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2015-16
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Our Mission

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

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2015-16
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This is a Time of Transition

The new officers of the Board of Governors officially take office on July 1. My first official duty is to write this column. I started by looking back at prior Kansas Bar Journal articles. In his first column as president, Jerry Green promised to be informative, enlightening, thought-provoking, and yet entertaining. He has fulfilled his promise. Jerry, thanks for a great year and your true commitment as members of the Kansas Bar, as well as the Kansas Bar Association. This is a tough act to follow. Like Jerry, I will do my best to keep you informed and to listen to your ideas. As in-house counsel, I spend a lot of time explaining legal concepts and requirements to non-lawyers. Due to the attention-span challenges that come with reading long legal explanations, I often break up the subject matter into small topic areas or focus points to help my internal audience grasp the concepts. Please accept my apology if I slip into that writing format over the next year.

What is ahead for the KBA?

This next year will be one of exploring options for the future of the KBA. As with lots of membership organizations, the KBA is constantly trying to validate its relevance to lawyers and determine what needs to be done to retain and grow membership. The basic questions haven’t changed in the last 10 years or so. How do we make our organization relevant to members? How do we attract the younger members of the profession? What services do our members want us to offer?

The KBA has started a strategic planning process chaired by Greg Goheen. We need your input. Please send ideas to Greg at ggheen@ksbar.org. Part of this process also involves an Annual Meeting Task Force lead by Gary Ayers. We really need to hear from those who don’t regularly attend the meetings. Gary can be reached at gayers@ksbar.org.

Did you miss a wonderful event? The 2015 KBA Annual Meeting with a twist!

This year a great committee worked to shake things up and create a new KBA Annual Meeting attraction. If you didn’t attend the KBA Annual Meeting you missed a fun time. Thanks to the Annual Meeting Planning Committee for a fabulous and innovative job and for all your hard work to pull together this meeting: Chair Greg Musil, Doug Patterson, Peter Simonsen, Todd Thompson, Sarah Warner, David Waters, Lisa Renee Westergaard, Amy Winterscheid, Christi Bright, BreAnne Hendricks, Chris Pickering, Geri Hartley, Harry Wigner, Judge Brenda Cameron, Judge Christina Dunn Gyl-legenborg, Judge David Cahill, Linda Coffee, Mark Dupree, Mike Sexton, Mira Mdvani, Mitch Biebighauser, Scott Gyl-legenborg, Tiffany McFarland, Toby Crouse, Andrew DeMarea, and Tracy Fredley, as well as KBA staff, Deana Mead, Anne Woods, Meg Wickham, Cassandra Blackwell, Danielle Hall, Joe Molina, and Jordan Yochim.

About the President

Natalie G. Haag currently serves as executive vice president/general counsel for Capitol Federal Savings Bank. She has been a member of the Kansas Bar since 1985, and received her bachelor’s degree from Kansas State University in 1982 and her law degree from Washburn University School of Law in 1985.

nhaag@ksbar.org
Introducing the New Young Lawyers Section Board

It’s that time of the year again . . . time to meet the Young Lawyers Section board! This year looks to be a great year, with a capable and enthusiastic board ready to move the YLS in new and exciting directions. Many thanks go out to our immediate past president, Sarah Warner. Sarah’s tireless work as president has left some very big shoes to fill. I will strive to continue the legacy she left behind. Thankfully Sarah and her leadership will still stay involved in KBA as she serves on the board of governors.

It’s with great excitement that I introduce you to the 2015-2016 YLS board:

President – Justin Ferrell

Ferrell currently serves as in-house counsel/risk manager for the Kansas Counties Association Multi-Line Pool (KCAMP). KCAMP provides insurance for counties and municipalities in Kansas. He has been awarded the Topeka Bar Association’s Outstanding Young Lawyer Award and has served in many capacities on both the TBA Young Lawyers, as well as the KBA Young Lawyers. In his spare time Justin enjoys running, cycling, and spending time with his wife, Traci, and their two daughters, Piper and Maizy.

President-Elect – Nathan Eberline

Eberline is the associate legislative director and legal counsel for the Kansas Association of Counties. His responsibilities include advocating on behalf of counties before the Kansas Legislature and providing legal counsel to county officials. Prior to working for KAC, he held a similar position with the League of Kansas Municipalities. Eberline holds a J.D. from the University of Iowa College of Law and a B.A. in English and political science from Wartburg College in Waverly, Iowa.

Secretary/Treasurer – Clayton Kerbs

Kerbs was born and raised in Dodge City. He is married to Leah Kerbs and they have one son, Porter. He attended Creighton University and Washburn University School of Law and then worked for Sen. Jerry Moran prior to entering private practice. He currently works at Kerbs Law Office in Dodge City, with his father Glenn Kerbs, where he represents municipalities, handle domestic cases, and a general civil practice.

ABA Liaison – Anne Smith

Smith is an associate with Shaffer Lombardo Shurin in Kansas City, Missouri, where she handles civil litigation matters. She joined Shaffer Lombardo Shurin after serving as a research attorney for the Kansas Court of Appeals and for Justice Nancy Moritz of the Kansas Supreme Court. She graduated from Texas Tech University, summa cum laude, in Honors Studies with degrees in advertising and political science and graduated Order of the Coif from the University of Kansas School of Law. She enjoys swimming and sailing.

CLE Committee Liaison – Jake Peterson

Peterson is an associate attorney at Clark, Mize & Linville Chtrd., in Salina, where his practice focuses on civil litigation and health care. He graduated from Washington University in St. Louis Law School and earned his undergraduate degree in physics from Washburn University. He originally hails from Lindsborg, a small community in central Kansas. In his free time, Peterson enjoys relaxing on the porch with his wife, Leah, and his dog, Stella.

YLS Forum Editor – Amanda Wilwert

Wilwert is an associate for Foulston Siefkin in the law firm’s Topeka office. Her practice is focused on health care law and professional malpractice. Along with the Kansas Bar Association, she is also a member of the Topeka and Douglas County bar associations, Kansas Women Attorneys Association, Women Attorneys Association of Topeka, and the Judge Hugh Means Inn of Court. When she is not working or participating in bar association functions, she enjoys swimming, golfing, and playing outside with her dogs, Lexie and Odin.

YLS Forum Editor – Sarah Morse

Morse graduated from Emory University in Atlanta in 2007 and Emory University School of Law in 2011. After a graduate fellowship at the Turner Environmental Law Clinic, she returned to her hometown and now works as an associate attorney at Fisher, Patterson, Sayler & Smith LLP in Topeka. Morse’s practice focuses on administrative law, government liability, and employment law.

Judicial Externship Coordinator – Kate Marples

Marples is from Dodge City and now lives in Lawrence, where she graduated from KU with a B.A. in Germanic languages and literatures and received her J.D. from KU Law in May 2014. She is currently serving as a term clerk for the U.S. District Court. In her free time, Marples enjoys spending time with family and friends. Since passing the bar, she has enjoyed training for and completing her first half marathon and Olympic-distance triathlons.

Mock Trial Chair – Lisa Brown

Brown has practiced at Goodell, Stratton, Edmonds & Palmer LLP in Topeka since January 2015. She practices primarily in the areas of civil litigation, employment law, and health care law. She has been in private practice in Topeka since she graduated from Washburn University School of Law in 2012. In addition to her involvement with the KBA and the KBA YLS, Brown is a member of the Sam A. Crow American Inn of Court (program chair 2015-2016), the Topeka Bar Association (Young Lawyer Division secretary, 2015-2016), the
Women Attorneys Association of Topeka, and the Kansas Women Attorneys Association. She is also involved with the Civitan Club of Topeka.

**Mock Trial Chair – Mitch Biebighauser**

Biebighauser has been a practicing criminal defense attorney with Bath & Edmonds P.A., in Overland Park since he graduated from the University of Missouri-Kansas City in June 2014. His practice includes all stages and severities of criminal matters. Prior to his admission to the bar, he co-founded the Board of Barristers at UMKC Law School to develop and promote trial advocacy education, and he competed in more than 10 national law school mock trial competitions. Biebighauser also served on the *Urban Lawyer Law Review* board as a research editor. Outside of the practice of law, he enjoys camping, hiking, and canoeing – especially in northern Minnesota where he grew up.

**Legislative Liaison – Andrew Mayo**

Mayo graduated from Presbyterian College in 2007 and subsequently attended Emory School of Law in Atlanta, where he obtained his juris doctorate and a master’s in theological studies in 2012. After moving to Kansas, he clerked for the Hon. Kim R. Schroeder at the Kansas Court of Appeals. In August 2014, Mayo joined the law firm of Riordan, Fincher, Munson & Sinclair P.A., where his practice focuses on civil litigation, transactional work, and probate matters.

**Social Chair – Joslyn Kusiak**

Kusiak is a civil litigation attorney at Klenda Austerman LLC, where she represents clients in all phases of civil litigation, including trust and creditor rights litigation, intellectual property disputes, and consumer protection claims. Active in the Wichita community, she serves on the Greater Wichita YMCA Community Development board of trustees and the Young Professionals of Wichita board of trustees. Kusiak enjoys lively discussion and traveling.

**Pro Bono Chair – Brendan Lykins**

After graduating from Kansas State University, Lykins went to Seoul for a half decade to teach, came home, went to Washburn Law, and after law school he decided to hang his own shingle. Now, he mostly represents plaintiffs in civil litigation and also is on contract with the YWCA Center for Safety & Empowerment in Jackson and Wabaunsee counties.

**Immediate Past President – Sarah Warner**

Warner is an attorney at Thompson Ramsdell Qualseth & Warner P.A. in Lawrence; she also teaches Conflict of Laws as an adjunct professor at Washburn Law. Outside the KBA YLS, she serves on the KBA Board of Governors and in leadership with the Kansas Association of Defense Counsel (treasurer) and Douglas County Bar Association (president). When not at the office, Sarah enjoys singing, camping, and “competing” in triathlons. Warner and her husband Brandon (an administrative patent judge with the U.S. Patent & Trademark Office) call Lenexa home with their dog, Kolbe.
New Law Wise Editor Named

Ron Keeover, former Education-Information Officer for the Kansas Supreme Court’s Office of Judicial Administration, has been named Editor of Law Wise newsletter, a KBA electronic newsletter that is published six times during the school year as a teaching tool for Kansas school teachers and others interested in law-related education.

Keeover succeeds Hon. Kathryn Gardner, who is now serving as a Judge of the Kansas Court of Appeals, following many years of service on the KBA Law-Related Education Committee (LRE), including as committee chair and two stints as editor of Law Wise. Keeover retired from the courts in September 2013 after serving the state judiciary as public information officer and liaison for LRE for more than 32 years. During his tenure, Keeover worked closely with the KBA staff in presenting numerous educational programs and opportunities for Kansas teachers and their students, including several years as chair of the LRE Committee and co-editor of Law Wise in coordination with the KBA’s Public Services directors.

Keeover said he is honored to have been selected as Law Wise editor. “The KBA has worked many years to produce a thoughtful newsletter with useful information and teaching tools about the courts and the legal profession while making the publication a fun learning experience for its subscribers. As the newsletter once advertised, ‘we want to lay down the law in the classroom,’” Keeover said.

Law Wise was started by KBA Executive Director Marcia Poel Holston in the 1970s. Keeover became a co-sponsor and contributor to the publication soon after joining the courts in 1981. Together, they formed a Joint Commission on Public Understanding of the Law, which consisted of appointees by the Supreme Court, KBA, and state department of education. The newsletter, as well as LRE curriculum guides for each of grades K-12, became the principal endeavors of that now-disbanded commission.

The newsletter and numerous teacher conferences on law-related education, however, lived on through joint enterprises of the KBA and the Kansas Supreme Court’s law-related education program. Those education outreach programs included one interactive TV classroom project for Law Day for which the American Bar Association awarded Kansas its Most Outstanding Law Day Program for 1995. The program was broadcast from the Supreme Court Courtroom and featured the chief justice, governor, legislative leadership, and the attorney general, who responded from the bench to questions posed by students in two classrooms at Wichita’s law magnet school in City Hall. The interactive discussion was uplinked via satellite and made available with teacher’s guides to schools statewide, marking the first-ever use of video conferencing technology to present an interactive Law Day program, according to the American Bar Association.

Law Wise is published free by the KBA through a grant by the KBA LRE Committee that is chaired by Hon. G. Joseph Pierron Jr., a judge on the Kansas Court of Appeals and is coordinated by Anne Woods, the KBA’s public services manager and director of the Kansas IOLTA Program. The publication includes law-related news, two classroom lesson plans and links to “terrific technology for teachers.”

To sign up to receive your free issues of Law Wise, visit http://www.ksbar.org/lawwise.

If you have questions or suggestions for topics to include in the 2015-16 school year editions, you may contact ronkeeover@gmail.com or Anne Woods at awoods@ksbar.org.
Get into the Flow of Briefwriting

When you read an excellent brief you notice its strong arguments, persuasive tone, and clear prose. But usually something else makes it better than most you have read. That seemingly intangible characteristic is often “flow.” An excellent brief flows seamlessly from argument to argument and point to point. You are much more likely to notice when a brief does not flow well because you have to stop and reread paragraphs to follow the argument.

An argument is easier to follow when the writer connects its underlying points. Creating good “flow” in a brief requires making connections clear from section to section, paragraph to paragraph, and sentence to sentence.

To do this, you have to determine how the sections, paragraphs, and sentences of your brief are connected, and then make those connections explicit. This sounds simple, but it isn’t. We often take these connections for granted; we treat them as obvious to the reader because they are obvious to us. Because your reader is coming to this material for the first time, the connections will not be apparent unless you make them apparent. You have to spend some drafting and editing time making these connections explicit for your reader.

These three tips will help you explicitly connect your arguments and ideas and improve the flow of your briefs.

#1 – Use a reader-focused macro organization

Good flow requires a solid macro organization that makes immediate sense to your reader. Because the court will be reading your brief, you should place your arguments in the same macro order the court will follow when it analyzes your issue. By doing so, you telegraph to the court why each section or point heading matters. Briefs in the recent U.S. Supreme Court cases of Obergefell v. Hodges and King v. Burwell illustrate this.

In Obergefell, petitioners challenged the constitutionality of state bans on same-sex marriage. Petitioners and the state of Kentucky organized their briefs according to the established analytical method for equal protection cases. In an equal protection case, a court generally decides whether it should depart from the usual rational basis scrutiny (for example because the government restriction burdens a fundamental right), and then it decides whether the restriction withstands that level of scrutiny given the government’s interest at stake. Even in a case as complex and momentous as this one involving same-sex marriage, the briefs’ macro organizational structures, as evidenced by their tables of contents and point headings, explicitly followed this basic and predictable analytical method for equal protection cases.

Petitioners

A. The 14th Amendment requires a close examination of the purported justifications for Kentucky’s marriage ban.

B. Kentucky’s marriage ban is not supported by any legitimate state interest.

C. Kentucky’s recognition ban infringes upon the equal dignity of same-sex couples for additional reasons.

State of Kentucky

A. Windsor reaffirms, not undermines, each state’s province to define marriage in accordance with the consensus of its citizens.

B. The constitutionality of Kentucky’s marriage statutes should not be assessed under the Equal Protection Clause by applying heightened scrutiny.

C. Kentucky’s marriage laws are rationally related to a legitimate state interest.

Similarly, briefs in King v. Burwell followed this organizational approach in arguing whether the Affordable Care Act makes federal tax credits available on federally created health insurance exchanges. A specific issue was whether a health insurance exchange established by the federal government was an “exchange established by the state” under the Act. For this statutory interpretation question, the parties organized their arguments in line with general methods of predicting legislative intent: analyzing the text’s plain meaning, applying established canons for construing statutory provisions, and cautiously interpreting legislative history.

Petitioners

A. The IRS rule contradicts the plain meaning of the ACA’s subsidy provision.

B. The Fourth Circuit’s textual “hook” for the IRS rule does not withstand scrutiny.

C. The Act’s structure and context confirm the plain text of the subsidy provision.

D. The plain text does not render [the Act] absurd, as even the Fourth Circuit conceded.

United States

A. The text [and other] directly applicable provisions make clear that tax credits are available on Exchanges in every State.

B. The [Act’s] structure and design confirm that tax credits are available through the Exchanges in every State.

Footnotes


2. Brief for Respondent Steve Beshear, in his official capacity as the Governor of Kentucky at ii-iv, No. 14-556 (U.S. June 26, 2015).


4. This section used interpretive canons to make additional textual arguments. Id. at 27-30.


6. This section also used interpretive canons to make additional textual arguments. Id. at 35-41.
C. Petitioners’ alternative account of the Act’s design is baseless.7

The United States argued text first even though the plain meaning of the provision at issue seemed to doom its cause. Sometimes you have to impose this organizational structure on your brief when it does not immediately seem most persuasive. Making your organizational path the same path the court has to travel will signpost the destination and keep the court moving.

#2 – Repeat words or phrases

Another way to help the court move quickly and without hesitation through several paragraphs of your brief is to repeat particular words and phrases. Think about repetition as a way to smoothly transition the reader from an already familiar point to a new point.8 Here is an example from respondents’ brief in *McCullen v. Coakley*, a Supreme Court case challenging the validity of a Massachusetts regulation establishing a fixed buffer zone that prevented protests within a certain distance from facilities performing abortions.

Petitioners complain that the Act does not let them engage in the most effective speech possible, which they define as close, quiet conversations as close as possible to facility doors and driveways. Of course, this ignores the evidence that petitioners do, in fact, engage in close, quiet conversations with patients before they enter facilities. And it ignores the law, which does not guarantee protesters the form of expressive activity they deem most effective.

More fundamentally, it also ignores the reality of protesting on busy urban streets. It is not possible, for example, to safely approach a moving car. It is dangerous, for protestors . . . .

Finally, petitioner’s argument ignores the inevitable effect of their preferred mode of communication . . . .9

By choosing the same word “ignore” multiple times, the writer creates a pattern that makes the prose easier to follow and explicitly links each separate point.

#3 – Strategically place connecting words

Linking ideas explicitly can also be accomplished by moving the connecting idea toward the end of one sentence and the beginning of another.10 This not only transitions from a familiar point to a new one, it helps propel the court forward through your argument. Here is the technique used in the *McCullen* brief.

. . . Instead, were this Court to conclude that the employee exemption made the Act infirm, the case should be remanded for the lower courts to determine whether the exemption can be severed from the remaining provisions of the Act.

Whether a provision is severable is a question of state law, and in Massachusetts the Legislature has declared a presumption in favor of severability . . . .11

You do not have to use the exact same words to flow from one idea to another. The following is an example, again from a brief in *King*, where different words convey the same connecting idea, namely the significance of the issue before the court.

. . . It is simply implausible that Congress intended to have the IRS resolve these broad, fundamental policy decisions.

The Fourth Circuit recognized the enormous significance of the question at issue here. However, it backwardly argued . . .12

In both of these examples, the transition occurs between paragraphs, but you can use this technique between sentences within a paragraph as well. Also, none of these techniques is limited to briefwriting. You can use them effectively in other forms of legal writing too.

Can you overuse these techniques? Theoretically you can, but it’s unlikely given the complexity of the law and the sheer number of points to be made in most briefs.13 You be the judge. Partially for fun, I used techniques #2 and #3 to transition between almost every paragraph in this column. Did you notice? ■

### About the Author

**Pamela Keller** is a clinical associate professor and the Schroeder Teaching Professor at the University of Kansas School of Law. Keller also directs the lawyering skills program and the judicial clerkship program. Before teaching, she practiced employment law with Ice Miller in Indianapolis and clerked for the Hon. John W. Lungstrum.

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7. Here the writers applied a cautious dose of legislative history. *Id.* at 45-51.
10. For more examples of this technique see Ross Guberman, _Bridge to Somewhere: Better Flow for Busy Lawyers_, _LEGAL WRITING PRO_ (March 10, 2015), http://legalwritingpro.com/blog/bridge-to-somewhere-better-flow-for-busy-lawyers/.
11. *Id.* at 39-40.
Postcard from Overland Park: Wish You Were Here

A long time ago, back when toddlers slept in cribs coated in lead paint, back when every sack lunch included sandwiches dripping in Miracle Whip, people did really crazy things, like licking stamps and mailing bills. And in that era, there was something popular called a postcard. People would send them from faraway vacation spots like Branson, Pikes Peak, or the Grand Canyon.

And one of the most popular expressions on postcards was this: “Wish you were here!” The senders really didn’t mean that, of course. Vacations were designed to get away from people like, well, you. If you received one of them, and decided to oblige the wishful thinking of your friend, and therefore arrived at the Motel 6 near Silver Dollar City, your neighbors would promptly move to the Holiday Inn.

When the mail service died, people began to use Facebook as a proxy — this time from really far places like Hawaii — all designed to say, “Hey, I’m important. Look at what a great vacation I’m taking! How are things in Parsons?”

So anyway, a couple weeks ago in a moment of nostalgia, I felt like sending out a postcard. Actually many postcards — like 500 or more. I wanted to send them to people like you. But unlike most, my card wasn’t to show you up. The card would be conveying something actually meaningful. To say — hey, what I’m doing is worthwhile, and I wish I could share it with others.

And the return address would be the Doubletree in Overland Park from the Kansas Bar annual meeting. Because if you weren’t there — and you probably weren’t — you missed a lot. You missed out on opportunities for education, inspiration, and fulfillment.

Yes, the bar meeting had the traditional activities, such as golf and social gatherings. This year they organized an event at Overland Park’s Prairiefire, which the Kansas City Star has described as the “sexy new development” in the Kansas City metro.

But it was two other things that stuck with me.

The first was the keynote speaker on day one. His name was Darryl Burton. He has an unusual moniker — he’s called an “exoneree.” You see, in 1985, he was arrested and charged with capital murder and armed criminal action in St. Louis. Burton pleaded not guilty. He was convicted of capital murder in less than an hour, in a case without physical evidence and motive.

In prison, through a series of events that would be worthy of a Grisham novel, Burton wrote over 600 letters. One found its way to Cheryl Pilate, a KU law graduate from the class of 1990 and a member of the Kansas Bar. On August 28, 2008, Judge Richard Callahan exonerated him and released him from prison, after he spent 24 years in prison for a crime he did not commit. Darryl told his story to me and a hundred other Kansas attorneys.

When he finished speaking, I knew I had to speak to his attorney, Cheryl Pilate. We connected a couple weeks later.

“Darryl’s case was the second innocence case I worked on after obtaining, with my co-counsel, the exoneration of Ellen Resonover in 1999,” Cheryl explained to me. “I knew from the outset that Darryl was innocent — no physical evidence connected him to the crime, and the prosecutors lacked any evidence of motive. Their only evidence came from the dubious accounts of two veteran snitches who were angling for leniency and other benefits from the system. On their face, the snitches’ accounts seemed incredibly weak to me — and those accounts certainly fell apart when we located new witnesses. Indeed, as it turned out, one of the two snitches was far from the scene of the shooting — he was around the corner, hoping to head to the liquor store for more booze when the shots were fired.”

“Despite the weakness of the case against Darryl, it took eight years of legal work from a team — two lawyers, three investigators — to win Darryl’s release and exoneration. Eventually, we were able to locate witnesses — some brand new, others who had been only briefly mentioned in police reports but not properly interviewed — who established beyond any doubt that Darryl had nothing to do with the homicide. His case, and the protracted legal battle we fought, highlights the dangers of hasty and superficial police investigations, lying snitches, underfunded and overwhelmed defense counsel, and the withholding of exculpatory evidence.”

“Although we had an overwhelming amount of evidence of innocence by three years into the case, it took another five to obtain Darryl’s release, largely because of legal impediments to the consideration of innocence claims. We eventually achieved success in Cole County, Missouri, and, in August 2008, walked Darryl out of prison.”

“Although Darryl and many, many others have been exonerated and released, many more innocent people wait behind bars. The litigation of these cases is enormously time-consuming and requires the dogged persistence of counsel for many years. It is my most fervent hope that recent attention to the flaws in the investigation and prosecution of criminal offenses will focus public attention on much-needed reforms.”
If Darryl Burton’s story illustrates the imperfections of our system, it also highlights the opportunities our profession offers, and aptly validated by Pilate, provided you are willing to accept difficult, possibly hopeless, causes. And fight like heck.

There was a second “moment” in the meeting that has stuck with me.

It came at the luncheon for Distinguished Service awards on Thursday. This was a continuation in the affirmation of the goodness of our profession and the people who comprise it. Among the 23 attorneys who were recognized included Overland Park attorney Tom Hamill for the Distinguished Service Award for his many years of service to the Kansas Bar and the American Bar Association. Tom has achieved a rare trifecta in the profession – serving, at various times, as president of the Johnson County Bar, Johnson County Bar Foundation, and the Kansas Bar.

And you thought it was cool to be president of your fraternity?

There were many other colleagues called up to the podium, including Mira Midvani who established a pro bono practice at her firm where she accepts referrals from Kansas City-area domestic violence shelters, assistance programs, and legal aid offices from both Missouri and Kansas. She has assisted pro bono clients apply for visas for victims of violent crimes and helped battered women and children obtain legal status and work authorization under the Violence Against Women Act.

There were two recipients for the Courageous Attorney Award – one going to the Sedgwick County District Attorney’s Office for their efforts in changing a sexist culture that had proliferated by a particular judge; the staff’s willingness to come forward and file a complaint resulted in disciplinary action by the Supreme Court against the offending party. Those attorneys shared the award with Evan Ice of Stevens & Brand as he battles ALS with grace and courage.

The luncheon was inspiring.

I’m glad I was there to see it all.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.

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Mediator

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Remembering Monroe

Legal ethics lost a giant this year. Monroe Freedman (1928-2015) is widely regarded as the “founder of modern legal ethics as an academic field.” He was also my teacher, mentor, and friend. Remembering Freedman in a column titled “Thinking Ethics” is fitting. Thinking ethics was his idea.

Until well into the 1960s, legal ethics was rarely taught as a subject in law school. And even when it was, the hardest questions were never asked. Freedman changed that. In 1966, Freedman asked “The Three Hardest Questions” facing criminal defense lawyers. Among the questions was whether it is “proper to put a witness on the stand when you know he will commit perjury.” Freedman’s answer was yes. A lawyer, he explained, should of course try to convince the client not to commit perjury. But if that effort failed, Freedman argued, the criminal defense lawyer’s paramount duty is to the client, not to the court.

This idea kicked off a firestorm of debate, and almost led to his disbarment. Freedman’s view on the perjury dilemma was not the law then, and it is not the law now. Model Rule 3.3, for example, prohibits a criminal defense lawyer from knowingly “offering evidence that the lawyer knows to be false,” and requires a lawyer who comes to know about his client’s perjury to “take reasonable remedial measures, including, if necessary, disclosure to the tribunal.” Still, what Freedman offered was a new client-centered paradigm for thinking about the relative roles of lawyers, clients, and courts in our adversarial system. And he anchored that paradigm, like none before him, to the Constitution.

Freedman was a champion of civil liberties, of the powerlessness, and those in need of legal representation. To those ends, he played a major role in bringing legal advertising within First Amendment protection. Today, many people lament the manner in which certain lawyers choose to exercise their right to commercial speech. But, to Freedman, legal advertising is essential to overcome grave informational disparities between those who have and those who have not. Without legal advertising, Freedman argued, it is the poor and middle-class who will suffer most. They are the ones least likely to know their rights and least likely to know a lawyer who can protect those rights. Freedman argued that lawyers should chase ambulances—not to take advantage of victims, but rather to prevent insurance companies from doing so. Again, the Model Rules do not permit live solicitation of clients, and thus, for all practical purposes, proscribe ambulance chasing. But it was Freedman’s ideas that opened up more general forms of lawyer advertising, with the aim of opening up the justice system to those in need.

Of course, there is much more that may be said about Freedman’s contributions to the field. Remembering Monroe, however, requires some attention to who he was, not just to what he did and stood for. Above all else, Freedman was a consummate gentleman and fearless advocate. He was generous with his time and thoughts, which redounded to the great benefit of all who knew him, including me. When I taught Professional Responsibility for the first time, as a visiting assistant law professor at Hofstra University, Freedman invited me to attend his classes (which I did). After class, he was always interested in hearing my thoughts (though I was always much more interested in his).

The hardest questions of legal ethics pre-existed Freedman. But he was among the very first to openly voice them, and push others to think about them. That is Freedman’s enduring legacy. And now it is ours.

About the Author

David S. Rubenstein is a professor of law and director at the Center for Law and Government at Washburn University School of Law. Prior to teaching, Rubenstein clerked for the Hon. Sonia Sotomayor in the Second U.S. Circuit Court of Appeals and for the Hon. Barbara S. Jones in the U.S. District Court for the Southern District of New York. He also served as an assistant U.S. attorney in the Southern District of New York and was an associate at the law firm of King & Spalding.

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Footnotes


3. See Monroe Freedman, The Professional Responsibility of the Criminal Defense Lawyer: The Three Hardest Questions, 64 Mich. L. Rev. 1469 (1966). To this day, Freedman’s canonical article is one of the most—if not the most—widely cited article on legal ethics ever. The two other hardest questions raised in the lecture and article were (1) whether it is proper for a lawyer to cross-examine for the purpose of discrediting an adverse witness when the lawyer knows the witness is telling the truth, and (2) whether it is proper for a lawyer to give legal advice to a client that the lawyer has reason to believe the client will use to commit perjury. Id. at 1469.


5. A group of federal judges—including future Chief Justice Warren Burger—filed a disciplinary complaint against him. After four months of proceedings, the Disciplinary Committee announced its decision to “proceed no further in this matter.” See Freedman, supra note 3 at n.1.

6. MODEL RULES OF PROF’L CONDUCT 3.3(a)(3).


8. See Model Rules of Prof’l Conduct 7.3(a).
KSEthics Listserv

I question that anyone enjoys unsolicited communications from Stan Hazlett and the Office of the Disciplinary Administrator. The gray envelopes he sends are usually responsible for shortness of breath, rapid heart rate, cold sweats, and a full host of symptoms of depression. Everything about those gray envelopes is bad and, as a consequence, many lawyers’ impressions of Hazlett’s office are correspondingly bad as well. It can take some creativity and effort to address those negative perceptions, and the KSEthics email listserv is a time-tested tool for improving the Disciplinary Office’s outreach.

If you are licensed in the state of Kansas and provided the Kansas Supreme Court a valid email address at registration, then you were signed up to the KSEthics email listserv in May. According to Hazlett, some 12,000 attorneys were automatically signed up. Washburn University School of Law hosts the listserv, but administrative or legal questions and feedback should be directed to Deborah Hughes at attydisc@kscourts.org.

The Quiz

The inaugural message notes the broad purpose of the listserv: “As part of our ongoing effort to be of service to the bar, we have created the KSEthics listserv for the purpose of sending ethics hypotheticals by email to all subscribers on a bi-weekly basis. Each hypothetical will include the answer and an explanation of the answer, including citations to the applicable Kansas Rule(s) of Professional Conduct.”

A sample hypothetical from a recent listserv email asks, “Attorney trust records must be preserved:

A. For a period of two years after termination of representation.
B. For a period of three years after termination of representation.
C. For a period of five years after termination of representation.
D. Until the termination of representation.

ANSWER: C. A lawyer must keep complete trust account records and preserve them for a period of five years after termination of the representation. Kansas Rule of Professional Conduct 1.15(a)."

As apparent from that sample, the hypotheticals are not even remotely comparable to trip-and-trap questions like those found on the bar exam. They do represent rather routine situations in law practice and practice management that Hazlett says have arisen in Kansas with enough frequency to be relevant or situations which are presented by lawyers as questions to Hazlett’s office.

When asked if he thought he would ever run short on material for the listserv, Hazlett noted that he has some 15 years of experience teaching and testing professional responsibility courses and has enough questions to keep the listserv going for quite a long time. Lawyers are even encouraged to submit their own questions to the Disciplinary Office. While he is not permitted to issue formal opinions as may be common in other jurisdictions, his office can provide informal advice, and queries from the bar could end up in a future quiz on the KSEthics listserv. (Questions can be directed to attydisc@kscourts.org or (785) 296-2486.)

Carlson’s Ethics Refresher

The quiz-like format of the emails is borrowed from Dennis G. Carlson, former counsel for discipline of the Nebraska Supreme Court. Carlson sent out Carlson’s Ethics Refresher quizzes to all of us licensed in Nebraska for years and he passed on to Hazlett that the quizzes had generated a lot of positive feedback. Using a short quiz format for the listserv provides some degree of interactivity. Hazlett even went so far as to suggest they might be “fun.” That is, perhaps, an overly optimistic assessment of anything ethics related. Regardless, I found myself reading through all of Carlson’s quizzes – high-fiving myself when I got them right – and I anticipate doing so with Hazlett’s questions as well.

Give it a Chance

Many lawyers get testy about unsolicited email and lack the gumption to create a rule to automatically delete or file them. Those lawyers will be comforted knowing that the listserv is not mandatory. Any attorney wanting to avoid the bi-monthly emails can unsubscribe with a simple click. So far, only a few dozen attorneys have done so, but rest assured that the Supreme Court is not compiling an “aggravating factors” dossier on unsubscribers. Additionally, the listserv is not a conversational listserv where participants can post questions, arguments, or off-topic musings about life and cats. Continued participation brings just two more emails to your inbox each month and those emails are genuinely interesting and often helpful.

It is fair to question Hazlett’s notion of “fun” if a listserv quiz on the Kansas Rules of Professional Conduct qualify, but the KSEthics listserv demonstrates a sincere attempt by the Disciplinary Office to change things up a bit. For many, the only interaction with the office was the cursed gray envelopes. Those arrived unexpectedly, were stubbornly vague and uninformative, interfered with our day (or week, month, or year), and left us in a sour mood. In contrast, the KSEthics listserv emails arrive predictably, are concise and precise, and take just a few minutes to impart their wisdom. The listserv may not be “fun” but it is better to get our ethics knowledge from a quick quiz than from personal experience and a gray envelope.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and an adjunct professor teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Section.

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Serving Our Veterans

I frequently get asked a fair question: why should I help a veteran with free legal services? I have my own personal reasons, and I think that question is better answered by the person volunteering his or her time. Whether it’s patriotism, a desire to give “thanks,” or a feeling of responsibility to the community, attorneys volunteer their time for different reasons. One thing that continues to push me when I feel tired, frustrated, or wonder if I’m really making a difference is this: I’m glad the veteran that I’m providing legal services to standing before me did not give up when he or she may have felt the same way while defending our country. Now that may sound corny, but it does not change the nature of those veterans’ military service and the freedoms that we enjoy as a result of that service. Some veterans need legal assistance and cannot afford it, which for many creates a sense of responsibility for giving back.

This need is not being ignored by people in the Topeka community. Marilyn Harp, the executive director of Kansas Legal Services (KLS), spoke to law students at Washburn University School of Law this year about how they could become involved in the effort to address what she called the “justice gap” – the gap that exists between those that need and cannot afford legal assistance and our current ability to provide such services. Through KLS and AmeriCorps, fellow law student Nikki Southall and I were able to provide legal services to veterans last summer. We provided over 650 hours of pro bono legal services through KLS on issues such as divorce, landlord tenant, wills, pro se filing and representation, document preparation and review, general legal information, the Uniformed Services Employment and Reemployment Rights Act (a deploying service member federal job protection law), and other assistance. But resources are limited at KLS, so there are only so many clients that can be helped there.

Washburn Law also has been dedicated to—and continues to assist—veterans in our area. Professor Lynette Petty, who teaches in the Washburn Law Clinic, is spearheading an effort to provide estate planning services to veterans living in Kansas. By the time that this article is published, Washburn Law will have provided four Veterans Legal Assistance Clinics to veterans in the community offering wills, living wills, durable powers of attorney, and health care directives through volunteer students, faculty, and staff, namely Debi Schrock, Curtis Waugh, John Francis, and Janet Jackson, as well as others. I am honored to be a part of that program and stand shoulder-to-shoulder with the faculty who provide legal services to veterans in our community. But just as at KLS, resources are limited at Washburn University School of Law, leaving a continued need for Kansas lawyers to volunteer.

I have been told by more than one person that veterans are not special and they should not be treated any differently than anyone else; why do something for them for free? I have only one response to that: not every veteran volunteered to be in the military. The draft is a real thing and although not currently in use, large numbers of our citizens were forced to do the unthinkable for our freedom. I do realize that the draft is no longer employed; however, there are other recruiting practices that prey on the lesser advantaged in our society and those practices can have a coercive effect on a person’s choice of whether to continue to live in poverty or to join the U.S. military and serve his or her country.

I am asking you as an attorney to volunteer four hours of one day, just one time this year to assist a veteran with their legal issues. This can be in the form of document preparation, review of a simple divorce, preparing a will, or anything else that is needed. Some attorneys want to give back to veterans but do not know how. I can tell you personally, as a veteran, that it means the world to us when you do take the time to assist us. Please make the time for those of us who have given so much for you. Assisting us in engaging the legal system enables us to move past those barriers that may seem small to others, but are huge impediments to veterans who might already be disenfranchised by a system they feel jaded toward.

Marilyn Harp has stated that in several locations around the state, KLS does training on general powers of attorney, accessing the online forms that can be prepared on their website, and general information. She also stated that KLS can package an hour of ethics for the training, with some CLE credit for the time spent actually participating in a pro bono clinic. She said that if people are interested in learning about those opportunities in their area they should contact Cindy VanHoutan at cindyv@klsinc.org to get on the email list used to publicize the opportunities.

To those of you who already give of your valuable time, thank you very much for what you have done and continue to do. Your efforts in assisting veterans is greatly appreciated by those of us who have served. All gave some, some gave all; please give back to those who have given so much for you.

About the Author

Robert “Joe” Pilgrim served in the U.S. Navy from 2002-07 and left as a Petty Officer Second Class (Air Warfare) in aviation electronics. He is now a 3L at Washburn University School of Law.

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Larry Myers

Larry Myers, 67, died June 21 at Via Christi St. Francis Campus in Wichita. He was born September 10, 1947, in Dodge City, to Harvey and Alice Ewy Myers. In 1965 he graduated from Sublette High School.

Myers began practicing law in Wichita, and in 1978 he opened a satellite office in Garden City, where he became a sole practitioner in 1980. During the Vietnam War he served in the U.S. Army.

He is survived by his four children, Eric S. Myers, of La Crosse, Rebecca Alexander, of Sublette, Alexandria T. Myers, of Auckland, New Zealand, and Dane H. Myers, of Garden City; two brothers, Steve Myers, of Maize, and Lynn Myers, of Sublette; and four grandchildren. He was preceded in death by his parents and a brother, Norman Myers.

Richard H. Rumsey

Richard H. Rumsey, 81, died June 7 in Wichita. The son of Hugo C. and Dorthy W. (Dunmire) Rumsey, he was born December 17, 1933, in Kansas City, Missouri. He graduated from Shawnee Mission North High School in 1952 and from the University of Kansas School of Law in 1958.

Rumsey practiced law in Wichita and also represented several smaller cities. He was a lifetime member of the Kansas Bar Association.

He is survived by his wife of 57 years, Lorie; children, Robb W. Rumsey and Bruce D. Rumsey; sisters, Ann Olson and Susan Rappard; 10 grandchildren; and numerous nieces and nephews.
Ron Keeover retired in 2013 as the education-information officer in the administrative office of the Kansas Supreme Court after 32 years of service. He is a founding member of the United States and International Conference of Court Public Information Officers and served as the organization’s first president. He is the current president of the Kansas Sunshine Coalition for Open Government, and represented that organization in helping the Kansas Association of Broadcasters and Kansas Press Association lobby for legislation that has opened court records that had been sealed for 35 years. Before joining the Kansas courts, Keeover spent 17 years as a legal affairs reporter and taught English as an adjunct assistant professor for 25 years. He holds a Master of Science degree from Kansas State University and a Bachelor of Arts degree from Washburn University of Topeka.

Joann Johnson, of Olathe, is an attorney with the Law Firm of Martin & Wallentine, where she represents clients on a variety of civil and criminal matters. She has volunteered her time through Kansas Legal Services and the Economic Opportunity Foundation Inc., both in Kansas City, Kansas. She earned her law degree from the University of Kansas School of Law, and holds a Bachelor of Science from Virginia Tech, as well as a Master of Science from the University of Florida.

Keven M.P. O’Grady is a district court judge for the 10th Judicial District in Olathe. He graduated from Rockhurst University and received his law degree at the University of Kansas School of Law. O’Grady was in a private law practice in Overland Park for 25 years before being appointed to the bench in October 2012. He has been a member of the KBA since 1987 and is a past president of the Family Law Section.

Robert T. Stephan, of Overland Park, is a past attorney general for the state of Kansas, having served that position from 1979-95. Since that time, he has served as chair of the Governor’s Domestic Violence Fatality Review Board, Johnson County Criminal Justice Advisory Council, Kansas Attorney General’s Senior Consumer Advisory Council and Kansas Coalition Against Sexual and Domestic Violence 30th Anniversary Committee. Stephan also served as a member of SAFEHOME Capital Campaign Steering Committee, Kansas Supreme Court Access to Justice Committee and Johnson County Developmental Supports Governing Board.

Gabrielle Thompson, of Manhattan, has been in private practice as an elder law attorney since 2007. Prior to entering private practice she was a managing attorney for Kansas Legal Services in Manhattan and Seneca for 13 years, after serving 12 years as a prosecutor.

Eric Hartenstein is a member/manager of Hartenstein Poor LLC and practices in many areas, including business, real estate, family, juvenile, probate and criminal law. He is a 1982 graduate of Kansas State University and 1986 graduate of the University of Kansas School of Law.

*Pro Bono Certificate awardee Catherine Foulston’s biography was not available at press time.
The Pro Bono Award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

Mira Mdivani, of Overland Park, is a business immigration attorney at the Mdivani Corporate Immigration Law Firm. Over 10 years ago, Mdivani established a pro bono program at her firm where she and other firm’s business immigration lawyers accept referrals from Kansas City area domestic violence shelters, assistance programs and Legal Aid offices from as far away as Liberal and Springfield, Missouri. They successfully helped pro bono clients apply for U Visas for victims of violent crimes and helped battered women and children obtain legal status, work authorization and travel documents under the Violence Against Women Act. Clients hailed from countries around the globe including Laos, the Netherlands, Guatemala and Sri Lanka. Mdivani currently serves on the board of governors of the Missouri Bar Association, the KBA, the Earl O’Connor Inn of Court, and Jackson County CASA. She recently completed terms as president of the Kansas Women Attorneys Association, the Association for Women Lawyers of Greater Kansas City and the Human Resource Management Association of Johnson County.

Sarah Warner, of Lawrence, is an attorney at Thompson Ramsdell Qualseth & Warner, where her practice focuses on resolving state and federal constitutional claims, insurance disputes, and other business and personal claims. She also teaches Conflict of Laws as an adjunct professor at Washburn University School of Law. Before joining the firm, she worked for three and one-half years as chambers counsel to Chief Justice Robert Davis of the Kansas Supreme Court. She earned her bachelor’s degree (with honors and distinction) from the University of Kansas in 2003 with majors in French, mathematics, international studies and political science, and her juris doctorate, magna cum laude, from Ave Maria School of Law in Ann Arbor, Michigan, in 2006. Warner recently completed her term as president of the KBA Young Lawyers Section and has been appointed to the KBA board of governors beginning July 1. She also serves on the Kansas Board for Discipline of Attorneys and is treasurer of the Kansas Association of Defense Counsel and president of the Douglas County Bar Association.

This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

The award will be given only in those years when it is determined there is a worthy recipient.

Zackery E. Reynolds, of Fort Scott, graduated in 1982 from Washburn University School of Law with honors. He has been in private practice ever since, concentrating primarily on litigation and estates. He served as president of the KBA in 1999 and received an Outstanding Service Award for his service to the Ethics Grievance Committee in 1992. His interest in promoting diversity began when he was KBA president. His KBA Journal Article, “Diversity in the Kansas Bar: A 2020 Vision,” was followed by the creation of the permanent Diversity Committee, which continues today to promote diversity in the bar. He is a fellow in the American College of Trial Lawyers.

This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, non-lawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize law-related projects involving significant contributions of time; committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; work by a public official that significantly advances the goals of the legal profession or the role of the KBA; and/or service to the legal profession and the KBA over an extended period of time.
Paul Davis, of Lawrence, is a partner with the law firm of Fagan Emert & Davis LLC. He is a graduate of the University of Kansas and the Washburn University School of Law. Davis served 12 years in the Kansas House of Representatives. From 2009-15 he served as the House minority leader. During his time in the Legislature, Davis developed a reputation as someone who could form bi-partisan coalitions. He was also a steadfast supporter of public education and the judiciary. Davis has been active with a number of organizations, having served on the board of directors of the Arc of Douglas County, the Health Care Access Clinic, Leadership Lawrence, the KBA Board of Governors and the State Legislative Leaders Foundation.

Dennis Depew has served as chief of the Civil Litigation Division of the Kansas Attorney General’s Office in Topeka since May 2015. Prior to that, he was a partner in the Depew Law Firm in Neodesha since graduating from the University of Kansas School of Law in 1983, where he maintained a general law practice with his father, Harry Depew, and his brother, Doug Depew. The family’s firm was founded in 1953. Depew was a pioneer in Southeast Kansas in the area of alternative dispute resolution. He was one of the first attorneys in the area to become a certified mediator in civil and family law cases in 1995. He was also an approved domestic case manager in high conflict post-divorce cases in three judicial districts. Outside of his family, his two passions over the years have been public education and service to members of the bar. He was first elected to the Neodesha school board in 1985 and went on to serve the Southeast Kansas area on the board of the Kansas Association of School Boards before serving the entire state as he worked through the officer chairs of KASB from 2010-14. He served the profession as a member of the Kansas Board of Discipline of Attorneys for five terms from 1999 until 2014. He was elected in 2005 to the KBA board of governors and is now completing his run through the officer’s chair of the KBA. Depew participated in the group that in 2014 reinstated appellate judicial evaluations and has been a constant proponent of merit selection for the Court of Appeals and Kansas Supreme Court. Depew is a Fellow Silver of the Kansas Bar Foundation and will begin a term on the KBF board of trustees in July. He was also recently elected to serve on the Kansas University School of Law board of governors.

L.J. Leatherman, of Topeka, is a partner in Palmer Leatherman White & Girard LLP. He specializes in plaintiff’s tort litigation in automobile negligence, wrongful death, third-party claims against insurance companies and insurance bad faith. Leatherman is a graduate of Washburn University School of Law. He is an active member of the Kansas and American bar associations, and Trial Lawyers for Public Justice. He serves as a member of the Topeka/Shawnee County Ethics Committee.

Patricia E. “Patty” Riley, of Topeka, has practiced law since graduation from Washburn in 1977. In 1983, she and her husband, Wesley A. Weathers, formed Weathers & Riley L.P., now Weathers, Riley and Sheppeard LLP. She was elected to serve on the Kansas Supreme Court Nominating Commission from the 2nd Congressional District from 2003-11. She chaired the Topeka Bar Association’s Nominating Committee and the statewide Gender Bias Committee of the Kansas Women Attorney’s Association, served on the KBA’s Insurance Committee, served on the board of the Kansas Association for Justice, served on a Washburn Law School Search Committee for a new dean and currently serves as a member of “GNIP GNO,” a group that evaluates and awards stipends for Best Note and Best Comment for the Washburn Law Journal. She is a member of the Women Attorneys Association of Topeka, the Kansas Women Attorneys Association and the Topeka, Kansas and American bar associations.

Judge Dale L. Somers, of Topeka, is a native Kansan who grew up in Norton. He received his undergraduate degree from Kansas State University in 1968 and his juris doctorate from the University of Kansas School of Law in 1971. He was in the private practice of law in Topeka with the firms of Eidson, Lewis, Porter & Haynes and Wright, Henson, Somers, Sebelius, Clark & Baker for 32 years until he became a U.S. bankruptcy judge in 2003. Somers was appointed to the Bankruptcy Appellate Panel for the 10th U.S. Court of Appeals in 2010. He also serves as a member of the Judicial Resources Committee of the Judicial Conference of the United States. Somers served on the KBA board of governors from 1988-98 and as president from 1995-96. He is a Fellow of the American Bar Foundation, a Fellow of the Kansas Bar Foundation and a Fellow of the American College of Bankruptcy.

Judge Gregory L. Waller, of Wichita, is a fifth generation Kansan. He attended Hutchinson public schools and graduated from Hutchinson High School. Waller obtained an Associate of Arts degree from Hutchinson Community College. He graduated from Washburn University with honors in 1970 and from Washburn University School of Law in 1972. Waller then went into private practice with G. Edmond Hayes at the firm of Hayes and Waller. In 1975 he joined the Sedgwick County District Attorney’s Office as an assistant district attorney and later became the chief administrative assistant district attorney. In 1993 he was appointed judge of Division 5 of the Sedgwick County District Court. From 2002-08, Waller was the presiding judge of the criminal department of the Sedgwick County District Court. Additionally, he served as a trial judge of civil, criminal, juvenile, probate and traffic. Waller is a member of the Kansas and Wichita bar associations, Kansas District Judges Associa-
tion, American College of Prosecuting Attorneys, Washburn University Foundation board of directors, CASA, and numerous other civic and social organizations. Waller is presently a member of the WBA's Professional Diversity and Criminal Law committees and the KBA's Diversity Committee.

COURAGEOUS ATTORNEY AWARD

The Courageous Attorney Award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession.

The Sedgwick County District Attorney’s Office was honored with the Courageous Attorney Award due to its staff’s willingness to come forward and file a complaint regarding the actions of a judge against female staff attorneys. The Kansas Supreme Court issued its finding on the complaint on Feb. 27, 2015, and found Judge Timothy Henderson’s misconduct was wide ranging, with multiple female attorneys and staff members subject to repeated inappropriate and offensive comments for years. Despite widespread knowledge, the conduct went on for years unchallenged, and without the district attorney, Marc Bennett, and his attorneys, Melissa Green, Amanda Marina, Kristi Topper and Sandra Lessor, going on record, the misconduct would have continued.

Evan H. Ice, of Lawrence, is a fourth generation Kansas lawyer born in Newton. He graduated from the University of Kansas in 1986 with a Bachelor of Science degree in mechanical engineering. He returned to KU in 1990 and graduated from its law school in 1993 as No. 1 in his class. That same year he joined the firm of Stevens, Brand, Winter, Lungstrum & Golden (now Stevens & Brand LLP). His practice has been mostly devoted to business organizations and governance, trusts and estates, real estate, banking, municipal government and tax law. At the age of 49, Ice was diagnosed with ALS. Since his diagnosis, he has continued to work full time, maintaining a high level of work production, despite his struggles with diminishing muscular and motor functions, great pain and discomfort. With the help of special speech activated software, Ice continues to communicate through emails and prepare legal documents required for clients and with assistance, he continues to communicate with clients by phone, as well as meeting with clients in person. Ice realizes that he will lose that ability to speak, so he has been creating a voice bank, recording different words, phrases, and sentences so he can still communicate with his friends and family. Despite the struggles he may have, Ice is at work everyday with a smile and can be heard laughing or telling jokes.

DISTINGUISHED GOVERNMENT SERVICE AWARD

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

Richard A. Euson, of Wichita, has served as the Sedgwick County counselor for 34 years. He has held the position of county counselor since 1997, having twice served as interim county counselor prior to that time. His role as county counselor is unique in that he must not only advise a public entity on a myriad of diverse subjects but also navigate the Kansas Rules of Professional Conduct on a daily basis. He serves as attorney and advisor to the Board of County Commissioners, the Sedgwick county manager and county department heads, as well as representing the county’s other elected and appointed officials. He earned his bachelor’s degree in political science from the University of Kansas and his juris doctorate from Washburn University School of Law. Euson has been a member of the KBA and the Wichita Bar Association for many years.

Anita Tebbe, of Overland Park, is a law professor and chair of the Legal Studies Department at Johnson County Community College. She earned a juris doctorate from Washburn School of Law, Master of Arts-Education from the University of Missouri, Kansas City, and a Bachelor of Arts in history from Loyola University, Chicago. Tebbe is active in the Johnson County Bar Association and chairs the Naturalization Committee. She is also a member of the Kansas Bar Association and a member of the KBA Paralegals Committee. As a member of the American Bar Association, Tebbe served as chair of the ABA Paralegal Approval Committee. Tebbe received three distinguished service awards from Johnson County Community College, has been an exchanged professor with Udmurt State University, Izhevsk, Russia, and assisted in the establishment of the JCCC Legal Interpreting Program. She also coordinated numerous Kansas Court of Appeals oral arguments at JCCC yearly and in 2012 coordinated the Kansas Supreme Court oral arguments on campus.

PROFESSIONALISM AWARD

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

Larry E. Keenan, of Great Bend, attended the University of Kansas, where he received both his undergraduate and law degrees. In 1954 he was drafted into the U.S. Army. After five months as a private, he was admitted to the Judge Advocate General’s Corp., where he served three additional years primarily at Fort Riley, prosecuting and defending cases. He was discharged as a captain in 1958. He then returned to his hometown
The Distinguished Service Award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

• The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.

Only one Distinguished Service Award may be given in any one year. However, this award is given only in those years when it is determined that there is a worthy recipient.

Thomas A. Hamill, of Overland Park, began his legal career at a small firm in western Kansas and served briefly as an officer in the trust department at Commerce Bank of Kansas City. Soon he became an assistant U.S. attorney in Kansas City, Kansas, where he tried many civil and criminal cases over the next four years. In 1996, Hamill and Scott Tschudy opened the Martin Pringle office in Overland Park.

Throughout his career, Hamill has been active in numerous professional associations, including past president of the Johnson County Bar Association, Johnson County Bar Foundation and Kansas Bar Association. He served as a member of the American Bar Association House of Delegates for 18 years, serving as the KBA delegate to the House and the state delegate to the House, and as a member of the ABA Board of Governors for three years. He also served as chair of the Kansas Public Employees Retirement Systems board of trustees.

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

• The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.

The award is only given in those years when it is determined that there is a worthy recipient.

The Kansas Informed Voters Project is a nonpartisan voter education project intended to educate citizens about the judicial system, to inform them that politics and special interests have no place in the courts. The project strives to provide citizens with the tools they need to exercise informed voters in both retention elections and partisan contests. The Kansas Project has educated and continues to educate members of the public about the importance of protecting America’s democracy by keeping the third branch of the government, the judiciary, free and fair, as the Founding Fathers intended it to be.

Milestones for Members of the Legal Community

25-Year Certificates
Hon. Bradley E. Ambrosier, Elkhart
Mark A. Andersen, Lawrence
Stacy M. Andreas, Lawson, Missouri
Jess W. Arbuckle, Wichita
Joseph M. Backer, Independence, Missouri
D. Shane S. Bangerter, Dodge City
Shannon K. Barks, Kansas City, Missouri
Curtis G. Barnhill, Lawrence
Anthony S. Barry, Topeka
Lisa J. Bean, Sioux Falls, South Dakota
Gregory D. Bell, Hutchinson
Kim A. Bell, Wichita
Bruce A. Berkley, Downs
Thomas V. Black, Pratt
Donna F. Bohn, Wichita
Mary J. Brunetti, Frontenac
Leah B. Burkhead, Mission
Robert S. Caldwell, Overland Park
Harry D. Callicotte, Lexington, Kentucky
James R. Campbell, Burlington
Mark S. Carder, Kansas City, Missouri
Kevin D. Case, Kansas City, Missouri
John T. Coghlan, Kansas City, Missouri
Steven F. Coronado, Kansas City, Missouri
Deborah D. Cox, Topeka
June R. Crow-Johnson, Lawrence
William F. Cummings, Wichita
Kendall R. Cunningham, Augusta
Tye G. Darland, Atlanta
J.P. Davidson, Wichita
Jane A. Detering, Wichita
Issac L. Diel II, Overland Park
Stephen P. Doherty, Overland Park
J.M. Doty, Ottawa
Dexter Eggers, Salina
Thomas R. Fields, Kansas City, Kansas
William N. Fleming, Lawrence
Matthew D. Flesher, Wichita
Sarah M. Foster, Wichita
James F. Freeman III, Kansas City, Missouri
Ilene M. Gaekwad, Portland, Oregon
Dean D. Garland, Olathe
John R. Gerdes, Wichita
William D. Grant Jr., Tonganoxie
George D. Halper, Kansas City, Kansas
Forest W. Hanna III, Olathe
William E. Hanna, Kansas City, Missouri
G. Thomas Harris III, Sedan
David A. Hawley, Wichita
Hon. Stephen A. Hilgers, McPherson
Ben W. Hobert, Kansas City, Missouri
Michael D. Hockley, Overland Park
Zoe Ann K. Holmes, Rockwall, Texas
Curt D. Hoover, Olathe
Nancy S. Hoppock, Overland Park
D’Ambra M. Howard, Overland Park
H.E. Howe, Prairie Village
Anne M. Hull, Wichita
Charles J. Hyland, Overland Park
James B. Jackson, Independence, Missouri
Scott Jensen, Wichita
Mark E. Jones, Columbia, Missouri
Michael G. Jones, Wichita
Leonard W. Jurden, Shawnee Mission
Michael A. Kearns, Manhattan
J.T. Klaus, Wichita
Philip M. Kleinsmith, Colorado Springs, Colorado
John J. Knoll, Overland Park
Linda R. Koester-Vogelsang, Lawrence
James S. Kreamer, Kansas City, Missouri
Michael J. Kuckelman, Overland Park
Mary V. Larson, Leawood
Cheryl B. Linder, Kansas City, Missouri
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Sheryl C. Nelson, Kansas City, Missouri
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50-Year Certificates
Mark D. Arthur Jr., Russell
Donald D. Barry, Topeka
Paul P. Cacioppo, Parkville, Missouri
William M. Cobb, Wichita
Donald A. Culp, Kansas City, Missouri
Timothy R. Emert, Independence
Stewart L. Entz, Topeka
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J.D. Farris, Atchison
Joseph P. Flynn, Wichita
David K. Fromme, Springfield, Missouri
Arthur A. Glassman, Topeka
L.H. Goossen, Newton
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James M. Immel, Iola
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John L. Richeson, Ottawa
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Hon. Adrian J. Allen, Topeka
Nicholas W. Klein, Golden, Colorado
Donald E. Lambdin, Wichita
James K. Logan, Olathe
Joe W. Peel, Lombard, Illinois
Robert J. Roth, Wichita
George Voss, Dodge City

2015 KBF Golf Tournament Winners
Madison Hatten
Scott Hill
Chris Kaufman
Matt Keenan
Score: -18

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Special Thanks

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2015 Legislative Wrap Up

By Joseph N. Molina III
The 2015 Kansas legislative session ended on Friday, June 26 as both chambers embraced Sine Die. Normally Sine Die is a ceremonial process devoid of any real work; however, 2015 was not a normal session. The sheer length of the session, a record 113 days, was only outpaced by the breadth of discussion. In 2015 the Kansas Legislature introduced 311 Senate bills, seven concurrent resolutions, and 54 resolutions. The Kansas House proposed 435 bills, 19 concurrent resolutions, and 28 resolutions. This Legislature introduced 285 more proposals than its predecessor did in 2014. For our part, the KBA monitored or engaged on 114 bills and provided expert testimony on more than 40 bills.

We are all firmly aware that taxation was the reason for such a long and expensive (nearly $1 million of Veto Session) session. Coming into the year the state was running a significant shortfall. Some estimated it around $300 million and others saw the hole as even larger. The first course of action was a combination of cuts, bonding and efficiency legislation. Those initial solutions called for $1 billion in Kansas Public Employees Retirement System (KPERS) bonding, school finance changes, and Kansas Department of Transportation (KDOT) transfers. However, the changes did not close the entire gap, and further monthly revenue shortfalls required an increase in some type of tax.

After a grueling three-plus week Veto Session, the Kansas Legislature passed a tax plan. The plan, which received the bare minimum of votes in the House (63) and Senate (21), did not garner a single Democrat vote. The bullet points for the tax plan are as follows:

- Increase the state sales tax to 6.5 percent that generates an estimated $164 million.
- Raise tobacco taxes by 50 cents per pack to generate $40 million.
- Protects the exemption passed in 2012 for 330,000 businesses which shields income for these LLCs from taxation, including owner’s salary and draws.
- Wipe out itemized deductions, yielding $97 million.
- Retain the Food Sales Tax Credit program but drop plans to LOWER the sales tax on food to 4.95 percent.
- Continue the governor’s “March to Zero” on income taxes by accelerating the triggering mechanism that will force even further income tax rate reductions in 2019.
- Offer a tax amnesty plan worth $30 million.

This plan will raise $384 million in new taxes along with an addition $47 million from managed care organizations for the privilege of offering health care plans in Kansas. This is a record amount of new taxes for the state of Kansas. Unfortunately these new taxes fail to cover the entire shortfall. The budget remains $50 million underwater, requiring the governor to make additional cuts. Thus far, only $1.8 million from the Board of Regents budget has been cut. The rest of the cuts have yet to be named.

Complicating matters is the recent three-judge panel decision concerning school finance. That ruling found key parts of the school block grant bill unconstitutional and ordered the immediate payment for capital outlay and local option budget. This amounts to over $50 million. This appropriation was not considered in the FY 16 budget. The state has successfully stayed this ruling which means that the amount due is pushed back till the Kansas Supreme Court makes a determination. However, should this ruling be upheld, the budget shortfall for FY 16 would have doubled and many would blame the judicial branch for the budget problems.

Judicial Branch

Besides working to balance the state budget, the Kansas Legislature has taken serious interest in reforming the judicial branch. The Kansas Legislature has proposed a number of legislative initiatives that reduce the influence of a centralized judicial branch, increase local control of judicial resources or alter the daily operations of the court system. The KBA has taken an active role in opposing these initiatives. Below is a list of bills that have been introduced this session.
Thank you for making this year’s Annual Meeting another success!
Judicial Selection

The Kansas House is responsible for all of the proposals to alter the method for selecting Kansas Supreme Court justices. Two measures were passed out of the House Judiciary Committee. They include HCR 5004, partisan elections, introduced by Rep. Mark Kahrs (R-Wichita) and HCR 5005, governor appointment, introduced by Rep. Travis Couture-Lovelady (R-Palco). Both of these concurrent resolutions require a two-thirds vote for passage. House leadership did not schedule a debate or vote on either of these resolutions. However, this could change in 2016 should the Supreme Court uphold the school finance decision. The remaining proposals to change merit selection failed to gain traction and should not be viewed as viable options at this point.

HCR 5003
A PROPOSITION to amend section 3 of article 4 of the constitution of the state of Kansas, relating to the judiciary and recall elections.

HCR 5004
A PROPOSITION for the direct partisan election of Supreme Court justices and Court of Appeals judges, abolish the Supreme Court Nominating Commission.

HCR 5005
Constitutional amendment revising article 3, relating to the judiciary; allowing the governor to appoint Supreme Court justices and Court of Appeals judges, subject to Senate confirmation; abolishing the Supreme Court Nominating Commission.

HCR 5006
Constitutional amendment revising article 3, relating to the judiciary; allowing the governor to appoint Supreme Court justices and Court of Appeals judges, subject to Senate confirmation; lifetime appointment, subject to removal for cause; retaining the Supreme Court Nominating Commission, membership amended.

HCR 5012
Constitutional amendment; abolishing the Supreme Court Nominating Commission; Supreme Court justices appointed by governor from nominees submitted by the House Judiciary Committee.

Court Operations

In addition to altering the method of selecting justices, the Legislature introduced a number of bills aimed at changing how judges/justices maintain their position. Two methods to increase the percentages necessary to survive a retention election were proposed.

The proposal to lower the retirement age for judges/justices did get some traction as it would be the easiest, statutory (63 votes) change rather than constitutional (84 votes), and have the largest impact (five Kansas Court of Appeals judges and two Kansas Supreme Court justices would age out during this administration).

Finally, the Senate introduced a bill that would make the Supreme Court Nominating Commission a public body governed by the Kansas Open Meetings and Open Records Act. The goal of this proposal is to require the SCNC members’ votes to be open to the public. This bill stalled due to an amendment on the Senate floor requiring the governor to provide a list of all applicants who apply for the Kansas Court of Appeals.

HCR 5009
Constitutional amendment, 33 percent vote against retention of a Supreme Court justice would result in open position.

HB 2073
Changing the mandatory retirement age for judges and justices.

HB 2344
Retention rates for Kansas Court of Appeals (70 percent).

SB 197
Applying open meeting requirements to Supreme Court Nominating Commission.

In addition, the Legislature passed a conference committee report that expands district judge’s jurisdiction, allows county law libraries to use certain funds for court operations, protects debts owed to the courts from dormancy, and classifies electronic filing fees as court costs. This bill, CCRB for HB 2111, was agreed to in conference committee and can be found online at [http://www.ksLegislature.org/li/b2015_16/measures/documents/ccrb_hb2111_01_0331.pdf](http://www.ksLegislature.org/li/b2015_16/measures/documents/ccrb_hb2111_01_0331.pdf).

Judicial Budget

The Kansas Legislature passed a judicial budget that increased state general funding in exchange for adopting fiscal policy proposals. The main policy provision is the non-severability clause drafted by Sen. Jeff King (R-Independence). However a lawsuit filed by Chief Judge Larry T. Solomon (Shawnee County District Court, Case No. 2015 CV 156) challenges the law because it strips the Kansas Supreme Court of administrative authority over its 31 judicial districts. Solomon claims this violates the separation of powers doctrine. Oddly, the lawsuit fails to challenge the non-severability clause that would void all judicial branch appropriations should any other part of the law be struck down.

The outcome of this lawsuit raises many more questions than it answers. Should the law be found to violate the separations of powers doctrine, does the judicial branch lose all of its funding? What timetable? Can the court keep docket fees collected from parties? Will the court be forced to repay any monies spent? Who is required to withhold funds? Will employees be required to refund salary payments?

In the meantime the judicial branch budget breaks down as follows:

- $101.9 million for SGF; (For FY 17 – State General Fund increases to $105.7 million).
- $576,000 from dispositive motion fee (SB 15).
This funding level is significantly lower than the original Supreme Court request of $123 million, but discussions with the Office of Judicial Administration lead me to believe the court system will be able to maintain current service levels.

### Bills of Interest

#### SB 45 – Constitutional Carry
SB 45 allows the concealed carry of a firearm without a concealed carry license issued by the state so long as the individual is not prohibited from possessing a firearm under either the federal or state laws. Carrying a concealed firearm cannot be prohibited in any building unless the building has posted a sign in accordance with rules and regulations from the attorney general’s office.

#### HB 2216 – Kansas Money Transmitter Act, Kansas Mortgage Business Act, ITMs and the Kansas ABLE Act
HB 2216 makes several amendments to the Kansas Money Transmitter Act (KMTA); amends the Kansas Mortgage Business Act (KOMBA) to create an exclusion for certain liens in the definition of “mortgage loan”; amends a provision governing branch banking and authorized transactions by remote service units in the Kansas Banking Code to update the definition of “remote service units”; and enacts new law to establish the Kansas ABLE (Achieving a Better Life Experience) Savings Program.

#### ABLE Act
The bill establishes the Kansas ABLE Savings Program, an enabling tax-deferred savings program authorized by the passage of the federal ABLE Act, for the purpose of empowering individuals with disabilities and their families to save private funds to support the individuals with disability and to provide guidelines for the maintenance of such accounts.

#### Senate Sub. for HB 2258 – Temporary Assistance for Needy Families
This bill places the Temporary Assistance for Needy Families (TANF) authority in statute rather than in rules and regulations. This bill modifies and creates certain requirements concerning child care, TANF assistance, and food assistance. This bill requires TANF recipients to include cohabiting partners as part of the household.

All adults applying for TANF are required to complete a work program assessment as specified by the Department of Children and Families. This includes adults who were previously disqualified or denied TANF due to non-cooperation (which the bill defines), drug testing, or fraud. Adults who are ineligible aliens or receiving Supplemental Security Income are not required to complete the assessment process. Child care support has been limited to a total lifetime maximum of 24 months per adult.

#### HB 2159 – Driving under the influence
This bill amends the law concerning driving under the influence. The bill amends the statute governing ignition interlock restrictions of driving privileges following a first occurrence of a DUI-related test refusal, test failure, or conviction to allow the person under the restriction to drive to and from the ignition interlock provider for maintenance and downloading of data from the device.

#### SB 34 – Election crimes
This bill gives independent authority to prosecute any person for a Kansas election crime to the Kansas Secretary of State’s office. It also amends the penalty for voting fraud to include a level 9 nonperson felony.

#### House Sub. for SB 91 – Renewable Energy Standards
This bill replaces the renewable energy portfolio requirements with a voluntary renewable energy goal, reduces the lifetime property tax exemption to 10 years for new renewable resources after December 31, 2016, and excludes individuals or companies that generate electricity from renewable resources at wholesale only from the definition of public utility.

#### Sub. for SB 38 – Bad Faith Assertion of Patent Infringement
This bill adds provisions regarding bad faith assertions of patent infringement to the Kansas Consumer Protection Act. The bill makes it an unconscionable act or practice under the Act to make a bad faith assertion of patent infringement by sending an electronic or written communication stating the intended recipient or affiliated person is infringing or has infringed on a patent.

#### SB 113 – Human trafficking
The bill creates a civil cause of action for a victim of conduct that constitutes human trafficking, aggravated human trafficking, or commercial sexual exploitation of a child against the person or persons who engaged in such conduct, if the victim suffered personal or psychological injury as a result of the conduct. The victim may seek actual damages, exemplary or punitive damages, injunctive relief, and any other appropriate relief. The court is required to award costs to the prevailing plaintiff, including reasonable attorney fees, and a victim awarded damages shall be deemed to have sustained damages of at least $150,000. The bill requires the action be filed within 10 years after the victim was freed from the human trafficking situation or turned 18 years of age, whichever is later. A victim is allowed to request that the attorney general pursue the case on the victim’s behalf, with damages awarded going to the victim. The attorney general is allowed to seek reasonable attorney fees and costs. The action is subject to the subrogation provisions for compensation by the Crime Victims Compensation Board, and it will not preclude any other remedy available to the victim under federal or state law.

#### HB 2003 – Annexation of noncontiguous land
This bill amends law related to annexation of noncontiguous land by a city, sometimes called “island” annexation. Specifically, the bill changes authority for unilateral annexation of land owned by or held in trust for a city by adding a requirement that the land adjoin the city. The bill also changes provisions regarding consent annexation of noncontiguous land to require the affirmative vote of two-thirds of the members of the Board of County Commissioners, rather than a simple majority.

For more information on these bills or other bills passed during the 2015 legislative session please visit the following:

- www.kslegislature.org;
- www.ksbar.org
- http://www.kslegislature.org
- www.ksbar.org
2015 Legislative Wrap Up


Special Notice

While it may be difficult to think about the 2016 legislative session when the 2015 Legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all legislative proposals be submitted in final form by September 1, 2015. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submit it to the appropriate section.

The KBA Legislative Committee will meet after the September 1 deadline to consider all legislative proposals for the 2016 session.

About the Author

Joseph N. Molina III serves as the director of legislative services for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority and served as assistant attorney general, acting as chief of the Kansas No-Call Act. Molina earned a B.A. in political science, philosophy, and economics from Eastern Oregon University and a J.D. from Washburn University School of Law.

jmolina@ksbar.org

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ATTORNEY DISCIPLINE

ORIGINAL PROCEEDING IN DISCIPLINE
NO. 112,967 – JUNE 12, 2015

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Barker, of Blue Springs, Missouri, an attorney admitted to the practice of law in Kansas in 1995. Barker’s ethical problems involved his practice of law at a time when his license was suspended for failure to pay annual registration fees and that the location of his office on his letterhead was actually a UPS store.

DISCIPLINARY ADMINISTRATOR: On July 28, 2014, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent did not file an answer. The disciplinary administrator recommended indefinite suspension.


HELD: Court found that Barker failed to answer the complaint or appear at his disciplinary hearing. Court stated that when a respondent fails to appear before the Court when facing recommendations of indefinite suspension, a sanction greater than that recommended by the disciplinary administrator or panel, even up to disbarment, may be warranted. Certainly, the lack of an appearance at a hearing before this court qualifies as an additional aggravator of these circumstances under consideration. Court also noted that had the respondent been candid with the district court in December 2013 and followed through with the opportunity to clarify his licensing status at that time, this matter would not likely be before the Court at all today. Court held indefinite suspension to be appropriate in this case.

INDEFINITE SUSPENSION
IN RE JAMES A. CLINE
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 113,191 – JUNE 12, 2015

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Cline, of Wichita, an attorney admitted to the practice of law in Kansas in 1990. Cline had been reinstated to the practice of law in 2011 and his current ethical issues involve his representation of a workers compensation/personal injury client.

DISCIPLINARY ADMINISTRATOR: On July 2, 2014, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on July 30, 2014. Respondent also entered into a stipulation regarding rule violations. Disciplinary administrator recommended indefinite suspension.

HEARING PANEL: A consolidated hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on September 17, 2014, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.4(a) (2014 Kan. Ct. R. Annot. 495) (communication); and 8.4(d) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct prejudicial to the administration of justice). Respondent entered into stipulations regarding the rule violations. Hearing panel recommended suspension for two years.

HELD: Court found the evidence and stipulation established by clear and convincing evidence the charged misconduct. Court reiterating the sanctions imposed on Cline in 2009. Court acknowledged the compliance effort the respondent made at that time, which included an affidavit in which he swore: “I believe I am fully capable of practicing law without repeating the mistakes of my past.” Court acknowledged, however, that respondent currently appeared on a complaint very similar to the ones leading to his 2009 suspension. Court adopted the disciplinary administrator’s recommended sanction of indefinite suspension.

PUBLISHED CENSURE
IN RE LARRY D. EHRlich
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 113,200 – JUNE 12, 2015

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Ehrlich, of Wichita, an attorney admitted to the practice of law in Kansas in 1974. Ehrlich’s ethical issues involved his representation of a client in a workers compensation/personal injury case and his involvement with James Cline during a time when Cline was suspended from the practice of law.

DISCIPLINARY ADMINISTRATOR: On July 2, 2014, the Office of the Disciplinary Administrator filed a formal complaint
against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on July 18, 2014. Respondent also entered into a stipulation regarding rule violations. The disciplinary administrator recommended that Ehrlich’s punishment be published censured.

HEARING PANEL: A consolidated hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on September 17, 2014, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.4(a) (2014 Kan. Ct. R. Annot. 495) (communication); and 5.3 (2014 Kan. Ct. R. Annot. 646) (responsibilities regarding nonlawyer assistance). The hearing panel recommended that Ehrlich’s punishment be published censured.

HELD: Court found the evidence before the hearing panel established by clear and convincing evidence the charged misconduct. Court found published censure was appropriate. However, a minority of the Court would impose a more severe discipline.

INDEFINITE SUSPENSION
IN RE LAURENCE M. JARVIS
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 112,511 – MAY 1, 2015

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Jarvis, of Leawood, an attorney admitted to the practice of law in Kansas in 1969. The ethical complaints against Jarvis involve his representation of clients in the area of contracts, probate, filing foreign judgment, and power of attorney. Jarvis was on a diversion agreement from prior complaints.


DISCIPLINARY ADMINISTRATOR: On March 24, 2014, the Office of the Disciplinary Administrator filed a formal complaint against the respondent, alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on April 7, 2014. The disciplinary administrator recommended that Jarvis be disbarred.

HELD: Court stated that the respondent filed exceptions to the hearing panel’s final hearing report. At oral arguments, the respondent conceded that his only objection to the final hearing report was that his due process rights were violated when the Review Committee summarily terminated his diversion and reinstated formal disciplinary proceedings on the other complaints. Court expressed no opinion as to the merits of Jarvis’ due process argument. For the purposes of this proceeding, Court assumed, without deciding, that due process does not permit discipline to be imposed for the KRPC violations arising from the conduct that was subject to those complaints. Court was more concerned with the KRPC violations that the panel found the respondent committed in his representation of a certain client and a power of attorney. The conduct from which these violations arose was not subject to the diversion agreement. And the evidence before the hearing panel established by clear and convincing evidence that the charged misconduct violated KRPC 1.7; 1.8; 8.4(c); and 8.4(d). Court adopted the panel’s findings and conclusions.

A majority of the Court agreed with the hearing panel’s recommendation that the respondent be indefinitely suspended from the practice of law. In particular, Court agreed with the hearing panel that the respondent’s knowing, intentional disregard for the authority of the district court and of the client’s temporary guardian and conservator was egregious. The respondent asked the court to consider that his actions were rooted in his desire to protect the client. While the respondent clearly disagreed with the district court that presided over the client’s guardianship and conservatorship proceedings, this is not a satisfactory explanation for the respondent’s decision to disregard and actively undermine the district court’s orders and to interfere with the temporary guardian and conservator’s management of the client’s estate. The respondent’s unwillingness to recognize or take responsibility for this misconduct further indicated that indefinite suspension is the appropriate sanction. A minority of the court would disbar the respondent.

DISBARMENT
IN RE RUSTIN K. RANKIN
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 113,235 – JUNE 12, 2015

FACTS: This is an attorney discipline proceeding against Rankin, of Fredonia, an attorney admitted to the practice of law in Kansas in

Appellate Practice Reminders

Citing to Unpublished Opinions

Though unpublished opinions are not binding precedent and are not favored for citation, it is sometimes necessary to cite to them. If you cite to an unpublished opinion, you must make sure that a full copy of the opinion is attached to the pleading. See Rule 7.04(g)(2)(C) [2014 Kan. Ct. R. Annot. 64].

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Regardless of whether you are filing a traditional paper pleading or submitting a pleading through the electronic filing system, there are basic rules for formatting. Type should always be black and margins should be one inch. See Rule 1.05(a) [2014 Kan. Ct. R. Annot. 6]. Every pleading must also bear the name, address, telephone number, fax number, and email address of the person filing the pleading. See Rule 1.05(b).

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From the Appellate Court Clerk’s Office
1999, Rankin’s ethical issues involved his business relationship with a client and his conversion of money from the client.

DISCIPLINARY ADMINISTRATOR: On August 12, 2014, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent answered on September 4, 2014, admitting some allegations and denying others. Disciplinary Administrator recommended Rankin be disbarred.

HEARING PANEL: A panel of the Kansas Board for Discipline of Attorneys held a hearing on October 29 and 30, 2014, at which the respondent appeared in person and through counsel. The hearing panel determined the respondent violated KRPC 1.5(a) and (b) (2014 Kan. Ct. R. Annot. 515) (fees); 1.7(a)(2) (2014 Kan. Ct. R. Annot. 531) (conflict of interest); 1.8(a) (2014 Kan. Ct. R. Annot. 542) (conflict of interest); 1.15(a) (2014 Kan. Ct. R. Annot. 567) (safekeeping property); and 8.4(c) (2014 Kan. Ct. R. Annot. 680) (engaging in conduct involving misrepresentation) and (g) (engaging in conduct adversely reflecting on lawyer’s fitness to practice law). The hearing panel recommended Rankin be indefinitely suspended.

HELD: Court found the evidence before the hearing panel established by clear and convincing evidence the charged misconduct. After careful consideration, a majority of the court agreed with the Office of Disciplinary Administrator that disbarment is the appropriate sanction. The facts, which are undisputed before this court, show a flagrant pattern of misrepresentation, conflict of interest, and exploitation of a vulnerable client over a number of years, all of which resulted in a substantial loss of the client’s property. This is not simply a matter of “atrocious” record keeping, as the respondent characterized it. A minority of the court would follow the hearing panel’s recommendation of indefinite suspension.

FACTS: The plaintiffs in this case—Peterson, Eilert, and Hlad—sued Ferrell doing business as 4L Grazing LLC (Ferrell), alleging Ferrell breached numerous grazing contracts while the plaintiffs’ cattle were supposed to be calving, fattening, and breeding on Ferrell’s pastures during 2008. The plaintiffs claimed that Ferrell failed in his duty to adequately feed, care for, and supervise their cattle and caused multiple forms of damages. The matter proceeded to a bench trial, and the district court found Ferrell had breached the grazing contracts. The court awarded a total of $240,416.90 of damages to compensate the plaintiffs for the reduced value of the unexpected open cows, the lost expectation value of calves never conceived, the costs associated with rehabilitating the body condition of the bulls and cows, the lost value of dead and salvaged bulls, and the reduced value of stocker cattle that did not put on expected weight. On appeal, the Court of Appeals found that Peterson did not have standing and dismissed his claims. The panel affirmed the district court’s finding of a breach of the grazing contracts and affirmed the district court’s damage award in most respects. Peterson v. Ferrell, No. 107,359, 2012 WL 5869622.

ISSUES: (1) Contracts, (2) cattle grazing, and (3) standing

HELD: Court held that because Peterson failed to come forward with any evidence that he personally owned any of the cattle in ques-
tion, he cannot meet his burden to demonstrate a cognizable injury personal to him. Court found the Court of Appeals correctly found that Peterson had no standing. Next, Court held that after a complete review of the evidence presented below, the district court’s finding that Ferrell breached these duties is supported by substantial competent evidence. There was evidence given at trial that the animals were not given nutrition adequate to their needs, that their grazing was not managed to optimize grass intake, and that their health was not adequately monitored or treated. As far as damages, the district court did not err in limiting the damages for unexpected open cows to the difference in value between a bred cow and an open cow without also awarding the lost expectation value of calves never conceived and also in settling the value of the lost bulls at the cost of virgin 2-year-old bulls. Court remanded to determine the exact amount of damages properly attributable to the cattle owned by Eilert and Hlad individually and to limit and itemize the award accordingly.

STATUTES: K.S.A. 17-7673; K.S.A. 20-3018; K.S.A. 56a-201; and K.S.A. 60-2101

CONTRACTS AND INSURANCE COVERAGE
WILES V. AMERICAN FAMILY LIFE ASSURANCE COMPANY OF COLUMBUS
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
COURT OF APPEALS – REVERSED
NO. 106,661 – JUNE 5, 2015

FACTS: After suffering severe injuries from an automobile accident, Wiles filed a claim for benefits under a hospital intensive care policy issued to him by the American Family Life Assurance Company of Columbus (AFLAC). AFLAC denied the claim under the policy's intoxication exclusion, relying in large part on a hospital toxicology report indicating that Wiles had a blood alcohol concentration of 0.25 within two hours of the accident. Consequently, Wiles filed suit against AFLAC, seeking coverage under the policy. After excluding the hospital toxicology report, the district court found that AFLAC failed to prove that Wiles' accident was in consequence of his intoxication and therefore determined that Wiles' claim for benefits was covered under the policy. The district court then granted Wiles' motion for attorney fees, finding that AFLAC's denial of coverage was without just cause or excuse. AFLAC appealed, and the Court of Appeals reversed the district court's findings and remanded the matter for a new trial.

ISSUES: (1) Contracts and (2) insurance coverage

HELD: Court agreed with AFLAC that the Court of Appeals erred in determining AFLAC had satisfied the appropriate foundation requirements to admit the hospital’s toxicology report. However, Court held the district court erred in its determination that AFLAC’s denial of coverage was without just cause or excuse and reversed that portion of the district court’s judgment awarding attorney fees to Wiles under K.S.A. 40-256.

STATUTES: K.S.A. 20-3018; K.S.A. 40-2203; and K.S.A. 60-256,-419, -460, -2101

EMINENT DOMAIN AND SAVING STATUTE
NEIGHBOR V. WESTAR ENERGY INC.
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 111,972 – MAY 8, 2015

FACTS: In October 2011, Westar Energy Inc. (Westar) sought an easement over real estate owned by Neighbor through a condemnation proceeding under the Eminent Domain Procedure Act (EDPA). In accordance with the EDPA, the district court determined Westar had the power of eminent domain and that the taking was necessary to Westar's lawful corporate purpose. It then
appointed three appraisers to determine Neighbor's compensation for the taking.

On February 6, 2012, the appraisers filed their report with the district court, and Westar paid the appraisers' award to the clerk of the court. On February 27, 2012, Neighbor properly appealed their award to the district court under K.S.A. 2014 Supp. 26-508 by timely filing his notice of appeal. On May 20, 2013, Neighbor filed a motion to dismiss his appeal without prejudice. The district court granted the motion on June 6. Approximately five months later, on November 25, Neighbor filed a second notice of appeal, purporting to again appeal the appraisers' award under K.S.A. 2014 Supp. 26-508. He also cited Kansas' saving statute, K.S.A. 60-518, as authority for allowing his otherwise untimely second appeal. Westar moved to dismiss. It argued K.S.A. 60-518 does not apply to an appeal of an appraisers' award permitted under K.S.A. 2014 Supp. 26-508 and therefore his second appeal should be barred as untimely. After a hearing, the district court agreed with Westar, dismissing Neighbor's appeal with prejudice.

ISSUES: (1) Eminent domain and (2) saving statute

HELD: Court disagreed with the district court. K.S.A. 2014 Supp. 26-508 provides that in eminent domain cases, "[t]he appeal shall be docketed as a new civil action, the docket fee of a new court action shall be collected and the appeal shall be tried as any other civil action." Civil actions are generally governed by the time limitations in Article 5 of the Kansas Code of Civil Procedure, K.S.A. 60-101 et seq. Because Article 5 of the code includes K.S.A. 60-518, the saving statute applies to such eminent domain appeals. Accordingly, Court reversed the district court's dismissal and remanded for further proceedings.

STATUTES: K.S.A. 26-501, -504, -508; and K.S.A. 60-101, -518

### Appellate Decisions

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**DOUGLAS DISTRICT COURT AND COURT OF APPEALS – AFFIRMED ON ISSUES SUBJECT TO REVIEW**

**NO. 108,563 – MAY 1, 2015**

**FACTS:** Civil jury declared Thomas to be a sexually violent predator under Kansas Sexually Violent Predator Act. On appeal he claimed in part the district court (1) violated his federal right under Confrontation Clause by permitting state's expert witnesses to give opinions based on hearsay statements within his treatment records, and (2) improperly instructed jury on state's burden of proof by giving an erroneous reasonable doubt instruction. Court of Appeals affirmed in unpublished opinion. Review granted on both issues.

**ISSUES:** (1) Hearsay challenge and (2) instructional error

**HELD:** Court of Appeals correctly found the Confrontation Clause challenge was not preserved for appellate review. Court reiterated that appellants asserting Confrontation Clause challenges for first time on appeal may not circumvent K.S.A. 60-404.

Pattern instruction states "... If you have reasonable doubt as to the truth of any of the claims required to be proved by the State..." In this case, error is assumed by district court's substantive modification of the instruction to read "... If you have reasonable doubt as to the truth of the claims to be proved by the State...", but error was harmless.

**STATUTES:** K.S.A. 2014 Supp. 59-29a02(a), -29a07(a); K.S.A. 2014 Supp. 60-251(d)(2), -261, -2101(b); K.S.A. 59-29a01 et seq.; and K.S.A. 60-404

**HEALTH CARE EXPENSES AND INDIGENG CRIMINAL OFFENDER**

**UNIVERSITY OF KANSAS HOSPITAL AUTHORITY ET AL. V. THE BOARD OF COUNTY COMMISSIONERS OF THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/KANSAS CITY, KANSAS, ET AL.**

**WYANDOTTE DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED**

**NO. 108,391 – MAY 22, 2015**

**FACTS:** A Kansas Highway Patrol (KHP) trooper stopped Thomas for speeding in Wyandotte County. When the trooper exited his patrol vehicle, Thomas sped away. An ensuing high-speed chase ended when Thomas crashed head-on into a tree. The trooper removed Thomas from his car, put him on the ground, handcuffed him, and formally placed him under arrest. Although the trooper called for an ambulance, Thomas initially refused any medical services, but the trooper later took Thomas to the emergency room at Kansas University Medical Center. Staff insisted on keeping Thomas overnight and the trooper instituted a “police hold” on Thomas, which meant that he wanted the hospital to call him before releasing Thomas. The trooper picked up Thomas the next day and took him directly to the Wyandotte County jail. No KHP officers guarded Thomas during his hospital stay, although there was an officer from the Kansas University Police Department in Thomas’ room when the trooper arrived to take Thomas to jail. During the hospital stay, Thomas—whose indigence the parties do not challenge—incurred $23,197.29 in medical charges from the University of Kansas Hospital Authority and $2,311 from the Kansas University Physicians, Inc. The Hospital Authority demanded payment from both the Unified Government of Wyandotte County/Kansas City, Kansas, and KHP. Both refused to pay the Hospital Authority for Thomas’ expenses, each claiming it was not liable under the law. The Hospital Authority filed suit against both the county and KHP. The county prevailed in its arguments before the district court and Court of Appeals. Both KHP and the Hospital Authority continue to argue the county should be liable for Thomas’ medical care.
ISSUES: (1) Health care expenses and (2) indigent criminal offender

HELD: Court held that Thomas was under arrest and in KHP’s custody at the time he was taken to the hospital for treatment. Based on that custody, KHP was liable for Thomas’ reasonable medical expense under K.S.A. 22-4612(a), which superseded the holding in Wesley, 237 Kan. 807. Court held the district court correctly affirmed the district court’s resolution of the case.

STATUTES: K.S.A. 19-1910; and K.S.A. 22-2202, -4612, -4613

INSURANCE AND SCHOOL ACTIVITIES

RODRIGUEZ ET AL. V. USD 500 ET AL.

WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – REVERSED

NO. 107,174 – JUNE 12, 2015

FACTS: An accident that injured Rodriguez occurred on August 29, 2006, while he was traveling to his first match of the Sumner Academy soccer season. Rodriguez was riding in the bed of a pickup truck driven by fellow student and teammate Hitze when the pickup collided with another car. Rodriguez was thrown from the pickup and sustained the injury that now requires him to have round-the-clock care. Rodriguez’ mother initially filed this lawsuit on his behalf against the school district, Hitze, and the driver of the car that had collided with Hitze’s truck. During the course of the lawsuit, plaintiff learned that the Association, which administers various extra-curricular activities in the state, had purchased a Mutual of Omaha policy to cover injuries sustained by participants during events the Association sanctioned, as well as during certain types of travel to and from such events. Mutual of Omaha denied coverage and was added as a defendant. After a lengthy bench trial, the district judge ruled that Rodriguez’ travel in Hitze’s truck was neither “authorized” by the school district nor “subject to reimbursement,” the two requirements for “covered travel” under the definition in the Mutual of Omaha policy. The judge based his decision on his belief that the school was prohibited by state law and district policies from authorizing travel by private vehicle when no adult was present. And, in his view, the travel would have qualified as subject to reimbursement only if the driver had a contract with the school district to pay for gasoline; there was no evidence that Hitze had such a contract. The district judge therefore held that Mutual of Omaha should be dismissed as a defendant in the case. The Court of Appeals held the trip was authorized travel as contemplated by the insurance policy. However, the Court of Appeals found that the travel was not qualified as subject to reimbursement and thus there was no coverage under the Mutual of Omaha policy.

ISSUES: (1) Insurance and (2) school activities

HELD: Court held the evidence admitted at the bench trial made clear that Rodriguez’ travel with Hitze, although not arranged for or supervised by Sumner Academy, was nevertheless authorized by it. Nothing in the administrative guideline 3.5.5.3.1-A or in K.S.A. 72-8305 or K.S.A. 72-8301(c) ran contrary to Sumner Academy’s system of allowing such travel once parents agreed to it. However, Court disagreed with the Court of Appeals and district court in finding that Hitze’s expense in transporting Rodriguez to the soccer match qualified as “subject to reimbursement” under the Mutual of Omaha policy. Court stated that a reasonably prudent insured would understand the phrase to include travel that could be reimbursed and not limit its application to travel that was likely or would be or was required to be reimbursed.

DISSENT: Justice Johnson dissented and would find that the travel expenses were not subject to reimbursement under the insurance policy.

STATUTE: K.S.A. 72-8208a, -8301, -8305

CRIMINAL

STATE V. AGUIRRE

RILEY DISTRICT COURT – REVERSED AND REMANDED


FACTS: After the state presented a video recording of detectives’ two interviews with Aguirre, jury convicted him of capital murder for premeditated intentional killing of his ex-girlfriend and their son. On appeal he claimed in part that his motion to suppress incriminating statements made during the two interviews should have been suppressed because officers failed to honor his invocation of Miranda rights during the first interview, and that constitutional violation tainted statements made during the second interview.

ISSUE: Invocation of Miranda rights

HELD: Under the facts in this case, law enforcement officers violated Aguirre’s Miranda rights when they refused to allow him to terminate questioning as he had been advised he could. All statements obtained in first interview after he invoked his Miranda rights should have been suppressed. Applying Smith v. Illinois, 469 U.S. 91 (1984), the taint of the Miranda rights violation was not sufficiently attenuated to validate his waiver of rights in the second interview, thus statements obtained in second interview should have been suppressed as well and cannot be used in harmless error analysis. Because state failed to carry burden of showing that the erroneous admission of Aguirre’s unconstitutionally obtained confessions was harmless, Aguirre’s convictions were reversed and case was remanded to district court.

DISSENT: (Biles, J., joined by Nuss, C.J., and Rosen, J.): Under Kansas case law, including State v. Scott, 286, Kan. 54 (2008), there was no unambiguous and unequivocal invocation by Aguirre of his right to remain silent. Given inconsistency in his statement about “tak[ing] rights” and “wanting to keep helping officers” after he returned another son to family members, it was reasonable for officers to ask follow up questions to determine whether the statement voiced Aguirre’s concern over his son’s care or Aguirre’s intent to invoke right to remain silent.

STATUTE: K.S.A. 2014 Supp. 22-3601(b)

STATE V. BOLLINGER

BOURBON DISTRICT COURT – AFFIRMED

NO. 110,945 – JUNE 26, 2015

FACTS: Bollinger was convicted by a jury of felony murder, aggravated arson, and aggravated child endangerment when his wife died and his son was severely injured in a house fire. Bollinger challenges the sufficiency of the evidence based on the statutory elements of arson, the constitutionality of the arson statute, prosecutorial misconduct in closing argument, admission of out-of-court statements, and cumulative error.

ISSUES: (1) Sufficient evidence, (2) constitutionality of the arson statute, (3) prosecutorial misconduct, (4) admission of evidence, and (5) cumulative error

HELD: Court held a jury does not have to specify the nature of the other person’s property interest in an arson case. Whether a particular interest qualifies as an interest to support an arson conviction is a question of law. Court held the jury had before it evidence sufficing to support a factual determination from which the legal conclusion could be drawn that Bollinger set fire to property in which another person , his wife, had a legal interest. Regarding the constitutionality of the arson statute, Court held that applying the statutory language to Bollinger and his marital situation, as opposed to applying the statute to an abstract defendant, the proscribed conduct does not lie in some fuzzy realm of speculation. Instead, a reasonable interpreta-
tion of the statutory phrase “any interest” implies an assertable legal interest in property. The Kansas arson statute is sufficiently clear as to inform Bollinger that setting fire to the house in which his wife was residing would constitute arson, and the resulting prosecution did not constitute an arbitrary and discriminatory enforcement of the statute against him. Next, Court held the prosecutor did not belabor the assertion that the jury could reasonably conclude that someone could be heard screaming in the background, and the identity of the screaming person would not have been critical for the conviction. The prosecutor simply asked the jury to listen to the tape and reach a decision about what it was hearing. The prosecutor did not act improperly, and Court found no error. Court stated Bollinger failed to object to the out-of-court statements made by his wife leading up to the fire and consequently the issue was not preserved for appeal. Court found no error to cumulate.

STATUTES: K.S.A. 21-5812; K.S.A. 23-2801; K.S.A. 59-505; and K.S.A. 60-404, -460

STATE V. BOLZE-SANN
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 105,297 – JUNE 19, 2015

FACTS: An infant died after becoming trapped between mattress and footboard of adult bed at daycare provider’s home. Jury convicted Bolze-Sann of involuntary manslaughter and aggravated endangering a child. Court of Appeals affirmed in unpublished opinion. Bolze-Sann petitioned for review on claims: (1)-(3) challenging sufficiency of evidence relevant to proving she acted recklessly; (4)-(5) alleging district court erred in instructing jury; and (6)-(7) alleging procedural trial errors including how district court answered a jury question, and jury not being polled.

ISSUES: (1) Preliminary hearing evidence of reckless conduct, (2) trial evidence of reckless conduct, (3) evidence of reckless conduct supporting alternative means of involuntary manslaughter, (4) declining to define “imminence” for jury, (5) refusal to issue limiting instruction regarding evidentiary value of state regulation, (6) written response to jury question, and (7) jury polling

HELD: Bolze-Sann filed pretrial motion to dismiss, arguing evidence at preliminary hearing was insufficient to establish probable cause that she had committed crimes of aggravated endangering a child or involuntary manslaughter. District court properly dismissed the motion as untimely filed.

No merit to the claim that the state did not show that Bolze-Sann realized or should have realized the particular danger of positional asphyxiation, and no merit to the challenge that any danger was “imminent.” If a defendant exposes an infant to a known risk that injury could result if the infant naps on an adult bed, the risk exists throughout the period the child naps and is imminent. Under facts in case viewed in light most favorable to state, there was sufficient evidence for reasonable jury to conclude that (1) Bolze-Sann realized the danger to the infant in allowing the infant to nap on an adult bed, and (2) consciously and unjustifiably disregarded that danger.

Even if court were to find district judge instructed jury on alternative means, substantial evidence was presented as to each means. Bolze-Sann did not object to lack of specific definition for “imminence,” and did not propose a definition. No error, let alone clear error, occurred with respect to omission of a definition of “imminence” from the jury instructions.

Under facts in this case, district judge did not err in refusing to instruct jury that K.A.R. 28-4-116(b)(2)(A) (2009) is not intended to protect infants from suffocation.

Under K.S.A. 22-3420 before 2014 amendment, it was error for district judge to discuss and answer outside the defendant’s presence a question received from jury during its deliberations. Error is assumed when record does not indicate whether Bolze-Sann was present when district judge discussed question with prosecutor and defense counsel, but error was harmless given no showing her presence would have made a difference. No showing of structural error occurring in district court’s failure to comply with deliberating jury procedures, or in any violation of statutory or constitutional right to public trial or impartial judge.

Bolze-Sann’s failure to raise jury polling issue before the district court, either contemporaneously or in a posttrial motion, precludes appellate review.

CONCURRENCE (Stegall, J., joined by Rosen, J.): Writes separately to address confusing and contradictory caselaw on limited question of whether a judge answering a jury question with a written note, as distinct from giving an oral answer in open court, violates Sixth Amendment requirement that a defendant be present at every critical stage of the proceeding. Because state conceded error here, a future case will have to revisit the question and bring needed clarity to this unsettled area of criminal procedure.

STATUTES: K.S.A. 2014 Supp. 22-3405(a), -3420, -3420(d), -3420(f); K.S.A. 21-3201(c), -3404(b), -3608(a)(2); and K.S.A. 22-2902, -3208(4), -3405(1), -3414(3), -3420, -3420(3), -3421

STATE V. CHEEKS
WYANDOTTE DISTRICT COURT – REVERSED
AND REMANDED
NO. 111,279 – JUNE 19, 2015

FACTS: Cheeks was convicted in 1993 of second-degree murder of wife. State v. Cheeks, 258 Kan. 581 (1995). He filed March 2009 petition for postconviction DNA testing under K.S.A. 21-2512. District court summarily denied the petition because statute limited testing to convictions involving first-degree murder or rape. On appeal Cheeks prevailed on equal protection claim, requiring statute being extended to similarly situated individuals, and petition was remanded to district court. State v. Cheeks, 298 Kan. 1 (2013). Meanwhile, Cheeks was released on parole. District court again denied the petition, finding Cheeks was no longer “in state custody” as required by K.S.A. 21-2512. Cheeks appealed.

ISSUE: Interpreting K.S.A. 21-2512

HELD: Plain language of K.S.A. 21-2512 makes custody status of the convicted person of interest only at the time the petition is filed, not when the petition is heard. Because Cheeks was in prison when he filed his petition for postconviction DNA testing, he satisfied the “in state custody” requirement of K.S.A. 21-2512. No need in this appeal to address whether Cheeks remained “in state custody” for purposes of K.S.A. 21-2512 after having been released on parole.

DISSENT (Rosen, J., joined by Stegall, J.): Agrees that Cheeks’ custodial status at the time he filed his petition controls, but does not agree Cheeks is entitled to the relief being sought. Would deny the request and dismiss the petition based on reasoning set forth in dissent in Cheeks, 298 Kan. 1, 17-20.

STATUTE: K.S.A. 21-2512, -3401, -3502

STATE V. DICKEY
SALINE DISTRICT COURT – REVERSED
AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 110,245 – MAY 22, 2015

FACTS: Dickey pled guilty to felony theft. Presentence investigation report (PSI) designated criminal history score based on three prior person felonies, including a 1992 pre-KSGA juvenile adjudication. On appeal Dickey argued for first time that this classification violated Sixth Amendment, citing Descamps v. United States, 570 U.S. ___, 133 S. Ct. 2276 (2013), and Apprendi v. New Jersey, 530 U.S. 466 (2000). He also cited the analysis in State v. Murdock, 299 Kan. 312 (2014), as further support. State argued Descamps was inapplicable because it involved application of a federal sentencing
enhancement statute, and claimed the invited-error doctrine barred Dickey’s challenge because he did not challenge the classification at sentencing. Court of Appeals vacated the sentence and remanded, holding (1) the Descamps argument could be raised for first time on appeal, (2) the analysis and holding in Murdock did not apply in this case, and (3) classifying the 1992 juvenile adjudication as a person felony required judicial factfinding in violation of Dickey’s constitutional rights as described in Descamps and Appendix. 50 Kan. App. 2d 468 (2014). Court granted state’s petition for review and Dickey’s cross-petition.

ISSUES: (1) Waiver, (2) applicability of Murdock, and (3) Descamps

HELD: Dickey’s legal challenge to classification of his 1992 burglary adjudication can be raised for first time on appeal. A defendant’s stipulation or failure to object at sentencing to convictions listed in PSI may prevent a later challenge to the existence of the listed convictions, but a stipulation or lack of objection regarding how those convictions should be classified or counted for purpose of determining the criminal history score will not prevent a subsequent challenge under K.S.A. 22-3504(1) of the prior convictions. To the extent State v. Vandervort, 276 Kan. 164 (2003), State v. Gueller, 276 Kan. 578 (2003), and State v. McBride, 23 Kan. App. 2d 302 (1996), stand for proposition that a subsequent legal challenge under K.S.A. 22-3504(1) is waived if a defendant stipulated or failed to object at sentencing to classification of prior convictions or the resulting criminal history score, those cases are specifically overruled.

Unlike prior convictions at issue in Murdock, KSGA provides a specific method for classifying prior burglaries for criminal history purposes. Issue in this case is controlled by K.S.A. 2014 Supp. 21-6811(d). Neither Murdock’s legal reasoning nor holding has any applicability to this classification issue.

Under facts of this case, district court was constitutionally prohibited from classifying Dickey’s prior burglary adjudication as a person felony under K.S.A. 2014 Supp. 21-6811(d) because doing so necessarily resulted from district court making or adopting a factual finding (i.e., the prior burglary involved a dwelling) that went beyond simply identifying the statutory elements that constituted the prior burglary adjudication. Burglary of a “dwelling” (as defined in K.S.A. 2014 Supp. 21-5111[k]) was not included within statutory elements making up Dickey’s burglary adjudication under K.S.A. 1991 Supp. 21-3715, thus the burglary adjudication should have been classified as a nonperson felony for criminal history purposes. Sentence was vacated. Case was remanded to district court for re-sentencing with instructions that the prior burglary adjudication be classified as a nonperson felony.

STATUTES: K.S.A. 2014 Supp. 21-5111(k), -6809, -6811(a), -6811(d), -6814(c), -6820(e)(3); K.S.A. 2014 Supp. 21-4710(d)(8), -4711(a), -4715(c), -4721(e)(3); K.S.A. 22-3504, -3504(1); and K.S.A. 1991 Supp. 21-3715

STATE V. DULL

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED COURT OF APPEALS – REVERSED

NO. 106,437 – JUNE 5, 2015

FACTS: Dull was convicted on guilty plea to burglary and misdemeanor theft, offenses committed when he was 18. In another case in which he was prosecuted as an adult, he was convicted on guilty plea to aggravated indecent liberties with a child, and committed when he was 17. District court consolidated the cases, ordered consecutive sentences, and as required by statute for aggravated indecent liberties conviction, ordered lifetime post-release supervision. Dull appealed, arguing for first time that mandatory lifetime post-release supervision for juveniles categorically constitutes cruel and unusual punishment under U.S. and Kansas constitutions when imposed on juveniles who have committed and are later convicted of similar sex offenses. He also challenged the imposition of consecutive sentences. In unpublished opinion, Court of Appeals affirmed, applying analysis in Graham v. Florida, 560 U.S. 66 (2010), and relying on State v. Mosman, 294 Kan. 901 (2012), and State v. Cameron, 294 Kan. 884 (2012), cases upholding constitutionality of mandatory lifetime post-release supervision for first-time adults convicted of aggravated indecent liberties. Panel also found it lacked jurisdiction under K.S.A. 21-4721(c)(1) to consider Dull’s challenge to imposition of consecutive sentences. Dull’s petition for review on both issues was granted.

ISSUES: (1) Mandatory lifetime post-release supervision for juveniles and (2) consecutive sentences

HELD: Dull’s Eighth Amendment categorical proportionality challenge is properly before the court. Relevant Eighth Amendment case law was reviewed. No Kansas cases have addressed issue raised in this appeal. While mandatory lifetime post-release supervision has been found to be constitutional for adults, factors that result in diminished culpability for juveniles all diminish the penological goals of lifetime supervision for juvenile sex offenders. Court holds that mandatory lifetime post-release supervision is categorically unconstitutional under Graham when imposed on a juvenile who committed and was later convicted of aggravated indecent liberties. The mandatory lifetime post-release supervision portion of Dull’s sentence was vacated.

District court imposed departure sentence for Dull’s aggravated indecent liberties conviction. Applying reasoning of State v. Ross, 295 Kan. 1126 (2012), K.S.A. 21-4721(c)(1) does not prevent a challenge to district court’s decision to impose consecutive sentences in a multiple conviction case involving a presumptive and departure sentence. Panel’s dismissal of this issue for lack of jurisdiction was erroneous, but district court’s imposition of consecutive sentences was affirmed under facts in this case.


STATE V. FUNK

CLOUD DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED

NO. 107,422 – MAY 15, 2015

FACTS: Funk appeals from the imposition of lifetime post-release supervision following his guilty plea and conviction of one count of attempted indecent solicitation of a child. His plea arises from criminal charges filed against him following his sexual encounter with a 14-year-old girl. Funk contended lifetime post-release supervision was disproportionate as applied to him, constituting cruel and/or unusual punishment in violation of Section 9 of the Kansas Constitution Bill of Rights and the Eighth Amendment to the U.S. Constitution. Both the district court and Court of Appeals rejected his arguments.

ISSUES: (1) Sentencing, (2) attempted indecent solicitation of a child, and (3) lifetime post-release supervision

HELD: Court examined the factors pursuant to State v. Freeman, 223 Kan. 362. Court held that balancing all the factors, Funk’s crime was a serious one, and a sex offense against a minor has historically been treated as a violent felony without regard to whether physical force was used to commit it. Funk’s mitigating claims about the nature of his crime were not supported by evidence or factual findings, and Funk presented no evidence of mitigating facts about his character. Finally, the second and third Freeman factors did not
indicate Funk's lifetime post-release supervision sentence was grossly disproportionate to sentences for more serious Kansas offenses or for similar conduct outside our jurisdiction. The seriousness of Funk's crime and the legitimate penological goals of the lifetime post-release supervision period outweigh the lack of strict proportionality with other sentences in Kansas and other jurisdictions, especially given that the sentence is not grossly disproportionate. Because of this, lifetime post-release supervision is not so disproportionate a punishment to an 18- or 19-year-old man's participation in a sex act with a 14-year-old girl that the punishment is shocking to the conscious or offensive to fundamental notions of human dignity. Funk's lifetime post-release supervision term did not constitute cruel or unusual punishment under Section 9 of the Kansas Constitution Bill of Rights.

Dissent: Justice Johnson dissented and would find the lifetime post-release supervision sentence in this case is unconstitutionally cruel and unusual.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3301, -3505, -3510, -4703, -5506, -6804; K.S.A. 22-3717; and K.S.A. 60-2101

STATE V. GODFREY
SHAWNEE DISTRICT COURT – AFFIRMED NO. 109,086 – MAY 29, 2015

FACTS: Following initial confusion about terms of plea agreement regarding his placement at Larned State Hospital, Godfrey entered guilty plea to first-degree felony murder and aggravated battery. On appeal he claimed the state violated the plea agreement and denied him due process because the agreement was ambiguous and should have been interpreted to impose Godfrey's original understanding that he would be sent to Larned “in lieu of sentencing.”

ISSUE: Preserving issue for review

HELD: Godfrey's claim, raised for first time on appeal, was not considered because he failed to preserve it for appellate review. He neither filed motion to withdraw his plea after the initial confusion nor did he object to state's recommendation at sentencing. Kansas Supreme Court Rule 6.02a requires an appellant raising a constitutional issue for first time on appeal to affirmatively invoke and argue the exception to mootness doctrine. Finding Godfrey failed to satisfy Rule 6.02(a)(5) in this respect amounts to abandonment of the constitutional claim. Here, Godfrey made no effort to explain why review of his unpreserved constitutional issue was warranted. Admonition in State v. Williams, 298 Kan. 1075 (2014), was applied.

STATUTE: K.S.A. 22-3431

STATE V. HILTON
ELLIS DISTRICT COURT – APPEAL DISMISSED NO. 102,256 – MAY 22, 2015

FACTS: District court revoked both first and second of Hilton's two consecutive 12-month probation terms as a result of violation occurring during first 12 months. Court of Appeals dismissed Hilton's appeal as moot because she had completed service of prison terms underlying the consecutive probation. Kansas Supreme Court reversed and remanded, finding exception to mootness doctrine because the dual revocation was an issue of public importance likely to arise in other cases. Court of Appeals then affirmed the revocation of both probation terms, but questioned without addressing the predicate issue of whether district judge was empowered to grant consecutive probation terms in the first place. 49 Kan. App. 2d 586 (2013). Petition for review granted.

ISSUE: Mootness of the appeal

HELD: Court of Appeals was right in the first place. Appeal is dismissed as moot. Answering the question posed on petition for review would require court to reach and decide a predicate uncontested question on the authorization for consecutive probation peri- ods. Court will await a more appropriate setting to consider whether a district judge may grant consecutive probation terms and, if so, under what circumstances such terms may be revoked.

STATUTES: None

STATE V. JAMES

FACTS: Police officers stopped James for traffic infraction and discovered marijuana in the car. After he was arrested, handcuffed, and advised of Miranda rights, officers took phone from his hip pocket. James filed motion to suppress evidence including text messages discovered on his phone. District court denied the motion, finding James did not consent to the search, but search of the cell phone was a lawful search incident to the arrest. James appealed his convictions, arguing in part that the warrantless search of his cell phone violated the Fourth Amendment. Court of Appeals affirmed, 48 Kan. App. 2d 310 (2012). James' petition for review was granted.

ISSUES: (1) Search of cell phone incident to arrest, (2) review under K.S.A. 22-2501, and (3) review under Fourth Amendment

HELD: A valid search incident to arrest does not extend to search of cell phone found on the arrestee's person, pursuant to Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (2014), decided while James' appeal was pending.

History of K.S.A. 22-2501, codifying scope of a lawful warrantless search incident to arrest, is discussed including the striking down of subsection (c) as unconstitutional in State v. Henning, 289 Kan. 136 (2009). When a statute, such as K.S.A. 22-2501, affords Kansas citizens greater protections against searches and seizures than the Fourth Amendment, the statute governs the permissible scope of state action. When such statutes are either silent or merely codify the federal constitutional standard, however, it is proper for courts to determine the permissibility of state action as a matter of constitutional law. Contrary holding of State v. Julian, 300 Kan. 690 (2014), is overruled.

Riley forecloses a valid search incident to arrest, and district court correctly found under facts of case that James' acquiescence to law enforcement demands did not constitute a legally effective consent for the search. State's use of the text messages was critical in unmasking James' guilt. The settlement agreement provided for the search was not statutorily authorized. Disagreed, however, with majority's rationale for overruling prior holding in Julian.

STATE V. JONES

FACTS: Jones was charged with aggravated robbery in 2008. She agreed to plead guilty as charged and the prosecutor agreed to join
in Jones’ request for a downward dispositional departure to probation and to recommend supervision by Community Corrections Field Services if Jones’ criminal history score was a G or lower. Jones’ criminal history score was determined to be I, which triggered the state’s obligation to join in her request for probation. At the sentencing hearing, a different judge presided and the state was represented by a different prosecutor. The prosecutor did not confirm defense counsel’s statement that the state joined in the departure motion or otherwise inform the court that the state recommended departure to probation. The sentencing judge denied Jones’ dispositional departure motion, citing the nature of the crime, Jones’ character and condition, public safety, and the crime’s seriousness. The judge sentenced Jones to 59 months’ imprisonment, the mid-range term in the applicable grid box, and 36 months’ post-release supervision. A divided Court of Appeals panel held the prosecutor did not violate the plea agreement because the prosecutor’s comments were adequate to fulfill the agreement’s requirement for the state to recommend probation. Judge Atcheson disagreed. The Supreme Court reversed and remanded for reconsideration in light of two recent plea-agreement-breach decisions. On remand, the same panel reconvened, and again the same majority determined the prosecutor did not violate the plea agreement. Judge Atcheson again dissented.

ISSUE: Plea agreements

HELD: Court stated that the prosecutor had an affirmative duty arising from the plea agreement to recommend a particular sentence, which is what Jones bargained for when she agreed to plead guilty as charged. And the only consideration she received in exchange for the plea was the state’s promise to join in her efforts to be sentenced to probation rather than imprisonment.

Court held the state breached its plea agreement with Jones. The prosecutor did not inform the court of the state’s recommendation, refer the court to a document containing the recommendation, or otherwise make sure the sentencing court was aware of the recommendation.

BIER: Justice Beier dissented and would hold the state did not breach the plea agreement.

STATUTES: K.S.A. 20-3018; K.S.A. 21-3427; and K.S.A. 60-2101

CITY OF ATWOOD V. PIANALTO
RAWLINS DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 109,796 – MAY 22, 2015

FACTS: Early on the morning of January 1, 2012, an Atwood police officer clocked Pianalto’s vehicle traveling 28 miles per hour in an area he thought was 20 miles per hour speed limit on North Lake Road. The officer was unaware the speed limit sign had been knocked down. During the stop, the officer developed suspicion that Pianalto was intoxicated. He administered field sobriety tests and arrested Pianalto for DUI. Pianalto was convicted in Atwood Municipal Court of DUI and speeding. Pianalto appealed arguing the officer lacked reasonable suspicion for the traffic stop based on the fallen traffic sign. He argued that unless otherwise marked, the speed limit automatically increased to 30 miles per hour at the place of the stop in accordance with K.S.A. 2011 Supp. 8-1558, so Pianalto’s 28 miles per hour speed did not provide the reasonable suspicion to initiate a stop for speeding. The district court denied Pianalto’s motion to suppress in a written order finding the officer was reasonably mistaken about the speed limit because he did not know the sign had fallen down. The Court of Appeals did not address the issue of another officer’s earlier knowledge of the downed sign as imputed to the arresting officer because the issue was not preserved in the trial court.

ISSUES: (1) Reasonable suspicion, (2) speeding, (3) missing speed limit sign

HELD: Court held the officer’s mistake as to the speed limit was a mistake of fact, not a mistake of law. Court also held the officer’s reliance on the false, but normally true, fact that a speed limit sign was in place was objectively reasonable. The district court found the speed limit had been 20 miles per hour on North Lake Road for “more years than anyone knew.” And the evidence established that signs displaying the 20 miles per hour limit are normally in place on both ends of the road. Court found that nothing in the record indicated the officer had any reason to doubt the continuing existence of the normal condition.

STATUTES: K.S.A. 8-1558, -1567; and K.S.A. 60-2101

STATE V. SISSON
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 106,580 – JUNE 12, 2015

FACTS: Officer Gawith of the Salina Police Department observed a driver make a right turn without activating the car’s turn signal. Gawith tried to get the car to stop. Instead of pulling over, the driver accelerated, driving as fast as 50 miles per hour in a posted 30-mile-per-hour zone. After the eventual stop, officers handcuffed and searched Sisson. After several pat-downs, Officer Carswell eventually found in Sisson’s right front pocket an electronic scale and a baggie containing a vegetable material that was later proved to be marijuana. Another officer retraced the route and along the way, found in the middle of the road nine baggies containing marijuana and one baggie containing cocaine powder. The bags were knotted in a manner similar to the baggie found in Sisson’s pocket. Sisson claimed he purchased the marijuana found in his pocket earlier that day and had intended to start using it just before the police pursuit began. He went on to explain that the scale was for kitchen use in ordinary cooking. A jury ultimately found Sisson guilty of possession of marijuana, possession of drug paraphernalia, possession of cocaine, and fleeing and eluding a police officer while committing five or more moving violations. The jury found him not guilty of possession of marijuana with intent to sell, deliver, or distribute; not guilty of possession of marijuana without tax stamps; and not guilty of possession of cocaine without tax stamps. The Court of Appeals affirmed.

ISSUES: (1) Answering jury questions, (2) video evidence, and (3) jury instructions

HELD: Court first held that it was evident that the jury based its conviction on the cocaine residue. The court instructed the jury that it had to be unanimous in rendering a such a conviction. There was nothing improper about the conviction, and the instructions, read together with the answer to the jury’s question, were enough for the jury to understand the foundation for a conviction. The court’s answer sufficient to allow the jury to fulfill its function as a factfinder. Next, Court stated that because Sisson did not demonstrate that the state breached its affirmative duty to make the tape available in advance of trial and because of the lack of demonstrable prejudice, it concluded that the district court did not abuse its discretion by allowing the state to introduce the evidence of the dashboard camera. The tape merely corroborated the testimony of police officers that Sisson was committing traffic violations as he drove away from pursuing police cars and helped defeat the assertion that the drugs on the street belonged to Sisson. Last, Court rejected Sisson’s claim that the instruction on drug paraphernalia improperly invaded the province of the jury by directing them to find that the scale necessarily constituted illegal paraphernalia. Court stated the instructions tracked the statutory language and accurately stated the law.
CONCURRING: Justice Biles concurred with the majority’s decision. He wrote separately to find disapproval with the PIK instruction language, but concluded the error was not reversible.

STATUTES: K.S.A. 21-5701; and K.S.A. 22-3212, -3414

STATE V. SOTO
RILEY DISTRICT COURT – AFFIRMED
NO. 109,374 – MAY 15, 2015

FACTS: State charged Layne (as principal) and Soto (as aider and abettor) with premeditated murder of Freel, and with other related crimes. Soto was tried first. Prior to trial, state moved to admit incriminating statements by Layne to a witness (Youdath) as declarations against interest. District court granted the motion over Soto’s objection that Layne was not available for cross-examination. During break in trial after Youdath’s testimony, state reached plea agreement with Layne but did not inform Soto’s counsel. District court did not instruct jury on lesser included offenses as proposed by state, finding no evidence to justify giving the lesser included instructions. Jury convicted Soto of aiding and abetting first-degree premeditated murder, and of various drug offenses. He filed unsuccessful motion for new trial, citing state’s failure to disclose Layne’s availability to testify about incriminating statements made to Youdath. On appeal Soto claimed that state’s failure to disclose the plea agreement, which changed Layne’s status from unavailable to available, denied Soto due process and a fair trial. Soto also claimed district court erred in failing to instruct jury on lesser included offense of intentional second-degree murder.

ISSUES: (1) Motion for new trial – state’s failure to disclose plea agreement with codefendant, (2) invited error, and (3) failure to instruct on intentional second-degree murder

HELD: Facts of case examined for *Brady* violation, finding third prong is not met. In light of overwhelming evidence, there was no reasonable probability the outcome of Soto’s trial would have changed even if Layne testified. No abuse of district court’s discretion in denying Soto’s motion for new trial.

State’s argument for application of invited error doctrine was declined. Kansas cases distinguishable by Soto’s counsel’s acquiescing to trial judge’s ruling rather than requesting that the lesser included instruction not be given.

Clear error standard applied and was not met. The second-degree instruction was legally and factually appropriate. Applying *State v. Haberlein*, 296 Kan. 195 (2012), cert. denied 134 S. Ct. 148 (2013), there was overwhelming evidence of premeditation, but there were some inferences which could have drawn a factfinder to conclude the shooting was intended but not premeditated. However, due to overwhelming evidence that Soto acted with premeditation, Court is not firmly convinced the jury would have found him guilty of aiding and abetting intentional second-degree murder if lesser included instruction had been given.

CONCURRENCE and DISSENT (Rosen, J.): Concurs with majority’s conclusions affirming Soto’s convictions. But on this record, and consistent with his dissenting opinions in cited cases applying K.S.A. 2014 Supp. 22-3414(3), would simply find the trial court did not err in failing to instruct jury on the lesser included offense.


STATE V. QUESTED
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 106,805 – JUNE 26, 2015

FACTS: Quested entered guilty pleas in two Saline District Court cases. Plea agreement provided that sentences imposed would run consecutive to yet-to-be-imposed sentence in his recent factually re-
lated guilty plea conviction in Dickinson District Court. Dickinson District Court imposed first sentence. The next day Saline District Court imposed consecutive sentences and granted dispositional departure to probation. When probation was revoked almost a year later Quested filed motion to correct an illegal sentence, claiming the Saline district judge lacked statutory authority to run the Saline sentences consecutive to the Dickinson sentence. Quested appealed the district court's denial of that motion. Court of Appeals affirmed in unpublished opinion. On Quested's petition for review, state argued there was no appellate jurisdiction to review the Saline County sentences that Quested had agreed to in the plea agreement.

ISSUES: (1) Appellate jurisdiction and (2) authority to impose consecutive sentences

HELD: There was appellate jurisdiction to consider Quested's appeal. Appellate court has jurisdiction to correct an illegal sentence even if a defendant bargained for the sentence as part of a plea agreement.

A sentencing judge in one Kansas county has authority to order a sentence to be served consecutive to a sentence previously imposed by a sentencing judge in another Kansas county. No Kansas statute expressly authorizes or prohibits a sentencing judge ordering a sentence to run consecutively to a sentence previously imposed in a different county. The legislative silence creates an ambiguity. Kansas sentencing statutes, U.S. Supreme Court decisions, and Kansas cases predating State v. Chronister, 21 Kan. App. 2d 589 (1995), were reviewed, finding no suggestion the Kansas Legislature ever intended to strip sentencing judges of common-law power to impose consecutive sentence absent a statutory abrogation of that power. No such statute was found, and post-Chronister cases supporting Quested's position were distinguished. Historical perspective and practical necessity compel reliance on common law in this limited and unique circumstance.

CONCURRING: (Bier, J.): Concurred with majority's result and rationale based on statutory construction.

DISSENT (Nuss, C.J.): Would stand by declaration in State v. Obey, 238 Kan. 280 (1985), that Legislature has reserved to itself the power for authorizing consecutive sentences. Because KSGA does not authorize consecutive sentences in this situation, the Saline sentencing judge lacked authority to order consecutive service of Quested's sentences. Any fix lies with the Legislature. Questions majority's reliance on legislative inaction on this issue, and questions of how the intermediate appellate court opinion in Chronister cases supporting Quested's position were distinguished. Historical perspective and practical necessity compel reliance on common law in this limited and unique circumstance.

CONCURRING: (Johnson, J.): The discretion retained by sentencing courts must be authorized by statutes. Legislation can remedy a perceived legislative oversight and make its own corrections. Majority's new hybrid sentencing scheme, allowing invocation of common-law sentencing authority wherever it is not prohibited by statute, cannot withstand close scrutiny. Majority mischaracterized past cases and used distorted dicta taken out of context. Finds multiple disagreements with majority's state decisis rationale based on Chronister.

STATUTES: K.S.A. 2014 Supp. 21-6820(c)(27); K.S.A. 21-3102(1), -3102(3), -4601, -4603(e(f), -4608, -4608(a), -4608(b), -4701 et seq., -5103(a); K.S.A. 22-3504(1), -3716(b); K.S.A. 38-1601 et seq.; K.S.A. 60-1507; K.S.A. 77-109; K.S.A. 2006 Supp. 21-4603(d)(b), -4603(d)(f), -4720, -4720(a), -4720(b); K.S.A. 2005 Supp. 21-4716; and previous versions of K.S.A. 21-4608

STATE V. REED
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 106,807 – JUNE 19, 2015

FACTS: Reed and Price were arrested for involvement in shooting the victim several times. Victim survived. Price entered plea and named Reed as shooter. At Reed's trial, for purpose of questioning victim's refusal to testify, district judge excused jurors and emptied courtroom except for counsel, Reed, and court personnel. District judge determined that victim was unavailable as a witness, thus victim's preliminary hearing testimony would be read to the jury. Reed was convicted of attempted first-degree murder. At sentencing, district judge granted Reed's motion for departure sentence, departing from presumptive sentence for severity level 1 crime and criminal history A, instead sentencing Reed as though he had criminal history C. Reed appealed his conviction and sentence. State challenged the departure sentence. Court of Appeals in unpublished opinion affirmed the conviction and sentence. Review granted on Reed's claims that Court of Appeals erred in holding that: closure of courtroom for hearing to determine whether victim would testify did not violate Reed's Sixth Amendment right to public trial or was harmless error; victim was unavailable and Reed had prior opportunity to confront victim at the preliminary hearing; and trial counsel was not ineffective for failing to object to prosecutor eliciting testimony from Price about his truthfulness. Review also was granted on state's cross-petition challenging the departure sentence. State further argued district court had no jurisdiction to consider Reed's claim of ineffective assistance of counsel because issue was raised for first time in untimely motion for new trial, and appellate court lacked jurisdiction to consider the issue.

ISSUES: (1) Appellate jurisdiction, (2) public trial violation, (3) ineffective assistance of counsel – preliminary hearing, (4) ineffective assistance of counsel – truthfulness questioning, and (5) downward departure sentence

HELD: Threshold jurisdictional question was resolved against state. State v. Kirby, 272 Kan. 1170 (2002), remains good law. As Court of Appeals has recognized, untimeliness of motion for a new trial is a procedural flaw that may affect the defendant's right to counsel, but it does not deprive the district and appellate court of jurisdiction.

On facts of case, Reed's Sixth Amendment right to public trial did not attach to questioning victim to determine his availability to testify. A court order to testify in face of contempt is not an indispensable condition for finding a witness is unavailable. District judge did not abuse his discretion when he determined the victim was unavailable to testify, and Reed's claim that trial counsel was ineffective for failing to object to that decision lacked merit.

Defense counsel was not ineffective for allowing the admission of unavailable victim's preliminary hearing testimony. Interest and motive of adverse party on a prior occasion for cross-examination of a witness need only be similar, not identical, to the interest and motive at a later point in order to vindicate the adverse party's right to confrontation. It is the adverse party's interest and motive, not his or her attorney's, that define the proper focus.

Criminal defense counsel is not ineffective for failing to object to prosecutor's questions about whether terms of a witness's plea agreement requires the witness to testify truthfully and confirming that the witness believes himself or herself to be doing so. Such questions in this case were not improper.

A district judge has a statutory duty to state basis for imposing a departure sentence on the record and must make findings of fact on the reasons for departure. A district judge's stated belief that sentencing guidelines have incorrectly determined the length of a particular sentencing range is not a substantial and compelling reason to justify a departure sentence. To the extent the district judge in this case relied on any disparity in sentencing guidelines between parole eligibility dictated for an attempted crime and completed crime, it was legal error to do so. Absence of findings in record does not support additional factors that panel identified as possible mitigators. Reed's sentence was vacated. Case was remanded for resentencing and to have district judge clearly state reason(s) on record and make appropriate findings.
STATE V. RODRIGUEZ

JOHNSON DISTRICT COURT – AFFIRMED

COURT OF APPEALS – AFFIRMED

NO. 106,731 – JUNE 5, 2015

FACTS: Jury convicted Rodriguez of rape, aggravated sodomy, and criminal restraint of victim; incident occurred in house where Vallejos was watching for relatives. Conviction relied on victim’s testimony that she fell asleep and awoke being sexually assaulted by Rodriguez. Rodriguez maintained that someone else raped the victim. But for multiplicitious criminal restraint conviction, Court of Appeals in unpublished opinion affirmed the convictions. Rodriguez filed K.S.A. 60-1507 motion, claiming ineffective assistance of trial counsel in failing to request DNA testing of hair found on bed where rape occurred, and trial forensics had excluded Rodriguez as source of that hair. In unpublished opinion Court of Appeals affirmed district court’s denial of relief. Rodriguez also filed post-conviction motion for DNA testing under K.S.A. 21-2512, requesting testing of samples collected from Vallejos but never analyzed. District court denied the motion, finding additional testing would not produce the noncumulative, exculpatory evidence required by K.S.A. 21-2512(c). In unpublished opinion, Court of Appeals reversed and remanded. After district court ordered additional testing to compare Vallejos’ samples to samples found at crime scene, analyst confirmed that neither Rodriguez’ nor victim’s DNA was present on any bedroom item, but Vallejos’ DNA was on pillowcase. District court denied Rodriguez’ motion for a new trial, finding this DNA evidence was unlikely to yield different outcome because pillowcase DNA could not be linked to victim. Court of Appeals affirmed in unpublished opinion. Rodriguez petitioned for review, claiming district court failed to make sufficient findings as required by Supreme Court Rule 183(j), and district court abused its discretion in denying motion for new trial. Review granted.

ISSUES: (1) District court’s findings of fact and conclusions of law and (2) motion for new trial

HELD: Rule 183(j) applies to K.S.A. 60-1507 motions, not motions for new trial. Under facts in this case, the more general Supreme Court Rule 165 was satisfied by district court’s findings and conclusions of law, including the district court’s holding that the new DNA evidence was “unlikely” to yield a different trial result.

The new DNA evidence was favorable, but under facts in case, there was no reasonable probability a jury would have reached a different outcome had it considered the testing results. District court did not abuse its discretion in denying Rodriguez’ motion for a new trial.


STATE V. WOODS

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 108,998 – MAY 1, 2015

FACTS: Woods was convicted of first-degree premeditated murder for shooting death of wife. His claims on appeal included: (1) procedural and substantive competency claims, arguing that his pretrial competency hearing was inadequate, that his unusual conduct during trial should have obligated district court sua sponte to hold a second competency hearing, and that district court erred in finding Woods competent to stand trial; (2) district court erred in admitting recorded statements Woods made during interview with investigators; (3) district court abused its discretion by prohibiting defense from voir dire questioning jurors whether they or those close to them have mental illness history; (4) insufficient evidence of premeditation supported the conviction; (5) he was entitled to instruction on lesser included offense of voluntary manslaughter under sudden quarrel or heat of passion theory; and (6) district court order that Woods register as a violent offender under the Kansas Offender Registration Act (KORA) violated Apprendi, and was a void and unenforceable contract given, Woods’ intellectual disability and mental illness.

ISSUES: (1) Competency claims, (2) admission of statements, (3) limiting voir dire examination, (4) sufficiency of the evidence, (5) lesser included offense instruction, and (6) offender registration

HELD: Competency hearings in Kansas were discussed, noting that defendants may raise both procedural and substantive competency claims. In this case, there was no denial of due process where district court complied with statutory process that was constitutionally sufficient under State v. Barnes, 263 Kan. 239 (1997). And there was no abuse of district court’s discretion in finding Woods competent to stand trial under preponderance of evidence standard, or in failing to sua sponte engage in another competency determination.

Under totality of circumstances, district court did not err in determining that Woods’ confession to the investigators was voluntary. Low intelligence alone does not preclude finding a defendant knowingly and voluntarily waived Miranda rights, and there is no evidence that Woods’ confession was coerced.

No Kansas is case directly on point, but similar to State v. Simmons, 292 Kan. 406 (2011), district court correctly held the proposed mental health voir dire query was not relevant when Woods was not raising a mental disease or defect defense.

Adequate evidence, including Woods dealing a lethal blow after victim was felled and rendered helpless, supported jury’s verdict.

A voluntary manslaughter instruction was not warranted in this case. There was no objective evidence of a provocation sufficient to support issuing that instruction.

Under K.S.A. 2011 Supp. 22-4906(a)(1)(F), all defendants convicted of first-degree murder must register under KORA. That statutory subsection does not require a district court to find the crime occurred with a deadly weapon. Also, district court’s notice was simply a form used to notify Woods he will be obligated to register as a violent offender if he is ever released from prison.

COURT OF APPEALS

CIVIL

DIVORCE AND CHILD SUPPORT
IN RE MARRIAGE OF SKOCZEK
JOHNSON DISTRICT COURT – AFFIRMED
NO. 112,057 – JUNE 5, 2015

FACTS: The parties were married in 1997. They have four minor children. In 2013, the wife filed for divorce. Sometime later, on their own, they resolved all issues except maintenance and child support. Their separation agreement provided that they would have joint legal custody of the children and they agreed to a 2-2-3 parenting plan. The district court approved the plan and incorporated the parties’ separation agreement and parenting plan into the divorce decree filed in May 2014. The court found that it was in the children’s best interests that the parties receive joint custody of the children.

The district court then tried the issues of maintenance and child support. After applying a parenting time adjustment, the district court ordered the father to pay the mother $1,700 per month child support. The father contends the court erred when it adjusted the guidelines child support figure for his parenting time and he is paying too much for child support.

ISSUES: (1) Divorce and (2) child support

HELD: Court held the district court applied the correct legal standard, and its factual determinations had legally sufficient support in the evidence. Court stated that because it does not reweigh that evidence on appeal, it concluded that others would indeed come to the same conclusion and, thus, it cannot be an abuse of discretion.

STATUTES: No statutes cited.

DIVORCE AND MAINTENANCE
IN RE MARRIAGE OF CRAWFORD
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 112,786 – JUNE 12, 2015

FACTS: The parties were married in October 1996. In October 2009, as part of the parties’ separate maintenance action, they executed a stipulation and property settlement agreement which obligated the husband to pay the wife “$1,025 per month commencing in the month that either party leaves the marital residence, with a like amount to follow each month thereafter [on] the 1st day of the month until further Order of the Court. . . . Duration of the maintenance shall be 55 months.” According to the journal entry and decree of divorce filed on February 11, 2011, the parties agreed that the 55-month maintenance period referred to in the settlement agreement expired in October 2014. In June 2014, the wife filed a motion to reinstate and extend maintenance. A hearing on the motion was held that in August 2014; after hearing arguments the district court held the settlement agreement did not have a provision regarding retaining or reserving jurisdiction. The district court found that the divorce decree did state jurisdiction was reserved “concerning said maintenance . . . for modification if necessary.” However, the district court held: “Modification and reinstatement are not similar things. In this particular case, modification in the context of Kansas law means that the Court has the authority to reduce the maintenance and the amount—from the amount of $1,025 downward but the Court is without jurisdiction to increase the maintenance upwards or to lengthen the period of time.”

ISSUES: (1) Divorce and (2) maintenance

HELD: Court held that because the settlement agreement and the original divorce decree did not expressly state or contain language making it unmistakably clear that the district court had continuing jurisdiction to hear motions for reinstatement or extension of maintenance beyond the initial order, the district court lacked jurisdiction under K.S.A. 2013 Supp. 23-2904 to reinstate or extend maintenance beyond October 2014.

STATUTES: K.S.A. 23-2712, -2903, -2904; and K.S.A. 60-1610

DUI, MOTION IN LIMINE, AND DC-70 NOTICE
CITY OF OVERLAND PARK V. LULL
JOHNSON DISTRICT COURT – REVERSED
AND REMANDED WITH DIRECTIONS
NO. 111,741 – JUNE 9, 2015 (MOTION TO PUBLISH,
ORIGINALLY FILED MARCH 13, 2015)

FACTS: Officer Morse of the Overland Park Police Department responded to the scene of an injury accident in which a truck driven by Lull had struck a U.S. mail truck at an intersection, causing the mail truck to tip on its side, trapping the driver. Lull had bloodshot eyes and smelled of alcohol. Lull admitted to having just come from a bar where he had two drinks. When asked to produce proof of his insurance, Lull initially gave Morse his medical insurance card. Lull failed multiple field sobriety tests. At the station, Morse started the required 20-minute alcohol deprivation period before the administering of a breath test and provided Lull with a copy of the DC-70 form. Morse observed Lull follow along while the DC-70 form was read to him. At one point, however, Morse became distracted by Lull’s comments and lost her place on the DC-70 form. In doing so, Morse failed to read paragraph 7 to Lull. Morse was unaware she had not read paragraph 7 to Lull until she subsequently viewed the video of their interaction. After Lull indicated that he understood the DC-70 form as read to him, Lull was asked to submit to a breath test. Lull refused, indicating he had been told by attorneys not to take the test. Lull was convicted in Overland Park Municipal Court of DUI, a second offense, refusal of preliminary breath test, and failure to yield right of way. Lull appealed to the Johnson County District Court. Before trial, Lull filed a motion in limine arguing his test refusal should be suppressed because Morse failed to comply with the oral notice requirements under K.S.A. 2012 Supp. 8-1001(k). The district court denied Lull’s motion and his subsequent renewed motion in limine raising the same argument. The jury found Lull guilty of DUI second offense and failure to yield.

ISSUES: (1) DUI, (2) motion in limine, and (3) DC-70 notice

HELD: Court held that by omitting paragraph 7, Morse did not inform Lull that the statutory penalty for him as a repeat DUI offender was more severe for him than those described in paragraph 6, i.e., automatic suspension of driving license for one year instead of an automatic suspension of either 30 days or one year depending on his blood alcohol level. Thus, Lull did not receive the information necessary for him to make an informed decision as to whether to take the test or not. Court held the officer failed to substantially comply with the notice provisions and the evidence of the test refusal should have been suppressed. Court held the error was not harmless and court was not convinced that had the test refusal evidence been excluded, the jury would still have found Lull guilty beyond a reasonable doubt. Reversed for new trial.

STATUTES: K.S.A. 8-1001; and K.S.A. 60-261
ESTATES, STANDING, AND MORTGAGES & NOTES IN RE ESTATE OF AREA
JACKSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 110,768 – MAY 29, 2015

FACTS: Five of Area’s seven children agreed to lend her money in 1995 to build a home in Horton and Area signed a promissory note and mortgage to repay the loan. In 2011 Area moved into an assisted living facility. In 2011, Area signed a quitclaim deed where she and her son, Jack, were named as joint tenants with right of survivorship. Area died shortly thereafter. The State Department of Health and Environment’s Division of Health Care Finance filed a petition to open Area’s estate to recoup nearly $33,000 in Medicaid assistance and Jack also filed a claim alleging he was one of the holders of the promissory note and was due $105,000. The administrator opposed the claim based on statute of limitations. The property was sold at a private sale for $110,000 and the children petitioned the court as mortgagees in possession and to use the proceeds to pay off the unpaid note. A magistrate judge granted the petition to pay the proceeds to the five children. In an appeal, the district court judge affirmed and in a later motion to reconsider also held the administrator appointed by the state lacked standing to appeal.

ISSUES: (1) Estates, (2) standing, and (3) mortgages and notes
HELD: Court held the administrator appointed by the state did have standing to challenge the claim and that the administrator properly asserted the statute of limitations as a defense against the enforceability of the note and mortgage lien. Court stated that Kansas is a “lien theory” jurisdiction. In a lien theory jurisdiction, the five children cannot simply claim to possess the real estate in order to protect their interests in the note and mortgage—they must take some legal action to protect their lien. Under Kansas law, a mortgage is not a conveyance of an interest in land. The mortgagee acquires no estate whatever in the property, either before or after any contract condition is broken, but acquires only a lien securing the indebtedness described in the instrument. The five children here had taken no legal action to enforce their lien until they filed their claim in their mother’s estate. Because the statute of limitations had expired, the note and mortgage were unenforceable. Court held if there is no enforceable mortgage lien, these five children cannot be mortgagees in possession. Court stated it is a long-standing principle that equity will not lie when a legal remedy exists. Court held the statute of limitations was applicable and provided a legal remedy for the five children to take action on the note within the statutory period of five years. The five children failed to do so, and the district court could not disregard the statute of limitations based on unidentified equitable consideration. The district court erred in affirming the magistrate’s decision that the five children were entitled to payment. The statute of limitations was applicable to the note and mortgage, the note and mortgage were unenforceable, and the five children were not mortgagees in possession and their claims should be denied.

STATUTES: K.S.A. 39-709; K.S.A. 59-1301, -1401; and K.S.A. 60-511, -1002

HABEAS CORPUS
SCAIFE V. STATE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 111,319 – MAY 29, 2015


ISSUE: K.S.A. 60-1507(f) in multiple conviction cases
HELD: District court’s summary dismissal of Scaife’s K.S.A. 60-1507 motion, filed January 6, 2010, was affirmed. The court stated that enactment of Kansas Sentencing Guidelines Act, State v. Guder, 293 Kan. 763 (2012), abrogated longstanding rule that multiple sentences from multiple counts in a single case were considered a single sentence. Pursuant to Baker v. State, 297 Kan. 486 (2013), and Supreme Court Rule 183(c), appellate jurisdiction on Scaife’s affirmed convictions and sentences terminated when mandate issued September 24, 2008. Scaife became a prisoner in custody under a sentence, and had until September 24, 2009, to file K.S.A. 60-1507 motion to collaterally challenge the affirmed convictions and sentences. With respect to the voluntary manslaughter conviction, his allegations of error impacting the first-degree murder conviction were cured when Kansas Supreme Court vacated that conviction and remanded for new trial.


INSURANCE
EVERGREEN RECYCLE LLC V. INDIANA LUMBERMENS MUTUAL INS. CO. ET AL.
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART
NO. 110,329 – MAY 1, 2015

FACTS: Evergreen Recycle was in the business of turning wood waste into mulch and turning other organic waste into compost. Evergreen sued Lumbermens after they refused to pay Evergreen’s insurance claim involving a fire in one of its mulch piles. Evergreen had purchased the insurance policy through its agent, Eck Agency Inc. During discovery, Lumbermens asserted various affirmative defenses that it claimed excused its duty to pay for Evergreen’s property loss, including failure to notify of loss. Lumbermens filed a third-party petition against Eck Agency seeking indemnity in the event that Eck Agency was found to be Lumbermens’ agent and if Lumbermens was found liable to Evergreen. After discovery and the pretrial conference, Eck Agency moved for summary judgment. The district court granted the motion and dismissed Eck Agency from the lawsuit. Before trial, the district court ruled on 10 motions for summary judgment or motions for partial summary judgment. The case proceeded to a jury trial on the sole issue of whether the notice requirement under the policy, i.e., “prompt notice,” was met by Evergreen. After a 13-day jury trial, the jury returned a verdict in Evergreen’s favor for $235,000. After reducing the judgment by the deductible, the court entered judgment for Evergreen in the amount of $231,000.

ISSUE: Insurance
HELD: Court held Lumbermens failed to refute Evergreen’s assertion that it did not willfully conceal or misrepresent any fact concerning the mulch piles. Court stated Lumbermens responded to Evergreen’s motion for partial summary judgment with objections rather than providing evidence to create a disputed material fact. Court held Lumbermens failed to come forward with any evidence supporting its position that the illegal acts, that the mulch pile exceeded the maximum size permitted by the fire codes and that Evergreen failed to comply with the fire codes by monitoring the internal temperature of the pile, caused or increased the loss. Court held that all of the issues of hazardous exclusions that Lumbermens now points to it knew or should have known at the time of the policy re-
newal. Court held Lumbermens provided no record cites to the facts supporting its position that Evergreen misrepresented the loss and claim. On the notice issue, court held it would not examine the issue when there was a full jury trial on the merits of that issue. Court held Lumbermen failed to present evidence that Evergreen was neglectful in the way that it chose to fight the fire. Court held Lumbermen failed to show that Evergreen did not cooperate and that the lack of cooperation resulted in substantial prejudice to Lumbermens. Court held the policy of insurance provided that mulch would be covered under both “stock” and “stock in open” as defined by the policy. The fact that Evergreen bought additional coverage in September 2008 did not negate the coverage under the original policy. As such, the district court correctly interpreted the policy limit as $237,000. Court rejected Lumbermens’ argument that the policy should be reformed to express the true intention of the parties, finding no coverage for mulch under the original policy and only $117,000 of coverage under the new policy. Court rejected Lumbermens’ alleged trial errors that the pretrial instructions substantially prejudiced the coverage under the new policy. Court rejected Lumbermens’ alleged trial errors that the pretrial instructions substantially prejudiced the jury, that the policy should have been allowed to speak for itself as to trial errors that the pretrial instructions substantially prejudiced the coverage under the new policy. Court rejected Lumbermens’ alleged trial errors that the pretrial instructions substantially prejudiced the jury, that the policy should have been allowed to speak for itself as to notice, that the jury instructions were erroneous concerning notice, that the trial court did not err in ruling on motions in limine, and the trial court did not err in excluding evidence during trial. Court found the trial court did not err in dismissing Eck as a third-party defendant.

STATUTES: K.S.A. 40-2,120, -2404; and K.S.A. 60-208, -209, -230, -250, -251, -252, -256


FACTS: Samuel Jahnke brought suit against Blue Cross and Blue Shield of Kansas Inc. due to BCBS’s refusal to pay medical bills he incurred for his treatment, including surgery, of a brain tumor. BCBS denied benefits for the medical costs associated with the surgery because the costs had been incurred during the policy’s 240-day waiting period for the treatment of tumors and growths. The Jahnkes claim that the 240-day waiting period violated the Kansas Small Employer Health Care Act, K.S.A. 40-2209b et seq., (the Act) which relates to “health benefits plans covering small employers.” BCBS removed the action to federal court on the basis that the Jahnkes’ claims were preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (2006). The federal court disagreed, finding no federal subject matter jurisdiction, and remanded the case to the state district court. Upon remand, the Jahnkes and BCBS filed cross-motions for summary judgment. The district court granted BCBS’s motion for summary judgment on Count I pursuant to the agreement of the parties but granted the Jahnkes’ motion for summary judgment on Count II. In doing so, the district court adopted the federal court’s ruling that ERISA did not apply due to the safe harbor exemption. The district court ruled the policy was subject to the Act, the Act restricted waiting periods to 90 days’ maximum, and BCBS’s 240-day waiting period violated the Act. The court awarded the Jahnkes damages in the amount of $99,459.97, plus interest. Following a subsequent motion and hearing, the court awarded $93,839.51 in attorney fees to the Jahnkes.

ISSUES: (1) Insurance, (2) Kansas Small Employer Health Care Act, (3) jurisdiction, and (4) private right of action

HELD: Court addressed this case based on jurisdictional arguments raised by BCBS at oral argument. Court agreed with BCBS and found no private right of action. Court stated the Kansas Unfair Trade Practices Act (KUTPA) affords no private right of action. The Act, in mandating that its violations “shall be treated as violations of the unfair trade practices act” and subject to its penalties, expresses clear legislative intent that it creates no private right of action. See K.S.A. 40-2209o. Court concluded that in the Act, as in the KUTPA, the Legislature provided no express or implied private cause of action. Because neither this court nor the district court has subject matter jurisdiction over the Jahnkes’ direct action in court, court dismissed the appeal and vacated the judgment entered by the district court.


JAIL TIME CREDIT HOOKS V. STATE ELLSWORTH DISTRICT COURT – AFFIRMED NO. 112,013 – MAY 1, 2015

FACTS: In 1979, Hooks was convicted of second-degree murder and received an indeterminate sentence of 7-1/2 years to life. While on parole in 1990, he was convicted of criminal threat in a new case and sentenced to one to five years’ imprisonment, resulting in an aggregate indeterminate sentence of 8-1/2 years to life. On May 12, 2010, the Kansas Department of Corrections (KDOC) revoked Hooks’ parole and on or around that same time, Hooks was charged with possession of cocaine in Sedgwick County District Court Case No. 10-CR-1650. After entering a plea of no contest, Hooks was sentenced to 20 months in prison. In the journal entry of judgment, the sentencing court noted that Hooks had accrued 208 days of jail credit. On July 31, 2012, Hooks was paroled from his indeterminate life sentence in order to begin serving his 20-month prison sentence for the 2010 conviction. Hooks asked the KDOC to apply his 208 days of jail credit to the 20-month sentence. The KDOC refused, stating it already had taken the 208 days of jail credit into account when computing his July 31, 2012, parole date from the indeterminate sentence. On March 11, 2013, Hooks filed a pro se K.S.A. 60-1501 petition in the district court alleging he was entitled to 208 days of jail credit against the 20-month sentence he received in case No. 10-CR-1650. The district court appointed counsel and ordered the state to file a response to Hooks’ petition. The state answered, alleging that Hooks’ petition should be dismissed for failure to provide proof of exhaustion of his administrative remedies. After the parties presented arguments at a November 27, 2013, hearing, the district court denied Hooks’ petition. The court did not address the state’s exhaustion argument but simply ruled that the KDOC correctly computed Hooks’ sentence.

ISSUE: Jail time credit

HELD: Court held that the state failed to object to the district court’s failure to make findings of fact and conclusions of law with respect to the state’s exhaustion argument, and the issue was not properly preserved for appeal. Court disagreed with Hooks’ claim that the conclusion reached by the court improperly disregarded the sentencing court’s order to apply the jail credit against his 20-month sentence. Court stated that the parties did not include the 2010 journal entry in the record, so it had no way of knowing whether the court in its journal entry ordered the 208 days to be credited to the 20-month sentence. But to the extent that it did so, the sentencing court erred. Notwithstanding this error, Court found the district court properly upheld the KDOC’s decision to apply 208 days of jail credit against Hooks’ indeterminate sentence. This is because the KDOC has full authority to interpret court documents for purposes of executing the sentence and calculating a release date consistent with the applicable statutes and administrative regulations.

STATUTES: K.S.A. 21-6606, -6615; K.S.A. 22-3717; and K.S.A. 60-1501
LIFE INSURANCE
NEY V. FARM BUREAU LIFE INSURANCE CO.
BARTON DISTRICT COURT – AFFIRMED
NO. 111,016 – MAY 29, 2015

FACTS: After the death of the insured, his father, the deceased, filed a claim under a life insurance contract naming the deceased as the insured and the father as the sole beneficiary. Farm Bureau Life Insurance Co. (FBL) denied payment of the death benefit under the policy. The father then filed a lawsuit seeking the policy value of the death benefit. The district court granted summary judgment in favor of FBL. On appeal from the court’s judgment, Michael argued the district court erroneously relied on K.S.A. 40-420(9) to find that FBL could contest payment of the death benefit under a life insurance policy despite the fact that the policy did not affirmatively authorize FBL to do so. The father also argued on appeal that the misrepresentations made by his son in the application for reinstatement of the lapsed policy were not material under K.S.A. 40-418.

ISSUE: Life insurance

HELD: Court held that the plain and unambiguous language of K.S.A. 40-420 requires insurance contracts delivered in Kansas to allow for contestability after reinstatement with some limitations. Court held that FBL was within its authority to contest payment under the policy based on allegations of fraud and misrepresentation of material fact pertaining to reinstatement because the insured died within two years of the date the policy was reinstated. However, court held there was no dispute as to any fact necessary to establish all the elements of common-law fraudulent misrepresentation. There was no dispute that the insured made untrue statements of fact by representing in his application for reinstatement that he had not been examined or treated by any physician since the policy was originally issued. He also knew they were untrue, as he had experienced several visits to doctors since the policy was originally issued. Those representations were made for the purpose of providing evidence of his insurability and with the knowledge that FBL may rely on them. Court stated that this established, at the very least, a reckless disregard for the truth. Court concluded there was no dispute as to any fact necessary to establish the elements of common-law fraudulent misrepresentation and FBL was entitled to judgment as a matter of law.

STATUTE: K.S.A. 40-418, -420

NEGligence, FIERGhETTER’S RULE,
AND POLICE OFFICERS
APODACA V. WILLMORE ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 111,987 – MAY 15, 2015

FACTS: Apodaca is a police officer who was injured as he reported to a traffic accident. Apodaca was traveling at a high rate of speed and crashed into a vehicle parked in the highway. The district court granted summary judgment to the defendants based on application of the firefighter’s rule.

ISSUES: (1) Negligence, (2) firefighter’s rule, (3) police officers

HELD: Court held this case presents an issue of first impression in Kansas whether the judicially created firefighter’s rule (previously referred to as the “fireman’s rule”) applies to law enforcement officers. Court found the policy expressed by the Kansas Supreme Court applies equally to firefighters and law enforcement officers. Court concluded that the firefighter’s rule bars law enforcement officers from recovering in negligence actions for injuries they receive in handling public safety calls—such as automobile accidents—as part of their official duties. Moreover, the court concluded that the exceptions to the firefighter’s rule are not applicable to this case.

STATUTE: K.S.A. 60-259
NEGLIGENCE AND POST-TRAUMATIC STRESS DISORDER
MAJORS V. HILLEBRAND ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 112,153 – JUNE 12, 2015

FACTS: Majors suffered from post-traumatic stress disorder after his daughter was severely injured in an accident when the car he was driving was involved in a collision with a large Kansas Department of Transportation (KDOT) truck driven by Hillebrand. Majors sued for his injuries claiming, Hillebrand negligently caused the accident. In granting summary judgment to the defendants, the district court found: (1) Majors did not suffer any physical injury; (2) Majors suffers from PTSD but neither PTSD nor its symptoms constitutes a physical injury under Kansas case law; (3) Kansas precedent requires the plaintiff to show that he or she suffered from a qualifying physical injury before he can succeed on a claim of negligent infliction of emotional distress; and (4) no exceptions to the physical injury rule applied.

ISSUES: (1) Negligence and (2) PTSD

HELD: Court stated that a plaintiff cannot recover for emotional distress caused by the defendant’s negligence unless that emotional distress is accompanied by or results in physical injury to the plaintiff. The qualifying physical injury must directly result from the emotional distress allegedly caused by the defendant’s negligence and must appear within a short span of time after the emotional disturbance. Court found Majors’ generalized physical symptoms of emotional distress such as those associated with post-traumatic stress disorder are insufficient to state a cause of action for negligent infliction of emotional distress. Court held district court correctly granted summary judgment to the defendants on Majors’ claim of negligent infliction of emotional distress.

CONCURRENCE: Chief Judge Malone concurred with the majority opinion but wrote separately to encourage the Kansas Supreme Court to reconsider the physical injury rule and either abandon the majority opinion but wrote separately to encourage the Kansas Supreme Court to reconsider the physical injury rule and either abandon the majority opinion or adopt an exception to allow a plaintiff in a case such as this one to properly perform the duties of his position; and (c) the order was served upon Miller. Court found that substantial evidence supported the PVD’s finding of evidence satisfactory to the board that Miller failed or neglected to properly perform the duties of his position as county appraiser. Last, court stated that, consistent with the standards governing procedural due process, and based on the plain reading of the statute that confers upon the board the authority to both suspend and terminate a county appraiser, court concluded the board’s decision to terminate Miller was a final termination decision and not a suspension. As such, Miller was not entitled to full salary and benefits from the time he was terminated to the date the PVD hearing was held or to the date that the PVD’s decision (or appeal from such decision) was final.

DISSENT: Judge Atcheson dissented. Judge Atcheson would find that Miller got nothing approaching constitutional due process from the commissioners before being dismissed, so the ALJ’s decision to that decision failed to provide sufficient due process after the dismissal. He would treat Miller’s termination as a paid suspension for the balance of his term of office.

STATUTES: K.S.A. 19-430, -431; and K.S.A. 77-514, -524, -601, -621

WORKERS COMPENSATION, DEATH BENEFITS, AND STAY DURING APPELLATE REVIEW
NUESSEN V. SUTHERLANDS ET AL.
WORKERS COMPENSATION BOARD – REVERSED AND REMANDED WITH DIRECTIONS
NO. 111,417 – JUNE 12, 2015

FACTS: Workers compensation benefits were awarded to the heirs of Nuessen who died at work at Sutherlands. In the original workers compensation claim, the board issued a final decision on June 28, 2013, affirming the administrative law judge’s (ALJ) award. Three days after the board’s decision, Nuessen’s heirs (Nuessen) sent a demand for compensation, for the $25,000 lump-sum death benefit payment plus payment of Nuessen’s medical and funeral expenses. Nuessen contended that K.S.A. 2014 Supp. 44-556(b) does not provide for an automatic stay of benefits in death cases. In response, Sutherlands argued that K.S.A. 2014 Supp. 44-556(b) stayed all payments pending the appeal to the Kansas Court of Appeals since there were no weekly benefits owed. The ALJ issued a decision awarding penalties. The board vacated the penalties awarded by the ALJ for failing to pay the death benefits in a timely fashion while the case was on appeal. The board found Nuessen was not entitled to receive penalties because the demand for the $25,000 lump-sum death benefit payment plus payment of Nuessen’s medical and funeral expenses was premature, and that K.S.A. 2014 Supp. 44-556(b) stayed payment of benefits due and owing while the decision was appealed. Sutherlands did not request a stay pursuant to K.S.A. 77-616 of the board’s decision ordering the payment of death, medical, and funeral benefits.

ISSUES: (1) Workers compensation, (2) death benefits, and (3) stay during appellate review

HELD: Court held that K.S.A. 2014 Supp. 44-556(b) provides that review by the Kansas Court of Appeals does not stay the payment of death, medical, and funeral benefits.
ment of weekly workers compensation benefits due for the 10 weeks before the Workers Compensation Board decision and for the period of time the decision is being judicially reviewed. Court also held that K.S.A. 2014 Supp. 44-556(b) does not automatically stay any action of the Workers Compensation Board. Rather, by its plain language, it prohibits the board and the Kansas Court of Appeals from staying the payment of certain benefits pending review. K.S.A. 44-512a(a) imposes a penalty when a timely demand has been made by the employee/claimant and the employer or insurance carrier fails to timely pay the benefits due. Court held that if Sutherlands desired to stay the board’s decision on appeal, it could have requested a stay order from either the board or from the Court of Appeals pursuant to K.S.A. 77-616 and it did neither. Court also held that Nuessen made two demands for payment and this put Sutherlands on notice that a request for penalties and attorney fees was possible.

**Held:** Court reiterated that it is generally within a sentencing judge’s discretion to determine whether a sentence should run concurrent with or consecutive to another sentence. Court held the district court did not abuse its discretion when it ordered Horn to serve the sentences consecutively. The district court made an adequate record of its decision. It specifically acknowledged Horn’s proffered reasons for imposing concurrent sentences, but it ordered consecutive sentences, citing the senseless nature of the crime and the vulnerability of the child victim. Based on the case facts, a reasonable person could agree with the district court’s decision to run the sentences consecutively.

**STATUTES:** K.S.A. 21-6801, -6820; and K.S.A. 22-3601

**STATE V. MULLEN**

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

**NO. 110,468 – MAY 1, 2015**

FACTS: Based on postal inspector’s report of package to be delivered that had been flagged as suspicious with police K-9 unit alert to possibility of narcotics, an anticipatory search warrant was obtained which required controlled delivery of the suspected drug package to the house before it granted authority to enter the home. Package was delivered to the house and left at the door when no one answered. Warrant was executed when Mullen took the unopened package inside. Mullen charged with possession with intent to distribute marijuana. He filed unsuccessful motion to suppress, arguing that the anticipatory search warrant was not validly executed because the triggering event – controlled delivery of the package – required hand-to-hand delivery. Mullen was convicted in bench trial on stipulated facts, with written stipulation, including his waiver of right to jury trial. On appeal he claimed (1) the affidavit submitted to obtain the anticipatory search warrant was insufficient to support probable cause to issue the warrant, (2) the anticipatory warrant was not properly executed, and (3) the district court failed to explain Mullen’s right to a jury trial or to obtain Mullen’s personal waiver of right to jury trial before proceeding with bench trial.

**ISSUES:** (1) Probable cause for anticipatory search warrant, (2) execution of the warrant, and (3) waiver of right to jury trial

**HELD:** District court did not err in finding the affidavit provided sufficient probable cause to issue the anticipatory search warrant. The affidavit provided probable cause to believe the triggering event would be satisfied.

District court’s denial of motion to suppress was affirmed. Court noted that Kansas cases have not explicitly defined the term “controlled delivery,” and holds that a controlled delivery is the delivery of a package containing suspected illegal contents under the control and supervision of law enforcement officers whether accomplished in hand-to-hand delivery or through a drop-off delivery. The triggering event for a controlled delivery anticipatory search warrant’s execution is someone taking possession and control over the package at the specified place under the supervision of law enforcement officers.

Record is silent involving district court’s explanation to Mullen of the right to jury trial and his subsequent waiver of that right. This error requires reversal of the bench trial conviction and remand to district court.

**STATUTE:** K.S.A. 2011 Supp. 65-4101(g)
The J.L. Weigand, Jr. Notre Dame Legal Education Trust is the largest private legal scholarship in the nation. The Trust was established to actively promote excellence in legal education and to encourage the most scholastically qualified students who are long-term Kansas residents to remain in or return to Kansas to practice law. Specifically, the Trust provides scholarships, mentoring and networking opportunities for students attending law school at Notre Dame, Washburn, and the University of Kansas.

This year, the Trust is pleased to announce the national distinction achieved by two of its scholars, Amelia G. Yowell and Katie Jo Luningham.

Amelia G. Yowell was selected to join the prestigious U.S. Supreme Court Fellows Program for the 2015-2016 year. Yowell has been assigned to the Administrative Office of the U.S. Courts beginning this fall.

The Supreme Court Fellows Program was created in 1973 by the late Chief Justice Warren E. Burger to provide promising individuals with a first-hand understanding of the federal government, in particular, the judicial branch. In the words of Chief Justice John G. Roberts, Jr., the program offers “a unique opportunity for exceptional individuals to contribute to the administration of justice at the national level.”

Supreme Court Fellows work with top officials in the judicial branch of the government, examining the federal judicial process and seeking, proposing and implementing solutions to problems in the administration of justice. Yowell was selected by a nine-member commission selected by the Chief Justice of the United States Supreme Court.

Before beginning her fellowship, Yowell will finish her clerkship with the Hon. Mary H. Murgia of the U.S. Court of Appeals for the Ninth Circuit. Originally from McPherson, Kansas, Yowell graduated summa cum laude from the University of Notre Dame Law School in 2011. She previously clerked for the Hon. Julia Smith Gibbons of the Sixth Circuit and served as a commercial litigation associate at Foulston Siefkin, LLP in Wichita, Kansas.

Katie Jo (Baumgardner) Luningham was named a Burton Distinguished Legal Writing Award Winner, one of the highest national awards for student legal writing. Her paper Resisting Rulemaking: Challenging the Montana Settlement’s Title IX Sexual Harassment Blueprint, was published last year in the Notre Dame Law Review.

The Burton Awards for Legal Achievement program is an academic effort sponsored by the Burton Foundation and run in association with the Library of Congress. The program is designed to reward major achievements in the law ranging from literary awards to the greatest reform in law. About 30 awards are given to practicing attorneys, and 10 students—including Luningham—were awarded the prize for legal writing.

“This is such a huge honor and it’s the best way to end a law school career,” said Luningham.

Luningham hails from Louisburg, Kansas. She served as the Executive Notes Editor of the Notre Dame Law Review. Luningham graduated magna cum laude from NDLS in May 2015, and will begin practicing at Husch Blackwell in Kansas City in September.

The J.L. Weigand, Jr. Notre Dame Legal Education Trust is proud of these two scholars for their outstanding accomplishments. They serve as excellent evidence that the Trust is achieving its goals of supporting legal education and ensuring a bright future for the practice of law in Kansas.
Positions Available

**Associate Attorney.** McDowell Rice Smith & Buchanan P.C. is seeking associate attorney candidates with 1-4 years' experience in the areas of commercial, business, dispute resolution, and/or tort and professional liability litigation. Minimum requirements include:
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If interested, please forward introductory letter and resume for consideration to gspies@mcdowellrice.com.

**Lateral Attorney.** McDowell Rice Smith & Buchanan P.C. is seeking lateral mid-senior level candidates with established practices to provide both the highest quality services to the candidate's existing clients and depth and experience to the firm in the areas of commercial, business, dispute resolution, tort and professional liability litigation and/or transactional work. Must be licensed in both Missouri and Kansas. If interested, please forward introductory letter and resume for consideration to gspies@mcdowellrice.com.

**Lawrence Firm Needs Estate Planner.** Barber Emerson L.C. seeks experienced estate and tax planning attorney to assume established practice of a senior attorney with substantial clients. Please send your resume to Managing Member, Barber Emerson L.C., 1211 Massachusetts, Lawrence, KS 66044.

**Litigation Associate.** Hite, Fanning & Honeyman LLP, a well regarded mid-sized law firm in Wichita, is looking to add a litigation associate. The ideal candidate will possess 2-5 years' experience and be committed to practicing in Wichita. Salary will be commensurate with experience. Please send resumes to Brad LaForge, 100 N. Broadway, Suite 950, Wichita, KS 67202 or LaForge@HiteFanning.com.

**Topeka City Attorney.** As a member of the City of Topeka’s executive management team, the city attorney is responsible for management of the Legal Department, including prosecution and litigation. Minimum qualifications: Juris doctorate, license to practice law in the state of Kansas, five years of professional law practice with supervisory experience. Must be a resident of Shawnee County or relocate upon completion of the probationary period. Salary range is $86,709-$131,322, DOQ. Submit a cover letter, resume and City of Topeka employment application to the City of Topeka Human Resources Department. Electronic employment application available at www.topeka.org/jobs.shtml.

**Attorney Services**


**Contract Brief Writing.** Experienced brief writer is willing to take in appellate proceedings for any civil matter. Attorney has briefed approximately 40 cases before the Kansas Court of Appeals and had approximately 30 oral arguments in the Kansas Court of Appeals and Kansas Supreme Court. I have criminal and civil litigation experience, in addition to civil and criminal appellate experience. I welcome both civil and criminal appeals. Rachelle Worrall, (913) 397-6333, rwlaw310@outlook.com.

**Estate & Trust Litigation.** Available to assist you in probate and trust litigation in Kansas, Missouri and other states. www.nicholsjilka.com.

**QDRO Drafting.** I am a Kansas attorney and former pension plan administrator with years of experience in employee benefit law. My services are available to draft your QDROs, communicate with the retirement plans, and assist with qualification of your DROs or other retirement plan matters. Let me help you and your client through this technically difficult process. For more information call Curtis G. Barnhill at (785) 856-1628 or email cgb@barnhillatlaw.com.

**Veterans Services.** Do you want to better serve your veteran clients without going to the trouble of dealing with the VA? I am a VA-accredited attorney with extensive experience applying for various VA benefits, including Improved Pension. I regularly consult with attorneys (and their clients) about the various services attorneys can offer their clients to help qualify veterans and their families for various VA programs. As soon as a client is in position to qualify, I can further assist by handling the entire application to the VA for you. For more information about my various consultation and application services, please contact the Law Office of Scott W. Sexton PA. at (785) 409-5228.
Law Office Software

Juris DOC Pro Law Office Software. Free use of Juris DOC Pro law office software for 60 days, to see if it may be useful in your practice, by saving time and helping to increase billable hours each month. Application contains child support worksheet for both Kansas and Missouri, in addition to an extensive library of other forms connected to a database. If interested, download the trial version at http://www.jurisdocpro.com/ then request a 60-day license key from Tom Harris at gtharris@sbcglobal.net.

Office Space Available

Class A Law Office in Downtown Olathe. Two large office spaces available – located across the street from the Johnson County Courthouse in the prestigious Park-Cherry Building. Services available include telephone, Internet, copier/scanner/fax, two conference rooms, file space, full kitchen with eating area. Space for staff person if needed. Call Kay Martin or Jadh Kerr for more information at (913) 782-1000.

Office Sharing for Attorney. Located at 130 N. Cherry St., Ste. 100, in Olathe, which offers quick and easy access to the Johnson County Courthouse. New Tenant renovations that include a café style open kitchen and bar seating, a collaborative area surrounded by large bay windows, a conference room, and reception area. Services available include telephone, Internet, online faxing, scanner, printer, TV, and space for staff person if needed. Call Margot Pickering for more information at (913) 647-9899.

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Office Space for Lease. Located at 921 SW Topeka Blvd., which offers quick and easy access to downtown Topeka including the County, Municipal, and Federal Courthouses; State Capitol Building; Docking State Office Building; Curtis Building; and more. There is available space on the first or second floor of the building, which includes individual offices and/or office suites. The building also includes a beautiful glass atrium sitting room used as an art display. Provided services include private parking and receptionist services. Please call Swinnen & Associates LLC at (785) 272-4878 for more information and to schedule an appointment to view the space.

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