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

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President’s Message

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Lewis Walked Into the Unknown and Made a Difference

By Matthew Keenan

Political Spoils and the First Amendment

By Michael T. Jilka

美国总统选举的候选人，通过选举集会和选举辩论，向选民展示他们的政策立场和领导能力。选举结果将决定谁将担任下一届政府的领导角色。选民们将根据自己的价值观和利益选择他们认为能最好地代表他们的候选人。

政治阴谋和第一修正案

By Michael T. Jilka

莱斯走了进来，走进了未知的世界，改变了现状。
From the President
Thomas E. “Tom” Wright

Why doesn’t the KBA have a PAC?

Lawyers have a particular civic duty to use their knowledge of the law to reform the law when necessary. The Kansas Rules of Professional Conduct are specific.

PREAMBLE: A LAWYER’S RESPONSIBILITIES: KPRC 1.1. As a public citizen, a lawyer should seek improvement of the law, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients; employ that knowledge in reform of the law and work to strengthen legal education. To fulfill our obligation to reform or improve the law we must work through the Legislature and we must do it the best we can. That includes influencing legislators and, yes, at times even elections.

As far as I can tell the Kansas Statutes don’t define Political Action Committees or PACs. Political committees are defined at K.S.A. 25-4143(k)(1). “Political committee” means any combination of two or more individuals or any person other than an individual, a major purpose of which is to expressly advocate the nomination, election, or defeat of a clearly identified candidate for state or local office or make contributions to or expenditures for the nomination, election, or defeat of a clearly identified candidate for state or local office.

PAC is a term used by the public and media. A “committee” is a political organization under the Campaign Finance Act. It is established by a candidate, political party, corporation, union, or any group of people that receives “contributions” and makes “expenditures.” Political committees formed by corporations and unions are known as “separate segregated funds.” The public and media generally use the term “political action committee” or “PAC” to refer to committees (political).

A PAC allows individual contributors to make relatively small contributions into a single entity to be commingled with other small contributions, which when combined together can greatly increase the ability of the entity to make contributions of significance. If a PAC helps us properly reform the law then it is a good thing. Some have insinuated that the establishment of a Kansas Bar Association PAC is a bad thing. There are hints of the loss of innocence. That is naïve.

All other professions – doctors, dentists, engineers, accountants, and architects – have PACs. The Kansas Association for Justice (aka the Kansas Trial Lawyers Association) has a PAC that made $30,600 in expenditures in 2007. Every business or professional group that the KBA has opposed in the Legislature during my career has had a PAC or similar committee.

Creating a PAC is part of improving our position. Think of it this way, if you create a PAC and mail checks to incumbents you accomplish very, very little. If a KBA member personally discusses our interests with a legislator, candidate, or party official and then delivers a check, then you may have accomplished something. I have no doubt that we need more personal involvement between our members and the Legislature. We also need a PAC.

PACs come in all shapes and sizes. The PAC bylaws define who belongs, who governs, how it is funded, to whom it can and cannot contribute, how it can be dissolved or terminated, and whether it is to help only lawyer candidates, or party organizations, or incumbents, or whomever you choose. Some PACs include all dues paying members; some include only those that contribute, etc. In many PACs the operation of the PAC remains under the control of the Bar Association Board of Directors. PACs can be tailor-made and tightly or very loosely controlled.

OK, Ms./Mr. Answer Woman/Man, please consider the following questions:

• Will some members quit if they see KBA money going to a party or candidate they dislike?

Tom Wright can be reached by e-mail at twright21@cox.net or by phone at (785) 271-3166.
Of course some members may quit. In the past, when the KBA has made significant changes in policy, membership has been impacted. The potential loss of some members cannot and should not keep the Board of Governors from doing what they determine is the right thing to do. Over time membership in the KBA will remain stable.

• Won’t a PAC make us openly partisan?

Those with partisan points of view will undoubtedly criticize contributions they don’t like. Education, candidate research, and contribution decisions based on thorough and understandable criteria, which is vetted to mitigate subjectivity, will help ensure the credibility of the PAC and decisions made by its leaders.

• Since I already pay the KBA too much money won’t it cost me even more?

The kind of PAC the KBA would consider is strictly voluntary. If it works well and develops a good reputation within the Bar it will thrive. Otherwise, it will not generate funds necessary for success.

• We already have KBA members in the Legislature so why do we need it?

Being elected to office is expensive and difficult. If the KBA can assist KBA members who seek election then we should do so. That also means helping our members and other lawyers who support our principles to be re-elected.

• What if the Terrorists, Liberals, Conservatives, Whigs, or Martians-Circle Choice gain control of the PAC?

A balanced PAC committee will ensure that extreme interests from left or right won’t gain control. The bylaws should be specific about our contribution philosophy.

• Isn’t the KBA so diverse that it would be impossible to agree on how money should be spent?

According to Whitney Damron, our contract lobbyist and legislative guru, there are more than 100 political action committees operating in Kansas. If we create a PAC it will not result in immediate change. Over time, however, the KBA and its members, particularly those who choose to become involved in the PAC, will become more politically educated and involved. That will increase our political influence and help us carry out our civic duty.

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KBA Seeking Nominations for ABA Delegate

The Kansas Bar Association (KBA) is presently seeking nominations from any member who would be interested in serving as a representative of the KBA to the House of Delegates of the American Bar Association (ABA). This position has been held by Judge Christel Marquardt, who resigned from this seat following her recent election as an At-Large Delegate to the ABA House.

The control and administration of the ABA is vested in the House of Delegates, which is the policymaking body of the American Bar. Thus, the person assuming this position shall represent the interests of the KBA in matters before the House.

The term of office will expire in August 2010 at the conclusion of the ABA Annual Meeting, and the successful candidate shall be eligible to serve two additional two-year term(s) through an elective process. As a KBA Delegate to the ABA House, you would also serve as a member of the KBA Board of Governors.

Please be aware that you must maintain a membership in both the American and Kansas bar associations for the duration of the term at your own expense. Travel to both the Mid-Year and Annual meetings of the ABA is necessary. Partial reimbursement for travel is available.

Any KBA member who would like to be considered should send a letter of interest along with a résumé or list of qualifications to Jeffrey Alderman, Executive Director, Kansas Bar Association, via e-mail to jalderman@ksbar.org or by mail to 1200 SW Harrison St., Topeka, KS 66612.

All materials must be received by Friday, December 5, in order to receive consideration by the Board of Governors who shall make the appointment to fill this unexpired term.

For more information, please call Bar headquarters at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
Wanted: More IOLTA Applications

By Sarah Bootes Shattuck, Kansas Bar Foundation president

The Kansas Bar Foundation’s mission is, in part, “funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity...”

So it follows that administration of Interest on Lawyers’ Trust Accounts (IOLTA) is one of the most important tasks the Foundation performs. Because of IOLTA, this year applicants received grants of more than $176,000 that advanced access to justice, helped educate students about our judicial system, and increased the safety of Kansas consumers. Those grants are:

- Kansas Legal Services – $102,075;
- Kansas Legal Services – $25,000 – consumer protection project;
- Kansas Bar Association – $20,750 – law related education committee;
- SAFEHOME – $6,875 – a domestic violence shelter in Kansas City, Kan.;
- Olathe USD 233 – Law Day – $6,000;
- KBA YLS Mock Trial Program – $4,500;
- Topeka Youth Project – $4,000 – youth court;
- Catholic Charities Inc. $4,000 – a domestic violence program; and
- Douglas County Legal Aid Society Inc., – $300.

We applaud these groups and the good work they do. We thank the thousands of Kansas lawyers who make these grants possible by participating in the IOLTA program, but … Why aren’t there more applications?

Last January, the IOLTA committee, chaired by Wichita lawyer Kathy Webb, reviewed 17 applications. Webb and other committee members think that is a small percentage of the groups that could and should have applied for our assistance.

For example, local bar associations have struggled for years to find the best way to promote Law Day. I suspect that having some additional money to fund those programs would help. Why did only one school district out of several hundred apply for money? Why didn’t any local bar association apply?

I’d be willing to bet that almost every Kansas community with population more than 10,000 has a domestic abuse program or shelter, but we had applications only from Wichita and Kansas City.

Many school districts and communities would benefit from a youth court project. Why is the only application from Topeka?

Why aren’t there any applications from the many Court Appointed Special Advocate (CASA) programs around our state?

Our staff members do a great job publicizing IOLTA, but they can’t do it all. We have to help. As members of our local communities, we serve on school boards, boards of theYWCA/YMCA, the Catholic Charities, the local CASA, and many other nonprofit organizations. We should advocate for them. We should encourage them to apply and, if necessary, help them complete the applications.

Webb said it best, “It is extremely rewarding to know that we were able to provide funds this year totaling $176,000 to nine different programs across the state. The 3,472 lawyers (of over 10,000) who participate in IOLTA should feel proud. Unfortunately, we have too few applicants to consider each year. I hope that KBA/KBF members will reach out to organizations in areas where those attorneys practice and encourage them to apply for an IOLTA grant.”

The deadline for IOLTA grant applications is Dec. 31, 2008. Isn’t there an organization in your community that should apply? ■
Advance Notice
Elections for 2009
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2009-2010 leadership year.

OFFICERS

KBA President-elect: (Current – Timothy M. O’Brien, Kansas City, Kan.)
KBA Vice President: (Current – Glenn R. Braun, Hays)
KBA Secretary-Treasurer: (Current – Hon. Benjamin L. Burgess, Wichita)
KBA Delegate to ABA House of Delegates: Sara S. Beezley is eligible for re-election

The KBA Nominating Committee, chaired by Linda Parks, Wichita, is seeking individuals who are interested in serving in the positions of President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates of the Kansas Bar Association. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA executive director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, Jan. 16, 2009. This information will be distributed to the Nominating Committee prior to its meeting on Friday, Jan. 30, 2009. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for President-elect, Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be six positions on the KBA Board of Governors up for election in 2009. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jeffrey Alderman by Friday, March 6, 2009. If no one files a petition by March 7, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2009 are:

• District 1: Incumbent Eric G. Kraft is eligible for re-election. Johnson County
• District 4: Incumbent William E. Muret is eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
• District 5: Incumbent Martha J. Coffman is not eligible for re-election. Shawnee County
• District 7: Incumbent Rachael K. Pirner is not eligible for re-election. Sedgwick County

For more information

To obtain a petition for the Board of Governors, please contact Kelsey Hendricks at the KBA office at (785) 234-5696 or via e-mail at khendricks@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Linda Parks at (316) 265-7741 or via e-mail at parks@hitefanning.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
Pro Bono Services: We can do more

By Scott M. Hill, Hite, Fanning & Honeyman LLP, Wichita, KBA Young Lawyers Section president

In my monthly young lawyers’ columns, I try to focus on the needs of young lawyers. I try to articulate what we as young lawyers do well. And I try to comment on those areas where we need to improve. In each of these areas I try to draw on my own experiences (albeit from a relatively short time in practice) to help my peers improve.

But as I look at my own practice and around at the practices of my peers, I see myself and other lawyers falling short in one very important area, pro bono service. I admit to being as guilty as the next. We too often are hyperfocused on billable hours and the bottom dollar. We say we don’t have time. But the bottom line is that we just aren’t providing the pro bono services that we should be providing.

Don’t get me wrong, it isn’t all bad. I am not suggesting that we are outright ignoring pro bono service. Like many of you, I do occasionally help the “cold call” client with a demand letter or suggestions on responding to a suit, all without requesting payment. I’ve provided guidance on court procedures, and I have helped draft contracts without receiving a dime. I have made limited appearances in court proceedings with no expectations of compensation.

But as I began brainstorming on this topic, I questioned whether I in fact do provide more pro bono services than I initially thought. Regretfully, I do not. Taking on a free case for a friend is not what the Model Rules had in mind. Remember, the term “pro bono publico” is Latin for “for the public good.” So unless your friend represents one of the poor, disadvantaged, or disenfranchised litigants in our system, likely you too are falling short. I’ve also often heard attorneys say that they do plenty of pro bono work accidentally (namely because their clients don’t pay their bills). This “pro bono” work is also not exactly the type of service that the Model Rules anticipated.

So I direct this column as much at myself as any other lawyer. For those of us falling short on our pro bono obligations, I offer some thoughts and motivations to help you get started.

First, I begin by reminding you that you have a responsibility under the Model Rules to “render public interest legal services.” KRCP 6.1. It should be that simple: You are required to do it. And for good reason. Remember, pro bono service gives something back to the community. Specifically, it is giving to those in need. The comments to the KRCP Rule 6.1 state the reasons well, “The rights and responsibilities of individuals and organizations in the United States are increasingly defined in legal terms. As a consequence, legal assistance in coping with the web of statutes, rules, and regulations is imperative for persons of modest and limited resources, as well as the well-to-do.” The knowledge that those in need are being served should be sufficient reason to give your time.

But there is something in it for you as well. Experience. Many young attorneys, especially those in larger firms or those involved with more complex litigation, gain years of “behind the scenes” work but never have the opportunity to take depositions, argue motions, or participate in trials. And as more and more cases settle or resolve without trial, even those in a trial practice rarely see the courtroom. With pro bono service, you drive the litigation. You advise the client directly. You argue the motions. And remember, this isn’t pretend litigation simply because you aren’t being paid. It’s real. Your client has real problems and real needs. You get the opportunity to appear before judges. You get to prepare for and try cases. Today, many paying clients can’t afford to take cases to trial. With pro bono cases that variable is removed. You get to experience today what many of your peers without providing pro bono services may not get to experience for years.

You can also gain valuable experience in diverse areas of law. Often pro bono cases may involve a significantly different area of law than you currently practice. Take the opportunity to branch out. Learn something new or use the knowledge that you gained in law school to serve the public good.

Finally, I want to remind you that this does not have to be an overwhelming time commitment. Spread your labor over time. In fact, the Model Rules recommend that an attorney aim to spend 50 hours a year on pro bono work. These 50 hours per year can easily be spread out over time. If you aim to provide pro bono services on a regular basis, you will certainly meet this goal.

Don’t lose sight that our calling as attorneys is a great one. We owe society in general a small portion of our time, and the best way we can give that time is by using our expertise to help those citizens who can no longer help themselves. As with so many things, what you get out of pro bono work is what you put into it. Don’t wait for pro bono work to find you. Perhaps the best way to find a good fit for your practice is to work through your local bar association or the Kansas Bar Association. Or perhaps the best way may be to take the next call of a client in need. Either way, take a step toward serving the community with pro bono service.

Scott M. Hill may be reached at (316) 265-7741 or by e-mail at hill@hitefanning.com.
Lewis Walked Into the Unknown and Made a Difference

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

Lawyers, by the nature of their profession, seek to make a difference in the lives of their clients. Whether it's writing a will, defending a civil suit, or representing someone on the brink of losing his or her civil liberties, this is what separates lawyers from doctors or any other profession. But as the writer Tom Peters once said, “unless you walk out into the unknown, the odds of making a profound difference are pretty low.”

One would be hard-pressed to find anyone who took a bigger leap into the unknown than Bob Lewis, the former Court of Appeals judge, who passed away four years ago. But if you think Bob Lewis was just an appellate judge, then you don’t know about his role as a criminal defense lawyer in one of the most notorious crime sprees in Kansas history. That would be his representation of James C. Hunter. And if Hunter’s name is not familiar to you, all of that is about to change.

The paths of Hunter and Lewis converged in a dramatic way in the month of January 1985 when Lewis was assigned to defend Hunter against first-degree murder charges in Thomas County.

The Crime

Hunter was one of three people charged with a crime spree in Northwest Kansas. When the criminal justice system ran its course, there were three trials and their ultimate conclusions were something no one could have possibly anticipated. And through it all, a community torn by violence found ways to make peace.

While there are many facts in dispute, a few are not controverted. Hunter lived in Amoret, Mo., a small town just across the state line from La Cygne, Kan. On Feb. 13, 1985, he was hitchhiking from Texas to the Kansas City area. Near Wichita, the car that picked him up already had three passengers – Mark Walters, Lisa Dunn, and Daniel Remeta. What Hunter did not know was that at least one of these passengers had already murdered four people in Florida and Arkansas, and the number of victims was about to grow.

With Hunter as their new passenger, and driving north on I-135, they turned west, not east, on I-70. Four hours later Remeta would murder a 27-year-old worker at the Stuckey’s Restaurant at the Grainfield exit off I-70. By 4 p.m. authorities had discovered the crime and the chase was on. Soon thereafter, Thomas County Undersheriff Ben Albright pulled the car over.

One of those four passengers shot Albright twice; he survived his serious injuries to become an important witness implicating Hunter. Thirty minutes later Remeta and his passengers arrived at the town of Levant, a nearby community of 100 people. Two young workers at the grain elevator there — Rick Schroeder, 29, of Levant, and Glenn Moore, 55, of Colby — were shot execution style leaving two families with six children between them.

An hour later, after a shootout near a farm house, Mark Walters was shot and killed, and Remeta was wounded. Remeta, Hunter, and Dunn were all charged with two counts of first-degree murder and multiple related felonies. Remeta and Dunn faced additional counts from the crimes committed in other states.

The Appointment

District Judge Keith R. Willoughby asked Bob Lewis to represent Hunter. Willoughby also appointed Jake Brooks, of Scott City, to represent Dunn, and Jerry Fairbanks, of Goodland, to defend Remeta. Lewis had worked in the Attorney General’s Office for two years after law school. He then served as Rawling county attorney from 1967-1971. Brooks had a specialty in criminal cases and Fairbanks had served as Wallace County attorney for eight years. Still, this was a daunting task for many reasons. For starters, it was the first murder trial in Thomas County in more than 30 years. It was also the first Kansas trial to be televised live, gavel to gavel, and garnered nationwide publicity.

The Detroit Free Press, in its June 17, 1985, edition reported from Colby that “daily broadcasts emptied the streets of shoppers to the point where the Franklin Street merchants could tell recesses by the sudden and short-lived flurry of customers.”

Another newspaper reported, “Police said they had received numerous death threats at the rural jail where the trio was being held, and early this morning, moved the three to undisclosed jails elsewhere.” “Authorities had feared vigilante reprisal ever since news of the killings rocked rural northwest Kansas … .” Efforts to change the venue in May 1985 were unsuccessful. “There was no question the community felt threatened; but the citizens recognized we as counsel had a job to do and never once did I have a disrespectful thing said to me by the people in Colby,” said Jerry Fairbanks.

The Trial

Ben Albright, who survived multiple shots, was a key witness against Hunter. He testified that he believed the man who fired shots at him had, according to, the Kansas Supreme Court’s opinion, “shoulder-length brown hair and a full beard.” That description matched Hunter. There were two guns used in the crimes, a .22 and a .38 caliber. Dunn and Hunter testified that
Lewis Walked Into the Unknown

(Continued from Page 9)

Remeta used the .38 and never parted with it. He told anyone who would listen that “it was his baby.” Albright was shot with that gun.

The events at the Levant elevator also implicated Hunter. As described in the Kansas Supreme Court opinion: “The testimony concerning Hunter’s activities at the Levant elevator conflicted greatly. [Elevator manager Maurice] Christie testified that he observed a bearded man, later identified as Hunter, holding a gun in the face of Rick Schroeder and forcing him into a pickup truck. [Assistant Manager Fred] Sager testified that he saw a bearded man with a gun in his hand and that Rick Schroeder got into the pickup by himself. [Grain elevator employee] Dennis Tubbs testified that Hunter held Schroeder’s arm and told him to get into the pickup.”

Hunter insisted Remeta committed the crimes and forced them to tag along, leaving them unable to get away without being shot. Hunter testified Remeta had bragged about having killed 12 people, including a hitchhiker, and made it clear he didn’t leave witnesses. Dunn likewise testified she had been raped and beaten by Remeta, who clearly was the ringleader. Remeta testified in the Colby trial and did not dispute these characterizations.

At the close of evidence, Lewis requested an instruction for compulsion; Judge Willoughby denied it, because at that time, compulsion was not recognized as a defense to felony murder. After 12 and a half hours of deliberation, jurors found Hunter and Dunn guilty on all counts. Both received four life-prison terms.

The Appeal

On July 17, 1987, the Kansas Supreme Court unanimously reversed the verdict against Hunter, saying the trial judge was wrong when he refused to allow jury members to consider whether Hunter was acting under “compulsion.” But this determination required a lengthy analysis by the Court. It noted: “[w]hether the defense of compulsion is available to a criminal defendant charged with felony murder under K.S.A. 21-3401 is an issue of first impression.” The opinion analyzed the issue and concluded: “The better view, consistently adhered to by commentators, is that any limitation to the defense of duress be confined to crimes of intentional killing and not to killings done by another during the commission of some lesser felony.”

Remeta never went to trial. In May 1985, he pleaded guilty to three murders, two kidnappings, and two other shootings. In July 1985, Remeta was sentenced to five life-prison terms. He was executed in Florida for crimes in that state on March 31, 1998.

The Retrial

Hunter was tried again in January 1988 at Hays. Cocounsel Scott Beims described how this trial was different. “The original KBI investigator — the one who took the initial statements — was replaced after several days by investigators from Topeka. His early investigation was much more favorable to Hunter than the later witness interviews. In the retrial, we called him in our case in chief. It made a big difference. The implication was that Hunter became a focus of the second group of investigators, and with the passage of additional time, the witness statements became less favorable. We still had a lot of obstacles. Albright was pretty emphatic the person who shot him had a beard. But we demonstrated that Hunter was in the back seat of the car and he may have been the last person he saw before being shot. Plus the fact that Remeta never let anyone else use his gun.”

In his closing argument, Lewis underscored the only defense he had — compulsion — “I don’t know that I have ever talked to or heard the testimony of a more cold-blooded murderer than Daniel Remeta,” Lewis said. “Killing people, to Daniel Remeta, is about like swatting flies to you and me.”

Once the jury was given the case, the court discharged one alternate juror, Beims remembered: “It was a lady, and she approached us and started to cry. We didn’t know what she was about to say. And she said ‘I know he isn’t guilty and I’m not going to get the chance to tell anyone that.’ It left quite an impression on us. We obviously wished she was deliberating the case.”

The Ellis County jury acquitted Hunter on all seven charges. “It was bittersweet obviously because he came to appreciate that Hunter was no killer. But we also came to know and like the family of Rick Schroeder. He was shot in cold blood. It was a tragedy at so many levels,” Beims said.

Dunn’s conviction in state court was affirmed. But in 1992 a federal court of appeals ordered Dunn to receive a new trial because her defense team didn’t receive money to hire expert witnesses to develop a defense based on the battered-woman syndrome. Dunn’s new trial took place in Topeka. In September 1992, a jury found her “not guilty” on all seven counts.

In 1964, the American College of Trial Lawyers established the Lawyers Award for Courageous Advocacy. In 44 years, there have been only 13 recipients. All but five were members of the American College. Bob Lewis, not a member, was so honored in 1991.

Mike Corn, a reporter for the Hays Daily News, covered the retrial in Hays:

For three years, through two jury trials and a successful appeal that forced the second trial, Lewis nearly lived the life of a defense attorney for Hunter. All the while, he remained low-key and ever humble. Rather than
being boastful of anything, Lewis instead credited the system for Hunter’s acquittal on the murder charges.

While the murders gained worldwide publicity, the kindness of some victims made publicity of a much different kind. The day after the Thomas County guilty verdict, this was the headline in the June 16, 1985, Seattle Times:

Friendship blooms in small crime-scarred Kansas town.

An extraordinary affection, like a flower thriving in the rubble left by war, has grown out of the horror and tragedy that rode into this placid community. William and Jean Dunn have been given solace, support, and no small measure of love by Thomas County Undersheriff Ben Albright, one of the men their daughter was convicted yesterday of trying to kill. ‘We’re just trying to get through a bad situation the best way we know how,’ said Albright.

Albright and his wife, Pat, and the Dunns often sat together in the tiny Thomas County courtroom where Lisa Dunn, 18, and co-defendant James Hunter, 33, were convicted on charges of murder and kidnapping. The article continued: “I came out here to help Ben, and he wound up helping me,” said Dunn.

And even Remeta – who admitted his crimes – found peace with at least one family. Wesley Moore, son of Glenn Moore, one of the victims taken from the grain elevator, was quoted in the newspaper that, while at one time he wished Remeta would be put to death, he no longer believed that killing Remeta would do any good. He wrote a letter to Remeta, which was described in a news article – “I told him that I forgave him,” Moore said, “and I asked him for forgiveness for myself, because at one time when this first happened, I bore grudges against him and I had hatred in my heart against him.”

And on the day of Remeta’s execution, he released this statement: “I would give a thousand lifetimes to undo past deeds.” Lisa Dunn returned home to Michigan, where she lives today. And Hunter? Four days after his acquittal he died of a heart attack at the age of 36. The Wichita Eagle’s story said Bob Lewis “called his client’s death ‘devastating’... He was just getting on with the rest of his life, which he didn’t think he had.”

Bob Lewis’ three-year odyssey as a criminal defense lawyer in the Hunter case not only made a profound difference in the life of his client, but it also changed Kansas criminal law forever. But his leap of faith was a journey shared with the other Kansas attorneys who were assigned the defense of this case – Jake Brooks, Jerry Fairbanks, and Scott Beims. Making a mark on the profession that’s worth revisiting 23 years later.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
A Love-Hate Relationship

By Andrew Ricke, University of Kansas School of Law

Your stress is at an all-time high, your sleep is minimal and you have a rapid decline in social relationships. Sound like the symptoms of mild depression? Worse—it’s the common side effects of the first year of law school. Deemed by many as a nightmare of their past, the first year is a gauntlet of lightning strikes, the Socratic method of terrorizing students, and a vicious clash with the Rules Against Perpetuities. With all the negative connotations associated with our most notorious of years, is it possible for us to alter our perspectives and look back on our worst memories with appreciation and gratitude? If we are taught anything as law students, it is that an argument can always be made. So this is the task I will undertake, as I reflect on the last year that was, in an attempt to justify our most detested memories from the first year of law school …

The Realization that You are Probably Not as Smart as You Thought

You are about to enter law school and your spirits are at an all-time high. You have just graduated near the top of your class. The countless hours you have poured into LSAT preparation and filling out applications have finally paid off. Your family is so proud of you, your friends won’t stop telling you how rich you’ll be (and how excited they are), and you cannot help but bask in your own achievements. Then … law school happens. Professors are suddenly the ones asking the questions; priding themselves on teaching styles they learned watching “The Paper Chase,” and grilling unsuspecting students with conundrums that couldn’t be more confusing if asked in a foreign language. The subject matter has become so complex and written in such archaic legal jargon that students start to question their reading skills. If all these factors weren’t enough, along come the “gunners.” Nothing makes you want to curl up into a ball under your desk more than overachievers describing alleged study habits or spouting off obscure footnotes. Apparently, gunners don’t eat or sleep and spend their free time (weekends/holidays/bathroom breaks) brushing up on the most recent Restatements. All these horrors—and it’s only the first week. You have suddenly gone from being at the top of your class to trying to reassure yourself that they can’t flunk everybody, can they? Soon after walking through the doors, students quickly start to face a rude awakening: They may not be as smart as they thought.

Although it sounds cruel upon first impression, this lesson in humility serves an even greater purpose. The grueling nature of the first year pushes students into an uncomfortable and unfamiliar environment where boundless pressure and self-doubt are inevitable. But from these strains, we are taught an invaluable lesson in using adversity to our advantage. All of the uncertainty surrounding class ranks, exams, and even our own capabilities yields an unwavering motivation. We are able to thrive off of our fears and push ourselves to 14-hour school days, near perfect attendance, and all-night cram sessions. By the end of the year, we resemble the rescued crew from a sinking ship: We have done the improbable and survived our first year of law school. We arise with an even greater appreciation for both the professors and the classmates who pushed us. By striving through the pain and doubt, we are bestowed with an even greater sense of pride and self-confidence we thought unthinkable just months ago.

Law School, The Only Place Where Lightning Strikes Twice

Or even several times, depending on the quality of your answers. Thought by some as a form of cruel and unusual punishment, “lightning strike” is the overwhelming method of choice by professors to “encourage” class discussion by striking fear into the hearts of first-year students by calling on them at random. Add in the “rolling boulder” method (moving ever-so-slowly down the line) and you soon realize that nothing is more nerve-racking in your first year than being in the spotlight during lecture. Maybe it is the fear of publicly humiliating yourself in front of your peers. Or possibly it is the concern of projecting yourself as completely incompetent to the person grading your exam. Either way, these worries coerce first-year students into keeping up with assignments and into making genuine attempts to learn the law on their own. Instead of goofing off before class, students frantically flip through their notes making a desperate last-minute attempt to grasp the material. From all the pre-lecture anxiety arises an unprecedented level of preparation. Whoever knew that being struck by lightning could be so good for you?

Boredom is a Luxury of the Past

Early on in my first semester I came to the realization that there will never be enough time in the day. In law school, where extensive reading predominates, legal research is never-ending, and being involved in extracurricular activities is highly encouraged by potential employers, students must take advantage of every moment. Even if it is possible to ever get caught up with all of your homework, there are still days left of outlining preparation to do for finals. But even with all the complaints, this hectic schedule simulates the pace of the real world, providing valuable experience in working under pressure. Students must finally eliminate naps, become more efficient with their days, and perfect the crucial skills of time management and prioritization. Although such a demanding environment seemingly strips us of any and all social life, it provides a vital focal point in our development into professionals and our adjustment to the strictures of the “daily grind.”

If our reflections show us anything, it is that the first year of law school is something more than Blackacre, res ipsa loquitur, and doominion over foxes. Its essence is the experience, one of both enlightenment and survival. Although we inevitably occupy ourselves with fears and self-doubt, the experience ultimately readies each of us for the greater challenges lying ahead in our legal careers.

So, thank you, first year. Our love-hate relationship endures. ■

About the Author

Andrew Ricke is currently a second-year student at the University of Kansas School of Law. A native of Rose Hill, he attended the University of Kansas for his undergraduate education, graduating with distinction and earning a Bachelor of General Studies in political science and sociology. He is currently an intern for The Law Offices of Smith/Coonrod, Overland Park, and Smith Legal, Lawrence.
Welcome Fall 2008 Admittees to the Kansas Bar

Scott Christopher Ackerman
Margaret Pierson Aisenbrey
Heidi Victoria Anderson
Angela Lee Angotti
Cory Lee Atkins
Christopher Charles Ault-Duell
Rachel Elizabeth Avey
Anthony Thornton Badgerow
Anne Elizabeth Baggott
Miriam Elisabeth Champion Bailey
Meghan Elizabeth Barnds
Shannon Lea Bell
George B. Belohlavek
Martisse Best
Aimee M. Betzen
John D. Beverlin II
Daniel Howard Blomberg
Chelsea Sue Boldra
James Bordonaro
Shawn Michael Boyd
Seth Kenneth Brackman
Dustin Allen Knight Bradley
Amy Michelle Brozenic
McCäin Elizabeth Bryant
Lindsey Claire Buchholz
Paul A. Bullman
Pedro Daniel Calderon
Monica S. Cameron
Christine Courtney Campbell
Cassie Janae Carpenter
Sean Thomas-Paul Carver
Amy Michelle Brozenic
McClain Elizabeth Bryant
Lindsey Claire Buchholz
Paul A. Bullman
Pedro Daniel Calderon
Monica S. Cameron
Christine Courtney Campbell
Cassie Janae Carpenter
Sean Thomas-Paul Carver
Kimberly Rae Gray
Brandon Lloyd Grubbs
Amy Hall
Anne Barker Hall
David Charles Hancock
Ashley Nicole Harms
Serene Asayo Hawkins
Jonathan Michael Hensley
Benjamin Charles Herrig
Luke Reed Hertenstein
Tyler Clayton Hibler
Lewis Michael Higgins, Jr.
Taylor J. Hight
Brian T. Hipp
Rickey Edward Hodge, Jr.
Joshua Jay Hofer
Ryan Adrian Hoffman
Curtis Nash Holmes
Matthew Lorn Hoppock
Krista Erin Morgan-Howard
Roger D. Hudlin
Ryan Huschka
Benjamin N. Hutnick
D. Michelle Illig
Lori Lei Jensen
Scott Daniel Johnson
Shawn Craig Jurgensen
Paul Joseph Kasper II
Ryan Kell
Kelsy Lynn Kinning
Elizabeth S. Kisthardt
Daniel E. Lawrence
Eric Wayne Lomas
Andrew William Lonard
Christine Ann Louis
Rachel Brianna Mahn
Stuart Bradford Martens
Timothy Paul Matas
Charles Eugene McClellan
Scott Michael McFall
Christopher Michael McGown
Lara L. McNerney
Brendan Leigh McPherson
John Nolan McWilliams
Shira Megerman
Amy Joan Mellor
Mark Allen Menefee
Matthew Dylan Mentzer
Michael Merdinger
Cara May Milligan
Jessica Crystal Morgan
Christina Eva-Marie Morris
Phillip Michael Murphy, II
Kristen Nazar
Andrea E. Nelson
Lucas J. Nodine
Andrea Rae Nourie
Kevin Joseph O’Keefe
Kevin James Oakleaf
John Alexander Oliveros
Wakil Oyeleru Oyedemi
Michael Gayle Page, Jr.
Lane Robert Palmateer
David Mathew Pankos
Tisha Sharon Croslan Panter
Austin Keith Parker
Bryant Emerson Parker
Andrea E. Patrick
Richard Charles Paugh
Mary Katherine
Kissinger Paulus
Eric Michael Pauly
Adam Corwin Peer
Abigail Lea Pierpoint
Nicoile Marie Proulx
Melody Lorraine Rayl
Scott Alan Reed
Elena Rettiger-Lincoln
Aimee Nicole Richardson
Earl R. Richardson
Wesley McCready Rogers
Lisa Rene Faust Rohe
Christopher Ross Scott
Laurel Adele Klein Seals
Michael Ryan Serra
Samatha Kay Shannon
Katie M. Shetlar
Jenna Koger Simmons
Matthew Phillip Simmons
Mark Andrew Simpson
Luke Paul Sinclair
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Matthew Duane Stromberg
David James Stucky
Eric Ryan Stucky
Irene Sulaiman
Amy Elissa Taylor
Douglas Martin Taylor
Joshua P. Taylor
Lucas Leigh Thompson
Carol Jane Toland
Brad Alexander Vining
Tai Bo James Vokins
Maureen Anne Walterbach
Cynthia Grace Waskowiak
Karl Luke Wenger
Bryon Scott Wharton
William H. White, Jr.
Britton Gregory Wilson
Jane Anne Wilson
Angela Maureen Witten
John Warren Witten
David Robb Wolfe
Eryn Adrienne Wright
Stephanie Anne Yeo
Daniel Andrew Yasuaki Yozu
Christopher James Zarda
Benjamin E. Zimmerman IV
Katherine Ann Zluticky
Jennifer Marie Zook

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
NOVEMBER/DECEMBER 2008 – 13
Deadline to Submit 2009 IOLTA Grant Applications is Dec. 31

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2009 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2009, through March 31, 2010. The deadline to submit applications has been extended to Dec. 31, 2008. The KBF Board of Trustees will make a decision on the applications in February 2009.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, which is comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Association for Justice, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:
• be a 501(c)(3) or 501(c)(6) if a local bar association,
• use the funds for a specific charitable purpose,
• agree to an audit or a review of expenses,
• provide quarterly and year-end reports as necessary, and
• demonstrate fiscal responsibility and the ability to provide quality services.

For more information or to request an IOLTA grant application for 2009, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org or visit www.ksbar.org/public/kbf/iolta.shtml.
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**Members in the News**

**CHANGING POSITIONS**

Amy C. Bixler Kelly has joined Shook Hardy & Bacon LLP, Kansas City, Mo., as of counsel.

Starla L. Borg has joined Condray & Thompson LLP, Concordia.

Randal O. Carlson, Stephen D. Kort, and Patricia L. Wilson have joined Swanson Midgley LLC, Kansas City, Mo.

Chane C. Carpenter has joined Honeywell International Inc., Olathe.

Brandon L. Corl has joined Honeywell International Inc., Olathe.

Jeffrey R. Elder has been appointed district judge for the 2nd Judicial District, Division 3, Pottawatomie County, Westmoreland.

Allison H. Fasel has joined Heitland Leach LLC, St. Louis.

Alicia C. Friedman has joined the Office of the Kansas Attorney General, Topeka.

Richard L. Green has joined the Department of the Navy, Office of General Counsel, Washington, D.C.

Burke W. Griggs has joined the Kansas Department of Agriculture, Division of Water Resources, Topeka.

Tracy M. Hayes has joined Sanders Conkright & Warren LLP, Overland Park.

Jared T. Hiatt has joined Clark, Mize & Linville Chtd., Salina, as an associate.

Kristi C. Hartmann has joined Putnam & Hartmann LLC, Kansas City, Mo.

Rickey E. Hodge Jr., has joined Stinson, Lasswell & Wilson L.C., Wichita, as an associate attorney.

Christopher R. Howard has joined Fisher & Phillips LLP, Kansas City, Mo.

Amy Lynn Johnson has joined Slagle, Bernard & Gorman P.C., Kansas City, Mo.

Daniel E. Lawrence has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita.

Mark E. Lindstrom has joined Post, Warren & Lindstrom LLP, Overland Park.

Teresa L. Mah has joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.

Donald F. McDonald Jr. has joined Sanders & Simpson P.C., Kansas City, Mo., as of counsel.

Eric R. Melgren, Wichita, has been appointed U.S. District Judge for the District of Kansas.

Mary D. Minear has joined the Office of the Kansas Secretary of State, Topeka.

Audrey M. Mitchell has joined Baker, Sterchi, Cowden & Rice LLC, Olathe.

Jeremiah J. Morgan has been named counsel with Bryan Cave LLP, Kansas City, Mo.

Joshana L. Offenbach has joined the Kansas Board of Healing Arts, Topeka.

James D. Oliver has been named as partner-in-charge of Foulston Siefkin LLP’s Overland Park office.

Christopher S. Peoples has joined Riling, Burkhed & Nitcher Chtd., Lawrence.

Walter R. Randall Jr. has joined William Blair & Co., Chicago.

Elena D. Rettger-Lincoln has joined the Kansas Department of Education, Topeka.

Ruth A. Rithaler has become the assistant Montgomery County attorney, Independence.

Thomas Kelly Ryan has been appointed district court judge of the 10th Judicial District, Overland Park.

Kannon K. Shanmugam has joined Williams & Connolly LLP, Washington, D.C.

Wesley F. Smith has joined Stevens & Brand LLP, Lawrence, as a partner.

Jeremy A. Southall has joined Brooke Capital Corp., Overland Park.

David J. Stucky has joined Adrian & Panek P.A., Overland Park.

John Bernard Sullivan has become partner at Beall, Mitchell & Sullivan LLC, Wichita.

Lloyd C. Swartz has been appointed an associate judge of the Municipal Court, Topeka.

Matthew B. Todd has joined Barber Emerson L.C., Lawrence.

Seth G. Valerius has joined the Kansas Division of Workers’ Compensation, Topeka.

**CHANGING LOCATIONS**

Kenneth J. Berra has opened the Law Office of Kenneth J. Berra, UMB Bank Bldg., Ste. 215, 1310 Carondelet Dr., Kansas City, MO 64114.

James M. Brun has moved to 7500 College Blvd., Ste. 500, Overland Park, KS 66210.

Trista C. Curzydelo has moved to 170 W. 98th Terr., Ste. 200, Overland Park, KS 66212.

Gary T. Eastman has started his own firm, The Eastman Law Firm, 12288 S. Mullen Rd., Olathe, KS 66062.

Entz & Chanay P.A. has moved to 6342 S.W. 21st St., Ste. 101, Topeka, KS 66615.


Charles W. Macheers has moved his firm, Charles W. Macheers LLC, Attorney at Law, to 6750 Antioch Rd., Ste. 301, Overland Park, KS 66204.

Jolynn Oakman, Attorney at Law, has moved to 310 W. Central, Ste. 205, Wichita, KS 67202.

David R. Nachman has relocated his business practice at 4550 Belleview, Kansas City, MO 64111.

Nuss & Farmer P.A. has moved to 323 S. Judson St., Fort Scott, KS 66701.

Schoenig Law Firm LLC has moved to 111 S. Kansas Ave., Olathe, KS 66061.

Stephen P. Weir P.A. has moved to 2900 S.W. Wanamaker Dr., Ste. 202, Topeka, KS 66614.

**MISCELLANEOUS**

Margaret A. Farley, Lawrence, was installed as the 57th president of the Kansas Association for Justice.

Steve F. Kearney, Topeka, is the 2008 recipient of the Award of the Merit from the Kansas Association of Career and Technical Education.

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**Dan’s Cartoon by Dan Rosandich**

“Since it is your first offence, I’ll just sentence you to a bad haircut.”
Roy L. Cole


Survivors include two sons, Douglas R. Cole, Collierville, Tenn., and Craig E. Cole, Garnett; two brothers, Clarion Cole and Orville Cole, both of Garnett; a sister-in-law; four grandchildren; and two great-grandchildren. He was preceded in death by his wife, Evelyn Marjorie Baker.

Brian J. Moline

Brian J. Moline, a long-time Kansas public servant, died Sept. 29 at Midland Hospice Care in Topeka after a sudden and incapacitating illness. He was 68. A naturalized citizen, Moline and his family immigrated to the United States from England when he was 12. He believed deeply in the promise of his adopted country and dedicated much of his life to one of its foundational ideals: That everyone under the law is equal.

Moline was committed to fairness and demanded it on behalf of the clients he represented, the constituents he served, and the consumers and companies whose interest he protected as a member and chairman of the Kansas Corporation Commission (KCC). His commitment to fairness was apparent in his pioneering work in the early 1970s for the Wichita Legal Aid Society (WLAS) and later with his co-founding of Kansas Legal Services. Prior to his work for WLAS, he served in the Kansas Legislature from 1966 to 1971.

In addition to his 20 years at the KCC (first as general counsel, then chairman from 2003-2007), Moline served on the Kansas Governmental Ethics Commission and was general counsel from 1995-1997 to then-Kansas Insurance Commissioner Kathleen Sebelius. While serving as KCC chairman, he was elected to the board of directors of the National Association of Regulatory Utility Commissioners (NARUC) and was selected chairman of its subcommittee on nuclear issues. He lectured outside the United States on ethical and legal issues confronting public utility commissions as a member of NARUC’s Committee on International Relations. Moline also served in many community and state capacities, including serving on the Topeka and Shawnee County Public Library board of trustees and the Kansas State Historical Society executive committee, serving terms as president for both organizations. He was also president of Independence Chair-

itable Trust, a fundraising resource for Kansas Legal Services. After his retirement in 2007, he continued to be involved in policy debate, heading the Alliance for Sound Energy Policy during the 2008 legislative session and most recently returned to his professional roots by working for the Disability Rights Center of Kansas.

The Kansas Bar Association (KBA) twice-recognized Moline, giving him the Distinguished Service Award in 1994 and the Distinguished Government Service Award in 2006. In 2003, he was named adjunct professor of the year by students at Washburn University School of Law, the same school where he earned his law degree in 1966, and taught juvenile law, trial techniques, insurance law, and legal history for more than 20 years. Moline served on the KBA Board of Editors for the Journal of the Kansas Bar Association and wrote more than 10 articles for the Journal. He also served as chair of the Topeka Bar Association’s Ethics and Grievance Committee and Board of Trustees.

Moline found the time to write extensively from the topic of legal ethics to Kansas history. He authored a chapter on former Attorney General Vern Miller for the 2006 book, “From John Brown to Bob Dole: Movers and Shakers in Kansas History.” He also contributed to a 1993 book about U.S. Supreme Court justices, authoring a chapter on Justice David J. Brewer of Kansas.

Moline is survived by his wife, Kathie Sparks, Topeka; a brother, Mike Moline, San Antonio; and four children, Justin Cooper, Denver, Brock Cooper, Lawrence, Matt Ingham, Fort Worth, Texas, and Ashley Ludwig, Austin, Texas. He was preceded in death by a sister, Partricia Moline Russell; and his parents, Charles and Tess Moline.

Dale R. Stinson

Dale R. Stinson, 81, a retired attorney with the Wichita firm of Stinson, Lasswell & Wilson, died Aug. 29. After graduating high school, he joined the U.S. Navy’s V6 program and attended Louisiana Polytechnic Institute and Rice University, studying engineering. After World War II, Stinson enrolled at Emporia State University. He earned his law degree from Washburn University and was admitted to practice law in Kansas in 1951.

A practicing attorney for 55 years, Stinson served as the first full-time judge pro tem under the late Hon. Clark Owens in the Sedgwick County Probate Court. He served as president of the Wichita Bar Association, Kansas Bar Foundation, and the Estate Planning Council; and he served on the board of directors of Starkey Inc., a nonprofit organization for adults with developmental disabilities. He was a 60-year member and 33rd degree mason of the Albert Pike Blue Lodge AF&AM, a 50-year member of the Wichita Scottish Rite, York Rite, and Midian Shrine; and served on the board of trustees of the Wichita Consistory.

Survivors include his wife, Melva; sons, Jeffrey, London, England, Dale, Wiesbaden, Germany, and Bradford, Wichita; daughter, Melissa, Key Biscayne, Fla.; brothers, Robert, Olathe, and John, Wichita; sister, Judy, Warrensburg, Mo.; and four grandchildren. Stinson was preceded in death by his parents, Dale and Anna; brother, Ner; and sister, Betty Ann.
Live Seminars

Friday, December 12, 9 a.m. – 3:30 p.m.
Plaza Lights Institute
Country Club Plaza Marriott, Kansas City, Mo.
Co-sponsored by: CoreFirst Bank & Trust

Wednesday, December 17, Noon – 1 p.m.
FDIC Insurance: Preparing for Client Inquiries
Terri D. Thomas, Kansas Bankers Association, Topeka

Telephone Seminar

Tuesday, December 9, Noon – 1 p.m.
FMLA Intermittent Leave: Issues and Strategies
Meredith J. Rund, Bryan Cave LLP, Kansas City, Mo.

Wednesday, December 10, Noon – 1 p.m.
The Employee Free Choice Act and Union Avoidance Strategies for Your Corporate Client
Brian J. Christensen, Bryan Cave LLP, Kansas City, Mo.

Tuesday, December 16, Noon – 1 p.m.
Do the New FDIC Insurance Regulations Impact Your Client’s Trust?
Terri D. Thomas, Kansas Bankers Association, Topeka

Mark Your Calendars!

Tuesday, January 13, Noon – 1 p.m.
Juvenile Rights to a Jury Trial
Donald W. Hymer Jr.

Wednesday, January 14, Noon – 1 p.m.
Child in Need of Care (CINC) Updates
Donald W. Hymer Jr.

Friday, January 16
Government/Administrative Seminar
Kansas Law Center, Topeka

Friday, January 30
Solo & Small Firm/Law Practice Management Seminar, Rolling Hills Wildlife Conference Center, Salina

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Optional Airfare Program is available from Kansas City!
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* Prices are for the LAND PROGRAM ONLY and are per person, double occupancy (glan taxes).
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Get a Do-It-Yourself MBA

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

It is an exciting time for lawyers. Economies at all scales, and in almost all countries, are reeling so it is no surprise that many grasshoppers are asking what skills and degrees might be recession proof. Of course, anywhere uncertainty and instability lurk provides work for lawyers with better-than-average insight into business and economic matters. A first step to obtaining a better-than-average rating for your insights might involve a stop at The Personal MBA (personalmba.com).

The aim of The Personal MBA is to catalog 77 of the best business books in print that capture the core knowledge offered by many Masters in Business Administration (MBA) degree programs. Whether it is a replacement for a true MBA program is an issue discussed in “The Personal MBA Manifesto.” The actual reading list is far more interesting; however. The list is divided into sections, some of which I reproduce here, and there are a handful of interesting offerings for each section.

Productivity and Effectiveness

It would be hard to imagine a list of best books about productivity that does not reference David Allen’s “Getting Things Done.” Allen promises in the introduction, “It’s possible for a person to have an overwhelming number of things to do and still function productively with a clear head and a positive sense of relaxed control.” He goes on to teach a simple system, reducible to a one-page flowchart that guides you to that goal. I am hooked and I keep hearing that many of you too depend on “Getting Things Done” for your survival.

Psychology and Communication

I first came across “Deep Survival” by Lawrence Gonzales in some reading about backpacking and fly-fishing. Gonzales searches for the traits that keep some alive in the face of seemingly insurmountable odds while others perish in seemingly benign circumstances. The author’s own father was shot out of his B-17, survived falling 20,000 feet, and watched his captors point a pistol in his face and pull the trigger – twice! While not a typical business book, “Deep Survival” highlights what the latest research has to say about survivors and provides insight for navigating perils lawyers face.

One of the minor perils gaining root in our profession is the dreaded “death by PowerPoint.” What once may have been a groundbreaking communication tool is now mired in bullet points and trivial clip art. Garr Reynolds attempts to move the focus off of PowerPoint to storytelling in “Presentation Zen.” Reynolds teaches brainstorming techniques, moves on to storyboarding tools, and finally ends by building a rich, captivating presentation sans bullet points. For video examples of the possibilities, go to www.ted.com to watch Garrett Lisi explain his “Beautiful New Theory of Everything” using some of the ideas discussed in “Presentation Zen.”

Personal Finance

Any MBA program that does not hit upon money probably misses one of the larger points of the degree. The Personal MBA program starts by explaining how to get and keep your own pile of cash with the classics “The Millionaire Next Door” by Thomas J. Stanley and William D. Danko. The authors used questionnaires and interviews to investigate the habits of America’s wealthy. They discover that those who appear wealthy might not be the people who can survive an economic downturn or even retire at 45. The “secrets” discovered might seem a bit dated but are uncomfortably obvious in light of recent economic problems. At the very least, their prescriptions once helped pull a nation out of the Great Depression.

Finance and Analysis

Having established a firm foundation in personal finance, attention turns to actually mastering the tools of financial wiz- ards. An accounting textbook, “The Essentials of Accounting” (9th Edition) by Robert N. Anthony and Leslie K. Breitner, explains the mechanics of modern accounting systems. Managing a law firm, evaluating profitability, counseling clients, and even evaluating evidence have all required more of me than a passing knowledge of accounting. Study hard and you might even find yourself building a credible business plan.

The Degree

Finishing the Personal MBA will not provide a certificate for the wall but it will help solidify any lawyer’s understanding of basic business skills. Those benefits may be personal but learning them just might prevent our economy’s woes from becoming personal.

About the Author

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LEGAL ARTICLE: POLITICAL SPOILS...

POLITICAL SPOILS
AND THE FIRST AMENDMENT

By Michael T. Jilka

I. Introduction

“To the victor goes the spoils.” That oft-quoted aphorism has deep historical roots and fueled the rise of legendary political machines such as Tammany Hall, the Pendergasts, and Chicago’s Daleys. While legislation such as the Pendleton Act1 curbed some of its more abusive aspects, the constitutional validity of political patronage was commonly accepted at least until the 1970s. In 1976, the U.S. Supreme Court sharply curtailed the use of political patronage, holding that such practices amounted to an unconstitutional coercion of a person’s political beliefs and associations.2 In a series of cases that followed over the ensuing two decades, the Court expanded both the scope of actions and persons potentially subject to this First Amendment right. The constitutional protection now extends beyond employment terminations to cover intermediate employment measures, and even independent contractors enjoy protection.

But the constitutional bar against political patronage is not absolute. Courts recognize that “[a] public agency would be unmanageable if its head had to ... retain his political enemies ... in positions of confidence or positions in which they would be ... exercising discretion in the implementation of policy.”3 Certain positions, known as policymakers or confidential employees, are exempted from constitutional protection. This aspect of the Court’s First Amendment jurisprudence has spawned a steady stream of litigation. This article traces the development of the constitutional norms governing political patronage dismissals under the First Amendment right of political association.

II. Supreme Court Framework

The Supreme Court’s jurisprudence addressing the constitutionality of political patronage dates from the 1970s. The Court’s opinions reflect a sharp fissure among the justices over the normative value of political patronage. The prevailing view posits political patronage as an evil that inhibits a fundamental constitutional right — the right to freely express one’s political beliefs and support candidates of one’s choosing. The dissenting view, which is forcefully articulated by Justices Lewis F. Powell Jr. and Antonin Scalia, emphasizes the practical necessity of political patronage to the effective functioning of a democratic political system.

The Court’s initial foray into the thicket of political patronage came in *Elrod v. Burns*.4 In *Elrod*, a newly-appointed Democratic sheriff terminated Republican employees of the sheriff’s department because they were not affiliated with or sponsored by the Democratic Party. More specifically, the employees were asked to pledge political allegiance to the proper party, work for political candidates, financially support the party, or obtain sponsorship of a party member to keep their jobs.

The Court held that the sheriff’s actions violated the plaintiffs’ First Amendment rights.5 In a plurality opinion authored by Justice William J. Brennan Jr., the Court offered two reasons for its conclusion. First, it stated that political patronage “is inimical to the process, which undergirds our system of government and is at war with the deeper tradi-

FOOTNOTES
3. *[Wilbur v. Mahan*, 3 E3d 214, 217 (7th Cir. 1993).
5. Id. at 373.
tions of democracy embodied in the First Amendment.”6 The Court emphasized that political patronage forces individuals to compromise their beliefs and constrains their exercise of a fundamental constitutional right:

It is not only belief and association, which are restricted where political patronage is the practice. The free functioning of the electoral process also suffers. Conditioning public employment on partisan support prevents support of competing political interests. Existing employees are deterred from such support, as well as the multitude seeking jobs. As government employment, state or federal, becomes more pervasive, the greater the dependence on it becomes, and therefore the greater becomes the power to starve political opposition by commanding partisan support, financial and otherwise. Patronage thus tips the electoral process in favor of the incumbent party, and where the practice’s scope is substantial relative to the size of the electorate, the impact on the process can be significant.7

Second, the Court found that apart from the potential impact of patronage dismissals on the expression of opinion, the practice also had the effect of imposing an unconstitutional condition on the receipt of a public benefit.8 This effect ran afoot of the holdings in a line of cases beginning with Perry v. Sindermann,9 which hold that the government cannot deny a constitutional right:

The Court added new layers to Elrod’s foundation in Branti v. Finkel.12 In Branti, the newly-appointed public defender terminated two assistant public defenders on the basis of their Republican party affiliations. The Court held that the terminated employees need not prove they were forced to change political beliefs or lose their jobs.13 Instead, the employees need only prove that they were terminated “solely for the reason that they were not affiliated with or sponsored by the Democratic Party.”14

In the course of its opinion, the Court refined the “policymaker” exception and again recognized that the constitutional bar to politically-motivated dismissal is not absolute. “If an employee’s private political beliefs would interfere with the discharge of his public duties, his First Amendment rights may be required to yield to the state’s vital interest in maintaining governmental effectiveness and efficiency.”15 Persons who serve in “confidential” or “policymaking” positions can be terminated on the basis of their political affiliation.16 But the Court again acknowledged the difficulty of drawing sharp lines delineating which positions are subject to constitutional protection. In some situations, a position may be labeled political and outside First Amendment scrutiny even though it is neither confidential nor policymaking in character. For example, the Court recognized that if a state’s election laws require that precincts be supervised by two elections judges of different parties, a Republican judge could be legitimately discharged solely for changing his or her party affiliation.17

By the same token, party affiliation is not necessarily relevant to every policymaking or confidential position. For example, a state university’s football coach formulates policy, but no one could claim that a certain political affiliation makes one a better coach. On the other hand, a governor could legitimately believe that the official duties of various assistants who serve as speechwriters, press secretaries and legislative liaisons cannot be performed effectively unless those persons share her political beliefs and party commitments. Summarizing its holding, the Court instructed lower courts to look beyond labels and ask whether the hiring authority can demonstrate that party affiliation is an appropriate requirement for the effective performance of the public office involved.18

In Rutan v. Republican Party of Illinois,19 the Court extended the holdings of Elrod and Branti beyond termination to cover promotion, transfer, recall, and hiring decisions based on party affiliation and support. In Rutan, the governor of Illinois imposed a hiring freeze, which practically required his personal permission to hire, fire, or transfer any state employee. In deciding whether to grant such permission, the governor reviewed whether the applicant voted in Republican primaries, made financial contribution to the Republican party, or promised to join and work for the party in the future. The plaintiffs claimed they suffered adverse effects of the freeze

6. Id. at 357.
7. Id. at 356.
8. Id. at 359-60.
11. Id. at 367-68.
13. Id. at 517.
15. Id.
16. See id. (citing Elrod, 427 U.S. at 375).
17. Id. at 518.
18. Id.
because they were not Republican Party supporters.

The Court reversed the Seventh Circuit’s holding20 that only employment decisions constituting the “substantial equivalent of a dismissal” violate the First Amendment. The Court noted that the First Amendment concerns articulated in Elrod and Branti barring political patronage dismissals were equally applicable to adverse employment actions falling short of termination.21 The potential loss in pay increases, inconvenient hours, or long commutes that may result from an employee’s refusal to compromise their political beliefs violated the First Amendment just as does a termination.

To round out its quartet of holdings on the issue, the Court extended the scope of First Amendment protection to independent contractors in O’Hare Truck Services Inc. v. City of Northlake.22 In O’Hare, the city maintained a rotation list of available towing companies. O’Hare was on the list for decades. In 1993, the incumbent mayor ran for re-election. He asked O’Hare to contribute to his campaign. O’Hare refused and instead supported the mayor’s opponent. O’Hare even displayed the opponent’s campaign posters at its place of business. The mayor won re-election, and soon thereafter, removed O’Hare from the rotation list. O’Hare sued, claiming its removal violated his First Amendment right to political association. In a 7-2 opinion, the Supreme Court extended Elrod’s and Branti’s constitutional protections to independent contractors.

The Court noted that if O’Hare’s owner had been a public employee who performed tow truck operations, the city could not have discharged him for refusing to contribute to the mayor’s re-election campaign.23 The Court could discern no compelling reason for treating independent contractors differently.24 In both situations, government power was exercised to coerce a person’s political beliefs. The Court reasoned that “our cases make clear that the government may not coerce support in this manner, unless it has some justification beyond dislike of the individuals’ political association.”25

III. Who are Policymakers and Confidential Employees?

Policymakers and confidential employees are not protected from politically motivated dismissals. But Elrod and Branti do not provide bright-line rules to determine the identity of these employees. The task has devolved onto the lower courts to develop approaches that consistently define the constitutional right across a broad array of factual scenarios. The First Circuit aptly described the amorphous nature of the ensuing case law interpreting Elrod and Branti:

[I]t is largely a porridge of general statements and variables: Positions are less likely to be protected to the extent that they are ‘higher,’ more ‘political,’ more ‘confidential,’ and so on; duties prevail over titles; everything depends on circumstances.26

The policymaker exception is easy to apply at the extremes. When a new administration takes office and terminates high-level policymaking employees of the previous administration, the Branti exception applies and the terminated employees have no First Amendment protection. At the other extreme, if a janitor employed by the prior administration was terminated for his or her support of the wrong political party, the exception would not be applicable and the janitor is protected by the First Amendment. Between those two extremes lie a virtually endless variety of factual scenarios.

A pair of recent Tenth Circuit cases illustrates the court’s analysis in deciding claims alleging deprivation of the First Amendment right of political association. In Jantzen v. Hawkins,27 Sheriff Lewis Hawkins, the incumbent sheriff of Canadian County, Okla., sought re-election. He convened a meeting of his subordinates and announced that anyone who ran against him, openly opposed his re-election, or was in any way disloyal to him, would be fired. Richard Haugland announced his intention to run against Hawkins. He was immediately fired. Duane Jantzen, Monte Preno, and William Gabariel Moulton, who served as deputy sheriffs and jailer, respectively, actively supported Haugland’s candidacy. Hawkins won the election and terminated Jantzen, Preno, and Moulton. Haugland, Jantzen, Preno, and Moulton then filed suit under 42 U.S.C. § 1983, alleging their First Amendment right of free association was violated. The district court entered summary judgment in favor of the sheriff and county. The Tenth Circuit affirmed in part and reversed in part.

The court quickly dispensed with Haugland’s claim. Haugland alleged that the only reason he was fired was because he was a candidate for sheriff against his own boss. The court affirmed the district court and held that the right to political affiliation does not encompass the mere right to affiliate with oneself.28 The court reached a different conclusion with respect to Jantzen, Preno, and Moulton. The court noted that a plaintiff making a political discrimination claim must establish that (1) political affiliation and/or beliefs were “substantial” or “motivating” factors behind their dismissals and (2) their respective employment positions do not require political allegiance.29 With regard to the first prong of a political discrimination claim, the court noted that Hawkins’ repeated demands of “unswerving allegiance” from his subordinates, coupled with the evidence that Moulton, Jantzen, and Preno were fired because of their affiliation with Haugland, established a genuine dispute as to whether political affiliation and/or beliefs were a substantial factor in the plaintiffs’ termination.30

23. Id. at 720.
24. Id.
25. Id. at 721. Subsequent case law is divided over whether First Amendment protection extends beyond existing commercial relationships. Prisma Zona Exploratoria De Puerto Rico Inc. v. Calderson, 310 F.3d 1, 7 n. 3 (1st Cir. 2002).
26. Flynn v. City of Boston, 140 F.3d 42, 44 (1st Cir. 1998).
28. Id. at 1252.
29. Id.
30. Id.
As for the second prong, the court asked if the plaintiffs’ respective positions required political allegiance. This requirement directs the court to analyze “the nature of the employee’s duties and responsibilities.” More specifically, the court focuses on the inherent powers of the positions and the actual duties performed. The defendant bears the burden of proof on whether political association was an appropriate requirement for the effective performance of the public office involved. The court first noted that the record indicated that the sheriff’s office ran smoothly while Jantzen, Preno, and Moulton remained in their jobs during the election campaign. This fact cast doubt on the sheriff’s assertion that political loyalty was necessary. The court then turned its attention to the details of the particular positions in question. The duties of a jailer consist of (1) receiving and booking inmates, (2) regulating inmates’ meals, (3) regulating inmates’ medication, (4) monitoring jail activity and conducting cell checks, and (5) keeping jail records. In the court’s view, none of these actual duties and inherent powers necessarily require political loyalty to the sheriff for efficient performance. The job of a jailer is a politically neutral one. The court rejected the district court’s reasoning that the jailer’s actions “were a reflection on the sheriff with the public and entitled the sheriff to demand and receive political loyalty in this position.”

The court reached a similar conclusion regarding the position of deputy sheriff. The primary duty of a deputy sheriff is to patrol the county and enforce and invest city funds. She had significant amounts of policymaking. The performance of the city treasurer involved significant amounts of policymaking. The court held a genuine fact dispute exist- ed over the appropriateness of political loyalty as a job requirement for deputy sheriffs and jailers.

The court applied this framework to the position of city treasurer in Snyder v. City of Moab. In Snyder, a new mayor, Karla Hancock, took office. She had statutory authority of appointment over four positions: chief of police, city attorney, public works director, and city treasurer. Hancock did not reappoint Snyder as city treasurer. Snyder was the only incumbent who did not support Hancock in the campaign. Snyder challenged her dismissal on First Amendment grounds.

The district court found that the mayor had proven that the effective performance of the city treasurer’s job required political allegiance to the mayor. Snyder appealed, contending that the district court erred in denying her judgment as a matter of law. The Tenth Circuit affirmed.

The court found the evidence indicated the position of city treasurer involved significant amounts of policymaking. The city treasurer’s job description stated that the city treasurer “interacts with the public and addresses complaints and problems.” Snyder herself conceded she dealt with the public and resolved citizen complaints directly. She had authority to make adjustments to water, sewer, and garbage bills. In addition, she had significant policymaking authority to set the city’s monetary policy by determining the city’s cash requirements and invest city funds. She had significant

(Continued on next page)
authority over hiring decisions in the treasurer’s office. In light of these factors, the court concluded that the position of city treasurer entailed broad policymaking authority and significant discretion to use that authority.41

Snyder pointed to testimony from Hancock, in which the mayor stated she believed it was inappropriate to consider “political loyalty” a requisite for employment as city treasurer. Based on this testimony, Snyder argued she was entitled to judgment as a matter of law. The court disagreed. First, the court viewed Hancock’s testimony to indicate she believed that the position of city treasurer did require political loyalty, but to her personally rather than to a political party generally.42 This testimony was, in the court’s view, a distinction without a difference. Second, the court found that Hancock’s testimony did not obfuscate the other evidence that supported the jury verdict that the city treasurer position required political allegiance.43

The Tenth Circuit has acknowledged that its previous cases are not consistent regarding the analysis of “the nature of the employee’s duties and responsibilities.”44 In Dickerson v. Quarberg,45 the court focused on the inherent powers of the positions and the actual duties performed. Three years later, the court found that a dispute as to the actual duties of an employee was not relevant for a Branti inquiry.46 Given the conflict, the court followed its earlier precedent and focused on both the inherent and actual powers of the office.47

Other circuit courts disagree with this approach and focus solely on the inherent powers of the position.48 For example, in Tomczak v. City of Chicago,49 the Seventh Circuit justified its sole focus on the inherent powers of a position for two reasons. First, that approach relieved courts of the burden of re-examining the actual duties of a position every time a position changed hands.50 Second, such an approach provides certainty to litigants.51 From a practical perspective, a newly-elected administration may not know the actual duties of certain employees in the previous administration, or have different views as to what the duties should be. As the First Circuit observed, “[A] new administration should not be overly hamstrung in filling key positions with loyal employees simply because of the way the prior administration operated.”52 Given the intra-circuit split within the Tenth Circuit on this issue, the court will likely have to resolve this split en banc in a future case.

“Confidential employees” are identified in a similar fashion as “policy-makers.” Confidential is a catchall designation for “government employees who, while not decisionmakers, are in close contact with policymakers” and their records, and for whom “political antipathy can serve as a decent proxy for a lack of trust and loyalty.”53 The Ninth Circuit’s decision in Hobler v. Brueher54 is instructive. In Hobler, the plaintiffs were two at-will secretaries in the prosecutor’s office of Adams County, Wash. Their boss, David Sandhaus, went down to landslide defeat in the general election. The newly-elected prosecutor, Gary Brueher, evidently perceiving a mandate to clean house, terminated the two plaintiffs. The two plaintiffs in turn filed suit, claiming they were terminated in retaliation for their support of Sandhaus.

The court noted that the question before it was not whether the two plaintiffs held the title “confidential secretary” or could be properly denominated as such, but whether the work they did made their support for the outgoing prosecutor against the incoming prosecutor “an appropriate requirement for the effective performance of the public office involved.”55 The court held that the two plaintiffs’ actual duties and relationship to Sandhaus made them confidential employees in the Branti sense.56 The court noted that most offices have certain key persons who work so closely with the outgoing boss that an incoming boss must have the option to select his or her own persons for that position. The two plaintiffs fit that category; they were Sandhaus’ conduit for sensitive information. Sandhaus depended on the two plaintiffs to advise him how the other staff were performing their jobs. The two plaintiffs helped interview applicants for attorney and support staff positions. They sat in on discussions with employees about personnel problems. They handled the payroll and interacted with other county officials on Sandhaus’ behalf. In the court’s view, “Requiring Brueher to keep on persons that his predecessor and political enemy worked with so closely would simply have stymied him.”57

41. Id.
42. Id. at 1187.
43. Id.
44. Jantzen, 188 F.3d at 1253 n. 1.
45. Dickerson, 844 F.2d at 1435.
46. Green v. Henley, 924 F.2d 185 (10th Cir. 1991).
47. Jantzen, 188 F.3d at 1253 n. 1.
49. Tomczak v. City of Chicago, 765 F.2d 633 (7th Cir. 1985).
50. Id. at 641.
51. Id.
52. Hadfield v. McDonogh, 407 F.3d 11, 18 (1st Cir. 2005).
54. Hobler v. Brueher, 325 F.3d 1145 (9th Cir. 2003).
55. Id. at 1151.
56. Id. at 1151-52.
57. Id. at 1152.
The court identified several factors that qualified the case for the Branti exception. First, the office in question was small, ensuring that the elected official would have continual and close working relationships with his support staff.68 Second, the dismissals targeted two specific individuals whose personal activities in the office mattered a great deal to the incoming official, as opposed to a wholesale firing of the entire office.69 Third, the two plaintiffs continually interacted on Sandhaus’ behalf with courthouse personnel who affected his performance, as well as county commissioners who determined the prosecutor’s budget. In effect, the two plaintiffs were the public face of Sandhaus.60

Hobler highlights the case-specific and fact-sensitive nature of the Branti inquiry. The court emphasized that no multifactor or exclusive test governs the analysis. But the court summarized several of the factors that shaped its analysis:

(1) How closely does the person work with the official? (2) Does the person’s job require personal loyalty to the official? (3) Is the office so small that the relationship is necessarily close, or so large that it isn’t? (4) Does the official rely on the person for information about delicate matters within the office or communications with the public or other officials on behalf of the official? (5) Would the official’s ability to manage relationships with office staff or persons with whom the office deals be impaired if the persons are politically loyal to an adversary or not loyal to him? (6) Were the dismissals of only one or a small number of employees who worked most closely with the policymaker, or were they wholesale dismissals? (7) Did the individual speak to other employees, the public, and other policymakers on behalf of the official?61

The Tenth Circuit addressed the “confidential employee” exception in Barker v. City of Del City.62 Jana Barker was the administrative assistant to the city manager of Del City. In that capacity, she acted on the city manager’s behalf at city council meetings and civic social functions; worked on confidential and sensitive matters; and worked with the council, other employees, and the public on community problems.

The city held a contentious election in which several incumbents on the city council were defeated. The newly-elected officials took office and terminated the city manager. Barker worked for the new city manager for nine months until her employment was terminated. She filed suit alleging she was terminated because of her continuing relationship with the former city manager. With cursory analysis, the Tenth Circuit held that political association and allegiance were appropriate requirements for the performance of Barker’s job as administrative assistant to the city manager.63 Based on the case authority cited by the court, one can conclude that Barker’s proximity to the policymaker, the city manager, coupled with her access to information, brought her within the realm of “confidential employee” status.

State law classifications may factor into whether the policymaking label applies. For example, in Shockency v. Ramsey County,64 the Eighth Circuit looked to provisions of Minnesota law for aid in deciding whether the plaintiffs were policymakers. In Shockency, a deputy sheriff told co-workers that he intended to run against Sheriff Robert Fletcher. One of the dispatchers publicly supported the deputy’s campaign. After Fletcher won re-election, the deputy and dispatcher were demoted. The deputy and dispatcher challenged their demotions, claiming their First Amendment right of free association was violated.

The court noted that other circuits had previously ruled that deputy sheriffs held policymaking positions and could be transferred for political reasons.65 The court distinguished these cases because they turned on state law provisions in other jurisdictions. In the case before it, the court found that Minnesota law categorized the deputy and dispatcher’s positions as falling within the classified service and not based on political affiliation. In contrast, the sheriff’s chief deputy, three principal assistants, and the sheriff’s personal secretary are in the unclassified service. By virtue of their classification in the classified service, the two plaintiffs were protected from retaliation for refusing to contribute to campaigns or from being compelled to (Continued on next page)

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58. Id. at 1154. 60. Id. 61. Id. at 1154-55. 62. Barker v. City of Del City, 215 F.3d 1134 (10th Cir. 2000). 63. Id. at 1138 (citing McCloud v. Testa, 97 F.3d 1536, 1556 (6th Cir. 1996) (“[W]orkers analogous to a cabinet secretary to a chief executive, along with the confidential advisors and administrative assistants of such executives and cabinet secretaries, are not entitled to First Amendment protection.”); Smith v. Sushka, 117 F.3d 965, 971 (6th Cir. 1997) (administrative assistant to county engineer); Savage v. Gorski, 850 F.2d 64, 68-69 (2d Cir. 1988) (confidential secretary to corrections official); see also Wilbur v. Mahan, 3 F.3d 214, 216 (7th Cir. 1993) (noting that the confidential character of positions such as personal secretary or personal assistant makes political affiliation an appropriate job requirement). 64. Shockency v. Ramsey County, 493 F.3d 941 (8th Cir. 2007). 65. Id. at 950-51.
A department’s size may affect whether a position fits within the policymaker/confidential employee category. For example, in Fuerst v. Clarke,67 David Clarke was demoted from his position as a deputy sheriff in the Milwaukee Sheriff’s Department. He alleged his demotion was in retaliation for criticizing the sheriff’s decision to hire a public relations officer. The department had some 600 deputy sheriffs, 43 sergeants, 22 lieutenants and captains, and an inspector. The court noted that the size of a department has some bearing on whether a deputy sheriff is deemed a policymaker. “Particularly in a small department, a sheriff’s core group of advisers will likely include his deputies.” In a smaller department with a less hierarchical structure, a deputy may be delegated broader powers than in a large department, such as Milwaukee. The converse is true in a larger department. The Fuerst court reversed the district court’s ruling that Clarke’s position was a policymaking one.

The foregoing cases demonstrate that identification of persons subject to politically motivated dismissal generally rests on standards instead of bright-line rules. Certain positions almost invariably fall within the policymaker category and are subject to politically motivated dismissal. Prosecutors, for example, have uniformly been held to fit within the policymaker exception.68 Speechwriters and administrative assistants who work in close proximity to elected officials also invariably fit within the exception. Other positions are more difficult to categorize. In an effort to clarify the law, the Sixth Circuit has identified four categories of positions that presumptively fall into the Branti exception:

**Category 1:** Positions explicitly empowered by law to exercise political discretion;

**Category 2:** Positions not explicitly so empowered, but exercising political discretion by a jurisdiction’s pattern or practice;

**Category 3:** Confidential advisors; and

**Category 4:** Positions filled by a balancing of affiliations.69

66. Other courts have noted that state law classification of a position is not determinative in the Branti analysis. Haufeld, 407 F.3d at 18 n. 5. 67. Fuerst v. Clarke, 454 F.3d 770 (7th Cir. 2006). 68. Gordon v. County of Rockland, 110 F.3d 886, 890-91 (2d Cir.), cert. denied 522 U.S. 820 (1997) (“All circuit court decisions – and almost all other court decisions – involving attorneys in government service, other than public defenders, have held that Elrod/Branti, do not protect these positions.”); Mummau v. Ranch, 687 F.2d 9, 10 (3d Cir. 1982) (holding that an assistant district attorney fell squarely within the Elrod-Branti exception); Clark v. Brown, 861 F.2d 66, 68 (4th Cir. 1989) (holding that dismissal of assistant county district attorney for political reasons was protected by qualified immunity); Aucoin v. Haney, 306 F.3d 268, 276 (5th Cir. 2002) (holding that assistant district attorney falls within the Elrod/Branti policymaker exception); Monks v. Marlinga, 923 F.2d 423, 426 (6th Cir. 1991); Williams v. City of River Rouge, 909 F.2d 151, 155 (6th Cir. 1990) (“Courts that have decided whether city and county attorneys are ... protected [under the First Amendment against politically motivated dismissal] have almost uniformly found that they are not.”); Livas v. Petka, 711 F.2d 798, 800 (7th Cir. 1983) (holding that an assistant prosecutor was a policymaker and thus could be subject to termination under Elrod); Fazio v. City and County of San Francisco, 125 F.3d 1328, 1334 (9th Cir. 1997) (holding that an assistant district attorney was a policymaker who could be terminated for political reasons). 69. Justice v. Pike County Bd. of Educ., 348 F.3d 554, 559-60 (6th Cir. 2003).

IV. Does the Pickering/Connick Test Apply to a Policymaker or Confidential Employee?

Terminated employees often invoke two related, yet distinct, First Amendment rights.70 Where a government employer takes adverse action on account of an employee’s political association and/or political beliefs, the Elrod/Branti analysis applies. But where a government employer takes adverse action because of an employee’s exercise of his or her right of free speech, courts apply the balancing test from Pickering v. Board of Educ.71 and Connick v. Myers.72 Under its current formulation,73 the test has five parts:

1. The court must determine whether the public employee speaks pursuant to his official duties, and if so, then there is no constitutional protection because the restriction on speech simply reflects the exercise of employer control over what the employer itself has commissioned or created;

2. If an employee does not speak pursuant to his official duties, but instead speaks as a citizen, the court must determine whether the subject of the speech is a matter of public concern, and if not, then the speech is unprotected and the inquiry ends;

3. If the employee speaks as a citizen on a matter of public concern, the court must determine whether the employee’s interest in commenting on the issue outweighs the interest of the state as employer;

4. Assuming the employee’s interest outweighs that of the employer, the employee must show that his speech was a substantial factor or a motivating factor in a detrimental employment decision; and

5. If the employee establishes that his speech was such a factor, the employer may demonstrate that it would have taken the same action against the employee even in the absence of the protected speech.74

When a terminated employee who fits within the “policymaker” or “confidential employee” exception alleges that his termination infringes on his free speech rights, the question arises whether the Elrod/Branti exception displaces...
the Pickering/Connick test. In other words, can an employer terminate policymaking or confidential employees regardless of their speech? The federal appellate courts are sharply split on this issue.

In situations in which both Elrod/Branti and Pickering/Connick potentially apply, federal appellate courts have developed three distinct approaches. The first approach, which has been adopted by the Second Circuit, rejects the application of the policymaking exception in cases where the termination is based on speech rather than political affiliation. Under this approach, Pickering/Connick trumps Elrod/Branti.

At the other end of the spectrum lies the approach adopted by the Ninth Circuit. Under that approach, the court determines whether the employee is in a policymaking or confidential position, and that inquiry is “dispositive of any First Amendment retaliation claim.” In other words, the Pickering/Connick free speech analysis does not apply.

The First, Sixth, Seventh, and Tenth Circuits take a middle approach, applying the policymaking exception in situations where the employee’s speech relates to either his political affiliation or substantive policy views. If the policymaker’s speech relates to matters unrelated to his or her politics or substantive policy positions, the Pickering/Connick free speech analysis applies.

V. What Conduct Does the Right of Free Association Protect?

“The First Amendment protects public employees from discrimination based upon their political beliefs, affiliation, or nonaffiliation unless their work requires political allegiance.”

The typical First Amendment political patronage case involves an employee subjected to adverse employment action based on party affiliation and support or failure to support or pledge allegiance to a particular political viewpoint. The right of political association need not be tied to party loyalty. Opposition during a party primary, for example, is constitutionally protected.

A plaintiff who plants yard signs, hands out campaign literature, or campaigns for a candidate in an election falls within the orbit of constitutional protection. But is the perception of political loyalty a protected act of association? In other words, is a plaintiff’s association with a politically-controversial third party, standing alone, sufficient to trigger constitutional protection? A pair of recent opinions authored by Kansas federal judges answers this question in the negative.

In Busey v. Board of County Commissioners of Shawnee County, Busey, a former Shawnee County sheriff’s deputy, filed a § 1983 suit claiming he was forced to retire due to his association with former Sheriff Dave Meneley. Busey conceded he had no political involvement with Meneley or his campaigns for sheriff. His only relationship with Meneley was through work. Busey claimed, in effect, that his perceived political loyalty to Meneley prompted his forced retirement.

In an opinion authored by Judge Julie A. Robinson, the court relied heavily on the First Circuit’s decision in Correa-Martinez v. Arrillaga-Belendez. In that case, Jorge Correa-Martinez, an administrative employee in the judicial system, claimed that he was forced to resign because of his close relationship with Judge Jose Padilla, the former administrative judge, with whom the defendants had personal and political differences. Correa did not claim that the defendants discriminated against him on the basis of his political beliefs or advocacy of ideas.

The First Circuit noted that freedom of association requires more than mere relationship. “Put another way, the [F]irst [A]mendment does not protect against all deprivations arising out of an act of association unless the act itself ... falls within the scope of activities eligible for inclusion within the constitutional tent.” Measured against these standards, the court found Correa’s allegations deficient. His complaint did not allege that he possessed or expressed any significant political views. In fact, the complaint suggested that Correa scrupulously avoided partisan political involvement. The complaint did not allege that the defendants knew anything about Correa’s politics. These shortcomings created, in the court’s words, a chasmal gap that was not bridged by Correa’s bald assertion that he had been terminated due to his close relationship with Padilla. In the court’s view, Correa’s complaint merely supported the inference that politics was in the air between the

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75. McEwan v. Spencer, 124 F.3d 92, 103 (2d Cir. 1997).
76. Biggs v. Best & Krieger, 189 F.3d 989, 994-95 (9th Cir. 1999).
78. Barker, 215 F.3d at 1139 (“We agree with the Seventh Circuit that, although an employee’s status as a policymaker bears considerable attention when weighing the interests of the government, the policymaking employee exception does not apply and courts must apply Pickering balancing when the speech at issue does not implicate the employee’s politics or substantive policy viewpoints.”).
79. Id. at 1251.
80. See, e.g., Bass v. Richards, 308 F.3d 1081 (10th Cir. 2002).
81. See Curriaga v. City of Clairton, 357 F.3d 305, 311 (3rd Cir. 2004) (citations omitted); Padilla-Garcia v. Guillermo Rodriguez, 212 F.3d 69, 76 n. 6 (1st Cir. 2000); Jordan v. Ector County, 516 F.3d 290, 296 (5th Cir. 2008).
84. Id. at 57.
85. Id. at 58.

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defendants and Padilla. But a politically charged atmosphere, without more, provided no basis for a reasonable inference that defendants’ employment decisions about Correa were tainted by their disregard of Correa’s First Amendment rights. Merely juxtaposing a protected characteristic – someone else’s politics – with the fact that plaintiff was treated unfairly is not enough to state a constitutional claim.

Judge Robinson found the First Circuit’s reasoning persuasive and rejected Busey’s claim. She noted that Busey did not claim that he expressed or possessed any political views. The record was silent as to the political contours, if any, of Busey’s relationship with Meneley. To defeat summary judgment, Robinson found that Busey was required to show a causal connection linking defendants’ adverse employment decision to Busey’s politics. In other words, Busey was required to show that he was subjected to discrimination based on his political loyalty, affiliation, or views.

Judge Richard D. Rogers reached the same conclusion a year later in Good v. Board of County Commissioners of Shawnee County. Good was terminated from his position as a deputy sheriff in Shawnee County. He also claimed that his termination was caused by his association with former sheriff Meneley. But Good conceded that (1) he did not socialize with Meneley while he worked for the sheriff’s department, (2) he had no association with Meneley while Meneley was sheriff other than as an employee, (3) he was vocal about actions taken by Meneley that he did not like, (4) he was in Meneley’s “doghouse” at one time, and (5) he did not become a friend of Meneley until after his termination.

The court held that Good’s right of association claim was not protected by the First Amendment. The court noted that a plaintiff must assert that adverse employment actions were taken against him because he engaged in conduct protected by the First Amendment. Good failed to do so. He merely asserted that adverse actions were taken against him because the defendants perceived that he was engaged in protected First Amendment activity. He did not claim that the defendants discriminated against him on the basis of actual loyalty to a political party, political candidate, or advocacy of ideas.

Busey and Good, thus, underscore the need to allege conduct to trigger the First Amendment right. The mere perception that a plaintiff shares the political views of a third party, standing alone, is insufficient to merit constitutional protection.

VI. Conclusion

The First Amendment right of political association pits the fundamental right of freedom to support political candidates and hold political beliefs of one’s choosing against the practical realities of a functioning democratic political system. The Supreme Court has attempted to reconcile these competing ideas by constructing a constitutional framework that prohibits its political patronage in general, but recognizes the necessity of certain deviations from this principle. Those deviations are reflected in the “policymaker” and “confidential employee” exceptions, which withhold constitutional protection to ensure that election results cannot be thwarted by holdovers from the prior administration. But the scope of these exceptions is not easily reduced to bright-line rules. Given the endless variety of governmental organization in this country, application of the “policymaker” and “confidential employee” exceptions remains a fact-intensive inquiry.

About the Author

Mike Jilka practices law with Holbrook & Osborn in Overland Park. He is a 1988 graduate of the University of Kansas School of Law.

Attorney Discipline

IN RE STEVEN A. JENSON
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 99,468 – SEPTEMBER 12, 2008

FACTS: Respondent, a private practitioner in Paola, was the subject of two complaints arising out of the same post-divorce child custody dispute. A hearing panel dismissed one of the complaints following the hearing even though the allegations were supported by a preponderance of the evidence. A majority found clear and convincing evidence of violations of KRPCs 3.4 (fairness to opposing party), 4.1 (truthfulness), 4.3 (unrepresented persons), and 8.4(a) (attempting to violate the rules), (c) (misconduct involving misrepresentation), and (d) (misconduct prejudicial to the administration of justice) in the second complaint. The majority found one aggravating factor and two mitigating factors and recommended published censure.

A dissenting minority final hearing report discussed the facts and applied the law on “clear and convincing evidence” in finding no violation of the rules had been established by that standard in either complaint.

HELD: The Supreme Court noted that the panel did not have the opportunity to review the Court’s restatement of the intermediate standard of proof [In re B.D.-Y., 286 Kan. ___ (July 18, 2008)] when it filed its reports. The Court adopted all of the majority’s findings as to violations of KRPCs 3.4, 4.1, and 8.4 but adopted the dissent’s reasoning as to KRPC 4.3. It further accepted the panel majority’s recommended sanction.

Civil

HABEAS CORPUS
PABST V. STATE
THOMAS DISTRICT COURT – AFFIRMED
NO. 97,139 – SEPTEMBER 19, 2008

FACTS: Pabst convicted of first-degree murder. Victim’s parents hired private attorney to act as associate counsel to assist prosecutor. In 2003, after direct appeal, retained attorney filed timely 1507 with 11 grounds, including undeveloped ineffective assistance of counsel claim to be amended after discovery. New retained attorney filed an amended 1507 petition in 2005 with additional grounds. State moved to dismiss the new claims as time barred. Pabst advanced right to amend under Rule 215, argued the new ineffective assistance claims related back to original pleading and noted state’s failure to specifically plead limitations defense. District court denied the amendment and 1507 relief, finding no exceptional circumstances excused petitioner’s failure to raise trial errors in direct appeal and any error occurring due to special prosecutor was harmless. On appeal, Pabst claimed (1) trial was fundamentally unfair because he was prosecuted by victim and because special prosecutor had conflict of interest with related concurrent civil proceeding, (2) ineffective assistance of trial and appellate counsel, and (3) amended pleadings related back, or district court should have extended the 1507(f) limitation period to prevent manifest injustice.

ISSUES: (1) Conflict of interest and fair trial, (2) ineffective assistance of counsel, and (3) amended 1507 motion

HELD: Statutory provisions for victim to be represented in prosecution are discussed. Legislature has authorized a prosecuting witness to employ an attorney to act as associate counsel to assist prosecutor. Associate counsel’s concurrent representation of the victim in a separate civil action does not create a per se violation of defendant’s due process rights. Associate counsel employed pursuant to K.S.A. 19-717 is subject to statutory conflict rule of K.S.A. 19-705. Violation of conflict rule is not structural error, but is subject to harmless error analysis. Pabst failed to establish that any conflict of interest by associate counsel substantially affected the criminal prosecution so as to deny Pabst a fair trial. No exceptional circumstances shown for failing to raise conflict issue at trial or on direct appeal.

Trial counsel not constitutionally ineffective in failing to move for disqualification of the associate counsel retained by the victim’s family or in failing to impeach testimony of medical examiner. Appellate counsel not constitutionally ineffective in failing to raise conflict issue on appeal.

Amendment provision of K.S.A. 60-215(a) does not apply to motion for relief under K.S.A. 60-1507. Amendment asserting a new ground supported by facts that differ in time and type from ground in original motion does not relate back as to circumvent one year limitation in 1507(f)(1). District court correctly found Pabst’s new grounds did not relate back to the original motion, and no error in failing to apply 1507(f)(2) to extend the limitation period.

HABEAS CORPUS AND STATUTORY IMMUNITY
MCCRACKEN V. KOHL
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 98,607 – SEPTEMBER 5, 2008

FACTS: McCracken was charged with three counts of aggravated battery and one count of criminal damage to property, based upon using his vehicle to push a vehicle driven by Parker into a ditch, while it was occupied by Parker, Carothers, and Lane. The district court dismissed McCracken’s petition for a writ of habeas corpus in which he sought immunity from prosecution for the aggravated battery charges based upon statutory self-defense provisions. The district court found McCracken failed to meet his burden of proving his entitlement to statutory immunity.

ISSUES: (1) Habeas corpus and (2) statutory immunity

HELD: Court held that McCracken provided no credible argument to justify his use of force. There was never an imminent threat of unlawful force against him and a reasonable person would not risk disabling his or her own vehicle by ramming an aggressor’s vehicle if the goal was to drive away from the scene. Court also held that any threat to the dwelling had long passed negating a contention that force was necessary because Parker’s vehicle was blocking the driveway leading to his dwelling. Court also held the defense of property was more problematic because law enforcement presented no proof that the dwelling had been burglarized, nor did McCracken present evidence that items had been stolen from his home. Court concluded that McCracken had failed to meet his burden of proof on the justifiable use of force and the district court did not disregard undisputed evidence.

STATUTES: K.S.A. 20-3018(c); K.S.A. 21-3211, -3214,-3218, -3219; and K.S.A. 60-1501, -2103(b)

INSURANCE AND EXCLUSIONS
AMERICAN SPECIAL RISK MANAGEMENT CORP ET AL.
V. CAHOW ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 95,942 – SEPTEMBER 12, 2008

FACTS: Peoples Bank applied for errors and omissions endorsement to a directors’ and officers’ liability insurance policy issued by Progressive Casualty Insurance. Shortly after the policy was issued, the bank sought coverage and a defense against allegations made by American Special Risk Management Corp. American alleged that the bank was guilty of negligence and conversion by failing to exercise ordinary care when it allowed an American employee, William Cahow, to open a business (a doing business as (d/b/a) or a sole proprietorship) account in the name of “Bill Cahow d/b/a William Cahow, to open a business (a doing business as (d/b/a) or a sole proprietorship) account in the name of “Bill Cahow d/b/a American Special Risk Management” and when it honored improperly endorsed checks that were owned by American and presented by Cahow. See K.S.A. 84-3-420 (conversion of instruments). Over an eight-year period, Cahow repeatedly and consistently deposited American’s funds in the business account and then transferred funds to his personal account, which was also at the bank. Cahow’s scheme was eventually discovered and the bank’s senior officer (Chenowith) knew criminal charges were pending against Cahow. Approximately three weeks after Chenowith learned of the criminal prosecution, the bank applied for the subject insurance policies. The bank failed to disclose the Cahow situation or the bank’s potential liability on the application. Shortly after the policy was issued, American sued both Cahow and the bank for damages resulting from Cahow’s embezzlement and the bank’s negligence. Progressive made no contact with the bank regarding settlement offers and a consent judgment. After entry of judgment, American filed a garnishment action against Progressive and others. The garnishment action went to trial. The trial court held it was “almost inconceivable” that the bank would not have known the Cahow situation would be expected to give rise to a claim and therefore the claim was excluded from Progressive’s coverage.

ISSUES: (1) Insurance and (2) exclusions

HELD: Court held that when an application for insurance asks for the identification of any facts, circumstances, or situations that could reasonably be expected to give rise to a claim and the policy excludes any claim arising from an undisclosed risk, an insurance company invoking the exclusion and denying coverage must establish that the applicant failed to disclose known information that an objective person would reasonably perceive as a potential risk. This test requires application of a combined subjective-objective standard: (1) subjectively, what facts did the applicant know and (2) objectively, would a reasonable person perceive that the known facts create a potential risk? Court held that under the facts of this case, the bank had knowledge of facts, circumstances, and situations that could reasonably be expected to give rise to a claim, and the nondisclosure triggered the exclusion for undisclosed risks.

STATUTES: K.S.A. 40-2205(A) and K.S.A. 84-3-420

Criminal

STATE V. COOK
SALINE DISTRICT COURT – AFFIRMED
NO. 97,440 – SEPTEMBER 5, 2008

FACTS: Cook convicted of premeditated first-degree murder, aggravated burglary, and criminal possession of firearm. On appeal, he claimed there was insufficient evidence to prove premaditation. He also claimed certain jury instructions should have been given even though he did not request them, claimed evidence of other crimes and bad acts was erroneously admitted, and claimed his sentences violated Apprendi.

ISSUES: (1) Sufficiency of evidence of premaditation, (2) jury instructions – standard of review, (3) self-defense instruction, (4) unanimity instruction, (5) evidence of prior crimes and bad acts, and (6) grid-box sentencing

HELD: Under facts, sufficient evidence supports jury’s finding of premaditation.

All of Cook’s instruction complaints are viewed under clearly erroneous standard. If a defendant wants to embrace or adopt any instruction proposed by the state, the defendant must take affirmative action to request the district court to give that instruction on behalf of the defendant, or must object to the omission of the desired instruction from the court’s final instructions to the jury.

No factual or legal merit to Cook’s request for self-defense instruction, and no clear error in not instructing jury on lesser-included offense instruction for voluntary manslaughter under alternative means under K.S.A. 21-3403(b).

Because jury was instructed that a single offense of aggravated burglary may be committed by unauthorized entry or remaining within a residence, an alternative means case was presented. Under facts where state clearly relied exclusively on the “remained in” means, and Cook’s authority to enter the dwelling was not contested, no clear error demonstrated.

Contemporaneous objection requirement not satisfied by posttrial motion challenging admission of evidence, thus Court declines to review issues that Cook used a stolen vehicle, or that Cook used drugs after the shooting. Issue raised for first time on appeal, that Cook threatened co-defendants with harm, is not considered. No clear error in trial court’s failure to give limiting instruction regarding evidence that Cook forged a check prior to the shooting.

No Apprendi error in sentencing Cook to high numbers in the appropriate sentencing grid boxes for his on-grid felony convictions without submitting factors used to increase sentences to a jury for proof beyond a reasonable doubt.
STATUTE: K.S.A. 21-3211(a), -3211(b), -3212, -3214(1), -3401(a), -3403(b), -4701 et seq., -4704(e)(1), 22-3601(b)(1), 60-404, -455

STATE V. FITZGERALD  
SEDGWICK DISTRICT COURT – REVERSED  
COURT OF APPEALS – REVERSED  
NO. 95,812 – SEPTEMBER 12, 2008

FACTS: Fitzgerald was driving girlfriend's truck when he was stopped for traffic violation. Officer arrested him for driving on suspended license and discovered $2,673 in cash on Fitzgerald. Officer then searched truck and found drugs and drug paraphernalia. Girlfriend arrived and consented to second search, which uncovered no new evidence, but Fitzgerald made incriminating statements to second officer who arrived at scene. District court denied Fitzgerald's motion to suppress the drug evidence and statements, finding Fourth Amendment exceptions in the existence of probable cause plus exigent circumstances, and inevitable discovery based on the girlfriend's later consent. Fitzgerald appealed. In unpublished decision, Court of Appeals affirmed district court's decision on both search warrant exceptions. Fitzgerald's petition for review is granted.

ISSUES: (1) Probable cause and exigent circumstances for initial search and (2) inevitable discovery

HELD: Under totality of circumstances, state failed to demonstrate the existence of probable cause to justify a warrantless search of the truck Fitzgerald was driving. Factors cited by state are individually examined, finding in part the discovery of cash on Fitzgerald is not in and of itself enough to support probable cause, and use of officer's training and experience merely as one factor in analyzing totality of circumstances for reasonable suspicion or probable cause does not violate a defendant's constitutional rights. District court erred in relying on the probable cause plus exigent circumstances exception to admit evidence derived from the initial search of the truck.

STATE V. TYLER  
WYANDOTTE DISTRICT COURT – AFFIRMED  

FACTS: Tyler was convicted of first-degree murder and conspiracy to commit first-degree murder in the Thanksgiving Day shooting of Michelle Wallace. Tyler was 17 years old at the time of the shooting. Tyler was not the shooter in the killing but was involved in the conspiracy and was in the sport utility vehicle when it happened. The district court certified Tyler for adult prosecution.

ISSUES: (1) Judicial misconduct, (2) sufficiency of the evidence, and (3) adult certification

HELD: Court rejected Tyler's argument that the trial judge violated judicial canons by consulting with lay persons about the clarity of the proposed instruction on aiding and abetting and that the judicial misconduct mandated a reversal for a new trial. Court stated the jury instruction on aiding and abetting was an accurate statement of the law. Tyler had no substantive right to any additional language in the instruction and he failed to present any prejudice. Court held that a reasonable juror could infer that, when Tyler agreed, in return for drugs, to “roll with” the conspirators on their murderous trip, Tyler understood that he would be a participant in the unlawful venture, even though he had declined to be the actual shooter. The promise of drugs could provide the incentive for Tyler to wish to bring about the success of the planned crime. A rational juror could reasonably infer that Tyler actually carried through with his promise to be a lookout, when he assumed his position in the victim's vehicle and remained in the victim's presence until the murder was completed. In other words, the evidence reasonably established more than mere presence at the time and place of the murder and was sufficient to support the jury's verdict that Tyler aided and abetted in Wallace's murder. Court rejected Tyler's Apprendi argument. Court stated that a state is not constitutionally required to provide preferential treatment to juveniles, and Apprendi was not intended to place constraints on the determination of which court will prosecute a juvenile offender. Court also affirmed the constitutionality of the presumption that he is an adult based on the severity of his alleged offenses.

STATUTES: K.S.A. 21-4706(c); K.S.A. 22-3601(b)(1); and K.S.A. 38-1604(c)(2), -1636(a)(2), -2347

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On record of case, even if girlfriend's later consent was voluntary, state failed to demonstrate inevitably. Thus the inevitable discovery exception does not apply to excuse the warrantless search of the truck.


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WYANDOTTE DISTRICT COURT – AFFIRMED  

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From the Office of the Kansas Secretary of State

The Office of the Kansas Secretary of State is increasing a few fees in the Business Services Division, effective Nov. 1, 2008. Please review the list of new fees at http://www.kssos.org/other/business_services_fee_changes_081009.html

Contact Stephanie Mickelsen, deputy assistant secretary of state, at (785) 296-7456 or stephaniem@kssos.org if you have questions about the new fees.
Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Copy Requirements

Rule 5.01 requires that written motions be accompanied by eight copies if filed in the Supreme Court and three copies if filed in the Court of Appeals. Each must be an exact copy of the original, including any attachments. Attorneys often mistakenly believe that one copy of attachments will suffice. The complete pleading must be distributed to every judge or justice considering the motion.

Rule 2.042 – Custodial Status of Defendant in Sentencing Appeals

When sentencing is challenged in any criminal appeal, it is the state’s continuing obligation to notify the appellate clerk in writing of any change in the custodial status of the defendant during the pendency of the appeal. At a minimum, the state should check the defendant’s custodial status at the time its brief is filed and again when the case is scheduled for oral argument or assigned to the summary calendar. A change in the defendant’s custodial status may affect the nature, or even the viability, of the sentencing issue on appeal.

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A motion for attorney fees requires an affidavit attached to the motion, which specifies: the nature and extent of services rendered by the attorney, the time expended on the appeal, and the factors the attorney considered in determining the reasonableness of the fee. The motion may be filed at any time but no later than 15 days after oral argument. If oral argument is waived, the motion and affidavit must be filed no later than either 15 days after the argument waiver or the date of the letter assigning the matter to a non-argument calendar, whichever is later. See Rule 7.07(b) and KRPC 1.5 Fees.


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NOTICE OF AMENDMENT OF LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The U.S. District Court for the District of Kansas gives notice of the amendment of local rule 81.1. Copies of the amendment are available to the bar and the public at the offices of the clerk at Wichita, Topeka, and Kansas City, Kan. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendment is also available on the U.S. District Court Web site at www.ksd.uscourts.gov.

Interested persons, whether members of the bar, may submit comments on the amendment addressed to the clerk at any of the record offices. All comments must be in writing and in order to receive consideration by the court, must be received by the clerk on or before 4:30 p.m., Dec. 15, 2008.

The addresses of the Clerk’s offices are:

204 U.S. Courthouse  490 U.S. Courthouse  259 Robert J. Dole U.S. Courthouse  
401 N. Market  444 S.E. Quincy  500 State Ave.  
Wichita, KS 67202  Topeka, KS 66683  Kansas City, KS 66101

Signed:  Timothy M. O’Brien  
Clerk of Court  
U.S. District Court, District of Kansas
Civil

ADOPTION AND JURISDICTION
IN RE ADOPTION OF BABY BOY M.
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 99,867 – OCTOBER 10, 2008

FACTS: Baby Boy M was conceived out of wedlock by K.L. and C.M. in Wisconsin. C.M. moved to Minnesota and then to Kansas, the second move being concealed from K.L. for some time. K.L. attempted to locate C.M. numerous times. C.M. gave birth to baby Boy M in Topeka and then relinquished her rights to the child the next day. K.L. filed in Wisconsin for primary physical placement and sole legal custody of the child. The adoptive parents filed adoption proceedings in Kansas. After conducting an evidentiary hearing, the district court in Kansas concluded that it had jurisdiction and entered a decree of adoption and termination of parental rights.

ISSUES: (1) Adoption and (2) jurisdiction
HELD: Court concluded that the district court failed to observe the statutory procedure for its decision to retain jurisdiction and reversed and vacated the court's determination of convenient forum and remanded for compliance with the statutory procedure. Court instructed on remand for the district court to conduct the proper analysis to determine whether Kansas is the most appropriate forum for the issues raised by the parties. Court also held that based upon its review of the transcript and journal entry of judgment, it must conclude that the district court failed to make any of the requisite findings to support a termination of K.L.’s parental rights, except an apparent finding as to the best interests of the child. K.S.A. 2007 Supp. 59-2136 clearly requires a finding by clear and convincing evidence would render the court’s decision unsupportable under the statute.

STATUTES: K.S.A. 38-1336, -1348, -1353, -1354; and K.S.A. 59-2127, -2136(h)(1)

AD VALOREM TAXATION AND CHARITABLE EXEMPTION
IN RE TAX APPEAL OF THE MENTAL HEALTH ASSOCIATION OF THE HEARTLAND
BOARD OF TAX APPEALS – AFFIRMED
NO. 98,956 – OCTOBER 10, 2008

FACTS: The Mental Health Association of the Heartland (MHAH) is a not-for-profit corporation organized under the laws of Missouri and admitted to engage in business in Kansas as a foreign not-for-profit corporation. MHAH is exempt from federal income tax and contributions to the corporation are tax deductible. MHAH built the Marion Home to provide housing to low-income, chronically homeless, and mentally ill individuals. The Board of Tax Appeals denied an exemption from ad valorem taxation because the Marion Home was not used exclusively for a charitable exempt purpose because it was actually and regularly used for housing for which MHAH received compensation from the tenants or federal government in the form of subsidized rents or grants.

ISSUES: (1) Ad valorem taxation and (2) charitable exemption
HELD: Court determined that because the Marion Home was primarily used as a low-income housing facility, K.S.A. 79-201b Fourth is the applicable exemption statute. Moreover, based on the plain meaning of K.S.A. 79-201b Fourth and the strict construction that must be given to exemption statutes, the court determined that MHAH is not entitled to a statutory tax exemption because of its failure to meet the requirements of K.S.A. 79-201b Fourth. Further, because K.S.A. 79-201b Fourth is the specific statute that controls low-income housing and because K.S.A. 79-201 Second is only a general statute, K.S.A. 79-201b Fourth is the applicable statute to determine whether MHAH is entitled to a statutory tax exemption. Court held MHAH was not entitled to a tax exemption under K.S.A. 79-201b Fourth.

STATUTES: K.S.A. 77-621(c); and K.S.A. 79-201 Second, Ninth, -201b Fourth

APPELLATE JURISDICTION
ROWLAND ET AL. V. BARB ET AL.
RENO DISTRICT COURT – APPEAL DISMISSED
NO. 98,398 – OCTOBER 3, 2008

FACTS: The parties continue to dispute ownership of an approximate 700-foot strip of land, which lies between two parcels of land formerly owned by the Rowlands. More than 20 years ago, the Barbs purchased one parcel and the Badgetts purchased the other. The Rowlands retained ownership, by title, of the strip of land between the parcels for use as a southern access route to their pasture on the northern border of the parcels sold to the appellants. In October 2003, the Rowlands filed a petition to eject the appellants from the disputed strip of land and to recover damages for trespass. In a counterclaim, the appellants asserted they had obtained ownership of the strip of land through adverse possession or, alternatively, that they had obtained a prescriptive easement. The district court concluded the appellants failed to establish their claim of adverse possession, found in favor of the Rowlands, and awarded $15,000 in damages. The appellants moved for reconsideration, and the district court reversed its decision, concluding the appellants did obtain ownership of the land through adverse possession, awarding legal title to the appellants and rescinding the award of damages. In the first appeal, the Court of Appeals reversed and remanded for additional findings of fact as to whether the defendants were in exclusive possession and for consideration of damages. On remand, the district court concluded the evidence was insufficient to support the appellants’ claim of adverse possession and prescriptive easement and reinstated the damages award in favor of the Rowlands. Court granted the appellant’s motion to appeal out of time. Both parties challenge our jurisdiction to consider this appeal based on timing of appellate filings.

ISSUE: Appellate jurisdiction
HELD: Court dismissed appeal finding that the district court erred in granting appellants an extension of time to file a notice of appeal under K.S.A. 60-2103(a) based upon excusable neglect. Court also held the appellants failed to establish that the district court’s order granting the extension was not made and entered prior to the expiration of the official appeal period. The appellants’ original 30-day filing period commenced on Jan. 20, 2007, and expired on Feb. 18, 2007. The appellants filed their motion to appeal out of time on March 1, 2007, well after the original 30-day filing period had expired, and the district court granted the extension on March 13, 2007. Court stated that because the district court’s order granting the extension was not made and entered prior to the expiration of the official appeal period, the unique circumstances doctrine, even if viable, would not apply.

STATUTE: K.S.A. 60-206(A), -2103(a)
FACTS: In their separation agreement, Burke agreed to pay $1,580 per month in child support. Lisa filed a motion to modify support based on increased child care costs. Lisa filed an amended motion to modify child support based on Burke's receiving additional income ($19,424) in the form of tax-exempt interest, qualified dividends, and distributions from a subchapter S corporation. The district court denied Lisa's amended motion, finding that the dividends were unavailable to pay additional child support because 80 percent of the dividend went to pay installment obligation and the balance went to pay the tax liability on the dividends.

ISSUES: (1) Child support and (2) subchapter S corporation distribution

HELD: Court held the portion of the distribution made to Burke and used to pay the installment obligation is income for purposes of calculating child support. Court stated the fact that Burke chose to use his income to pay for an asset he purchased does not change the character of the money from “income” to “non-income.” Court also held that distributions used to pay income tax on money distributed by an subchapter S corporation should be included in gross income for purposes of calculating child support. Court reversed for a determination regarding how much of the distribution went to pay income tax on retained earnings attributed to Burke and how much of the distribution went to pay income tax on the income actually distributed to Burke. Court affirmed the effective date of any modification decided by the district court.

STATUTES: K.S.A. 60-1610(a) and K.S.A. 79-32,139

CONTRACTS


PUBLISHED VERSION FILED OCTOBER 7, 2008

FACTS: Falkners owned home in Colony Woods, a subdivision operated by homeowners association (CWHA). Dispute arose when Falkners roofed home with product not approved by Declaration of Restrictions. Once roofing job was completed, Architectural Control Committee (ACC) invited Falkners to submit approval request form for exterior materials used. ACC did not respond to that request within 30 days as provided by the preconstruction application provision in Declaration of Restrictions. Falkners filed action for declaratory judgment, seeking court interpretation of Declaration of Restrictions. CWHA counterclaimed for injunction and damages. Trial court granted judgment to Falkners. CWHA appealed, arguing the district court incorrectly interpreted Declaration of Restrictions.

ISSUE: Interpretation of Declaration of Restrictions

HELD: Trial court right for the wrong reason. It correctly determined the Falkners failed to follow proper procedures to obtain approval of their roofing material, but incorrectly interpreted Declaration of Restrictions to find savings clause was not applicable to Falkners. Under facts of case, CWHA waived compliance with homeowners’ restrictions.

DISSENT (McAnany, J.): Agrees that district court erred in its interpretation of Declaration of Restrictions, but disagrees that concept of waiver applies in this case.

STATUTES: None

MORTGAGE FORECLOSURE AND NECESSARY PARTY LANDMARK NATIONAL BANK V. KESLER FORD DISTRICT COURT – AFFIRMED NO. 98,489 – SEPTEMBER 12, 2008

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

ISSUES: (1) Mortgage foreclosure and (2) necessary party

HELD: Court stated that a party is not contingently necessary in a mortgage foreclosure lawsuit when that party is called the mortgagor in a mortgage but is not the lender, has no right to the repayment of the underlying debt, and has no role in handling mortgage payments. Court held that the failure to name and serve MERS as a defendant in the foreclosure action in which the lender of record has been served is not a fatal defect that the foreclosure judgment must be set aside. Court also stated that in a mortgage-foreclosure lawsuit, a district court does not abuse its discretion when it denies a motion to intervene that is filed by an unrecorded mortgage holder or its agent after the mortgage has been foreclosed and the property has been sold. Court held the district court also was well within its discretion in denying motions from MERS and Sovereign to intervene after a foreclosure judgment had been entered and the foreclosed property had been sold.

STATUTES: K.S.A. 58-2323 and K.S.A. 60-219

NEGLIGENCE, RES JUDICATA, AND COLLATERAL ESTOPPEL
RHOTEN V. DICKSON ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 98,837 – SEPTEMBER 26, 2008

FACTS: When discovery revealed the man who struck Danielle Rhoden's car was not aware a Topeka police officer was chasing him, the federal court dismissed Rhoden's civil rights complaint against the city of Topeka and one of its police officers, Lt. Pase. The federal judge found no causal connection between the police officer's acts and Rhoden's injury. After that ruling, the federal court declined to hear Rhoden's state negligence claims. She then filed a lawsuit against the city and the officer. Rhoden filed her state claims against the defendants in Shawnee County District Court. She claimed negligence, or in the alternative, negligence per se under the Kansas Tort Claims Act against Pase and Topeka (through the doctrine of respondeat superior) and negligence, or in the alternative, negligence per se against Dickson. In her petition, Rhoden asserted substantially similar factual allegations that were in her federal civil complaint. Adopting the facts from the federal district court's decision, the district court determined that both of Rhoden's claims arose out of the same common nucleus of important facts—the traffic accident and Pase's conduct in that accident. In addition, the district court noted that proof of cause was essential in both claims. Finally, the district court noted the witnesses and facts needed in the state lawsuit overlapped the same evidence used in the federal action. Therefore, the district court applied res judicata to bar Rhoden's state claims. Basing its decision on the federal district court's conclusion there was no causal connection between Pase's actions or inactions and plaintiff's injuries, the district court also found that collateral estoppel applied. The district court held: “If [p]laintiff was allowed to proceed on her negligence claims, a relitigation of that issue would be inevitable because causation is an element of negligence. The relitigating of causation, which [p]laintiff has already failed to prove, is strictly prohibited by issue preclusion.”

ISSUES: (1) Negligence, (2) res judicata, and (3) collateral estoppel

HELD: Court found Pase and city of Topeka substantially complied with Supreme Court Rule 141 and any violations did not prevent the district court from granting summary judgment. Court found that a federal court's refusal to consider a plaintiff's state law theories does not prevent claim preclusion from applying to theories in a state lawsuit since those theories arose out of the same claim or factual transaction, which the federal court did determine. Court held that both of Rhoden's claims arose out of the traffic accident between Dickson and Conley and Pase's conduct in that accident. Further, the facts necessary to prove Rhoden's federal and state law theories relate in time and origin. Also, Rhoden's statement of facts in her federal complaint and state petition discloses the witnesses and proof needed in both actions are identical. Thus, because Rhoden's state claim arose out of the same transaction as her federal lawsuit, court found that res judicata applied and the district court was correct.

STATUTES: K.S.A. 8-1738(d) and K.S.A. 20-3018(c)

NEGLIGENCE, SLIGHT-DEFECT RULE, AND SUMMARY JUDGMENT
ELSTUN V. SPANGLES INC.
RENO DISTRICT COURT – REVERSED AND REMANDED
NO. 98,179 – OCTOBER 3, 2008

FACTS: On Feb. 24, 2004, Elstun stepped into a 2-inch deep hole in the parking lot of Spangles and suffered a broken hip. She testified the hole was hidden from view because the pavement was dark and wet and the hole was filled with water. The district court granted summary judgment to Spangles finding the slight-defect rule barred her claim.

ISSUES: (1) Negligence, (2) slight-defect rule, and (3) summary judgment

HELD: Court held the district court did not abuse its discretion in admitting photographs depicting the depth of the hole as 2 inches. Elstun merely challenged the evidentiary basis for the photos but failed to provide contrary evidence to dispute the depth of the hole. Court held the district court erred in applying the slight-defect rule to a retail business parking lot. Court stated the long-standing Kansas rule that slight defects in sidewalks do not present an actionable negligence claim against cities, individuals, or private corporations required by law to maintain them because of the financial burden of maintenance in Kansas weather. However, court stated that in contrast to sidewalks, parking lots are not always open to the public and sometimes they are only open to customers or those approved by business managers. Court held parking lots are controlled by the same rules of liability as the rest of the business premises.

STATUTES: None

SHACKLE RESTRAINTS DURING TRIAL
STATE V. ANDERSON
CLOUD DISTRICT COURT – REVERSED
NO. 96,602 – SEPTEMBER 26, 2008

FACTS: Anderson threatened to bomb Social and Rehabilitation Services (SRS), kill an SRS employee, and kill the person who was caring for the children after SRS had taken his girlfriend's children into emergency custody. Police stopped Anderson's truck and he denied the threats. The police arrested Anderson and found drugs during a search of the truck. He was charged with criminal threat and multiple drug charges. Anderson was taken to court in shackles and multiple drug charges. Anderson was taken to court in shackles for his jury trial. Defense counsel requested removal of the shackles. The court ordered the shackles remain on based on the preference of the jailer. The jury convicted Anderson of all charges.

ISSUE: Shackel restraints during trial

HELD: Court stated that rather than exercising judicial discretion in considering Anderson's request that the shackles be removed, the district court deferred to the jailer and let him decide. The jailer's decision became the court's decision, without analysis or application of the principles of law to the facts presented. As such, the district court clearly abused its discretion. Court found that the state acknowledged that the shackles were apparent to the jurors deciding Anderson's innocence or guilt. Anderson was charged with criminal threat, that is, that he threatened violence with the intent to terrorize others. The presence of shackles clearly sent the message to the jury that here is a violent and dangerous man. The discretion to shackel Anderson throughout the trial was exercised without any
TAX APPEAL AND KANSAS ENTERPRISE ZONE ACT IN RE TAX APPEAL OF GENSTLER EYE CENTER BOARD OF TAX APPEALS – AFFIRMED
NO. 98,163 – SEPTEMBER 26, 2008

FACTS: Genstler filed a request for project exemption in connection with the original construction of a new $2.2 million facility in Topeka for its business, which was identified as: “Medical business, ophthalmology, and optometry; there would also be included eye exams, screening, cataract surgery, laser surgery, etc.” The application designated the type of business as “commercial enterprise other than a manufacturing business or a retail business” but did not designate the facility as a “business headquarters.” The Department of Revenue, Office of Policy & Research (department), issued a letter opinion denying the requested exemption due to the department’s determination that the business was a retail business that was not expanding in a city with a population of 2,500 or less, or to a location outside a city in a county having a population of 10,000 or less. Genstler petitioned for administrative review of the decision, and after an informal conference procedure, the secretary of revenue issued a final determination that Genstler is a ‘retailer’ as defined under the Kansas Enterprise Zone Act (KEZA) and not entitled to a sales tax exemption.” The Board of Tax Appeal (BOTA) concluded that Genstler failed to demonstrate eligibility for the exemption based upon the same rationale cited by the department. One member of BOTA dissented, however, concluding that Genstler’s facility qualified as a “business headquarters” that created at least 20 new full-time positions and, thus, was eligible for the exemption.

ISSUES: (1) Tax appeal and (2) KEZA

HELD: Court stated that the KEZA creates a sales tax exemption for purchases of tangible personal property and services in connection with remodeling or construction of certain business facilities that otherwise fulfill statutory criteria. Court held under the facts of this case, and for purposes of classification under K.S.A. 74-50,114 and 74-50,115, an “eye center and clinic” must be considered a retail business because it is a business of professional service providers expressly listed in K.S.A. 17-2707. Court also held that under the facts of this case, a sole facility of a retail business that houses principal officers and from which managerial support and direction are given only to the business in that sole facility does not constitute a business headquarters of an enterprise for purposes of K.S.A. 74-50,114(g).

STATUTES: K.S.A. 17-2707; K.S.A. 74-50,114, -50,115; K.S.A. 77-601, -621(c)(4), (8); and K.S.A. 79-3606(cc)

TAX CREDITS AND SETTLEMENT AGREEMENTS IN RE TAX APPEAL OF HALLMARK CARDS INC. V. KANSAS BOARD OF TAX APPEALS – AFFIRMED

FACTS: Hallmark and the Kansas Department of Revenue (KDOR) made a tax settlement for all of Hallmark’s corporate tax issues for 1994-1996. The agreement excepted issues concerning future adjustments or income tax credits under the High Performance Incentive Program (HPIP). After the Kansas Court of Appeals’ ruling that Hallmark was entitled to credits under HPIP for 1995 and 1996, the KDOR calculated the credit due Hallmark, but held that the HPIP credits that could be refunded to Hallmark for a tax year was limited to the total tax liability paid by Hallmark that year and any excess would be carried forward. BOTA agreed with the KDOR.

ISSUES: (1) Tax credits and (2) settlement agreements

HELD: Court held under the plain terms of the tax settlement agreement in this case, which has an exception for credits received under K.S.A. 79-32,160a(e), any such credits are subject to the terms of the statute. If there was no statute, there would be no credits. Court concluded that the carry forward provisions of K.S.A. 79-32,160a(e) apply to all credits received under that subsection, including the credits considered by the settlement agreement here. Court stated that Hallmark had prepaid its tax, and when its total tax liability was later reduced by application of the HPIP credits, it was entitled to a refund of the amounts it had prepaid that were replaced by HPIP credits, up to its amount of tax liability. It received this refund, and there is no provision in the HPIP statute for any further refunds to Hallmark for these tax years based on its HPIP credits.

STATUTES: K.S.A. 1997 Supp. 74,50-131; and K.S.A. 79-32,160a(e)

TAX REFUND, AMENDED RETURNS, AND TOLLING OF STATUTE OF LIMITATIONS IN RE TAX APPEAL OF LEMONS
KANSAS BOARD OF TAX APPEALS – AFFIRMED
NO. 98,468 – SEPTEMBER 19, 2008

FACTS: In 2004, the Lemons and the Internal Revenue Service agreed to a refund for the Lemons’ 1994 taxes in the amount $410,000 from overpaid taxes and interest. The Lemons filed an amended 1994 tax return to reflect the refund. The Kansas Department of Revenue (KDOR) refused to accept the Lemons’ amended 1994 return arguing it was not filed within the 180-day period required for reporting adjustments to federal income. The Board of Tax Appeals (BOTA) found the statute of limitations was tolled and ordered the KDOR to process the return.

ISSUES: (1) Tax refund, (2) amended returns, and (3) tolling of statute of limitations

HELD: Court stated that K.S.A. 2007 Supp. 79-3230(f) directs the taxpayer to report any adjustment by the IRS to the taxpayer’s federal income to the KDOR by filing an amended return within 180 days of the date the federal adjustments are paid, agreed to, or become final, whichever is earlier. However, the court also stated that K.S.A. 2007 Supp. 79-3230(g) provides that failure to comply with the provisions of 79-3230 tolls the statute of limitations. Court held that despite KDOR’s request, in cases such as this, where a taxpayer is seeking a refund, the court will not speculate why the taxpayer would not immediately seek a refund within the 180-day window that subsection (f) requires. Court held the Lemons’ 1994 amended tax return, though untimely under subsection (f), should be allowed under the tolling provision of subsection (g).

STATUTES: K.S.A. 74-2426(c)(3); K.S.A. 77-601, -621; and K.S.A. 79-3230(f), (g)
TRUST
IN RE TESTAMENTARY TRUST OF KEYS
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED

FACTS: More than two years after death of life beneficiary of trust, bank petitioned for distribution of remainder of trust proceeds. District court ordered distribution to all remaining beneficiaries but for a church that no longer existed, finding distribution to that nonentity was impossible, and United Methodist Conference was not entitled to distribution of church’s remainder interest. Conference appealed.

ISSUE: (1) Vesting and (2) distribution of interests of remainder beneficiaries

HELD: Under facts of case, a testamentary trust, which terminated upon death of a life beneficiary, established a vested remainder interest in a church, which was in existence at the time of the trust’s termination but was dissolved at the time the trust’s proceeds were being distributed. Upon dissolution of the church, its parent entity was entitled to its assets, including the vested remainder interest in the trust proceeds.

STATUTES: K.S.A. 2007 Supp. 58a-103(2)(A); and K.S.A. 17-1701, -1712 to 1752, 58a-101 et seq., -410(a), -816(26)

Criminal

STATE V. BAAIRUP
SHAWNEE DISTRICT COURT – DENIED
NO. 98,186 – OCTOBER 3, 2008

FACTS: State charged Baatrup with driving under the influence of alcohol under alternative theories of being incapable of driving safely and of driving with a blood alcohol concentration exceeding the legal limit two hours after driving. District court instructed jurors to sign verdict form on which they all agreed. Because all jurors had to agree on theory of guilt under facts of this case, district court properly instructed jurors to sign verdict form on which they all agreed. State appealed on question reserved, arguing this instruction is no longer necessary under recent Kansas Supreme Court rulings.

ISSUE: Jury unanimity

HELD: This is a multiple acts case because Baatrup’s acts giving rise to his conviction are not one course of conduct and are factually separated. Because all jurors had to agree on theory of guilt under facts of this case, district court properly instructed jurors to sign verdict form on which they all agreed. State v. Stevens, 285 Kan. 307 (2007), is examined and applied.


STATE V. BOYER
SEDGWICK DISTRICT COURT
SENTENCES VACATED AND REMANDED

FACTS: Boyer appealed from sentence in which his juvenile adjudication was used to classify him as a persistent sex offender and double his sentence.

ISSUE: Classification as persistent sex offender

HELD: Boyer’s sentences are vacated and case is remanded for resentencing. K.S.A. 21-4704(j) determines whether a defendant is a persistent sex offender so that the person’s presumptive sentence is doubled. Juvenile adjudications are not referenced in that statute. Accordingly, a juvenile adjudication cannot be considered when determining whether a defendant is a persistent sex offender. Contrary decision handed down in unpublished opinion by another Court of Appeals panel, State v. Swisher, No. 94,705 (unpublished, April 6, 2007).

STATE V. BRYANT
JOHNSON DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR RESENTENCING
NO. 96,192 – SEPTEMBER 5, 2008

FACTS: Bryant was convicted of securities fraud based on his offering of an investment program that was characterized as a high-yield investment fraud program. Based upon the jury’s finding of a fiduciary relationship, the district court granted a six-month upward durational departure in addition to Bryant’s 18-month base sentence.

ISSUE: (1) Speedy trial, (2) expert testimony, and (3) departure sentencing based on fiduciary relationship

HELD: Court affirmed Bryant’s conviction, concluding his statutory right to a speedy trial was not violated because a three-month period was properly attributable to him, and the district court properly admitted expert testimony involving the hallmark characteristics of high-yield investment fraud schemes. However, the court reversed the trial court’s imposition of an aggravated durational departure based upon the existence of a fiduciary relationship. Court concluded that because a fiduciary relationship was necessarily inherent in the crime charged in this case, it could not be used as aggravating factor to support a durational departure.

STATUTES: K.S.A. 17-1253; K.S.A. 21-4716(a); K.S.A. 22-3402(2); and K.S.A. 60-456(b)

STATE V. CASADY
DONIPHAN DISTRICT COURT – AFFIRMED
NO. 99,023 – SEPTEMBER 12, 2008

FACTS: Casady convicted on plea agreement. At sentencing, district court assessed court costs and $100 application fee for appointment of counsel from Board of Indigents’ Defense Services (BIDS) to be paid out of $500 cash appearance bond deposited with court and waived payment of BIDS attorney fees. On appeal, Casady claimed K.S.A. 22-4529 is an unconstitutional recoupment statute because it imposes a mandatory $100 application fee on all defendants who seek appointed counsel from BIDS.

ISSUE: Constitutionality of K.S.A. 22-4529

HELD: When district courts follow teachings and directions of State v. Hawkins, 37 Kan. App. 2d 195 (2007) and 285 Kan. 842 (2008), the wording of K.S.A. 22-4529 passes constitutional muster as directed by 10th Circuit and U.S. Supreme Court and complies with directions of Olsen v. James, 603 F.2d 150 (10th Cir. 1979), which are necessary to allow a recoupment statute to be constitutional.


STATE V. GLASS
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 98,252 – SEPTEMBER 19, 2008

FACTS: Police officer stopped car in immediate vicinity of just reported robbery. Driver and two passengers arrested after officer discovered money and other evidence. Glass filed motion to suppress and claimed inclusion of juvenile adjudications in his criminal history violated Apprendi.

ISSUES: (1) Vehicle stop and (2) sentencing

HELD: No error in district court’s denial of motion to suppress.
Under totality of circumstances in this case, and giving appropriate weight to those facts and circumstances, officer had a reasonable suspicion based on articulable facts that occupants of vehicle (which included the defendant) had just committed an aggravated robbery sufficient to stop the vehicle without violating Fourth Amendment. State v. Baker, 239 Kan. 403 (1986), is discussed and applied.


STATUTES: None

STATE V. HERNANDEZ
SALINE DISTRICT COURT – AFFIRMED
NO. 98698 – OCTOBER 10, 2008

FACTS: Hernandez’s toddler was playing in front yard with other kids when he wandered into nearby grocery store parking lot, fell into retaining pond, and almost drowned. State charged Hernandez with aggravated endangerment of a child. District court dismissed the charge at preliminary hearing, finding incident was an accident with no reckless conduct by Hernandez. State appealed.

ISSUE: Aggravated endangering a child

HELD: No Kansas case law has discussed K.S.A. 21-3608(a)(2). Case law from other jurisdictions is examined and applied. The failure to realize an ideal level of supervisory attention of a child does not equate to acting with heedless indifference to the consequences, thereby perversely disregarding a known strong possibility, as contrasted with a remote or significant possibility, of harm to the health or safety of the child. Under facts, district court properly dismissed aggravated endangerment charge because insufficient evidence was presented to establish probable cause Hernandez acted “recklessly” under K.S.A. 21-3608(a)(2).

STATUTE: K.S.A. 21-3201(c), -3608(a)(1) and (2), 22-2902(3), -3602(b)(1)

STATE V. JOHNSON
RENO DISTRICT COURT – AFFIRMED
NO. 98,707 – SEPTEMBER 19, 2008

FACTS: Johnson convicted on plea to charge of aggravated intimidation of a witness or victim. On appeal, she challenged district court’s jurisdiction because her actions in preventing a child witness to testify in Kansas occurred outside of Kansas, and she had no duty to bring the child to Reno County to testify because neither of them were served with a subpoena. She also claimed district court erred in denying her motion to withdraw plea because insufficient facts supported the plea and her plea was coerced and under duress.

ISSUES: (1) Jurisdiction and (2) withdrawal of plea

HELD: Issue of first impression in Kansas. A district court has jurisdiction to convict a defendant of aggravated intimidation of a witness or victim in the district where the witness or victim was prevented or dissuaded from testifying, even if the defendant’s actions occurred outside the district.

Under facts of case, there was a sufficient factual basis for district court to accept Johnson’s guilty plea. Signed plea agreement contradicts Johnson’s claim of coercion and duress, and Johnson had benefit of competent counsel.

STATUTE: K.S.A. 21-3104, -3832(a)(1), -3833(a)(4), 22-2602, -2612, -3210(d)

STATE V. RENFRO
JOHNSON DISTRICT COURT – AFFIRMED
NO. 97,863 – OCTOBER 3, 2008

FACTS: Renfro convicted of aggravated interference with parental custody of child he fathered and shared joint and equal custody with child’s mother. On appeal he challenged constitutionality of K.S.A. 21-3422(b) and claimed insufficient evidence supported the conviction.

ISSUES: (1) Constitutionality of K.S.A. 21-3422 and (2) sufficiency of evidence

HELD: Provisions of K.S.A. 21-3422(b) relating to defenses in prosecution of aggravated interference with parental custody are examined and held to be constitutional.

Sufficient evidence supports Renfro’s conviction. Renfro took the child and deliberately concealed the child’s whereabouts for 10 days, depriving mother of her equal right to custody. Renfro also refused to tell police where the child was.

STATUTE: K.S.A. 21-3422, -3422(a), -3422(b), -3422a

STATE V. URBAN
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 98,856 – OCTOBER 10, 2008

FACTS: Urban granted personal recognizance bond subject to condition that she go to Johnson County Community Corrections Residential Center. When she failed to return while on pass to visit her family, state charged her with aggravated escape from custody. District court dismissed the charge, finding her release on bond and placement at the facility did not fit definition of K.S.A. 21-3809(b)(1). State appealed.

ISSUE: Custody while at residential center

HELD: A person placed at a community corrections residential facility is in custody for purposes of K.S.A. 21-3809(b)(1). Under K.S.A. 21-3810(a), that person is thus subject to a charge for aggravated escape from custody if he or she leaves the facility without permission or fails to return to the facility when required to do so under the terms of a temporary leave. Disagreement with contrary unpublished Court of Appeals decision is noted, State v. Hampton, No. 91,092 (Sept. 24, 2004).

STATUTE: K.S.A. 20-3018(b), 21-3809(b)(1), -3810(a), -4614a

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ABA’s interested in serving on this Board should contact:

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