk.
Andrea C. Bernica has joined Shughart Thomson & Kilroy P.C., Overland Park, and Robert J. Bruchman has joined the Kansas City, Mo., office.
Andrew L. Bolton has joined Fairchild & Buck P.A., Lawrence.
Mary E. Christopher has joined Goodell, Stratton, Edmonds & Palmer LLP as an associate attorney.
Jennifer E. Conkling has joined the Law Office of Carol Ruth Bonebrake, Topeka.
Jeffrey E. Evans has joined Flint Hills Resources, Wichita.
Lewis M. Galloway and Nathan A. Orr have been elected as partner at Spencer Fane Britt & Brown LLP, Kansas City, Mo.
Martha Jenkins is an assistant attorney general for the District of Columbia.
Keitha M. Johnson has joined the Kansas City, Mo., office of Bryan Cave LLC as an associate and Staci O. Schorgl has been named as partner.
Melissa S. Lockton and Jason R. Scheiderer have joined Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.
Brenden J. Long has joined TFI Family Services Inc., Topeka, as general counsel and director of human resources.
Christopher J. Lucas has joined Norris & Keplinger LLC, Overland Park.
Matthew M. Merrill has been named a shareholder with Brown & Dunn P.C., Kansas City, Mo., and Travis A. Wymore has joined the firm as an associate.
Jerry J. Miller has joined Signature Property Management, Westwood.
Sarah E. Millin has joined Lathrop and Gage L.C., Kansas City, Mo.
Audrey M. Mitchell has joined Scharnhorst Ast & Kennard P.C., Kansas City, Mo., as a paralegal, and Eric A. Morrison has joined the firm as an associate.
Dara E. Montclare has joined Shook Hardy & Bacon LLP, Kansas City, Mo.
David A. Morris has joined Minter & Pollak, Wichita.
James D. Myers has joined Shaffer Lombardo Shurin, Kansas City, Mo.
Trina Hudson has joined My Child Advocate P.A., Olathe.
Stephen N. Six has been appointed Kansas Attorney General by Gov. Kathleen Sebelius.
Michael M. Tamburini has joined Galichia Medical Group P.A., Wichita.
Dawn S. Wavle has joined Hawker Beechcraft Corp., Wichita.

CHANGING PLACES
Ronald D. Garrison, Garrison Law Office, has moved to 9401 W. 87th St., Ste. 201, Overland Park, KS 66212.
Horn Aylward & Bandy LLC has moved to 2600 Grand Blvd., Ste. 1100, Kansas City, MO 64108.
Shawn P. Lautz has started his own firm, Law Offices of Shawn P. Lautz L.C., 1 E. 9th, Ste. 213, Hutchinson, KS 67501.
Ross R. McIlvan has started his own firm, McIlvan Law Firm, 300 W. Main, Madison, KS 66860.
Kyle J. Steadman has moved to Foulston Siefkin LLP’s Wichita office, 1551 N. Waterfront Pkwy., Ste. 100, Wichita, KS 67206.

MISCELLANEOUS
Gregory M. Bentz, Shughart Thomson & Kilroy P.C., Kansas City, Mo., has been installed by the Kansas City Metropolitan Bar Association as president.
Charles P. Efflandt, Foulston Siefkin, Wichita, has been named a Charter Fellow and elected a Founding Regent of the American College of Environmental Lawyers.
Martha A. Halvordson, Kansas City, Mo., has been appointed to the American Arbitration Association’s National Roster of Arbitrators and Mediators.
The merger between Husch & Eppenberger LLC and Blackwell Sanders LLP has been completed and the firms are now operating as Husch Blackwell Sanders LLP.
Anne M. Kindling, Topeka, has been installed as president of the Kansas Association of Defense Counsel. She also received the Silver Helmet for her contributions in legislative matters.

“Jest Is For All” by Arnie Glick

“No, Mr. Foster, I’m afraid that keeping your fingers crossed during the signing of the contract did not render it unenforceable.”
**Joe L. Norton**

Joe L. Norton, Olathe, 66, died Jan. 19. He was born Jan. 1, 1942, in Shattuck, Okla., and grew up in Caldwell, Kan., before attending the University of Kansas and its law school. Norton started in private practice more than 40 years ago and was most recently a senior partner at Norton, Hubbard, Ruzicka, Kreamer & Kincaid L.C. in Olathe.

Norton is survived by his wife, Jane, of the home; father, Fielding Norton; children, Sallie Ben Attar, Jay Norton, and Sarah Jane Stevenson; brother, Fielding Norton II; and seven grandchildren.

He was preceded in death by his mother, Marie Norton.

**Robert “Bob” Reeder**

Robert “Bob” Reeder, Troy, 91, died Jan. 20 in Kansas City, Mo. He was born July 22, 1916, in St. Joseph, the son of Charles Ward and Isabel Symns Reeder. He attended the University of Kansas, graduating in 1938, and then attended the University of Michigan Law School, graduating in 1941.

After law school he was a special agent with the Federal Bureau of Investigation before resigning to join the U.S. Marine Corps during World War II; he was honorably discharged in 1945. Reeder joined his father’s law practice in Troy in 1948 and continuously practiced law there for more than 50 years.

Reeder succeeded his father on the board of directors of the First Bank of Troy and served as director for more than 50 years. He was a Highland Community College trustee for 30 years; a member of the Troy School Board; Doniphan County attorney; Troy Kiwanis Club; American Legion Post No. 55; Masonic Lodge No. 55; Troy Chapter No. 16; Royal Arch Masons; Moila Shrine Temple; and the Kansas, Doniphan County, and American bar associations.

Survivors include his wife, Martha, Troy; daughters, Ellen Reeder, Springfield, Ill., Mary Reeder Blake, Wichita, Pat Reeder, Topeka, and Kay Reeder Lloyd, Leawood; nine grandchildren; and two great-grandchildren.

He was preceded in death by his parents; sister, Virginia Reeder Blevins; and brothers, William and Charles Reeder.

**Walter F. “Walt” Stueckemann**

Walter F. “Walt” Stueckemann, 81, died Feb. 3 in Fort Dodge. He was born March 3, 1926, in Great Bend, the son of Gustav and Augusta Junghaertchen Stueckemann. He was a graduate of Notre Dame University and received his juris doctorate from the University of Kansas School of Law in 1950. He practiced law in Jetmore from 1950 until his retirement in 1990.

Stueckemann was a member of the Masonic Lodge, past poten-tate of Elkora Shrine and part of the Clown Unit, Hutchinson Breakfast Lions and past district governor of the Lions, American Legion, Veterans of Foreign Wars, and a lifetime member of the Kansas Bar Association. He was very active during his life in scouting and received the Silver Beaver. He served in the U.S. Navy as lieutenant junior grade in World War II.

Survivors include two sons, Bill Stueckemann, Hutchinson, and Dan Stueckemann, Bonner Springs; two daughters, Linda Taylor, Colby, and Pam Seapy, Norman, Okla.; a sister, Johanna Stueckemann, Apple Valley, Minn.; 11 grandchildren; and 12 great-grandchildren.

He was preceded in death by his parents; wife, Marjorie Ann Liston; two infant sons; and a brother, Adolf.

**Louis James**

Louis James, 80, died Feb. 17 in Hays. He was born July 24, 1927, in Stockton, the son of Glenn Martin and Mary Ella Macy James. He married Carol V. Darnell on Sept. 16, 1956, in Osborne.

He was a practicing attorney and a member of the Kansas Bar Association for more than 50 years.

He had served as an assistant attorney general for the state of Kansas, the county attorney for Osborne and Pawnee counties, and the Larned city attorney.

He was an active member of the First Christian Church in Larned, serving on the church board, elders, and deacons and was a longtime choir member. He was valedictorian of the Stockton High School Class of 1945. He was a Rotarian member for more than 50 years, a Kansas State University alumnus, a Washburn University alumnus, a Boy Scout master, and a licensed ham radio operator.

James is survived by his wife of the home; three sons, Andrew, Belton, Mo., Eric, Citrus Heights, Calif., and Bradley, Larned; a sister, Nola Cooper, Tonganoxie; and seven grandchildren.

He was preceded in death by a sister, Mary Lee Thomas, and a brother, Glenn Richard James.

**Ronald D. Watson**

Ronald D. Watson, 67, died Feb. 6. He was born Dec. 31, 1940, in Hutchinson to Chet and Nola Watson.

He received his law degree from Washburn University School of Law and became a member of the Kansas Bar Association in 1969.

Survivors include his wife, Janis, daughter Molly Rainey, son, Tyler Watson, and grandsons, Drew and Greyson Rainey, all of Wichita.

He was preceded in death by his parents and brother, Darrell.
KBA Committees and Sections Seek Volunteers

The KBA relies heavily on members who volunteer their time, talent, and energy to committees, panels, and sections. The KBA’s standing committees and panels function throughout the year, along with task forces appointed for specific tasks. In addition, the KBA has 22 sections that focus on specific practice areas and help develop legislative proposals and CLE offerings. This time of year, we collect information from individuals who are willing to serve on committees, panels, or sections.

Below is a volunteer form that you can use to let incoming KBA President Tom Wright know of your interest as he considers appointments for the coming year. Section volunteer forms will be forwarded to the appropriate section officers.

KBA Committee and Section Call Form

Please designate which committee/panel you are interested in serving on. If indicating more than one committee/panel, please number your choices for first, second, and third preferences.

( ) Access to Justice
( ) Annual Meeting (Overland Park 2009)
( ) Awards
( ) Bench-Bar
( ) Continuing Legal Education
( ) Diversity
( ) Ethics Advisory
( ) Ethics Grievance Panel
( ) Fee Dispute Resolution Panel
( ) Journal Board of Editors
( ) Law-Related Education
( ) Legislative
( ) Media Bar
( ) Membership
( ) Nominating
( ) Paralegals
( ) Standards for Title Examination
( ) Unauthorized Practice of Law

Please designate the section(s) to which you belong and are interested in serving as an officer or volunteer, e.g., to help with section newsletters, review legislation, develop CLE programming, etc. Please number your choice to indicate first, second, and third preferences.

( ) Administrative Law
( ) Agricultural Law
( ) Alternate Dispute Resolution
( ) Bankruptcy & Insolvency Law
( ) Construction Law
( ) Corporate Counsel
( ) Corporation, Banking & Business Law
( ) Criminal Law
( ) Elder Law
( ) Employment Law
( ) Family Law
( ) Government Lawyers
( ) Health Law
( ) Insurance Law
( ) Intellectual Property Law
( ) Law Practice Management
( ) Litigation
( ) Oil, Gas & Mineral Law
( ) Real Estate, Probate & Trust Law
( ) Solo & Small Firm
( ) Tax Law
( ) Young Lawyers Section

Name ______________________________ Telephone _______________________
Address ____________________________________________ KBA/Court # ______________
City __________________ State _____ Zip Code __________ E-mail _________________________

Please return by May 30, 2008, to
KBA Committees and Sections Coordinator
P.O. Box 1037
Topeka, KS 66601-1037
Fax (785) 234-3813
Recovery of Attorney’s Fees in Kansas

By Jerry D. Fairbanks, First National Bank, Goodland, Corporate Counsel Section CLE liaison

Litigation is expensive and one of the major concerns for corporate counsel is attorney’s fees. There may be times when those fees can be recovered.

The general rule under Kansas law is that attorney’s fees are not recoverable unless authorized by statute or agreement of the parties. *Golconda Screw Inc. v. West Bottoms Ltd.*, 20 Kan. App. 2d 1002, 894 P.2d 260 (1995).

In 1876, the Kansas Legislature passed a law declaring that a contractual provision providing for recovery of attorney’s fees in a note, bill of exchange, bond, or mortgage shall be null and void unless specifically authorized. This law was later codified in K.S.A. 58-2312. The 1994 Kansas Legislature repealed the prohibition against attorney’s fees and amended K.S.A. 58-2312, as well as parts of the Kansas Uniform Consumer Credit Code, which specifically allowed contractual agreements for the recovery of attorney’s fees.

The amendment became effective July 1, 1994, and K.S.A. 58-2312 now provides as follows:

Except as otherwise provided by law, any note, mortgage or other credit agreement may provide for the payment of reasonable costs of collection, including, but not limited to, court costs, attorney fees and collection agency fees, except that such costs of collection: (1) may not include costs that were incurred by a salaried employee of the creditor or its assignee and (2) may not include the recovery of both attorney fees and collection agency fees.

The Kansas Court of Appeals in *Ryco v. Chapelle Intern.*, 23 Kan. App. 2d, 30, 926 P.2d 669 (1996), held that the amendment to K.S.A. 58-2312 was substantive and refused to allow its retroactive application. The credit agreement allowing attorney’s fees must have been entered into after July 1994.

On its face this statute prohibits the collection of attorney’s fees for inside or corporate counsel as they would be a “salaried employee.” It has been suggested that, despite the statutory language, it may be possible to collect attorney’s fees for a “salaried employee” if such a provision is included in the note, mortgage or other credit agreement. Colorado has the same statutory prohibition for salaried employees, but the Colorado courts have allowed attorney’s fees if specifically authorized in the credit agreement.

What does this mean for Kansas general counsel? It does mean that if you are collecting on a note, mortgage, or other credit agreement, you may wish to hire outside counsel to proceed with that collection, as you will be able to request attorney’s fees. It further means that if your credit agreement, note, or mortgage provides for the attorney’s fees for a “salaried employee,” there may be an argument to the court for the collection of those fees.

Any discussion of attorney’s fees would not be complete without suggesting that there are other situations when fees may be allowed pursuant to statute. Without getting into a discussion of each of these statutes, those that seem to be of most import and application for us are as follows:

K.S.A. 60-211, which is substantially the same as Fed. R. Civ. P. 11, provides for assessment of attorney’s fees for signing a pleading, motion, or other paper in bad faith. This must be requested and allowed by the court.

K.S.A. 40-256 provides for the collection of attorney’s fees in actions on insurance policies if it appears from the evidence that an insurance company, society or exchange has refused without just cause or excuse to pay the full amount of a loss, the court shall allow the plaintiff a reasonable sum as attorney’s fees for services in said action.

K.S.A. 79-3268, which is generally referred to as the “taxpayer bill of rights and privileges,” provides for the payment of attorney’s fees from the director of the Kansas Department of Revenue if it can be proved that an assessment or claim asserted by the department was without reasonable basis in law or fact.

K.S.A. 60-2003, although not specifically authorizing attorney’s fees, allows for the assessment and taxation of costs in a civil matter. These costs in many instances can be equal to or greater than attorney’s fees and should not be ignored.

About the Author

**Jerry D. Fairbanks** serves as general counsel and executive vice president of the First National Bank (FNB) in Goodland and has served in this capacity for the past 10 years. FNB is predominately an agricultural bank with nine branch banks located in western Kansas and eastern Colorado. Fairbanks is licensed to practice law in Kansas and Colorado and serves on several Kansas Bar Association committees and as the secretary/treasurer of the Trust Division of the Kansas Bankers Association.

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“This number has been disconnected. If you feel this message is in error, please hang up and try your call again.”

“Mail Returned: Forwarding order expired.”

Your client has gone missing and the matter you are working cannot close and pay you until they are found. Some days one wonders if KRPC 1.4(a) might be amended to require a little bit from clients: “A client shall keep her attorney reasonably informed about her whereabouts and promptly comply with requests for information.” Until then, you may need to expend a little elbow grease to track down missing clients, witnesses, or defendants.

**Fast and Free**

We each leave a trail of information about ourselves in our wake as professionals and consumers. Google will pick up on many of those trails and can return valuable information for locating your client. Most names will generate an overwhelming number of false hits, however. Narrow the search by enclosing the name in quotation marks and adding a keyword like a profession, a city, or even an e-mail address (i.e., “Larry Zimmerman” larry@valentine-law.com).

Online communities like MySpace, Friendster, or Linked-In are booming resources for location information. You can search each individually or you could hit a broad swath of them using Wink.com. Wink.com can find such interesting bits as campaign contributions, articles written by or mentioning your client, court filings, and employer rosters.

Wink.com, however, does not appear to grab information from one of the largest online communities — facebook.com. Facebook recently opened their community to users beyond college campuses and a simple name search can turn up considerable information valuable in locating your client.

Free resources can often be worth their price. Effective use requires some specific knowledge about your client that can filter out the false hits. Knowing your client’s hobbies, professional history, or even their alma mater can narrow the search to a direct hit.

**Professional Searches**

Private eyes are about as common online as generous Nigerian billionaires. The best will put shoe leather to pavement but run up bills to match such personalized service. That is often overkill and inexpensive electronic resources frequently do the trick.

One of the best, ID-Info, deserves a permanent spot in your favorites list. A portion of ID-Info records includes access to credit report information so setting up an account includes an onsite security inspection and interview (painless but good security practice). Once that quick process is completed, accessing location information can be done individually online or as a batch of individuals by uploading to ID-Info’s secure

(continued on next page)
People, People

(Continued from Page 21)

Web site. Information returned includes bankruptcy and deceased searches, real-time directory assistance, Social Security number searches, and current and prior addresses and phone numbers.

ID-Info offers several different pricing structures depending on the types of information sought and how information is provided (individual vs. batch). Searches are priced per hit — no hit, no fee. Contact ID-Info at www.id-info.com or info@id-info.com.

Another must-have in every attorney’s favorites list should be Accurint.com — a LexisNexis product. Accurint provides access to an ever-growing array of public and proprietary databases that can be distilled into a variety of reports from basic people locators to detailed personal profiles. Prices vary depending on the detail requested in the reports. Contact a representative at www.accurint.com or (888) 332-8244.

Quick Tips

1. Online resources evolve constantly. As business models and user demographics change, so does the effectiveness of the service. Regularly compare two or more resources to be sure you are getting the best data.

2. Search tools are seldom one-click wonders. They can point you in the right direction but you must have enough familiarity with your subject to weed out false hits.

3. Practice and hone your search skills on yourself, family, and colleagues. Practice helps uncover blind spots in online resources and familiarizes you with the types of data that make finding people more effective.

4. Use only reputable online sources. Attorneys disclose information for location purposes subject to applicable ethics rules and state information security laws.

The Cautious Hunter

Use your search practice as self-defense against identity theft and personal or professional attacks. Pay attention to what is said online about you and your practice and watch for incorrect information (stop by www.annualcreditreport.com to verify information on your credit report too).

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.

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Gambling with Settlement Proceeds: Confidentiality after Amos v. Commissioner
By Mary E. Christopher

I. Introduction
The parties who participate in a settlement conference must weigh the risks presented by taking the case to trial and decide whether to “roll the dice” and accept the decision entered by 12 unknown laypeople on the jury or whether to manage their risk through settlement. The preparations and strategies of the participants, the excitement at the prospect of monetary gain or loss, and emotional highs and lows involved in reaching a compromise may be compared to a show in the days of the famed Rat Pack — no one knows quite where things are headed, who will appear, or when the gathering will end.

Parties to a successful settlement conference or their insurers often insist on confidentiality as one of the terms or conditions of settlement. A defendant may believe the publicity regarding the fact of settlement will set a precedent that will inspire others to file similar claims or false accusations, damage his or her reputation, or outweigh the defendant’s assertions that liability was not clearly established.2 The promise of confidentiality may convince a defendant to relinquish his or her opportunity to go to trial and roll the dice on obtaining a defense verdict. Similarly, a plaintiff may not want his or her identity and the amount of settlement to be known. A plaintiff may wish to minimize subsequent solicitation from opportunists, relatives, or charitable organizations, or to preempt the possibility that the public will perceive that a small settlement meant that his or her suit had no merit.3 For insurers, confidentiality provisions are seen as a way to protect the insured from adverse publicity that could lead to future litigation.

The inclusion of a confidentiality agreement within a settlement agreement historically was a fairly straightforward process. The “value” of the confidentiality provision was considered more aesthetic than economic, and the consideration for the provision was minimal and mutual. However, recent cases from the tax court suggest the Internal Revenue Service (IRS) may assign “economic value” for a confidentiality provision, leaving many nervous they are taking a gamble by agreeing to incorporate a confidentiality clause. This article will examine the current thought on the value of confidentiality, starting with the defining case of Amos v. Commissioner.4

II. How Lucky Can One Guy Be … Ain’t That a Kick in the Head?
In January 1997, viewers watched a televised incident involving more than a figurative “kick in the head” when, during a Timberwolves-Bulls game, basketball’s infamous Dennis Rodman fell and landed on top of courtside photographers and a television cameraman named Eugene Amos. Rodman twisted his ankle in the fall and then, as he got up, kicked Amos in the groin.5

After the incident, Amos was transported by ambulance to a local medical center. Amos told medical staff that immediately after he was kicked in the groin he experienced shooting pain to his neck, but that the pain was subsiding.6 Medical personnel noted Amos was limping and complained of pain but was able to walk, and no other physical injuries or trauma were noted.7 It must have dawned on Amos that opportunity was knocking at his door because, while still at the medical center, Amos contacted a personal injury attorney about representing him in connection with the incident.8 After a dispute with medical staff, Amos abruptly left without having been discharged. Later that day, Amos filed a police report declaring that Dennis Rodman had assaulted him.9

Note: Endnotes begin on Page 28.
Shortly thereafter, Rodman’s attorney contacted Amos’ attorney. Following several meetings, the parties agreed to settle the potential claim. In the confidential settlement agreement executed by the parties, Amos agreed to release all potential claims relating to the incident against Rodman, the Chicago Bulls, and the National Basketball Association. In addition, Amos agreed to keep the terms of the settlement confidential; not to publicize the settlement; not to grant any interviews or make any statement regarding the incident; to keep the underlying facts, allegations, and opinions concerning the assault confidential; not to make any public statement regarding either Rodman or the assault; and not to assist authorities in any prosecution of Rodman. Amos received payment from Rodman of $200,000.

When Amos filed his 1997 tax return, he did not include the $200,000 settlement proceeds in his gross income. This did not go unnoticed. The IRS issued a deficiency notice to Amos indicating he was only entitled to exclude $1 of the settlement proceeds from his gross income. This meant Amos would have to pay tax on $199,999. Amos disputed this determination, asserting the entire $200,000 should be excluded under Internal Revenue Code §104(a)(2).

A. Every time it rains ... it rains pennies from heaven – §104(a)(2)
Under the Internal Revenue Code (IRC), compensation received in the form of damages generally must be reported as gross income. If an exemption from taxation applies, however, it rains pennies from heaven for the taxpayer. Section 104(a)(2) of the IRC contains five narrow exemptions from taxation for injuries or sickness received by virtue of workers’ compensation, accident or health insurance, pensions, or annuity payments as the result of active service in the armed forces, or disability income received as a direct result of a terroristic or military action. Finally, subsection 104(a)(2) contains a tax exemption for litigation damages received on account of “personal physical injuries or physical sickness.”

Two U.S. Supreme Court decisions are significant in understanding the mechanics of §104(a)(2): Burke v. United States and Commissioner v. Schleier.

In Burke, the Court examined §104(a)(2)’s requirement of “personal injury.” In the underlying case, Burke argued she was entitled to a refund of the taxes withheld from the settlement she received following a sex discrimination suit against her employer. In the absence of legislative history, the Court turned to IRS regulation §1.104-1(c)’s definition of excludable damages as amounts received through an action “based upon tort or tort type rights.” Grabbing the “based upon tort or tort type rights” element onto §104(a)(2), the Court determined the taxpayer must show the legal basis of his or her claim was “a tort-like personal injury.” The Court noted Burke’s complaint sought redress under Title VII, which offered only the limited remedies of backpay, injunctions, and other equitable relief, not the broad range of compensatory damages available in tort cases. The Court reasoned because Title VII was not designed to redress a tort-like personal injury, Burke could not show the underlying cause of action giving rise to her settlement award was “based upon tort or tort type rights.” Therefore, the Court concluded Burke was not entitled to an exclusion under §104(a)(2).

In Commissioner v. Schleier, the U.S. Supreme Court refined its analysis of §104(a)(2). Following a class action suit claiming violations of the Age Discrimination in Employment Act of 1967 (ADEA) challenging United Airline’s policy of firing employees upon reaching age 60, Schleier received a settlement, which represented both backpay and liquidated damages. Schleier included the backpay portion of the settlement as gross income on his tax return, but excluded the amount attributable to liquidated damages. The IRS issued a deficiency notice.

Schleier initiated proceedings in U.S. Tax Court, claiming not only did he properly exclude the liquidated damages portion as damages received on account of personal injuries or sickness, but also that he should receive a refund of the taxes he paid on the backpay portion of the settlement under §104(a)(2). The Court began its analysis of the exclusion in §104(a)(2) by considering the application of the phrase “on account of personal injuries” in a typical personal injury automobile accident case where the taxpayer recovers damages for medical expenses, lost wages, and for pain, suffering, and emotional distress. The Schleier Court reasoned that in personal injury cases, each element was properly excluded from taxation under §104(a)(2) “not simply because the taxpayer received a tort settlement, but rather because each element of the settlement satisfies the requirement set forth in §104(a)(2) that the damages were received ‘on account of personal injuries or sickness.’” In analyzing the application to Schleier’s ADEA claim, the Court found there was no psychological or personal injury to Schleier serving as the proximate cause of the unlawful termination leading to his recovery of back wages. Likewise, it found the liquidated damages received under the ADEA were not received “on account of personal injury.”

Schleier made it plain that, in order to successfully claim exemption from taxation under §104(a)(2), a taxpayer must satisfy two independent requirements. First, the underlying cause of action must be “based upon tort or tort type rights” (satisfying the requirement set forth in Burke) and, second, the taxpayer must demonstrate each individual element of the recovery is causally linked to his or her personal injury.

B. Luck be a lady tonight ... Amos v. Commissioner
In Amos v. Commissioner, Amos may have hoped Lady Luck was by his side as he argued that he met his burden of showing he could exclude the $200,000 settlement proceeds from his gross income as compensatory damages received for personal physical injuries or physical sickness under §104(a)(2). The U.S. Tax Court stated the issue was “how much of the settlement amount at issue Rodman paid to [Amos] on account of personal injuries.” The court noted the U.S. Supreme Court provided the framework in Schleier for analyzing §104(a)(2) exclusions and, after Schleier, Congress had imposed an additional requirement of “personal injuries that are physical or sickness that is physical,” by amending the statute.

Proceeding to its analysis, the court examined the underlying factual determination of “the nature of the claim that was the actual basis for settlement.” The IRS and tax courts may consider evidence such as the complaint, evidence pertaining to the negotiations between the litigants, and the settlement agreement. The Amos court noted the nature of the claim...
LEGAL ARTICLE: GAMBLING WITH SETTLEMENT PROCEEDS

was a factual issue determined by referring to the settlement agreement. The court further observed, “If the settlement agreement lacks express language stating what the amount paid pursuant to that agreement was to settle, the intent of the payor is critical to that determination.”

The Tax Court found that “[t]he settlement agreement expressly provided that Rodman’s payment of the settlement amount at issue ‘releases and forever discharges ... Rodman ... from any and all claims and causes of action of any type, known and unknown, upon and by reason of any damage, loss or injury ... sustained by Amos [petitioner] arising, or which could have arisen, out of or in connection with ... [the incident].”

Based on the record before it, the court concluded that “Rodman’s dominant reason in paying the settlement amount at issue was to compensate petitioner for his claimed physical injuries relating to the incident.” Presumably, this finding could satisfy both the first and second prongs of the Schleier analysis.

C. They call you Lady Luck but there is room for doubt ...

The court did not end its analysis there, however. The court continued by stating the terms of the settlement agreement belied the idea that the entire settlement amount was paid on account of Amos’ physical injuries, despite testimony of Amos’ attorney to the contrary. The court concluded that “Rodman paid a portion of the settlement ... on account of other secondary reasons,” i.e., in exchange for Amos’ agreement not to defame Rodman, disclose the terms of the settlement, publicize the incident, or assist in any criminal prosecution.

The Amos court treated these “nonphysical injury provisions” of the settlement agreement as separate elements of recovery, in an apparent effort to apply the “physical injury” requirement established in the 1996 amendments to §104(a)(2). The Tax Court determined “Rodman paid petitioner $120,000 of the settlement amount at issue on account of petitioner’s claimed physical injuries and $80,000 of that amount on account of the nonphysical injury provisions in the settlement agreement.”

Thus, the holding in Amos allows the IRS and tax courts to examine and bifurcate the provisions of the settlement agreement as if the provisions were individual elements of the total recovery, and to assign any nonphysical injury provisions, i.e., confidentiality provisions, a separate taxable value. In doing so, Amos substantially changed the long-standing view of confidentiality agreements as a mere accoutrement of the settlement where §104(a)(2) is involved.

To many practicing attorneys, the Tax Court’s decision in Amos may appear counterintuitive. Settlement agreements have been treated under the law as a type of contract governed by and interpreted according to contract law. Thus, the act of maintaining confidentiality could be regarded as a specified act of forbearance, which constitutes an expressly bargained-for contractual term. Moreover, the bargained-for specific acts of forbearance made by the party agreeing to maintain confidentiality often provide reciprocal inducement for the return promises of the other settling party or parties. Traditionally, where all of the settling parties desire the inclusion of a confidentiality provision, it has been treated as part of a corresponding set of mutual promises, not as a separately bargained-for element of the lawsuit with independent economic value.

Although it acknowledged the nature of the claim is the key determination, the Amos court arguably looked beyond the elements of the claim alleged by the plaintiff when it considered the confidentiality clauses in the settlement agreement. The Schleier decision did not discuss assignment of a separate value for the confidentiality provision; instead, it focused on whether a tort-type personal injury served as the proximate cause of the underlying legal action, which led to the recovery of damages. In Amos, however, there was no petition setting forth Amos’ specific allegations. The Tax Court determined the basis of Amos’ claims was largely based upon the evidence contained in the settlement agreement. The court found, based upon the multiple clauses dealing with confidentiality, that Amos’ recovery was not solely related to his personal physical injuries and assigned separate values representing the taxable and nontaxable portions of the damages paid by Dennis Rodman.

D. Just the way you look tonight ...

after the Amos decision

Amos established confidentiality is taxable and has a value separate from the value paid as compensation for personal injury. Following the evolutionary application of §104(a)(2) in Amos, the IRS has successfully bifurcated and allocated settlement proceeds in subsequent cases. Where does that leave us today? Legal practitioners must recognize that the IRS may treat an unexpected portion of the settlement proceeds as an amount paid in exchange for confidentiality and treat that portion as taxable income.

Confidentiality will remain an important bargained-for element of settlement for settling parties. In spite of Amos, some plaintiffs may consider demanding extra compensation for confidentiality provisions, but that “extra” compensation will clearly be subject to taxation. For the plaintiff who seeks to avoid taxable compensation, Amos hints that a determination as to the intent of the payor is necessary only in the event
that the settlement agreement is silent in regard to the nature of the claim.\textsuperscript{54} The decision suggests that the parties could have expressly stated the amount apportioned in payment for confidentiality within the settlement agreement.\textsuperscript{55}

In the event that the underlying factual cause giving rise to plaintiff’s claim would make it difficult to clearly substantiate that the damages were received on account of “personal injuries or sickness”\textsuperscript{56} and one or more of the settling parties demands the inclusion of a confidentiality provision, commentators suggest that the clauses within the settlement agreement relating to confidentiality be minimized so that the confidentiality component does not appear to be the dominant reason for the settlement.\textsuperscript{57} In addition, because “language in a settlement agreement can offer some probative evidence of how a settlement payment should properly be characterized for purposes of § 104(a)(2),”\textsuperscript{58} the parties should include express language in the agreement linking as many aspects of the plaintiff’s personal injury claims to the settlement proceeds as the facts of the case will allow.

Some commentators have suggested the inclusion of express language in the settlement agreement setting forth: (1) “all potential physical injury claims with any sort of a corresponding factual basis” as persuasive evidence that the settlement proceeds are related to the release of plaintiff’s physical injury claims, (2) “a causal connection between the proceeds and those physical injury claims,” (3) a disclaimer or denial that any consideration was paid for confidentiality or (4) the amount of consideration actually paid for confidentiality, and (5) an express statement from the payor that the dominant purpose of the payment was to compensate plaintiff only for his or her personal injury claims.\textsuperscript{59}

Following the Amos decision, as settling parties attempt to avoid the risk of adverse tax consequences, two approaches have emerged for the assignment of value for the confidentiality provision. The first is the proverbial “peppercorn” approach where the parties exchange reciprocal promises and allocate a de minimis amount, e.g., $1 as good and valuable consideration for the confidentiality provision.

The second approach is to specify in the settlement instrument that the entire settlement amount represents payment for personal injuries and/or for future medical care.\textsuperscript{60} Examples of express language following the second approach include:

(1) “While Releasees and Releasor represent that this agreement would not have been consummated absent the foregoing confidentiality covenants, Releasees and Releasor acknowledge that no portion of the settlement amount represents consideration for the mutual promise to maintain strict confidentiality of all the terms of this agreement. Rather, the Releasees and Releasor expressly have agreed that each other’s reciprocal confidentiality covenant is the sole consideration given in exchange for that of the other,”\textsuperscript{61} or

(2) All settlement sums set forth herein represent payment of damages on account of personal injuries and sickness, within the meaning of Section 104(a)(2) of the Internal Revenue Code of 1986, as amended.\textsuperscript{62}

Settling parties will be likely to employ the second type of approach in cases of catastrophic injury or significant damages. In such cases, the inclusion of express language within the settlement instrument should provide plaintiff with supporting evidence of the payor’s intent that every settlement dollar serve as compensation for the immediate and future medical needs of the injured party in the event of an IRS audit.

E. When you’re smiling … structured settlements

Under certain circumstances, settling parties may choose to employ a structured settlement as a means of stretching available coverage dollars. Structured settlements with periodic payment of damages stretched over time are more likely to be used in circumstances where minors or other persons require long-term care. Qualified assignment payments made as part of a structured settlement must meet the requirements of §104(a)(1) or (2) in order to be excluded from taxation.\textsuperscript{63} To keep everyone smiling and to avoid the possible invalidation of the qualified assignment, counsel may wish to carefully allocate a portion of the settlement as consideration for confidentiality and clearly exclude that portion from the funding used for periodic payments.

F. When the moon hits your eye like a big pizza pie ... What happens if there is an adverse determination by the IRS?

Amos makes plain the importance of a well-crafted settlement agreement. When settling parties fail to give full attention to the details of the settlement agreement, like Las Vegas revelers, they may end up longing for a sodium bicarbonate tablet in the aftermath. Can the settlement agreement be repudiated by the plaintiff in the event that the IRS determines that an unanticipated portion of the settlement proceeds are taxable proceeds paid in exchange for

(continued on next page)
G. Fly me to the moon ... Let’s fly let’s fly away

It used to be assumed that confidentiality was one of the elements of reciprocal promises given by the settling plaintiff in exchange for payment of damages by the defendant. In light of recent case law, however, if a party intends to rely on the §104(a)(2) exemption, he or she must plan ahead. To eliminate the feeling a party is taking a gamble by agreeing to incorporate a confidentiality clause, clear language should be incorporated within the settlement instrument clarifying the underlying causes of action and specifying the amounts paid in exchange for the elements of the plaintiff’s recovery. If necessary, the agreement should specify the set dollar amount paid in exchange for the confidentiality provision.

About the Author

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ENDNOTES

1. The nickname of a group of popular entertainers from the 1950s and 1960s, including Frank Sinatra, Dean Martin, Sammy Davis Jr., Peter Lawford, Joey Bishop, Lauren Bacall, Judy Garland, and Shirley MacLaine. "Often, when one of the members was scheduled to give a performance, the rest of the Pack would show up for an impromptu show ... The marquees of the hotels at which they were performing as individuals might read ‘DEAN MARTIN – MAYBE FRANK – MAYBE SAMMY.’" Wikipedia, Rat Pack, at http://en.wikipedia.org/wiki/Rat_Pack (last visited Oct. 30, 2007).


3. Id.


6. Id.

7. Id.

8. Id.

9. Id.


14. 26 U.S.C. § 61(a) contains an expansive definition of gross income as “all income from whatever source derived.” In broad terms, the "origin of the claim" determines whether settlement proceeds qualify for exemption from taxation. For example, punitive damages, lost profits recovered in a business dispute, and post-judgment interest must be included within gross income, while workers’ compensation damages and compensatory damages paid in connection with a personal injury claim are generally exempt. “[T]he taxpayer must treat damages received as a substitute for the loss alleged in the complaint. Thus, damages are taxed in the same manner as the underlying lost item they replace.” 5 MERTENS LAW OF FEDERAL INCOME TAXATION, 24A:2 (Daniel W. Matthews, JD, LLM, ed., Thomson/West, 2/2007). See also Commissioner v. Schleier, 515 U.S. 323, 328, 115 S. Ct. 2159, 132 L. Ed. 2d 294 (1995).


16. Section 104(a) of the Internal Revenue Code contains exemptions for five categories of compensation for personal injuries or sickness. 26 U.S.C. § 104(a)(2) (2000). 26 U.S.C. § 104(a)(2) provides: “... gross income does not include ... (2) the amount of any damages (other than punitive damages) received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal physical injuries or physical sickness.” The IRS interprets ‘damages received’ to include amounts received through a settlement agreement, not simply damage awards received in the prosecution of a legal action. 26 C.F.R. § 1.104-1(c). A little more than one year before Amos filed his tax return, Congress amended §104(a)(2) by adding the “physical” requirement in order to clarify that damages for employment discrimination, for injury to reputation, and punitive damages (with one limited exception) did not qualify for tax-exemption. The statute was amended to read “personal physical injuries or physical sickness.” 26 U.S.C. § 104(a)(2) (2000), Pub. L. No. 104-188, (amended1996). See also 5 MERTENS LAW OF FEDERAL INCOME TAXATION 24A:5 and 24A:6 (Daniel W. Matthews, JD, LLM, ed., Thomson/West, 2/2007), citing H.R. Rep. 105-737, 104th Cong., 2d Sess. (1996).


22. Id. at 234.

23. Id. at 237.

24. Id. at 238-242.

25. Id. at 242.


27. Id. at 325-326.

28. Id. at 327.

29. Id. at 327-328.

30. Id. at 329.


32. Id. at 330.

33. Id. at 332.

34. “In sum, the plain language of § 104(a)(2), the text of the applicable regulation, and our decision in Burke establish two independent requirements that a taxpayer must meet before a recovery may be excluded under § 104(a)(2). First, the taxpayer must demonstrate that the underlying cause of action giving rise to the recovery is ‘based upon tort or tort-type rights’; and second, the taxpayer must show that the damages were received ‘on account of personal injuries or sickness.’” Commissioner v. Schleier, 515 U.S. at 336-337.
36. Id.
37. Amos, T.C. Memo. 2003-329, 2003 WL 22839795 at *4 (emphasis added). The Amos court observed that, subsequent to Schleier, Congress amended the exclusion provided in § 104(a)(2) to include the requirement that “any amounts received must be on account of personal injuries that are physical or sickness that is physical.” The court noted that “emotional distress is not to be treated as a physical injury or physical sickness for purposes of sec. 104(a)(2), except for damages not in excess of the amount paid for medical care attributable to emotional distress.” Amos, 2003 WL 22839795 at *4 n.4.
42. Id. at *6.
43. Id. at *6.
44. Id. at *6.
46. Id. at *7.
47. Id. at *7.
49. See Restatement (Second) of Contracts (1979), § 71, Comments a and d.
50. An act of forbearance qualifies as a bargained-for performance comprising consideration. See Restatement (Second) of Contracts (1979), § 71(3), stating that “a performance may consist of (a) an act other than a promise, (b) a forbearance, or (c) the creation, modification, or destruction of a legal relation,” which may be given by the promise or by some other person. Comment a explains that “[i]n the typical bargain, the consideration and the promise bear a reciprocal relation of motive or inducement: The consideration induces the making of the promise and the promise induces the furnishing of the consideration ... [A] mere pretense of bargain does not suffice, as where there is a false recital of consideration or where the purported consideration is merely nominal. In such cases, there is no consideration and the promise is enforced, if at all, as a promise binding without consideration under §§ 82-94.” Comment d states that “[c]onsideration by way of performance may be a specified act of forbearance, or any one of several specific acts or forbearances of which the offerer is given the choice or such conduct as will produce a specified result.”
51. Restatement (Second) of Contracts (1979), § 80, states: “(1) There is consideration for a set of promises if what is bargained for and given in exchange would have been consideration for each promise in the set if exchanged for that promise alone. (2) The fact that part of what is bargained for would not have been consideration if that part alone had been bargained for does not prevent the whole from being consideration.” Comment a explains: “Since consideration is not required to be adequate in value (see § 79), two or more promises may be binding even though made for the price of one. A single performance or return promise may thus furnish consideration for any number of promises. But if the performance or return promise would not be considered for a single promise, it is not consideration for that promise as part of a set of promises or for the other promises in the set.”
52. See, e.g., Barnes v. Commissioner, 73 T.C.M. (CCH) 1754, 1756 (1997).
53. See Randall O. Sorrels and Neel Choudhury, Plaintiffs’ Attorneys Beware: Little Known Tax Consequences Associated with Confidentiality Provisions, 6 Hous. Bus. & Tax L.J. 257, 277 (2006) (Arguing confidentiality is a separately negotiable term and, therefore, “the plaintiff should consider demanding extra compensation for its inclusion.”) Sorrels and Choudhury argue that a confidentiality provision “brings with it unresolved tax and ethical problems,” a plaintiff should not agree to include a confidentiality provision, demand extra compensation for its inclusion and include express language in the settlement agreement in order to “minimize the confidentiality component of the agreement.”). Id. at 268-69.
The Missouri Supreme Court held disciplinary proceedings, resulting in a three-year term of probation. The Kansas disciplinary office also held a disciplinary hearing on the federal charge. The panel concluded as a matter of law that respondent's conviction constituted a KRPC 8.4(b) (criminal misconduct) violation. The panel found one aggravating factor and several mitigating factors and recommended published censure.

HELD: Respondent filed no exceptions to the final hearing report. The Court adopted the panel's findings of facts and conclusion of the rule violation and further accepted the panel's recommendation as to sanction.

IN RE SCOTT L. RUTHER
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 99,079 – FEBRUARY 1, 2008

FACTS: As noted by the Kansas Supreme Court, this matter is based on some bizarre facts. A relatively minor trust account issue could have been resolved by a diversion but, due to respondent's failure to respond and cooperate, escalated into an indefinite suspension. After a complaint was filed regarding respondent's trust account, respondent met with a disciplinary office financial investigator. An audit revealed that respondent used an interest-bearing savings account as his trust account for client funds. However, he...
also deposited personal funds into the account on two occasions. Although the personal and client funds were commingled, the balance of the account never fell below the amount owed to clients. There is no evidence that any client funds were ever converted to respondent's use.

The deputy disciplinary administrator wrote to respondent twice, suggesting that he apply for the diversion program. Upon successful completion of this program, the complaint is dismissed and remains confidential. However, respondent never contacted her. Subsequently, she sent a letter informing respondent that the review committee found violations of Rule 1.15 and ordered informal admonition. Respondent did not respond to the letter and failed to appear for the scheduled admonition.

The deputy disciplinary administrator next wrote to respondent and finally called respondent, leaving a telephone message, requesting an explanation as to why he failed to appear for the admonition. Respondent failed to contact the disciplinary administrator's office and failed to return the call.

The disciplinary administrator then wrote to the review committee to report respondent's failure to appear for the admonition and to request that a formal hearing be scheduled. The review committee ordered a hearing, and the disciplinary administrator wrote to respondent, suggesting that he retain counsel for the hearing. A formal complaint was filed, but respondent failed to file an answer. Respondent then failed to appear for the hearing, failed to file exceptions to the final hearing report, and failed to appear at oral argument before the Kansas Supreme Court.

HELD: The Court adopted the uncontested findings of fact and conclusions of violations of KRPC 1.15(d) and (e) (safekeeping property) and Supreme Court Rule 211(b) (requiring answer to formal complaint). The Court noted that respondent was administratively suspended in October 2006 for failing to obtain his continuing legal education hours and to pay the related fee. He has apparently not been reinstated since that time. The Court then adopted the panel's recommended sanction of indefinite suspension but deemed it to have commenced on the date of the administrative suspension.

Civil

**DUI, LICENSE SUSPENSION, AND CONSTITUTIONAL CHALLENGE**

**MARTIN V. KANSAS DEPARTMENT OF REVENUE**

**JOHNSON DISTRICT COURT – REVERSED**

**COURT OF APPEALS – AFFIRMED**

**NO. 94,033 – FEBRUARY 1, 2008**

FACTS: Martin was pulled over for malfunctioning rear brake light. He eventually failed field sobriety tests, refused a portable breath test, and later failed a chemical test at the police station. The chemical test result led the Kansas Department of Revenue (KDOR) to suspend his license. His administrative appeal was unsuccessful. However, a district court judge reversed the license suspension, holding that the police officer misinterpreted the law governing brake lights and that this misinterpretation meant he lacked reasonable suspicion to initiate the stop. The Court of Appeals overturned the district court and concluded the KDOR correctly held that the propriety of a traffic stop is irrelevant in a driver's license suspension hearing.

ISSUES: (1) DUI, (2) license suspension, and (3) constitutional challenge

HELD: Court held the exclusion of Fourth Amendment to the U.S. Constitution and section 15 of the Kansas Constitution Bill of Rights issues from the KDOR decision in administrative hearings does not violate procedural due process. Court held raising any potentially controlling constitutional issue at the time of the administr-
strict court to make a sound decision as to valuation on remand, the majority provided detailed guidance that narrows, if not eliminates, discretion upon remand.

**STATUTES:** K.S.A. 17-6405; K.S.A. 20-3018; K.S.A. 56-1a253(a); and K.S.A. 59-6a201 et seq., -6a202, -6a205, -6a207

**ESTATES, LITIGATION EXPENSES, AND STATUTE OF LIMITATIONS**

**COOKE ET AL. V. GILLESPIE ET AL.**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 96,250 – FEBRUARY 1, 2008**

FACTS: The parties have been fighting over estate proceeds for 20 years. In 1995, Gillespie and Cooke were awarded approximately $2.25 million. A little more than $167,000 of Cooke’s settlement was set aside in a trust fund pending resolution of litigation expenses. The expenses were ordered to be split. The district court denied both parties arguments of summary judgment based on statute of limitations. The current disagreement arises out of an interpleader action to determine distribution of funds that had been withheld for the litigation expenses. The Court of Appeals found that under the common fund theory, as well as under quantum meruit or an unjust enrichment analysis, Cooke should be responsible for payment of an equitable share of the litigation expenses. Court of Appeals reversed and remanded for the determination of an equitable division of the expenses of litigation and a distribution of funds held by the clerk.

**ISSUES:** (1) Estates, (2) litigation expenses, and (3) statute of limitations

**HELD:** Court held the appellee’s failure to cross-appeal the district court’s denial of her summary judgment motion based upon the statute of limitations precluded the appellate court from considering the issue. Court also held the appellee’s failure to raise in her brief her statute of limitations argument — raised before, but unaddressed by, the district court — as an alternate basis for affirming judgment in her favor, also precluded the appellate court from considering the issue.

**CONCURRENCE:** Justices Johnson and Beier concurred.

**STATUTES:** K.S.A. 20-3018(c); and K.S.A. 60-518, -2103(h), -2106(c)

**HABEAS CORPUS**

**MONCLA V. KANSAS**

**SEDGWICK DISTRICT COURT**

**REVERSED AND REMANDED**

**COURT OF APPEALS – REVERSED**

**NO. 94,811 – FEBRUARY 1, 2008**

FACTS: Moncla convicted of first degree murder in 1997. Litigation history includes a 1998 motion for new trial based on newly discovered evidence, the Supreme Court’s reversal and remand for an evidentiary hearing, and the district court’s denial of relief on that motion which the Supreme Court affirmed. Moncla filed 60-1507 motion in 2003 claiming: (1) prosecutorial misconduct in repeatedly calling Moncla a liar; (2) ineffective assistance of trial counsel for failing to object to prosecutor’s statements regarding polygraph testing, failing to request transcript of sidebar conference, and failing to request DNA testing of hairs and items found at crime scene; and (3) more newly discovered evidence. In unpublished opinion, Court of Appeals affirmed with a dissent regarding the denial of an evidentiary hearing on the newly discovered evidence claim. Supreme Court granted Moncla’s petition for review.

**ISSUES:** (1) Prosecutorial misconduct, (2) ineffective assistance of counsel, (3) and newly discovered evidence

**HELD:** Prosecutor’s remarks regarding Moncla were improper, but under facts, no reasonable probability that outcome of trial could have been more favorable if remarks had not been made. Moncla failed to demonstrate that trial counsel’s failure to object and preserve this issue for appeal constituted exceptional circumstances excusing Moncla’s failure to raise claim for first time eight years after trial.

Moncla’s specific allegations of ineffective assistance are considered and rejected under facts in case.

District court abused its discretion in denying a hearing on Moncla’s newly discovered evidence claims. The motion is not a rehashing of his 1998 motion. New witnesses who might prove Moncla’s innocence have not been evaluated by district court, and Moncla alleges facts never heard by jury. Reversed and remanded for evidentiary hearing.

**STATUTE:** K.S.A. 60-455, -1507, -1507(b)

**HABEAS CORPUS**

**TOLEN V. STATE**

**SALINE DISTRICT COURT – AFFIRMED**

**NO. 95,106 – FEBRUARY 1, 2008**

FACTS: Tolen’s conviction for rape and aggravated sodomy was final in March 2002. Tolen filed K.S.A. 60-1507 motion in January 2005, which the district court summarily denied as not filed within the one-year limitation period in K.S.A. 60-1507(f). Tolen appealed, claiming K.S.A. 60-1507(f) is unconstitutional because it did not include grace period for claims pre-existing the July 2003 enactment of the limitation period. Appeal transferred to Supreme Court.

**ISSUE:** Constitutionality of K.S.A. 60-1507(f)

**HELD:** Court of Appeals correctly applied grace period in Hayes v. State, 34 Kan. App. 2d (2005), and Tolen lacks standing to raise this issue because he is attempting to argue a constitutional infirmity that cannot help him even if it were to merit a cure. Also, adoption of the one-year time limit for filing motions under K.S.A. 60-1507 put all persons on constructive notice of the new provision, and federal court decisions since June 1998 put all on constructive notice that a statutory time limit on post-conviction proceedings was construed as including a one-year grace period to include pre-existing claims.

**STATUTES:** 28 U.S.C. § 2244(d)(1) (2000); K.S.A. 2005 Supp. 21-4720(c); and K.S.A. 60-1507, -1507(f)
before the prison authorities take action that abridges an inmate's constitutionally protected liberty interest. Court held that the "stigma plus" test applies to determine if petitioner has a liberty interest that requires due process protection and that characterizing a prisoner as a sex offender constitutes a form of stigma contemplated by the "stigma plus" test. Court concluded that under the facts presented, the petitioner alleged facts that, if proven, satisfy the "plus" element of the "stigma plus" test, in that petitioner alleges the sex-offender treatment program places significant burdens on him, which are not imposed on prisoners who are not classified as sex offenders.

STATUTE: K.S.A. 60-1501, -1503

Criminal

STATE V. BLACKMON
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS – VACATED AND REMANDED
NO. 95,696 – FEBRUARY 1, 2008

FACTS: Jury found Blackmon guilty of unintentional second-degree murder. Finding the facts did not encompass the manifest indifference to the value of human life required by the second-degree murder statute, district court granted Blackmon’s motion for departure sentence and imposed a downward durational departure sentence equivalent to the presumptive sentence for involuntary manslaughter. State appealed, claiming in part the record did not support the district court’s departure sentence. Court of Appeals reversed in unpublished opinion. Blackmon’s petition for review granted.

ISSUES: (1) Order in limine, (2) opinion on credibility (3) Doyle and prosecutorial misconduct, (4) sufficiency of evidence of theft, and (5) BIDS reimbursement

HELD: Drayton did not object to detective’s testimony, thus issue not preserved for appeal. Also, no violation of order or substantial prejudice under facts of case.

Detective’s opinion on Drayton’s credibility or Drayton’s guilt or innocence was inadmissible as a matter of law, but error was harmless under facts of this case.


Jury could have rationally inferred that Drayton completed theft before victim died or could have found the murder and theft were part of a continuous chain of events.

Under facts of case, district court erred in ordering Drayton to fully reimburse BIDS when court essentially found Drayton would not have the financial ability to pay the amount ordered. Assessment of attorney fees is reversed.


STATE V. FARMER
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 91,466 – FEBRUARY 1, 2008

FACTS: Farmer convicted of first-degree felony murder, criminal discharge of a firearm at an occupied vehicle, aggravated burglary, aggravated battery, and aggravated assault. On appeal he claimed: (1) insufficient evidence supported his conviction of criminal discharge of a firearm at an occupied vehicle, thus that conviction and his related felony murder conviction cannot stand; (2) those two convictions are multiplicitous; (3) his confession was involuntary because police appealed to his religious beliefs; and (4) district court improperly determined criminal history score without having it proven to a jury.

HELD: No merit to state’s argument that Farmer cannot challenge sufficiency of the evidence for first time on appeal. Rejects Farmer’s argument that act of discharging a firearm at a person who happens to be in a vehicle is aggravated battery or aggravated assault, and that state pursued this as drive-by shooting to avoid application of merger rule. Evidence in this case supported Farmer’s felony conviction of criminal discharge of a firearm at an occupied vehicle.

Applying Schoonover multiplicity analysis, Farmer’s convictions of felony murder and criminal discharge of a firearm at an occupied vehicle are separate offenses for which cumulative punishments may be imposed.

Under totality of circumstances, trial court correctly determined that Farmer’s confession was voluntary. State v. Cobb, 30 Kan. App. 2d 544 (2002), and cases in other jurisdictions referencing religion, are compared.

Criminal history claim defeated by State v. Ivory, 273 Kan. 44 (2002), and subsequent Kansas and U.S. Supreme Court cases.

CONCURRENCE AND DISSENT (Beier, J., joined by Johnson, J.): Agrees with majority on Farmer’s multiplicity, confession, and sentencing claims. Disagrees with majority on Farmer’s sufficiency of the evidence claim. Statute criminalizing the discharge of a
firearm at an occupied vehicle was not intended to capture and cannot capture conduct punishable as a felony because it already fits the definition of aggravated assault or aggravated battery. No evidence that Farmer shot at the vehicle the victim happened to be sitting in rather than at the victim himself. Prosecutor could have pursued first-degree premeditated murder or first-degree felony murder based on aggravated battery. Because felony murder charge was based on the criminal discharge of a firearm into an occupied vehicle, both convictions should have been reversed.

STATUTES: K.S.A. 2006 Supp. 21-3436(a)(15), -3436(b)(4), -3436(b)(6), -4219(b), 22-3602; and K.S.A. 21-3401(b), 22-3601(b)(1)

STATE V. HAWKINS
SEDGWICK DISTRICT COURT
AFFIRMED IN PART, AND REVERSED IN PART
COURT OF APPEALS – AFFIRMED
NO. 95,310 – FEBRUARY 8, 2008

FACTS: Hawkins convicted of driving under the influence (DUI), failing to stop at a stop sign, failing to dim headlights, and making an illegal turn. Traffic offenses were added to the DUI charge in an amended information filed after mistrial. Court of Appeals affirmed the convictions and district court order to pay Board of Indigents’ Defense Services (BIDS) application fee, but reversed and vacated district court’s order for reimbursement of BIDS attorney fees. 37 Kan. App. 2d 195 (2007).

ISSUES: (1) Evidence of breathalyzer test refusal, (2) compulsory joinder, and (3) BIDS application fee

HELD: Court of Appeals correctly found that Hawkins failed to preserve issue of error in allowing state to use Hawkins’ refusal to submit to a breathalyzer against him at trial. No showing of exceptional circumstances for consideration of this issue for first time on appeal.

If state amends an information prior to retrial following a hung jury mistrial and the defendant proceeds to trial on the amended information without objection, the defendant has waived any claim that the amendment violated double jeopardy or the compulsory joinder provisions of K.S.A. 21-3108(2).

Court of Appeals correctly affirmed order for payment of application fee, and correctly reversed and vacated BIDS attorney fees order and remanded for findings in compliance with K.S.A. 2006 Supp. 22-4513.

STATUTES: K.S.A. 2006 Supp. 8-1001(i), 22-4504(a), -4504(b), 4513, -4153(a), -4513(b), -4529, 31-3836(c); and K.S.A. 21-3108(2), -3108(2)(a), -3108(2)(c)(ii)

STATE V. HOLT
WABAUNSEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 96,744 – FEBRUARY 1, 2008

FACTS: Holt convicted of first-degree premeditated murder and conspiracy to commit murder. On appeal he claimed trial court erred in: (1) polling jury by asking if this was the verdict of the jury, (2) refusing Holt’s request to add “mere presence or association” language to instruction on aiding and abetting where jury had doubts whether Holt or another (Casey) was the shooter, (3) instructing jury on aiding and abetting because insufficient evidence supported that instruction, (4) instructing jury on aiding and abetting even though state had prosecuted on inconsistent theory that Holt was the shooter, (5) ordering Holt to reimburse Board of Indigents’ Defense Services (BIDS) for attorney fees, and (6) using Holt’s prior convictions to calculate criminal history score.

ISSUES: (1) Polling jury, (2) “mere presence or association” in aiding and abetting instruction, (3) sufficiency of evidence for aiding and abetting instruction, (4) aiding and abetting instruction as inconsistent with state’s theory, (5) BIDS reimbursement, and (6) criminal history score

HELD: No Kansas cases on point. Under facts, consideration of polling issue for first time on appeal was not warranted under “ends of justice” exception because Holt failed to show the purported error actually harmed him. American Bar Association standard for polling is discussed.

Under facts, trial court correctly refused to add “mere presence or association” language to pattern instruction on aiding and abetting because PIK Crim. 3d 54.04 clearly informs jury that intentional acts by a defendant are necessary to sustain a conviction for aiding and abetting.

Under totality of evidence, jury could have reasonably concluded that Holt aided and abetted Casey in the commission of a crime. State’s theory that Holt was the person who killed the victim did not prevent the court from giving an aiding and abetting instruction.

Trial court failed to make particularized findings on the record regarding Holt’s financial resources and nature of the burden of the payment of fees would have imposed. Remanded to district court for compliance with K.S.A. 2006 Supp. 22-4513.

Holt’s claim regarding his criminal history score is defeated by State v. Ivory, 273 Kan. 44 (2002), and subsequent Kansas and U.S. Supreme Court cases.


STATE V. HUNT
CRAWFORD DISTRICT COURT – AFFIRMED
NO. 96,883 – FEBRUARY 8, 2008

FACTS: Hunt convicted in Crawford County District Court for first-degree premeditated murder. Victim resided in Bourbon County, and her body was discovered in Crawford County.

On appeal Hunt claimed: (1) venue in Crawford County was not proper; (2) trial court erred in admitting opinion testimony as habit evidence; (3) prosecutorial misconduct in rebuttal portion of closing argument; (4) trial court should have given limiting instruction regarding testimony of Hunt’s discordant relationship with victim; (5) prosecutorial misconduct in asking question that violated Doyle v. Ohio, 426 U.S. 610 (1976); and (6) cumulative error denied him a fair trial.

ISSUES: (1) Venue, (2) evidence of habit, (3) prosecutorial misconduct, (4) limiting instruction on prior crime evidence, (5) prosecutorial misconduct for Doyle violation, and (6) cumulative error

HELD: Under facts, sufficient evidence to trigger statutory presumption that victim died in Crawford County. Prosecutor’s closing argument remarks that killing occurred in Bourbon County were ill-advised and counterintuitive, but were not evidence rebutting the statutory presumption. Prosecution in Crawford County did not violate Hunt’s constitutional rights. Jury entitled to decide whether statutory presumption of place of death had been rebutted by the evidence, thus error to modify PIK instruction to state that venue was established as matter of law. Error was harmless under facts in case.

No abuse of discretion by trial court’s admission of evidence of habit. This testimony was not an opinion on the defendant’s guilt.

Defense counsel elicited the allegedly inadmissible testimony on cross examination and commented on it in closing argument; prosecutor’s rebuttal was within bounds of fair comment.

Evidence that Hunt had pushed victim in past was not overly prejudicial in light of evidence from other witnesses.

No contemporaneous objection to Doyle violation, but under facts the claim is reviewed as prosecutorial misconduct as raised in the appeal and no reversible error is found.

Closer case than most, with two errors in instructing the jury, one instance of prosecutorial misconduct, and evidence of guilt not direct and overwhelming. Under totality of circumstances, however, Hunt received a fair trial.
STATE V. MARTIN
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,819 – FEBRUARY 1, 2008

FACTS: As she drove a car, Martin had her 16-year-old son fire four shots from a handgun at an occupied house. No one was injured inside the house. Martin pled guilty to criminal discharge of a firearm at an occupied dwelling and contributing to a child's misconduct. Because of the firearm conviction, there was a presumptive imprisonment for the charges. The district court granted an upward dispositional departure and ordered Martin to serve a prison sentence. The Court of Appeals vacated the sentence and ordered resentencing.

ISSUES: (1) Departure factors, (2) fiduciary relationship, and (3) callous and cowardly disregard for human life

HELD: Court held that a defendant mother violated the special fiduciary relationship and unique position of trust between herself and her 16-year-old co-defendant son when she handed him a loaded gun, she urged him to shoot at an occupied house as she drove by, and he complied. Court held the violation of a mother's special fiduciary relationship and unique position of trust with her son is a valid departure factor. Court also held the violation of a defendant mother's special fiduciary relationship and unique position of trust with her co-defendant son is a substantial and compelling reason to depart from the presumptive sentence.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3612(a)(5), -4219(b), -4716(a), (c), (d); and K.S.A. 60-455

STATE V. PATTON
SHAWNEE DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 98,470 – FEBRUARY 1, 2008

FACTS: Florida attempted to extradite Patton from Kansas on outstanding Florida arrest warrant. Patton challenged extradition and filed motion to determine competency. District court denied that motion and found the statutory and procedural requirements for extradition had been satisfied. Patton appealed, arguing a fugitive in an extradition proceeding must be sufficiently competent to understand the nature of the proceeding and to consult with counsel regarding the proceeding. Court of Appeals granted state's motion for summary disposition. Supreme Court granted Patton's petition for review.

ISSUE: Competency in extradition hearing

HELD: Case of first impression in Kansas. General principles regarding extradition are discussed. Focus of Patton's appeal is his competency during the extradition procedure itself, and not his competency at time of the crime or his competency to stand trial. Brewer v. Turner, 165 Kan. 330 (1948), is distinguished. Cases in other jurisdictions are examined. In order to give meaning to and allow the full exercise of an alleged fugitive's statutory right to counsel and right to raise defenses in an extradition proceeding under K.S.A. 22-2701 et seq., an alleged fugitive may challenge whether he or she possesses a present ability to consult with an attorney with a reasonable degree of rational understanding on the issues of whether he or she (1) is the person named in the request for extradition and (2) is a fugitive.


STATE V. PAUL
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 95,105 – FEBRUARY 1, 2008

FACTS: Paul was convicted in 2005 of one count of sale of methamphetamine and one count of possession of drug paraphernalia. The trial court determined that his sale of methamphetamine conviction was a severity level 1 drug felony based upon two similar convictions finalized in 1999. Before the Court of Appeals, Paul argued that his two convictions occurred on the same day and may only be counted as one prior conviction. The Court of Appeals affirmed.

ISSUE: Habitual offender

HELD: Court held the plain language of K.S.A. 2006 Supp. 65-4161(c) governs the disposition of this appeal. For offenses committed on or after July 1, 1993 — and thus subject to the Kansas Sentencing Guidelines Act (KSGA) and not the Habitual Criminal Act — the definition of “prior conviction” included in the KSGA in the context of criminal history also applies to determination of an offense's criminal severity level unless the Legislature specifically indicates a contrary intent. Court also stated that the plain language of K.S.A. 2006 Supp. 65-4161(c) provides that if at the time a person violates that section he or she has two or more prior convictions under the Kansas Controlled Substances Act, K.S.A. 65-4101 et seq., that person shall be “guilty of a drug severity level 1 felony.” The statute does not provide any other requirement with regard to the timing of the previous convictions in relation to one another.

STATUTES: K.S.A. 1997 Supp. 8-262(a)(1)(C); K.S.A. 21-4501, -4504(2), -4705(a), (b), -4710(a), (d)(11); K.S.A. 65-4101 et seq., -4160; and K.S.A. 2006 Supp. 65-4161(a)-(c)

STATE V. RUIZ-REYES
RENO DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 95,056 – FEBRUARY 1, 2008

FACTS: Ruiz-Reyes convicted of possession of cocaine with intent to distribute under K.S.A. 65-4161(a). Sentencing court enhanced Ruiz-Reyes' sentence to a severity level 2 drug felony under K.S.A. 65-4161(b) based upon a prior drug conviction that did not become final until after Ruiz-Reyes committed the conduct underlying this appeal. Court of Appeals reversed and remanded, 37 Kan. App. 2d 75 (2007). Supreme Court granted state's petition for review.

ISSUE: Enhancement of sentence pursuant to K.S.A. 65-4161

HELD: K.S.A. 65-4161, a self-contained habitual criminal statute, sets forth conditions under which the criminal severity level of a conviction obtained under that section will be enhanced at sentencing. The plain language of K.S.A. 65-4161(b) contemplates a violation committed by an individual who has at least one prior conviction at the time the individual violates the law. Because the defendant in this case did not have a prior drug conviction at the time he violated K.S.A. 65-4161(a), his subsequent drug conviction could not enhance the criminal severity level of his current conviction under the provisions of K.S.A. 65-4161(b). As in State v. Paul, decided this date, interpretations of Habitual Criminal Act have no place in the interpretation of the Kansas Sentencing Guidelines Act or the provisions of K.S.A. 65-4161.

STATUTES: K.S.A. 2006 Supp. 65-4161 sections (a), (b), and (c); and K.S.A. 21-4504, -4504(e)(3), -4701 et seq., -4710(a), 65-4161, -4161(a), -4161(b)
STATE V. VENTRIS
MONTGOMERY DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 94,002 – FEBRUARY 1, 2008

FACTS: Ventris was convicted of aggravated robbery and aggravated burglary in the murder of Ernest Hicks. At Ventris’ trial, the district court admitted impeachment testimony from a jailhouse informant who had been surreptitiously planted in his jail cell by the state. The district court also admitted testimony from Ventris’ girlfriend, Theel, that he had forcibly strip-searched her approximately one month before the murder. The district court relied on the concept of res gestae.

ISSUES: (1) Informant testimony and (2) res gestae

HELD: Court held that once a criminal prosecution has commenced, a defendant’s statements made to an undercover informant surreptitiously acting as an agent for the state are not admissible at trial for any reason, including the impeachment of the defendant’s testimony. Court stated that without a knowing and voluntary waiver of the right to counsel, the admission of a defendant’s uncounseled statements to an undercover informant who is acting as a state agent violates the defendant’s Sixth Amendment rights. Court put an end to the practice of admitting evidence of other crimes or civil wrongs independently of K.S.A. 60-455. Because of the reversal on the first issue, Court declined to make a determination that the error was harmless.

DISSENT: Chief Justice McFarland dissented from the decision on the issue of statements made to an undercover informant surreptitiously acting as an agent for the state and that the majority’s decision runs contrary to the weight of authority of other jurisdictions.

STATUTE: K.S.A. 60-455

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

Motions for Additional Time to File Briefs

Supreme Court Rule 6.01 (2007 Kan. Ct. R. Annot. 36) sets out the standard time schedule for filing various types of briefs. In a perfect world, these timelines would be met, but in reality attorneys often need to file an extension of time in which to prepare a brief. Such an extension may be sought pursuant to Rule 5.01 (2007 Kan. Ct. R. Annot. 32), which governs the filing of general appellate motions. Typically, an extension does not exceed the original filing time, for example, 30 days.

At the present time, the Appellate Clerk’s Office has authority to grant up to three extensions of time unless the motion for time is opposed or the case has been expedited by the appellate court. See Rule 5.03 (2007 Kan. Ct. R. Annot. 33). If the motion is opposed or the case is expedited, the motion will be sent to the respective court for ruling. Any request for extension of time must state “grounds reasonably indicating the necessity therefor,” Rule 5.02 (2007 Kan. Ct. R. Annot. 33). Compelling reasons would need to be stated to justify an extension in an expedited case. In that instance, one might expect to be granted less than 30 days and certainly should plan to file the brief within the extended time.

Motions for Extension of Time are held for response for five business days from date of service, plus three mail days. At the end of that time period, the Clerk’s Office or the respective appellate court will enter an order. Note that extensions of time up to 20 days may be granted without waiting for a response. See Rule 5.01.

For questions about these practices or appellate court rules, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
FACTS: Price and Whitehead appealed a decision of Social and Rehabilitation Services (SRS) against them that substantiated allegations of physical abuse of a child. Price and Whitehead filed a petition for review but served the petition upon the legal assistant to an SRS attorney, not Gary Daniels, the secretary of SRS. The district court dismissed the petition for lack of jurisdiction because the plaintiffs failed to serve the agency head.

ISSUES: (1) Administrative law, (2) service, and (3) agency head

HELD: Court held that K.S.A. 77-615(a) requires that the petition for judicial review of a state agency decision be served on the agency head, another person designated by the agency for service, or “the agency officer who signs an order.” When the agency’s proceeding has been held before a hearing officer from the Office of Administrative Hearings (OAH) and that officer has issued the final agency order, service must be made either upon the agency head or another person designated by the agency for service. A hearing officer from the OAH is not part of the agency and thus cannot be the “agency officer” who signs an order. Court held the district court properly dismissed the petition for judicial review for lack of jurisdiction.

STATUTES: K.S.A. 75-5301(a), -37,121; and K.S.A. 77-526(c), -527(j), -613(e), -615(a)

CHILD SUPPORT AND TRAVEL EXPENSES IN RE PARENTAGE OF BROWN RAWLINS DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 98,125 – FEBRUARY 15, 2008

FACTS: Brown acknowledged paternity of his son, Joshua, in 1997, and was ordered to pay $162 per month in child support. Brown lives in New Jersey and works as a teacher and coach for a total income of $56,207. Joshua’s mother, Finley, lives in Colby and earns $10,712 per year in working two part-time jobs. In 2005, Finley moved to modify child support. Under the guidelines, Brown’s child support would be more than $500 per month. Brown requested a reduction of $250 to $300 per month for travel expenses he incurred when he traveled to see Joshua in Kansas. In mediation, the parties agreed to a minimum of four visits by Brown per year. At a hearing, the district court determined that Brown would incur $2,316 during four trips per year ($579 per trip). Brown’s child support obligation was determined to be $524 per month, based on a monthly support obligation of $537 less an $18 credit for long-distance parenting time costs, plus a $5 child support enforcement fee.

ISSUES: (1) Child support and (2) travel expenses

HELD: Court held that the district court was misguided by the notion that the cost of long-distance travel must be adjusted based upon the ration that the travel expenses bear to Brown’s gross income. Court stated there is no support for such a requirement in the guidelines. Court held the district court applied the wrong legal standard and abused its discretion. Court reversed for new determination of the travel expense adjustment.

STATUTE: None


FACTS: The Kansas Universal Service Fund (KUSF) was established to provide a subsidy for local exchange telephone carriers in order to replace revenue lost from bringing intrastate and interstate rates into parity pursuant to state and federal law. The district court reversed a Kansas Corporation Commission (KCC) order and awarded interest to a group of rural telecommunication companies, which received a restoration of support payments they had lost from the KUSF for access line adjustments under K.S.A. 66-2008(e). The restoration of these payments was ordered by the KCC after a mandate from this court that affirmed the district court and overturned the basis utilized by the KCC in calculating the appropriate adjustments to KUSF support for 2003 through 2005 because the KCC failed to consider the required statutory factors for each such adjustment.

ISSUES: (1) KCC and (2) KUSF

HELD: Court held that any entitlement to post-judgment interest attached automatically and was not waived by Bluestem’s failure to previously plead or otherwise request such interest. Under the facts of this case, court held where there was no final, definite adjudication of the rights of the parties by reason of a prior district court action or this court’s review thereof, but rather any finality and definiteness was achieved only upon a subsequent agency action on remand, post-judgment interest under K.S.A. 16-204 was not triggered by the prior judgment of the district court or the mandate of the appellate court. Court reversed the award of post-judgment interest.

STATUTES: K.S.A. 16-204; K.S.A. 66-2008(e); and K.S.A. 77-621(c)

DIVORCE, SHARED RESIDENCY, AND CHILD SUPPORT IN RE MARRIAGE OF ATCHISON PHILLIPS DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 97,901 – FEBRUARY 8, 2008

FACTS: Brenda and Tracy were divorced on April 14, 2005. There were three minor children of the marriage. In a separate order filed on April 21, 2005, the district court approved a shared residency arrangement, finding that Brenda and Tracy regularly shared the residency of the children on an equal or nearly equal basis. The district court ordered Brenda and Tracy to share the direct expenses set forth in the parenting plan on an equal basis. At the conclusion of a 2006 hearing to increase child support, the district court terminated the shared residency order and granted primary residency of the children to Brenda. The district court found that a “degree of entity exists between the parties that make[s] it difficult, if not impossible, for them to effectively communicate in a manner that might facilitate an order of shared custody.” The district court specifically found that there had been no mutual sharing of direct expenses on a monthly basis since March 2006, and that Brenda had been “bankrolling the direct expenses.” Although the district court found that Tracy had not been accounting for his share of the expenses, the
district court acknowledged that Tracy “spends significant periods of time parenting his minor children.” Accordingly, the district court ordered Tracy to pay child support pursuant to the guidelines but granted Tracy a 15 percent parenting time adjustment, resulting in a monthly child support obligation of $905.

ISSUES: (1) Divorce, (2) shared residency, and (3) child support

HELD: Court held there was a material change in circumstances to justify modification of child support, based upon Tracy’s failure to account for expense and based upon the tension and stress between the parties caused by the shared residency order. Court stated that this case provided a good example of why the revised guidelines caution parties against using a shared expense formula. Such a parenting plan will only succeed with the most highly motivated parents, and it did not work here for the Atchisons. Court held the district court’s findings that Tracy failed to comply with the shared expense order and that he failed to account for his share of the direct expenses were supported by substantial competent evidence, and the district court did not erroneously apply the guidelines regarding shared residency. The district court did not err in terminating the shared residency order. However, court held the district court failed to properly exercise its discretion in determining the appropriate parenting time adjustment to award to Tracy. Court remanded to allow the district court to reconsider the parenting time adjustment and to exercise its discretion on the issue.

STATUTE: K.S.A. 2006 Supp. 60-1610(a)(1)

HABEAS CORPUS
CRANFORD V. STATE
JOHNSON DISTRICT COURT – AFFIRMED
NO. 96,625 – FEBRUARY 15, 2008

FACTS: Cranford pled no contest to attempted aggravated indecent liberties with a child. He filed a 60-1507 motion alleging ineffective assistance of counsel, but pursued no appeal from the denial of relief. More than two years later, he filed a second 60-1507 motion based upon newly discovered evidence that victim had recanted her testimony. District court granted state’s motion to dismiss, finding no manifest injustice or exceptional circumstances permitted the out-of-time and successive motion. Cranford appealed, claiming district court erred in denying the motion without a hearing.

ISSUE: Summary denial of post-conviction motion as untimely and successive

HELD: Substantial competent evidence supports district court’s finding that Cranford failed to overcome hurdles of motion being untimely and successive. Cranford pled no contest to attempted aggravated indecent liberties with a child in order to receive benefits of plea bargain and thereby admitted to well-pled facts of the information for purposes of the case. He also admitted at sentencing that he molested the victim. District court did not err in determining it would not be manifestly unjust to dismiss Cranford’s 60-1507 motion as time barred, despite claim that victim had recanted her testimony.

KANSAS TORT CLAIMS ACT, WRONGFUL DEATH, NEGLIGENCE, OUTRAGE, AND 42 U.S.C. § 1983
POTTS ET AL. V. BOARD OF COUNTY COMMISSIONERS OF LEAVENWORTH COUNTY ET AL.
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 97,828 – FEBRUARY 22, 2008

FACTS: Alene Wilson fell in her home and was injured, but refused to be transported to a hospital by Leavenworth County EMTs. Wilson eventually was transported to the hospital, but died at home some two weeks later as a result of an infection acquired at the hospital. The heirs at law and administrator of Wilson’s estate alleged the defendants were negligent, indirectly causing Wilson’s death, when they refused to transport Wilson to the hospital against her wishes and in violation of a durable power of attorney held by Potts. The plaintiffs also asserted the tort of outrage and claims under 42 U.S.C. § 1983. The district court granted summary judgment to defendants finding the Kansas Tort Claims Act shielded the defendants from liability for the claims of negligence and wrongful death and that the uncontroverted facts did not support a claim of outrage or § 1983.

ISSUES: (1) Kansas Tort Claims Act, (2) wrongful death, (3) negligence, (4) outrage, and (5) 42 U.S.C. § 1983

HELD: Court held that K.S.A. 2007 Supp. 75-6104(d) provided immunity to county and county EMTs who allegedly failed to comply with county protocols, as the EMTs did not owe a duty of care to the patient independent of county protocols in place to protect the patient’s health or safety. Court stated that no special duty was owed by EMTs and county to patient where evidence was undisputed that the defendants from liability for the claims of negligence and wrongful death under the Kansas Tort Claims Act.

TERMINATION OF PARENTAL RIGHTS
IN RE A.A.
BARTON DISTRICT COURT – AFFIRMED
NO. 98,835 – FEBRUARY 8, 2008

FACTS: After A.A., a 10-year-old girl, was allegedly raped by her 15-year-old brother, H.A., she was declared a child in need of care and taken into protective custody. Eventually, the parental rights of Harold and Vickie A. to A.A. were terminated. The parents claimed the Revised Kansas Code for Care of Children unconstitutionally denied equal treatment based on race when compared to the Indian Child Welfare Act, there is insufficient evidence to support the district court’s decision, and the district court abused its discretion either by denying a trial continuance or by failing to interview the then 11-year-old child.

ISSUE: Termination of parental rights
HELD: Court rejected the parents equal protection claim. Court stated that while the Indian Child Welfare Act precludes the termination of parental rights unless the parents' unfitness is proved beyond a reasonable doubt and the Kansas statutes require proof of unfitness “only” by clear and convincing evidence for non-Indians, these laws differ for Indian tribes not because of their race but because of their unique historical claims to sovereignty and the decisions Congress has made because of that history. Court also held there was sufficient evidence to support the termination and that the parents failed to address or even acknowledge the sexual abuse allegations combined with other evidence — including their failure to make reasonable progress in creating a suitable home for their child — which provided ample support for the decision when giving deference to the lower court. Last, the court held a trial judge is vested with wide discretion in denying a trial continuance or by failing to interview the then 11-year-old child, and the judge was well within that discretion here.

STATUTE: K.S.A. 2006 Supp. 38-2262, -2269(a)

TERMINATION OF PARENTAL RIGHTS AND INDIAN CHILD WELFARE

ACT IN RE M.B. AND A.B.

JOHNSON DISTRICT COURT – AFFIRMED


FACTS: In 2004, the mother of M.B. and A.B. stipulated to child need in need of care proceedings. Based on evidence that father was incarcerated, court adjudicated both children to be in need of care. After mother failed to work toward reintegration, the state initiated termination proceedings. District court terminated parental rights after finding neglect, failure to comply with reintegration plan, and father was incarcerated and had no involvement with children. Father appealed, mother did not. At no time during the proceedings was there any mention to the district court of the children’s Native American heritage. Four months after appealing, father claimed the children were Indian children. After Indian status was confirmed, this court dismissed appeal and remanded for proceedings pursuant to the Indian Child Welfare Act (ICWA). The Cherokee Nation became involved in the proceedings thereafter. The district court determined that the ICWA only applied prospectively from the time the court received notice of the children's Indian heritage. The district court found that the Cherokee Nation had the opportunity to participate in all court proceedings since that time and that any possible error had been remedied with the intervention of the tribe. The district court further noted that setting aside the prior rulings would not serve the purpose and intent of the ICWA. The district court denied both Mother's and Father's motions to invalidate the proceedings. Father appealed.

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

HELD: Court held there was no question the ICWA applied to this case and that the district court needed to comply with its provisions. However, court held that the district court took appropriate remedial action to comply with the requirements of the ICWA once it determined that the act applied. Court found that any possible error in giving notice to the Cherokee Nation was remedied by the court’s subsequent action and the intervention of the tribe and that the father did not argue that the district court failed to comply with any of the substantive provisions of the ICWA. Court held the district court did not err in denying the father’s motion to invalidate the proceedings. Court stated that the district court did not expressly rely on the existing Indian family doctrine in reaching its decision and the court declined to discuss the doctrine’s application to the case. Court held there was sufficient evidence to establish that the father was an unfit parent and that the condition was unlikely to change in the foreseeable future from the children’s point of view and the district court did not err in terminating the father's parental rights.


Criminal

STATE V. ANDREWS

JOHNSON DISTRICT COURT – AFFIRMED

NO. 96,627 – FEBRUARY 15, 2008

FACTS: Andrews convicted of felony theft and criminal possession of a firearm. He appealed from district court's denial of motion to suppress evidence obtained and derived from recordings of Andrews’ numerous phone conversations to his girlfriend while Andrews was in jail. District court found Andrews consented to his jail phone calls being recorded, and there was no reasonable expectation of privacy.

ISSUE: Recording inmate phone calls

HELD: Under facts of case, information received from recording Andrews’ telephone conversations from a county jail did not violate Kansas wiretapping statutes. Andrews clearly consented to the monitoring of his telephone calls because of the meaningful notice given by jail’s orientation handbook, numerous notices stating consent was given when a call was made, and warnings given during the telephone calls. Andrews’ phone conversations were lawfully utilized to obtain a search warrant and his motion to suppress was properly denied.


STATE V. COBURN

WYANDOTTE DISTRICT COURT

REVERSED AND REMANDED

NO. 96,210 – FEBRUARY 1, 2008

FACTS: Coburn convicted of six counts of aggravated indecent liberties with a child and one count of sexual exploitation of a child. On appeal, he claimed the trial court erred in denning Coburn’s motion to sever the sexual exploitation charge from the other six counts. Citing Ashcroft v. Free Speech Coalition, 535 U.S. 234 (2002), Coburn also claimed K.S.A. 1998 Supp. 21-3516 is unconstitutional because it criminalizes the possession of simulated nude exhibitions of a person under the age of 18. Finally, Coburn claimed insufficient evidence supports his convictions.

ISSUES: (1) Motion to sever and joinder of charges, (2) constitutionality of K.S.A. 1998 Supp. 21-3516(b)(1), and (3) sufficiency of evidence

HELD: Under facts of case, none of the conditions precedent under K.S.A. 22-3202(1) were met to allow joinder of the sexual exploitation of a child charge with charges of aggravated indecent liberties with a child. Also under facts of case, misjoinder of the charges did not constitute harmless error because highly inflammatory evidence used to prove sexual exploitation charge was sufficiently prejudicial to deny Coburn a fair trial. Even if one or more conditions precedent under K.S.A. 22-3202(1) could be established to allow joinder of the charges in this case, trial court was under a continuing duty to grant motion for severance to prevent prejudice and manifest injustice. Coburn's convictions are reversed and case is remanded for new trial.


Sufficient evidence supports Coburn's convictions.

CONCURRENCE AND DISSENT (Buser, J.): Concurs that K.S.A. 1998 Supp. 21-3516 is not unconstitutional, and that suffi-
cient evidence supports Coburn’s convictions. Dissents from majority’s holding that trial court committed reversible error in denying Coburn’s motion to sever. Extensive disagreement with majority’s finding that the charges were not of the same or similar character for joinder, and that Coburn was prejudiced by joinder of the charges.


STATE V. SCOTT
ATCHISON DISTRICT COURT
REVERSED AND REMANDED
NO. 96,879 – FEBRUARY 22, 2008

FACTS: Scott convicted of sale of cocaine within 1,000 feet of school. His arrest and conviction were based on testimony by informant (Soden). On appeal, Scott challenges the credibility of witnesses and identifies inconsistencies in evidence. He also claims trial court erred in refusing to admit testimony that Soden was being criminally investigated for forging Scott’s checks, evidence Scott claimed was integral to his defense.

ISSUES: (1) Sufficiency of evidence and (2) admission of evidence concerning forgery investigation

HELD: Sufficient evidence supports Scott’s convictions. Under facts of case, evidence that Soden was being criminally investigated for forging Scott’s checks, evidence Scott claimed was integral to his defense.

ISSUES: (1) Sufficiency of evidence and (2) admission of evidence concerning forgery investigation

HELD: Sufficient evidence supports Scott’s convictions. Under facts of case, evidence that Soden was being criminally investigated for forging Scott’s checks, evidence Scott claimed was integral to his defense.

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1. the amounts available and likely to become available to the Fund for payment of claims;
2. the size and number of claims which are likely to be presented in the future;
3. the total amount of losses caused by the dishonest conduct of any one lawyer or associated groups of lawyers;
4. the unreimbursed amounts of claims recognized by the Commission in the past as meriting reimbursement, but for which reimbursement has not been made in the total amount of the loss sustained;
5. the amount of the claimant's loss as compared with the amount of the losses sustained by others who may merit reimbursement from the Fund;
6. the degree of hardship the claimant has suffered by the loss; and
7. any conduct of the claimant which may have contributed to the loss.

B. If a claimant is a minor or an incompetent, the reimbursement may be paid to any person or entity for the benefit of the claimant.

By order of the Court, this 13th day of February, 2008.

FOR THE COURT

Kay McFarland, Chief Justice
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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
Brown Bag Ethics, including Lunch

- **Wednesday, April 2, Noon – 12:50 p.m.**
  Ethics Update — Recent Kansas Supreme Court Ethics Decisions and the Newly Revised Kansas Rules of Professional Conduct, Janith Davis, Office of the Disciplinary Administrator, Topeka
  Topeka & Shawnee County Public Library, Topeka

- **Wednesday, April 9, Noon – 12:50 p.m.**
  Legal Ethics & E-Lawyering, Professor Michael Hoeflich, University of Kansas School of Law, Lawrence
  Topeka & Shawnee County Public Library, Topeka

- **Monday, April 14, Noon – 12:50 p.m.**
  The Three Roles of the Ethical Lawyer, Hon. Stephen D. Hill, Kansas Court of Appeals, Topeka
  Topeka & Shawnee County Public Library, Topeka

Live & Videocast Seminars

- **Friday, April 11, 9 a.m. – 4 p.m.**
  Family Law, SpringHill Suites of Lawrence

- **Saturday, April 19, 8:30 a.m. – 12:15 p.m.**
  The Many Sides of Environmental Law (Videocast Debut), Multiple sites statewide

- **Friday, April 18**
  Lesbian, Gay, Bisexual, Transgender Seminar
  Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.

- **Friday, April 25, 8:30 a.m. – 4:05 p.m.**
  If You’re Still a Bankruptcy Lawyer, You Probably Ought to Hear This …
  SpringHill Suites of Lawrence

- **Friday, April 25, 9 a.m. – 5:20 p.m./Saturday, April 26, 9 – 11:55 a.m.**
  KBA YLS Hands-On CLE Series: Expert Preparation, Examination, Opening Statements & Voir Dire Session II (Limited to 24 registrants)
  Federal Courthouse, Wichita. Participants will be able to attend the Midwest Winefest’s Grand Tasting.

- **Friday, May 9**
  Intellectual Property, The Radisson, Lenexa

- **Tuesday – Friday, May 13-16, 8:30 a.m. – 12:25 p.m.**
  Wind Energy Law: The Whirlwind Tour
  Garden City, Hays, Wichita, and Salina (respectively)

Telephone Seminars

- **Wednesday, May 14, Noon – 1 p.m.**
  Representing Parents in Child in Need of Care (CINC) and Termination of Parental Rights (TPR) Cases; Discussion of Immigration and Domestic Violence Issues, Ema K. Loomis, Attorney at Law, Olathe

- **Wednesday, May 21, Noon – 1 p.m.**
  So, You’re Going to Trial in a Criminal Case …
  James E. Rumsey, James E. Rumsey Law Firm, Lawrence

- **Wednesday, May 28, Noon – 1 p.m.**
  Immigration: State & Federal Legislative Updates, Angela Ferguson, Austin & Ferguson LLC, Kansas City, Mo.
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One you believe would be of interest to your colleagues in the practice of law in Kansas?

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