Practical Tips for Handling Children’s Issues When One Parent Is in the Military
## KBA Officers and Board of Governors

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My last column. Let me say that again. My last column. Whew!

Actually, I have enjoyed it. Material has not been hard to come by. In addition, it has been fun to hear from people who actually read the stuff, some of whom even agreed with what I said. But it’s almost time to ease into the past president role, and I look forward to that as well.

I started my presidency talking to you about the importance of the Kansas Bar Association (KBA), and the need for all of us to reach out to the young or solo lawyers to encourage their participation. If I had a theme for my presidency, I think that was it. After all, “... the strength of the pack is the wolf, and the strength of the wolf is the pack.” And through tremendous effort by our executive director, Jeff Alderman, and his staff, as well as a terrific Membership Committee, headed by the always energetic Bob Hiller, we have surpassed 7,000 members for the first time in KBA history. Pretty impressive. We still need to work on mentoring and bringing people into and along in the Association, but we also deserve a pat on the back for the work we have already done.

In addition to membership, we have addressed other issues throughout the year.

- We rebuilt our building. Yes, by the time you read this column, the KBA Headquarters will be complete. Members of the KBA and the Kansas Bar Foundation (KBF) from across the state worked very hard to raise the money necessary to refurbish our building. And members of the KBA and KBF from across the state came through with significant donations. The grand reopening of the building will be during our KBA Annual Meeting in Topeka this year, and it should be quite a bash. Of course, it’s not too late to give — and to buy a brick.

- We worked to protect the independence of our judiciary. Each year it seems there is a small but vocal group that attacks our system to appoint appellate court judges and justices. They seek to subject our system to the influence of special interests, politics, big business, and big money. We worked to get KBA representatives and other interested parties to address the Kansas Legislature and, at least for this year, our system is safe.

- We established a committee to work toward the implementation of mandatory IOLTA. Not because we like the word “mandatory.” Rather, in spite of it. Hopefully we can also obtain “comparability” in the interest rates paid on IOLTA accounts. We now know that the vast majority of states have such systems and many more states are moving in that direction. If we can adopt a mandatory IOLTA system with comparable interest rates to those generally paid by banks, we think we can increase the funds otherwise available through IOLTA by 40 percent, which will improve our ability to provide access to justice. We know there are still some issues to address, but we think we have answers for them.

- We revitalized our Diversity Committee. They are working to have our Association leadership better reflect the diversity that exists in the legal community. They will also focus on disparities in partnership opportunities and salaries that women lawyers face. Among many great ideas, the committee has proposed a Diversity Award to help honor lawyers or firms who are working toward increasing diversity in the legal field.

- We joined with the University of Kansas School of Law and Washburn University School of Law to hold a Rule of Law Conference. In response to the atrocities that have occurred in Pakistan, American Bar Association President Bill Neukom asked all state bar associations to hold these conferences to help educate our communities and citizens about the importance of the rule of law. On May 15, many of our appellate court judges, Hon. J. Thomas Marten, Secretary of State Ron Thornburg, and many other dignitaries joined together in Topeka to present the conference. It was well attended by business leaders from across the state and was incredibly informative. Many thanks to Sara Beezley, who chaired the committee and who made the event a real success.

Of course, these are just some of the highlights. Many other issues are on the horizon. We should continue to explore the establishment of a Work/Life Balance Committee (the Oklahoma Bar Association established such a committee after experiencing one lawyer suicide per month over approximately 18 months). We should also explore how the KBA could help to establish Children’s Waiting Rooms at courthouses across the state to assist the courts and the parties who have no place to “store” children while their case is being litigated. And we must stay involved with the legislative process.

So the work of the Kansas Bar Association goes on. And I have to tell you that I have truly been impressed by the dedication and devotion of our members to the improvement of our profession. You are a great group of people.

Thank you for allowing me to serve as president this past year. It has been fun.
Raising the Bar Honor Roll

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Last Column Inspires Mixed Emotions

By Amy Fellows Cline, Triplett, Woolf & Garretson LLC, Wichita, KBA YLS president

This is my last KBA Young Lawyers’ President’s Column. This statement inspires mixed emotions in me. I admit, I’ve considered this column to be one of the hardest aspects of my “presidency.” Although I’ve spent a tremendous amount of time traveling between Wichita and Topeka or Kansas City to accept awards (the Topeka Bar Association recently presented our mock trial program with its Liberty Bell Award), participate in KBA Board of Governors and Executive Committee meetings, and speak to new admittees to the Kansas Bar, this windshield time pales in comparison to the hours I’ve spent on the 10 columns I’ve been required to produce. You’d be surprised how difficult it is to select a theme, which you think may be of interest to Kansas young lawyers and which hasn’t been overplayed, then articulating that theme in a column of 850 or so words. Yet, when I consider how much I’ve learned and grown, both personally and professionally, in that effort and my time as Young Lawyers Section (YLS) President, I am quite astonished.

I should point out, I’m not normally a “reflector.” That is, I prefer to look forward to future events rather than rehash the past. However, it is quite impossible to escape some reflection as my tenure as your YLS president comes to a close. Since this position has benefited me in so many ways, many of which were completely unforeseen, I thought some of you may appreciate a little public reflection in the event it inspires you to serve our section in this capacity someday.

First, I should point out the networking opportunities provided by this office. I have shared company with interesting and incredibly gifted attorneys, not only from across Kansas, but also from all over the world. I have spent hours sharing ideas and brainstorming with these attorneys to address such themes as promotion of diversity in our profession, making our YLS vital to the “big bar,” effectively advocating for or against proposed legislative changes affecting our clients and profession, and improving the lives of young lawyers, both professionally and personally. The perspectives and information I’ve gained from these sessions is quite invaluable. Plus, it was just downright interesting! For instance, participants in my small “brainstorming” group at the American Bar Association Young Lawyers Division (ABA YLD) Summit on Diversity, which recently took place at the ABA YLD Spring Conference in Washington, D.C., included a Jewish lesbian who works as a governmental immigration attorney, a female attorney from a San Francisco firm owned exclusively by gay men, a Toledo attorney from a firm the majority of whose owners are female, a former FLDS member whose experiences inspired her to work as a child welfare advocate in D.C., a Texas immigration attorney who focuses his practice on naturalizing nonresidents who were brought to the United States by their parents while they were minor children, and an African-American female associate from a large firm in Chicago. The varied nature of the viewpoints and novelty of the proposals debated in our discussions certainly made me appreciate why diversity is such a laudable goal. Whether I agree with all of the approaches that are being taken across the country to promote diversity in our profession, it was refreshing to know lawyers are actively striving to accomplish this goal.

This position also provided me with the opportunity to address new bar admittees. Listening again to the oath of admission reinvigorated my zeal to practice law and reminded me how lucky I am to be working in a profession, which I so wholeheartedly enjoy.

The KBA YLS president is also granted admission to some pretty exclusive circles, which I’ve thoroughly enjoyed. The KBA Board of Governors jointly hosts a dinner in December with the Kansas District Judges Association at an elegant restaurant on the Plaza in Kansas City, which allowed me to rub elbows with esteemed judges from across the state. In February, the board jointly hosts another dinner with the Kansas Bar Foundation at the Topeka Country Club in appreciation of our Court of Appeals judges and Supreme Court justices. I’ve recalled these experiences several times while preparing and delivering oral arguments. You simply cannot underestimate the value of getting to know the judge or justice presiding over your matter on a personal level in terms of easing your anxiety over your presentation. Once you learn the figure in the black robe is really just a person trying to do the right thing — just like you are for your client — the argument becomes much less intimidating.

Last, I must appreciate the benefits I’ve received from this column, which I’ve sometimes considered the bane of my existence (at least, when I couldn’t sleep because I was stressing over what to write about). I’ve gleaned a tremendous amount of advice from those I’ve approached under the guise of soliciting their opinions for topics to address in my column. I have a new appreciation for legal support staff, who work tirelessly for inexperienced bosses, often without much recognition for how invaluable they are to our work product and sanity. I learned new ways to cope with the challenges of taking and returning from an extended leave of absence from my fellow “new mom” attorneys. And, I have learned what I need to accomplish in order to become a valuable business partner to my fellow attorneys at my firm.

I want to thank you for the opportunity to serve as your YLS president. I hope I’ve been able to pass along some of the tremendous benefits I’ve received from an experience I will never forget.

FOOTNOTES
1. Incidentally, this ownership came about because one of the firm’s biggest clients threatened to pull its business unless the firm changed to make the majority of its owners female. So, the firm promoted two associates early. What an interesting avenue for the promotion of diversity!
2. This firm uses a centralized assignment system to encourage diversity, whereby partners give their assignments to the firm’s diversity director, who assigns them to the associates based upon a number of criteria in an effort to ensure all associates have an equal opportunity to succeed, and no one feels they miss out on “plum” assignments or opportunities to work with influential partners. Another path to diversity I hadn’t considered!
3. While I wasn’t able to attend the February 2008 dinner (since I was due to have a baby the week after the dinner), I’ve attended this event in the past as a guest of another invitee. It was a truly exceptional experience.
They may be young, but that doesn’t mean that can’t try a good case. On March 1 and April 5, high schoolers from across the state presented their “case” for mock trial supremacy at the Kansas Bar Association Young Lawyers Section’s (KBA YLS) regional and state Kansas High School Mock Trial competitions. This 11th annual project allows high school student teams to participate in mini-trials that are judged by attorneys. The student teams consist of three to four student attorneys and three student witnesses. The student attorneys present opening statements, closing arguments, and direct- and cross-examination of three witnesses. The top six schools from the Wichita and Olathe regional competitions (held in March) advance to the state competition (held in April).

The Wichita regional (hosting schools west of Topeka) saw a relatively small field — three teams from The Independent School, two teams from Sunrise Christian Academy, and a single team from Collegiate. But not to be disappointed with the limited competition, the talent coming from these early rounds was evident. Going into the final round, The Independent School’s “A” team was perfect, with its “B” team in a close second place. The two squared off in the final round, with the winner headed to the state tournament. The fight for the second spot in the state tournament saw an evenly matched Sunrise Academy “A” team versus Collegiate. Judges in both contests commented about the quality of competition and the worthiness of each of the teams to represent the Wichita region at the state tournament. After several close contests, the “A” teams from Independent and Sunrise finished one-two and advanced to the state competition, with the “C” team from Independent finishing third.

While in sharp contrast in the number of teams, the Olathe regional tournament also produced exceptional competition and outstanding performances. Teams from Bonner Springs (High), Shawnee Mission Northwest, Shawnee Mission East, Shawnee Mission West, and Blue Valley Northwest all competed. Finishing one-two-three, and moving on to the state competition was Shawnee Mission North (first place), Shawnee Mission East (second place), and Blue Valley Northwest (third place).

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The state competition saw the best-of-the-best. Coming in to the last round, The Independent School (unbeknownst to them) had first place locked up. But second place and third place were up for grabs. Sunrise Academy and Shawnee Mission Northwest squared off, with the contest to determine second and third place. In a close competition, with two ballots awarded to Sunrise Academy and one ballot to Shawnee Mission Northwest, second place went to Sunrise Academy, with Shawnee Mission Northwest locked in at third. Congratulations to all these teams.

Volunteers were an essential part of this competition. Thank you to all of those who volunteered a portion of their Saturday to help judge for this rewarding cause. Your feedback was greatly appreciated by the students and is critical to their continued growth and success in mock trial.

While the competition this year is strong, it can always expand. This year’s tournament experienced 19 teams from nine schools covering northeast and south central Kansas. More students in other schools in these areas, and in many more schools from across the state, have the talent and the desire to compete in these tournaments. The missing element, however, is the coaching and mentoring elements from young attorneys, who are willing to dedicate even five to 10 hours with the students. These volunteers are necessary not only to provide tips and techniques to the students, but to also encourage local schools to sponsor and offer programs geared toward the KBA YLS High School Mock Trial competitions. If you are interested in coaching a team, please contact either myself at hill@hitefanning.com or Meg Wickham of the KBA at mwickham@ksbar.org.
Mario Chalmers v. “Rope” Engleman: No Contest

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

“Mario’s Miracle” is now forever a part of KU basketball lore. But Mario Chalmers’ trey was hardly the first time KU needed divine intervention in the Final Four. In 1940, KU was in its first NCAA Final Four, and in the semifinal game, KU played Southern Cal, which came into the game as a prohibitive favorite. KU won on a buzzer beater; the person who took and made that shot was named to the NCAA All-Tournament Team. He was also a consensus All-American. His senior year, in addition to everything else he was doing, he was student body president. He is also a Kansas lawyer. You see, before Mario, there was Danny Manning, and before him there was Wilt, and then Clyde Lovellette.

But before all of these giants, there was a player who poured the concrete foundation to KU’s basketball legacy. His name is Howard Engleman. And if his name is not familiar to you, all that is about to change.

If Howard Engleman ever wrote his memoirs, book publishers would declare it fiction. If Hollywood made it a movie, Blockbuster Video would have to sell it in four sections of their store: “Adventure/Sports/Drama/Military.”

The story begins with Engleman playing point guard at Ark City, leading his team to the state finals. Phog Allen wanted him, and Engleman obliged. At KU — where his nickname was “Rope,” after his blond, curly locks — he drained the shot to beat USC 43-42. It was considered — at the time — one of the biggest upsets in college basketball history.

The Kansas City Star, on March 24, 1940, blared this headline: “Howard Engleman’s Shot from the Corner Decides Contest for the Jayhawks.” The news story described that Bobby Allen, son of Phog, “stole the ball and passed to Engleman alone in the corner. Unhurried and calm, the blond forward took his stance and flipped the ball through the hoop with ridiculous ease.”

Engleman was the bright star on a team with some true Zeniths. One teammate, Ralph Miller, for instance, went on to coach at Wichita State, Iowa, and Oregon, winning 657 games. Another, Dick Harp, coached KU for seven years.

After graduation, Engleman enlisted in the Navy and during World War II a Japanese kamikaze plane hit his ship in the Pacific. He sustained severe burns and recovered in a hospital at Saipan. He then returned stateside to attend KU law school.

While in law school, he held a part-time job. Coaching the KU freshman team! When Phog sustained a concussion and missed several games, Engleman coached the varsity in 1947, adding “Head Coach, KU” to his lengthy CV. And on March 1, 2003, his jersey was officially retired and raised to the rafters in Allen Fieldhouse. His speech, delivered at center court, remains a classic: www.kusports.com/multimedia/video/basketball/02-03/highlights/osu.

And then, upon graduation, he settled in Salina, joined Hampton Royce & Engleman, and did something that neither Mario nor Wilt ever attempted, trying cases. His former law partner, Stan Sexton, offered this observation to his trial partners in Engleman’s defense: “Chester case.” That would be Mills vs. Smith, 9 Kan. App. 2d 80 (1983).

Chester, you see, was a 100-pound male lion who roughed up a 2-year-old girl. Shockingly, litigation followed, and Engleman defended Chester’s owner.

Judge Parks of the Kansas Court of Appeals described the case this way: “The male lion, named Chester, was approximately three-and-one-half feet long and weighed 90 to 100 pounds. Gary Clarke, the director of the Topeka zoo, testified at the trial that 9-month-old cubs are very strong and dangerous animals.”

The mother, Althea Mills, “stayed with her two daughters 30 to 50 feet from the lion while the grandparents took pictures.” When older sister Traci distracted the mom, Darci, the second child, “ran off toward her grandparents [the Buckbees], approaching from behind the lion, while Merle Buckbee was taking a photograph of his wife petting Chester.” And this is where it gets interesting. The court’s opinion noted, “Chester reared up on his hind legs, knocked Darci to the ground, grabbed her head in his mouth” and, as Judge Parks described, Chester “began working his jaws.” [Legal speak for a toddler getting up close and personal with Chester’s molars.] The toddler needed stitches but was not severely injured.

So add to Engleman’s CV, “defending a lion who tried to swallow a toddler.” O.J. Simpson’s case would be easier. At the end of trial, the jury basically canonized Chester — sticking the toddler’s parents with 50 percent fault and damages awarded of $99. Moral of the story: both on the court, and in it, Howard Engleman, now retired at age 88, has no peer.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
A Kansas Legal Education: An Education Harvard Law Never Received

By Danny Moskowitz, University of Kansas School of Law

“H"ave a seat and the recruiting coordinator will be right with you.” Yet again, I found myself at another callback interview for a large East Coast law firm. Beads of perspiration were flowing down my face, and the usual pre-interview jitters were apparent. After what seemed to be a lengthy wait, the hiring partner emerged. I can only assume that he came from more important business than interviewing an ambitious, though very nervous, second-year law student.

During the early minutes of the interview, we dispensed with the requisite introductory small talk. Then, an acute silence descended upon the room. In order to break the silence, I lobbed a few facts about the firm, which I had spent hours learning when I should have been reading for class, but still, my interviewer said little. He seemed impervious to flattery.

My mind quickly began racing to my every flaw. Had he seen how poorly I performed in Professor Hecker’s Business Association course? Or, worse yet, was he able to see how tight my suit was from the weight I had put on due to those late nights studying at Green Hall? I began to curse myself for trading in my gym membership for countless hornbooks and a mediocre grade point average. Even worse, I began to think that my family was right — I should have pursued a career in medicine. Why had I defined five generations of doctors in my family to become a lawyer? “Well, this is it,” I thought, “I might as well look into bankruptcy law and see if I could set a new legal precedent on how to discharge student loans.” For it was clear only two minutes into the interview: I was not going to get this job.

Then the partner shifted his gaze from my resume to me and stated more than asked: “I presume you are originally from Kansas.”

“No, Sir, I am not.”

“Well, you must have married a lady from Kansas.”

Again, I replied in the negative, and I informed him that I was not even married, but if he knew of any nice Jewish girls in the area, then he should please give them my name. “A little joke,” I thought, “Come on. Give me something.”

At that moment, I noticed he was agitated, and then he finally asked me the question that characterized all of my interviews, from New Orleans to Philadelphia: “What the hell is a nice, Jewish, East Coast boy like you doing out in Kansas for law school?” Here, we go again, I thought.

Each Kansan, whether he has lived here his whole life or only a matter of months, is familiar with the term “East Coast Bias,” an expression that refers to the “tendency for sports writers in the United States to give greater weight and credibility to teams on the Eastern seaboard.” Undoubtedly, all Jayhawk fans can relate to this after consistently seeing KU basketball (and football) teams underrated nationally and picked to lose, for example, to the “unstoppable” North Carolina Tar Heels in this past Final Four.

Of course, if a lawyer goes to his or her Black’s Law dictionary, they will not find a term that describes the stereotypes held by East Coast lawyers about a Middle America legal education, or for that matter, Middle America in general. Clearly, my father, a physician, was unaware of such a phenomenon, as he frequently told me it did not matter where I went to law school. He always remarked that in 20 years of practicing medicine, not one of his patients had ever inquired or commented on where he had gone to medical school. However, like much of my father’s advice (i.e., his insistence that I ask out, though I had not seen her in ages, a family friend’s daughter who turned out to be engaged), it did not seem to resonate as I began my 2L summer employment search. In addition to the above-noted story, one outlandish e-mail response to an employment inquiry stands out. Upon acknowledging receipt of my resume, one lawyer wrote to a fellow partner at the firm:

“I met this kid. Pretty sharp, although I wondered what a Heeb was doing at Kansas where they won’t teach evolution.”

This e-mail and similar situations prompted me to discuss my job search with Hecker (of course, a wiser course of action would have been to seek his assistance for my inability to understand Business Associations, but that’s a whole different story). After our meeting, I received an e-mail from Hecker stating:

“Get used to the perception about Kansas, and don’t try to change it — keeps out the riff raff.”

As I reflect on my experiences at Kansas, the more I realize the wisdom in Hecker’s advice, and that of my father as well. My legal education at Kansas has been imbued with unforgettable values that I likely would not have acquired had I stayed on the East Coast; so, despite what my future colleagues on the East Coast may think, I believe I will be a better lawyer in the future for having come to Kansas.

I have truly appreciated the Midwestern values on display within Green Hall. I vividly remember my first day of law school orientation when I tried to make a good impression on my classmates by informing them of the famous lawyers I had worked for in a large Washington white-shoe firm before entering law school. I was met with blank stares. It was not that my new classmates did not care, but that it did not matter to them. The usual pretentiousness and materiality I encountered in Washington, D.C., had been replaced with openness, sincerity, and warmth.

But Midwestern values are not the only attributes I have encountered through my time in Kansas. I have received a top-notch education as well. Last week, Chief Justice John Roberts visited KU Law School, a tremendous honor for any school. He lectured in my Constitutional Law class and presided over the finals of the Moot Court Competition. As I listened to my peers’ questions during class and witnessed the Moot Court finalists aptly responding to the Chief Justice’s questions, I realized that my peers and I have received a legal education second to none, which will prepare us to be great advocates for our clients, and enable us to compete with lawyers from any school in the country.

(continued on next page)
A TRIBUTE TO JOE L. NORTON

By D. Todd Arney, Hubbard, Ruzicka, Kreamer & Kincaid L.C., Norton

Joe Norton died unexpectedly on Jan. 19, 2008, of a heart attack at the age of 66. A graduate of the University of Kansas School of Law, Joe started his practice in 1967 in a law firm with origins back to 1930 now known as Norton, Hubbard, Ruzicka, Kreamer, and Kincaid L.C.

Shortly after beginning the practice of law, Jim Hubbard and Tom Ruzicka joined Mr. Norton in what proved to be a very special partnership that lasted more than 35 years until the time of his death. During this time, Joe, Jim Hubbard, and Tom Ruzicka maintained a close friendship as their legal careers progressed. Daily lunches, common interests, mutual respect, and fairness to each other was the recipe for the standing relationship, which is notable in today’s legal environment. Along with Scott Kreamer, the law firm continued to prosper with Joe as the senior partner.

Joe’s reputation as one of the premier family law attorneys in Kansas City was well deserved. While representing many clients with substantial means, Joe also had compassion for those less fortunate. Armed with experience and an amazing understanding of family law matters and human tendencies, Joe was aggressive and tough but not mean spirited. He appreciated that lawyers were given the special privilege of advocating the interest of clients and he understood that under all circumstances a lawyer must be honest and fair. If Joe made a statement, you could trust that it was true. He was a man of his word.

Joe’s success did not cause him to be conceited or insensitive. Instead, he was always considerate and kind to his friends, colleagues, co-workers, and family. His humor and quick wit were truly unique. Joe’s sayings were priceless and often repeated. His ideas and stories about raising children are unforgettable. If you were around Joe for any period of time it was rare not to burst out with laughter at something he said or in response to a story he told. As noted by Jim Hubbard to the Olathe News, he was the “life of the party.”

Joe is survived by his wife Jane, of 44 years; his son, Jay Norton, a fellow Johnson County attorney; two daughters, and seven grandchildren. Joe adored his wife even keeping a picture of her in his car at all times. He was very proud of his son, Jay, and spoke often about his daughters. He enjoyed spending time with his grandchildren relaying stories like loving grandfathers do.

We will certainly miss our friend and colleague.

A Kansas Legal Education

(Continued from Page 9)

Sure, perhaps the next time I am subjected to the trivial stereotypes regarding Kansas, I could counter that KU is currently second in the diversity rankings, or how the law school is in the top 20 in breeding Supreme Court clerks, or how KU professors’ open-door policy allows students to form genuine relationships with their teachers. But, in true Kansas spirit, I think I’ll let the quality of my legal education speak for itself. As the KU basketball team can certainly relate, sometimes it is better to be underrated.

About the Author

Danny Moskowitz is a second-year law student at the University of Kansas School of Law. He attended Tulane University for his undergraduate education, where he graduated cum laude with a Bachelor of Arts in political science and Jewish Studies. This summer he will be working for the law firm Berger Montague P.C. in Philadelphia, where he will be employed in their Antitrust Department.

The author would like to thank Beau Jackson, Andrew Shaw, and Jesse Tanksley, who help make this article possible. In true KU Law fashion, they put aside their own pressing work to help a fellow student. Also, he would like to thank Avi Levine, who the author relies upon for his invaluable support, counsel, and friendship. Moskowitz can be reached at dmoskow@ku.edu.
The Lewis F. Powell Jr. Award of Professionalism and Ethics

You are invited to nominate one or more colleagues for this prestigious award.

The American Inns of Court, with more than 350 Inns nationwide, is dedicated to the advancement of excellence, civility, professionalism, and ethics in the practice of law. Mentoring plays a significant role in the attractiveness and success of the Inns. A major dimension of that mentoring is guidance, not only by word but also by example, of senior lawyers and judges whose professional lives have reflected civility, competence, and an ethical attitude in all things — in other words, professionalism.

The Lewis F. Powell Jr. Award of Professionalism and Ethics is given to recognize exemplary service to the legal profession in the areas of legal excellence, professionalism, civility, and ethics. It may be awarded to judges and lawyers that have not been directly involved with the American Inns of Court.

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The American Inns of Court Foundation once again will hold its Celebration of Excellence this October in Washington, D.C., for the purpose of publicly recognizing this deserving recipient. Three national awards will be presented on behalf of the nearly 100,000 active and alumni members of the American Inns of Court.

Nominations may be by letter, accompanied by information about the nominee sufficient to allow the committee to make a reasoned judgment. Additional letters of recommendation may be included in the package. Completed nomination packages must be received at the Foundation offices no later than June 30, 2008. They should be addressed to the attention of Cindy Dennis, AIC Awards and Scholarships Coordinator. For more information, contact Ms. Dennis at (800) 233-3590 ext. 104 or cdennis@innsofcourt.org.

Sincerely,

Deanell Reece Tacha
President

This award is bestowed upon a person who has rendered exemplary service in the areas of legal excellence, professionalism, and ethics. The award gives the American Inns of Court Foundation an opportunity to reach out to persons who share the Foundation’s vision of legal service as a distinguished profession. It is not restricted to persons who have been directly involved with the American Inns of Court. The Lewis F. Powell Jr. Award for Professionalism and Ethics is presented annually at the Celebration of Excellence held at the U.S. Supreme Court.

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| The Honorable E. Norman Veasey | 1996 | The Honorable Thelton E. Henderson | 2005 |
| John P. Frank, Esquire | 1997 | The Honorable Wallace P. Carson, Jr. | 2006 |
**Law Practice Management Tips & Tricks**

**An Apple Today?**

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

I just returned from a CLE where 12 laptops were in use. Of those, four were Apple PowerBooks. That is on track with indicators that Apple has captured 20 percent of the PC/laptop market. Are you missing the boat not switching? Probably not but you might go kick the tires just to see if Apple scratches an itch.

**Hardware**

The Mac Mini is the cheapest introduction to the Apple product line. The Mini runs a 2.0 GHz Intel Core Duo processor, has 1 GB memory, and sports a 120 GB hard drive with a DVD/CD writeable optical drive squeezed into a case smaller than Volume 4A of the Kansas Statutes Annotated. (Monitor, keyboard, and mouse sold separately.)

A comparable machine from Dell improves the specifications with a 320 GB hard drive along with a mouse and keyboard for just more than $600. The Dell is packaged in a larger tower case but is user upgradeable.

That difference in cost is enough to persuade many consumers that Apple is too expensive. There are differences beyond raw components, which make assessing costs more of a personal decision than a balance sheet calculation, however.

**Software – Operating System**

Apple’s native operating system, OS X, is thoroughly integrated with the hardware — so much so that you cannot buy OS X for anything other than Apple hardware. The purpose is to create an appliance that you use rather than a kit that you build and tinker with to keep functional.

Some users scream “Fascism!” because Apple squashes choice and variety. Others appreciate the focus on tasks (i.e., word processing, managing a music library, or video conferencing) rather than on computer management to keep myriad hardware and software options running smoothly.

I used to patiently tinker with wizards and driver downloads to get a printer or wireless network running. I do not enjoy that so much now. By way of illustration, I purchased a Microsoft Webcam. Installation on my Thinkpad required drivers from a CD, an online update, and a trip to Microsoft support to get it working. That same camera plugged into the Apple Mini and was automatically configured for use with iChat in 30 seconds. Choice and cheap sometimes come with premiums in time.

Another wrinkle to consider when pondering a switch to Apple is their machines’ ability to run Microsoft Windows XP or Vista. Using Boot Camp, software included with OS X, any Apple can boot directly into XP/Vista. Alternatively, utilities like Fusion or Parallels allow you to run an XP/Vista session inside a window. I currently run an XP session using Parallels to allow access to some Windows-only tools. I have been surprised at how fast it is and how well it integrates with OS X.

**Software – Office Suite**

Neither the Mini nor the Dell comes standard with an office suite for word processing, spreadsheets, or presentations. A first download for either a PC or Apple user ought to be OpenOffice — a freeware office suite. Home and business users can use OpenOffice (openoffice.org) for Windows or NeoOffice (neooffice.org) and avoid paying either Apple or Microsoft.

If you must have Microsoft Office, it is available for both Apple and Windows for a steep premium — $360 to start. Outlook is not available for Apple, however. Entourage is the Outlook equivalent but it is a pretty poor substitute if you are an Outlook poweruser. Of course, you can install Outlook or the entire Windows Office suite in a virtual XP/Vista session as mentioned above. It runs remarkably smooth and fast.

Apple bundles a trial version of its own office suite, iWork, with the Mini. Keynote, the presentation software, shines at making great-looking presentations from minimal effort. Pages for word processing and Numbers for spreadsheets work as well as their Microsoft Office counterparts and seem to handle output to Office-readable formats well. Purchase of the full iWork license is just $80.

**Personal Decision**

Answering whether you should switch to Apple triggers the best lawyers’ answer — “It depends!” Take a test drive. If you cannot locate one to play with, make use of YouTube.com to search out demonstrations. Just because one tool works (Windows) is not a guarantee it works best for you — the difference may be worth your time.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Welcome Spring 2008 Admittees to the Kansas Bar

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Barbara L. Albert
Latina Michelle Alston
Angela Suzanne Armenta
Francis John Baalmann
Cesar A. Baca
Elisabeth Bach-VanHorn
Bradley Michael Bakker
Brian Michael Bartlett
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Todd Aaron Bertholf
Kyle Matthew Binns
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Chad Eric Blomberg
Thomas Eugene Brownback
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Stefanie J. Seidenschlaw Waldren
Ryan William Walkiewicz
Scott Patrick Waller
Scott F. Walterbach
Matthew Barrett Walters
Hilary Wanke
Bradley R. Ward
Kristi Kress Wilhelmy
Grace Ruth Willnerd
Anthony B. Wingrove
Michael Preston Winkler
Joann M. Wolrman
Anastasia Kathleen Wullschleger
Guillermo Gabriel Zorogastua

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

JUNE 2008 – 13


**CHANGING POSITIONS**

Jeffrey W. Brown has joined Bell Nunnally & Martin LLP, Dallas.

Michael E. Callahan has joined Stinson Morrison Hecker LLP, Kansas City, Mo., as a member of the construction law group as partner and Heath A. Hawk has also joined as an associate.

Wendell F. “Bud” Cowan, Overland Park, and Jason P. Lacey, Wichita, have become partners at Foulston Siefkin LLP and Toby J. Crouse, Overland Park, has been named as special counsel.

Jeremy J. Crist has joined the Riley County Attorney’s Office, Manhattan, as assistant county attorney.

Michelle M. Carter-Gouge has joined Preferred Health Systems, Wichita.

Aaron R. Disney has joined Learjet Inc., Wichita.

Lewis M. Galloway has been named as partner at Spencer Fane Britt & Brown, Kansas City, Mo.

Michelle D. Haskins has joined Constangy, Brooks & Smith LLC, Kansas City, Mo.

Courtney A. Hasselberg has been named as a member of Seyferth Knittig & Blumenthal LLC, Kansas City, Mo.

Elaine D. Koch has been appointed to the Bryan Cave LLP, Kansas City, Mo., global labor and employment client practice group.

Aimee A. Minnich has joined Siegfreid Bingham Levy Seizer & Gee P.C. as an associate, Prairie Village.

Scott H. Murphy has joined Swanson Midgley LLC, Kansas City, Mo, as a member.

Karen R. Palmer has joined Kansas Legal Services, Wichita.

William H. Pitsenberger has joined Newbery, Ungerer & Hickert, Topeka, as of counsel.

David E. Rowe has joined University of Kansas Medical Center, Kansas City, Kan.

Jennifer W. Svancara has joined the Law Offices of Donald B. Balfour, Kansas City, Mo.

**CHANGING PLACES**

James E. Carpenter has moved to 816 Ann Ave., Kansas City, KS 66101.

Shannon S. Crane moved to the Hutchinson Branch with the Kansas Legal Services, 206 W. 1st St., Hutchinson, KS 67501.

Christopher A. Randall has moved to 155 N. Market, Ste. 1000, Wichita, KS 67202.

Kyle J. Steadman has moved from the Topeka office of Foulston Siefkin LLP to the Wichita office at 1551 N. Waterfront Pkwy, Ste. 100, Wichita, KS 67206.

**MISCELLANEOUS**

John L. Brennan, Wichita, has been elected a member of the board of governors for the Independent Living Resource Center Inc.

Mary Ruth Byerley, Wichita, is the secretary for the board of trustees for Historic Wichita-Sedgwick County Inc.

Carolyn L. Matthews, Wichita, is a member of the 2008 board of directors of the Boys & Girls Clubs of South Central Kansas.

Timothy E. McKee, Wichita, was elected to serve on the Kansas Big Brother Big Sisters board of directors as secretary.

Hon. G. Joseph Pierron, Topeka, was the guest speaker at the Brandeis University National Women’s Committee Listen and Learn Program.

David E. Rogers was elected to be on the board of directors of the Music Theatre of Wichita and Monte A. Vines was elected as president-elect.

David J. Rebein, Dodge City, was the guest speaker at the Cimarron Area Chamber of Commerce Annual Meeting.

John A. Vetter is the 2009 president of the Ronald McDonald House Charities of Wichita.

Thomas E. Wright, Topeka, received the Col. John Ritchie Award presented by the Washburn University Alumni Association.

**EDITOR’S NOTE**

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

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**“Jest Is For All” by Arnie Glick**

“And to my nephew Norman, the TV game show addict, I give and bequeath the sum of one thousand dollars — or what’s behind curtain number three!”
John E. Altenborg

John E. Altenborg, 89, died March 23 in Lindsborg. A lifetime Lindsborg resident, Altenborg was born Dec. 10, 1918, to John A. and Hilda Nelson Altenborg. He graduated from Bethany College, served three years in the Army during WWII, and earned the combat infantry badge for service in Europe. After the war, he graduated from Washburn University School of Law and practiced law for 55 years in Lindsborg. In 1998 he became a lifetime member of the Kansas Bar Association.

Survivors include sons, Terry, Boulder, Colo., and Jim, Lindsborg; daughter, Debra Maurer, San Diego; seven grandchildren; and seven great-grandchildren. He was preceded in death by his wife, Betty Hopkins.

Edward Costello

Edward Costello, 85, Marion, a banker and lawyer, died April 2. He was born April 9, 1922, on a farm southwest of Tampa. He is the son of James and Anna Noone Costello. He enrolled at the University of Wichita (WU) in 1941 and enlisted in the Army Reserve in 1942. He was called to active duty in 1943. Costello was commissioned to the U.S. Infantry as a second lieutenant in 1944 and was assigned to the 71st Infantry Division. He returned to the United States in 1946 and re-enrolled at WU. After college he enrolled at Washburn University School of Law and earned his juris doctorate in 1949. He began practicing law in Marion in 1949. In 1953, he took a position as managing officer of the Tampa State Bank, where he continued to practice law. Costello was appointed by Gov. John Carlin to the Kansas State Bank Commission, where he served six years, two-and-a-half years as chairman.

Costello was a lifetime member of the Veterans of Foreign Wars, serving as commander of Post No. 6958 in 1951. He was also active in the American Legion, Tampa Lions Club, and Knights of Columbus. For more than 30 years he was a member of the Marion County, Central Kansas, and Kansas bar associations and the Kansas Bankers Association.

He is survived by his wife, Mary, Marion; two sons, Pat Costello, Moscow, Idaho, and Chris Costello, Marion; four daughters, Mickey Lundy, Marion, Cathleen McNamara, Teresa Perky, and Barbara Loehr, all of Overland Park; four sisters, Anna Bergkamp, Pretty Prairie, Rosemary Lewis, Wichita, Catherine Hajek, Tampa, and Florence Scanlan, Laguna Nigel, Calif.; and 17 grandchildren.

Walter J. Kennedy Jr.

Walter J. Kennedy Jr., 79, Shawnee, died April 2. He was born May 18, 1928, the son of Walter and Emily Kennedy in Kansas City, Kan. Kennedy joined the Navy and served in the submarine service from 1944 to 1949.

Kennedy graduated from the University of Kansas and its law school and after a brief stint as a government attorney, he moved his family to El Dorado. He worked in a law firm there until 1961, when he moved back to Kansas City. He joined the law firm of Hoskins, King, McGannon, Hahn & Hurwitz and eventually became a partner. He retired in 2007 with the firm of McAnany, Van Cleave & Philips. Kennedy was a lifetime member of the Kansas Bar Association.

Survivors include his second wife, Geraldine Rieke; two daughters, Kathleen Kennedy and Nancy Kennedy; three stepchildren, Greg Rieke, Janet O’Neal, and Robin Neville; nine grandchildren; and a great-grandson. He was preceded in death by his parents and first wife, Norma Buie.

Bruce Warren Zuercher

Bruce Warren Zuercher, a retired attorney from Klenda, Mitchell, Austerman & Zuercher, died April 1 in Wichita. He was 77. He was born Jan. 1, 1931, the son of Walter and Agnes Hash Zuercher in Newton. He was raised in Whitewater and earned his bachelor’s and law degrees from the University of Kansas.

Zuercher served three years as a military police officer in the U.S. Army before beginning his law career in Kansas City. In 1960, he joined the law firm of Jochem, Sargent, and Blaes in Wichita, which, in 1986, merged into the current firm of Klenda Mitchell; he served as a senior partner. Zuercher was a lifetime member of the Kansas Bar Association.

He is survived by his wife, Rosemary; children, Mark Zuercher, Orinda, Calif., Greg Zuercher, Wichita, Lynn Zuercher, Arlington, Va., Todd Zuercher, McKinney, Texas, Anne Edmiston, Wichita, Jean Shefi, Walnut Shade, Mo., Paul Zuercher, Lincoln, Neb., and Joan Danitschek, Lenexa; and 14 grandchildren. He was preceded in death by his brothers, Duane and Vaughn.
I. Introduction

Several thousand Kansas citizens are currently serving in the U.S. military. Many of these individuals are members of the active component of the military and their official residence and domicile are in Kansas. Increasingly, Kansas members of the Army Reserve and National Guard are being deployed overseas for up to 18 months. These factors have spawned a number of cases concerning child custody, child support, and parenting time.

II. Determining Military Status

The first step an attorney must take is to determine if one of the parties is in the U.S. Military as defined by the Servicemembers Civil Relief Act (SCRA), 50 U.S.C. Appendix § 501 et seq. The purpose of the SCRA is to allow military personnel sufficient time to respond to civil process and to appear at court hearings when their presence is inhibited by their military duties. The SCRA does not prohibit a trial, but does provide for continuances, appointment of counsel, and other protections.

Servicemembers who are covered by the SCRA include members of the Army, Navy, Air Force, Marines, and Coast Guard who are on active duty under 10 U.S.C. § 101(d) (1); members of the National Guard who are called to active duty as authorized by the president or secretary of defense for more than 30 consecutive days pursuant to 32 U.S.C. § 502 (f); and members of the Public Health Service and the National Oceanographic and Atmospheric Administration. Not always will a client know if their spouse, former spouse, or other parent is a member of the military as defined by the SCRA.

FOOTNOTES
There are several ways to determine if a party is in the military. One method is to inquire of a client if they have a copy of orders for the party in the military. In the case of a new divorce, the nonmilitary spouse has usually been given a copy of his or her official orders from the military spouse. However, where the parties are already divorced or have never been married, military orders are usually not available. Either party or the judge may request information from the Department of Defense (DOD) to ascertain if a person is in the military, and the DOD must issue a statement as to military service. The DOD office to contact for such information is:

Defense Manpower Data Center
1600 Wilson Blvd., Suite 400
Attn: Military Verification
Arlington, VA 22209-2593
Tel: (703) 696-6762
Fax: (703) 696-4156

III. Service of Process

A. Service within the continental United States

Kansas law provides that an individual must be served personally, by registered mail, or in a few limited instances, by publication. Of course, any individual may enter their appearance by executing an Entry of Appearance. The typical scenario is that an attorney is seeking to serve a member of the military who either resides on a military post or outside the military post in civilian housing. If a member of the military lives off-post, then the Kansas Code of Civil Procedure applies. In that instance the military member may be served by personal service or by registered mail. There are no additional requirements imposed, merely because the individual is in the military.

Generally, a servicemember may not be served by a state or private process server on a federal military base or post. A federal fort or other military base is considered a federal enclave. Military officials have no responsibility or obligation for serving process on military personnel on or off a military post. Military police, the criminal investigation division, or any other military entity may service process. However, a soldier or sailor’s commander can be very helpful in obtaining service. An attorney can send court pleadings and an Entry of Appearance to a unit commander and request assistance having the servicemember sign the Entry of Appearance and return it.

Military commanders can also make the servicemember available for service of process by a local process server.

Another resource is to utilize the services of a private process server near the military base of the soldier or sailor being served. This can be done through the local yellow pages or over the Internet. Many private investigators advertise that they serve members of the military. Many private process servers and local government process servers have excellent relationships with military commanders, which makes process serving easier.

Another method of service is to wait until the servicemember returns to visit the children and have them served personally. This can be done by utilizing the sheriff’s office or by employing a private process server. This works well if the servicemember is the noncustodial party and service of process is not time-critical.

B. Service outside the continental United States

American military personnel are stationed throughout the world, and serving them with process can appear to be an insurmountable obstacle to an attorney. Serving military personnel overseas is difficult, but not impossible. All members of the military stationed overseas are given either an Army Post Office (APO) or Fleet Post Office (FPO) address. Technically these are U.S. mail addresses and can be used to serve the servicemember by registered mail. However, the soldier or sailor may not sign for the registered mail. To further complicate matters, military postal clerks sometimes do not return the receipt or send back the receipt signed by someone other than the servicemember.

The U.S. Postal Service (USPS) has a manual on international postage rates or fees. Often local USPS personnel have experience with serving servicemembers by registered mail and can provide advice. If all else fails, place the documents to be served, addressed to the person to be served, including the correct address, affixing the proper postage, and return receipt in an envelope. Place this inside a larger envelope with the APO or FPO address of the soldier, but address to the Military Post Office or Officer-in-Charge. Send a short note requesting that the servicemember be properly mailed the letter and that the return receipt be properly executed and returned.

If all else fails, service may be obtained on an overseas servicemember through the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil or Commercial Matters. The party seeking service must complete a request form and mails it with the documents to the foreign nation’s “Central Authority.” The attorneys for the receiving country’s “Central Authority” review the documents to ensure that proper procedure has been followed. The documents are then forwarded to the proper government agency for service. Any documents sent to Israel or England must be forwarded by the clerk of the district court.

2. 50 U.S.C. § 582.
3. 32 C.F.R. § 516.
4. 32 C.F.R. § 720.20.
IV. Appointment of Counsel

When an attorney learns the opposing party is a member of the military as defined by the SCRA, a request should be made to appoint the servicemember an attorney. Unfortunately, the SCRA does not give any guidance concerning compensation for the appointed attorney. Therefore it is up to the court’s discretion as to who (if anyone) is required to compensate the appointed attorney. If the court requires the servicemember to pay his or her own attorney, how is their appointed attorney going to collect attorneys’ fees if the client is serving in Afghanistan? The disciplinary rules require the appointed attorney to represent their client vigorously within the bounds of the law.

The best solution to this problem is to address the issue at the outset. The party moving the court to appoint an attorney to represent the servicemember should include a provision in the motion that the servicemember or other a specific party or entity pays the attorneys fees of the court-appointed attorney. The military will not provide a military attorney (hereinafter referred to as JAG to represent the party in the military. A JAG can give advice, but may not represent a servicemember in a court proceeding.

V. Initial Stay

When the respondent in a domestic case is a member of the military, the SCRA states the district court shall stay the proceedings for at least 90 days, upon motion by counsel or the district court, if the court determines there may be a valid defense and a defense cannot be presented without the presence of the respondent. This also applies if the servicemember’s appointed attorney, after due diligence, cannot locate the respondent to determine if a meritorious defense exists. It is up to the court to determine whether the appointed attorney has used “due diligence.”

If the servicemember is aware of the court proceedings and has applied for a stay, certain rules come into play. The SCRA states a district court upon its own motion and shall upon motion of counsel enter a stay of court proceedings for at least 90 days if the motion includes information required by statute. This information shall include: (1) A statement as to how the servicemember’s current military duty effects his ability to appear in court and when he or she can appear in court, and (2) A statement from the servicemember’s commanding officer stating the servicemember’s current military duty prevents him or her from appearing in court, and stating military leave is not authorized.

The request for stay may be filed by the servicemember, his or her attorney-in-fact, where a power of attorney has been given, or by the servicemember’s attorney. There is no prescribed format for either statement. A letter, affidavit, memo, or e-mail should suffice. Neither statement may be written by the servicemember. In fact, the commanding officer of the servicemember can provide all the information required in one statement.

VI. Additional Stays vs. Mandatory Appointment of Counsel

A servicemember, or representative or attorney, may request an additional stay of proceedings beyond the initial 90-day stay. The additional stay may be for all or part of the servicemember’s period of military duty. An attorney should analyze carefully if a second stay of proceedings should be requested. The court may grant an additional stay until the material effect is removed. For example, if the servicemember’s presence is necessary, and cannot obtain leave to return for the court hearing, a stay could be granted until the servicemember can return. A servicemember is not automatically entitled to a stay until his or her military duty has ended.

If an additional stay beyond the initial 90-day stay is not allowed, the court must appoint an attorney to represent the servicemember. As a practical matter, the servicemember has likely employed counsel or has been appointed an attorney. Thus, the court has the option of granting an additional stay or appointing an attorney for the servicemember. The court can also hold a hearing to determine if an additional stay should be granted. Consideration should be given to the effect of an additional stay on both parties. If a stay is not granted, can the servicemember sufficiently assist his counsel in preparing for a court hearing? Can the servicemember appear via video conferencing?

VII. Defending Against a Request for Staying the Proceedings

If a stay of proceedings is granted, it can work a hardship on the nonmilitary party in domestic cases. For example, a mother is deployed and has custody of her child, and leaves the child with an out-of-state relative instead of the father. The father files a motion to change custody, and mother applies for a stay until her military duty is complete. There are tools and strategies to effectively oppose a request for stay of proceedings.

7. 50 U.S.C. App. § 521 (d).
11. 50 U.S.C. App. § 522 (d) (2).
A. Requirement of a military necessity

First, what is the military necessity that prevents a hearing, and has the servicemember provided documentation of military necessity? The commander of the servicemember must clearly delineate the nature of the military necessity. Even soldiers in combat zones normally receive leave during which time a court proceeding can be scheduled.

The nature of the court proceeding also has an impact on the necessity of the servicemember appearing in court. In a hearing to determine child custody, it may be imperative to have the servicemember present for the hearing. In a motion to increase child support, a request for stay has been denied by some courts because the presence of the servicemember was not necessary. It is up to the discretion of the court as to whether the presence of the servicemember is so critical that a stay is necessary.

B. Requesting the servicemember appear by electronic device

Another strategy to avoid a stay, is suggesting to the court that the servicemember appear through a video conference or through a video conference deposition. The military is constantly increasing its video conferencing capabilities. Video conferences are conducted between military commanders who are separated by lengthy distances. Face to face meetings are often prohibitive because of time and the danger of travel. The military has implemented video conferences with servicemembers and their families to boost morale. This same technology can be used to allow the servicemember to appear at the hearing. Logistically, it may be easier to take a video conference deposition of the servicemember. There is precedent for a court to deny a stay and allow videotape depositions.

C. Requesting an interlocutory or temporary order

Counsel for the nonmilitary party can also convince the court that an interlocutory or temporary order might be appropriate. Take for example, a servicemember who has custody of his or her child places them with a grandparent and then deploys. The attorney for the noncustodial, nonmilitary party may be able to convince the court it is in the best interest of the child to change custody on a temporary basis. Obviously counsel for the nonmilitary party should argue that a stay is not in the best interests of the child(ren) and would have a greater adverse effect if the stay is granted than the adverse effect on the servicemember if the stay is not granted.

D. Other defenses

The location of the servicemember and availability of leave may give the attorney for the nonmilitary party ammunition for avoiding a lengthy stay. If a servicemember is at a post in the United States, it is much easier to argue that military duty does not require a stay. Counsel should request a statement from the servicemember’s commander or personnel records indicating the number of ordinary leave days available to the servicemember, and if they are able to take ordinary or emergency leave. The judge can always order the servicemember to inform the court when the servicemember is eligible for leave.

Kansas law requires a custodial parent to notify the other parties 30 days in advance by registered mail, if they intend to reside elsewhere for more than 90 days. If a servicemember deploys overseas for more than 90 days, does this apply? If the servicemember does not comply with K.S.A. 60-1620 (a), the attorney for the nonmilitary party may be able to use this as a defense against a stay. There are no Kansas cases that address whether military deployment for more than 90 days is a change of residence as set out in K.S.A. 60-1620 (a).

VIII. Other Related Issues

A. Child support

Determining child support is usually one of those issues that will not normally require a stay. A servicemember’s income is fairly easy to compute. The attorney for the nonmilitary spouse should obtain the Leave and Earning Statement (LES) of the servicemember.
A servicemember and his or her counsel should not automatically concede the issue of residential custody. The military has gone out if its way to make life easier for military parents. Most military posts have established day care centers and preschools. Many military installations have grade schools, middle schools, and even high schools. Those military installations without their own schools, have established close relationships with local civilian schools. An attorney representing a servicemember in a custody fight should obtain detailed information on all military services offered to children.

The children of servicemembers also have unique opportunities. For example, children residing on a military installation often are offered classes on local languages and customs. Many military installations offer scholarships and other programs available only to the children of servicemembers that reside on that installation. Military installations have excellent recreational programs and other programs specifically designed to provide activities for children of all ages. Children of servicemembers have access to excellent medical and dental treatment. All servicemembers arriving at a military installation are assigned a military sponsor to assist them with concerns and to provide information.

At the very least, a servicemember should be allowed to have extended parenting time with his or her children. Many of the same arguments cited above for residential custody can also be utilized for extended parenting time. Servicemembers are entitled to 30 days of leave each year, which allows them plenty of time to visit relatives and friends. Spending a summer in Germany or Italy with a parent could be an experience of a lifetime.

X. Kansas Cases

There have been several notable Kansas cases involving the SCRA and its predecessor, the Soldier and Sailor’s Civil Relief Act (SSCRA). The most recent case is In re Marriage of Bradley. Levi Bradley, the petitioner, joined the military and shortly thereafter filed for divorce and obtained an order granting him temporary custody of the child. The parties later agreed to an order granting sole legal custody to Levi, but giving Levi’s mother residential custody. Later, Amber Bradley, the respondent, filed a motion to modify this order.

Levi Bradley applied for a stay pursuant to the SCRA, and indicated he was in Iraq. Amber argued the SCRA did not apply to temporary orders, and the district court agreed. The court ordered temporary joint legal custody with Amber receiving temporary residential custody. Levi Bradley appealed.

The Kansas Supreme Court upheld the decision of the court, but did use an unusual rationale. 50 U.S.C. A. App. § 522(b) (2) requires the servicemember to meet two requirements: (1)
To send a letter or other communication indicating how the military service materially affects the ability to appear in court and stating a date when the servicemember can be available; and (2) A letter from the servicemember’s commander stating that the military member is unavailable and is not able to receive military leave to appear in court. The Court held that Levi failed to complete either of these requirements.

In re Marriage of Hampshire16 is an interesting case in which the father cleverly attempted to take advantage of the SSCRA, the predecessor of the SCRA. In 1985, Yvonne Hampshire filed for divorce. Ricky Hampshire was in the military and absent without leave (AWOL), Yvonne had Ricky served in the Riley County Jail. The pleadings did not indicate that Ricky was in the military, and Ricky took no action to file an answer. Eventually Yvonne obtained a default judgment for child custody and child support.

Ricky Hampshire sought to set aside the default judgment alleging that the pleadings did not state he was in the military, and was void pursuant to the SSCRA. The Court rejected this argument and ruled the judgment was voidable, not void. The Court also ruled that the SSCRA only applied to soldiers on active duty, and that because Ricky was AWOL he was not on “active duty.” Thus the SSCRA did not apply to Ricky.

Another domestic case involving a military member is that of In Re Marriage of Thompson.17 Elizabeth Thompson filed for divorce and obtained an order for custody and child support. She made no attempt to serve her husband, David Thompson, nor did she file anything indicating David was in the military. David became aware of the divorce and had a JAG send a letter to the court indicating David wanted a stay of the proceedings and alleging the district court had no in personam jurisdiction over David. David filed no other documents with the district court, and Elizabeth was granted a default judgment for child custody and support.

David then filed a motion to set aside the child support order, alleging that Elizabeth had not complied with the provisions of the SSCRA. The district court held the letter from David’s military attorney constituted an Entry of Appearance, that David had received proper notice of the proceedings and denied David’s request to set aside the order. The Kansas Court of Appeals reversed and held the letter from David’s military attorney did not constitute an Entry of Appearance and David had never been properly served with the pleadings.

XI. Conclusion

The Servicemember’s Civil Relief Act is designed to protect the soldier, sailor, or marine who’s military service effects his or her ability to appear in court when properly served with notice of a court proceeding. However, the SCRA does not give the servicemember an automatic stay on all proceedings to the servicemember. In this era of increased military operational tempo, legal practitioners need to be familiar with the provisions of the SCRA.

About the Author

Thomas D. Arnhold is a 1978 graduate of Washburn University School of Law School and has practiced in Hutchinson since 1980. He is a member of the law firm of Oswalt, Arnhold, Oswald, and Henry, where he has practiced since 1991. Arnhold retired in October 2007 from the Kansas Army National Guard after 24 years of service. While in the Kansas Army National Guard, he attained the rank of colonel and last served as the staff judge advocate of the 35th Infantry Division at Fort Leavenworth. As a former judge advocate, Arnhold dealt with a variety of issues involving the Servicemembers’ Civil Relief Act and frequently spoke to soldiers and family readiness groups on deployment and premobilization issues.

Summary Judgement for Failure to Mediate: Is it Really That Simple?

By Stanley A. Leasure

I. Introduction

Crandall v. Grbic was decided in July 2006 by the Kansas Court of Appeals.1 In an opinion written by Chief Judge Gary Rulon, the court held that summary judgment was appropriate because plaintiffs, who had entered into a mediation agreement with the defendant, elected to file suit without first attempting to mediate.2 The portion of the opinion addressing the mediation issue was written in a summary fashion, without citation and with little discussion or analysis, leaving the impression that the entitlement of the defendant to a summary judgment was self-evident. In fact, the resolution of this issue called into question not only fundamental issues of contract interpretation, but also the interplay between the various processes of alternative dispute resolution and entitlement of access to the courts. Unfortunately, the court did not address these issues, giving no guidance with respect to several fundamental legal principles, including two of first impression in Kansas.3 This case has attracted attention in the alternative dispute resolution (ADR) literature as standing for the facially simple proposition that failure to mediate is grounds for summary judgment.4 It is anticipated that it will be relied upon for this proposition in cases litigated in state and federal courts around the country.5

FOOTNOTES
2. Id. at 198, 138 P.3d at 379.
3. In reaching its decision regarding the mediation clause, the court impliedly determined that such mediation agreements are enforceable in Kansas and that the remedy for breach is dismissal of the action filed prior to the mediation.

II. Crandall v. Grbic

In this case, the homebuyers sued their real estate agent under several theories, including breach of fiduciary duty, fraud, misrepresentation, and violation of the Kansas Consumer Protection Act.5 The agent filed a motion for summary judgment on a number of grounds, one of them being that the failure of the plaintiffs to attempt mediation before filing suit as required in the contract precluded their claims.7 The trial court granted the defendant's request for summary judgment.8

On appeal, the court affirmed, agreeing that there were no genuine issues of material fact on the substantive issues.7 Also, at the end of its lengthy opinion, having already affirmed the summary judgment in favor of the defendant on all substantive claims, the court devoted a scant five paragraphs to its conclusion that the agent was also entitled to summary judgment because the homeowners failed to mediate their claims against

6. Id. at 180, 138 P.3d at 369.
7. Id. at 185, 138 P.3d at 371.
8. Id.
9. Id. at 186, 138 P.3d at 372.
The defendant had filed his motion for summary judgment. Seeking mediation, they did attempt to mediate after the plaintiffs' argument that although they filed suit without first seeking mediation, they did attempt to mediate after the defendant had filed his motion for summary judgment.

With no citation of authority and little discussion, the court decided that the mediation clause required the homeowners to pursue mediation at some point before they did. In the same fell swoop, the court, without discussion or analysis, also impliedly decided that such mediation agreements are enforceable in Kansas and that the remedy for breach is dismissal of an action filed prior to the mediation, two issues of first impression in Kansas. As will be discussed in the subsequent sections of this article, these determinations involve significant legal issues, which the court did not discuss.

III. Interpretation

Mediation clauses in contracts are nothing more than that; contractual clauses to be construed and interpreted as such. Unfortunately, other than the court's reference to the fact that “the law favors reasonable interpretations of contracts,” the Crandall opinion shed no light on the basis for the court's determination in this regard. An examination of the issue of interpretation must begin with an analysis of the common law of Kansas regarding the interpretation of contracts in general, and to the extent available, ADR provisions.

The initial determination the court must make is whether an ambiguity is present. A clear, unambiguous contract is to be enforced according to the terms chosen by the parties. If the contractual terms are clear, there is no room for construction. They are interpreted through the judicial function without extraneous evidence. The Kansas courts have consistently ruled that parties will be held to understand their contracts and intend what their terms suggest. Likewise, the courts eschew the notion that it is within their prerogative to redraft contracts in an effort to reach some perception of an equitable result. Sometimes the terms are not so clear. An ambiguity exists when the provisions are susceptible to construction yielding two or more meanings. Once the court determines that a contract is ambiguous, the intent of the parties at the time the contract was executed is determinative and evidence of intent is admissible.

In Kansas, the primary rule of construction is to determine intent by looking at the language as a whole, taking into consideration all circumstances and conditions that confronted the parties when they made the contract. As mentioned by the Crandall court, the law favors reasonable rather than unreasonable interpretations and interpretations, which reduce the terms of a written contract to an absurdity or which vitiate the purpose of the agreement are avoided.

City of Lenexa v. C.L. Fairley Construction Co., involved a dispute over the interpretation of ADR provisions in which the Kansas Supreme Court resorted to the typical rules of contract interpretation. An arbitral award had been entered in favor of the contractor who filed a motion to confirm it. The city opposed the motion and sought to vacate the arbitral award, claiming that the contract was ambiguous and that the ambiguity created a presumption against binding arbitration. The city argued that the parties never agreed to be bound by the

10. Id. at 197-198, 138 P.3d at 379. The substantive claims were determined in favor of the defendant and the court decreed his entitlement to summary judgment based on those claims. The question arises as to whether all rulings necessary to the outcome of the case had been decided and the subsequent discussion regarding the breach of the mediation clause constituted nothing more than dicta. The appellate courts in Kansas have addressed the nature of dicta in a number of cases. It has been characterized as: declarations in an opinion not necessary to the decision of the matter in controversy; (Rodriguez v. Cascade Laundry Co., 185 Kan. 766, 347 P.2d 455 (1959); Putnam v. City of Salina, 137 Kan. 731, 2 P.2d 957 (1933); not controlling of the actual decision (Flax v. Kansas Turnpike Auth., 226 Kan. 1, 596 P.2d 446 (1979)); and which were broader than the legal questions before the court for decision (State ex rel. Parker v. Stonehouse Drainage Dist., No. 1, Jefferson County, 152 Kan.188, 102 P.2d 1017 (1940)). As such, under Kansas law, these declarations, while respected, (State ex rel. Parker v. Stonehouse Drainage Dist., No. 1, Jefferson County, 152 Kan. 188, 102 P.2d 1017 (1940)) are binding on “nobody.” State v. Crosby Bro. Mercantile Co. 103 Kan. 856, 176 P. 670 (1918).

11. Id. at 198, 138 P.3d at 378. The Purchase Contract contained the following mediation clause: “MEDIATION. Any dispute or claim arising out of or relating to this Contract, the breach of this Contract, or the services provided in relation to this Contract, shall be submitted to mediation in accordance with the rules and procedures of the Homesellers/Homebuyers Dispute Resolution System. Disputes shall include representations made by the Buyer, Seller, or any real estate broker/licensee in connection with the sale, purchase, financing, condition, or other aspect of the Property including, without limitation, allegations of concealment, misrepresentation, negligence, and/or fraud ... The following matters are excluded from mediation hereunder ... (e) violation of Kansas real estate license laws.” Id.

12. Id. at 198, 138 P.3d at 378. The court stated: “The Purchase Contract is clear on this issue, any dispute “shall be submitted to mediation.” As cited above, the law favors reasonable interpretations of contracts. To allow the plaintiffs to attempt mediation to avoid summary judgment after defendant has devoted time and money defending their lawsuit. Sometimes the terms are not so clear. An ambiguity exists when the provisions are susceptible to construction yielding two or more meanings. Once the court determines that a contract is ambiguous, the intent of the parties at the time the contract was executed is determinative and evidence of intent is admissible. In Kansas, the primary rule of construction is to determine intent by looking at the language as a whole, taking into consideration all circumstances and conditions that confronted the parties when they made the contract. As mentioned by the Crandall court, the law favors reasonable rather than unreasonable interpretations and interpretations, which reduce the terms of a written contract to an absurdity or which vitiate the purpose of the agreement are avoided.


14. Id.


25. Id. at 318, 777 P.2d at 853.

26. Id.
arbitrator’s decision and that the remedies provision, which provided that other remedies were not precluded, created an ambiguity regarding the binding nature of the proceeding. The city also claimed that failure to demand arbitration within a certain time frame resulted in the finality of the engineer’s decision. The trial court found that during negotiations the parties intended the arbitration to be binding; and, accordingly, allowed introduction of evidence of intent. It concluded that the provision did not call for binding arbitration.

IV. Enforceability-Waiver

A surprising number of cases dealing with the issue of waiver of the right to insist on enforcement of ADR clause have been the subject of litigation at both the trial and appellate levels, including several in Kansas. Waiver of rights under a contract is not favored, and such issues in arbitral settings are decided in the shadow of the very strong federal policy favoring enforcement of such agreements. Accordingly, the burden of establishing waiver has been described as “heavy,” particularly when a defendant has raised the issue in its answer. It has also been held that to establish waiver it must be shown that the party seeking to enforce an arbitration provision engaged actions inconsistent with intent to arbitrate and that the party claiming waiver was prejudiced.

In D.M. Ward Construction Co. Inc. v. Electric Corp. of Kansas City, the court comprehensively reviewed the issue of waiver of rights under an arbitration provision. This case involved a suit by a subcontractor against its general contractor for a balance owed. The subcontract contained an arbitration clause that “all claims, disputes, and other matters in question arising out of, or relating to, this subcontract ... shall be decided by arbitration.” The defendant did not raise the issue of arbitration in its answer. Finally, about nine months later, after discovery and more than one trial setting, the defendant moved to compel arbitration and stay the court proceedings under the Kansas Uniform Arbitration Act. The court denied the motion. A bench trial ensued, and the court entered judgment in favor of the plaintiff. On appeal, the defendant general contractor asserted that the trial court erred in refusing to compel arbitration. The plaintiff countered that the defendant’s delay in raising the arbitration issue constituted waiver.

The court noted that waiver is the product of “an intentional renunciation of a claim or right and exists only where there has been some absolute action or inaction inconsistent with that claim or right.” While recognizing the absolute right of a party to an arbitration contract to insist upon the enforcement of that right, the court noted that such a right could be waived. The court quoted the Kansas Supreme Court’s explanation that the right to arbitration can be waived “by [a party] being unjustifiably slow in seeking arbitration.” The court reviewed a number of other federal and state decisions on this issue to the effect that waiver can be found as a result of “participation in a lawsuit without reserving the right to arbitrate, by raising it in the answer or reasonably soon thereafter”; “filing answers and motions, moving for extensions of pretrial deadlines, and initiating extensive discovery before filing a motion to compel arbitration”; and “answering and filing a cross-claim while waiting nine months before moving to compel arbitration.”

The court also recognized the modern trend in evaluating waiver is to question whether the opposing party has been prejudiced. What constitutes prejudice was explored by the court, which noted that it has been found when the party seeking arbitration invokes the judicial process to the detriment or prejudice of the other party. In addition, the court observed that the Fifth Circuit had found no prejudice when

27. Id. at 318, 777 P.2d at 853-854.
28. Id.
29. Id. at 318, 777 P.2d at 853.
30. Id.
31. See also Alexander v. Esherhart, 27 Kan. App. 2d 897, 907, 7 P.3d 1282, 1290 (2000), in which the Kansas Court of Appeals held that “arbitration agreements are construed using the usual rules and canons of contract interpretation” and that the affirmation of arbitration agreements is desirable result, even if the provisions of the contract are somewhat uncertain and indefinite.
32. 28. Id.
39. Id. at 115, 803 P.2d at 594.
40. Id.
41. Id. See K.S.A. 5-402(a).
42. Id.
43. Id. at 117, 803 P.2d at 595.
44. Id. at 114, 803 P.2d at 596.
45. Id.
46. Id. at 117, 803 P.2d at 596 (citing Proctor Trust Co. v. Neibart, 130 Kan. 698, 705, 288 P. 574 (1930)).
47. Id. at 117, 803 P.2d at 596 (citing Jackson Trak Group Inc. v. Mid States Port Auth., 242 Kan. 683, 751 P.2d 122 (1988)).
48. Id. at 118, 803 P.2d at 596. (citing Jackson Trak Group Inc. v. Mid States Port Auth., 242 Kan. 683, 751 P.2d 122 (1988)).
49. Id. at 119-120, 803 P.2d at 597 (citing Price v. Drexel Burnham Lambert Inc., 791 F.2d 1162 (5th Cir. 1983)).
50. Id. at 120, 803 P.2d at 597.
51. Id. (citing 98 A.L.R. 3d 767; 5 Am. Jur. 2d, Arbitration and Award §§ 51, 52).
52. Id.
53. Id. (citing Price v. Drexel Burnham Lambert Inc., 791 F.2d 1156, 1158 (5th Cir. 1986)).
the party insisting on arbitration expressed the desire to arbitrate in his answer and maintained that position during the minimal discovery it conducted.\textsuperscript{54} Finally, the court cited the Tenth Circuit’s tour de force on waiver, which listed six factors to be used in determining waiver.\textsuperscript{55} Using the six-factor test under \textit{Peterson}, the court found that the defendant’s actions were inconsistent with its later assertion of the right to arbitrate.\textsuperscript{56} Among the factors the court considered important in reaching this conclusion were: (1) the defendant’s answer gave no indication that it desired to arbitrate, (2) the trial court was not aware that the defendant claimed a right to arbitrate until its motion filed 10 months after the lawsuit began, (3) discovery was essentially complete prior to the time defendant filed its motion to compel arbitration, (4) the defendant’s request for arbitration enforcement came very close to the trial date, (5) the defendant did not file a counterclaim requesting a stay of the proceedings, (6) the defendant conducted some discovery prior to filing its motion to compel arbitration, and (7) the tardiness of the request for arbitration prejudiced the plaintiff since it had already conducted a substantial amount of discovery in preparation for trial.\textsuperscript{57}

V. Conditions Precedent and Exhaustion of Remedies

The issue of exhaustion of remedies was addressed in the appellee briefs in \textit{Crandall}.\textsuperscript{58} However, in its opinion affirming the summary judgment in favor of the defendant, the court of appeals did not address this issue directly. The Kansas Supreme Court has used an exhaustion of remedies rubric to analyze the prelitigation requirement for ADR. In \textit{National Education Association – Topeka v. Unified School District 501}, the Court considered this issue in the context of a mandatory grievance procedure established in an employment contract between members of a teachers’ union and the school district.\textsuperscript{59} The underlying issue involved entitlement to health insurance premium refunds.\textsuperscript{60} The trial court granted summary judgment, dismissing the complaint of the union on the basis that it was required to follow the employment contract grievance procedure prior to litigation.\textsuperscript{61} The contract required binding arbitration, but the union never requested arbitration before litigation and, in fact, missed the deadline for requesting arbitration.\textsuperscript{62} The trial court, however, remanded the case for arbitration. On appeal, the school district claimed the trial court lacked jurisdiction because the issues at hand were the subjects of a mandatory arbitration agreement.\textsuperscript{63} The Court ruled that since the parties had “unambiguously agreed to submit all questions involving the interpretations of their contracts to an arbitrator, the function of the courts is limited.”\textsuperscript{64} In affirming the summary judgment granted to the defendants, the Court held that “where a party makes no attempt to invoke mandatory contractual agreements, it is barred from then suing to enforce the contract.”\textsuperscript{65}

In an analogous situation, the First Circuit deemed mediation a true condition precedent, precluding the right to institute arbitration when neither party had requested mediation.\textsuperscript{66} The trial court denied the plaintiff’s motion to compel arbitration on the grounds that the contractual language contemplated mediation as a condition precedent to both arbitration and litigation.\textsuperscript{67}

VI. Statutory Enforcement

Compared to mediation clauses, for which statutory enforcement procedures are not generally available, the mechanisms and procedure for the enforcement of agreements to arbitrate are well established under the Federal Arbitration Act (FAA).\textsuperscript{68} Notwithstanding the significant differences between arbitration and mediation,\textsuperscript{69} a few courts, having made the decision to enforce a mediation clause, have applied the aforementioned stay and summary adjudication provisions of the FAA or a state counterpart drafted under the Uniform Arbitration Act (UAA).\textsuperscript{70} In this way, the courts incorporate the summary procedures provided in the FAA and its state counterparts, stay the litigation, and direct the parties to proceed to “arbitration,” and resolution of the case.\textsuperscript{71} Notwithstanding the expediency of this approach, it has been soundly criticized as a distortion of the mediation process as well as the provisions of the FAA and the UAA.\textsuperscript{72}

\textsuperscript{54} Id. at 120, 803 P.2d at 598 (citing \textit{Teneco Resins Inc. v. Davy Intern.}, AG, 770 F.2d 416, 421 (5th Cir. 1985)).
\textsuperscript{55} Id. (citing \textit{Peterson v. Shearson/American Exp. Inc.}, 849 F.2d 464, 467-468 (10th Cir. 1988)).
\textsuperscript{56} The six factors identified as critical in an examination of the question of waiver were: (1) whether the party’s actions are inconsistent with the right to arbitrate; (2) whether the litigation machinery has been substantially invoked and the parties are well into preparation of a lawsuit before the party notified the opposing party of an intent to arbitrate; (3) whether a party either requested arbitration enforcement close to the trial date or delayed for a long period before seeking stay; (4) whether a defendant seeking arbitration filed a counterclaim without asking for a stay of the proceedings; (5) whether important intervening steps (e.g., taking advantage of judicial discovery procedures not available in arbitration) had taken place; and (6) whether the delays affected, mislead, or prejudiced the opposing party.
\textsuperscript{57} Id. at 121-122, 803 P.2d at 598.
\textsuperscript{58} Brief of Appellants, p. 21-22.
\textsuperscript{59} 269 Kan. 535, 7 P.3d at 1174 (2000).
\textsuperscript{60} Id. at 534, 7 P.3d at 1176.
\textsuperscript{61} Id.
\textsuperscript{62} Id. at 539, 7 P.3d at 1178.
\textsuperscript{63} Id. at 542, 7 P.3d at 1180.
\textsuperscript{64} Id. at 546, 7 P.3d at 1182.
\textsuperscript{65} Id. at 547, 7 P.3d at 1183 (citing \textit{Atterberry v. Ritchie}, 243 Kan. 277, 285, 756 P.2d 424 (1988)).
\textsuperscript{66} \textit{HIM Portland LLC v. DeVito Builders Inc.}, 317 F.3d 41, 44 (1st Cir. 2003).
\textsuperscript{67} Id. at 44.
\textsuperscript{68} 9 U.S.C.A. §§ 3-4. See also K.S.A. 5-402(d).
\textsuperscript{69} See the Kansas Dispute Resolution Act, K.S.A. 5-502 (g) and (h).
\textsuperscript{71} 7 U.S.C. §§ 3, 4, 9; Uniform Arbitration Act §§ 2, 7, 11 ULA 68, 133 (1985); See also K.S.A. 5-402.
Such blurring of the lines between arbitration and mediation for purposes of enforcement was found unnecessary by the U.S. District Court for the District of Kansas in Lynn v. General Electric Co.73 The court rejected the argument that the mediation process encompasses arbitration for purposes of the FAA. One of the points made by the court was that the recent revisions to the UAA and the promulgation of the Uniform Mediation Act (UMA) distinguish between arbitration and mediation.74 The National Council of Commissioners on Uniform State Laws declined to extend the UAA so as to mandate summary enforcement of agreements to mediate.75 The Lynn court explained: “The Court also finds compelling the fact that, although included in preliminary drafts of the UMA, the final version of the UMA drafted by the National Council of Commissioners on State Laws does not require enforcement of agreements to mediate.”76

VII. Common Law Dismissal or Stay

Another issue faced by the court with respect to a violation of a mediation agreement is whether the underlying litigation should be dismissed or simply stayed to permit the mediation to go forward. In addition to the substantive questions, this issue raises several procedural considerations. These include: the treatment of a motion to dismiss for failure to arbitrate as a motion to compel arbitration,77 whether a motion to dismiss is an appropriate mechanism to present the issue of mandatory arbitration to the court,78 and the nature of the power to stay proceedings.79

This question of the propriety of staying litigation to allow alternative dispute resolution proceedings to take place has been examined.80 Hillock v. Wyman involved a dispute over purchase of a residence in which the agreement contained a mediation clause very similar to the one in Crandall.81 The plaintiff contended that the defendants had breached a contractual provision by refusing to mediate the dispute. They sought recovery of attorney’s fees incurred in the bringing of their litigation.82 The matter was before the court on a motion for summary judgment by the defendant, which was granted, and the court declined to award damages resulting from the claimed breach of the mediation clause because “As a matter of fairness and practicality, the court cannot retrospectively enforce a mediation clause after determining, with the benefit of hindsight, that mediation would have been futile.”83

While dismissal is certainly one of the available arrows in the court’s quiver to deal with a failure to mediate,84 the less drastic combination of specific performance and stay have been implemented in a number of such cases.85

VIII. Monetary Damages and Other Sanctions

In connection with the breach of a mediation clause, the nonbreaching party can seek several types of damages under

74. Id. at *6.
75. Id. at *7.
76. Id. at *7 comparing July 23-30, 1999 annual meeting draft, with Uniform Mediation Act, reprinted in 22 N Ill. U. L. Rev. 165, 166-72 (2002), providing final draft without summary enforcement provisions.
78. Some courts have ruled that it is not. The Missouri Court of Appeals has held that the appropriate motion is for a stay of proceedings and not a motion for dismissal. See, e.g., State ex rel. St. Joseph Light & Power Co. v. Donelson, 631 S.W.2d 887, 892 (Mo. App. W.D. 1982); Fleming & Hall Administrators Inc. v. Response Inc., 195 S.W.3d 458, 461 (Mo. App. W.D. 2006).
82. Id. at *3.
83. Id. at *3.

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general principles of the law of contract damages. One type of recovery would be for lost expectation interest. Under Kansas law, such claims seek to recover the benefit of the bargain (usually lost profits, plus any incidental or consequential damage caused by the breach) to place the claimant in as good a position as if the contract had not been breached. The U.S. District Court for the District of Kansas has explained: “Ordinarily, contract damages are based upon the injured party’s ‘expectation interest,’ as measured by (a) the loss in the value to [the injured party] of the other party’s performance caused by its failure or deficiency, plus (b) any other loss, including incidental or consequential loss, caused by the breach, less (c) any cost or other loss that [the injured party] has avoided by not having to perform.”

In other such instances, damages for reimbursement of losses caused by reliance on the contract could be appropriate, so as to put the damaged party in as good a position as though the contract had never been made. These damages are usually recoverable as an alternative to expectation damages when lost profits cannot be proven with the requisite certainty and usually include expenditures made and property consumed in reliance on the contract. To be recoverable, reliance damages must represent foreseeable expenditures made valueless by virtue of the defendant’s breach, and like other contract damages, be reasonably certain and the proximate result of the breach.

Other potential sanctions have surfaced in litigation involving breach of arbitration clauses which could be applied to mediation cases such as awards of attorneys’ fees and other sanctions. In Bailey v. Bicknell Minerals Inc., the Seventh Circuit found that the filing of litigation by the president of a union against an employer violated a contractual obligation to arbitrate. The magistrate judge dismissed the lawsuit and the plaintiff appealed. The court not only affirmed the dismissal but assessed sanctions against the plaintiff’s attorney with respect to summary judgment vis-à-vis breach of the mediation clause as argued unnecessarily to the decision and mere dicta. Coming on the heels of a detailed analysis of the substantive issues, that portion of the opinion dealing with the mediation clause is, to say the least, devoid of superfluity; and the mediation provisions in the contract are couched in the leanest of terms, making it difficult to reconcile the court’s holding with the contract language.

After deciding every substantive issue against the plaintiffs, the court came to the final point regarding the failure of the plaintiffs to mediate. The court could have simply concluded with a statement that, based on the court’s holdings with respect to all of the substantive claims, a ruling on the issue of failure to mediate was not necessary. However, the court decided to deliver a final pronouncement: “Although defendant is entitled to summary judgment on all issues because of the plaintiffs’ failure to prove their claims, the district court was correct to grant defendant a summary judgment by reason of the plaintiffs’ failure to timely seek mediation.”

The point, however, is that once the court elected to weigh in on this issue, the manner in which it dealt with it (if it be deemed more than dicta) may have a profound effect. The opinion of the court of appeals did not explicate the complexity of the underlying principles and policy issues appurtenant thereto, particularly in light of the undeveloped nature of this area of the common law.

This ruling left several questions unanswered: (1) Was the filing of the suit not precluded by the mediation clause as long as the plaintiffs attempted mediation sometime during the litigation and, if so, how early?; (2) What was the court’s interpretation of the contract language, given that mediation

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93. Id. at 408-409, 870 P.2d at 693.
96. 819 P.2d 690 (7th Cir. 1987).
97. Id. at 693.
was not specifically made a condition precedent to the filing of a lawsuit and there was no specific provision regarding exhaustion of remedies prior to litigation; (3) What effect, if any, did the mediation rules (dealing with the initiation of mediation, mediator selection and time limitations for the bringing of claims) which were incorporated into the contract have on the court’s interpretation?; and (4) Are the implied conclusions of the court to be construed as new common law rules in Kansas regarding mediation clauses? In addition, the court’s decision that summary judgment was the appropriate remedy for the plaintiffs’ violation of the agreement to mediate was not explained. The court had the option to declare that a stay of litigation and an order to participate in mediation was an appropriate alternative. The reason the court approved the ultimate sanction of summary judgment is unknown. Was the possibility of monetary damage linked with a possible stay considered and rejected?

Perhaps, most importantly, the court did not address whether the defendant had waived his right to seek protection from the litigation pursuant to the mediation clause. As discussed above, the Kansas courts have dealt with similar issues in the arbitral context on a number of occasions. Yet, by resolving the issue in summary fashion, the Crandall court declined to develop the common law in Kansas by drawing parallels or distinctions between these holdings and cases involving mediation. It is clear the court was convinced the summary judgment granted by the trial court was appropriate and that the plaintiffs should not prevail on appeal. Unfortunately, the manner in which the mediation issue was dealt with does nothing to further the development of the law in this area and, in some respects, may cloud it. Hopefully, this will be subsequently overcome by the determination that the discussions in Crandall regarding the mediation issues constitute nothing more than dicta, so that when these issues arise again, the analysis of these important issues can start with a clean slate, unencumbered by the undeveloped conclusions in the Crandall opinion.

About the Author

Stanley A. Leasure received his juris doctorate from the University of Tulsa in 1980. He is an assistant professor of business law at Missouri State University. His 25 years of law practice in Fort Smith, Ark., with the law firm of Daily & Woods PLLC included service as a mediator and arbitrator in litigated cases. He is a certified civil mediator in Arkansas.
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Supreme Court

**Attorney Discipline**

**IN RE PATRICK S. BISHOP**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**INDEFINITE SUSPENSION**

**NO. 99,076 – MARCH 28, 2008**

FACTS: Respondent was a private practitioner in Fort Scott who was admitted in 1979. Two different complaints were filed by the Fletchers, one involving a vehicular accident injuring Mr. Fletcher and one involving a Qualified Domestic Relations Order between Mrs. Fletcher and her former husband. In the personal injury matter, respondent filed a petition but failed to obtain service of process on the defendant. The court dismissed the matter in 2001 but respondent lied to his client regarding the status of the claim until 2005. In the post-divorce matter, respondent represented Mrs. Fletcher for 11 years but failed to prepare an acceptable order. He provided false excuses for the delay in that matter as well.

The hearing panel found respondent violated KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 3.2 (expediting litigation), 8.1 (disciplinary matters), and 8.4 (misconduct) and SCR 207 (failure to cooperate with disciplinary process). The panel found eight aggravating factors, including a diversion that counts as prior discipline in any subsequent proceedings, and three mitigating factors. Respondent requested probation, but the panel rejected his plan and recommended one-year definite suspension and proof of restitution prior to reinstatement. Respondent filed exceptions to some of the findings.

HELD: The Court reviewed the facts and found clear and convincing evidence to support the panel's findings of fact. The conclusions of rules violations were not in dispute. Respondent requested published censure, but the Court found the misconduct to be intentional rather than negligent and ordered indefinite suspension plus proof of restitution prior to reinstatement.

**IN RE TROY L. DAUGHERTY**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**INDEFINITE SUSPENSION**

**NO. 99,467 – MARCH 28, 2008**

FACTS: Respondent was a private practitioner in Olathe and was admitted in 1990; he is also admitted in Illinois and Missouri. In a case of reciprocal discipline, a formal complaint was filed in Kansas based on disciplinary proceedings in Illinois and Missouri. At the Kansas hearing, respondent disputed the findings of the Illinois disciplinary hearing panel. The Illinois complaint was based on a $15,000 car loan respondent obtained from a bank. However, he failed to purchase the intended car, purchased a different car for $10,000, spent the extra $5,000 and defaulted on most of the loan. He later lied about the transaction in bankruptcy proceedings, in which the bank claimed the $15,000 was obtained fraudulently and inexplicably claimed an additional $18,000 in attorneys fees for attempting to collect the $9,000 balance on the loan.

The Illinois panel considered the facts and found violations of seven rules and considered mitigating and aggravating factors, including a prior published censure in Kansas. The panel recommended a suspension of one year with reinstatement conditioned on proof of payment of restitution to the bank. Subsequently, the Missouri Supreme Court adopted the Illinois findings and suspended respondent's license for one year with no reinstatement until restitution is made. The Kansas panel noted that SCR 202 provides that a final adjudication in another jurisdiction conclusively establishes the misconduct for Kansas proceedings. The panel proceeded to compare the Illinois rules to their Kansas counterparts and found violations of KRPCs 3.1 (meritorious claims and contentions), 3.3 (candor to the tribunal), 8.1 (disciplinary matters), and 8.4 (misconduct). Based on the severity of the misconduct that amounted to bank fraud, the panel departed from recommending the reciprocal discipline requested by respondent and the disciplinary administrator and recommended indefinite suspension.

HELD: The Court observed that normally in cases of reciprocal discipline the sanction in Kansas is also the same. However, a majority concurred with the hearing panel's recommendation due to respondent's misconduct. A minority of the Court would impose an even harsher sanction and disbar respondent.
FACTS: Respondent, who was admitted in 1991, was the subject of a disciplinary proceeding, which resulted in a two-year definite suspension in 2002. He has not filed a petition for reinstatement of his license and remains suspended. The Disciplinary Administrator's Office received a report that respondent had engaged in the unlicensed practice of law during his suspension.

Following a formal disciplinary hearing, the panel found that respondent attempted to help a friend who was having financial difficulties and tried to help keep her home from foreclosure. He advised her to file a Chapter 7 bankruptcy petition and assisted in preparing it. He advised her not to exempt her home despite the fact she was residing in it. As a result, the home became the property of the bankruptcy estate. When the friend's wages were garnished, respondent referred her to a bankruptcy attorney for help. The attorney found she should not have filed for bankruptcy in the first place and should have exempted her home when she filed.

Despite the evidence of incompetence, the panel concluded that only violation of Rule 5.5(a) (unlicensed practice of law) was properly before it, considering respondent's licensure status. Because respondent was not authorized to provide legal advice from 2003 to the present while his license was suspended, the panel found he engaged in the unauthorized practice of law. The panel then found two aggravating factors and three mitigating factors and recommended indefinite suspension.

HELD: While respondent did not object to the panel's findings, apparently the Disciplinary Administrator's Office did. The office disagreed with the panel's jurisdictional conclusion that it was precluded from considering other violations that resulted from respondent's providing legal advice while not authorized to do so. The Court reviewed prior case law and determined that the separate types of inquiry were not mutually exclusive and that a suspended attorney is not absolved of compliance with other rules of professional conduct.

IN RE GEORGE W. SWISHER
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 98,844 – MARCH 28, 2008

FACTS: Respondent, who was admitted in 1991, was the subject of a disciplinary proceeding, which resulted in a two-year definite suspension in 2002. He has not filed a petition for reinstatement of his license and remains suspended. The Disciplinary Administrator's Office received a report that respondent had engaged in the unlicensed practice of law during his suspension.

Following a formal disciplinary hearing, the panel found that respondent attempted to help a friend who was having financial difficulties and tried to help keep her home from foreclosure. He advised her to file a Chapter 7 bankruptcy petition and assisted in preparing it. He advised her not to exempt her home despite the fact she was residing in it. As a result, the home became the property of the bankruptcy estate. When the friend's wages were garnished, respondent referred her to a bankruptcy attorney for help. The attorney found she should not have filed for bankruptcy in the first place and should have exempted her home when she filed.

Despite the evidence of incompetence, the panel concluded that only violation of Rule 5.5(a) (unlicensed practice of law) was properly before it, considering respondent's licensure status. Because respondent was not authorized to provide legal advice from 2003 to the present while his license was suspended, the panel found he engaged in the unauthorized practice of law. The panel then found two aggravating factors and three mitigating factors and recommended indefinite suspension.

HELD: While respondent did not object to the panel's findings, apparently the Disciplinary Administrator's Office did. The office disagreed with the panel's jurisdictional conclusion that it was precluded from considering other violations that resulted from respondent's providing legal advice while not authorized to do so. The Court reviewed prior case law and determined that the separate types of inquiry were not mutually exclusive and that a suspended attorney is not absolved of compliance with other rules of professional conduct.
The Court affirmed the Rule 5.5(a) finding and then proceeded to consider other allegations of violations rather than remanding the matter back to the panel. In its unusual role as fact-finder, the Court found clear and convincing evidence of violations of KRPCs 1.1 (competence) and 1.16(a) (declining representation). A violation of KRPC 1.7 (conflict of interest) was not established, and KRPC 1.8(a) and (e) (prohibited transactions) was apparently not raised or considered. The Court then accepted the recommendations of the hearing panel and the disciplinary administrator and ordered indefinite suspension.

IN RE ROBERT E. WONDER
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 99,495 – MARCH 28, 2008

FACTS: Respondent, whose registration address is Kansas City, Mo., was admitted in April 1984. A formal complaint charged him with misconduct in his handling of a probate matter. Respondent presented a will for probate and falsely represented to the court in an ex parte proceeding that the decedent's widow was named in the will as executrix. He further neglected to inform the decedent's brother and sister that the will named them as co-executors and as trustees of a testamentary trust. When they discovered the terms of the will, they petitioned the court to set aside the prior appointment and proceed according to the terms of the will.

The hearing panel found violations of KRPCs 1.1 (competence), 3.2 (expediting litigation), and 3.3(d) (candor to the tribunal). It found four aggravating factors present, and all three members found two mitigating factors while two found three additional mitigating factors present. Two members recommended published censure, while the third dissented and recommended suspension.

HELD: The Court adopted the uncontested findings of fact and the majority's conclusions of law. A majority of the Court agreed that published censure was warranted, but a minority would impose a more severe sanction.

Civil

EMINENT DOMAIN
SCHUCK V. RURAL TELEPHONE SERVICE CO. INC.
NORTON DISTRICT COURT – AFFIRMED
NO. 98,098 – APRIL 4, 2008

FACTS: When Schuck discovered that Rural Telephone had installed cable on his land outside the 40-foot easement he had negotiated with the company, Schuck filed action for ejectment and trespass after negotiations failed to resolve the dispute. Rural Telephone responded with petition for eminent domain seeking a permanent easement to keep its cable in its present location. Schuck then filed petition to temporarily and permanently enjoin Rural Telephone from proceeding with its eminent domain proceeding. District court denied the injunction, finding Rural Telephone's violation of the negotiated easement was a good-faith mistake, and that Schuck failed to prove Rural Telephone acted fraudulently, in bad faith, or in abuse of its discretion when it buried its cable on Schuck's land.

District court also found Rural Telephone has power of eminent domain under K.S.A. 17-618 and K.S.A. 17-1903. Schuck appealed.

ISSUE: Eminent domain

HELD: Schuck properly filed an independent injunction action challenging the necessity of Rural Telephone's taking, but Schuck failed to show that Rural Telephone concealed facts or acted in bad faith, and failed to establish prerequisites for injunctive relief. Although it may not originally have been necessary to place cable in its present location, Rural Telephone provided sufficient evidence to support its claim that it is now necessary for cable to stay there. Court's holding is limited to facts of this case. Rural Telephone's failure to conform to the easement it freely negotiated is not condoned, but under facts, district court's determination that Rural Telephone has power of eminent domain and that the taking was necessary to its lawful corporate purposes is sound. District court complied with requirements of the Eminent Domain Procedure Act.


Criminal

STATE V. POULTON
RENO DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS
AFFIRMED IN PART AND REVISED IN PART
NO. 95,353 – APRIL 4, 2008

FACTS: Poulton convicted on various drug charges after district court denied Poulton's pretrial motion to suppress evidence from two searches of Poulton's home. Court of Appeals found first search was illegal and reversed the convictions based on that search; it affirmed the convictions based on second search without addressing issue of whether evidence obtained constituted fruit of poisonous tree because Poulton failed to preserve that issue for appeal, 37 Kan. App. 2d 299 (2007). Poulton's petition for review granted.

ISSUE: Consideration of new issue on appeal

HELD: Challenge to evidence obtained in second search satisfies one or more of the three exceptions for considering new issues on appeal. Convictions based on second search are vacated and matter is remanded for hearing to determine whether evidence based on that search should be suppressed as fruit of poisonous tree in light of appellate courts' determination that first search was illegal.

STATUTES: None

STATE V. STOREY
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 95,592 – APRIL 4, 2008

FACTS: Storey convicted of burglary and theft for entering unfinished medical center and taking band saw. Storey appealed, arguing the taking of property from structure under construction did not constitute burglary under Kansas' statute. Court of Appeals affirmed, 37 Kan. App. 2d (2007), finding sufficient evidence supported the conviction because medical center qualified as a building based on plain reading of the statute, general legal authorities, and case law from other states. Judge Pierron filed dissenting opinion. Storey's petition for review granted on issues of whether entry into unfinished medical center with intent to commit a theft constitutes burglary as matter of law and whether district court violated Storey's constitutional rights by imposing enhanced sentence based on prior convictions not proven to a jury beyond a reasonable doubt.

ISSUE: (1) Unfinished structure and burglary and (2) sentencing

HELD: A plain reading of Kansas' statute, combined with weight of other authorities, leads to conclusion that the unfinished medical center in this case constituted a "building" under K.S.A. 21-3715(b).

Sentence is affirmed pursuant to State v. Ivory, 273 Kan. 44 (2002).

DISSENT (Johnson, J.): Would not rely on decisions from other states which construe their own statutes, and disagrees with majority's statutory interpretation and attempt to distinguish State v. Moler, 269 Kan. 362 (2000).

STATUTES: K.S.A. 20-3018(b), 21-3110(7), -3701, -3715, -3715(a), -3715(b), -3716; and K.S.A. 21-3716 (Weeks)
Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Petitions for Review of Court of Appeals Decisions

Any party filing a petition for review of a Court of Appeals decision should carefully review the procedural steps in Supreme Court Rule 8.03 (2007 Kan. Ct. R. Annot. 63-69), which governs those filings.

The practitioner should note, in particular:

The “decision” from which review may be sought includes formal or memorandum opinions, involuntary dismissals, and orders. Most petitions are filed from opinions, but occasionally an order of the Court of Appeals is reviewed. For example, a case may be dismissed on jurisdictional grounds by order.

The petition for review must be served and filed in the Appellate Clerk’s Office within 30 days after the decision of the Court of Appeals. There is no three-day mail time, and the 30-day period is jurisdictional. One cannot file a motion to extend the time. The filing of a motion for rehearing or modification in the Court of Appeals does not extend the time.

An original and nine copies of the petition are filed. The ninth copy of the petition is circulated to the Court of Appeals.

Pursuant to the Supreme Court’s Internal Operating Procedures, the vote of three justices is sufficient to grant any petition for review. See 2007 Kan. Ct. R. Annot. 80.

During the time in which to file a petition for review or during the Supreme Court’s consideration of a case on review, the Court of Appeals opinion may be cited for persuasive authority, provided the citation includes a notation that the case is not final and may be subject to review or rehearing.

At the Supreme Court argument on a case, which is subject to review, the parties maintain the same posture they were in before the Court of Appeals with the appellant in the Court of Appeals arguing first, regardless of whose petition for review was granted. The Supreme Court anticipates that the parties will argue the decision of the district court as well as the decision of the Court of Appeals.

For questions about these practices or appellate court rules, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
Reminders from the Kansas CLE Commission....

The Kansas Continuing Legal Education Commission is the office that tracks and reports your CLE credits to the Kansas Supreme Court for annual compliance. Noncompliance could result in additional fees and even the suspension of your license to practice law. The annual CLE requirement in Kansas is 12 hours of CLE credit, including 2 hours of professional responsibility by June 30, 2008.

The Kansas CLE Commission 2008–2009 Registration and Annual CLE Remittance Form was mailed to your address of record in late April. **This is the only notice you will receive.** If you have misplaced your copy, you may contact our office for another form. The registration form must be returned with payment by **July 1, 2008**, for your CLE record to reflect compliance. Credit cards, debit cards, and EFT cannot be accepted. Please note that incomplete forms will be returned and may result in a delay of processing your annual registration. Fees received in the CLE Commission Office on or after August 1 of the year in which due shall be accompanied by a $50 late payment fee.

If you have enrolled for online access to your record, you can access your online transcript of hours. This information is available free-of-charge, 24 hours a day.

**IMPORTANT – DON’T MISS - DATES:**

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<th>Date</th>
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<tr>
<td><strong>June 30</strong></td>
<td><strong>End of CLE year</strong></td>
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<td>All CLE hours must be attended by this deadline to avoid further penalties.</td>
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<td><strong>July 1</strong></td>
<td>Annual CLE Registration fee due.</td>
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<td><strong>July 31</strong></td>
<td>Last day to file 2007-2008 hours.</td>
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**NOTE:**

All paperwork must be received in our office before 5 p.m. of **July 31** to avoid late filing penalties. Fax and e-mail submissions will NOT be accepted.

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**TENTH CIRCUIT**

**2008 BENCH & BAR CONFERENCE**
The Broadmoor — September 4–6, 2008

The Honorable Carlos F. Lucero, Circuit Judge for the U.S. Court of Appeals for the Tenth Circuit, is pleased to invite you to attend the Tenth Circuit 2008 Bench & Bar Conference.

The 2008 Bench and Bar Conference will be held the **week of Labor Day, September 4–6, 2008, in Colorado Springs, Colo., at the Broadmoor Hotel.** The block for hotel reservations is not yet open, but an announcement will be posted as soon as it is open with favorable room rates for the conference.

- The conference will offer you an opportunity to earn approximately 14 hours of CLE credits including two hours of ethics credit.
- A welcoming reception will be held Thursday evening at the Penrose House.
- The conference will feature appearances by Justice Stephen Breyer, Jeffrey Rosen, Jan Greenburg, Stuart Taylor, Erwin Chemerinsky, Stephan Saltzberg, Douglas Berman, and many other professionals and experts in their fields.
- The program will offer substantive sessions on:
  - Electronic Discovery
  - Daubert Issues
  - Developments in Constitutional Law
  - Criminal Procedure
  - The New Tenth Circuit Electronic Filing Requirements
  - Islamic Law
  - Indian Law
  - Bankruptcy
  - Criminal Sentencing
  - Judicial Misconduct

Please check our Web site periodically for updates on the program and other details:  

If you have any questions, please call the Judicial Resources team at the Tenth Circuit Office of the Circuit Executive: (303) 844-2067.
Civil

CHILD SUPPORT AND SUBCHAPTER S CORPORATIONS
IN RE MARRIAGE OF LEONI
JOHNSON DISTRICT COURT – AFFIRMED
NO. 96,446 – DECEMBER 21, 2007
(MOTION TO PUBLISH FILED APRIL 8, 2008)

FACTS: Coni and Daniel Leoni were divorced in 1996. There were three children from the marriage. Daniel was ordered to pay $2,500 per month in child support. In March 2000, it was changed to $3,677. Coni filed to increase child support in November 2001. In April 2003, Daniel filed a motion to decrease child support. Due to discovery disputes and other issues, a hearing on the two motions was not held until July 2005. The disputed evidence in the case involved Daniel's involvement as owner, sole stockholder, and president of Corporate Sign Inc., a subchapter S corporation. After reviewing all testimony and exhibits, the district court estimated Daniel's total income from 2001 through 2004 and applied an extended-income formula. The court decided on monthly child support in the respective years in the amounts of $2,343, $2,707, $5,005, and $3,693. Coni appealed arguing there was not substantial competent evidence to support the trial court's child support determination for the years in issue because of its refusal to consider retained earnings from Daniel's solely owned corporation as income attributable to him during this time frame.

ISSUES: (1) Child support and (2) subchapter S corporations

HELD: Court held that under the facts of this case where the individual with the child support obligation was the 100 percent owner of the subchapter S corporation, the district court correctly computed the gross domestic income by including all of the subchapter S income plus business expenses, which were found to have been improperly deducted. Court also held that under the facts of this case, the district court properly considered all relevant factors, including the overall financial condition of the parties and provided valid and sufficient written reasons for using the extended income formula in imposing a cap on the amount of child support to be ordered.

STATUTE: K.S.A. 79-32,117, -32,139

GARNISHMENT AND PRISON ACCOUNTS
DILLON COMPANY V. DAVIS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 97,436 – APRIL 18, 2008

FACTS: Marvin Davis wrote a bad check for $50 at a Dillon’s grocery store in Wichita, and Dillon Companies Inc. obtained a judgment against him in 1991 for $405. The judgment was left fully unpaid until 2004, when Dillon’s successfully garnished $123.28 from Davis’ accounts at the El Dorado Correctional Facility, where Davis is an inmate. Davis challenged both the garnishment and the original judgment arguing improper service and that “nonwage” garnishment of his prison account was improper. The district court denied Davis’ lawsuit on both claims.

ISSUES: (1) Garnishment and (2) prison accounts

HELD: Court stated the facts set forth in a sheriff’s return of service are presumed to be accurate. The presumption may be rebutted by other evidence. Court held Davis failed to offer any actual evidence that he was not properly served. Court also found that Kansas prison inmates may receive “incentive pay” for work performed while in custody. Upon payment, the money is kept for the inmate in a prison account. Once that money has been placed into an account for the prisoner, it is subject to garnishment through a nonwage garnishment. Court held ordinary wages lose their status as earnings when they are deposited into a bank and that a bank account is not functionally different when its equivalent is provided to an inmate through a correctional-facility savings account.

STATUTES: K.S.A. 60-206(a), -303(d)(1), -2103(a) and K.S.A 61-3505, -3507, -3508

HABEAS CORPUS
CLEMONS V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 96,130 – APRIL 25, 2008

FACTS: Clemons’ state conviction was affirmed in 2002. He then sought federal habeas relief under 28 U.S.C. § 2254 on issues raised in his direct appeal. In August 2005 while his federal habeas appeal was pending, Clemons filed post-conviction motion under K.S.A. 60-1507 alleging issues concerning his right to counsel and to effective assistance of trial and appellate counsel. District court found the motion was untimely filed, and found the record conclusively showed Clemons was not entitled to relief. Clemons appealed, arguing the limitation period should have been equitably tolled while his federal habeas action was pending and claiming manifest injustice.

ISSUES: (1) Equitable tolling and (2) K.S.A. 60-1507(f)

HELD: Because the Kansas Legislature has not enacted a statutory tolling provision in K.S.A. 60-1507, and has instead provided for extension of the one-year limitation period upon a showing of manifest injustice, equitable tolling is unavailable in a 60-1507 action. Under facts of case, there was no tolling of the 60-1507(f)(1) limitation period during Clemons’ pending federal habeas petition, and Clemons did not present a substantial issue requiring an evidentiary hearing on his claims of manifest injustice. District court did not err in dismissing Clemons’ 60-1507(f) motion as untimely.


INTER VIVOS GIFTS AND TESTAMENTARY DISPOSITION
JOHANNES, ET AL. V. IDOL, ET AL.
BROWN DISTRICT COURT – AFFIRMED
NO. 97,156 – APRIL 25, 2008

FACTS: In the 1960s, Margret Johannes gave warranty deeds to four parcels of property to two of her sisters, Isabel and Hazel, and they placed the deed in a safety deposit box in their names. The deeds were signed and notarized. After being diagnosed with a terminal illness, Hazel removed the deeds and gave them to Isabel who placed them in a plastic box at her residence and forgot or misplaced them until 2002. The deeds were recorded with the register of deed in February 2002. The heirs of Margret sued to determine Margret's heirs and to set aside the four deeds. The district court ruled that the appellants had not identified any dispositive facts sufficient to controvert the presumption that Margret had made a valid delivery of the deeds to the appellees and consequently granted partial summary judgment to the grantees of the deeds and their successors in interest.

ISSUES: (1) Inter vivos gifts and (2) testamentary disposition

HELD: Court held under the facts of this case that (1) an unsupported challenge to a witness’s credibility is not sufficient to create an
genuine issue of a material fact; (2) the grantor executed and had her signature acknowledged on the four deeds and manifested the intent to divest herself of title and vest title in the grantees, (3) delivery of the deeds into the possession of two of the grantees created the presumption that they were delivered, (4) the reservation of a life estate by the grantor and her lack of control over the deeds result in the law presuming that she delivered the deeds during her lifetime, (5) the correct point of inquiry as to whether delivery occurred is shown by the evidence relating to the 1960s and facts that occurred long after delivery had been completed are not material facts sufficient to defeat a summary judgment motion, and (6) the district court correctly granted summary judgment.

STATUTES: K.S.A. 33-106; K.S.A. 58-2201, -2203, -2204; and K.S.A. 60-256(e)

JURISDICTION AND NATIVE AMERICAN INDIAN TRIBAL POLICE
CORNELIUS V. KANSAS DEPARTMENT OF REVENUE
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 97,466 – APRIL 4, 2008

FACTS: Cornelius was stopped at a sobriety checkpoint a few miles outside of the Prairie Band Potawatomi Nation Reservation in Jackson County. The Jackson County Sheriff’s Department was the authority responsible for arranging and operating the sobriety checkpoint with the cooperation of the Prairie Band Potawatomi Tribal Police. Cornelius refused to submit to a blood alcohol test and was issued multiple citations by Officer Boswell of the Prairie Band Police. Cornelius claimed Boswell lacked jurisdiction to issue the citations because there must be a valid written agreement for liability insurance coverage, which waives tribal immunity and is verified by the attorney general. The Kansas Department of Revenue (KDOR) argued the liability insurance provisions only apply where tribal police are acting on their own without an agreement with another law enforcement agency. The KDOR suspended Cornelius’ license. The district court affirmed the KDOR’s ruling.

ISSUES: (1) Jurisdiction and (2) Native American Indian tribal police

HELD: Court stated that Boswell was accompanied by, and operating under the authority of, the Jackson County Sheriff’s Department when he worked the sobriety checkpoint that brought him into contact with Cornelius. It is undisputed that the checkpoint was organized, managed, and controlled by the Jackson County Sheriff’s Department. Court held that any jurisdictional concerns based on Boswell’s presence were eliminated due to the requested participation of the Jackson County Sheriff’s Department. Court found that under K.S.A. 2004 Supp. 22-2401a(3), an agreement between a county sheriff’s department and police officers of a Native American Indian tribe gives the tribal police authority to act outside of their respective reservations. When Boswell made contact with Cornelius at the sobriety checkpoint, he was both a tribal officer and a deputy with the Jackson County Sheriff’s Department. Officer Boswell, therefore, properly exercised jurisdiction under K.S.A. 2004 Supp. 22-2401a(1)(a).

STATUTES: K.S.A. 19-805(a); K.S.A. 2004 Supp. 22-2401a(1)(b), (2)(b), (6), (3)(a), (c); and K.S.A. 77-621

NEGLECTED INFILCTION OF EMOTIONAL DISTRESS
WARE V. ANW SPECIAL EDUCATIONAL COOP NO. 603
ALLEN DISTRICT COURT – AFFIRMED
NO. 98,236 – APRIL 11, 2008

FACTS: When Daniel Ware was 4 years old, he fell asleep on the bus on his way to school. The bus was operated for the purpose of transporting students to and from ANW’s preschool. Daniel was inadvertently left on the bus by the driver. He woke up and began walking to his mother’s place of employment. A relative saw him, picked him up, and returned him to his mother. Five months later, Daniel became ill when told he would have to start riding the bus again. He was later diagnosed with posttraumatic stress disorder approximately nine months after the bus incident. Daniel’s parents brought suit against ANW alleging negligent infliction of emotional distress based on the incident in which Daniel was left sleeping on a school bus operated by ANW. ANW moved for summary judgment, arguing that Daniel did not suffer a compensable physical injury under Kansas’ law. The trial court, following well-established precedent, granted summary judgment for ANW on the basis that Daniel had suffered no immediate physical injury following the bus incident.

ISSUE: Negligent infliction of emotional distress

HELD: Court acknowledged that the physical manifestation requirements for negligent infliction of emotional distress have been vigorously criticized by some courts. Moreover, some courts have abandoned the requirement. Nevertheless, court stated there are a number of states that still require some type of objective evidence of a plaintiff’s emotional injury and Kansas happens to be one of those states that requires such evidence. It does not seem unreasonable to require some objective evidence of a plaintiff’s emotional distress. Court held that because Ware suffered no physical injury contemporaneous with or shortly after the bus incident, summary judgment on the negligent infliction of emotional distress claim was proper.

DISSENT: Judge Greene dissented and held that Ware’s emotional injury met the requirements for a valid claim of negligent infliction of emotional distress.

STATUTES: No statutes cited.

MORTGAGES, HOLD-HARMLESS AGREEMENT, AND CRIMINAL RESTITUTION
IN RE MARRIAGE OF HUDSON
JOHNSON DISTRICT COURT – AFFIRMED
NO. 97,035 – APRIL 18, 2008

FACTS: William Hudson and Brenda Loscher (f/k/a Hudson) purchased a home for approximately $354,500. Loscher prepared a mortgage loan application claiming she and Hudson could make a down payment of $153,000. Loscher falsified bank statements to indicate more than $153,000 in checking and savings accounts, when in reality they had less than $1,000 in the combined accounts. Loscher convinced her mother-in-law from Colorado, Shirley Hudson, to wire them a short-term loan for $153,000. After they moved into their new home, Loscher did not repay the loan and took several actions to circumvent repayment, including false Federal Express packages, fraudulent use of the identity of an attorney, and interference with Hudson’s contact with family members. Shirley placed a second mortgage on the home and then once the home was eventually sold, Shirley recovered $87,402.55, leaving a deficiency of $66,000.84. Loscher and Williams divorced for this and other reasons. Incorporated into their divorce decree was a separation agreement containing a hold-harmless provision stating that Hudson would be liable for any deficiency that existed from the second mortgage to Shirley. Sometime later, the U.S. attorney in Colorado filed multiple charges against Loscher for her unlawful acts related to the nonrepayment of the loan. Loscher pled guilty to one count of wire fraud and was sentenced to five years’ probation with restitution in the amount of $66,000.84 to be owed to Shirley as a condition of probation and a special assessment of $100 was also ordered against Loscher. Loscher filed a contempt motion in the divorce case arguing that Hudson’s failure to satisfy the second mortgage to Shirley as assigned by the hold-harmless provision required the district court to impose a judgment against Hudson in the amount of $66,000.84. After hearing evidence, the district court classified the $66,000.84 as restitution, which represented the deficiency owing for the second mortgage. Under that assessment, the court declined...
to find Hudson in contempt but interpreted the hold-harmless provision to mean that Hudson's liability encompassed any event in which Loscher would be found liable for the deficiency. Consequently, because Loscher's criminal restitution made her liable for the deficiency of the second mortgage, the court enforced the hold-harmless provision. The district court denied Hudson's motion for reconsideration of the hold-harmless agreement.

ISSUES: (1) Mortgages, (2) hold-harmless agreements, and (3) criminal restitution

HELD: Court held that the hold-harmless agreement was entered into when the parties were aware of the possibility of a deficiency that would need to be resolved. Hudson agreed to cover it. Court stated that this agreement was not abrogated by the subsequent plea agreement. Court found it was the province of the federal courts to determine the impact of the parties' previous agreement on the conditions of the plea agreement. Court held the state district court to determine the impact of the parties' previous agreement on the agreement. Court found it was the province of the federal courts stated that this agreement was not abrogated by the subsequent plea agreement. The district court denied Hudson's motion for reconsideration of the hold-harmless agreement.

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Held: Court affirmed the board’s findings and held that when an employee is on duty and participates in an activity on company premises, which is organized, encouraged, and supervised by the employer and which benefits the employer as well as the employee, the activity does not fall within K.S.A. 2004 Supp. 44-508(f)’s exception for “recreational and social events.”

Statutes: K.S.A. 2004 Supp. 44-508(f) and K.S.A. 77-601 et seq.

**Workers’ Compensation and Notice of Injury**

*Myers v. Lincoln Center Ob/Gyn et al.*

**Workers’ Compensation Board – Affirmed in Part, Reversed in Part, and Remanded**

*No. 98,445 – April 4, 2008*

Facts: Myers worked for Lincoln Center and was diagnosed with carpal tunnel in September 2004. She had carpal tunnel release surgery on her right arm on Oct. 4, 2004, was off work for 13 day period. The surgery cost was covered under her husband’s health insurance policy. Myers returned to Lincoln Center in a modified position as switchboard operator. On Dec. 1, 2004, Lincoln Center terminated Myers’ employment for failure to comply with terms set forth in a department-wide meeting held on Nov. 11, 2004. Myers had release surgery on her left arm on Jan. 25, 2005. Myers sent Lincoln Center notice of her workers’ compensation claim on Dec. 9, 2004. The administrative law judge determined Lincoln Center was liable for Myers’ disability, that Myers had provided timely notice of her injury, and that she made a good-faith effort to retain her employment. The Workers’ Compensation Appeals Board affirmed.

Issues: (1) Workers’ compensation and (2) notice of injury

Held: Court affirmed the board’s decision that Myers provided timely notice of her work-related injury. The board determined that Myers’ conversation with Weakland on Sept. 28, 2004, constituted sufficient notice of her carpal tunnel injuries. Court held the Board’s findings are supported by Myers’ testimony that she informed Weakland of the injury, that the injury was work related, and that the surgery was scheduled to occur in two days. Myers testified that Weakland said she would “take care of it,” and it is undisputed that Weakland asked Myers to reschedule the surgery and Myers complied. Weakland apparently did not otherwise object to the treatment, physician, or scheduling. The court stated it would not revisit credibility determinations. However, the court reversed and remanded for the board to apply the law set forth in *Caso v. Ar- mour Swift-Eckrich*, 283 Kan. 508, 154 P.3d 494 (2007), that Myers’ bilateral injury be calculated under the schedule of injuries set forth in K.S.A. 44-510d.

Statute: K.S.A. 44-510c, -510d, -510e, -510h(b)(2), -520

**Workers’ Compensation**

*Payne v. Boeing Co.*

**Workers’ Compensation Board – Affirmed**

*No. 98,108 – April 4, 2008*

Facts: Since 1996, Payne worked with history of back pain and back surgeries for which she made no workers’ compensation claim. She reinjured back on job in 2002. Administrative law judge found Payne was permanently and totally disabled, and reduced her disability award based on evidence that Payne was 35 percent impaired prior to the compensable 2002 injuries. Payne appealed to Workers’ Compensation Board, arguing her award should not be reduced based on her preexisting condition, or in the alternative, that her reduced payments should continue until she reaches $125,000 maximum payout for permanent and total disabilities, pursuant to *McIntosh v. Sedgwick County*, 282 Kan. 636 (2006). Majority of the board affirmed the administrative law judge’s decision. Payne appealed.

issues: (1) Interpreting K.S.A. 44-501(c), (2) offset and duration of payments, and (3) constitutionality of K.S.A. 44-501(c)

Held: K.S.A. 44-501(c) is construed and applied. Statute permits an award to the extent a work-related injury causes increased disability to a preexisting condition, and also requires any award to be reduced by the amount of any preexisting functional impairment. As written, statute is not predicated upon there being a prior award, only a pre-existing functional impairment. Ample evidence supports board’s reduction of Payne’s award based on her pre-existing condition.

Offset provision of K.S.A. 44-501(h), which is designed to prevent wage-loss duplication, as discussed in *McIntosh*, is contrasted with provisions of K.S.A. 44-501(c). Before 1993 amendment to K.S.A. 44-501(c), a Kansas employer bore the risk of employing someone with a pre-existing disability. Board’s application of K.S.A. 44-501(c) to reduce a workers’ compensation award based on claimant’s preexisting functional impairment is consistent with legislative intent in 1993 amendments to reduce cost of workers’ compensation insurance premiums. K.S.A. 44-501a does not apply because Payne received no compensation for her prior disability. Board did not err in calculating Payne’s award as reduced by the amount of her pre-existing functional impairment.

As applied to facts of case, K.S.A. 44-501(c) does not violate constitutional requirements of equal protection and due process.

Statute: K.S.A. 44-501(c), -501(h), -510a, 510c, -510e, -510f, -510f(a)

**Workers’ Compensation**

*Robinson v. Southwestern Bell Telephone Co.*

**Workers’ Compensation Board – Affirmed**

*No. 97,502 – April 4, 2008*

Facts: Robinson appealed his workers’ compensation award, claiming Workers’ Compensation Board erred in applying the retirement benefits offset of K.S.A. 44-510(h) to his lump sum retirement benefit, and erred in applying the offset before he had received his entire functional impairment award. Employer and insurance carrier, Southwestern Bell Telephone Co. (SBT) cross-appealed, claiming board erred in calculating Robinson’s retirement benefits offset based on the amount of the lump sum payment divided by his life expectancy from the date of the award and claiming board should have used the amount Robinson could have received had he elected to receive monthly payments.

Issues: (1) Application of retirement benefits offset to lump sum retirement payment and (2) calculating retirement benefits offset

Held: K.S.A. 44-510(h) requires the inclusion of all employer-funded retirement benefits when calculating the retirement benefits offset, including but not limited to lump sum and periodic retirement payments. Under facts of case, board’s application of retirement benefits offset to Robinson’s lump sum payment and at commencement of Robinson’s permanent partial disability payments, are affirmed. This did not lower Robinson’s award below his percentage of functional impairment in violation of K.S.A. 44-510(h).

SBT’s cross-appeal is rejected. Under facts of case, the board’s methodology in calculating the retirement benefits offset is consistent with the statute’s direction to reduce work disability benefit by the “weekly equivalent amount of the total amount of all such retirement benefits.”

\textbf{Criminal}

\textbf{STATE V. AUCH}
\textit{JOHNSON DISTRICT COURT – AFFIRMED NO. 98,806 – APRIL 18, 2008}

FACTS: Auch charged with multiple counts of forging Vandeputte’s signature on various insurance application documents, and was convicted of one count of forgery. On appeal, he claimed: (1) trial court committed plain error by allowing prosecution on multiple counts of forgery that exposed him to double jeopardy and undue prejudice, (2) prosecution did not commence within statutory limitations period, (3) trial counsel was ineffective in failing to object to multiplicitious charges and untimely prosecution, (4) there was insufficient evidence to prove his intent to defraud, and (5) postings on the trial court’s case history Web site denied him a fair trial.

ISSUES: (1) Multiplicity, (2) commencement of prosecution, (3) ineffective assistance of counsel, (4) intent element of forgery charge, (5) case history on Web site

HELD: No merit to double jeopardy claim because Auch was not convicted of multiple violations of same statute, and limited appellate record demonstrates that multiple forgery charges were based on separate forgery acts.

Under rule in \textit{State v. Nunn}, 244 Kan. 207 (1989), Auch’s prosecution was timely within statute of limitations, which expanded to five years prior to expiration of the prior two-year limitations period. Also, no merit to Auch’s claim of unreasonable delay in execution of his arrest warrant.

No showing of prejudice supports Auch’s claim of ineffective assistance of counsel.

Lack of trial transcript in record precludes appellate review of Auch’s challenge to sufficiency of the evidence. Also, no merit to argument that no intent to defraud could be present because no property right was ever affected as a result of his actions. Auch signed Vandeputte up for automatic bank drafts and membership contrary to Vandeputte’s explicit directive. Fact that membership was later cancelled and refund received did not negate Auch’s intent to defraud when he signed Vandeputte’s signature to bank draft authorization.

Limited appellate record, which does not include Auch’s post-trial motion for mistrial, shows no prejudice to Auch resulting from the case history postings. Auch not entitled to mistrial.

\textbf{STATE V. MELL}
\textit{FRANKLIN DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 98,725 – APRIL 18, 2008}

FACTS: Mells were arrested and prosecuted on drug charges based in part on evidence of drug usage seen in Mells’ home after marijuana plants were observed in side yard, and seizure of that evidence after a search warrant was issued. District court granted Mells’ motion to suppress, finding marijuana was growing within the plea agreement by undercutting the required finding for granting probation without providing any support for the recommendation of probation. Foster thus was denied due process. Sentence vacated and case remanded for new sentencing hearing at which state is bound to comply with plea bargain it made.

\textbf{STATE V. JOHNSON}
\textit{GEARY DISTRICT COURT – APPEAL DISMISSED NO. 97,313 – APRIL 18, 2008}

FACTS: Johnson attempted to file appeal from revocation of his probation three years earlier, claiming he was not told of right to appeal. District court denied Johnson leave to file appeal out of time, found Johnson was aware of his right to appeal, and found appeal frivolous. Johnson appealed. Court of Appeals noted that Johnson should have completed prison portion of sentence resulting from the challenged probation revocation and directed parties to show cause why the appeal should not be dismissed as moot.

\textbf{STATE V. GILLEN}
\textit{POTTAWATOMIE DISTRICT COURT REVERSED AND REMANDED NO. 97,711 – APRIL 18, 2008}

FACTS: Gillen entered guilty plea before district magistrate judge to one count of possession of drug paraphernalia. Gillen appealed to district court from conviction and sentence imposed by the magistrate judge and filed motion to suppress statements and evidence. District court found K.S.A. 22-3609a did not authorize Gillen to appeal conviction and sentence from a district magistrate judge following a plea. In denying Gillen’s motion for reconsideration, district judge held that a defendant must file a motion to withdraw his or her plea in order to appeal the district court. Gillen appealed.

ISSUE: Appeal from judgment of district magistrate judge

HELD: Gillen has a criminal judgment appealable to the district court. District court’s attempt to analogize case with pleas entered in a district court criminal case is unpersuasive. District court erred in determining it had no jurisdiction. There is no requirement that a defendant be aggrieved before he or she can appeal the judgment of a district court magistrate judge. Gillen’s appeal starts the case anew in district court.

\textbf{STATE V. FOSTER}
\textit{RILEY DISTRICT COURT – SENTENCE VACATED AND REMANDED NO. 97,407 – APRIL 11, 2008}

FACTS: Foster entered no contest plea to aggravated assault pursuant to state’s agreement to recommend probation. Prosecutor did so but remained silent or negative as to whether probation would serve interest of community, a necessary finding by the district court in sentencing because Foster’s offense involved use of firearm. Foster appealed from 27-month prison sentence, claiming breach of plea agreement.

ISSUE: Compliance with plea agreement

HELD: No published Kansas appellate decision has found a violation on basis that prosecutor so undercut the agreed-upon sentencing recommendation through other comments that the recommendation itself was substantially undermined. \textit{State v. Hill}, 247 Kan. 377 (1990), is distinguished. When prosecutor provides statement of facts that does not support the recommended sentence and fails to provide any rationale under which the court might nonetheless adopt the recommended sentence, the state has not fulfilled the terms of the plea agreement. Here, prosecutor substantially violated
curtialge of the residence, and no exigent circumstances justified the officer's warrantless entry into the residence. District court also excised paragraphs two and five in the search warrant affidavit, and found the affidavit as excised would not have had a substantial basis for magistrate to determine that probable cause existed for issuance of a warrant. State appealed.

ISSUES: (1) Curtialge of the home, (2) exigent circumstances for warrantless search, (3) affidavit for search warrant, and (4) good-faith exception

HELD: Four factors in State v. Fisher, 283 Kan. 272 (2007), are individually applied and weighed. District court erred in finding marijuana plants were growing within curtialge of the residence. Factors in State v. Platten, 225 Kan. 764 (1979), for determining whether exigent circumstances exist for warrantless search, are discussed and applied. Substantial competent evidence supports district court's finding that officer's warrantless entry into Mells' residence was not justified by exigent circumstances. District court properly excised paragraph 5 in the search warrant affidavit, but improperly removed paragraph 2.

The affidavit as properly redacted did not establish probable cause to support the search warrant because it shows no nexus between the marijuana plant area and Mells' residence. Had the magistrate been told about material omissions and misleading information in the affidavit, there would have been no finding of probable cause under totality of circumstances.

The Leon good-faith exception to the exclusionary rule does not apply. Case remanded for trial without evidence seized from search of Mells' residence.

CONCURRING and DISSENTING (Leben, J.): Agrees that officer did not invate curtialge of Mells' home, that warrantless search of the home was not justified by exigent circumstances thus paragraph 5 was properly excised from probable cause affidavit, and that state waived any claim that good-faith exception to exclusionary rule applied. Dissents from conclusion that affidavit provided an insufficient basis for issuance of a search warrant. The affidavit provided sufficient facts to support the magistrate's conclusion that there was a reasonable probability that evidence of a crime would be found in Mells' home when facts and reasonable inferences from them are considered as a whole.

STATE V. MOORE
RENO DISTRICT COURT -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 96,597 -- APRIL 25, 2008

FACTS: Moore convicted of multiple methamphetamine-related offenses. On appeal he claimed error in the denial of his motion to suppress evidence found in his truck and camper, arguing the initial stop was unlawful, scope of that stop exceeded its initial purpose, subsequent search of vehicle was not based on probable cause, and he was under custodial interrogation when he made pre-Miranda statements during the traffic stop. Moore also claimed district court abused its discretion in denying motion for new trial based upon an allegedly biased jury, erroneously admitted evidence of Moore's prior methamphetamine-related convictions to prove possession without analyzing the evidence under K.S.A. 60-455, and erred in allowing witness to testify despite violation of sequestration order. Moore also claimed the sentencing severity level of his conviction for manufacture of methamphetamine violated the identical offense doctrine. State cross-appealed Moore's primary sentence as violating K.S.A. 21-4705(e).

ISSUES: (1) Motion to suppress, (2) motion for new trial, (3) admissibility of prior convictions, (4) sequestration order, (5) identical offense doctrine, and (6) K.S.A. 21-4705(e)

HELD: No error in denying motion to suppress. Officer properly based initial stop on reasonable suspicion that Moore was driving under the influence, did not exceed scope of that initial stop, and had probable cause to search vehicle after he detected odor of both anhydrous ammonia and ether and observed in plain view several items used in manufacture of methamphetamine. No error in refusing to suppress a pre-Miranda statement by Moore during the investigative stop because Moore was not in custody when statement was made.

No abuse of district court's discretion in denying motion for mistrial. No evidence supports Moore's suggestion that jury was somehow biased against him.

District court erred in failing to conduct analysis under K.S.A. 60-455 of admissibility of Moore's prior convictions for methamphetamine-related offenses. Prior conviction evidence to prove possession in nonexclusive possession cases does not per se violate K.S.A. 60-455. Evidence was properly admitted as relevant to show Moore's knowledge and awareness of items in trailer. Any error was harmless in light of overwhelming evidence of Moore's guilt.

No error in permitting witness to testify despite the alleged violation of sequestration order. No evidence of any prejudice resulting from this alleged violation.

Based on State v. Cooper, 285 Kan. __ (March 28, 2008), Moore's challenge to his sentence fails. Because elements of manufacturing methamphetamine are not identical to elements of possession of paraphernalia with intent to manufacture, and jury was properly instructed as to those elements as defined by the charging documents, the two offenses are not identical for sentencing purposes.

State's cross-appeal is sustained. District court erred in not sentencing Moore to a second or subsequent K.S.A. 65-4159 conviction pursuant to K.S.A. 21-4705(e). Moore's due process challenge fails because statute does not alter crime's severity level classification, nor make proof of the prior conviction an element of the crime. Although Moore's prior conviction occurred after acts charged in present case, Moore was required to be sentenced as a second or subsequent offender because his prior conviction occurred prior to his sentencing in the present case.

STATE V. VANEK
GEARY DISTRICT COURT
REVERSED AND REMANDED
NO. 98,836 -- APRIL 18, 2008

FACTS: Vanek charged with felony DUI, a third offense, and traffic infractions. District court granted Vanek's motion to suppress all statements made during traffic stop. State conceded that Vanek's post-arrest statements were inadmissible for lack of Miranda warnings, and district court found Vanek was "in custody" during all questioning. State filed interlocutory appeal, arguing questions at traffic stop did not constitute custodial interrogation.

ISSUE: Custodial interrogation

HELD: District court erred in suppressing statements Vanek made prior to his arrest. Relevant case law examined and discussed. During a lawful traffic stop, a law enforcement officer is not required to Mirandize an individual before asking routine investigatory questions where the individual is not in legal custody or deprived of his or her freedom in any significant way. This is true even though the officer suspects the individual may have committed a crime, and even though the individual is not free to leave during the lawful detention. Once the individual is accused of a crime and has been arrested and taken into custody, Miranda warnings are required before questioning can continue. Under facts and circumstances of this case, the officer investigating Vanek for suspicion of DUI was not required to Mirandize Vanek before asking him whether he had been drinking alcohol.

STATE V. MOORE
RENO DISTRICT COURT -- AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 96,597 -- APRIL 25, 2008

STATE V. VANEK
GEARY DISTRICT COURT
REVERSED AND REMANDED
NO. 98,836 -- APRIL 18, 2008

STATE V. VANEK
GEARY DISTRICT COURT
REVERSED AND REMANDED
NO. 98,836 -- APRIL 18, 2008

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NO. 98,836 -- APRIL 18, 2008
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Friday, June 13, 8:25 a.m. – 12:25 p.m. (Session I); 1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Debut
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Lenexa, Topeka, Wichita

Tuesday, June 24 – Monday, June 30
Video Replay Week – Brown Bag Ethics, Environmental Law, & Legislative & Case Law Institute
Multiple sites statewide

Thursday, July 10, 8:25 a.m. – 12:25 p.m. (Session I); 1:25 – 5:25 p.m. (Session II)
Legislative & Case Law Institute Video Replay
(Featuring the 2008 Kansas Annual Survey as seminar materials)
Topeka & Shawnee County Public Library, Topeka

Wednesday, July 16, 8:30 a.m. – 12:15 p.m.
The Many Sides of Environmental Law Video Replay
Topeka & Shawnee County Public Library, Topeka

Thursday, July 17, 9 – 10:40 a.m. and 1 – 2:40 p.m.
Brown Bag Ethics Video Replay
(Featuring Professor Michael Hoefflich, Legal Ethics & E-Lawyering and Hon. Stephen D. Hill,
The Three Roles of the Ethical Lawyer) Topeka & Shawnee County Public Library, Topeka

Thursday, July 24, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
(Featuring Professor Michael Hoefflich, Legal Ethics & E-Lawyering and Hon. Stephen D. Hill,
The Three Roles of the Ethical Lawyer) Topeka & Shawnee County Public Library, Topeka

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