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11 Reaching Out to Isolation
By Alisha Udhwani
Lessons of Our Kansas Heritage:  
**Brown v. Topeka Board of Education**

On March 22, 2013, I had the opportunity to speak to newly admitted citizens at a naturalization ceremony conducted at Topeka’s historic site, now a national monument, the schoolhouse associated with *Brown v. Topeka Board of Education*. Naturalization ceremonies are my favorite courtroom events; some lawyers prefer adoptions. Because almost half of my childhood was spent in other countries, I prefer naturalization ceremonies. There, one observes 80 or more adults who adopt our country as their own. The ceremony serves the happy purpose of reminding them that the United States of America is also adopting them. As a lawyer, I can think of no better site to conduct a naturalization ceremony than the school building that commemorates one of the most important and inspirational U.S. Supreme Court decisions in the last 100 years.

Natalie Haag’s “Separation of Powers” article in last month’s KBA Journal addressed a theme that has been on the minds of Kansas attorneys. We face legislation that will change the means of selecting and appointing our appellate judges, legislation believed to result from anger at our Kansas Supreme Court’s constitutional determination related to school funding. Our legislature and our governor are resolutely intent on changing the framework of the judiciary. Is such action necessary? To answer, I return to *Brown v. Topeka Board of Education* for a secondary history lesson, less well known to our citizenry, which addresses the separation of powers.

We are all aware of the courageous Supreme Court decision in *Brown v. Topeka Board of Education*, which held that the doctrine of “separate but equal” in education was inherently unequal. *Brown* flatly overruled 50 years of “separate but equal” segregated facilities previously deemed constitutional in *Plessy v. Ferguson*. The Supreme Court determined that the inherent inequality associated with separate educational facilities for different races denied our citizenry “the equal protection of the laws.” *Brown* began a long and intense integration struggle, because many parts of our country had no desire to change their segregated public schools.

As we now know, the rule of law prevailed. However, altering school segregation required numerous state and federal court determinations as integration plans were introduced by state and city school boards across our country. Members of the Fifth U.S. Circuit Court of Appeals sitting within our southern states, faced death threats to themselves and their families, which required 24-hour-a-day protection as they adjudicated integration cases. As state and local school boards attempted to comply with the determinations contained within *Brown*, additional state, federal, and Supreme Court decisions provided the constitutional guidance required to achieve equal protection under the laws.

As a young boy, I remember watching the 1957 events in Little Rock, Ark. There, a handful of black students were to commence the integration process at Central High School, despite strong objections and resistance from all quarters within the Little Rock community. Gov. Faubus sought and obtained a state order to stop the integration process. The state court order was set aside by a federal court. Ultimately, President Dwight D. Eisenhower issued a proclamation to disperse those persons engaged in the obstruction of the federal court orders. One thousand troops from the 101st Airborne Division accompanied nine black school children as they entered the doors of Central High School. Television caught the drama of soldiers with lowered bayonets, the innocence and courage of the school children, and the fierce, almost apoplectic, rage of the segregationists attempting to upset the process.

School integration was not achieved quickly. It occurred haltingly over time. With much debate and litigation addressed to integration plans, forced busing, attendance quotas, funding for public and private schools, and the like, our nation made resolute progress toward integration. Today, integrated schools are the norm. Our country, while not perfect, is stronger and better for the effort. The process was achieved through all three branches. Our judiciary could do no more than make the constitutional decision and interpret the subsequent statutory enactments. Planning and implementation was left to our legislators. Enforcement was left to our executive branch. All worked in harmony to achieve a remarkable result to strengthen and improve our country.

As our legislature and citizens continue the dialog on selection and appointment of our appellate judiciary, I hope they will keep the lessons of *Brown v. Topeka Board of Education* in mind. The power of the judiciary, the legislature, and the executive branch are each different; each power is unique. All are necessary to achieve the goals which we all have for Kansas. Disputes and strong differences of opinion remain the bedrock of a vibrant democracy. Ultimately, our state and our society are improved by public debate and political process. While differences of opinion exist, the judiciary, the legislature, and the executive branch each have a complimentary role in the process. The state of Kansas will be better and stronger if we can retain these ideals as we address and resolve our current differences.

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
One of the biggest challenges I face legally is the art of writing. If you’ll recall from my very first article in the KBA Journal, I mentioned that writing these submissions was one of the biggest reasons I was on the fence about becoming president. It isn’t that I’m a bad writer per se, it is just something I have always struggled with and been self-conscious about. I constantly compare myself to the lawyers who can write an amazing brief or a witty, intelligent article that people actually want to read.

Being that I’ve always struggled with the art of writing, especially legal brief writing, writing was a huge hurdle for me as a new associate. When I started at Fleeson, I was the only associate. That meant that for much of my first year, I spent a good deal of time doing research and writing projects for partners. I also spent much of my time stressing about those writing assignments. Eventually I got into a groove, gained a bit more confidence, and began to improve. Along the way, I learned a thing or two from partners about handling writing assignments, and I thought I would use this opportunity to share them with you.

1. Have a clear idea of what your assignment is, and don’t be afraid to ask questions

Sometimes you won’t get much direction or many details when you get an assignment. In some cases, that could be because the attorney really wants to make sure that you focus on a specific issue without getting distracted by the myriad facts. Other times, it is just an oversight, and you really do need more information in order to complete the assignment. Do not be afraid to either ask questions at the time or to go back and ask questions later. You want to turn in the best work product possible, right? You don’t want the assignment brought back to you with the comment, “You kinda missed the mark ... ,” do you? I didn’t think so. Your goal is to give the partner/attorney exactly what he or she needs and for it to completely answer the question, right? In order to accomplish that, you need to know what you are being asked to do, and the only way to know that is to ask.

2. Find out what the timeline/deadline is

Always find out when the assigning attorney needs something by. Sometimes it may be by 5 p.m. that afternoon, and other times you may have a few weeks. Regardless of the deadline, know what it is! The project you are working on could be for pretrial motions, a brief that has a deadline, or some equally important time-sensitive issue. You do not want to be the one that was unable to deliver something in a timely manner. That being said, once you know your time frame, do not put the project off until the last minute. Take some time to briefly review the assignment so that you can determine how complex it is (or isn’t) and how much time it is likely going to take you to turn in an excellent work product. Then, schedule working on it accordingly. You do not want to delay starting because you think it will be “easy” only to find out that isn’t the case. That could result in you (1) not turning in a good work product or (2) not being timely – both things that will reflect poorly on you.

3. Follow up

After you have turned in your project, I encourage you to follow up with the attorney to find out if you did what he or she needed you to do and/or if there is anything further you can help with. Sometimes attorneys get busy and forget to give feedback on projects. Don’t just sit back and assume that no news is good news. The only way to improve is to get some feedback, even if you have to ask for it. It also will reflect well on you and will show initiative on your part.

Now, what happens once you have moved past doing research and writing projects for an associate and become a partner working on your own files? At Fleeson, we are lucky enough to have a partner who primarily devotes his career to legal writing. He prepares and/or assists with briefs for most of the attorneys in our office. Sometimes, it can be really easy (especially for someone like me who does not particularly enjoy writing) to just turn over a brief and let someone else take care of it; however, as a still somewhat new attorney, I recommend against it. The only way to get better at writing is to actually do it. I always draft my own briefs. I may have them reviewed and edited before final submission, but I truly believe it is important to write the first drafts yourself.

I hope these tips will provide you some guidance in working on future writing assignments. If you are like me, and writing is not your strongpoint, I encourage you to seek out CLEs that are geared toward legal research in writing. I also encourage you to continue to practice, practice, and practice some more.

About the Author

Brooks G. Severson is a member of Fleeson, Gooing, Coulson & Kitch LLC in Wichita, where she practices in civil litigation. She currently serves as president of the KBA YLS. Brooks can be reached at bseverson@fleeson.com.
2013 KBA Elections

Voting is currently taking place for two contested elections: Secretary-Treasurer and District 2 Governor (only available to members practicing in District 2). This year marks the first year that elections will be conducted online rather than by mail; voting remains completely anonymous.

If you have not yet voted, please take a few moments to do so (your one-time username and password has been emailed to you). If you would prefer a paper ballot over voting electronically, please contact Christa Ingenthron, Governance and Public Services, at cingenthron@ksbar.org or at (785) 234-5696. All completed paper ballots must be mailed directly to:

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Please note that all voting closes at 5 p.m. on Friday, April 19. All paper ballots must be mailed by Monday, April 15 in order to meet the April 19 deadline.

Should you have any questions, please contact Jordan Yochim, KBA Executive Director, at jeyochim@ksbar.org or directly at (785) 234-5696.
Lean on Me

By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, Executive Director, mcdonalda@kscourts.org

A couple weeks ago at church the soloist sang the song “Lean on Me.” Here are the lyrics:

Sometimes in our lives
We all have pain
We all have sorrow
But if we are wise
We know that there’s always tomorrow

Lean on me, when you’re not strong
And I’ll be your friend
I’ll help you carry on
For it won’t be long
‘Til I’m gonna need
Somebody to lean on

Please swallow your pride
If I have things you need to borrow
For no one can fill those of your needs
That you won’t let show

You just call on me brother, when you need a hand
(Chorus)
We all need somebody to lean on
I just might have a problem that you’d understand
We all need somebody to lean on ...

If there is a load you need to bear
That you can’t carry
I’m right up the road
I’ll share your load
If you just call me

Call me (if you need a friend) ...

Songwriter: Bill Withers

When I reported to the KALAP board members that we needed more volunteers they suggested that it be the topic of our next column and when I started to write about what our volunteers do, the words of that song leapt to mind.

KALAP volunteers pretty much take to heart those lines about giving a hand, being there as a friend, as someone who might understand the problem, as someone to lean on during a difficult time. That is a special gift – to just be present to someone and offer encouragement. It is a unique gift too; the volunteer is not there in the role of a credentialed therapist or caregiver, but more as one human being with another. Not that therapists don’t have a part in healing – they often play a vital role. It’s just not the KALAP volunteer role. Family and friends also are an important part of a support network. But (we like to think anyway) only a lawyer can fully appreciate the joys and sorrows of being a lawyer. So a peer volunteer has something special to offer in that realm.

In the beginning most volunteers were recovering alcoholics, and they are still an important part of KALAP. But as our services have expanded to include mental health and aging issues, along with other conditions, the need to draw volunteers from a broader sector has emerged. We now have many volunteers who have not experienced a problem personally but are nonetheless willing and able to help others. The primary quality necessary to be a good volunteer in my opinion is willingness – willingness to spend some time with another lawyer and to be firmly compassionate. Time is a rare commodity and our stock in trade in the legal community, so taking time out to be with another can be challenging, perhaps even heroic. As for compassion, I can only say that my experience with lawyers across the state of Kansas convinces me that we are compassionate and care deeply for our fellow lawyers, our clients and the legal profession.

Under Supreme Court Rule 206, volunteers are bound by confidentiality, are given immunity and are relieved of the obligation to report unethical conduct. KALAP offers annual training sessions for volunteers and has a good stock of materials for use by volunteers. Our staff and board members are always available to assist if requested. Volunteers are always asked if they are in a position to work with someone and free to decline for any reason. We do our best to pair volunteers with someone with whom they have things in common. In most instances, KALAP asks that both parties sign a simple contract, primarily to establish structure and basic expectations. And volunteers are asked to provide brief periodic reports, again to maintain that structure and communication.

Like any other giving of self, the rewards almost always surpass the efforts. Paul Seymour, of Lawrence, says: “I experience great satisfaction personally in being there for others who are striving for a better way of life ... . Serving as a KALAP Volunteer not only helps others, it helps me keep striving to live a better life as well.” Rian Ankerholz, of Overland Park, put it this way: “Most lawyers are at their best when they are helping people. Being a KALAP volunteer allows me to use my professional and people skills to help one of our own.”

KALAP volunteers are the main moving force of the program and deserve our heartfelt appreciation. On behalf of all associated with KALAP, thank you to our current volunteers and to those of you who decide to join our ranks in the future: just call me ...

About the Author

Anne McDonald graduated from the University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she served as a judge pro tem in Kansas City, Kansas Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as Executive Director.
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— Henry Goertz, Goertz Law Office, Dodge City

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Reaching Out to Isolation

By Alisha Udhwani, Washburn University School of Law, Topeka

My family came to the United States when I was young, drawn by promises of liberty and equality. After a short time in Florida, we moved to St. Croix in the U.S. Virgin Islands. While the people on the island are a unique cultural mix, Indians make up a miniscule minority, and my experience in grade school as an outsider was challenging. When it was time for me to attend college, I decided to leave behind my family, friends, and everything that I knew to attend Agnes Scott College, a small women’s college in Decatur, Ga. Still, even there, I was one of only a few Indians.

Being that I lived away from home for all four years of college, I was excited about the potential experiences of attending law school in Topeka. I’ll admit, I had never set foot in the Midwest before and had no idea what to expect. To me, that move was an exciting adventure that would result in the fulfillment of my dream of representing immigrant women who are victims of domestic violence.

But reaching that dream was not easy. At orientation, it didn’t take me long to realize I was the only Indian woman in the whole law school, and also the only Hindu. That didn’t shake me, however, since I spent much of my life being an only. I tried my best to blend in, but the color of my skin, and my religious and cultural beliefs became the central subject of many interactions. My complexion, the way I spoke and dressed, and the religion that I practiced were always things I was proud of, but here, that led to my isolation. The comments became so regular, that for the first time, I started to physically see and feel the fact that I was an “only.”

I felt isolated as an immigrant woman; however, I was blessed to find a network of students and faculty members at Washburn University School of Law who were willing to reach out to me and help me through challenging times. They became my support system, my family away from home, and with their help, I began to feel comfortable and confident in my own skin. Moreover, by rediscovering a stronger me, I became a leader in the cultural community at Washburn Law, serving as president of the Asian American Law Student Association.

The challenges I faced as an “only” inspired me to think about what many women in immigrant families must face when we first move to the United States. Moving to a foreign land with vastly different people is frightening; especially for those who look different, dress differently, speak differently, and even pray differently. They, like me, must also experience the uncomfortable glares and questions from strangers.

This feeling of isolation only intensifies in situations of domestic violence amongst immigrant women. Many times, an abusive spouse may prohibit their wife from learning to drive, or calling home to speak with her family. Those women can’t even visit a coffee shop or public park without the supervision of the spouse. The spouse who often holds an explosive temper, who insults her and hurts her daily, is aware of the fact that the woman has no one to turn to. She is alone on this side of the world.

While domestic violence in totality is terrifying and difficult to overcome, immigrant women who experience domestic violence have different legal issues that keep them from leaving their abusers.

The summer after my first year of law school, I worked at Raksha Inc. in Atlanta, a nonprofit organization that assists immigrant women who are victims of domestic violence. During that time, I had the opportunity to learn about those struggles first hand. Through my conversations with many clients at Raksha, I realized that those women were ready to leave their partners, but felt that they couldn’t because of their immigration status. The abusers often use the woman’s legal status as a tool of suppression. Many women are fearful to reach out for help. They worry that if they talk, their children will be taken away from them or that they will be deported to a community that would view them as having brought shame upon their family.

In reality, the United States offers these women a means to escape abuse and obtain the ability to legally stay in the United States. Through organizations like Raksha Inc., many of these women are able not only to learn about the options, but also connect with family law and immigration attorneys who are able to assist them through their legal need. Those attorneys offer their assistance pro bono. As a Washburn Law clinic intern, my dream of assisting that community one woman at a time has already become a reality.

The tapestry of ethnicity, cultural practices, and religious beliefs that shape who I am has never offered me the benefit of being understood by my community. But I believe that my experience as an “only” will allow me to zealously advocate on behalf of the community I hope to serve. My journey from India to the heartland of America may not be as uncommon as it once was, but it set the trajectory of my life and is why I chose to attend law school. I was fortunate enough to meet people who were willing to help me through my darkest and most difficult times while adapting to life here. Now I’m ready to dedicate my career to assist these women and their children to escape the consuming cycle of abuse.

About the Author

Alisha Udhwani was born in India and raised in the U.S. Virgin Islands. She earned her Bachelors of Arts at Agnes Scott College with a double major in sociology/anthropology and political science. Udhwani intends to practice family law and immigration law in hopes of assisting immigrant women who are victims of domestic violence. Currently, she is a legal intern at the Washburn Law Clinic in the Domestic Division, a Washburn student ambassador, president of the Asian American Law Students Association, and secretary of the Black Law Students Association.
I love smart phones. My handy iPhone served as GPS, concierge, tour guide, camera, video game, library, link to my office systems, and as gentle tether for my free range kids exploring Washington, D.C. In contrast, my wife is at war with the concept.

As an early adopter, she started with a Kyocera 6035 back in 2001. She has tried every flavor of device and operating system since, and each disappoints with annoying failures. Either the execution of hardware and software disappoints or a stifling corporate business plan turns a good idea bad. Her latest disappointment is the deepest yet – the Windows Phone 8.

**Good Hardware**

Windows 8 Phone should be a great smart phone system, and the hardware available so far is terrifically competitive. The Nokia Lumina 920 and the HTC 8X are the current flagship phones for Windows Phone and they are each toe-to-toe with the iPhone 5 and high-end Android devices. Both hold their own in processing power, network speed, memory, storage, and screen quality. Each felt faster and smoother in side-by-side tests against the iPhone 5 and Galaxy S3 and both embarrass my rickety old iPhone 4S.

The Lumina steps it up a notch with great photo and video using a Carl Zeiss lens and powerful image correction software backing its 8.7 MP camera. Unfortunately, it is also a large and heavy beast that feels unusually heavy in the hand. Online reviews are spot-on calling it a brick. The HTC 8X is lighter and thinner but, though competitive, does not knock it out of the park in hardware – it holds its own but breaks no new ground. Irritating and inexcusable is the apparent lack of a hardware button to kill sound immediately. That never seems important until your ringer tone lets loose unexpectedly.

**Great Interface**

The Windows Phone operating system really shines. It looks different and innovative in comparison to the five-year-old designs of both iOS and Android (which barely advance interface design from the Psion S3 or HP-200lx of the early 1990s). Windows Phone's main screen includes customizable Live Tiles. Those user-controlled squares show updates from apps in real time so users can see at a glance a dashboard of information. Live Tiles blow away iOS's red badges for speedy usefulness. The widgets in Android are closer but not as clean, efficient, or snappy as Live Tiles. The Tiles rocket past the 20-year-old, horse and buggy interfaces of iOS or Android smart phones.

**Unfulfilled Promise**

So why is my wife so disappointed? There are some serious flaws with Windows Phone 8 that do not make themselves apparent until used daily. Most complaints have focused on the product “ecosphere” missing to support Windows Phone. Apple’s App Store and Google’s Android Market provide thousands more apps but a Windows Phone user is most likely looking for integration with their Windows PC and Microsoft Office (maybe even their Xbox Live account). The Windows Phone ecosphere may be smaller (and will likely stay that way), but it is tailored to its user. My wife picks a phone to match the products she uses instead of buying the products that support her phone. Sensible.

Sadly, that integration is very troubled. For example, there are serious issues with calendaring – a key tool for lawyers. Synchronization of Google Calendar and Outlook is terminated for all but paying customers effective January 2013 as the corporate battles between Google and Microsoft outweigh interoperability for customers. Unfortunately, the Microsoft replacement in Outlook.com is woefully inadequate. It coordinates poorly with Outlook on the desktop and syncs erratically with Windows Phone. Just this morning, my wife's phone calendar shows a series of Latin filler words as appointments on each day but the appointments she's entered are “unavailable at this time.” Another irritant is that voice mails email from our office shows a series of Latin filler words as appointments on each day but the appointments she's entered are “unavailable at this time.” Another irritant is that voice mails email from our office as a WAV file. Even though Microsoft developed the WAV file format, Outlook on Windows Phone cannot play them.

**Fix It Fast!**

Most improvements needed to make Windows Phone actually useful should be a quick fix. Programmers should be hard at work fixing synchronization but need to tweak other things like folder organization (non-Live Tiles apps appear in an unwieldy, unsorted list). The innovative and powerful interface deserves a fair shot at iOS and Android and would change the game if the day-to-day experience can be improved.

**About the Author**

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
The world was a busy place in 1956. The Cold War was going subzero and for college-aged men, the draft remained very much a reality. One of those called to active duty as an ROTC artillery graduate was a 22-year-old Texan named Leonard “Buzz” Gittinger. Gittinger was originally commissioned second lieutenant and assigned to the field artillery at Fort Riley. However, in July 1955 he received his Texas law license and on the first day of 1956, his transfer to JAG became effective.

That same year, Larry Keenan was in the middle of his own stint in the JAG Corps. And when their paths intersected later that year, on opposite sides of a case, what happened was a turn of events worth retelling some 56 years later.

“The Army put me to work on General Court Martial matters with zero trial experience and without having been to the JAG school for training,” Gittinger said. Keenan had a bit more experience – having completed JAG school at the University of Virginia and having tried a number of cases at Fort Riley. The protocol at Fort Riley, like most bases, was to throw newbies into defense until they gained sufficient experience to become a prosecutor.

But it wasn’t until Gittinger was appointed to defend a young man charged with assault that his litigation acumen would prove beyond his years. You see, the 1st Division, 4th Regiment, Company B, at Fort Riley, included the Solomon brothers. Both were staff sergeants (two stripes) and African American. They had something in common – identical twins. “Indistinguishable,” Gittinger said.

And on one dark night in May 1956, they were both outside the Outpost Club in Manhattan. “Outpost Club was in the south part of Manhattan, in a rather run down part of town, was made out of concrete blocks with no windows, and a liquor store was located nearby also out of concrete blocks,” Keenan recalled. “It was very dark in the front yard.”

“There were multiple fights and scuffles going on at the same time between the infantry and artillery soldiers,” reported Gittinger, “so much so that the evidence established one artillery soldier had a long 2-by-4 that he was swinging at every infantry soldier he could find.” One patron was stabbed.

“The assailant was identified as one of the Solomon brothers who had on a blue suit,” Keenan recalled. “I was assigned the case as the prosecutor and went to the Outpost Club a couple of times. I also went to the liquor store and interviewed everybody but, of course, nobody saw anything that night except the one person who said that the blue-suited Solomon was responsible for the stabbing.”

During the investigation, the military police took a statement from one of the brothers, who admitted that, on that night, he wore a blue suit. So, that brother was charged with criminal assault. As it turned out, being identical twins, who were aware of their own unique status, each owned a blue suit.

Gittinger drew the defense, “They would wear the same uniform at the same time, their emblems would be placed in identical locations on their uniform, and their staff sergeant stripes were not only identically placed, they were sewn on the shirt with the same stitch patterns and thread color.”

The Code of Military Justice provides that when a soldier is charged with a felony, he has the opportunity of selecting “individual counsel” to sit at the trial and “offer spiritual and physical comfort to the accused, as well as whatever help that person might provide,” Keenan recalled. It is generally intended that that person would be the company commander of the accused, who, along with the appointed counsel, would organize the defense. Keenan was in for a shock when Gittinger brought the accused into court with his individual counsel – the twin. A living, breathing, walking, but not exactly talking, clone.

The accused brother was known by the prosecutors to have a scar on his left cheek about a half-inch long and hardly visible. Thanks to that, and the close quarters in the Fort Riley courtroom, Keenan could separate sinner from saint. The witnesses were informed of the scar and its location. So Gittinger had a chess move of his own. “During the trial,” Keenan recalled, “at breaks the brothers would switch positions at the counsel table. I could tell this because of the scar. So, being a young lawyer, I thought that was wrong and I objected to the law officer, which, of course, pointed out to the court-martial panel what everyone else was thinking – these two brothers were impossible to separate. And my case was completely and totally hopeless.”

When asked to identify the defendant, the witnesses – and there were several – would get down from the elevated witness chair, walk to the defense counsel table where the brothers were seated, place their hands on the table and lean over to look for the barely perceptible scar. “It was a very comical and questionable identification process,” recalled Gittinger.

Q: Can you imagine seeing a hairline scar in the middle of a fight on a dark night?
A: Only if you are in the JAG Corps.

“We put on what witnesses we had. The defendant didn’t testify. Neither did the brother. The panel took the case and

(Con’t. on Page 15)
Give Your Writing (the Right) Personality

By Chelsi Hayden, University of Kansas School of Law, Lawrence

As attorneys, we all know the importance of being concise: judges like it—it saves them time—and clients like it—it gives your argument greater impact. And we know how to be concise: avoid legal jargon; quote sparingly; use the active voice; use simple sentences; omit needless words, etc.¹ Yet, many legal writers are reluctant to be concise because they fear it will strip their writing of personality. But if verbose writing has a personality, it is one that says, “Look at me! I’m self-important, inefficient, and have no respect for your time.” You wouldn’t want a friend with that personality, so why would you want to write with it?

Being concise doesn’t have to strip your writing of personality. In fact, it can showcase your personality. Of course, you have to give your writing the right personality. Thankfully, that’s easy to do. Just remember: variety is the spice of life.

Select your punctuation with purpose. If you’re not already friends with the em-dash, semicolon, and colon, get to know them. They’re your new best friends.

Let’s tackle the em-dash (—) first; it adds the most spice. An em-dash abruptly interrupts the flow of the sentence and signals to the reader that something dramatic is about to happen. It can be used on its own or in a pair to offset your text. The em-dash draws special attention to the information on the other side of the dash. Use it to highlight the legally determinative facts or emphasize the crux of your argument.

Mrs. Bates did the only thing she could to get even—frame Mr. Bates.

Many writers shy away from the em-dash because it is easily (and embarrassingly) confused with its close relative: the en-dash (–). Usually the em-dash is longer than the en-dash. The em-dash is the width of a lowercase “m” while the en-dash is the width of a lowercase “n.”² The en-dash is used to indicate a quantifiable range; it replaces the “to.” Use an en-dash when referring to dates—“I will be out of the office December 24–January 3.”—and when referring to a range of pages—“The relevant information is on pages 12–15 of the deposition.” The en-dash includes the first and last items in the range. Thus, in this example there is relevant information on pages 12, 13, 14, and 15.

To space or not to space? This is a matter of style, but in legal writing the preferred practice is to eliminate the space between the dash and the words around it, whether you’re em-dashing or en-dashing. Don’t confuse these dashes with the hyphen (‐). A hyphen is smaller in length than the en-dash and is used to connect two words that are closely related, words that function together as a single concept or work together as a joint modifier, such as “four-year prison sentence.” They are not interchangeable.

The semicolon is a great tool for keeping writing concise while adding variety to the sentence structure. Semicolons draw attention to the relationship between ideas without unnecessary words. Use a semicolon, not a colon, when you are connecting items of equal value. They can be used to do the following:

- Link two related independent clauses (i.e. complete sentences) to emphasize the connection between the clauses.

  Defendant lied; he said he had never been to the house.

- Link two related independent clauses when using conjunctive adverbs or transitional phrases.

  The court granted defendant’s motion; therefore, he was released on bond.

- Avoid confusion when listing items, particularly when the items in the list contain commas.

  There were four people in the courtroom: Judge Grantham; Mr. Branson, the prosecutor; Ms. Crawley, the defense counsel; and Mr. Bates, the defendant.

Colons are used after an independent clause to indicate what follows is an illustration or explanation of the preceding material, such as a list of items or a long quote. Colons are also used to link two independent clauses when the first introduces the second or they have a cause-and-effect relationship.

Ms. Bartlett’s testimony is crucial to the defense: it establishes that Mrs. Bates poisoned herself.

Don’t forget commas, exclamation points, and parentheticals. Avoid splicing commas, deflating exclamation points, and hiding important information in parentheticals. A comma splice occurs when you join two independent clauses with a comma. Commas do many things, but not that. Leave that to the period and the semicolon. Use the exclamation point between text. Microsoft Office Word automatically inserts an en-dash. If you type two hyphens and do not include a space before the hyphens it will convert them to an em-dash. Or use the following key combinations: Ctrl+Alt+hyphen for an em-dash and Ctrl+hyphen for an en-dash.

³ Conjunctive adverbs connect two clauses by showing their relationship, such as cause and effect, contrast, or comparison. The following are examples of conjunctive adverbs: however, therefore, as a result, and conversely.

Footnotes
2. The double hyphen (‐) is sometimes used in place of the em-dash, but most word-processing programs automatically double hyphens into dashes. When you type a space and one or two hyphens before the letter “m,” it will convert it to an em-dash. Or use the following key combinations: Ctrl+Alt+hyphen for an em-dash and Ctrl+hyphen for an en-dash.
3. Conjunctive adverbs connect two clauses by showing their relationship, such as cause and effect, contrast, or comparison. The following are examples of conjunctive adverbs: however, therefore, as a result, and conversely.
sparingly; overuse will weaken its power. When placing information in parentheticals, consider using a pair of em-dashes instead. If the information isn’t worthy of em-dashes, perhaps it isn’t relevant and should be excluded altogether.

Having trouble remembering which punctuation mark does what? Think of them as people:

Visual appeal is also important to engage your reader. Charts and images can be a fun break from the norm. But use them only when relevant and helpful, and know your audience. Lists are an effective way to engage the reader and emphasize an important collection of facts or a conclusion. You can also make your writing interesting by varying the length of your sentences and paragraphs. A one-sentence paragraph stands out and can be very effective if you use it to highlight the crux of your argument.

These tools break up the monotony of short, choppy sentences without diluting your writing with unnecessary words. Use your writing style to say, “I am clear, efficient, and respectful, yet interesting, engaging, and fun.” Don’t be a parenthetical.

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**About the Author**

**Chelsi Hayden** is a Lawyering Skills professor at the University of Kansas School of Law. She graduated from KU Law in 2001, Order of the Coif, and was a member of the Kansas Law Review. Prior to joining the KU faculty, she served as chambers counsel to the Hon. Carlos Murguia, U.S. District Court for the District of Kansas, and practiced business litigation at Shook, Hardy & Bacon LLP.

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**The Saga of the Brothers Solomon**

(Con’t. from Page 13)

deliberated for some time and ended up with a verdict of not guilty. The end result was that we convicted the hell out of a blue suit but not the person in it.”

Gittinger and Larry became friends and eventually left the Army. They formed firms north and south and remain active in the bar, now both in their 80s. When writing this column, I had hoped to locate Gittinger, and to my surprise, found a spry and energetic counselor still very familiar with the client who was unlike any other.

Keenan and Gittinger went on to handle countless cases and helped thousands of clients. It’s fair to say, however, that in all their years, never did their clientele include an accused with a brother uniquely situated to assist in his sibling’s defense.

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**About the Author**

**Matthew Keenan** has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.

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From Kansas to the World: The Cutting Edge of Environmental Law

By Isabel Segarra, University of Kansas School of Law, Lawrence

From the moment I submitted my law school applications, I have been certain of one thing: I want to practice environmental law. What I did not know when I first arrived at Green Hall in 2010 is just how much I would be exposed to cutting edge issues in environmental law and climate change.

Last summer, Kansas faced one of the most disastrous droughts in recent history. Many agriculture experts predict severe summer temperatures will only continue to worsen due to climate change. Through the environmental law curriculum and extracurricular opportunities offered at KU Law, I have engaged with this issue on both a local and global scale.

Professor Outka’s Environmental Law Seminar on climate change exposed me to the international and domestic legal frameworks governing climate change. This inspired me to apply for the Jessup International Moot Court team. This year’s Jessup problem is novel and profoundly saddening: What can small island nations do after rising sea levels inundate their entire territory?

Small island nations and territories represent some of our most beautiful and ecologically sensitive lands. I know this first hand from Professor Torrance’s Biodiversity Law course, which is taught in the U.S. Virgin Islands. Climate change not only threatens to take people’s homes, but also potentially their entire cultural and spiritual systems. Through the Jessup competition, my teammates (Matthew Agnew, Sam Barton, Jane Li, and Lauren Pearce), our advisor Professor Head, and I worked to identify the most viable legal strategies small island nations can bring before international tribunals. Our efforts paid off as we placed second in our region and secured a place at the international competition in Washington, D.C., later this year. Although I am proud of our success, I am also mindful that the threats posed by climate change are an ongoing challenge, especially for indigenous populations.

Climate change threatens to eradicate entire indigenous communities around the world. Those communities are on the front lines of a battle that has the potential to affect us all, yet the international community continues to push the issue aside in many ways. The U.N. Security Council does not consider climate change a security issue despite conservative measures that estimate climate change will cause between 50 and 200 million environmental refugees. Further, we are now learning that some of the initiatives in the now expired Kyoto Protocol under the U.N. Framework Convention on Climate Change have worked to exacerbate the consequences of climate change on indigenous communities rather than ameliorate them. Despite the lack of positive developments, the plight of those communities has not gone unnoticed.

Through the Tribal Law & Government Conference at KU Law this year, and with the encouragement of Professor Kronk, I had the privilege of serving on a panel addressing this very issue. It is incredible that we are addressing issues facing the island of Tuvalu, which is in the middle of the Pacific Ocean, in the landlocked Sunflower State. Climate change is a profound reminder of our interconnected humanity. A wheat farmer from Kansas need not speak Amharic to understand how drought affects our brothers and sisters in Ethiopia. It is also one of the reasons I am so glad to have commenced my environmental law career in Kansas.

If I have learned anything, it is that there is no single solution for climate change. We are all affected, we are all responsible, and we are all capable of doing our part to address the problem. The law school and KU are taking steps to address this global problem locally. The law school will no longer purchase Styrofoam products whose production releases ozone-depleting gases. Students and faculty are constantly reminded to be cognizant of their energy use, to turn-off classroom lights, and to recycle. Just up the hill, KU has a myriad of incentives to help the student body become environmentally conscious. Recently, the entire KU campus received the Tree Campus USA designation from the Arbor Day Foundation for the University’s tree replanting and conservation efforts. Preserving tree canopies is crucial in addressing climate change. I had the honor of representing the Law School in attaining that status through the Environmental Law Society.

The list of opportunities and experiences for environmentally minded students available at KU Law is limitless, unlike the natural resources we must preserve for future generations.

About the Author

Isabel Segarra is a 3L from Austin, Texas. She received a Bachelor of Arts in political science and sociology from Texas A&M University. She previously served as president of the Environmental Law Society and is currently pursuing the Environmental and Natural Resources Law Certificate offered by KU Law. She is grateful to her family for their support and to Professor Uma Outka for her continuous encouragement and enthusiasm.
2013 Outstanding Speakers Recognition
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars from January through March 2013.
Your commitment and invaluable contribution is truly appreciated.

Thomas A. Adrian, Adrian & Pankratz P.A., Newton
Genevra W. Alberti, The Clinic, Kansas City, Mo.
Matthew D. All, Blue Cross & Blue Shield of Kansas, Topeka
Janet L. Arndt, Office of Kansas Attorney General Derek Schmidt, Topeka
David E. Bengston, Stinson Morrison Hecker LLP, Wichita
Stacia Boden, Mission Group of Kansas Inc., Overland Park
Russell A. Brien, Brien Law Office LLC, Oskaloosa
John W. Brooms, Hinkle Law Firm LLC, Wichita
Link Christin, Hazelden, Center City, Minn.
John W. Dean, Beverly Hills, Calif.
Adam C. Dees, Vignery & Mason LLC, Goodland
John R. Dietrick, Creative Business Solutions, Topeka
Barb Dominguez, Office of the Secretary of State, Topeka
Emily A. Donaldson, Stevens & Brand LLP, Lawrence
Sarah E. Fertig, Office of Kansas Attorney General Derek Schmidt, Topeka
Burke W. Griggs, Office of Kansas Attorney General Derek Schmidt, Topeka
Danielle M. Hall, Kansas Bar Association, Topeka
Kathleen Harvey, Harvey Immigration Law Office, Overland Park
Alfred R. (Al) Hupp Jr., Lathrop & Gage LLP, Kansas City, Mo.
Peter Johnston, Clark Mize & Linville Chtd., Salina
Brian M. Johnston, Polsinelli Shughart P.C., Kansas City, Mo.
Hon. Phillip B. Journey, 18th Judicial District, Wichita
Jeff Kennedy, Martin Pringle Oliver Wallace & Bauer LLP, Wichita
John J. Knoll, City of Overland Park, Overland Park
Eric G. Kraft, The Katz Law Firm, Overland Park
Chelsey G. Langland, Kansas Court of Appeals, Topeka
L.J. Leatherman, Palmer Leatherman White & Dalton LLP, Topeka
Carole Levitt Esq., Internet for Lawyers, Rio Rancho, N.M.
Terry L. Mann, Martin Pringle Oliver Wallace & Bauer LLP, Wichita
Anne McDonald, Kansas Lawyers Assistance Program, Topeka
David McDonnell, Occupational Safety & Health Administration, Wichita
Mira Mdivani, Mdivani Immigration Practice Law Firm LLC, Overland Park
Trey T. Meyer, Law Office of Trey Meyer, Lawrence
Joseph N. Molina III, Kansas Bar Association, Topeka
Timothy P. Orrick, Orrick & Erskine LLP, Overland Park
Terri J. Pemberton, Cafer Law Office LLC, Topeka
Kathy Perkins, Kathy Perkins LLC Workplace Law & Mediation, Lawrence
Prof. David E. Pierce, Washburn University School of Law, Topeka
Thomas M. Rhoads, Glaves Irby & Rhoads, Wichita
James D. (Jim) Robenalt, Thompson Hine LLP, Cleveland, Ohio
Mark Rosch, Internet for Lawyers, Rio Rancho, N.M.
Alan L. Rupe, Kutak Rock LLP, Wichita
Jeremy K. Schrag, Research Attorney to Chief Justice Lawton Nuss, Topeka
M. Suzanne Schrandt, Kansas Health Institute, Topeka
Michael Sharma-Crawford, Sharma-Crawford Attorneys at Law LLC, Kansas City, Mo.
Rex A. Sharp, Gunderson Sharp & Walkel LLP, Prairie Village
Linda J. Sheppard, Kansas Insurance Department, Topeka
Jessica Skladzien, Kutak Rock LLP, Wichita
Dennis J. Stanchik, Dennis J. Stanchik P.A., Olathe
Kelli J. Stevens, Kansas Board of Healing Arts, Topeka
Valerie K. Tarbutton, McCrummin Immigration Law Group LLC, Kansas City, Mo.
David R. Tripp, Stinson Morrison Hecker LLP, Kansas City, Mo.
Christopher J. Tymeson, Kansas Department of Wildlife & Parks, Topeka
Brian M. Vazquez, Kansas Department of Health & Environment, Topeka
Tai J. Vokins, Cornwell & Vokins, Olathe
Tony Weigel, Weigel Law Office LLC, Grain Valley, Mo.
Cheryl L. Whelan, Kansas Department of Education, Topeka
Ken Wilke, Office of Revisor of Statutes, Topeka
Calvin K. Williams, Calvin Williams Law Office, Colby
Angela L. Williams, Law Office of Angela S. Williams LLC, Kansas City, Mo.
Molly M. Wood, Stevens & Brand LLP, Lawrence
Wyatt M. Wright, Foulston Siefkin LLP, Overland Park
Members in the News

CHANGING POSITIONS

Patrick R. Baird has joined the Missouri Attorney General’s Office, Kansas City, Mo., as the assistant attorney general.

Daniel L. Baldwin has joined Cornerstone Law Office LLC, Newton.

Chad Beashore has been promoted to partner at Shook Hardy & Bacon LLP, Kansas City, Mo.

Lisa M. Bolliger has joined the Johnson County Courthouse, Olathe, as a law clerk.

Alexander Thomas Briggs has joined Morris Laing Evans Brock & Kennedy Chtrd., Wichita. In addition, Emily Cassell Docking and Joshua J. Hofer have been promoted as partners.

David M. Buffo and Aaron James Mann have been promoted as partners of Husch Blackwell LLP, Kansas City, Mo.

Brady A. Burdge has joined the City Prosecutor’s Office, Wichita, as the assistant city attorney.

Brian Robinson Carman has joined Stinson Lasswell & Wilson L.C., Wichita.

David L. Dahl has been appointed as a judge in the 18th Judicial District, Wichita.

Shannon Dawn Cohorst Johnson has joined Seigfreid Bingham P.C., Kansas City, Mo.

Ryan R. Cox has joined Sanders Warren & Russell LLP, Overland Park.

Andrew M. DeMarea has joined Kenner Schmitt Nygaard LLC, Kansas City, Mo.

Diane D. Durbin has joined Horn Aylward & Bandy LLC, Kansas City, Mo., as of counsel. In addition, Anne Erickson has joined the firm as an associate and Justin D. Fowler has joined as a member.

Dominic Lawrence Eck and Paige Diane Pippin have joined Foulston Siefkin LLP, Wichita.

David S. Elkouri has joined Halcon Resources. Houston, as executive vice president of general counsel.

Shelley I. Ericsson has joined Armstrong Teasdale LLP, St. Louis, as partner.

Robert Stephen Herman has joined Douthit Frets Rouse Gentile & Rhodes LLC, Leawood.

Nathan T. Jackson and Matthew E. Terry have joined Waldeck Goldstein & Patterson P.A., Prairie Village.

Madeline N. Kramer has joined McDowell Rice Smith & Buchanan P.C., Kansas City, Mo., as an associate and Tiffany Ann McFarland has joined as a shareholder.

David J. Kuckelman has joined Smiths Group Corp., Washington, D.C.

Sarah C. Longhibler has joined the Law Office of Kurt L. James, Topeka.

J. Joseph Morris has joined Mallik Law Firm P.A., Leawood.

Cynthia A. Norton has been appointed as a bankruptcy judge for the U.S. Bankruptcy Court of the Western District of Missouri, Kansas City, Mo.

LeTiffany Obozé has joined the Sedgwick County District Attorney’s Office, Wichita.

Lara K. Pabst has joined Krigel & Krigel P.C., Kansas City, Mo.

Lara Q. Plaisance has joined the Law Office of Daniel P. Hampton, West Des Moines, Iowa.

Lindsey L. Poling has joined Capwest Mortgage, Overland Park, as in-house counsel.

Edward L. Robinson has been promoted as department chair of member and civil litigation at Joseph Hollander & Craft LLC, Wichita.

Stephen J. Ternes has been appointed as a judge for the 18th Judicial District, Wichita.

Brad A. Vining has joined Koch Company LLC, Wichita, as of counsel.

Steven R. Wilson has joined the Franklin Law Office, Wichita.

Jan T. Williams has joined the Law Offices of Paul C. Savage P.A., Coral Gables, Fla.

Taylor J. Wine has been named a municipal court judge, Melvern.

Rachel Black Zenger is the new city attorney of Belleville.

David N. Zimmerman has joined Spencer Fane Britt & Browne LLP, Kansas City, Mo.

Matthew A. Buchmann has moved to 4800 College Blvd., Ste. 2, Overland Park, KS 66211.

Tamara Pistotnik Collins has moved to 1540 North Broadway, Ste. 205, PO Box 47131, Wichita, KS 67201.

Kelli Cooper Law Office has moved to 142 N. Cherry St., Olathe, KS 66061.

Gerald Lee Cross Jr. has moved to 4800 Rainbow Blvd., Ste. 200, Westword, KS 66205.

Van R. Delhotal has moved to 17817 W. 39th St. South, Goddard, KS 67052.

Kansas Legal Services has moved to 340 S. Broadway, Wichita, KS 67202.

Joseph R. Ledbetter has moved to 1734 SW Van Buren, Topeka, KS 66612.

Stephanie L. Lindsay has moved to 2111 S. 67th St, Ste. 210, Omaha, NE 68106.

Darya V. Lyeshchenko has moved to 12980 Foster, Ste. 370, Overland Park, KS 66213.

Mary Anne McDonald has moved her office to 123 W. 5th St., Newton, KS 67114.

Keith A. Peterson has moved to 101 NW 5th St., Mulberry, FL 33860.

Patrick C. Smith has started his own practice, Patrick C. Smith LLC, 404 B North Grand, PO Box 1328, Pittsburg, KS 66762.

Daniel E. Stuart has moved to 4707 College Blvd, Ste. 208, Leawood, KS 66211.

MisCelerances

Louis J. Wade, Kansas City, Mo., was elected to the executive board of McDowell, Rice Smith & Buchanan P.C. at its annual meeting. In addition, R. Pete Smith was re-elected as chairman, Thomas R. Buchanan as president, and Brian J. Nicewanger and Kristie Remster Orme as general counsel.

Craig W. West, Wichita, has been inducted as a Fellow of the American College of Trial Lawyers.

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

Harlan C. Altman Jr.

Harlan C. Altman Jr., 90, of Dallas, formerly of Wellington, died January 22 in Dallas. He was born on March 1, 1922, the son of Harlan Cribbs Sr. and Katherine (Barbour) Altman in Wellington. Altman attended Wellington High School and later attended the University of Kansas, where he was the quarterback for the KU football team.

He served in the U.S. Army in World War II and later in the Korean Conflict. Altman attained the rank of first lieutenant, was captured in Europe, and was decorated for valor with the Silver Star, Bronze Star, and Purple Heart. He would return to the University of Kansas, where he received his juris doctorate, was a member of the Kansas and Oklahoma bar associations, and practiced law in Wellington for more than 50 years. While practicing law, Altman was also house counsel for Stewart Companies in Wellington.

Altman is survived by his son, Harry K. Altman, of Coppell, Texas; his brothers, Richard B. Altman, of Houston, and William W. Altman, of Clearwater, Kan.; his daughters-in-law, Helen and Pam, both of Dallas; four grandchildren; and two great-grandchildren. He was preceded in death by his wife, Virginia, his parents; and his son, Harlan C. Altman III.

Carl B. Anderson Jr.

Carl B. Anderson Jr., 66, of Lindsborg, died February 7. He was born on January 12, 1947, in Lindsborg, the fourth son of Carl B. Anderson Sr. and Mildred Holmstrom Anderson. He graduated from Bethany College in 1968 with a bachelor's degree in business economics. Anderson earned a juris doctorate from the University of Kansas School of Law in 1971.

Following graduation, Anderson was admitted to the Kansas Bar. His first position in private practice was in Sublette, where he also served as Haskell County attorney. In 1975, Anderson opened a private practice in Lindsborg. A year later he was elected to the 9th Judicial District, where he also served as the administrative chief judge for 10 years. He served in that position for 36 years until his retirement in 2013.

Anderson is survived by his wife, Rebecca Larson, of the home; his children, Michael Anderson and Megan Anderson Willich; two brothers, Dr. Richard Anderson and Dr. Ralph Anderson; three grandchildren; and many nieces and nephews. He was preceded in death by his parents and his brother, James Anderson.

Steven B. Doering

Steven B. Doering, 62, of Garnett, died February 11 at St. Luke’s Plaza Hospital in Kansas City, Mo. He was born February 1, 1951, in Salina, the son of Henry H. and Berniece (Stroup) Doering. Doering received his bachelor's degree in mechanical engineering from Kansas State University in 1974 and his juris doctorate from the University of Kansas School of Law in 1977.

After graduation, Doering joined the law practice of Orville Cole, where he practiced for 10 years before going into private practice for 26 years. He enjoyed a successful law career, practicing general law throughout Kansas. Doering was a member of the Kansas Bar Association, Kansas As-sociation of Trial Lawyers, the SOABs, and Masonic Lodge of Garnett.

Doering is survived by his wife, Karen Doering, of the home; sons, Hank Doering and Greg Doering, both of Manhattan; brother, Michael Doering, of Garden City; and four grandchildren. He was preceded in death by his parents and grandparents, Henry and Erma Doering.

Robert M. Green

Robert M. Green, 89, of El Dorado, died February 9. The fourth child of Cyril and Ruth Green, he was born in Midian and was a lifelong resident of Butler County. He graduated from Washburn University School of Law in 1952 and retired after practicing law for 50 years.

Green was elected as a state representative, county attorney, probate judge, and appointed as assistant U.S. attorney for Kansas. He served as a crew member of a B-24 Bomber during World War II in the 8th Air Corps as a waist machine gunner, flying on 29 combat missions over Germany.

Green is survived by his wife, Louise Green; son, Roger Green; two brothers, William A. Green and James L. Green; three grandchildren; and six great-grandchildren. He was pre-ceded in death by his sisters, Mildred Whitson and JaNell Ruth Brown; and two brothers, Cyril Green Jr. and Joseph Richard Green.

STUDENT AND EMPLOYEE DISMISSAL AND DISCIPLINARY CASES

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Federal and State Court
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Credits and Incentives in Kansas, and How They May Be Impacted by Recent Changes in Income Tax Laws

By Kevin P. Kennedy
I. Introduction

Kansas has a wide variety of tax credits and incentives. While some are available only to individuals, others are designed to encourage businesses to locate, expand or remain in the state. The intent of this Article is to provide an overview of the primary credits and incentives available to businesses, and how the recent changes to the Kansas income tax may affect their viability and usefulness.

For tax year 2009, the Kansas Department of Revenue reported just more than $252 million in credits taken on corporate income, individual income, and privilege tax returns.¹ Those geared exclusively to individuals, namely the Adoption Credit,² the Child Dependent Care Credit,³ the Earned Income Credit,⁴ and the Food Sales Tax Refund,⁵ totaled just over $144 million.⁶ It should be noted that three of those four credits (all except the Earned Income Credit) have been repealed effective January 1, 2013.⁷

The balance of credits taken in 2009, by credit type, is as follows:⁸

<table>
<thead>
<tr>
<th>Credit</th>
<th>Amount ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Business Machinery and Equipment Credit⁹</td>
<td>39,902,521</td>
</tr>
<tr>
<td>High Performance Incentive Program¹⁰</td>
<td>33,176,972</td>
</tr>
<tr>
<td>Historic Preservation Credit¹¹</td>
<td>7,173,150</td>
</tr>
<tr>
<td>Telecommunication Credit¹²</td>
<td>4,604,389</td>
</tr>
<tr>
<td>Business and Job Development Credit (carryover)¹³</td>
<td>3,863,187</td>
</tr>
<tr>
<td>Angel Investor Credit¹⁴</td>
<td>3,342,910</td>
</tr>
<tr>
<td>Community Service Credit¹⁵</td>
<td>2,673,101</td>
</tr>
<tr>
<td>Business and Job Development Credit (noncarryover)¹⁶</td>
<td>2,472,030</td>
</tr>
<tr>
<td>Research and Development Credit¹⁷</td>
<td>2,401,109</td>
</tr>
<tr>
<td>Declared Disaster Capital Investment Credit¹⁸</td>
<td>1,580,463</td>
</tr>
<tr>
<td>Community Entrepreneurship Investor Credit¹⁹</td>
<td>1,388,864</td>
</tr>
</tbody>
</table>

Higher Education Deferred Maintenance Tax Credit²⁰   | 799,681      |
Regional Foundation Credit²¹                         | 596,845      |
Small Employer Health Insurance Credit²²             | 375,035      |
Alternative-Fuel Tax Credit²³                         | 166,316      |
Historic Site Contribution Credit²⁴                   | 140,874      |
Individual Development Account Credit²⁵              | 78,197       |
Child Day Care Assistance Credit²⁶                   | 73,293       |
Disabled Access Credit²⁷                              | 66,539       |
Agritourism Liability Insurance Credit²⁸             | 4,208        |
Qualifying Pipeline Credit²⁹                         | Undisclosed   |
Single City Port Authority Credit³⁰                   | Undisclosed   |
Venture and Local Seed Capital Credits³¹             | Undisclosed   |
Total                                                | 107,979,701  |

Of those credits, the Business Machinery and Equipment Credit was repealed as of January 1, 2012, and House Bill 2117 signed into law on May 22, 2012, amends the following credits such that individuals, partnerships, S-corporations, limited liability companies, and other “pass-through” entities are no longer eligible to receive such credits effective January 1, 2013: Telecommunication Credit, Research & Development Credit, Small Employer Health Insurance Credit, Alternative-Fuel Tax Credit, Individual Development Account Credit, Child Day Care Assistance Credit, Disabled Access Credit, Agritourism Liability Insurance Credit, Single City Port Authority Credit, and Venture and Local Seed Capital Credits.

In addition to the above credits, Kansas has various incentive programs designed to promote commerce. Chief among them are the Promoting Employment Across Kansas (PEAK) program, and programs administered by the Kansas Bioscience Authority.

This article first presents an overview of the main credits and incentives available to businesses in Section II. In Section III, this Article presents an overview of the PEAK program and incentives administered by the Kansas Bioscience Authority.
Authority. In Section IV, this article discusses the effects of changes to Kansas’ income tax laws effectuated by House Bill 2117 on some of those credits and incentives.

II. Credits

A. Business Machinery and Equipment Credit

Although the Business Machinery and Equipment Credit (M&E Credit) was, in effect, repealed as of January 1, 2012, it merits brief discussion. The M&E Credit provided for a refundable credit based on a percentage of property taxes paid on specific categories of business personal property, namely commercial and industrial machinery and equipment, machinery and equipment used in mineral leasehold interests, and other business-related tangible personal property not elsewhere classified.

Even before being repealed, the M&E Credit appeared to be losing its effectiveness. Kansas changed its laws effective July 1, 2006, so that business personal property placed in service after that date was no longer taxable. The amount of the credit claimed continued to increase from tax years 2007 ($37,015,114) to 2008 ($38,536,260) to 2009 ($39,902,551), but preliminary numbers for tax year 2010 show a slight decrease to $35,187,562. Since business personal property can only be depreciated to a residual value of 20 percent, there is still property placed into service prior to July 1, 2006, on many companies’ books. But as the older property is disposed of and written off, the amount of property taxes paid, and the related credit would continue to decrease.

Perhaps as a partial replacement for the M&E Credit, the Kansas Legislature created a new expense deduction for certain machinery, equipment and “canned” software placed in service after December 31, 2011. The deduction allows businesses to take an additional expense in the year placed in service to, in effect, make them whole for the lost time value of money of depreciating property over its useful life. Both machinery and equipment (depreciable under Modified Accelerated Cost Recovery System, or “MACRS” under Internal Revenue Code Section 168) and canned software (as defined in Internal Revenue Code Section 197(c)(3)(A)(i)) are eligible. If the property is sold or moved outside the state during its useful life the taxpayer must recapture a proportionate amount of the deduction, based on timing of the sale or move. Like many benefits offered to Kansas businesses, this program isexclusionary. If a company chooses to expense an investment using this method, it cannot use the same investment to take advantage of a variety of credits and other deductions. Finally, like the credits amended through House Bill 2117, this additional deduction will only be available to corporate income taxpayers starting in tax year 2013.

B. High Performance Incentive Program

With the repeal of the M&E Credit, the High Performance Incentive Program (HPIP) is far and away the largest tax credit program available to Kansas businesses. It is designed to retain Kansas’ existing high performance businesses, encourage investment by existing companies in worker training and education, and spur the attraction of new, high quality firms to the state.

Before discussing the requirements to participate and the benefits available, it is critical to note that HPIP was designed as a “but for” program (that is, one must show foreknowledge of the program’s benefits, and how they acted as an incentive to the company). A Project Description form must be submitted to the Kansas Department of Commerce (KDOC) before a company commits to any capital investment it hopes to earn credits on. The initial form is expected to have best estimates, and should be amended as amounts firm up.

While generally described as a credit, there are actually three distinct benefits available under HPIP – an investment tax credit of 10 percent on capital investment over a threshold amount, an employee training tax credit, and a sales tax project exemption. In order to receive any or all of those benefits, businesses must both qualify and go through a certification process administered by the KDOC. There are four basic requirements. A company:

1. must be for-profit and subject to Kansas state taxes; and
2. must either
   a. be a manufacturer, or
   b. be a non-manufacturer who falls within an HPIP-eligible non-manufacturing NAICS category and receive at least 51 percent of revenues at the worksite from sales to any combination of Kansas manufacturers and/or out-of-state businesses or government agencies, or
   c. be a headquarters or back-office operation of a national or multi-national firm; and
3. must meet specified wage levels based on geographic areas and NAICS code; and
4. make a requisite investment in employee training.

While the first requirement is self-explanatory, the other three requirements merit some additional discussion. Any manufacturing business can participate in HPIP, as long as all other requirements have been met. All manufactur-
ers have a NAICS code that begins with a “3” – ranging from 311111 (Dog and Cat Food Manufacturing) to 339999 (All Other Miscellaneous Manufacturing).51

Non-manufacturing businesses that fall within HPIP-eligible NAICS codes can participate so long as they meet all other requirements and can show that a majority of their revenues at the worksite are derived from sales to any combination of Kansas manufacturers, out-of-state commercial customers, and/or out-of-state government customers. HPIP-eligible non-manufacturing NAICS codes are:

- 2211 through 2213 (power generation, distribution, water and sewage);
- 4231 through 4251 (wholesalers);
- 4811 through 5191 (variety of industries);
- 5211 through 7213 (financial entities, others); and
- 8111 through 9281 (repair, maintenance, others).

The final type of business that can participate is one that has been determined by the KDOC to be a “headquarters” or “back-office operation” of a national or multi-national corporation.52 To be a headquarters, KDOC considers factors such as whether principal officers are located on-site, the location of and how many worksites are served, and how little revenue is generated from activities on-site. To be a back-office, KDOC looks to see what types of non-revenue generating activities are conducted, whether such services are provided only for the company itself, and how many company worksites are served and where they are located. KDOC looks at the number and location of other worksites to determine national or multi-national firm status.53

Once it has been determined that a company can participate, it must then meet the wage and training requirements. To meet the wage requirement, a company must demonstrate that it pays above-average wages, as compared to other companies in the same geographical area with matching NAICS codes. That requirement is met if no other companies in the geographical area share the same NAICS code. The requirement is also met if a company does not meet either of those criteria, if it pays one and one-half times the state average wage. However, a company using this alternate wage standard must eliminate from the calculation any employee with five percent or more ownership in the business.54

The training requirement can be met in either of two ways. First, the training requirement is met if a company is participating in one of the state’s training programs – Kansas Industrial Training program (KIT)55 or Kansas Industrial Re-training program (KIR).56 Otherwise, a company must show that it spends an amount equal to at least two percent of the worksite’s total wages on eligible training. Eligible training expenses include instructor salaries, curriculum planning and development, travel, materials, supplies, textbooks, manuals, minor training equipment and certain training facility costs.57

As stated above, there are three benefits available under HPIP – an investment tax credit, a training credit, and a sales tax exemption. The investment tax credit equals ten percent on the capital investment exceeding either (i) $1 million in the metropolitan counties of Douglas, Johnson, Sedgwick, Shawnee and Wyandotte, or (ii) $50,000, in all other counties. Capital investments include all asset purchases, both real and personal, and eight times any annual lease payments. So, for example, a company leasing 20,000 square feet at $15.00/ sf and making capital purchases of $225,000 could receive a tax credit of $162,500 in a metro county, and $257,500 in a non-metro county.59 The investment credit can be carried forward for up to 16 years.60

The training credit, if earned, can be up to $50,000 per annum dollar-for-dollar on eligible training expenditures above two percent of total company payroll. No carry-forward of the training credit is allowed.61

Finally, a sales tax exemption on purchases is also available. Unless the entity qualifies for sales tax exemption in its own right (for example, elementary/secondary schools or religious organizations) or uses industrial revenue bond financing, the only way under current law a business may qualify to receive a Sales Tax Project Exemption Certificate is through HPIP. Prior to 2012, there were a variety of ways for businesses to receive such a certificate, which allow contractors and subcontractors to purchase materials free from sales tax, and exempt purchases of machinery, equipment and furnishings from sales tax. Now only HPIP certified businesses are eligible for such sales tax exemption.

C. Historic Preservation Credit

Kansas’ Historic Preservation Credit (Historic Credit) is often used in conjunction with the federal rehabilitation credit to offset the costs associated with renovating designated historical buildings. But while the federal credit can only be taken on income-producing properties, the Historic Credit can be taken whether the property generates income or not.63 Private residences can qualify. The Historic Credit is one of the few state credits that can be sold, and is the most actively traded. The others that can be sold are the Angel Investor Credit,64 the Community Service Credit,65 and the Higher Education Deferred Maintenance Credit.66

The first requirement for the Historic Credit is that the project expenses must exceed $5,000,67 although smaller projects can be combined to meet the minimum threshold.68 Buildings qualify if they are on the National Register of Historic

51. See www.census.gov/cgi-bin/ssrd/naics/naicsrch?chart=2012.
52. See K.A.R. 110-6-3.
53. See id.
54. See K.S.A. 74-50,131(e).
55. K.S.A. 74-5065.
56. Id.
57. See K.A.R. 110-6-3(e).
58. This is calculated as follows: ((20,000 x $15 x 8) + $225,000 - $1,000,000) x 10%.
59. This is calculated as follows: ((20,000 x $15 x 8) + $225,000 - $50,000) x 10%.
60. See K.S.A. 79-32,160(a).
62. I.R.C. 47.
63. See K.S.A. 79-32,211(b)(2).
64. K.S.A. 74-8133(e) and infra Part II.F.
65. K.S.A. 79-32,197a and infra Part II.G.
66. K.S.A. 79-32,261(e).
68. See id.
Places, the Register of Kansas Historic Places, or are located and contribute to a district that has been classified as a National or State Register Historic District. The Historic Credit equals 25 percent of qualifying expenses for both income-producing and non-income producing buildings. The credit increases to 30 percent for non-income producing buildings if the taxpayer is a 501(c)(3) organization. The Kansas State Historical Preservation Office must approve the application and work plan before work begins, and the Office monitors the projects to be sure they comply with required standards throughout. The Historic Credit allows for a 10-year carryforward.

D. Telecommunication Credit

Like the M&E Credit discussed earlier, the Telecommunication Credit provides for a refundable credit based on a percentage of property taxes paid on specific categories of business personal property. In effect, it lowers the assessment rate from 33 percent to 25 percent. However, the Telecommunication Credit is limited in that it is only available to telecommunication companies as defined in K.S.A. 79-3271(j). Pass-through entities will no longer be able to take the credit starting in 2013.

E. Business and Job Development Credit

The Business and Job Development Credit (B&J Credit) is no longer available. For tax years 2011 and thereafter, it was eliminated for Douglas, Johnson, Leavenworth, Sedgwick, Shawnee and Wyandotte counties. For tax years 2012 and thereafter, it was eliminated for all other counties.

Credits were actually earned under either of two acts – the Job Expansion and Investment Credit Act of 1976 or the Kansas Enterprise Zone Act. The latter provided a credit of $100 per new employee which could be recomputed each year for 10 years, plus an investment credit of $100 for each $100,000 of qualified investment. The former provided a one-time credit of either $1,500 or $2,500 per new employee, depending on the category of the employer (manufacturer vs. nonmanufacturer vs. retailer) and the location in the state (metropolitan vs. non-metropolitan), plus an investment credit of $1,000 per $100,000 of qualified investment. Various numbers of new employees were needed depending on the category and location.

Any credit earned through the Kansas Enterprise Zone Act but unused may continue to be carried forward and utilized so long as all requirements are met. Any credit earned through the Job

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69. K.S.A. 79-32,211(b)(2).
70. K.S.A. 79-32,211(a).
71. See id.
72. See K.S.A. 79-32,211(b)(3).
73. See K.S.A. 79-32,211(a).
75. See id.
77. See K.S.A. 79-32,160g.
78. K.S.A. 79-32,160 et seq.
79. K.S.A. 79-32,153 et seq.
82. See K.S.A. 79-32,160g.
Expansion and Investment Credit Act of 1976 with years left in recomputing the credit may also continue for the remainder of the nine-year period, again so long as all requirements are met. The B&J Credit cannot be used other than as explained above, or by a determination that a taxpayer actually qualified in the past, and could still amend those years and returns.

F. Angel Investor Credit

One of the few credits that can be transferred, the Angel Investor Credit (AI Credit) is designed to encourage investment in technology startup companies. “Angel investors” are those individuals, or owners of a certain permitted entity investor, who are of high net worth. Individuals who are associated with the business as executives, officers, employees, vendors or independent contractors are not allowed to participate.

Investors can receive a 50 percent tax credit based on their cash investment in Kansas businesses pre-approved by the secretary of the Department of Commerce (Secretary). The law will not allow credits of more than $50,000 for a single Kansas business, or a total of $250,000 of credits for a single year per investor who is a natural person or owner of a permitted entity investor.

Only certain businesses can be approved by the Secretary. The following are among the requirements:

1. The business must have had less than $5 million in gross revenues in its most recent tax year;
2. If the company is a bioscience company, it must have been in operation less than ten years;
3. If the company is not a bioscience company, it must have been in operation less than five years; and
4. It must generally be a stand-alone business – that is, it may not be a component of a non-qualifying company.

The AI Credit includes a sunset provision, and is set to expire December 31, 2016.

G. Community Service Credit

The Community Service Credit (CS Credit) is designed to assist nonprofit organizations in raising funds for major capital projects, rather than as a business incentive tool. Nonprofits can request up to $250,000 in tax credits under a competitive application process for community service, crime prevention, and health care projects. Nonprofits that obtain the credits then grant them to businesses or individuals who contribute to the project. If the project is in a rural area (generally areas with a population of less than 15,000), investors receive a tax credit equal to 70 percent of their contribution. For non-rural areas, the credit is 50 percent of the contribution. In effect, the CS Credit converts a portion of what would have been a charitable contribution deduction into a tax credit (with an offsetting reduction to the deductible amount).

H. Research and Development Credit

Unlike many states’ versions of this credit, the Kansas Research and Development Credit (R&D Credit) is not linked to or based on the federal credit at Internal Revenue Code Section 41. Rather, Kansas provides a simple, straightforward credit for businesses incurring allowable expenses.

Specifically, Kansas provides an income tax credit equal to 6.5 percent of the company’s investment in research and development above the three-year average of such expenditures for the current year and the immediately preceding two years. To qualify, the expenditures must simply be qualified research expenditures that would be deductible as such under the Internal Revenue Code. That is a looser standard than needed for the federal credit. Taxpayers are allowed to take 25 percent of the credit in the year in which it is earned, and carry forward any excess to be used in 25 percent increments until it is exhausted.

III. Incentives

A. PEAK

A relatively recent addition to Kansas law, the PEAK program differs from the above tax credits in that it allows companies to retain 95 percent of the payroll withholding tax on PEAK-eligible jobs. It is a discretionary program, and companies must be approved by the Secretary to participate. If a company qualifies and is approved, the benefits can be substantial. The total amount of withholding taxes retained by PEAK companies in the period from July 1, 2009, to June 30, 2010, was only $95,299. But that was the first year of the program. Although official numbers are not yet available for subsequent periods, the amounts retained appear to have increased exponentially and the PEAK program is now one of the most sought-after incentive programs in the state. An article in the Kansas City Business Journal reported more than $8.4 million in retained withholding as of May 2012, and it has been reported that AMC Entertainment received $47 million in incentives for moving its headquarters, including approximately 450 corporate employees.
into Kansas. The bulk of those incentives is through the PEAK program and will be received/retained over a period of years. 

PEAK started in 2009 and was initially geared exclusively to companies that relocated jobs into Kansas from out-of-state. In 2010 it was amended to shift the focus from relocation to location, allowing start-up companies to participate. 2010 also saw changes which would allow participation by companies that were adding an entirely new “facility, plant, division, office, department, production line, production shift or other business operations.” Starting in 2012, companies that were simply expanding existing Kansas operations could qualify, although the total benefits available are limited. Fi-

nal, for a two year window commencing January 1, 2013, there are some very limited funds available simply to retain businesses. Ancédotal evidence indicates that the state is keeping those retention funds in reserve for a special situation that might arise.

To qualify for PEAK, a company must meet certain wage requirements, have made available to full-time employees adequate health insurance for which the company pays at least 50 percent of the premiums, and be in an eligible NAICS code or be qualified as a headquarters or administrative/back office operation. There are two methods to meet the wage requirement: A company’s average wage must either be at or above the county median wage, or at or above the NAICS code industry average wage for the region.

The ineligible NAICS codes for the PEAK program are those starting with 221 (Utilities), 44 and 45 (Retail Trade), 61 (Educational Services), 7132 (Gambling Industries), 722 (Food Services and Drinking Places), 8131 (Religious Organizations), and 92 (Public Administration). Businesses categorized as bioscience companies are ineligible, as are those that have filed (or announced intention to file) for bankruptcy protection, or which are delinquent in paying taxes.

There are two types of PEAK-eligible projects, with differing tiers of benefits available. “Basic” projects are those where the company is adding at least five new employees within two years, although in the metropolitan counties of Douglas, Johnson, Leavenworth, Sedgwick, Shawnee and Wyandotte the company must hire at least ten new employees in that time frame. Depending on how far the wages exceed the median wage, and how desirable the jobs are, the Secretary can approve up to seven years of benefits. “High impact” projects are those where at least 100 new jobs are added within two years. Again, depending on how far the wages exceed the median wage, the Secretary can approve up to 10 years of benefits.

One final caveat to note regarding the PEAK program is that while companies can qualify for PEAK based on whether their average wage is sufficient, companies that are approved only retain the withholding on those jobs that actually pay above the median wage.

B. Kansas Bioscience Authority

The Kansas Bioscience Authority (Authority) is an independent entity of the state, created in 2004 for the stated purpose of making Kansas the “most desirable state in which to conduct, facilitate, support, fund and perform bioscience research, development and commercialization.” Rather than using tax credits, or allowing companies to retain a portion of their employees’ withholding taxes, the Authority focuses on providing grants and other direct financial assistance to targeted companies and individuals.

The Authority targets Kansas universities and colleges conducting bioscience research, as well as businesses in specific NAICS codes. But the enabling legislation is broadly drawn to permit a wide variety of recipients, including individuals. The Authority is funded by the incremental growth in state income taxes paid by bioscience workers over 2003 levels and uses a variety of programs to achieve its objectives. As of June 30, 2011, it had committed more than $200 million of funds to recipients. Very brief synopses of the programs follow, along with the amounts committed through June 30, 2011:

- Kansas Bioscience Growth Fund – $30,373,335 committed. The Authority invests in venture capital funds that have committed to establishing operations in the state and to working with the Authority to invest in Kansas bioscience companies.
• Eminent Scholars Program – $20,670,639 committed. This program is intended to recruit distinguished bioscience researchers to Kansas research institutions, where they can continue their research and commercialize their discoveries. Direct subsidies are provided to the institutions.126

• Centers of Innovation – $16,296,667 committed. This program is intended to make large dollar investments to help pair for-profit bioscience companies together with Kansas universities.127

• Expansion and Attraction Program – $16,210,388 committed. In this program, the Authority works with the KDOC and local economic development organizations to help expand existing businesses and attract new ones with strong growth potential. The program uses a mix of low-interest loans, grants and bonds.128

• Matching Fund Program – $12,590,591 committed. As its name implies, this program provides funds to match federal research dollars, as well as private sources of funding. Grants can be made to research institutions and bioscience companies.129

• Equity Investment Program – $8,986,693 committed. This program is focused on early-stage bioscience companies. It provides loans and grants to meet the need for growth capital.130

• Bioscience Business Services – $5,362,500 committed. Through this program, the Authority offers its expertise to Kansas bioscience companies in the more practical areas of business. The Authority can provide counseling to management, assistance in executive recruiting, guidance in the use of business and financial models, and help in identifying target markets and finding funding sources.131

• R&D Voucher Program – $4,238,377 committed. This program is geared toward high risk/reward projects. The Authority can underwrite up to 50 percent of direct research costs under this program. Any single program is limited to $1 million a year, for a maximum of two years.132

• Rising Stars Program – $1,857,500 committed. This program is designed to retain researchers already in-state, and recruit up-and-coming scholars, with the expectation that they will commercialize their discoveries in Kansas.133

• Proof of Concept Investment Program – $1,423,534 committed. This program generally provides small grants to early-stage projects to help companies then attract outside investors.134

• Drug Development Program – $500,000 committed. This program provides grants to support

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126. See K.S.A. 74-99b09(a)(6) and (7).
127. See K.S.A. 74-99b09(c).
128. See id.
129. See K.S.A. 74-99b09(a)(13).
130. See K.S.A. 74-99b09(c).
131. See id.
132. See id.
133. See K.S.A. 74-99b09(6) and (7).
134. See K.S.A. 74-99b09(c).
late-stage drug development projects at Kansas universities.¹³⁵

No matter which program a business is interested in, the first step is always the same — completing the Authority’s “Request for Assistance” form.¹³⁶ That form gathers some basic information, but also solicits descriptions of how the company’s product or service is “unique or disruptive,” what types of intellectual property and patents the company holds, and how much capital the company has already raised.¹³⁷ The Authority conducts an assessment of the business, then meets with company personnel to determine whether the business is a good candidate. If so, assistance is offered. If not, feedback and advice are provided.

Finally, before a company can receive benefits from the Authority, it must enter into a repayment agreement pursuant to which the company must agree to repay the grant money if the company relocates supported operations outside Kansas within 10 years of receiving such assistance.¹³⁸

IV. Effects of House Bill 2117

House Bill 2117,¹³⁹ signed by Gov. Brownback on May 22, 2012, provides significant tax cuts intended to boost the economy. Elements of the bill impact, both directly and indirectly, existing credit and incentive programs.

From an income tax perspective, the bill makes two significant changes. First, it reduces individual income tax rates,¹⁴⁰ and second, it eliminates (via deductions) the income taxes on nonwage business operating income for businesses taxed as pass-through entities.¹⁴¹ Such pass-through entities include limited liability companies, S-corporations, partnerships, and sole proprietorships.

In conjunction with the elimination of taxes on nonwage business income for pass-through entities, those same entities are prohibited, starting in 2013, from receiving a number of tax credits.¹⁴² Specifically, such pass-through entities can no longer receive the Telecommunication Credit, the R&D Credit, the Small Employer Health Insurance Credit, the Alternative-Fuel Tax Credit, the Individual Development Account Credit, the Child Day Care Assistance Credit, the Disabled Access Credit, the Agritourism Liability Insurance Credit, the Single City Port Authority Credit, the Venture and Local Seed Capital Credits, the Abandoned Well Plugging Credit, the Assistive Technology Contribution Credit, the Environmental Compliance Credit, or the Swine Facility Improvement Credit.¹⁴³ Those credits were directly affected by House Bill 2117. Credits which are transferable (for example, Historic Credit, AI Credit) should see little effect from the new law. Other credits and certain incentives will be impacted indirectly. Exact impact of the law on such credits and incentives is impossible to predict, but it seems certain that the following programs will be affected.

A. HPIP Program

Many pass-through entities have participated in HPIP in the past, and utilized its 10 percent investment credit and training credit to reduce their tax liability. Since their non-wage business operating income is no longer subject to Kansas income tax, the HPIP program has become less valuable to them after the adoption of the new law.

However, the HPIP Program does retain significant value even to such pass-through entities, in at least two ways. First, any HPIP credits earned and passed through to the owners can be used to reduce any Kansas income tax still owed by them. They could owe such taxes in a variety of ways, including:

- On wage income from the business which earned the credits;
- On wage income from a separate business;
- On taxable non-wage income (e.g., dividends); or
- On taxes owed on capital gains (e.g., from the sale of a business).

Second, as mentioned above, the HPIP Program is the only way for most businesses to obtain a sales tax exemption under a Project Exemption Certificate.¹⁴⁴ So, for example, if a company renovated an existing building for $500,000, purchased new computers and a phone system for $200,000, and purchased furniture and fixtures for $300,000, it could avoid approximately $80,000 in sales tax by participating in HPIP.¹⁴⁵

B. PEAK Program

Because PEAK involves the retention of employees’ withholding taxes, the reduction in individual income tax rates under the new law will decrease the amounts of payroll withholding by a company, and thus retained under the PEAK Program. For example, the top individual rate is decreasing from 6.45 percent to 4.9 percent. However, there will not be quite a corresponding reduction in amounts retained. To illustrate: Assume a company has 10 employees, each of whom makes $45,000, are single, and do not itemize their deductions. Their total state tax obligations will change as follows:

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>2013</th>
</tr>
</thead>
<tbody>
<tr>
<td>Income</td>
<td>$45,000.00</td>
<td>$45,000.00</td>
</tr>
<tr>
<td>Standard Deduction</td>
<td>-3,000.00</td>
<td>-3,000.00</td>
</tr>
<tr>
<td>Taxable Income</td>
<td>$42,000.00</td>
<td>$42,000.00</td>
</tr>
<tr>
<td>Tax¹⁴⁷</td>
<td>$2,236.50</td>
<td>$1,773.00</td>
</tr>
</tbody>
</table>

¹³⁵. See id.
¹³⁶. See www.kansasbioauthority.org/working-with-kba/investment-process/.
¹³⁷. See id.
¹³⁸. See K.S.A. 74-99b18.
¹⁴². See 2012 H.B. 2117, multiple sections.
¹⁴³. See id.
¹⁴⁴. See supra Part II.B.
¹⁴⁵. This is calculated as follows: ($500,000.00 + $200,000.00 + $300,000.00) x 8%. The calculation assumes an 8% combined sales tax rate, and $1 million in taxable expenditures.
¹⁴⁷. This is calculated as follows: For 2012: $1,462.50 plus 6.45% of the excess over $30,000 = $2,236.50; for 2013: $450 plus 4.9% of the excess over $15,000 = $1,773.
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Under this example, one would expect to see a 20.7 percent reduction in taxes withheld, and thus retained under the PEAK Program, even though one might expect about a 24 percent reduction based solely on the reduction in tax rates.

C. Kansas Bioscience Authority

Because the majority of the funds received by the Authority come from incremental increases in the withholding taxes of bioscience workers over 2003 levels, a reduction in the taxes paid by such workers could reduce the total funds available. However, because the number of bioscience employees can continue to increase while the “base year taxation” remains a fixed amount, the effect of the new law could be positive, negative, or neutral.

V. Conclusion

Although some credits have been completely abolished, and other credits and incentives have new restrictions on them, the overall climate for business in Kansas is improving. Kansas’ top marginal tax rate has gone from being the second highest of the area states to the second lowest. Pass-through entities will be exempt from state income tax on non-wage income starting in 2013. And C corporations will continue to be able to fully utilize the remaining credits. Whether the changes will result in enough growth to offset any tax reductions, however, remains to be seen.

About the Author

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148. This is calculated as ($2,236.50 - $1,773.00) ÷ $2,236.50 = 20.72%.
149. This is calculated as (.0645 - .0490) ÷ .0645 = 24.03%.
150. See K.S.A. 74-99b33(b). The “base year taxation” is equal to 95 percent of the 2003 state withholding taxes of bioscience employees working for bioscience companies and state universities.
151. Kansas’ top marginal tax rate has decreased from 6.45 percent to 4.9 percent. The surrounding states’ top marginal tax rates are 4.63 percent (Colorado), 5.25 percent (Oklahoma), 6 percent (Missouri), and 6.84 percent (Nebraska).
Attorney Discipline

Disbarment

In Re Steven C. Alberg

Original Proceeding in Discipline

Facts: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Steven C. Alberg, of Olathe, an attorney admitted to the practice of law in Kansas in 1980. Alberg’s ethical complaint involves his representation of divorce clients, his fee arrangements, and his sexual relationship with one of those clients.


Held: Court held that the respondent’s violations are significant, repeated, and numerous.

Court stated that at oral argument, respondent demonstrated no real perception of the significance of his numerous violations of the rules of professional conduct. Nor did he fully accept responsibility for his violations, instead describing himself as “a white knight” who allowed himself to be led by his heart. Court held that respondent’s inability to understand or take responsibility for the nature and breadth of his professional misconduct underscores the significance of the misconduct and engendered the court’s decision that disbarment from the practice of law is the appropriate sanction. Court noted that a minority of the court would impose discipline short of disbarment.

Disbarment

In Re John C. Davis

Original Proceeding in Discipline
No. 108,494 – February 1, 2013

Facts: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, John C. Davis, of Overland Park, an attorney admitted to the practice of law in Kansas in 1983, and in Missouri in 1968. Respondent’s Missouri license has been suspended since May 1, 2012. Davis’ ethical complaint involved his creation of a mining company in which he sold securities raising nearly $3 million and investors received no return on their investment.

Hearing Panel: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys, where the respondent was personally present and was represented by counsel. The hearing panel determined that the respondent violated KRPC 4.1 (2012 Kan. Ct. R. Annot. 605) (truthfulness in statements to others); KRPC 8.4(c) (2012 Kan. Ct. R. Annot. 643) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); and KRPC 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer's fitness to practice law).

Held: Court stated that Baker knowingly made misrepresentations and material omissions involving 36 investors in six states. He raised approximately $2.6 million and squandered all of the investors’ money. The investors received no return on their investment, including no dividends, interest, or return of principal. Even though the state of Idaho issued a deficiency letter to the respondent just eight days after the offering was filed, the respondent failed to act and cure that deficiency. In making the misrepresentations and in failing to take action to mitigate potential losses, the respondent acted both personally and as a fiduciary in a corporate capacity, and such actions seriously adversely reflect on the respondent’s fitness to practice law. Court held the facts show a pattern of misrepresentation and omissions and a severity of injury so severe that a majority of this court concluded disbarment was appropriate. A minority of the court would impose a less severe sanction.

Disbarment

In Re Douglas Lee Baker

Original Proceeding in Discipline
No. 108,206 – February 15, 2013

Facts: This is a contested original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Douglas Lee Baker of Lawrence, an attorney admitted to the practice of law in Kansas in 1975. The disciplinary complaint against Baker involved his creation of a mining company in which he sold securities raising nearly $3 million and investors received no return on their investment.


Held: Court held that Baker knowingly made misrepresentations and material omissions involving 36 investors in six states. He raised approximately $2.6 million and squandered all of the investors’ money. The investors received no return on their investment, including no dividends, interest, or return of principal. Even though the state of Idaho issued a deficiency letter to the respondent just eight days after the offering was filed, the respondent failed to act and cure that deficiency. In making the misrepresentations and in failing to take action to mitigate potential losses, the respondent acted both personally and as a fiduciary in a corporate capacity, and such actions seriously adversely reflect on the respondent’s fitness to practice law. Court held the facts show a pattern of misrepresentation and omissions and a severity of injury so severe that a majority of this court concluded disbarment was appropriate. A minority of the court would impose a less severe sanction.
HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on May 24, 2012, when the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.5 (2011 Kan. Ct. R. Annot. 470) (fees); 1.15 (2011 Kan. Ct. R. Annot. 519) (safekeeping property); 8.4(b) (2011 Kan. Ct. R. Annot. 618) (commission of a criminal act reflecting adversely on the lawyer's honesty, trustworthiness, or fitness as a lawyer); 8.4(c) (engaging in conduct involving misrepresentation); and 8.4(d) (engaging in conduct prejudicial to the administration of justice). The hearing panel recognized that it is an unusual event for a hearing panel to recommend discipline greater than recommended by the parties. However, the hearing panel found Davis' misconduct in this case so serious that the ultimate sanction of disbarment is appropriate.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Davis be indefinitely suspended from the practice of law.

HELD: Court found the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel's conclusions of law. Court adopted the panel's conclusions. Court found that Davis has continued to minimize his conduct and maintained that he did not take advantage of the trust estate or its beneficiaries. He personally professed to the court that his troubles were born of inefficiencies; that the trust and estate administration required a good deal of time in which he neither overcharged for his own benefit or the benefit of the firm. Court was not persuaded by that argument. The respondent knowingly converted an elderly, disabled client's funds and used those funds to pay his wife nearly a half a million dollars for supervising health care providers and ensuring that nursing facilities provided adequate care. Further, he used estate funds to pay his personal marital income tax liability. The respondent minimized his responsibility for that act by describing it as "borrowing" $83,000. Respondent took money entrusted to him, converted it to his own use, and has yet to fully refund either the estate or the law firm that covered some of his misappropriation from the estate. Court held that disbarment is the appropriate sanction.

ORDER OF DISCHARGE FROM PROBATION
IN RE KEVIN PETER SHEPHERD
NO. 102,925 – JANUARY 4, 2013

FACTS: On November 25, 2009, the court suspended the respondent, Kevin Peter Shepherd, from the practice of law in the state of Kansas for a period of three years. See In re Shepherd, 289 Kan. 1116, 220 P.3d 359 (2009). On May 2, 2011, the court granted the respondent's motion to suspend the remaining two years of suspension from the practice of law in Kansas and placed the respondent on probation for the remainder of the suspension term, subject to specific terms and conditions. See In re Shepherd, 292 Kan. 189, 254 P.3d 1262 (2011). On February 29, 2012, the court modified the terms of the respondent's probation. In re Shepherd, 293 Kan. 927, 271 P.3d 731 (2012). The respondent has now filed a motion to terminate probation, along with affidavits from the respondent and the supervising attorney, demonstrating compliance during the period of probation.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator confirms the respondent has fully complied with all conditions imposed upon him by the Court and offers no objection to the respondent being discharged from probation.

HELD: Court, having reviewed the motion, the affidavits, and the recommendation of the Office of the Disciplinary Administrator, found that the respondent should be discharged from probation and from any further obligation in this matter and that this proceeding is closed.

SIX-MONTH SUSPENSION
IN RE STEPHEN B. SMALL
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 107,556 – FEBRUARY 22, 2013

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Ste-
phen B. Small, of Kansas City, Mo., an attorney admitted to the practice of law in Kansas in 1986. Small’s complaint involved his representation of a client in an eviction proceeding, payment of his fees, and Small’s treatment of opposing counsel, the judge, and others involved in the case.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on November 15, 2011, when the respondent was personally present. The hearing panel determined that respondent violated KRPC 8.4(d) and (g) (2012 Kan. Ct. R. Annot. 643) (engaging in conduct prejudicial to the administration of justice and adversely reflecting on lawyer’s fitness to practice law). The hearing panel concluded that the respondent’s use of threats and intimidation tactics with respect to opposing counsel, the trial court, and the deputy disciplinary administrator resulted in prejudice to the administration of justice and, additionally, adversely reflected on the respondent’s fitness to practice law. The respondent’s practice with regard to notarizing documents was also troubling to the hearing panel. The respondent simply provided his notary with a signature page, signed by the respondent, and requested that the notary notarize the signature. The hearing panel recommended that the respondent be suspended from the practice of law for a period of 90 days.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended from the practice of law.

HELD: Court stated that the respondent did not file any exceptions to the hearing panel’s final hearing report. Court adopted the panel’s conclusions and held that the violations proved and respondent’s apparent inability to acknowledge any wrongdoing or address the relevant issues at oral argument before this Court demonstrated the need for a six-month period of suspension.

CIVIL

CONTRACT, KANSAS CASH-BASIS LAW, AND HELICOPTER
STATE EX REL. HECHT V. CITY OF TOPEKA
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,731 – FEBRUARY 1, 2013

FACTS: The city of Topeka attempted to purchase a new police helicopter. The state filed an action seeking a declaratory judgment that the agreement between the city and Schreib-Air Inc. (Schreib-Air), the helicopter dealer, was “invalid, void ab initio, and ultra vires” in violation of the Kansas cash-basis law, K.S.A. 10-1101 et seq. The state also requested a writ of quo warranto stating that the city and the city manager acted without valid and lawful authority and that any agreements entered into as a result were invalid, unlawful, and void. Ultimately, the district court granted summary judgment in favor of the state by finding that knowledge that the authorization for purchase could be vetoed by the mayor based on the mayor’s prior veto and the city ordinances regarding the city manager’s power to contract was imputed to Schreib-Air.

ISSUES: (1) Contract, (2) Kansas cash-basis law, and (3) helicopter

HELD: Court held that Schreib-Air’s agreement with the city was void when entered into because the city failed to satisfy the statutory conditions that would allow it to purchase the helicopter. Specifically, the city was either required to have at least $740,000 in its treasury for the purpose of buying the helicopter or it was required to secure financing for the purchase of the helicopter in compliance with the cash-basis law. Because neither of those conditions was met prior to the city entering into the agreement with Schreib-Air, the contract was made in violation of the cash-basis law and, consequently, the contract is unenforceable.
SUPPRESSION OUTFWEIGHS ITS HEAVY COSTS.

If so, COTA must then consider whether the deterrent benefits of taxation outweigh the evidence of the Fourth Amendment violation.

Once any additional discovery is completed, COTA should determine the scope and duration of additional discovery, if any. Once the issue of applicability of the exclusionary rule is determined, COTA must first determine the existence or nonexistence of a mother and child relationship. A co-parenting agreement is not automatically enforceable as violating public policy merely because it contains the biological mother's agreement to share custody of the children, designated Goudschaal as the residential custodian, established unsupervised parenting time for Frazier, and ordered Frazier to pay child support. Goudschaal appealed, questioning (1) district court's jurisdiction and authority to award joint custody and parenting time to an unrelated third person, and (2) district court's division of her individually owned property. Appeal transferred to Kansas Supreme Court.

ISSUES: (1) Jurisdiction and standing, and (2) property division

Held: Arguments of parties and amici curiae are comprehensively summarized. A woman claiming to be a presumptive mother of a child is an interested party under the KPA, and may bring an action to determine the existence or nonexistence of a mother and child relationship. A co-parenting agreement is not automatically rendered unenforceable as violating public policy merely because it contains the biological mother's agreement to share custody of her children with another, so long as the intent and effect of the

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arrangement will promote the welfare and best interests of the children. Under specific facts of this case, the co-parenting agreement between the biological mother and her same-sex partner contained no element of immorality or illegality and did not violate public policy, but rather the contract was for the advantage and welfare of the children, rendering it enforceable by the district court to the extent it is in best interest of the children. Case is remanded for further exploration of best interest of the children, and appointment of attorney to represent children's interests.


CONCURRING (Biles, J.): Would hold that KPA governs this case and provides sufficient statutory framework to resolve legal issues advanced by Frazier, thus unnecessary for court to delve further into authority it may have under common law or advance some other public policy rationale to decide issues presented. Concurs with majority's result affirming Frazier's parent-child relationship and her rights, duties, and obligations arising therefrom. Agrees with remand to further explore best interest of the children and appointment of attorney to represent their interests. Agrees with majority as to division of parties' property under Eaton.

STATUTES: K.S.A. 20-3018(c); K.S.A. 38-129, -1110 et seq., -1111, -1113, -1113(a), -1114(a), -1115(a)(4), -11114(c), -1114(f), -1126, -1336 et seq., -1337(14); and K.S.A. 60-201(b), -1610, -1610(b), -1616

MEDICAL LICENSE, REVOCATION, JURISDICTION, AND DUE PROCESS

FRIEDMAN V. KANSAS STATE BOARD OF HEALING ARTS

SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,921 – FEBRUARY 15, 2013

FACTS: In 1999, the Kansas State Board of Healing Arts (Board) issued a medical license to Friedman. For several years, Friedman paid the fees for the annual renewal of his license. Then, in March 2006, Friedman requested that the Board change his license designation to inactive status, and he did not pay the annual registration fee that was due by June 30, 2006. On July 31, 2006, the Board filed a formal disciplinary action against Friedman that resulted in an order of the Board revoking his license. Friedman claimed the Board could not initiate the action against him because his license was expired on the date the petition was filed. Friedman's motion to dismiss was denied. Court previously dismissed Friedman's appeal on this issue because he failed to exhaust administrative remedies. Friedman v. Kansas State Bd. of Healing Arts, 287 Kan. 749, 755, 199 P.3d 781 (2009) (Friedman I). While that appeal was pending, the administrative action continued in an amended petition and ultimate revocation of Friedman's license. The district court affirmed the revocation and the case was transferred to the Kansas Supreme Court.

ISSUES: (1) Medical license, (2) revocation, (3) jurisdiction, and (4) due process

HELD: Court held that the Board had jurisdiction to discipline Friedman because it is undisputed that the Board had issued a license to Friedman pursuant to the Kansas Healing Arts Act and that the acts that gave rise to the disciplinary proceeding occurred while Friedman was a licensee practicing under the Act. Court found there was substantial evidence to support each of the six disciplinary allegations against Friedman: (1) improper care of obstetrical patient and delivery of baby while Friedman was traveling to the hospital; (2) Friedman's order for inductions of obstetrical patient even though he was performing surgery in another hospital; (3) failure by Friedman to examine a patient 20 weeks pregnant who was bleeding and leaking amniotic fluid before she sent her home; (4) Friedman's treatment of patient over three year period and diagnosis by other doctor of stage IV cancer and patient's death; (5) Friedman's failure to review test results and fetus did not survive; and (6) that Friedman's license could be revoked because he surrendered his license while under investigation for disciplinary matters.

STATUTES: K.S.A. 20-3018(c); K.S.A. 65-2801, -2833, -2836, -2837, -2838(a), -2851; and K.S.A. 77-527(e), -601, -602, -621

TORTIOUS INTERFERENCE WITH CONTRACT AND PROSPECTIVE BUSINESS RELATIONSHIPS

COHEN ET AL. V. BATTAGLIA

JOHNSON DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – REVERSED
NO. 99,793 – FEBRUARY 8, 2013

FACTS: The Baron Automotive Group Inc. (BAG) and trustees of the Barton J. Cohen Revocable Trust Cohen and Cass Family Trust agreed to sell to Group 1 Automotive 100 percent of the membership interests in Baron Development Co. (BDC), including Battaglia's 20 percent security interest, and (2) BAG would sell to Group 1 all of its assets. When Battaglia, who was president of BAG and had a security interest in BDC, learned of the sale agreements, he insisted on knowing the purchase price and other details. The trustees refused the request because Battaglia was not a “seller” under the sale agreements, the transactions with Group 1 were confidential, and disclosure of such information might jeopardize the agreements. Four days before the sales transaction was set to close, Battaglia's attorney, Louis C. Accurso, filed a civil action for breach of fiduciary duty and self-dealing in the circuit court of Jackson County, Mo., naming Cohen, the Cohen Trust, Cass, BAG, and BDC as defendants (the Missouri action). That same day, Accurso faxed to Group 1's general counsel a copy of the Missouri action along with the following letter: "Please find enclosed a file-stamped copy of a lawsuit filed today on behalf of Marion Battaglia. If you have any questions or comments, please do not hesitate to contact me." After receiving the letter and a copy of the Missouri action from Battaglia's attorney, Group 1 refused to close the transaction without indemnification and escrow. Their demands were met, with the trustees allegedly incurring substantial attorney fees as a result. After closing, the Cohen and Cass trustees filed a tortious interference lawsuit against Battaglia. Included in their claims was an allegation that Accurso's conduct in "[s]ending the letter and a copy of the petition for the Missouri action served no purpose except to interfere with the sale transactions.” Battaglia filed a motion to dismiss the tortious interference claims under K.S.A. 60-212(b), which the trial court ultimately granted. The Court of Appeals panel rejected the rationales of the district court. But the panel nevertheless affirmed the dismissal on a different ground, i.e., § 772 of the Restatement (Second) of Torts (1979).

ISSUE: Tortious interference with contract and prospective business relationships

HELD: Court reversed because the Court of Appeals inappropriately resolved factual issues on a dispositive motion. Court held the Court of Appeals' reliance on § 772 of the Restatement of Torts and any related legal standard to be incorrect. The Court of Appeals clearly erred in concluding that Accurso's conduct could not be considered a tort because it did not involve misrepresentation or deceit. This was an error of law, and the Court of Appeals should not have considered the claim in that manner. The Court of Appeals also erred in concluding that Accurso's conduct was protected by the attorney-client privilege because the information was not communicated in confidence or in furtherance of a professional relationship. This was an error of law, and the Court of Appeals should not have considered the claim in that manner. The Court of Appeals should have remanded the case to the district court for further proceedings.

STATUTE: K.S.A. 60-212(b)
DANIEL D. DOUGLAS, Petitioner, v. AD ASTRA INFORMATION SYSTEMS LLC, Respondent.

FACTS: Danny Douglas was awarded benefits under the Workers Compensation Act (Act) for an injury he sustained while operating a go-cart at an event sponsored by his employer, Ad Astra Information Systems LLC. Employees were given the option of either attending the event or remaining at work. The employer and its insurance carrier, Hartford Insurance Co. (hereafter collectively referred to as Ad Astra), appealed the award, claiming that Douglas’ injuries were not compensable under K.S.A. 2006 Supp. 44-508(f) because they were sustained during a recreational or social event that Douglas was not required to attend. The Court of Appeals, in a split decision, affirmed the Workers Compensation Board (Board), and we granted Ad Astra’s petition for review.

ISSUES: (1) Workers compensation and (2) recreational or social events

HELD: Court stated that K.S.A. 2006 Supp. 44-508(f) sets forth the circumstances under which injuries sustained by employees while engaged in recreational or social events will not be construed as arising out of and in the course of employment for purposes of workers compensation benefits. The circumstances that will exclude an employee’s injuries from coverage under the Workers Compensation Act are when the employee was under no duty to attend the recreational or social event and when the injury did not result from the performance of tasks related to the employee’s normal job duties or as specifically instructed to be performed by the employer. Court concluded that the Board applied the incorrect legal standard and reversed and remanded the case to the Board for further proceedings in conformance with the plain language of K.S.A. 2006 Supp. 44-508(f).

STATUTE: K.S.A. 2006 Supp. 44-501(a), (g), -508(f)

CRIMINAL

STATE V. EDGAR

FACTS: Edgar was pulled over in a driver’s license check lane. Edgar presented an identification card and after running the license through dispatch, the officer discovered Edgar’s license had been suspended. The officer said he smelled a light odor of alcohol, Edgar said he had just one beer, and the officer had Edgar perform field sobriety tests. Edgar successfully performed the eye-gaze test, the walk-and-turn test, and the one-leg stand test. The police officer told Edgar that he did not have to refuse the preliminary breath test (PBT). did not have a right to consult with an attorney about the PBT, and could be subject to further testing. The PBT showed a 0.122 blood-alcohol content level. Edgar was arrested for DUI and driving on a suspended license. The district court found that absent the PBT results, there was no probable cause to place Edgar under arrest or ask him to take an alcohol test because there was no evidence of bad driving and because Edgar had passed three earlier sobriety tests. The only evidence of intoxication, the district court found, was an odor of alcohol. However, the district court ultimately denied Edgar’s suppression motion. It found the officer was not required to revisit his reasonable suspicion after each sobriety test. The district court explained that it found no case law on point but believed if the officer had reasonable suspicion to begin field sobriety testing in the first place, he also had suspicion to run the gamut of testing, particularly because each person tolerates alcohol differently and might pass the one-leg-stand test, but not the PBT. It also noted PBT administration could occur either before or after other testing. The district court found the officer did not provide the correct notice for the PBT, but that it was justified under the implied consent law. Court of Appeals affirmed.

ISSUES: (1) DUI, (2) preliminary breath test, and (3) notice of right to refuse test

HELD: Court held that field sobriety tests administered prior to a PBT request are part of the totality of circumstances examined by a court when determining whether there was reasonable suspicion to support the PBT request under K.S.A. 2010 Supp. 8-1012(b). However, Court held the officer in this case failed to comply with the notice requirements in K.S.A. 2010 Supp. 8-1012(c) by incorrectly informing the suspect he had no right to refuse the PBT. Telling Edgar he had no right to refuse the test transformed the test into an involuntary search by depriving Edgar of the opportunity to revoke his statutorily implied consent. Court held the district court erred by not suppressing the PBT results and that error also invalidated Edgar’s DUI arrest and the subsequent blood-alcohol test.

STATUTES: K.S.A. 8-262, -1001, -1012(a)-(d), -1567; and K.S.A. 21-3018
STATE V. FLOYD
SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
NO. 106,056 – FEBRUARY 15, 2013

FACTS: Floyd pled guilty to 26 counts of sexual exploitation of a child involving the videotaping of his 5-year-old niece's genitalia as well as showing other children engaging in oral and anal sex with adult men and animals. Before sentencing, Floyd filed a downward durational and/or dispositional departure motion, asking the court to depart from the presumptive prison term because he: (1) had no criminal history; (2) showed remorse for his actions and his family supports rehabilitation and welcomes him home; (3) was the financial backbone of his family, providing for his wife and children; (4) was suffering emotional problems and engaging in drug abuse when his crimes occurred, but wanted to change his course in life and complete treatment; (5) was father to a young son and hoped to be part of his life growing up; (6) was honorably discharged from the U.S. Air Force; and (7) was released from jail shortly after being arrested but “did not try to avoid further arrest and incarcerations.” The district court considered each mitigating factor at the sentencing hearing and denied the motion. The court found the reasons were not substantial and compelling, individually or collectively, to justify departure. Floyd was sentenced to a hard 25 life imprisonment sentence, but the court did use the mitigating factors listed in the departure motion to order the sentences to run concurrently rather than consecutively.

ISSUES: (1) Sentencing, (2) departure factors, and (3) lifetime post-release supervision

HELD: Court held the preliminary hearing transcript strongly supported the state's argument and the district court's finding that the pornographic images found in Floyd's possession were numerous and “reprehensible.” The district court's finding that Floyd's possession of those materials “indicated he knowingly and willingly took part in allowing and promoting a terrible industry” was not unreasonable, and reasonable people could agree with the district court's decision denying Floyd's departure motion. Court found no abuse of discretion. However, Court held the sentencing court had no authority to order a term of lifetime post-release supervision together with an off-grid indeterminate life sentence. Court held Floyd failed to preserve his cruel and unusual punishment argument, and it was not proper for consideration.

STATUTES: K.S.A. 21-3516(a)(5), -4643; and K.S.A. 22-3504, -3601

STATE V. HINES
SEDGWICK DISTRICT COURT – REVERSED, SENTENCES VACATED, AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 102,233 – FEBRUARY 15, 2013

FACTS: Hines convicted on plea to attempted second-degree intentional murder and aggravated battery. Charges arose from violent use of force against wife. Pursuant to plea agreement, Hines filed motion for downward dispositional departure sentence. After wife asked for leniency, sentencing court imposed concurrent downward durational departure sentences. State appealed, arguing victim's request for leniency was not legally sufficient for granting durational departure sentence. Court of Appeals reversed the sentence and remanded for resentencing, holding that testimony from victim or victim's family may furnish a substantial and compelling reason for departure, but finding victim's request for leniency in this case did not constitute a substantial and compelling reason for departure because facts established that Hines had acted with intent to kill victim. 44 Kan. App. 2d 373 (2010). Hines' petition for review granted.

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ISSUE: Departure sentence – Victim request for leniency
HELD: If a victim's request for leniency is substantial (i.e. the reason for the request is real, not imagined, and of substance, not ephemeral) and compelling (i.e., the reason for the request is one which forces the sentencing court, based on the facts of the case, to abandon the status quo and to venture beyond the sentence that it would ordinarily impose), then the request for leniency can, by itself, justify a sentencing court's decision to impose a departure sentence. Under facts of this case, wife's request for leniency would certainly not force a reasonable person to abandon status quo and impose sentences less than prescribed by sentencing guidelines. Sentencing court abused its discretion when it decided to impose duration of departure sentence based solely on wife's request for leniency. Judgment of Court of Appeals is affirmed. District court is reversed, and the case is remanded for resentencing.

STATUTES: K.S.A. 2011 Supp. 21-6820; and K.S.A. 21-4703(n), -4704(a), -4716(a), -4716(c), -4716(d), -4716(a)(1), -4718(a)(4)

STATE V. MARTINEZ
JOHNSON DISTRICT COURT – REVERSED
COURT OF APPEALS – REVISED
NO. 99,595 – FEBRUARY 1, 2013

FACTS: Martinez convicted on drug evidence discovered when police searched Martinez's car after stopping him based on suspicion that he was transporting or knew whereabouts of someone for whom officers had a warrant. Martinez filed motion to suppress, claiming officers conducted unlawful investigatory stop without reasonable suspicion. District court found experienced officers with hunch (correct in this case) rises to reasonable suspicion. Divided Court of Appeals affirmed in unpublished opinion. Review granted.

ISSUE: Suppression of evidence
HELD: Undisputed that investigatory stop occurred when police stopped Martinez. In reviewing law enforcement officer's reasonable suspicion of criminal activity under K.S.A. 22-2402(1), officer must be able to articulate more than a mere hunch of criminal activity to fall within statutory criteria. Reversed and remanded.

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

STATE V. MURPHY
GEARY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,178 – FEBRUARY 1, 2013

FACTS: Murphy convicted of drug charges based on cocaine discovered in traffic stop followed by officer initiating “by the way” query about drugs or weapons in car, and subsequent search. Murphy appealed, arguing search was illegal because traffic stop did not become voluntary encounter before Murphy consented to search of vehicle. Court of Appeals affirmed, 42 Kan. App. 2d 933 (2009). Review granted.

ISSUE: Voluntary encounter
HELD: Case is factually similar to State v. Thompson, 284 Kan. 763 (2007). Factors that tend to establish a voluntary encounter are stated and applied. Under facts in this case, reasonable person would have felt free to refuse officer's request or to terminate the encounter, thus Murphy gave consent to search his vehicle during a voluntary encounter with the officer.

DISSENT (Rosen, J.) (joined by Beier and Johnson, JJ.) : Would find Murphy's consent to search was given during illegal extension of initial traffic stop. As in Thompson dissent, does not believe a reasonable person would have felt free to terminate the encounter and drive away. Instead, officer's "by the way" phrase would lead reasonable person to believe that whatever followed was an extension of the traffic stop.

STATUTES: None
which violated state's promise to stand silent at sentencing hearing. Sentence vacated and case remanded to different judge of the district court for a new sentencing or plea withdrawal. This moots Peterson's remaining two issues.

STATUTES: K.S.A. 21-3304; and K.S.A. 2006 Supp. 21-3516(a) (2)

STATE V. SWINDLER
SUMNER DISTRICT COURT – REVERSED AND REMANDED
NO. 104,580 – FEBRUARY 15, 2013

FACTS: Swindler convicted of rape. On appeal he claimed: (1) rape is an alternative means crime and state failed to present sufficient evidence to support each of the means upon which jury was instructed, and (2) district court erred in denying motion to suppress incriminating statements and a drawing Swindler provided law enforcement officers during custodial interrogation in which his invocation of right to remain silent was not honored.

ISSUES: (1) Alternative means and (2) motion to suppress

District court judge's refusal to suppress the confessions and drawing was error. Coercive effect of investigators' failure to honor their promise that Swindler could terminate an interview at any time compelled Swindler's confessions and inculpatory drawing in violation of Fifth Amendment. Error was not harmless under facts of this case. Reversed and remanded.

STATUTES: K.S.A. 21-3501(1), -3502(a)(2); K.S.A. 22-3421; and K.S.A. 60-460(f)

STATE V. TRUJILLO
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,840 – FEBRUARY 15, 2013

FACTS: Trujillo arrested on charges arising from incident at former girlfriend's house, and from cocaine discovered during jail intake search. While case was pending Trujillo was ordered to have no contact with victim, but Trujillo wrote her letters and called her three times from jail. Jury convicted Trujillo of possession of cocaine and violation of protective order. On appeal, Trujillo claimed jury should have been given unanimity instruction, and claimed cocaine should have been suppressed because police lacked probable cause to arrest him. In unpublished opinion, Court of Appeals affirmed the conviction, and found probable cause issue had not been preserved for review. Petition for review granted.

ISSUES: (1) Unanimity instruction and (2) probable cause
HELD: While Trujillo's calls and letters were factually separate and distinct acts, and parties conceded error in not giving unanimity instruction, no clear error under facts in this case where Trujillo presented unified defense that he did not knowingly violate protective order because he did not know he had been ordered to have no contact. Jury thus had to either unanimously find he knowingly contacted the victim in violation of the protective order, or it would have acquitted on that charge.

Preservation issue not included in petition for review, and is not considered.

STATUTE: K.S.A. 22-3414(3)

STATE V. URISTA
SHAWNEE DISTRICT COURT – REVERSE, SENTENCE VACATED, AND REMANDED
COURT OF APPEALS – REVERSED
NO. 103,089 – FEBRUARY 8, 2013

FACTS: Urista entered no contest pleas to various crimes in exchange for state's promise to recommend a controlling 102-month prison term. District court instead imposed consecutive sentences for a controlling 204-month term. Urista appealed, claiming prosecutor violated plea agreement by making negative comments at sentencing which undermined the recommended sentence, (2) offender registration requirement increased his sentence beyond the statutory maximum, thus basis for the registration had to be proven to jury, (3) district court unlawfully used prior convictions not proven to jury to determine guideline sentence. Court of Appeals affirmed, 45 Kan. App. 2d 93 (2010). Review granted on all three issues.

ISSUE: Violation of plea agreement
HELD: Cases governing plea agreements and whether prosecutor's additional comments at sentencing undermine the sentencing recommendation are reviewed. Under facts of this case, prosecutor's comments at sentencing went beyond mere factual description of crimes or summary of victim's statements. Instead, prosecutor gave personal opinion regarding her prior involvement with Urista, providing a negative editorial with a particularly grave summation regarding Urista based on her observations. Those comments were unprovoked and unnecessary, and effectively undermined the sentencing recommendation. Prosecutor's breach of the agreement was not harmless. Sentence vacated and case remanded for new sentencing hearing before a different district court to best serve appearance of judicial neutrality. Remaining two issues related to sentencing are moot.

STATUTES: K.S.A. 2008 Supp. 21-4704(a); and K.S.A. 21-4606, -4704(h), -4720(b), -4720(b)(4)

COURT OF APPEALS

CIVIL

BANKRUPTCY AND ALTERNATIVE DISPUTE RESOLUTION
FYLER V. BRUNDAGE-BONE CONCRETE PUMPING INC.
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 107,763 – FEBRUARY 22, 2013

FACTS: Brundage-Bone Concrete Pumping Inc. filed for chapter 11 bankruptcy in Colorado and had 1,000-5,000 creditors. Fyler asked for a relief from stay to pursue a tort claim for negligence. After establishment of alternative dispute resolution procedures, both Brundage and Fyler stipulated to lifting the stay to proceed in ADR. Fyler filed a damage lawsuit against Brundage. In mediation, Brundage agreed to pay Fyler $50,000. However, the parties couldn't agree on a release and settlement of the claim. The district court granted Fyler's motion to enforce settlement and ordered that the settlement required Brundage to take all the necessary steps with the bankruptcy trustee to expedite a direct $50,000 cash payment to Fyler.

ISSUES: (1) Bankruptcy and (2) alternative dispute resolution
HELD: Court stated that all bankruptcy proceedings are within the exclusive jurisdiction of the federal courts. State courts can de-
HABEAS CORPUS

WRIGHT V. STATE

BUTLER DISTRICT COURT – AFFIRMED

NO. 106,780 – FEBRUARY 15, 2013

FACTS: Wright convicted of rape. Court of Appeals affirmed in unpublished opinion, finding Wright’s alternative means argument – that there was insufficient evidence to convict her under “force or fear” means of committing rape – was defeated by sufficient evidence to convict under the “unconscious or physically powerless” means of committing rape. On petition for review, Wright contended that even though one alternative means was sufficiently proved, her conviction should be reversed because another alternative means was not sufficiently proved. Kansas Supreme Court affirmed. 290 Kan. 194 (2010). Wright filed K.S.A. 60-1507 motion claiming trial counsel was ineffective in erroneously arguing for general verdict form instead of special verdict form which would have required jury to identify specific means of committing rape. Wright also claimed ineffective assistance of appellate counsel in failing to argue in direct appeal that sexual intercourse with a person who does not consent under circumstances when victim is overcome by force or fear constitutes alternative means of committing rape. District court conducted an evidentiary hearing and denied relief on both claims. Wright appealed.

ISSUES: (1) Ineffective assistance of trial counsel and (2) ineffective assistance of appellate counsel

HELD: Trial counsel’s request for a general verdict form did not fall below an objective standard of reasonable representation. District court’s denial of claim of ineffective assistance of trial counsel is affirmed.

Criminal

STATE V. DAVIS

FINNEY DISTRICT COURT – AFFIRMED

107,186 – FEBRUARY 8, 2013

FACTS: Davis stole goods from JC Penney, a retail merchant, and the district court ordered that she pay restitution to the merchant equal to the retail sales price of the items. Davis contends that the court should have awarded restitution only for the amount the merchant paid to buy the goods from its supplier. No evidence was presented in this case outlining any value other than the retail price of the goods, and no evidence showed that the recovery of that amount by the retailer would be inappropriate.

ISSUES: Restitution and (2) retail value

HELD: Kansas statutes and case law emphasize that the district court has substantial discretion in determining the amount of restitution and choosing the retail value of goods stolen from a retail
merchant as the value for restitution in these circumstances is within the district court’s discretion. Court held that in a case in which the defendant stole goods from a retail merchant, the district court does not abuse its discretion in awarding restitution in the amount of the goods’ retail value where that was the only value evidence presented and no other evidence convincingly showed that an award of the retail value would have been inappropriate.

STATUTE: K.S.A. 21-4603d, -4610, -6604(b)(1), -6607(c)(2)

CONCURRENCE AND DISSENT: Judge Green concurred in part and dissented in part. He concurred in the holding of the majority that the amount of restitution to an aggrieved party for the damage or loss caused by a defendant’s crime is to be determined by a trial judge exercising his or her judicial discretion. However, Judge Green disagreed with the majority’s holding that the trial judge properly applied his discretion in determining restitution in this matter since the judge was not required to adopt JC Penney’s restitution amount and could have requested additional evidence.

STATE V. HARGROVE
JOHNSON DISTRICT COURT – AFFIRMED NO. 105,415 – FEBRUARY 1, 2013

FACTS: Hargrove convicted of attempted aggravated burglary, and acquitted on charge of criminal damage to property (tampering with external residential phone box). On appeal he claimed reversibility in proposed instruction given to jury that failed to include essential theft element of attempted aggravated burglary charge. He also claimed insufficient evidence supported his conviction where jury acquitted on criminal damage to property charge.

ISSUES: (1) Invited error and constitutional defect in jury instructions and (2) sufficiency of the evidence

HELD: No controlling authority from U.S. Supreme Court or Kansas Supreme Court for resolution of tension between remedying trial mistake eroding criminal defendant’s fundamental rights and enforcing invited error doctrine. Here, instructional error compromised Hargrove’s right to trial by jury, and the error was not harmless. Considerations bearing on reconciliation of invited error rule and degradation of a defendant’s constitutional rights are discussed, with examination of cases in Kansas and other jurisdictions. Under facts of this case, court declined to review omission of contested elements of the charged offense from the jury instructions because record fails to show whether the omission resulted from a tactical decision or from inadvertence. Issue may be raised and, if necessary, a record developed on habeas corpus review.

No relief based on inconsistent verdict. Under facts of case, sufficient evidence supports jury’s verdict that Hargrove committed an overt act toward the commission of an attempted aggravated burglary and that he had the intent to commit a theft upon entering the premises.

STATUTES: K.S.A. 21-3701(a)(1), -3715, -3716, -3720; K.S.A. 22-3218, -3219, -3414, -3414(3); K.S.A. 31-3301; and K.S.A. 60-1507

STATE V. SANCHEZ

FACTS: While passenger in car and arguing with driver, Sanchez grabbed and jerked wheel causing car to crash. Police found her walking about a block away. She consented to blood test that showed blood concentration of 0.21. Sanchez charged with driving under the influence (DUI) and driving with a suspended license. Sanchez convicted of both charges in bench trial. She appealed, claiming she was not driving or operating the car when she grabbed the steering wheel while sitting in passenger seat, and challenging sufficiency of evidence supporting both convictions.

ISSUES: (1) Operating or attempting to operate a motor vehicle, and (2) sufficiency of the evidence

HELD: No Kansas case has determined scope of phrase “actual physical control of a vehicle” in context of a passenger. Considering plain language of K.S.A. 8-1416 and K.S.A. 2008 Supp. 8-1567(a)(3), as well as authority from other jurisdictions, court holds that a passenger becomes the driver or operator when he or she grabs the steering wheel and alters the vehicle’s movement.

Under facts of case, sufficient evidence supports both convictions.

STATUTES: K.S.A. 2008 Supp. 8-234a(b), -262(a)(1), -1567, -1567(a)(3); and K.S.A. 262(a)(1), -1416, -1567

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

The United States District Court for the District of Kansas gives notice of the amendment of local rules 7.2, 83.6.8, and CR44.1. Copies of the amendments are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendments are also available on the United States District Court website at www.ksd.uscourts.gov.

Interested persons, whether or not members of the bar, may submit comments on the amendments addressed to the Clerk at any of the record offices. All comments must be in writing and, to receive consideration by the Court, must be received by the Clerk on or before 4:30 p.m. on May 3, 2013.

The addresses of the Clerk’s offices are:

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401 N. Market
Wichita, KS 67202

Topeka Clerk’s Office
240 U.S. Courthouse
444 SE Quincy
Topeka, KS 66683

Kansas City Clerk’s Office
161 U.S. Courthouse
500 State Ave.
Kansas City, KS 66101

Signed:
Timothy M. O’Brien
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