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| Dennis D. Depew
(620) 325-2626
ddepew@ksbar.org | Hon. Sally D. Pokorny
(785) 832-5248
spokorny@ksbar.org | Eric L. Rosenblad
(620) 232-1330
ersonblad@ksbar.org | Chad D. Giles
(620) 221-1120
cgiles@ksbar.org | Terri S. Bezek
(785) 296-2639
tbekz@ksbar.org | Cheryl L. Whelan
(785) 296-3204
cwhelan@ksbar.org | Matthew C. Hesse
(316) 858-4924
mhesse@ksbar.org | J. Michael Kennalley
(316) 268-7933
mkennalley@ksbar.org | Calvin D. Rider
(316) 267-7361
crider@ksbar.org | Jeffery A. Mason
(785) 890-6588
jmason@ksbar.org | Nancy Morales Gonzalez
(816) 936-5788
ngonzalez@ksbar.org | William E. Quick
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(913) 371-3838
ggoheen@ksbar.org | | | | | | | | | | | | |
| Mira Mdivani
(913) 317-6200
mmdivani@ksbar.org | | | | | | | | | | | | |
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jvath@ksbar.org | | | | | | | | | | | | |
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(785) 841-0211
cbranson@ksbar.org | | | | | | | | | | | | |
| District 2 (Con’t.) | | | | | | | | | | | | |
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(785) 832-5248
spokorny@ksbar.org | | | | | | | | | | | | |
| Eric L. Rosenblad
(620) 232-1330
ersonblad@ksbar.org | | | | | | | | | | | | |
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(620) 221-1120
cgiles@ksbar.org | | | | | | | | | | | | |
| Terri S. Bezek
(785) 296-2639
tbekz@ksbar.org | | | | | | | | | | | | |
| Cheryl L. Whelan
(785) 296-3204
cwhelan@ksbar.org | | | | | | | | | | | | |
| District 3 | | | | | | | | | | | | |
| Eric L. Rosenblad
(620) 232-1330
ersonblad@ksbar.org | | | | | | | | | | | | |
| Chad D. Giles
(620) 221-1120
cgiles@ksbar.org | | | | | | | | | | | | |
| Terri S. Bezek
(785) 296-2639
tbekz@ksbar.org | | | | | | | | | | | | |
| Cheryl L. Whelan
(785) 296-3204
cwhelan@ksbar.org | | | | | | | | | | | | |
| District 4 | | | | | | | | | | | | |
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(620) 221-1120
cgiles@ksbar.org | | | | | | | | | | | | |
| District 5 | | | | | | | | | | | | |
| Terri S. Bezek
(785) 296-2639
tbekz@ksbar.org | | | | | | | | | | | | |
| Cheryl L. Whelan
(785) 296-3204
cwhelan@ksbar.org | | | | | | | | | | | | |
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(785) 556-2019
bkent@ksbar.org | | | | | | | | | | | | |
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| Matthew C. Hesse
(316) 858-4924
mhesse@ksbar.org | | | | | | | | | | | | |
| J. Michael Kennalley
(316) 268-7933
mkennalley@ksbar.org | | | | | | | | | | | | |
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(316) 267-7361
crider@ksbar.org | | | | | | | | | | | | |
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(785) 890-6588
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(816) 936-5788
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(816) 360-4335
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| At-Large Governor | | | | | | | | | | | | |
| Christi L. Bright
(913) 239-9966
cbright@ksbar.org | | | | | | | | | | | | |
| KDJA Representative | | | | | | | | | | | | |
| Hon. Thomas E. Foster
(913) 715-3860
tfoster@ksbar.org | | | | | | | | | | | | |
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| Rachael K. Pirner
(316) 630-8100
rpirner@ksbar.org | | | | | | | | | | | | |
| KBA Delegate to ABA | | | | | | | | | | | | |
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Greetings from Neodesha: Who Am I and Why Am I Here?

When writing a personal note to a friend, I usually start out with “Greetings from Neodesha.” That usually brings a smile to his or her face as throughout my life being from Neodesha has made for entertaining situations for me. First, people who see the name written but have not heard it pronounced have no clue as to the correct pronunciation, which is “Knee-oh-duh-shay.” Once the pronunciation is correct, then comes the question about the Native American heritage of the name, which means “meeting of the waters” to the Osage Indians who first lived here in the 1800s where the Fall River and Verdigris River come together. Next comes the inevitable question of “where is that?” and my answer of “30 miles north of Oklahoma and 70 miles west of Missouri” or “two hours straight south of Topeka on Highway 75” usually helps them figure that out.

Of course, the population question is then asked, and my answer is “about 2,800 people, give or take.” Finally, the question of “what is located in Neodesha?” is asked, to which I respond “really neat people, a lot of industry, including the company that patented the aerosol can, a plastics company that may have made the floor mats in your vehicle, a company that designs and builds industrial grain drying systems to process food all over the world, several budding entrepreneurial ventures, and, of course, Cobalt Boats. Cobalt literally makes the finest 20’ to 40’ runabout boats produced in the world and is the winner of the annual J.D. Power Award for Quality every year it has been given for boats, which they could not achieve without the hard working personnel that produce that kind of quality boat right here in landlocked Neodesha.

Now that you know about where I live, let me introduce myself to those of you who do not know me. I was born in Neodesha and am what I call a “lifer,” being away only to attend college. Ever since I would go to court with my father in the summer when I was in grade school, I wanted to become a lawyer. I remember thinking that the cases were always different and that a lawyer really did have the ability to help people when they really needed help. I was “hooked” at a very young age.

After high school, due to budgetary constraints, I lived at home and attended Independence Community College for two years, earning an Associate of Arts degree. During the summers I had my own car detail business and then went to work for a local new car dealership during the week and detailed private cars on the evenings and weekends. The next step was KU’s Business School and my bachelor’s degree in business administration two years later. My formal education was completed with three years at KU Law School, finishing in 1983.

Since then, I have been the administrative partner in the Depew Law Firm, which was established by my father, Harry L. Depew, in January 1953. Harry was a solo until 1980, when my older brother, Doug Depew, graduated from Washburn Law School and returned to the firm. I returned in 1983 after considering job offers from Kansas City and Tulsa, Okla., as I was still single and was well aware of the fact that the dating pool in Neodesha was very shallow. When Harry reached 65, he went to half days working and then eliminated one half day every year until he fully retired at age 70. No one thought Harry would ease into retirement as gracefully as he did, but he surprised us all and went to inactive retired status, telling Doug and me that we were on our own and that he was not going to keep going to CLEs. He was done.

Until his death in 2005, Harry was always available informally to run things by or to come in if needed to be there while a long-time client met with “one of the boys.” Harry believed in “learning by doing,” and I had only had my law license a few weeks when he appeared in my office with a file and announced that there was going to be an oral argument in the Court of Appeals in a month, he was going to be out of the country on one of his many foreign trips, and that I would be handling the argument in Topeka. While it was a little scary at times, I was able to get a lot of client and court experience very rapidly. That just sort of happens in a small town practice. Area judges were always patient and understanding, as were opposing counsel. Southeast Kansas was, and is, a great place to practice law as everyone was, and is, willing to help new and older attorneys alike.

My practice has been of a general nature out of necessity in rural Kansas. Getting on the indigent criminal defense list (before the days of public defenders) earned me a lot of court time and for some strange reason I was drawn to all aspects of a family law practice. Over time, as laws changed and practice changed, I found myself doing more and more family law work and became proficient in all aspects of family law from birth (adoptions, paternity, etc.) to death (estates, trusts, and planning) and everything in between (divorce, custody, support, guardianship/conservatorship).

I began to get frustrated at times and decided in 1993 that alternative dispute resolution was a lot more rewarding in family law cases than going in as a hired gun. After taking as much mediation training as I could get, I became a certified mediator in civil and domestic cases. Later, being a glutton for punishment, I was trained for and became an approved domestic case manager in high stress high conflict post-divorce cases. Until then, I never realized just how dysfunctional some families could be or how much help they needed to be able to make even very basic decisions regarding their children. It was at this point that I realized my undergraduate degree should have been in psychology rather than business administration. Hindsight is always 20/20.

Fortunately, I get some relief from the family law practice by handling business matters, helping my brother, Doug, in his
role as Neodesha city attorney, helping with real estate transactions, and becoming involved in other civil cases. Doug has an extensive debtors’ bankruptcy practice, something that Harry got into back in the late 1950s, and he is known as the bankruptcy expert of Southeast Kansas. As the practice of law has become more specialized, we now refer specialized cases like medical malpractice, workers compensation, personal injury, and Social Security disability to others in our area that have significant practices in those areas.

I have been asked why I was interested in being involved with the KBA. That answer is pretty simple. Harry always told us that the practice of law was a profession and that we owed our profession something back. He always felt that KBA involvement was a great way to “give back” and I agree wholeheartedly. The KBA is for every lawyer in Kansas, whether he or she hails from a large metropolitan area or is out in the sticks like me. The fact that someone from Neodesha in a two person firm can work his way up to the KBA presidency is “Exhibit A” in support of the notion that every member who has a desire to get involved can and does make a difference. I enjoy working on the issues that every lawyer in the state faces as well as the critical issues that our judicial branch is facing in terms of funding and independence. Our profession is a noble one and it is worth the time, effort, and reduced income to promote.

My other passion besides the law is public education. By the time this article is published, I will have just completed my year as president of the Kansas Association of School Boards (KASB). I am an 18 year local school board member, having served from 1985-1999 and from 2009 to the present, with my current term ending in June 2017. There is nothing that allows one to experience the entire spectrum of politics and public service quite like serving on your local school board. It always amazes me how a school board member can be a hero one month and pond scum the next. To serve in the front lines in a position like this, one has to have pretty thick skin and be willing to experience the thrill of victory and the agony of defeat. Having experienced both has certainly helped me be a better-rounded person. As with the law and the legal profession, my desire is to do all I can to ensure that the kids of my district and Kansas get the best education possible. As with the KBA’s legal and judicial issues, I enjoy working on the important challenges that our educational system faces daily. Again, as with the legal profession and the judicial system, those challenges are great and require good people to be willing to devote time and energy to face those challenges head on.

Returning to my home town to practice has been a decision that I have not regretted. While most rural practitioners will never get rich, there is plenty of opportunity to earn a good living and to get involved in things that bring rewards far greater than money. I have tried to do that since my return to Neodesha and my KBA service is an extension of that desire and opportunity to make a difference. There are literally thousands of Kansas attorneys, in small towns up to large cities, who have devoted their lives not only to helping clients professionally, but giving back to their communities and the state as a whole. It is all about being a professional, which we all are. I applaud all of the efforts of the KBA members across Kansas and beyond for the difference all of you make in the lives of others and am happy to be a small part of our collective efforts. I also appreciate the consideration and sacrifice of my wife, Shirley, and sons, Derek, who is a sophomore in the ROTC program at Wentworth Military College in Missouri, and David, who is a sophomore at Neodesha High School. They have put up with me being gone a lot in my KASB and KBA roles, and I could not be in this position without that support.

Hopefully you now know a little bit about who I am and why I am here. The KBA is a great organization, and I am anxious to work with our Board of Governors and all of you as we take on the challenges of the next year. If at any time you have something you think I need to know, please always feel free to contact me. If we are doing something right, that is always good to hear. If there is something we can be doing better, we need to know that as well. As a school board member, I am used to having people tell me what they think is being done wrong, so it is very difficult to offend me. I look forward to hearing from you.

My contact information is as follows:

Dennis Depew
Depew Law Firm
PO Box 313
Neodesha, KS 66757-0313
Telephone: (620) 325-2626
Fax: (620) 325-2636
Email: ddepew@ksbar.org

KBA President Dennis D. Depew may be reached by email at ddepew@ksbar.org or by phone at (620) 325-2636.
Introductions and Treat Your Secretary and Court Clerks Nicely

By Jeffrey W. Gettler, Emert Chubb & Gettler, Independence, jgettler@sehc-law.com

One of the responsibilities, or privileges you could say, of being the Young Lawyers Section president is writing a column for the Journal. As my term as president approached this was the one thing I dreaded most. I am not naturally a good writer. To compound that problem, I waited until after the KBA annual meeting to write this. Huge mistake. If you had the opportunity to attend the meeting and more specifically the Bryan Garner sessions, you can appreciate my dilemma. Garner is the editor in chief of Black’s Law Dictionary, author of countless books on legal writing, and is basically a guru on writing and language in general. He gave a 10-question quiz about commonly misused or misspelled words with two answers on each question from which to choose. I had a 50/50 chance of getting each question right. I correctly answered two. The quiz was a great marketing tool, intentionally so or not, as I immediately felt the need to order his books. I was fortunate to be one of a few dozen in attendance to receive a complimentary one. I have a point to all this, but before I make it, allow me to digress for a moment to tell you a little more about myself and recognize this year’s YLS Board of Governors.

I was born and raised in Independence. I have one older brother who resides in the St. Louis area, two of the hardest working and giving parents I know, and a grandma “Granny” to whom I owe a lot. I graduated from Loyola University Chicago in 2003 and the University of Kansas School of Law in 2005. In my senior year of high school, I had the opportunity to volunteer at a law firm then known as Scovel, Emert, Heasty & Chubb. During the summer between my 2L and 3L years, I stopped by the firm to visit and was offered an associate position upon graduation. I accepted and moved back to Independence. I am now a partner at the firm now known as Emert, Chubb & Gettler LLC. I maintain a general practice of law, but primarily work in the areas of family law and criminal defense. I am also the city prosecutor. When not working, I enjoy playing poker, watching movies, reading, trying to play golf, running when I get the motivation, traveling, and feeding my addiction to a phone app called Ruzzle, and visiting my significant other, Joslyn, in Wichita.

The KBA YLS would not exist and function as well as it does without a core group of young lawyers keeping the machine well oiled. Joining me on the YLS Board are: Sarah Warner, president-elect; Justin Farrell, secretary-treasurer; Brooks Severson, past president/KBF liaison; Vince Cox, ABA Liaison/ABA YLS District 22 representative; Carl Folsom, CLE liaison; Melissa Doeblin, pro bono chair; Adam Hall and Andrew Payne, YLS Forum editors; Shawn Yancy, mock trial liaison; and Kasey Klenda and Brian Bina, social chairs. A special thanks to each of them for agreeing to serve on the board. A big kudos to Brooks as well for her great term as president. During her tenure, Brooks always kept the Young Lawyers Section informed of events and issues, was instrumental in the implementation of the new KBA YLS judicial internship program, and was a great representative for the young lawyers of Kansas at various conferences and meetings. If I am half as effective as Brooks was as president, my tenure will be a success.

Back to my point. My point is this: It is for attorneys like myself that the following is so very important: Always treat your secretary and the court clerks nicely. This is advice that most attorneys are, and all attorneys should be, given from day one. My secretary is my personal Bryan Garner. She edits my letters and pleadings*, often before I review them for the first time. So you can imagine the boost in my ego and sense of accomplishment I get when I read a mistake-free letter or pleading. She has the power to make me or break me; to make me sound intelligent or inept. I’ve been fortunate that through this point in my career she has not chosen the latter.

The court clerk’s office is also a vital resource to attorneys. As a young lawyer, it is especially important to get in their good graces right out the gate. The clerk’s office is often your last line of defense before your pleading makes its way into the court’s file. Having the wrong case number on a document or forgetting to sign a pleading can give a judge the impression that you are sloppy or don’t care about your work. Clerks will generally bring these mistakes and omissions to your attention, but you can increase your chances that they’ll do so if you treat them with the respect they deserve. Get to know the clerks on a first-name basis. Ask them how they are doing. Make small talk. That may be difficult in larger counties, but it definitely pays dividends.

In short, for those of us who don’t have the writing prowess of Garner, secretaries/legal assistants, and court clerks play an even more vital role in our practice than most. Help them to help you.

I look forward to leading the YLS this year. I welcome any questions, comments or suggestions on how the YLS may be improved. You may reach me at (620) 331-1800 or by email at jgettler@sehc-law.com.

*My wonderful secretary, Jan, did not read or edit this article.

About the Author

Jeffrey W. Gettler is a partner at the firm of Emert, Chubb & Gettler LLC in Independence. He maintains a general practice of law with an emphasis in family law and criminal defense. He is also the prosecutor for the City of Independence. Gettler graduated from Loyola University Chicago in 2003 and the University of Kansas School of Law in 2005. He may be contacted at jgettler@sehc-law.com.
Don’t Give Into “Diversity Fatigue”

By Jacqlene Nance, Lawrence, jacqlene.nance@gmail.com

Editor’s note: The opinions expressed in this article are solely that of the author.

When family and friends visit from out of town I insist upon going to the Brown v. Board of Education National Historic Site. I insist, not just because the museum has great hours and is free, but because this National Park does a great job of connecting the struggle of the past with the issues of the present. Recently the New York Times reported that “Racial Diversity Efforts Ebb for Elite Careers, Analysis Finds.” The article’s authors, Nelson D. Schwartz and Michael Cooper, cite nationwide diversity challenges in the legal profession. They “raise[d] the question of whether the private sector’s commitment to affirmative action and diversity programs is eroding.” John Page, the president of the National Bar Association, stated “[t]here is diversity fatigue. We could fall backwards very quickly.”

I hear often that race based practices for employment and education are no longer necessary in “post racial” America. I strongly disagree with the idea that we as a profession should cease to seek ways to diversify. With the 50-year anniversary of Medger Evers’ death and the recent opening of the Martin Luther King Jr. National Memorial, we are reminded that progress does not happen overnight. The African-American civil rights movement took many years and a coordinated effort by many institutions and organizations. In order for the legal profession to be substantially diverse there must be a coordinated, consistent effort to promote access across all levels of leadership and all areas of the profession.

There are a number of great lawyers in this state with a real commitment to diversity. The dedicated commitment to this cause is evident by the activeness and support of the KBA Diversity Committee, the numerous local diverse bars, the numerous diversity scholarships for local law schools, the mentorship programs hosted by local law schools, programming for high school students, such as the Grow Your Own Lawyer program, and the commitment of our private and public legal employers across the state. For those dedicated to diversity who may feel “diversity fatigue” please do not lose focus on the end goal. We are trying to create a profession where all feel welcome and can make a meaningful contribution. Some may feel discouraged because a certain critical mass of diverse lawyers in leadership positions does not exist. This is not a reason to throw in the towel; it should be encouragement to conceptualize a better way to reach underrepresented populations.

While the U.S. Supreme Court visits the issue of race-based admissions for the third time in 10 years, law schools and firms have attempted multiple strategies to better recruit and retain talented individuals. Enriching the profession is about finding and encouraging the best possible candidates. I am not suggesting providing opportunities for individuals who are not properly prepared or qualified. Simply, we need to encourage more people to set their sights and goals on entering the profession. There are a number of other professions that are experiencing similar frustrations with a lack of diversity in their ranks. So many young students are not receiving the proper encouragement to excel academically and seek higher education. This issue is commonly referred to as the diversity pipeline. Law schools cannot expect to have a rich pool of diverse undergraduates to recruit from if diverse students are not graduating from high school. High schools students cannot succeed if they did not receive a strong foundation in elementary, middle and junior high school. At each step students are lost making the pool of prepared dedicated students a lot smaller. The engineering, business and medical professions are also trying to reach these students. A more collaborative approach for making meaningful connections with these students can help all of these professions become more effective at recruiting. More importantly, though, we need to be more focused on creating inclusive work and educational environments. Creating opportunities for diverse candidates to see people like them in positive work environments and utilizing opportunities for success can work wonders in creating more momentum toward a more diverse profession.

Even though the U.S. Supreme Court visited the issue of diversity in admissions practices this year in Fisher v. University of Texas at Austin, their decision did not move the conversation much further. Essentially the Court sent the case back to the lower court and instructed it to use strict scrutiny. I am sure that we will revisit this issue again in the next decade. As we as a nation progress, so will our approach to resolving this issue. Those not committed to a diverse environment are rubbing their hands in delight. They hope that those who are frustrated will just give up. If you need proof that a diverse profession leads to a richness of ideas, just visit with some young students. They are optimistic, have not yet reached their full potential and are hoping for a chance to contribute and excel. For now you can make a real difference by volunteering for a mentoring program, participating in Street Law, judging a moot court or mock trial competition, visiting www.discoverlaw.org, contributing to a diversity scholarship fund, or participating in the KBA Diversity Committee events. A small step can make a big impact in the future of our profession. ■

About the Author

Jacqlene Nance is an immigration services officer for the USCIS. Formerly, she was the director of admissions and scholarships for the University of Kansas School of Law and the associate director of admissions for the University of Connecticut School of Law. Additionally, she is a member of the Kansas Bar Diversity Committee. Nance lives in Lawrence.
Anti-Social Social Media

By Larry N. Zimmerman, Zimmerman & Zimmerman PA., Topeka, kslpm@larryzimmerman.com

The theory of social media is that people want to interact and connect with one another. But what if you do not want to connect? Is there an antidote to human interaction? Scott Garner, a graduate student at New York University, is experimenting with just that, releasing an app called “Hell is Other People” (hell.j38.net). Distilled to its essence, Hell connects to a user’s FourSquare account and notes check-ins from the user’s contacts creating escape routes and “optimally distanced locations for avoiding them.”

The app began as a class final and is viewed by some as a satirical take on the social media boom examining just how far virtual connections can be gamed to avoid real life interaction. While playing with those analyses, Garner was simply countering FourSquare’s purpose for students looking to “find out what bars everyone was hanging out at.” Hell answers Garner’s question: “Well, what about the students who don’t want to party all the time and don’t want to go to bars all the time? What can you do to avoid people by using technology?”

That anti-social curmudgeons are now served by the tech boom in social media illustrates the scope of the social media tech boom. Almost 70 percent of Internet users report regular use of social media sites and the top 10 trafficked websites in June 2013 include three social media giants with the biggest, Facebook, creeping up on Google as most visited site of all. Internet users love social media and that interest is fueling an expanded ecosystem of intertwined apps and services.

Tumblr

Tumblr, multimedia blogging site, has been around since 2006 and hosts more than 108 million blogs with more than half its users in the under 25 demographic. Less infested with parents, co-workers, and lame friends, Tumblr is an easier place to hang out with a narrow group of like-minded friends. Pseudonyms are allowed, privacy settings somewhat easier to manage, and outsider searches are often downright broken. That more relaxed environment also means there is much more Not Safe For Work content around as well and the copyright lawyers with takedown notices are less effectual. Adam Rifkin, CEO of PandaWhale, writes, “As long as Mom sees you on Facebook occasionally, she isn’t going to think to look for you on another site … which paradoxically frees young users to act out on a stage that seems more private despite them being on the open web.”

Snapchat

Snapchat is another photo messaging, social media tool especially popular with users 13 to 23 years of age. Unlike other services, Snapchat values impermanence. Users can share photos, record video, and add text for distribution to one or more recipients. Those shares are set to “time out” and delete up to 10 seconds after sharing. The app also includes features which require the recipient to prove they are present and interacting with their phone (no unattended shares) and notice is provided to the sender of any users taking a screenshot. For ordinary purposes, used as directed, Snapchat provides two-way communication of photos and video without leaving any incriminating evidence behind so as to provide users some freedom from maintaining an idealized online persona. Unfortunately, several recently revealed weaknesses call into question Snapchat’s claims of impermanence.

Voxer

Voxer turns smart phones into walkie talkies. Sure, some think that is redundant because a smartphone is a phone after all. Voxer’s features go significantly further, however. The app allows live two-way communication either one-on-one or as group chats. Though aimed at business with a pricing structure for corporate use of advanced features, the basic free version has become another popular social media tool for users wanting to communicate with a closed group of friends in a more private manner. Again, younger users are gravitating toward it as a way to connect without worrying as much about who is watching.

Public and Less Public

In the “real” world, most develop some distinction between the public and private self. That same distinction is evolving in the online social media world as well. We may be all business and professional on LinkedIn with a more casual – but guarded – persona on Facebook. Those with whom we are truly close will meet us in the more guarded back rooms of the Internet – “optimally distanced locations” from casual observers.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Zimmerman & Zimmerman PA, 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.
A Nostalgic Touch

Lessons from Someone Who Knows ...

By Matthew Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

It was Simon and Garfunkel, in their song “Feeling Groovy” off their 1966 groundbreaking album, “Parsley, Sage, Rosemary and Thyme,” who told us to “slow down, you’re moving too fast.” Decades later there is little evidence anyone has heed their advice. Six years ago the New York Times ran a story titled, “Too Busy to Notice You’re Too Busy.” No one read it. They were too busy. And today the self-help industry has become, well, you know, publishing books on how to un-busy our lives. The main takeaway is that being too busy is a threat to our spiritual, social, and physical well-being. Other than that, it’s no worry. I count 25 different books on Amazon with the words “slow down” in the title, including one titled simply, “The Slow-down Book: A Pathway to the Fullness of Life.” I hope to get to it eventually.

And so when my calendar showed the Bar Convention was rapidly approaching, my reaction was to decline, because, well, you know. But since I’ve attended almost every one over the last 20-some years, I plunged ahead. And like every previous convention, I left knowing it was time well spent.

So here is my chronicle of this year’s convention.

I started Wednesday afternoon at the Wichita Hyatt, spending time in the bar at the Bar. What’s not to like about that opener? But then consider my beer buddy was my 83-year-old mentor from Barton County. We solved problems – his, mine, and some of yours too – except for that little issue with your mother-in-law. Two hours later I attended the SOABs meeting, which is a topic for another column altogether.

On Thursday morning I ran in the KBA’s 5K along the Arkansas River, joined by an old roommate from the bachelor days – Johnson County District Judge Chuck Droge. As we “ran” we caught up on all that has transpired in the intervening 28 years. Ever tried to recap one marriage, four children, six houses, and a thousand cases while gasping for air? Suggestion: don’t try it at home.

Later that day I picked up my registration packet and read a tribute to Doug Stanley, who passed away in March. Written by Doug’s law partner Jim Goering, it was a thoughtful reflection on a friendship that spanned almost 30 years. Doug and I were law school classmates, and in Doug’s career he became a distinguished employment lawyer, served as managing partner for Foulston and gave back to the community of Wichita. So other than receiving our diplomas on May 20, 1984, Doug and I had almost nothing else in common.

And Thursday evening, I attended the Kansas Bar Foundation dinner and then the Bar Show. The latter was fun but the former gave me what I needed more than laughter – another 200 words. The Bar Foundation’s purpose is to serve Kansas and the legal profession by funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving, among other things, its accessibility, equality, and uniformity.

At the dinner they recognized many who have contributed to the success of the foundation. John J. Jurcyk Jr. received the Robert K. Weary Award, given to someone who has a career of leadership supporting the principles embraced by the foundation. In his 80-plus years, Jurcyk has found time to do some other things – let’s see – be selected in the American College of Trial lawyers, served as president of both the Wyandotte County Bar and the Association of Defense Counsel, received the KBA Professionalism Award, and before he did all this he served a little stint in Korea from 1952-1954. Throw in a 56-year marriage to Rita, sprinkle in five children, and you get the sense this guy has been, well, busy. I mean real busy.

And so when his son, John III introduced the anointed one, the younger John had the good sense to borrow a page from his dad’s book. And it was so simple, so profound, that it is worth reprinting here. It wouldn’t be fair to call it advice – that’s what know-it-alls tell you. John II is too modest to think you need his advice. These are suggestions when you wonder why you have no clients, no friends, no life. So when John II left the firm to become an advisor to the consolidated government of Kansas City, Kan., he offered these thoughts:

“In close, I will share with you another thing I have learned – if you live to be 80, people expect sage wisdom to just fall out of your mouth. The best I can do is to offer you some reminders that are key to the spirit and endurance of McAnany, Van Cleave & Phillips:

Be professional – courteous and truthful always.
Remember we practice the law – no one is perfect.
Work hard, but work as a team.
Love what you do, be passionate about it.
Have fun and welcome creative solutions.
Respect history’s lessons.
Love your family and make time for them.
Give back to the community in service and profits.
Forget insults.
Have a sense of humor.
Keep brewed coffee on the warmer.
Keep beer in the refrigerator.
Keep popcorn in your drawer.
Honor the law.”

Sometimes the people who are the busiest find time to do things that really matter. And when they speak, one should listen. See you next year in Topeka. Look for me in the bar.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
Even before beginning law school, I became aware that the way we resolve disputes is changing across the country. Gone are the days of the Great American Trial. A common statistic tossed around in the legal profession is that less than 2 percent of cases end in trial. The trend was noted at least as early as 2003, and perhaps even earlier.1 Despite an increase in federal civil and criminal filings, there has been a steady decline in bench and jury trials.2

During a volunteer internship with the Office of Judicial Administration, the Supreme Court’s administrative arm, I learned that Kansas is no exception. From fiscal years 1978 to 2005, while Kansas civil filings increased 280 percent during those years, the number of cases going to trial decreased 24 percent.3 Essentially, the decline of the Great American Trial has many causes, which have been attributed to changes in society and culture, including the types of cases being filed, changes in law, the Great Recession of 2008, the rise of the pro se litigant, and the rise of alternative methods of dispute resolution. These factors are all helpful in identifying the causes of the trend. But where do we go from here?

Skies are blue. The Kansas Office of Judicial Administration’s dispute resolution coordinator, Art Thompson, has been following this phenomenon for quite some time. Despite the economic hardship on state courts nationwide, Kansas courts remain dynamic and are addressing this change as the implications become more tangible. Through the Kansas Court system, Thompson is introducing a series of pilot programs across the state to implement ADR, court-mandated mediation, and other solutions.4 The Supreme Court’s Advisory Council on Dispute Resolution has selected seven processes to be implemented through the pilot programs in domestic, civil, and criminal cases. Together, these procedures enhance efficient use of resources, saving courts, lawyers, and litigants time and money.

In domestic cases, the pilot projects include: appointing a parenting coordinator, appointing a domestic special master as a quasi-judicial officer, and designating particular parties as vexatious litigants.

In civil cases, the pilot projects are testing three procedures, including mandatory civil mediation, domestic property arbitration, and neutral evaluation. Mandatory civil mediation is exactly what it sounds like. It would have parties seek mediation and reach compromises on their own. Data shows a higher rate of settlement than cases which did not participate in mediation. This improves communication between parties and may give them a “reality check” in regards to the merits of their case.

In the pilot districts, criminal cases would include felony mediation. Similar to plea bargaining, negotiations are between the prosecutor and the defendant, but with the facilitation of a mediator. Data from the 4th Judicial District in Colorado shows that this practice reduces both time to disposition and the number of cases that ultimately go to trial.

In addition to these pilot programs, the recent report of the Kansas Supreme Court’s Blue Ribbon Commission suggested implementing appellate mediation. Twenty-six other states have implemented experimental programs similar to the appellate mediation being contemplated here, and they have been largely successful.

Finally, as the number of pro se litigants is growing, limited representation plans are being introduced for Kansas attorneys to practically and ethically be able to assist pro se litigants in representing themselves.

Ultimately, these programs may well be the future of dispute resolution in Kansas. It is difficult to say whether the disappearance of the Great American Trial is a good or bad thing; it just is what it is. As long as Americans have access to a legal system that serves justice and upholds the Constitution, the law will live to see another day, and I have hope of finding a job as an attorney—even if it doesn’t look quite the same as it used to look.

For more information regarding these programs, contact Art Thompson. Special thanks to him for his invaluable contribution and expertise.

About the Author

India Keefover is a 2013 Washburn University School of Law graduate. She served on Moot Court Council and the Washburn Student Bar Association, and received the Patrik Neustrom ITAP Excellence in Advocacy Award in Summer 2013. She currently serves as a student prosecutor with the City of Topeka Legal Department. Originally from Marietta, Ga., India is thankful to her husband, Todd Keefover, and father-in-law, Ron Keefover, for introducing her to this great state and Washburn University.

Footnotes


4 Art Thompson, State Court & Statutory ADR Initiatives, 3-9 (Nov. 16, 2012) (2012 ADR CLE presentation).
Bluebook Refresher

By Ellen Byers, Washburn University School of Law, Topeka, ellen.byers@washburn.edu

There’s a reason this column isn’t titled “Citation Refresher.” It’s difficult to review citation rules without reference to a specific citation system. Moreover, few lawyers, if any, would be willing to revisit citation conventions from multiple systems. We like uniformity. That’s what is so beautiful about The Bluebook: A Uniform System of Citation,1 and about a document that consistently employs its rule-based citation forms.

Most of us learned The Bluebook in law school, and it still works well as a guide to basic source citation.2 Following is a review of core citation rules, with attention to common errors. The review focuses on cases, statutes, and signals and is not intended to be exhaustive.

Case citation

In addition to (1) case name,3 (2) reporter volume, (3) reporter title, (4) first page of case report, (5) and date of decision, the writer should:

• provide both the official state reporter citation and the West regional reporter citation for in-state cases (the regional reporter cite suffices for out-of-state cases).5
• provide pinpoint cites indicating the page(s) where the cited principle or quote appears. When a parallel cite is required, include pinpoint cites for both reporters.
• in federal case citations, identify the court that issued the opinion, in the court-and-date parenthetical. Don’t forget that a “D.” is required to identify a district court. E.g., D.D.C.
• indicate that a case is unpublished in parentheses following the court-and-date parenthetical.6


Spacing rules: Spacing in citations seems like a trivial matter, but spacing errors are common, and they probably call attention to themselves as much as any other type of error.

The most important citation spacing rules are these:8

• Close up all adjacent single capitals. For example, S.D.N.Y. and N.W.
• Put a space between single capitals and abbreviations of two letters or more. For example, D. Mass. and S. Ct.
• Ordinals, such as 2d, 3d, 4th, etc., are treated as single capitals. For example, F.2d and F.3d (but So. 2d and Kan. App. 2d, because the adjacent abbreviations contain two or more letters).

Short forms: Use short forms for cases when possible; they save space and keep the reader’s focus on the text. Generally, if you’ve provided the full cite within the same section of your document, you may use a short form in subsequent citations. The two case citation short forms are:9

1. Id. is used when the citation you wish to use is exactly the same as the immediately preceding cite. If you are citing to a different page, indicate that. E.g. Id. at 245. But, when you’re using a parallel cite—Id. at 245, 222 P.2d at 31.

Statute citation10

Federal statutes: (1) title number, (2) “U.S.C.,” (3) section number(s), and (4) date. A frequent error is using the wrong year for (4) or omitting it altogether.

In citation of the official United States Code (which The Bluebook prefers), the date is the year on the spine of the Code volume.11 A space goes between the section symbol and the section number. Inclusion of the popular name of the statute is optional. If the statute section has been revised since publication of the hardcover volume, indicate that in the date parenthases—(2006 & Supp. II 2008). If your section appears only in the supplement, indicate that: (Supp. II 2008).


or

Footnotes
1. All Bluebook references in this article are to the Nineteenth Edition.
2. There is now a Bluebook mobile app for the iPhone, iPad, and iPod. It operates within The Rulebook app (which is free). Once inside The Rulebook app, users may purchase additional databases. The Bluebook app costs $39 and is continually updated. See https://itunes.apple.com/us/app/rulebook/id454619081?mt=8.
3. The Bluebook urges practitioners to follow local rules in all citation matters. Bluepages 1. (B1).
4. Abbreviations for words in case names are in Bluebook Table 6 (T. 6).
5. A few states have adopted a public domain citation format for case citation, as indicated in T. 1.3.
6. Check local rules regarding citation of unpublished decisions. Kan. Sup. Ct. R. 7.04(f) states that “unpublished opinions are not precedentual and are not favored for citation. They may be cited for persuasive authority on a material issue not addressed by a published Kansas appellate court opinion.”
7. When constructing a short form for a case found in an electronic database, retain the unique identifier: R. 10.9(a)(ii).
9. See R. 10.9; B4.2.
10. See R. 12.1; B5.1.
11. For those who lack access to a print version of the official Code, if you can access an electronic version, such as Hein Online, that offers the official code in pdf. format, you may cite to that version exactly as if you are citing to the official print version. Hein Online is available to all users of the Washburn University School of Law library: http://washburnlaw.edu/library/research/databases/govtresources.html.

State statutes:
Each state has its preferred format for citation of its code; therefore, a review of state statutory citation is beyond the scope of this column. But here are a few points to keep in mind:

• Good news—Bluebook T. 1.3 provides a template for each state’s code. Don’t forget to follow the spacing rules set forth above.
• As with federal statutes, the required date (or “year”) is found on the spine of the code volume, the title page, or the copyright note; do not use the date the code was enacted. Remember, you are trying to convey to the reader how to find the provision.
• If you use a commercial electronic database, indicate that by identifying the database and its currency information in the date parentheses:


Signals14
Signals indicate the relationship between the text and the cited source. A signal can introduce a single source or multiple sources. Far and away the signal most commonly used by practitioners is “see.” See means the authority cited supports but does not directly state the proposition. It allows the writer to buttress his or her own analytical point, observation, or argument with authority. Signals usually make more sense if the cite is followed by an explanatory parenthetical.

Example:
The Sixth Amendment guarantee of the right to counsel ensures that criminal defendants are not left to fend for themselves. See Powell v. Alabama, 287 U.S. 45, 69 (1932) (recognizing that, without counsel, a layperson “faces the danger of conviction because he does not know how to establish his innocence”).

Note that “See” is capitalized only when it begins a citation sentence, not when it appears in a textual sentence, and it is not followed by a comma.

Another helpful signal is “e.g.” E.g. indicates that the sources that follow are examples of authority supporting the statement and that there exist additional examples, but citation to them is unnecessary. E.g. can be combined with see—“See, e.g.,” with commas as shown and a space after the comma.

Painful though it might be, paying attention to these core rules will make your written products appear unified and professional.

About the Author
Ellen Byers holds a Juris Doctor from Georgetown University Law Center and a Master of Fine Arts from the Iowa Writers’ Workshop. She practiced law as a trial attorney at the Department of Justice and as an assistant U.S. attorney in San Antonio before beginning a career as a law professor. She first taught at St. Mary’s University School of Law and currently teaches in the Legal Analysis, Research and Writing Program at Washburn University School of Law.

Wouldn’t you like to deal
with someone who speaks
your language...
Daryl Craft JD
Stephen Page JD
Stephen Funk JD
Gary Howland JD
Rudy Wrenick JD

Bruce Nystrom, PhD
Licensed Psychologist
River Park Psychology Consultants, LLC
www.riverparkpsych.com
727 N. Waco, Suite 320
Wichita, KS 67203
telephone: (316) 616-0260 • fax: (316) 616-0264
“Daily deal” websites, such as Groupon, have become increasingly popular advertising mediums for retailers—such as spas, restaurants, flower shops, etc.—wishing to attract business. Through the website, retailers offer coupons for goods and services at highly discounted prices, often as much as 50 percent off, so long as the website provider aggregates an agreed upon number of purchases. The fee for the website’s service is often as much as 50 percent of the collected sums.

For a lawyer, the arrangement might take the following form. The lawyer contracts with a daily deal website to offer coupons for $500 worth of legal fees at a discounted rate of $250. The website contacts prospective purchasers, and an agreed upon number of customers each pay the website $250. Of the sum collected, the website subtracts its 50 percent fee and remits the remainder to the lawyer.

Neither Kansas nor the American Bar Association (ABA) has specifically addressed whether this advertising arrangement runs afoul of the rules of professional responsibility. A handful of state bar associations have weighed in, however, with mixed results.

At the threshold, the use of Groupon or similar websites implicates Model Rule 5.4(a), which generally prohibits fee-sharing with non-lawyers. At least two jurisdictions have held that a lawyer’s use of such sites to sell legal services violates Rule 5.4(a), insofar as half the legal fee ($125 in our example above) is retained by the website. Other jurisdictions have held otherwise, concluding that the central purpose of Rule 5.4(a)—namely, to prevent interference with the lawyer’s professional judgment—is not threatened by the advertisement arrangement.

Still, even if the website’s retention of half the legal fee doesn’t qualify as fee sharing, this arrangement arguably runs afoul of Model Rule 7.2(b)’s proscription against paying unreasonable advertising fees. Again, jurisdictions are split on this issue: some reject the possibility that advertising costs totaling 50 percent of the coupon’s value could ever be deemed reasonable, while other jurisdictions have left open the possibility that they might be. Moreover, the analysis is necessarily context-specific because some websites might charge less for their services.

Beyond these threshold difficulties, a number of additional problems arise from the lack of any screening consultation between the lawyer and client prior to the coupon’s purchase. For example, when a client tries to redeem a coupon, the lawyer or client may determine that the legal services purchased are not needed. Or, upon consulting the client, it may be discovered that the lawyer’s representation would result in a conflict of interest in violation of Model Rule 1.7 or 1.9. Moreover, without some type of prescreening evaluation of each purchaser, there is the potential for purchasers to have legal problems that the lawyer does not have the ability or time to competently handle at the price for which the coupon was sold, in potential violation of Model Rules 1.1 (competence) and 1.3 (diligence). In short, it is generally necessary (and, certainly advisable) for lawyers to consult with potential clients prior to the formation of an attorney-client relationship. The use of Group or other daily deal websites vitiated this important screening function. To avoid or mitigate these problems, some jurisdictions require lawyers using these websites to make purchases subject to certain conditions and disclosures. For example, the lawyer may be required to make clear that the creation of an attorney-client relationship is subject to a conflicts check and the lawyer’s determination that he or she is competent to provide appropriate legal services to the purchaser.

Yet another set of complications arise if the lawyer does not, or cannot, provide the purchased services. For example, what if the lawyer determines that he or she cannot honor the coupon because of a conflict, or because, for whatever reason, the lawyer cannot provide the services the client thought he or she needed? Or, what if the client decides to fire the lawyer before any legal services are provided? Every jurisdiction to consider the issue has recognized the right of the client to fire the lawyer. And the general consensus seems to be that the client, in such cases, is entitled to any unused portion of the fee—including the portion of the fee retained by the website provider, which the lawyer will have to supply if the website does not. Moreover, some jurisdictions require lawyers to disclose to the purchaser, prior to sale, that the client retains the right to terminate the relationship and receive a full refund for services not provided.

Finally, like most coupons, those offered by Group and similar websites expire. Lawyers who do not honor expired coupons potentially violate Rule 1.5, which prohibits lawyers from charging unreasonable fees, as well as Rule 1.16(d), which requires lawyers to refund any part of an advance fee that has not been earned. Most of the jurisdictions that have decided this issue have held that the lawyer must either honor the expired coupon or fully refund the purchaser. At least one jurisdiction, however, has held that the lawyer is under no obligation to perform services or return the payment after the coupon expires.

FOOTNOTES
2. See, e.g., South Carolina, Ethics Advisory Opinion 11-05.
3. Compare, e.g., Alabama Ethics Opinion, 2012-01 (finding a 50 percent advertising cost unreasonable); Indiana Ethics Opinion, 2012-1 (same), with N. Carolina, 2011 Formal Ethics Opinion 10 (suggesting that the payment of a fee to such websites might be reasonable, "as long as the percentage charged against the revenues generated is reasonable compensation for the advertising service").
4. See, e.g., New York Ethics Opinion, 897; South Carolina Ethics Advisory Opinion 11-05.
5. See, e.g., Arizona Ethics Opinion, 13-01.
In sum, the use of daily deal websites, such as Groupon, to advertise legal services is fraught with many potential ethical violations. At least one jurisdiction outright prohibits this method of advertising for lawyers. Other jurisdictions strongly caution against it, and condone it only if certain conditions are met. What is clear, however, is that the use of such websites will deliver more than just clients: lawyers must also be ready to deal with an array of ethical issues that such arrangements bring.

About the Author

David S. Rubenstein is an associate professor of law at Washburn University School of Law. He teaches in the areas of professional responsibility, administrative law, constitutional law, and immigration. Prior to teaching, Rubenstein clerked for the Hon. Sonia Sotomayor on the Second Circuit Court of Appeals and for the Hon. Barbara S. Jones in the U.S. District Court for the Southern District of New York. He was also formerly an assistant U.S. attorney in the Southern District of New York, and an associate at the law firm of King & Spalding.
Members in the News

**Changing Positions**

**Kevin J. Arnel** has been elected managing partner of Foulston Siefkin LLP, Wichita.

**Richard L. Budden** has become a law clerk for Hon. J. Thomas Marten for the U.S. District Court for the District of Kansas, Wichita.

**Katherine S. Clevenger** has joined Cordell & Cordell, Kansas City, Mo., as an associate.

**Scott R. Condray** has been hired as a municipal judge for the City of Belleville.

**Brent N. Coverdale** has joined Scharnhorst Ast & Kennard P.C., Kansas City, Mo., as a partner.

**Ryan R. Cox** and **Nathan P. Dayani** have joined Sanders Warren & Russell LLP, Overland Park, as associates.

**Christopher D. Dandurand** has joined Stueve Siegel Hanson LLP, Kansas City, Mo., as of counsel and **Lindsay T. Perkins** has joined as an associate.

**Matthew J. Donnelly** has joined Hutton, Hudgins & Granger LLP, Topeka, as an associate.

**Kellee Dunn-Walters** has joined Lathrop & Gage LLP, Overland Park, as of counsel.

**Terry D. Holdren** has been named the new executive director/CEO designee of Kansas Farm Bureau, Manhattan.

**Cole A. Hoffmeister** has joined Emert, Hutton, Mudrick & Gragson LLP, Topeka, as an associate.

**Chad J. Sublet** was named city attorney for the City of Topeka.

**Mitchell L. Walter** has joined Gilmore & Bell P.C., Wichita, as an associate.

**Beverly M. Weber** has been promoted to a shareholder at Martin Leigh Law & Fritzlen P.C., Kansas City, Mo.

**Miscellaneous**

**Martin W. Bauer**, Wichita, has been inducted to the Clay Center Community High School Hall of Fame.

**Jane A. Deterding**, Wichita, has been elected by the board of directors of Citizens Bank of Kansas as chairman of the board.

**Timothy R. Emert**, Independence, has been awarded the 2013 University of Kansas Society Distinguished Alumnus Award by the University of Kansas School of Law.

**Nola T. Foulston**, Wichita, received the 2013 Children's Champions Award from Child Start for her dedicated contribution for helping children.

**Jeffrey D. Peier**, Wichita, was awarded a “Jiggs” Nelson Quality of Life Award by the Wichita Medical Research and Education.

**Valentine, Zimmerman & Zimmerman P.A.**, Topeka, has changed its name to Zimmerman & Zimmerman P.A.

**Patricia Voth Blankenship**, Wichita, has been elected to the American College of Real Estate 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.
Allan Eugene Coon

Allan Eugene Coon, 49, of Shawnee, died May 23 after a battle with cancer. He was born October 1, 1963, in Princeton, Mo., to Winton Eugene Coon and Twyla Jane (Wright) Coon.

In 1981 he attended Northwest Missouri State University, obtaining bachelor’s degrees in accounting in 1985 and education in 1987. In 1992 Coon graduated from the University of Missouri-Kansas City School of Law with a juris doctorate. After graduating, he accepted an associate position at Morrison & Hecker in Kansas City before joining Watson & Marshall in 1994. In 1996 he joined Hubbard, Ruzicka, Kreamer & Kincaid, where he became a member in 1999. Coon was a member of the Kansas and Missouri, the Kansas City Metropolitan, and the Johnson County bar associations.

Coon is survived by his wife, Deborah, of the home; parents, Gene and Twyla Coon, Princeton, Mo.; son, Christopher Wesley; four aunts; and three grandchildren.

John R. Eyer

John R. Eyer, 60, died May 7 in Salina. He was born June 5, 1952, in Horton, the son of William K. Eyer and Mildred (Crim) Eyer. Eyer graduated from Washburn University School of Law with a juris doctorate.

Eyer served 12 years as a Washington County attorney and also served as a district magistrate judge for Republic County. He was a member of the Belleville Masonic Lodge No. 129 AF & AM, Kansas Bar Association, Kansas District Magistrate Judges Association, and Belleville Housing Authority; was a former member of the Kansas County Attorneys Association, Kansas Criminal Defense Attorneys Association, and Belleville Public Library Board.

He is survived by his wife, Jackie Eyer, of Belleville; two stepsons, Mark LeDuc, of Clear Lake, Iowa, and Michael LeDuc, of Greenleaf; and five stepgrandchildren. Eyer was preceded in death by his parents and one brother, Keith Eyer.

Douglas Lancaster

Douglas Lancaster, 73, of Overland Park, died May 30 at St. Luke’s Hospital in Kansas City, Mo. He was born February 2, 1940, in Babylon, N.Y., and his family moved to Independence, Kan., when he was 10 years old. He graduated from the University of Kansas with a bachelor’s degree in business and obtained a juris doctorate from the University of Kansas School of Law.

Lancaster practiced law in Johnson County for 47 years, including serving as president of the Johnson County Bar Association and as a member of its Ethics Committee. In addition, he was a prosecutor of Fairway for 34 years and a member of the Kansas Bar Association.

He is survived by his wife, Shirley, of the home; daughters, Monica Jenista, of Eudora, Katherine Garrison, of Shawnee, and Heather Kilby, of Castle Rock, Colo.; brother, Bill Lancaster, of Tomball, Texas; and five grandchildren.

Bill D. Strange

Bill D. Strange, 84, of Grove, Okla., died May 4. He was born September 20, 1928, in Shaw to Everett and Gertrude Strange. After high school, he served in the U.S. Navy from 1946-1948. He returned to Kansas, enrolling at the University of Kansas, and he earned his law degree from Washburn University School of Law in 1953.

After serving as staff vice president for the Kansas Savings and Loan League from 1953-1958, Strange worked for 26 years with Peoples Savings and Loan Association of Marysville, where he retired in 1984 as president and CEO. During his career, he served as a commissioner for the state from 1985-1989, and director and/or officer-in-charge for the Federal Home Loan Bank of Topeka and the Federal Savings and Loan Insurance Corp. Strange also served as a member of the Kansas House of Representatives from 1951-1954, serving as the youngest elected member at the time and former board member and chairman of Kansas Savings and Loan Dept.; lifetime member of the Kansas Bar Association, Masonic Lodge in Topeka, and a Shriner with the ISIS temple.

Strange is survived by his son, Stan Strange, of Colby; daughter, Sheri Beck, of Spiro, Okla.; and 18 grandchildren and great-grandchildren. He was preceded in death by his wife, Reva, and daughter, Debbie Strange Vecchio.
20 Honored by the KBA for Their Service to the Profession

PRO BONO CERTIFICATE OF APPRECIATION

In addition to the Pro Bono Award, the Kansas Bar Association awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are now employed full time by an organization that has, as its primary purpose, the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge and/or;
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

Elizabeth K. Bell is engaged in the private practice of law in Manhattan. She graduated from Washburn University in 1996 with a Bachelor of Business Administration in accounting and received her law degree in 2003 from Washburn University School of Law.

Her legal practice focuses mainly on pro bono family law work in Manhattan and the surrounding areas. Bell is admitted to practice in both the state and federal courts in Kansas. She is also licensed as a certified public accountant in Kansas and has provided accounting and business services to clients in the Northeast Kansas area for more than 20 years.

Carl R. Clark is the senior shareholder in the Overland Park firm of Lentz Clark Deines PA. He has been a Chapter 7 panel trustee in the District of Kansas since 1984, and his firm’s practice is limited to representation of debtors and creditors in workouts, restructurings, and bankruptcy cases. Clark has also served on several occasions in the capacity of a receiver for the District Court of Johnson County.

Clark is a 1976 graduate of Kansas State University, cum laude, and a 1982 graduate of the University of Kansas School of Law. He is licensed to practice in Kansas and Missouri, and before the U.S. Court of Appeals for the Tenth Circuit. Clark is a member of the Missouri Bar Association, Kansas Bar Association (Bankruptcy and Insolvency Section), Johnson County Bar Association, and American Bankruptcy Institute, and served on the Bankruptcy Rules Committee for the District of Kansas Bankruptcy Court from 1992 to 2004. He served as vice president of the Kansas City Bankruptcy Bar Association from 1998 to 2006 and was a contributing author for Small Business Bankruptcy Reorganizations (John Wiley & Sons Inc. 1994). He is a frequent speaker on bankruptcy related topics for local and state bar associations. Clark is dual certified in both business and consumer bankruptcy by the American Board of Certification.

Shaye L. Downing originally began working with Sloan Law Firm as a law clerk in 2003. Her skills in organizing complex litigation and tackling legal issues then brought her to the firm as an associate attorney in 2005. She achieved member status in 2009.

Downing is a graduate of the University of Kansas School of Law and has dual undergraduate degrees in psychology and sociology from the University of Kansas. Her law school activities included competition in the school’s moot court competition and membership in the Black Law Student Association.

Her professional affiliations include membership in the American Bar Association, Kansas Bar Association, and the Women Attorneys Association of Topeka. She is admitted to practice law in Kansas’ state and federal courts, and she has been honored by the Kansas Legal Services Corp. for her efforts in providing pro bono legal services.

David P. Eron is the founder and managing partner of Eron Law. His practice concentrates on complex bankruptcy matters, including chapter 11 business filings, bankruptcy litigation, and complicated consumer filings in Wichita, Topeka, and Kansas City. After beginning his career with the Klein DeNatale firm in California, Eron moved to Kansas in 2006 to work for the Office of the U.S. Trustees. He founded Eron Law in 2009 and has devoted 10 percent of his practice to pro bono cases since that time. Eron serves the legal community as a member of the Kansas Bankruptcy Bench Bar Committee and as a member of the American Bankruptcy Institute Journal 2013 Editorial Board. He is a frequent CLE presenter on bankruptcy topics and author of several bankruptcy related articles. In addition to his bankruptcy practice, Éron has significant experience in civil litigation, contracts, lending and security instruments, and business formation and dissolution. He graduated from Iowa State University in 1998 and received his juris doctorate with distinction from the University of Iowa College of Law in 2002.
Douglas M. Greenwald is a shareholder in McAnany, Van Cleave & Phillips P.A. in Kansas City, Kan., where he practices general civil litigation, appellate law, insurance coverage and defense, family law, and product liability/personal injury defense. He is a board member of United Way of Wyandotte County and KidsTLC (Olathe). He graduated from the University of Kansas Law School in 1984.

Heart of America Stand Down seeks to connect with homeless veterans in the Kansas City area. This nonprofit is entirely comprised of dedicated volunteers with 100 percent of its proceeds going to veterans. Founded in 1993 by Arthur Fillmore and Robert Waechter, Heart of America's intent is to provide services to those in need who served their country. At their events, veterans are invited to lunch and a number of service agencies are made available, seeking to create a one-stop setting to connect these veterans with the services they need. Last year in Kansas City, 24 veterans had an opportunity to resolve their legal issues with a volunteer attorney.

Joann Wirth Johnson grew up as an “army brat,” living in far-flung places around the world as a child. She graduated from Virginia Tech with a Bachelor of Science degree in biology and from the University of Florida with a Master of Science degree in environmental engineering. Her first career was working as an environmental engineer in the utility industry and after taking time off to raise a family, she returned to school at the University of Kansas and earned her law degree and a Certificate in Environmental and Natural Resources Law in May 2012. While she seeks the right legal position in environmental or energy law, she works at Kansas Legal Services as an in-house pro bono attorney.

Donald N. Peterson II has practiced law in the Wichita area for 23 years. A Wichita State University and University of Kansas Law School graduate, he is a member of Withers, Gough, Pike, Pfaff and Peterson LLC. Peterson handles civil litigation, including class action minimum wage and overtime cases and ERISA disability litigation. He is the chair of the Wichita Bar Association CLE Committee and sits on the Kansas Board of Law Examiners.

John D. Tongier has been a partner/member of Strausbaugh & Tongier LLC in Overland Park since 2001, where his practice has centered on representing victims of personal injury and their families. He also maintains a mediation and family law practice. In addition, he is a volunteer with Kansas Legal Services, where he handles domestic cases — typically no/low asset divorces, where clients simply need a fresh start. A native of Coffeyville, he attended the University of Kansas for his undergradu-

ate degree (1979) and Washburn University School of Law for his law degree (1982). He is a member of the Kansas Bar Association, Johnson County Bar Association, Kansas City Metropolitan Bar Association, and the Kansas Association for Justice.

*James B. Arnett’s biography/photo not available at press time.*

**PRO BONO AWARD**

The Pro Bono Award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

Joni J. Franklin has been a practicing attorney and active member of the Wichita community for the past 17 years. Her practice focuses in the area of labor relations and workers compensation. Through her practice, Franklin has represented thousands of injured workers, and utilized her skills in negotiating and litigating highly complex labor disputes and contracts.

She has also dedicated herself to promoting the legal profession’s active participation in bettering the community’s access to justice. She is a regular volunteer at the protection from abuse docket, where she donates her services to help victims of domestic violence receive legal protection from their abusers. Franklin has also dedicated more than a decade of her career to service to the Kansas Bar Foundation. In addition, Franklin is also active in local charitable organizations.

**OUTSTANDING YOUNG LAWYER AWARD**

The Outstanding Young Lawyer Award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Jennifer L. Michaels received her undergraduate degree from the University of Nebraska in 2006 and graduated from Washburn University School of Law in 2009 with dean’s honors. During law school, she was a member of the Washburn Moot Court Council and received the 2009 Faculty Brief Award. After graduation, Michaels was an associate attorney with Parker & Hay LLP in Topeka where she practiced in the areas of financial institution and lender liability litigation, employment discrimination, employment law and insurance defense. In 2011, she accepted an associate attorney position at Millsap & Singer LLC in Leawood, where she represented banks in the areas of foreclosure, creditor’s rights and real estate law. In April 2013, she left Millsap & Singer to start her own property management company and law practice that focuses primarily on real estate and landlord tenant law.

Michaels is a member of the Kansas Bar Association, the Missouri Bar Association, and the American Bar Association.
For the past three years, she has served on the KBA Young Lawyers Section Executive Committee as the mock trial chair. As chair, she has organized the statewide Kansas High School Mock Trial Program, including the coordination and planning of regional and state competitions. During her involvement with the program, several new schools have participated, a Mock Trial Committee was developed, and a state-specific set of Rules of Competition was created.

OUTSTANDING SERVICE AWARDS

The Outstanding Service Awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the Kansas Bar Association and for recognizing non-lawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

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

Outstanding Service Awards may recognize law-related projects involving significant contributions of time; committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; work by a public official that significantly advances the goals of the legal profession or the role of the KBA; and/or service to the legal profession and the KBA over an extended period of time.

Anne E. Burke is a principal at the law firm of Manson Karbank Burke in Overland Park. She is a third-generation Kansas lawyer and attended the University of Kansas as an undergraduate, graduating with honors and distinction with a Bachelor of Arts in Liberal Arts and Sciences. She was elected to Phi Beta Kappa and was a Watkins Summerfield Scholar. Burke attended the University of Kansas School of Law and has been in private practice for more than 30 years. For the last 20 years she has focused her area of practice in the area of complex net worth divorce litigation.

Burke is a Fellow in the American Academy of Matrimonial Lawyers and has been recognized in Best Lawyers in America, Super Lawyers, and The Bar Register of Preeminent Women Lawyers.

Fred J. Logan Jr. is an attorney and partner with the law firm of Logan Logan & Watson L.C. in Prairie Village. His practice is focused primarily in the areas of business and real estate.

He has served in a number of regional and state leadership roles, particularly in the area of education. In July 2011, Logan was appointed by Gov. Sam Brownback to serve on the Kansas Board of Regents, which he will chair beginning July 1. In 2008, he chaired the successful campaign to pass a first-in-the-nation local sales tax to benefit life sciences and higher education initiatives. The Johnson County Education Research Triangle, which was overwhelmingly approved by Johnson County voters, benefits the University of Kansas Medical Center’s KU Cancer Center, Kansas State University’s Institute of Animal Health and Food Safety in Olathe, and the University of Kansas Edwards Campus. Logan served as a member of the Board of Trustees of the Johnson County Community College from 1992 to 1997. Initially appointed to a board vacancy in 1992, he was subsequently elected by the citizens of Johnson County to serve a four-year term in 1993 and served as chairman of the board for three years.

Logan presently serves on the board of directors of the Kansas City Area Life Sciences Institute and as a member of the Board of Trustees of MRI Global.

Mira Mdivani practices corporate immigration law with the Mdivani Law Firm in Overland Park and serves as president of the Corporate Immigration Compliance Institute. She represents employers in matters involving I-9 investigations by Department of Homeland Security and visas for international personnel. Her pro bono practice is dedicated to obtaining legal status for immigrant women and children survivors of domestic violence. Mdivani has published several books on immigration law and she teaches corporate immigration compliance and WAVA immigrant relief courses as adjunct law professor at the University of Missouri-Kansas City School of Law.

She currently serves on the KBA Board of Governors, chairs the KBA Immigration Law Section, and will be the incoming chair of the KBA CLE Committee. She has chaired the Missouri Bar Immigration Law Committee, served as president of the Association for Women Lawyers of Greater Kansas City, and is president-elect of the Kansas Women Attorneys Association.

Mdivani’s professional work and leadership have been recognized with the Missouri Bar Association President’s Award, Association for Women Lawyers of Greater Kansas City President’s Award, Business Practitioner of the Year by Missouri Lawyers Media Award, the Best of the Bar by the Kansas City Business Journal, and Robert L. Geron Award for Excellence in Continuous Legal Education awards. She has received the Pro Bono award from the Kansas City-Missouri School of Law Foundation, and pro bono recognition from the Kansas Bar Association and the American Immigration Lawyers Association.

Steven R. Smith has been a board member of the Kansas Lawyer’s Assistance Program since 2010. He also serves as a KALAP volunteer and works with a number of lawyers who have mental health issues. Smith is a frequent speaker at CLE seminars for KALAP and is a regular speaker for the Johnson County Community College paralegal ethics class and the Kansas

Smith’s practice is focused on civil litigation and appellate practice. His clients include several corporate entities that provide community-based residential housing and day services activities for individuals with severe developmental disabilities.

He attended the University of Kansas and obtained a bachelor’s degree in chemistry before attending Washburn University School of Law, where he obtained his juris doctorate in 1978.

Arthur J. Thompson is the dispute resolution coordinator with the Kansas Office of Judicial Administration. Through this position, he works with courts, state government, and nonprofit organizations to establish mediation programs and other methods of resolving disputes. Thompson is approved in core, civil, dependency mediation and domestic mediator, and is also a mediation trainer. He is the staff assigned to the Supreme Court’s Dispute Resolution Advisory Council and the Self Represented Study Committee. Thompson currently is the facilitator for the Domestic Violence Facilitation Project.

Calvin K. Williams is a solo practitioner in Colby, where his practice is limited to criminal defense. He graduated from Washburn University School of Law in 1978. Williams currently serves as a commissioner for the Kansas Lawyers Assistance Program, chair of the KALAP Foundation, and is president of the KBA Solo and Small Firm Section. Williams is past president of the Kansas Association of Criminal Defense Lawyers, served on Washburn Law’s Board of Governors, as an adjunct professor for Washburn’s Intensive Trial Advocacy Program, and as a member of the Blue Ribbon Commission. In addition, Williams is an active member of numerous national criminal defense bar organizations.

DISTINGUISHED GOVERNMENT SERVICE AWARD

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

Mary A. Torrence received her bachelor’s degree in American studies and political science from the University of Kansas in 1971 and her juris doctorate from the University of Kansas in 1974. She began her legal career in the Office of Revisor of Statutes in 1974 and became Revisor of Statutes in 2006 before retiring April 1, 2013. Torrence is a member of the Kansas Bar Association, the Topeka Bar Association, and the Women Attorneys Association of Topeka. In addition, she has participated in volunteer work for the YWCA of Topeka, the United Way of Topeka, Shawnee County CASA, and various other nonprofit organizations in the Topeka area.

PROFESSIONALISM AWARD

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

Robert I. Guenthner is a partner in the law firm Morris, Laing, Evans, Brock & Kennedy Chtd., where he has worked for 46 years. A lifelong resident of Kansas, Guenthner earned his bachelor and law degrees, with honors, from the University of Kansas.

While Guenthner was serving as president of the KBA’s Young Lawyers Section in 1971 and 1972, he was asked by the KBA president to form an ad hoc committee to propose rules governing the discipline of attorneys. A committee of the American Bar Association chaired by retired U.S. Supreme Court Justice Tom Clark had recommended a set of disciplinary enforcement rules for adoption by the states. For months the ad hoc committee members met weekly, considering the ABA proposed rules and making judgments as to how the ABA recommendations should be modified to fit practice in Kansas. From those discussions, Guenthner, as chair of the committee, became the principal draftsman of the rules that were eventually adopted by the Kansas Supreme Court and established the Office of Disciplinary Administrator and the Kansas Board of Discipline for Attorneys.

In 1979, Guenthner was appointed by the Kansas Supreme Court as one of the original members of the Kansas Board for Discipline of Attorneys. He has served continuously since then and has served as vice chairman since 1988. His term will expire on June 30, 2013, with 34 years of service to the Board of Discipline.

Guenthner has been a speaker at various seminars on ethics, business, banking, probate, and tax topics for both the Kansas Bar Association and the Wichita Bar Association, and for many years has written and updated a chapter of the Kansas Bar Association’s Estate Administration Handbook.

Guenthner is a Fellow of the American College of Trust and Estate Counsel, past president of the Wichita Estate Planning Council, former director and vice chairman of the Kansas Development Finance Authority and is recognized in the Super Lawyers and Best Lawyers in America publications.
DISTINGUISHED SERVICE AWARD

The Distinguished Service Award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

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

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

Hon. Marla J. Luckert has served as a justice of the Kansas Supreme Court since January 2003. Previously she served as a judge of the 3rd Judicial District in Topeka, beginning in 1992, and as that district’s chief judge from 2000-02. Before that she was in private practice with the Topeka law firm of Goodell, Stratton, Edmonds & Palmer. She has served as president of the Kansas Bar Association and was on the KBA Board of Governors in various capacities for more than 10 years.

She has chaired numerous KBA committees and sections and has previously received the KBA’s Outstanding Service Award. Luckert is a Fellow of the Kansas Bar Foundation, and she has served as president of the Kansas District Judges Association, the Kansas Women Attorneys Association, the Topeka Bar Association, the Topeka Women Attorneys Association, and the Sam A. Crow American Inn of Court.

PHIL LEWIS MEDAL OF DISTINCTION

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

The Kansas Coalition Against Sexual and Domestic Violence has been Kansas’ leading voice on sexual and domestic violence for the last 30 years. KCSDV enhances response and prevention efforts through training, public policy advocacy, public awareness programs, and support to professionals and local crisis centers. Last year, the Coalition provided 28,214 calls to the crisis hotline; 55,761 hours of crisis counseling; 21,150 victims served; 3,328 victims sheltered; and 93,369 shelter nights (where one person and one bed for one night equals one shelter night).

The purpose of KCSDV is the prevention and elimination of sexual and domestic violence through a statewide network of programs providing support and safety for all victims of sexual and domestic violence and stalking. Its goals are to build a coalition among service providers to promote communication, support, and networking to ensure a comprehensive quality service; develop research and data collection systems; enhance and support the provision of services for victims of sexual and domestic violence and stalking in Kansas; conduct statewide educational efforts; provide statewide and national advocacy for public policy changes; develop a statewide comprehensive prevention plan for ending sexual and domestic violence; and confront and affirm issues of empowerment affecting women and children without regard to race, color, creed, age, physical limitations, national origin, sexual orientation, religious affiliation, marital/parental status, education, and income.

MILESTONES FOR MEMBERS OF THE LEGAL COMMUNITY

25 Years of Service
Eric N. Anderson, Salina
Gary A. Anderson, Kansas City, Mo.
Jana K. Anderson, Eagan, Minn.
Stephen B. Angermayer, Pittsburg
Phillip P. Ashley, Kansas City, Mo.
Katherine J. Bailes, Overland Park
Jeffry D. Baker, Kansas City, Kan.
Tom R. Barnes II, Topeka
Coni K. Beal-Fries, Overland Park
Brenda J. Bell, Manhattan
Ralph E. Bellar Jr., Kansas City, Mo.
Patricia A. Bennett, Leawood
Carey P. Berger, Lawrence
Michael R. Bizal, Overland Park

David C. Black, Johnson City
Hiram E. Blomquist, Shawnee Mission
Brian G. Boos, Overland Park
Jonathan A. Borntick, Kansas City, Mo.
Barry R. Boyer, Topeka
Gerald W. Brenneman, Kansas City, Mo.
Charlene K. Brubaker, Hays
Hon. S. Margene Burnett, Kansas City, Mo.
Vincent A. Burnett, Wichita
Brian S. Burris, Colwich
Hon. Kevin G. Campbell, Lakin
Michael P. Cannady, Wichita
Gerald N. Capps Jr., Wichita

Charles J. Cavenee, Lansing
Geri A. Coen, Overland Park
Joseph R. Colantuono, Overland Park
Daniel D. Crabtree, Kansas City, Mo.
Samuel K. Cullan, Kansas City, Mo.
Carl B. Davis, Wichita
Brian D. Doerr, Overland Park
Keith E. Drill, Kansas City, Mo.
Cynthia C. Dunham, Olathe
G. Michael Fatall, Kansas City, Mo.
Timothy J. Feathers, Kansas City, Mo.
Mark E. Fern, Pittsburg
Richard M. Fisher Jr., Osawatomie
John E. Franke, Kansas City, Mo.
Robert J. Gilbert, Andover, Mass.
Feature Article: 2013 KBA Annual Meeting

Jon W. Gilchrist, Overland Park
Timothy H. Girard, Topeka
Lois A. Gladstone, Overland Park
Kevin W. Gunkel, Olathe
Scott C. Gyllenborg, Olathe
Tamara S. Hatheway, Kansas City, Mo.
S. Andrew Heidrick, Salina
Joseph W. Hemberger, Kansas City, Kan.
William J. Heydman, Garden City
Elizabeth Hill, Overland Park
Rodney V. Hipp, Kansas City, Mo.
David A. Hoffman, Shawnee Mission
Larry C. Hoffman, Overland Park
Thomas T. Inkelaar II, Omaha, Neb.
Stacey L. Janssen, Kansas City, Mo.
Martha Jenkins, Washington, D.C.
Steven A. Jensen, Paola
Michael T. Jilka, Lawrence
Robyn E. Johnson, Troy
Thomas H. Johnson, Lawrence
Hon. Jennifer L. Jones, Wichita
Ryan E. Karaim, Kansas City, Mo.
Hon. David J. Kaufman, Wichita
Gregory D. Keith, Wichita
Kristopher C. Kuckelman, Olathe
Jane A. Landrum, Overland Park
Lori A. Leu, Plano, Texas
Frank W. Lipsman, Olathe
Catherine P. Logan, Overland Park
Scott A. Long, Kansas City, Mo.
Todd E. Love, Topeka
Patricia L. Martin, Pittsburg
Tammy M. Martin, Wichita
Thomas M. Martin, Kansas City, Mo.
Vincent R. McCarthy, Kansas City, Mo.
Frank B. W. McCollum, Kansas City, Mo.
Mary Anne McDonald, Newton
John M. McFarland, Kansas City, Mo.
Greg J. Mermis, Shawnee
Michael A. Montoya, Salina
James C. Morrow, Kansas City, Mo.
Stephen K. Nordyke, Butler, Mo.
Steven K. O’Hern, Overland Park
Peter G. Olson, Liberal
Douglas G. Orr, Coffeyville
Theresa A. Pasek-Westfall, Hutchinson
Dan C. Peare, Wichita
Daniel S. Rabin, Overland Park
Walter R. Randall Jr., Chicago
Stanley L. Rasmussen, Lawrence
Norman I. Reichel Jr., Overland Park
John A. Reynolds, Salina
James M. Riehn, Cassville, Mo.
Bradley S. Russell, Overland Park
Susan G. Saidian, Wichita
Steven G. Sakoulas, Kansas City, Mo.
Julie A. N. Sample, Overland Park
Gary M. Sappington, Kansas City, Mo.
Lori R. Schultz, Kansas City, Mo.
Don L. Scott, Liberal
Kathryn A. Seeberger, Wamego
Hon. Maritza Segarra, Junction City
Jay N. Selanders, Kansas City, Mo.
Jay T. Shadwick, Overland Park
Douglas D. Silvius, Wichita
Brian L. Smith, Shawnee
Patrick C. Smith, Pittsburg
Steven P. Smith, Wichita
Dennis J. Stanchik, Olathe
John E. Stang, Wichita
Patrick J. Stueve, Kansas City, Mo.
Hon. Jeffrey L. Syrios, Wichita
John E. Taylor, Leawood
Terri D. Thomas, Topeka
Curtis L. Tideman, Overland Park
Wendel Scott Toth, Olathe
Scott E. Wasserman, Lenexa
Barbara M. Weians, Parkville, Mo.
F. A. White Jr., Kansas City, Mo.
Warran D. Wiebe, Lawrence
Michael T. Wilson, Wichita
Heather S. Woodson, Kansas City, Mo.
Hon. Eric R. Yost, Wichita
Ann M. Zimmerman, Salina

50 Years of Service
Stanley R Ausemus, Emporia
John V. Black, Pratt
Stephen M. Blaes, Saint Albans, Mo.
Gary E. Cooper, Colby
Richard M. Enochis, Overland Park
Norman E. Gaar, Leawood
Thomas D. Herlocker, Winfield
Richard G. Hunsucker, Rockville, Md.
Ronald D. Innes, Wichita
John W. Jordan, Wichita
Darrel A. Kelsey, Prairie Village
Claude L. Lee, Topeka
Michael T. Mills, McPherson
William L. Oliver Jr., Wichita
Arthur E. Palmer, Topeka
Hon. James A. Pusateri, Naples, Fla.
Richard H. Seaton Sr., Manhattan
E. Dudley Smith, Overland Park
Roger D. Stanton, Overland Park
Bob W. Storey, Topeka
Charles E. Wetzler, Leawood
Bruce H. Wingerd, Clay Center
Lee H. Woodard, Wichita
James C. Wright, Topeka

60 Years of Service
Constance M. Achterberg, Salina
John G. Atherton, Emporia
Hon. Michael A. Barbara, Wichita
Robert L. Bates, Great Bend
Joseph A. Bukaty, Kansas City, Kan.
James M. Caplinger, Topeka
Jack E. Dalton, Dodge City
Jack R. Euler, Troy
Bernie D. Frigon, Scottsdale, Ariz.
Donald W. Giffin, Kansas City, Mo.
Richard C. Hite, Wichita
Albert L. Kamas, Wichita
K. I. Loy, Pittsburg
Charles C. McCarter, St. Louis
John S. Seeber, Wichita
Don B. Stahr, Wichita
Bill D. Strange, Grove, Okla.
Sterling S. Waggener, Topeka
Hon. John Weckel, Salina
Edgar W. White, Ellkhart
James Robert Wilson, Centennial, Colo.
C. Bruce Works, Topeka
In Memoriam ... You’ll be Missed

Hon. Charles E. Andrews Jr., Topeka
Lester C. Arvin, Nashville
Mark A. Biberstein, Wichita
Hon. Wesley E. Brown, Wichita
Richard B. Clausing, Wichita
George F. Crawford, Overland Park
Stephen B. Doering, Garnett
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Golf

Golf Tournament Winners
1st Place – 1st Flight
Hon. Glenn R. Braun
Bruce A. Brumley
Jason C. Robbins
Steven M. Tilton

2nd Place – 1st Flight
Hon. Eric A. Commer
Hon. Christopher M. Magana
Hon. Patrick Walters

Golf Tournament Winners
1st Place – 2nd Flight
Brian R. Carman
Ryan Gering
Jeffrey N. Lowe
Eric S. Parkhurst

2nd Place – 2nd Flight
Daniel L. Baldwin
Matthew L. Benson
Angela M. Meyer
Amanda M. Wilwert

Sporting Clays

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Judge Champion Score
Hon. Gary L. Nafziger, 76/100

Lawyer Champion Score
Whitney B. Damron, 88/100
The 2013 legislative session came to an end on Thursday, June 20, as both chambers embraced Sine Die, the ceremonial end of the session. This year the legislature met for a total of 99 days, 19 more than promised at the start of the year. During these 99 work days, the Kansas Legislature introduced 663 bills (416 House bills and 247 Senate bills) and 33 concurrent resolutions (19 House Concurrent Resolutions and 14 Senate Concurrent Resolutions). The Kansas Bar Association monitored and engaged on 96 bills, and provided expert testimony on 47 bills, not including merit selection proposals.

However, the primary reason for the extend session was negotiations on a tax plan that would close the budget hole created by the 2012 tax cuts. Both chambers finally agreed to a major tax plan that extends a portion of the sales tax, reduces certain deductions, cuts the standard deductions, and lowers income tax rates. Here are the details:

CCR HB 2059 – 2013 Tax Plan

- 6.1 percent sales tax for all items, including food;
- Reduction to itemized deductions from 30-50 percent between 2013 and 2018, excluding the deduction for charitable contributions;
- No deductions for gambling losses;
- Standard deduction $5,500 for single filers and $7,500 for joint; and
- Reductions in income tax brackets (bottom, top);
  - Tax Year 2013: 3.0 and 4.9 percent;
  - Tax Year 2014: 2.7 and 4.8 percent;
  - Tax Year 2015: 2.7 and 4.6 percent;
  - Tax Year 2016: 2.4 and 4.6 percent;
  - Tax Year 2017: 2.3 and 4.6 percent; and
  - Tax Year 2018: 2.3 and 3.9 percent.

This compromise is not without detractors or controversy. Many are starting to claim that the tax compromise is actually a tax increase of $777 million. This claim is supported because the sales tax was set to return to pre-2010 levels on July 1 and remain at 5.7 percent. In addition, standard deductions for head of households and married filing jointly would have been increased to $9,000. Instead the tax plan extended a portion of the sales tax, reduced certain deductions, cut standard deductions, and lowered income tax rates. Here are the details:

SB 171 – Budget Bill

The legislature approved FY 2013 supplement budgets and appropriations for FY 2014 and FY 2015. The general trend was to cut spending in FY 2014/FY 2015 by culling full time employee positions, reducing higher education appropriations and consolidating various state agencies, (Kansas Department of Transportation and Kansas Turnpike). Another significant provision on the budget was the limitation placed on state agencies to fund salary and wages. This salary cap was designed to keep cost down. Gov. Brownback exercised his line-item veto power and vetoed the salary cap provision because “it impacts agencies inconsistently and punishes those agencies that were working most diligently to drive down cost.” (To view the entire veto message visit http://budget.ks.gov/publications/FY2014/Governors_Veto_Message--2013_SB%20171.pdf).

In the end, the two-year budget cycle is paid for with an increase in sales tax and the phasing out of various deductions. It is hoped that the two-year cycle will allow agencies greater stability and create a solid ending balance to deal with any unforeseen financial issues. It is important to note that the school finance case was not factored into the FY 2014/FY 2015 state budgets.

Judicial Branch

Budget

The Judicial Branch budget has been heavily discussed this year. The court proposed a very ambitious budget in order to increase non judicial personnel salaries, fund e-filing, extend the surcharge fee, and move away from user fees toward state general fund appropriations. The initial budget request totaled $137.04 million. That request included all grant, fee and state general funds.

However, the state budget contained some serious deviations from the initial budget request. Those cuts include $2.5 million in unfilled positions, $600,000 in delayed security system upgrades, $1.6 million in unfunded docket fee requests (possible addition through 2014 supplemental request), unfunded longevity pay, and KPERS increases.

The total reduction from the initial request was around $20 million but a majority of this reduction was for enhancements. The $6.4 million cut is currently being absorbed through reductions in temporary hours, use of retired judges, and 80 non-judicial vacancies.

The Supreme Court will look to absorb the remaining shortfall through efficiencies outlined by the Blue Ribbon Commission and the possible spend down of the one time unencumbered balances that merely require unilateral action by the Office of Judicial Administration.

By using unencumbered funds, seeking a 2014 supplemental package and implementing cost saving initiatives outlined by the Blue Ribbon Commission the Supreme Court should be able to avoid furloughs during the two-year budget cycle.

Kansas judicial districts will also have to cope with the newly enacted concealed carry law, HB 2052. This law, which became effective on July 1, 2013, will force courthouses to allow individuals who are licensed to carry a concealed weapon to enter. Those judicial districts equipped with added security may prohibit the carrying of a concealed weapon in courtrooms and ancillary courtrooms. However the bill does not specify if the chief judge may prohibit the carrying of a concealed weapon into hallways, bathrooms, and other non-designated areas. The judicial districts will have to incorporate additional security measures if they wish to prohibit guns in courtrooms but as written, a chief judge may not be able to keep guns out of courthouses.

The Supreme Court continued to implement the cost saving measures outlined by the BRC. They include:
E-Filing Project
The Kansas Supreme Court also proposed a new revenue stream to fund future maintenance and upgrades of the e-filing system. To complete the e-filing project the court would need to acquire $1.1 million in FY 2014; approximately $600,000 in FY 2015 and $350,000 for continued maintenance of the system going forward. However, the revenue stream was not authorized by the 2013 legislature. The Supreme Court has submitted a grant request to the judge advocate general (JAG). This request will be reviewed later this summer.

Repealing K.S.A. 21-105; One-Judge Per County
In 2012 the Blue Ribbon Commission recommended repealing the one judge per county requirement. That will allow the Supreme Court the flexibility to administer the judicial branch resources more efficiently. Two bills were introduced in 2013 to accomplish the repeal. HB 2016 would reassign magistrate judges should their yearly caseload fall under 600 cases. This bill was introduced by Rep. Lance Kinzer (R-Olathe). The Supreme Court introduced its own bill, HB 2113, that would simply allow the Judicial Branch to move judges around as it deem necessary. The most persuasive argument was proposed by the Kansas Magistrate Judges Association, which would allow high volume judicial districts to hire more magistrates to take care of those additional cases. The KMJA argued that district could hire three magistrate judges for the cost of one district court judge. Magistrate judges can complete a majority of the assignments/cases while lowering the caseloads. This seemed to interest the committee but in the end the issue proved to be too heavy a lift and both bills failed to move forward in the legislative process.

HB 2102, Removing the sunset provision for the Commission on Judicial Performance and reducing its docket fee
As way of background, in 2012 the funding for the Commission was diverted to the Supreme Court to use for salaries and other judicial branch functions. HB 2102 would push back the Commission’s sunset date to 2017 and reduce the docket fee amount from 3.05 percent to 1.72 percent. This bill failed to move forward in the legislative process.

Merit Selection
This year the legislature proposed more merit selection reform bills than any other. By last count eight bills were introduced that specifically attempted to change the current method of judicial selection. They include:

- **SCR 1601** would follow the federal model allowing the Governor to appoint subject to Senate confirmation.
- **SB 8** (trailer bill) would create a new commission that reviews governor’s selection; forwards recommendation to Senate Committee on Judiciary, which would make a recommendation to the full Senate.

The Senate debated SCR 1601 and SB 8 on Wednesday, January 30. SCR 1601 passed by the required two-thirds vote for a constitutional amendment (28-12) and SB 8 was approved on a vote of 28-11-1.

The House held its own hearings on a constitutional amendment and while it has advanced out of the House Judiciary Committee, it did not proceed further.

**HCR 5002** is strikingly similar to SRC 1601. However, the House Judiciary Committee amended the measure to place it on the 2014 general election ballot. **HCR 5003** would have members of the Kansas Supreme Court and Court of Appeals stand for partisan election to six-year terms. **HB 2020** would have the members of the Kansas Court of Appeals stand for partisan election to four-year terms. **HCR 5005** would change the nominating commission to one chosen by House and Senate leadership and the governor, with Senate confirmation. **HCR 5019** would eliminate the nominating commission and follow the federal model of governor appointment with Senate confirmation. The main difference is that under HCR 5019 judges would serve for a lifetime term.
HB 2019 would impose a Federal Model on the Kansas Court of Appeals (governor selects/Senate confirms). On March 27, Gov. Sam Brownback signed HB 2019, which reforms the method of selecting Kansas Court of Appeal judges. The action makes Kansas only the third state in the country to have dual methods of selecting its appellate level judges and justices. Gov. Brownback held a press conference at which he was flanked by a number of legislators and state officials, including Hon. Anthony Powell.

Besides these eight direct reform measures, Rep. Lance Kinzer (R-Olathe) introduced two bills that could alter the make up of the appellate court system without changing the selection method. They include:

**HB 2415** would reduce the mandatory retirement age from 75 years old to 65 years old for the Court of Appeals and Supreme Court. This age limit would not affect district or magistrate judges.

**HB 2416** would split the Court of Appeals into two divisions, one devoted to only criminal appeals (five judges) and the other devoted to civil appeals (nine judges).

No hearings were held on either bill since they were introduced during the Veto Session but it is very likely that Rep. Kinzer as chair of the House Judiciary Committee will discuss this in 2014.

**KBA Issues**

**HB 2398, Amending the Kansas Revised Limited Liability Act**

The KBA Legislative Committee organized a subcommittee to revise the Kansas Revised Limited Liability Act (KRLLA). The subcommittee, comprised of Bill Quick, Prof. Webb Hecker, Bill Matthews, Joe Jarvis, Joe McLean, and Ryan Kriegshauser, has worked with the Kansas Secretary of State's Office to determine which statutes need to be updated to conform to the Delaware code. The subcommittee has also identified specific statutes that required revision due to recent case law. The KBA introduced and supported this bill. It received a hearing in early March but failed to pass out of committee. Chairman Kinzer was concerned that the bill was too complicated and further discussion was needed. The bill will be held over until the 2014 session. House Judiciary Committee vice chairman Rep. Rob Bruchman agreed to “sponsor” this bill for the next session and work with the KBA to help move the bill forward.

**HB 2014, Revoking an ex-spouses inheritance rights upon divorce**

A Kansas Judicial Council Probate Advisory Committee recommendation, this proposal will automatically revoke an ex-spouse’s inheritance rights upon divorce. The proposal would create a new section. HB 2014 passed the Kansas House 119-0 and the Kansas Senate 39-0. However, an amendment in committee seriously altered the original intent of the bill and the Kansas Judicial Council asked that it be held over to study the change and determine if the amendment can be removed from the bill.

**HB 2015, Removing the exception for transfer of property to a spouse**

This proposal will remove the spousal gift exemption to marital property. The proposal would amend KSA 23-2601 by deleting the exemption for gifts received by a spouse. The amendment would clarify that a spouse’s creditors cannot reach assets given to the other spouse in circumstances where no fraud to creditors is involved. The statute was originally known as the “Married Women’s Property Act” and reversed the common law rule that the husband controlled the wife’s property. This bill passed both chambers and was signed into law by the governor. The law went into effect on July 1. See http://www.kslegislature.org/li/b2013_14/measures/documents/summary_hb_2015_2013.pdf.

**SB 124, Amending the Restraint of Trade Act**

After a series of official and informational hearings both chambers have decided that SB 124 is the best option available to solve the restraint of trade issue. The bill creates a new section declaring the purpose of the new section and the amendments to existing sections are to clarify and reduce uncertainty or ambiguity in the application of the KRTA and applicable evidentiary standards to certain business contracts, agreements, and arrangements that are not intended to unreasonably restrain trade or commerce and do not contravene public policy. The KBA took a neutral position on these bills. HB 124 passed both chambers and was signed into law by the governor. The law went into effect on April 18. See http://www.kslegislature.org/li/b2013_14/measures/documents/summary_sb_124_2013.pdf.

SB 124 also contained a retroactivity clause that would abate any action/defense filed after the effective date of the bill. In this way any cause of action currently pending in any court would not be subject to the provisions of SB 124. This would include seeking full consideration as a remedy. However, earlier this spring a Wyandotte County judge ruled that an antitrust plaintiff could no longer seek full consideration as a remedy since the legislature abolished that provision in the statute. The case goes to trial in June 2014.

**SB 5, Business Entities, restricted use of acquired entities name**

SB 5 would prohibit a business entity from using the name of another business entity that it acquires unless it also assumes responsibility for the acquired business entity’s liabilities, including any warranties. In addition, an identical bill was introduced in the Kansas House. That bill is HB 2010. The KBA provided neutral testimony on these bills with the desire to keep the bill from being worked. The committee was satisfied that the bill was a solution in search of a problem and tabled the bill for the session.

**SB 81, Kansas Open Records Act, law enforcement personnel exception**

SB 81 would amend current law as it relates to open records and identifying information of public officials. Public agencies would not be required to disclose any records on a public

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**Footnote**

Thank you for another great year!
Legal Article: 2013 Legislative Wrap-Up ...

website which are searchable by a keyword search and which identify the home address or home ownership of any law enforcement officer; parole officer; probation officer; court services officer; community corrections officer; federal judge; justice of the Supreme Court; court of appeals judge; district judge; district magistrate judge; U.S. attorney or assistant attorney for the Kansas district; attorney general or assistant attorney general; district attorney or assistant district attorney; and county attorney or assistant county attorney.

SB 81 passed both chambers and was signed into law by the governor. The law went into effect on July 1. The KBA supported this bill. See http://www.kslegislature.org/li/b2013_14/measures/documents/summary_sb_81_2013.pdf.

Sub. for HB 2183, Medical Recovery Assistance Program

This bill would alter what proceeds could be used to repay Medicaid expenses. By law all states must recover medical costs from deceased Medicaid recipients. The issue was discussed at the end of the 2012 session and a bill was introduced during the veto session but failed to gather enough interest to move forward in the legislative process. Sub. for HB 2183 is very similar to last year’s version with the exception of the look back period.

The KBA worked closely with a House Judiciary subcommittee to tone down this bill in the hopes that a more flexible model could be achieved. The subcommittee proposed gutting the original bill and substituting a “lien” process for repayment of medical assistance. The KBA worked with Rep. Blaine Finch to add a floor amendment to ensure that any medical assistance lien does not take priority over any lien already on file. The Conference Committee Report for Sub for HB 2183 was agreed to by both chambers and was signed by the governor. KBA supported the CCR. The law went into effect on July 1. See http://www.kslegislature.org/li/b2013_14/measures/documents/hb2183_enrolled.pdf.

Bills of Interest

Agriculture Law

HB 2404, Corporate farming

HB 2404 would amend definitions related to agricultural corporations to expand the number of corporate farming entities allowed to operate in Kansas. This bill was discussed in committee in mid-March but failed to gain any traction due to the complexity of the issue. The subject has been referred to the Kansas Judicial Council for further study over the interim. The Kansas Legislative Research Department has crafted a history of corporate farming laws in Kansas, which can be found at http://skyways.lib.ks.us/ksleg/KLRD/Publications/Corporate_Farming_Resources/memo_kansas_corporate_farming_law.pdf.

SB 168, Limiting nuisance actions against certain agricultural activities

This bill amends the law relating to the protection of farmland and agricultural activities from certain nuisance actions. The bill also creates a new section setting out compensatory damages that may be awarded to a claimant from a nuisance action against farmland used primarily for agricultural activity. The bill divides the level of damages based on whether the nuisance is permanent or temporary.

In addition, the bill allows any agricultural activity conducted on farmland, if consistent with good agricultural practices and established prior to surrounding agricultural or non-agricultural activities, to be presumed reasonable and to not constitute a nuisance. The bill presumes an agricultural activity that is undertaken in conformity with federal, state, and local laws and rules and regulations to be considered good agricultural practice. This law became effective on July 1.

Business and corporate laws

SB 187, Establishing the workers compensation and employment security boards nominating commission

SB 187 replaces the Workers Compensation Administrative Law Judge (ALJ) Nominating and Review Committee and the Workers Compensation Board Nominating Committee with a new entity named the Workers Compensation and Employment Security Boards Nominating Committee. The new Committee makes nominations pertaining to positions in the Workers Compensation Division, the Workers Compensation Review Board, and the Employment Security (Unemployment Insurance or UI) Board of Review. The bill also revises provisions of the Workers Compensation Act regarding qualifications for injury compensation claims, the appeals process pertaining to the recusal of an ALJ, the evaluation of physical impairment, and administrative responsibility for the State Workers Compensation Self-Insurance Program.

The new nominating committee will consist of Secretary of Labor, Kansas Chamber of Commerce, National Federation of Independent Businesses, Kansas AFL-CIO, Kansas State
Council of the Society for Human Resource Management, Kansas Self-Insurance Association, and one member from an employee organization or professional organization nominated by the secretary of labor. This law became effective on July 1.

SB 37, Kansas home inspectors professional competence and financial responsibility act

SB 37 would have extended the Kansas home inspectors professional competence and financial responsibility act beyond the July 1 sunset. However, Gov. Brownback vetoed this legislation.

Civil Laws

HB 2081, Kansas Consumer Protection Act, Kansas Code of Civil Procedure

HB 2081 amends the Kansas Consumer Protection Act (KCPA) and the Kansas Code of Civil Procedure in the areas of temporary restraining orders and temporary injunctions, poverty affidavits, redemption of real property, and civil forfeiture.

The bill also adds a new section that defines the crime of identity theft and identity fraud as unconscionable acts under the KCPA.

In addition, the bill adds a provision dealing with temporary restraining orders without notice or bond if the specific facts in a case demonstrate an immediate and irreparable harm before the adverse party can be heard; the movant has made certified efforts to notify the adverse party; and notice is supplied to the attorney general if the adverse party is the state or state agency.

This bill also includes amendments to poverty affidavits, redemption of real property and regulations for civil forfeiture. This law became effective on July 1.

HB 2252, Statute of limitations for rape and sexually violent crimes

HB 2252 allows a prosecution for rape or aggravated criminal sodomy to be commenced at any time. Additionally, the bill allows for prosecution of a sexually violent crime to commence within ten years when the victim is 18 years old or older. When the victim is under 18 years, the bill allows for prosecution of a sexually violent crime to commence within one year of the date the identity of the suspect is conclusively established by DNA testing, or within 10 years (increased from the former period of five years) of the date the victim turns 18 years of age, whichever is later. This law became effective on July 1.

HB 2278, Crimes involving firearms

HB 2278 makes theft of a firearm valued at less than $25,000 a severity level 9, nonperson felony. Previously, there was no penalty specific to theft of firearms; however, theft of property valued between $1,000 and $25,000 was a severity level 9, nonperson felony, and theft of property valued below
$1,000 was a class A nonperson misdemeanor. For theft of property from three separate mercantile establishments within 72 hours as part of the same act or transaction or in two or more acts or transactions connected together or constituting parts of a common scheme or course of conduct, a severity level 9, nonperson felony, the bill adds a maximum value of $1,000 for the property. This law became effective on July 1.

**HB 2170, Sentencing dispositions, probation and post release supervision**

HB 2170 makes several changes to sentencing, post release supervision and probation laws. The bill first allows low-risk defendants to be eligible for discharge if all restitution has been paid and they have followed the terms of their probation for 12 months. If these requirements are met the court is required to grant the discharge absent any compelling reason to deny. The bill makes other modifications to probation and post release supervision laws. This law became effective on July 1.

**Executive Reorganization Order 42, Abolishment of Juvenile Justice Authority; Transfer of duties to the Department of Corrections**

ERO 42 abolishes the Juvenile Justice Authority (JJA) and transfers the jurisdiction, powers, functions, and duties of the JJA and the Commission of Juvenile Justice to the Department of Corrections (KDOC) and the secretary of corrections, effective July 1. All officers and employees of the JJA engaged in the exercise of the powers, duties, and functions transferred by the ERO will be transferred to the KDOC, unless they are not performing necessary services. KDOC will succeed to the property and records of the JJA. The balance of all JJA funds will be transferred to the KDOC and used only for the purpose for which the appropriation was originally made. KDOC will assume all jurisdiction, powers, functions, and duties relating to juvenile correctional facilities and institutions, and will be responsible for rules and regulations; educational services; passes, furlough, or leave; institutional security plans; and a rigid grooming code and uniforms for such institutions.

**Senate Sub. for HB 2034, Human trafficking**

Senate Sub. for HB 2034 is a conference committee report that contains a number of issues including human trafficking, commercial sexual exploitation of a child promoting the sale of sexual relations, CINC issues and staff security. This bill authorizes the attorney general, in conjunction with other appropriate state agencies, to coordinate training regarding human trafficking for law enforcement agencies throughout the state and would designate the attorney general’s Human Trafficking Advisory Board as the official human trafficking advisory board of Kansas. The bill also establishes the Human Trafficking Victim Assistance Fund, which will be funded by the collection of fines imposed as described in the following paragraphs. The funds will be used to pay for training provided and support care, treatment, and other services for victims of human trafficking and commercial sexual exploitation of a child. This law became effective on July 1.

**SB 122, Unauthorized voting disclosure**

SB 122 modifies the definition of the crime of unauthorized voting disclosure while being charged with any election duty. The bill makes it illegal to intentionally disclose or expose the name of any voter who has cast a ballot, whether provisional or regular, except as ordered by a court in an election contest.
The bill prohibits disclosing the name of any voter who has cast a ballot from the time the ballot is cast until the final canvass of the election; the bill also states that nothing in the section will prohibit the disclosure of the names of advance voters. Finally, the bill states that nothing in the section prohibits authorized poll agents from observing elections as allowed under continuing law. This law became effective on July 1.

**Children and Family Law**

**SB 88, Children’s advocacy center fund fee increases**

SB 88 increases the fee certain defendants are required to pay from $100 to $400. This bill also eliminates the provision allowing the court to waive such fees if the court determined the fee would cause a hardship on the defendant. The fee fund offsets cost to state advocacy centers.

**HB 2223, Enacting the protective parent reform act**

HB 2223 concerns custody, visitation, and contact when a parent alleges physical, mental or emotion abuse or neglect by the other parent. Under this proposal the court shall consider that information, if supported by a preponderance of the evidence, in determining custody and visitation that is in the best interest of the child. HB 2223 failed to move forward in the legislative process. The KBA provided testimony opposing this bill.

**Special Notice**

While it may be difficult to think about the 2014 legislative session when the 2013 legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all legislative proposals be submitted in final form by October 1. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submit it to the appropriate section.

The KBA Legislative Committee will meet after the Tuesday, October 1 deadline to consider all legislative proposals for the 2014 session.

All proposals should be sent to Joseph N. Molina at:

Kansas Bar Association
1200 SW Harrison St.
Topeka, KS 66612
Email: jmolina@ksbar.org

**About the Author**

**Joseph N. Molina III** is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.
Rule 6.09(b) is hereby amended, effective the date of this order.

(b) **Additional Authority.**

(1) **Notifying the Court by Letter.**

(A) **Before Oral Argument or Before the First Day of the Docket on Which a No-Argument Case is Set.** Not later than 14 days before oral or 14 days before the first day of the docket on which a no-argument case is set, a party may advise the court, by letter, of citation to persuasive and or controlling authority that has come to the party’s attention after the party’s last brief was filed. If a persuasive or controlling authority is published or filed less than 14 days before oral argument or less than 14 days before the first day of the docket on which a no-argument case is set, a party promptly may advise the court, by letter, of citation.

(B) **After Oral Argument or After the First Day of the Docket on Which a No-Argument Case was Set.** After oral argument or after the first day of the docket on which a no-argument case was set, but before decision, a party may advise the court, by letter, of citation to persuasive or controlling authority that was published or filed after the date of oral argument or after the first day of the docket on which a no-argument case was set.

(C) **Contents of Letter to Court.** The letter must contain a reference either to the page(s) of the brief intended to be supplemented or to a point argued orally to which the citation pertains. A brief statement may be made concerning application of the citation, but the body of a letter submitted under this subsection may not exceed 350 words. The letter may not be split into multiple filings to avoid the word limitation.

(2) **Service and Filing.** A copy of the letter must be served on all adverse parties united in interest. The letter, with proof of service, must be filed with the clerk of the appellate courts and be accompanied by 16 copies.

(3) **Response.** A response, if any, must be:

(A) filed with the clerk of the appellate courts not later than 7 days after the service of the letter;

(B) limited to the reference, brief statement, and number of words allowed under paragraph (1)(C); and

(C) served on all adverse parties united in interest.

By order of the Court, this 21st day of May, 2013.

FOR THE COURT

Lawton R. Nuss
Chief Justice

2013 SC 56
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HELD: The Court, having examined the files of the office of the disciplinary administrator, found that the surrender of the respondent’s license should be accepted and that the respondent is disbarred.

CIVIL

HABEAS CORPUS

BAKER V. STATE

SEDGWICK DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – AFFIRMED

NO. 100,501 – JUNE 7, 2013

FACTS: Kansas Supreme Court affirmed Baker’s conviction for first-degree murder, and remanded for resentencing. Within one year of resentencing hearing, but more than a year after remand, Baker filed K.S.A. 60-1507 motion alleging ineffective assistance of trial counsel. District court dismissed the motion as untimely. Court of Appeals reversed, holding the time limitation under K.S.A. 60-1507 began 10 days after resentencing. 42 Kan. App. 2d 949 (2009). State petitioned for review.

ISSUE: Time for filing K.S.A. 60-1507 motion

HELD: Issue of first impression. Construing K.S.A. 60-1507 as a whole and in harmony with Supreme Court Rule 183, under facts of this case, the one-year time limitation in which to file a K.S.A. 60-1507 motion does not begin until the time to appeal from the resentencing expires. Judgment of Court of Appeals is affirmed. judgment of district court is reversed and case is remanded.

STATUTES: K.S.A. 22-3602(a), -3608; and K.S.A. 60-1507, -1507(a), -1507(c), -1507(f), -1507(f)(1)(i)

FIRST-PARTY NEGLIGENT ENTRUSTMENT

MARTELL V. DRISCOLL ET AL.

JEFFERSON DISTRICT COURT – REVERSED AND REMANDED

NO. 106,429 – JUNE 7, 2013

FACTS: Jerry L. Martell, as conservator for Kim “Travis” Driscoll (collectively referred to as “Driscoll”), filed a petition against Leroy Driscoll (Leroy) and other named defendants because Leroy allowed
Driscoll to drive a car belonging to Leroy and others, knowing that Driscoll was incapable of safely driving the car because his license was suspended, he had a drinking problem, had received multiple DUIs, and was a known reckless or incompetent person incapable of safely operating a vehicle. Driscoll subsequently got into a car accident with another vehicle, which resulted in injuries to Driscoll. Driscoll later filed a negligent entrustment claim against Leroy and the other presumptive owners of the vehicle, claiming that they owed him a duty to not give control of the vehicle to him. After filing an answer, Leroy filed a motion to dismiss Driscoll’s petition for failure to state a claim, arguing, among other things, that Kansas law does not recognize a first-party negligent entrustment claim. The district court granted Leroy’s motion to dismiss. The case was transferred to the Kansas Supreme Court.

ISSUE: First-party negligent entrustment

HELD: Court held that under Kansas law, a claim of negligent entrustment may be based upon knowingly entrusting, lending, permitting, furnishing, or supplying an automobile to an incompetent or habitually careless driver. An incompetent driver is one who, by reason of age, experience, physical or mental condition, or known habits of recklessness, is incapable of operating a vehicle with ordinary care. Court concluded that (1) Kansas law recognizes a first-party negligent entrustment claim; (2) if an entrustor owed a duty of care to an entrustee and that duty was breached, then determining the parties’ comparative fault for the incident resulting in injuries to the entrustee is a question of fact for the jury to decide. Court held that the issue of the parties’ comparative fault remained a fact issue that could not be resolved as a matter of law on a motion to dismiss for failure to state a claim; and (3) Kansas public policy does not prevent an entrustor from being liable for an entrustee’s injuries that resulted from the entrustee’s negligent use of the entrustor’s chattel. Court reversed the district court’s decision to dismiss Driscoll’s petition and remanded for further proceedings.

DISSENT: Justice Johnson dissented. Justice Johnson would not expand the concept of negligent entrustment to include a cause of action by an entrustee against the entrustor, i.e., first-party negligent entrustment.

STATUTES: K.S.A. 8-258a, -264; and K.S.A. 60-254

TRESPASS AND DUTY OWED
WRINKLE V. NORMAN ET AL.
JEFFERSON DISTRICT COURT – REVERSED AND CASE REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 103,373 – MAY 17, 2013

FACTS: The appellant, Rodney Wrinkle, was injured in the course of providing aid to a calf that he was escorting onto a neighbor’s property. Wrinkle was injured when the calf became entangled in a clothesline. He sued to recover medical damages from the neighbor, and the district court granted the Normans’ motion for summary judgment. The district court found that because Wrinkle was a trespasser on the Normans’ property, they had breached no duty toward him. The Court of Appeals affirmed by holding that Wrinkle was a trespasser because there was no evidence the cattle were owned by the Normans.

ISSUES: (1) Trespass and (2) duty owed

HELD: Court adopted a modified version of the Restatement (Second) of Torts § 197 (1965), recognizing a privilege to enter or remain on the land of another if it is or reasonably appears to be necessary in order to prevent serious harm to people or property, subject to certain conditions.

Court also adopted a modified version of the Restatement (Second) of Torts § 345 (1965), recognizing the duty of care to a party entering the property of another under exercise of a privilege is the same as the duty of care to licensees and invitees. Because the district court applied the incorrect standard for the duty of care in this case, Court remanded for the submission of new arguments predicated on the proper duty.

CONCURRING IN PART/DISSenting IN PART: Justice Rosen agreed with the Court’s adoption of the relevant sections of

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**Appellate Practice Reminders . . .**

From the Appellate Court Clerk’s Office

**Rule 6.09(b), Citation to Additional Authority**

Effective July 1, 2012, the Supreme Court amended Rule 6.09(b) to impose conditions on citation to additional authority after a party’s brief is filed. Effective May 21, 2013, the Court further refined the rule. Anyone who has filed an appellate brief and is considering filing a letter citing additional authority should review the current version of Rule 6.09(b) posted on the Court’s website at www.kscourts.org/rules/New_Rules_and_Amendments/default.asp.

Rule 6.09(b) allows citation of additional authority by letter after a brief is filed, but the timing of the submission affects the content. What Rule 6.09(b) contemplates is the citation to recent authority or the occasional case which was overlooked in research. The 6.09(b) letter is not a continuation of briefing.

Not later than 14 days before oral argument or 14 days before the first day of the docket on which a no-argument case is set, persuasive or controlling authority that has come to the party’s attention after its last brief was filed may be cited by letter. There is no time limitation on the publication or filing date of the authority cited.

Later submissions are controlled by the date of publication or filing of the authority. Less than 14 days before oral argument or less than 14 days before the first day of the docket on which a no-argument case is set, only newly-published or newly-filed authority may be cited. After oral argument or after the first day of the docket on which a no-argument case was set, but before decision, only persuasive or controlling authority published or filed after the date of oral argument or after the first day of the docket on which a no-argument case was set may be cited.

Under any circumstances, there is now a 350-word limit on the body of the letter which contains citation to additional authority. The letter may not be split into multiple filings to avoid the word limitation. The letter must contain a reference either to the page(s) of the brief intended to be supplemented or to a point argued orally to which the citation pertains.

Any response to a Rule 6.09(b) letter must be filed not later than seven days after service of the letter.

If you have questions about these rules or appellate procedure generally, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
FACTS: Macie Martin, both individually and as the representative of the estate of her husband, Curley Martin (Curley), filed a wrongful death action against defendants Sandip Naik, M.D., and Specialty Hospital of Mid-America (Hospital), in which she raised wrongful death and survival claims based on alleged medical malpractice. Both defendants filed motions for summary judgment in which they argued the statute of limitations barred both causes of action. In granting the Hospital’s and Naik’s motions, the district court concluded that Martin’s “causes of action here for medical negligence in the survival action and the wrongful death claim accrued April 8, 2004,” the date on which the defendants’ negligence could have occurred and the date on which Curley’s injuries were first reasonably ascertainable. The court found that K.S.A. 60-515, the tolling provision relating to disabled parties, would only have extended the limitation period one year past Curley’s death—to October 25, 2005. Because the tolling provision effectively shortened the limitation period, the district court concluded that the tolling provision should not be applied. Consequently, the district court agreed with the Hospital’s and Naik’s assertions and found that the wrongful death and survival causes of action were barred when this case was filed on October 25, 2006. The Court of Appeals held in Martin v. Naik, 43 Kan. App. 2d 591, 228 P3d 1092 (2010), that neither Martin’s wrongful death action nor the survival action was barred by the two-year limitation. With regard to the wrongful death claim, the Court of Appeals concluded that the basis for Martin’s lawsuit did not accrue, and thus the statute of limitations did not begin to run, until Curley’s death. As to the survival action, the Court of Appeals determined that Curley’s medical condition rendered him unable to reasonably ascertain the fact of his injury.

ISSUES: (1) Wrongful death, (2) survival action, (3) medical disability, and (4) statute of limitations

HELD: Court held that as applied to the facts of this case, the underlying medical malpractice claim was not time barred at the time of Curley’s death; hence, the wrongful death qualifying condition was met. The limitation period for Martin’s wrongful death action began running on the date of Curley’s death because there was no allegation of concealment or misrepresentation. Consequently, Martin’s wrongful death action was not time barred when filed two years to the day after Curley’s death. Court also held that the date on which the fact of injury was reasonably ascertainable was April 8, 2004. This was also the last date on which alleged malpractice occurred and thus was the date on which at least some of the acts giving rise to the action occurred. Because the dates coincide, Court concluded the exception was not triggered under the unique facts of this case—the fact of injury was reasonably ascertainable when the act that gave rise to the cause of action occurred. Court held the survival action was barred by the statute of limitations.

CONCURRING: Justice Johnson concurred in the results reached by the majority on both the wrongful death and survival actions but wrote separately with respect to the survival action and the interpretation of K.S.A. 60-513(c) for two reasons. Justice Johnson disagreed with the apparent holdings of the majority that the period of limitation was running against Curley while he was in a coma and that the provisions of K.S.A. 60-515 were not applicable here. He also perceived some fallacies in the reasoning of the Court of Appeals opinion and the dissent in this case which the majority opinion did not address. Chief Justice Nuss joined the concurring opinion.

CONCURRING IN PART AND DISSENTING IN PART: Justice Luckert concurred with the majority’s holding that Macie Martin’s cause of action for wrongful death was not barred by the statute of limitations. However, Justice Luckert dissented from the holding that the survival action she brought as a personal representative of the estate of Curley Martin was barred.


CRIMINAL

STATE V. ADAMS

FORD DISTRICT COURT – AFFIRMED

NO. 104,068 – JUNE 21, 2013

FACTS: The state charged Adams with aggravated indecent liberties with a child, aggravated criminal sodomy, and sexual exploitation of a child. The state later amended the complaint to add a second count of sexual exploitation of a child. Adams’ appointed counsel, Linda Eckelman, negotiated a plea agreement in which Adams agreed to plead guilty to aggravated indecent liberties with a child and agreed to testify against Noble, a participant. The agree-
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The district court conducted an evidentiary hearing on Adams’ K.S.A. 60-1507 motion and motion to withdraw her plea. Without making any credibility determinations or factual findings regarding Adams’ claims of ineffectiveness, the district court rejected Adams’ claim of prejudice. Specifically, the district court concluded Adams’ guilty plea was motivated by the overwhelming evidence against her, the “near certainty of her conviction,” and Adams’ desire to prevent her daughter from having to testify.

ISSUES: (1) Ineffective assistance of counsel and (2) withdrawal of guilty plea

HELD: Court held that Adams is burdened with demonstrating that a reasonable probability exists that, but for Eckelman’s errors, she would have insisted on going to trial. But the weight of the evidence against Adams, her repeated expressed desires to protect her daughter from testifying, and the potential for a much greater sentence all weigh against Adams’ assertions that had she been effectively counseled she would have risked a trial. The district court correctly held that Adams failed to meet her burden to demonstrate prejudice.


STATE V. BAKER
LABETTE DISTRICT COURT – AFFIRMED
NO. 107,858 – MAY 31, 2013

FACTS: Baker pled guilty to four crimes, including abuse of a child who died. District court denied Baker’s motion for concurrent sentences, and imposed consecutive sentences, including a life sentence with no possibility of parole for 20 years for felony murder, and an aggravated sentence under KSGA of 128-month prison term for child abuse. Baker appealed, claiming (1) imposition of consecutive sentences was an abuse of discretion and (2) aggravated sentence for child abuse violated Apprendi because jury did not decide aggravating factors or criminal history.

ISSUES: (1) Consecutive sentences – abuse of discretion and (2) Apprendi claims

HELD: No abuse of discretion to impose consecutive sentences. Under facts of this case, neither Baker’s acceptance of responsibility, his expression of remorse, any savings to state resulting from Baker’s decision to enter plea, nor any combination of these considerations offset compelling reason stated by judge for imposing consecutive sentences.

No appellate jurisdiction to review presumptive sentence, even if that sentence is to highest term in a presumptive grid block. And use of prior convictions for sentencing enhancement is constitutional.

STATUTES: K.S.A. 2012 Supp. 22-3601(b)(3); K.S.A. 2010 Supp. 21-36a06(b)(3); and K.S.A. 21-3401(b), -3609, -3808, -4721(c)(1)

STATE V. BOLEYN
RENO DISTRICT COURT – AFFIRMED
NO. 105,483 – JUNE 14, 2013

FACTS: Boleyn was convicted of aggregated indecent liberties with a child and sentenced to a hard 25 life sentence pursuant to

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Jessica’s Law for inappropriate sexual relationship with his girlfriend’s son. He argues that the district court erred when it admitted evidence at his jury trial establishing that he possessed pornography depicting homosexual acts and that the district court erred when it determined that his life sentence was constitutional.

ISSUES: (1) Admission of evidence and (2) sentencing

HELD: Court held Boleyn’s credibility was placed at issue in this case after he decided to testify in his own defense. Consequently, evidence showing that he had lied during his direct examination would have a legitimate and effective bearing on the decision of the case and would therefore be material. Because Boleyn denied being gay during his direct examination, the Court concluded that evidence establishing that Boleyn is gay would be material to the issue of judging the credibility of his testimony. However, Court held that evidence of Boleyn merely possessing homosexual pornography would not be probative to rebutting or impeaching his claim of not being gay. Here, there is nothing in the record to suggest that mere possession of homosexual pornography establishes that the possessor of the pornography is gay. Court concluded that the district court erred in admitting the stipulation into evidence for the purpose of rebutting Boleyn’s claim that he was not gay. However, Court held the admission of evidence was harmless. Court stated the most damaging evidence presented at trial was the audio recording of the phone conversation between Boleyn and T.V. During the conversation, Boleyn clearly expressed an awareness of the seriousness and the heinous nature of his conduct with T.V. Though the incidents were never described during the conversation, T.V.’s trial testimony

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STATE V. BREEDEN

WYANDOTTE DISTRICT COURT – CONVICTION

AFFIRMED, SENTENCE AFFIRMED IN PART AND VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS

NO. 104,475 – JUNE 14, 2013

FACTS: Breeden appeals his conviction for aggravated criminal sodomy of a child under the age of 14 and his sentence of life imprisonment with a mandatory minimum term of imprisonment of not less than 25 years. Breeden raises five issues: (1) The trial court erred by failing to instruct the jury on attempted aggravated criminal sodomy as a lesser included offense; (2) the trial court erred by failing to give a limiting instruction regarding the admission of evidence that Breeden battered and threatened the victim; (3) his constitutional right to testify was violated because the trial court did not obtain an affirmative waiver of that right on the record; (4) his hard 25 life sentence violates the Eighth Amendment to the U.S. Constitution and § 9 of the Kansas Constitution Bill of Rights; and (5) the sentencing court erred by entering a journal entry reflecting a sentence that included lifetime post-release supervision.

ISSUES: (1) Lesser included offense, (2) admission of evidence, (3) waiver of right to testify, (4) cruel and unusual punishment, and (5) lifetime post-release supervision

HELD: (1) Court held that the evidence did not support the giving of an instruction on attempted aggravated criminal sodomy; in other words, an instruction on attempted aggravated criminal sodomy was not factually appropriate in this case. (2) Court stated that a trial judge who admits 60-455(b) evidence must give a limiting instruction. Court held that the right to challenge the lack of a K.S.A. 2012 Supp. 60-455(b) limiting instruction is not based on whether a party has objected to the admission of the evidence that is the subject of the instruction, and a failure to object to the admission of the evidence does not waive the right to raise an issue on appeal regarding whether the failure to give a limiting instruction was clearly erroneous. Court concluded that in light of the overwhelming evidence, including Breeden’s confession, the failure to give a limiting instruction was not clearly erroneous. (3) Court held that Breeden’s constitutional right to testify was not violated even if the trial judge, who advised Breeden of his rights, failed to obtain an explicit waiver of the right to testify on the record. (4) Court held that Breeden’s life sentence did not constitute cruel and unusual punishment. (5) Court vacated Breeden’s lifetime post-release supervision based on prior case law.

STATUTES: K.S.A. 21-3107, -3402, -3403, -3404, -3421, -3502, -3506, -3520, -3522, -3502, -4643, -4701; K.S.A. 22-3414, -3540, -3601, -3717; and K.S.A. 60-404, -455(b)

STATE V. BURNETT

RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – REVERSED

NO. 100,766 – MAY 31, 2013

FACTS: Burnett was charged and convicted of aggravated weapons violation. The Court of Appeals affirmed his conviction. He claimed his statutory speedy trial rights were violated because he was not brought to trial within 180 days of his request to expedite his case under the Uniform Mandatory Disposition of Detainers Act (UMDDA), K.S.A. 22-4301 et seq.

ISSUE: Detainer

HELD: Court held that the Court of Appeals incorrectly determined there were procedural bars precluding review of Burnett's
case. Court stated that Burnett was not required to prove when the district attorney actually received his request and certification, that he was not required to send his request to the McPherson County jail officials rather than the KDOC and that he was not required to send his request by registered or certified mail. Court held the district court erred when it determined the UMDDA was inapplicable to Burnett’s pending charges. Based on this and the lack of any claim that continuances tolled the running of the 180-day period, Court held that the district court lost jurisdiction to try, convict, or sentence Burnett. Accordingly, Court reversed the Court of Appeals decision affirming the district court. Burnett’s conviction was reversed and his sentence vacated.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-2202, -4301, -4302, -4303, -4401; and K.S.A. 62-2901 (Corrick 1964)

STATE V. CARLTON
RILEY DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED

FACTS: Carlton sought review of a divided Court of Appeals decision. The panel reversed the district court’s order suppressing drug evidence obtained during a vehicle search conducted incident to Carlton’s arrest following a traffic stop. The panel majority acknowledged that the vehicle search was later invalidated by Arizona v. Gant, 556 U.S. 332, but held that the drug evidence should not be suppressed because at the time Carlton’s vehicle was searched, existing case law and K.S.A. 22-2501(c) permitted a search incident to arrest to discover evidence of a crime and thus the good-faith exception applied.

ISSUES: (1) Search incident to arrest and (2) good-faith exception

HELD: Court held the good-faith exception to the exclusionary rule applied and the majority panel of the Court of Appeals correctly held that it was objectively reasonable for the officer to rely on K.S.A. 22-2501 as it existed at the time of the search. Court reversed the district court’s suppression.

STATUTE: K.S.A. 22-2501

STATE V. CAMPBELL
RILEY DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 103,086 – JUNE 21, 2013

STATE V. CERVANTES-PUENTES
SEDWICK DISTRICT COURT – AFFIRMED
NO. 104,020 – JUNE 14, 2013

FACTS: Cervantes-Puentes convicted of aggravated indecent liberties with a child. District court denied Cervantes-Puentes’ motion challenging constitutionality of the sentence and motion for a departure sentence, and imposed hard 25 life sentence. Cervantes-Puentes appealed, claiming eyewitness identification was based upon an impermissibly suggestive photo array, and claiming his hard 25 life sentence violated Eighth Amendment and § 9 of Kansas Bill of Rights.

ISSUES: (1) Challenge to conviction – photo array and (2) constitutional challenges to sentence

HELD: Conviction is affirmed. State did not admit photo array or any testimony regarding it at trial. Cervantes-Puentes failed to include photo array in record on appeal, and even if he had, lack of trial record regarding factors ordinarily considered in determining reliability of eyewitness identification would hinder appellate court’s review.

Appellate counsel failed to construct a valid categorical Eighth Amendment claim. Court will not consider a purported categorical claim that, in reality, presents a case-specific proportionality challenge to a term-of-years sentence. See State v. Florentin, decided this same date.

STATUTES: K.S.A. 2009 Supp. 60-455; K.S.A. 21-3504(a)(3) (A), -4643, -4643(a)(1)(C), - 4643(d); and K.S.A. 22-3601(b)

STATE V. CHEFFEN
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,384 – JUNE 21, 2013

FACTS: Cheffen appealed his first-degree felony-murder conviction, which was based on the underlying felony of child abuse, following the death of his girlfriend’s 10-month-old son. Cheffen argues that (1) the trial court violated his right to a unanimous verdict because it asked individual jurors before the verdict was read whether it was their verdict—rather than asking after the verdict was read; (2) the phrase “in the commission of, attempt to commit, or flight from an inherently dangerous felony” in the felony-murder statute creates alternative means of committing the crime; and (3) he was entitled to a lesser included offense instruction on intentional second-degree murder.

ISSUES: (1) Right to unanimous verdict, (2) alternative means, and (3) lesser included offenses

HELD: Court held the better rule is to require a party wishing to challenge the trial court’s compliance with the procedures for inquiring about a jury’s verdict to have raised that issue first with the district court either in the form of a contemporaneous objection or posttrial motion. Court found Cheffen failed to properly preserve the jury polling issue for review. On the alternative means issue, Court held the legislature did not intend to create alternative means of committing felony murder under K.S.A. 21-3401(b) by providing that felony murder occurs when there is a death “in the commission of, attempt to commit, or flight from an inherently dangerous felony.” Instead, the phrase “in the commission of, attempt to commit, or flight from” describes factual circumstances sufficient to establish a material element of felony murder. Last, Court held the failure to give a second-degree murder instruction was harmless based on the overwhelming evidence against Chaffen.

CONCURRING: Justice Rosen concurred with the majority’s opinion, but wrote separately to be consistent with his opinion in other cases that find that due to the overwhelming evidence presented at trial establishing Cheffen’s guilt for felony murder based on his act of committing child abuse resulting in the death of the infant, an instruction on second-degree murder would not have been factually appropriate in the case.
STATE V. COX
LABETTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 103,674 – JUNE 21, 2013
FACTS: Cox appealed from jury convictions of two counts each of aggravated criminal sodomy and aggravated indecent liberties with a child. He was sentenced to concurrent prison terms of 165 months on each sodomy count and 61 months on each indecent liberties count. During the trial, at the state’s request and over a defense objection, the district court judge closed the courtroom to spectators while pictures of the girls’ genitalia were exhibited and discussed. Cox claims his constitutionally protected right to a public trial was violated when the district court closed the courtroom during the display and discussion of photographs.
ISSUES: (1) Right to public trial and (2) photos of victim’s genitalia
HELD: Court held that in evaluating whether the Sixth Amendment right to a public trial has been violated, Kansas courts employ the four-part test set out in Waller v. Georgia, 467 U.S. 39, 45, which held that the party seeking to close the hearing must advance an overriding interest likely to be prejudiced, that the closure must be no broader than necessary to protect the interest, that the district judge must consider reasonable alternatives to closing the proceeding, and that the judge must make findings adequate to support the closure. A defendant is not required to prove specific prejudice in order to obtain relief for a violation of the public-trial guarantee. Court held that in this case, the district judge’s wholesale closing of courtroom doors during the presentation of a sexual assault nurse examiner’s testimony concerning her examination of the child-victims’ genitalia violated the public-trial guarantee. Court stated at a district judge’s failure to meet any of the requirements set out in Waller prevents an appellate court from conducting a proper review of the propriety of the judge’s decision to close a courtroom; and it constitutes structural error requiring reversal. Court said that an appellate court will not retain jurisdiction and remand for the district judge to manufacture an after-the-fact, constitutionally defensible rationale to support closure of a courtroom during testimony in a criminal trial. Court also commented for the re-trial that Mother’s statement about her suspicion that her father was the girls’ abuser—without more than a vague reference to a past accusation of him by another young girl and his mere opportunity to commit the crimes at issue in Cox’s trial—was mere speculation. It did not qualify as admissible third-party evidence connecting her father to the crimes charged here. Court also stated the trial court did not err in failing to give Cox’s requested instruction on character evidence. Court reminded the trial court to refrain from admonishing spectators about witness intimidation in the presence of the jury.
STATUTES: No statutes cited.

STATE V. DENNIS
BUTLER DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 101,052 – MAY 3, 2013
FACTS: Jury convicted Dennis of drug charges based on evidence obtained in traffic stop and search of vehicle incident to arrest. District court denied motion to suppress, finding reasonable suspicion of traffic infraction supported the stop, initial pat-down was justified for officer safety, open beer bottle inside vehicle provided probable cause for arrest, and search of passenger compartment was proper search incident to arrest. Divided Court of Appeals panel reversed in unpublished opinion, finding search was illegal under Arizona v. Gant, 556 U.S. 332 (2009), but good-faith exception applied contrary to State v. Daniel, 291 Kan. 490 (2010), because officer did not testify that he relied on K.S.A. 22-2501(c) (search incident to arrest) to conduct his search. State’s petition for review granted.
ISSUE: Fourth Amendment – search of vehicle
HELD: Court of Appeals majority erred in finding Daniel not applicable to this case, and in finding state and federal case-law in effect at time of search of Dennis’ vehicle was not sufficiently settled to permit application of good-faith exception for vehicle search. When statute was effective, officer’s subjective understanding or articulation of K.S.A. 22-2501 as legal basis for search incident to arrest was not determinative of whether there was objectively reasonable reliance on the statute. Here, officer conducted a search incident to arrest upon objectively reasonable reliance on then-existing authority in K.S.A. 22-2501(c). District court correctly denied Dennis’ motion to suppress. Remanded to Court of Appeals for consideration of issues determined as moot when suppression issue decided.
STATUTES: K.S.A. 20-3018(b), 22-2501, -2501(c); and K.S.A. 22-2501 (Furse 1995)

STATE V. FLORENTIN
SUMNER DISTRICT COURT – AFFIRMED
NO. 104,883 – JUNE 14, 2013
FACTS: Florentin convicted of one count of rape, based on digital penetration of 13-year-old female when Florentin was 19 years old. On appeal he claimed: (1) State failed to present sufficient evidence to establish each alternative means for committing rape; (2) district court abused its discretion by denying motion for departure from hard 25 life sentence imposed under Jessica’s Law; and (3) the sentence imposed violated prohibitions on cruel and/or unusual punishment in Eighth Amendment and § 9 of Kansas Constitution Bill of Rights.
ISSUES: (1) Alternative means crime, (2) departure motion, and (3) constitutionality of hard 25 life sentence
HELD: Recent cases hold that rape statute’s incorporation of statutory definition of sexual intercourse does not create an alternative means crime, but instead describes different factual circumstances by which a defendant might perpetrate the single actus reus of the crime. Sufficient evidence of digital penetration supports Florentin’s conviction.
Under facts in case, district court judge did not abuse his discretion in denying Florentin’s request for departure from hard 25 life sentence to a sentence under Kansas Sentencing Guidelines gridbox for same crime without the age factor applicable in Jessica’s Law cases, and for further departure from that gridbox to a shorter prison term. Reasonable people could agree with district court judge that Florentin’s lack of prior criminal history, his age of 19, the victim’s willing participation in the crime, Florentin’s low to moderate risk of reoffending, and lack of physical harm to the victim were not substantial and compelling reasons to depart from legislatively prescribed sentence for Florentin’s rape of the 13-year-old.
Florentin waived or abandoned both an Eighth Amendment case-specific challenge and a § 9 challenge, and failed to construct a valid categorical proportionality argument under the Eighth Amendment.
Dissent (Moritz, J., joined by Beier and Johnson, JJ.): Would conclude that district court abused discretion by failing to properly apply the departure mechanism specifically provided for in K.S.A. 21-4643(d). Under facts of this case, no reasonable person could take view taken by the trial court, and majority relies on prior cases having far more egregious factual circumstances.
STATE V. HART

ELK DISTRICT COURT – AFFIRMED
NO. 101,723 – JUNE 7, 2013

FACTS: Hart convicted of two counts of indecent liberties with a child, K.S.A. 21-3504(a)(2)(A). Court of Appeals affirmed, finding in part that Hart did not preserve his challenge to district court’s admission of prior bad acts evidence under K.S.A. 60-455, but further finding 2009 amendment to K.S.A. 60-455 should be applied retroactively and would have doomed the challenge. 44 Kan. App. 2d 986 (2010). State petitioned for review of panel's interpretation of K.S.A. 2009 Supp. 60-455(d). Hart petitioned review of all claims presented to Court of Appeals: (1) prosecutorial misconduct in giving personal opinion that victims were credible, (2) trial court erred in providing jury with indecent liberties instruction that was broader than charging document, (3) trial court erred in admitting prior bad acts evidence involving the victims to prove motive, intent, plan, and absence of mistake or accident under K.S.A. 60-455, (4) trial court erred in giving limiting instruction on the admitted K.S.A. 60-455 evidence without explaining terms, (5) insufficient evidence supports the conviction of one victim being over 14 and less than 16 years old at the time, (6) cumulative error denied him a fair trial, and (7) constitutional rights violated by aggravated sentence imposed and increased based upon criminal history. Both petitions were granted.

ISSUES: (1) State’s petition for review, (2) prosecutorial misconduct, (3) breadth of elements instruction, (4) admission of K.S.A. 60-455 evidence, (5) limiting instruction for K.S.A. 60-455 evidence, (6) sufficiency of the evidence, (7) cumulative error, and (8) sentencing

HELD: State’s petition for review was improvidently granted. State was not a party “aggrieved by a decision of the Court of Appeals” merely because it would have preferred a different rationale to support its victory.

Hart challenged three comments by prosecutor. Two were permissible remarks. For third, prosecutor improperly vouched for victims’ credibility, but this isolated comment was not gross and flagrant, did not demonstrate ill will, and was not so egregious to warrant a new trial.

No showing that Hart’s substantial rights were prejudiced by the broadened jury instruction.

To assess whether trial error occurred, appellate court applies statutory law on evidence as it was at the time – thus the pre-2009 amendment version of K.S.A. 60-455 controls. Court of Appeals interpretation and application of the amended statute was error and has no force or effect as precedent. Here, state’s stipulation to preservation is accepted. Under version of K.S.A. 60-455 in effect at time of trial, district judge erred in admitting evidence of uncharged sexual abuse of the victims by the defendant for inclination, which is synonymous with propensity. Under facts of case, however, error was harmless.

K.S.A. 60-455 limiting instruction in this case was not erroneous for failure to define motive, intent, plan, lack of mistake or accident, inclination, or method.

Sufficient evidence supported Hart’s convictions. Based on all evidence of victim’s age, viewed most favorably to state, a rational factfinder could have concluded that victim was 14 or 15 years old at time of the charged crime.

The three minor trial errors in this case do not collectively require reversal under cumulative error doctrine.

Constitutional claims regarding sentencing are defeated by record or foreclosed by controlling Supreme Court precedent.

STATUTES: K.S.A. 2009 Supp. 60-455(d); K.S.A. 21-3503; -3504(a)(1)(A), -3504(a)(2)(A); K.S.A. 22-3414(3); and K.S.A. 60-261, -404, -455

STATE V. HOOD

SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART
AND REVERSED IN PART
NO. 101,953 – MAY 17, 2013

FACTS: Hood convicted of aggravated burglary and two counts of felony theft. Theft convictions were based upon Hood’s admission that he grabbed bank bag and purse from restaurant counter and fled. Court of Appeals, relying on fact that stolen property had different owners, rejected Hood’s claim that theft convictions were multiplicitous in violation of constitutional right against double jeopardy. 44 Kan. App. 2d 145 (2010). Hood’s petition for review included this multiplicity claim, and a claim that the sentencing court violated Hood’s right to jury trial by sentencing him to increased sentence based on prior criminal history not proven to a jury.

ISSUES: (1) Multiplicity and (2) sentencing – criminal history

HELD: Court agrees with Court of Appeals’ finding that Hood’s conduct in taking bank bag and purse was unitary. Applying analytical framework in State v. Schoonover, 281 Kan. 453 (2006), to Hood’s challenge to cumulative punishments, Court finds only one unit of prosecution under the theft statute. Considering theft statute as a whole, the unit of prosecution for theft is the act of unlawfully taking property, unaffected by the number of persons or entities possessing an ownership interest in the stolen property. Hood’s second theft conviction is multiplicitous, and is reversed. Case remanded to district court to vacate sentence on second theft conviction.

Hood’s sentencing claim is defeated by State v. Ivory, 273 Kan. 44 (2002). Court continues to abide by its interpretation in that case of U.S. Supreme Court precedent.

STATUTE: K.S.A. 21-3110(13), -3701, -3701(a), -3701(a)(1), -3701(b), -3701(b)(4)

CASE MOSES ZIMMERMAN & MARTIN P.A.
Wichita
316-303-0100
CMZWLAW.COM

OVERLAND PARK
913-948-9360

CASE, MOSES, ZIMMERMAN & MARTIN, P.A. IS A LEADING MULTI-PURPOSE LAW FIRM SERVING CLIENTS NEEDS THROUGHOUT THE STATE OF KANSAS
STATE V. HUFFMIER
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,422 – MAY 10, 2013

FACTS: Huffmier arrested after her ex-husband called police to report his concern that Huffmier was inebriated and driving their children to his house. Jury convicted Huffmier of DUI and other offenses. On appeal, Huffmier challenged the admission of evidence that Huffmier claimed portrayed her as a bad mother and of low moral character, and the prosecutor’s closing argument regarding that evidence. Court of Appeals affirmed in unpublished opinion, finding in part harmless error in trial court overruling defense objection to questions regarding visitation schedule and whether it changed after Huffmier’s arrest. Supreme Court granted Huffmier’s petition for review regarding her claims of irrelevant and prejudicial testimony.

ISSUES: (1) Admissibility of evidence, (2) testimony about visitation and asking whether children were in good shape, and (3) prosecutor’s closing argument

HELD: Several of Huffmier’s claims about specific evidence and testimony were not preserved for appellate review. Court considers only claims of error concerning testimony about Huffmier’s child visitation arrangements and prosecutor’s unanswered question as to whether the children were in “good shape” when they returned to their father.

Finding of harmless error is upheld. Based on substantial evidence that Huffmier was driving under the influence, no reasonable probability that trial’s outcome would have been different. Trial court’s mitigating admonition to jury to disregard the testimony bolsters that conclusion. Also, there was no reasonable probability that prosecutor’s unanswered question affected trial’s outcome, a conclusion reinforced by trial judge sustaining objection to the question.

No objection to prosecutor’s statements as evidentiary error, and Huffmier waived review of panel’s determination not to address prosecutor’s arguments as prosecutorial misconduct. To the extent Huffmier claims prosecutor’s closing argument violated K.S.A. 60-447, Huffmier never objected on that ground.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 60-261, -401(b), -404, -447, -447(a)

STATE V. JOHNSON
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,864 – MAY 3, 2013

FACTS: Johnson was charged with DUI offenses after being stopped in DUI sobriety check point, performance on field sobriety test, and 0.084 blood-alcohol concentration. He filed motion to dismiss based on destruction of arresting officer’s field notes and failure to preserve breath sample stored in Intoxilyzer. He also filed motion to suppress, claiming insufficient probable cause for breath test, and challenging Intoxilyzer test results and certification. Trial court denied both motions. Jury convicted Johnson of misdemeanor DUI. Johnson appealed. Court of Appeals affirmed, finding: (1) no evidence of bad faith in destruction of field notes or breath sample, (2) officer had probable cause for arrest, thus no warrant was needed to conduct breath test, and (3) admission of Intoxilyzer certification records did not violate right of confrontation. 43 Kan. App. 2d 815 (2010). Johnson’s petition for review granted.

ISSUES: (1) Destruction of field notes and failure to preserve breath sample, (2) warrantless breath test (3) certification records, and (4) foundation of admission of breath test results

HELD: Under facts in case, Johnson not denied that a fair trial or right to confrontation. Where testimony established the field notes were destroyed after information contained therein was fully and accurately transcribed into narrative report, there was no due process violation because substantial competent evidence supported trial court’s finding of no bad faith by officers. there was no suggestion the destroyed breath sample was exculpatory. Nor did Johnson request independent test as provided by statute.

Warrantless search exception of consent applies here. State not required to also establish probable cause plus exigent circumstances.

Certifications of law enforcement agencies and individual officers that simply establish their respective authority to conduct testing on a particular breathalyzer machine are not testimonial statements subject to Confrontation Clause requirements of Crawford. No violation of Johnson’s right of confrontation when district court admitted challenged certification records.

Claim of insufficient foundation for admission of breath test results not addressed because issue not separately listed in petition for review or argued.

STATUTES: K.S.A. 22-3213, -3213(2); K.S.A. 2007 Supp. 8-10001, -1001(a), -1001(b), -1001(k)(9), -1567(a)(2), -1567(a) (3); and K.S.A. 2007 Supp. 60-460(m)

STATE V. KARSON
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 101,263 – JUNE 21, 2013

FACTS: A now deceased Karson appealed his drug convictions, claiming the incriminating evidence found in his car should have been suppressed because it was illegally obtained after his arrest on an outstanding traffic warrant. At the time of his arrest, state law authorized a search incident to arrest for the purpose of discovering the fruits, instrumentalities or evidence of a crime under K.S.A. 22-2501(c). But after Karson was convicted, the U.S. Supreme Court held such searches illegal in Arizona v. Gant, 556 U.S. 332. Karson argued the district court erred when it denied his motion to suppress the drug evidence obtained from the vehicle search, which was pro-phetically based on an argument that the search incident to arrest was illegal. The state concedes the search was illegal under Gant but asserts the appellate courts do not need to decide this case because Karson died while the appeal was pending. In the alternative, the state argued for application of a good-faith exception to the exclusionary rule based upon the police officer’s objectively reasonable reliance on a then-valid statute. The Court of Appeals affirmed the district court, holding that although the search was unlawful, the good-faith exception to the exclusionary rule applied.

ISSUES: (1) Search incident to arrest and (2) good-faith exception

HELD: Court held that Karson’s case should not be abated because of his death in light of the public interest considerations of the case and the fact that it is based solely on a search incident to arrest based on an outstanding warrant and no observation of criminal activity be-
fore the arrest. On the substantive issue, Court held the good faith exception applied because it was objectively reasonable for the officer to rely on K.S.A. 22-2501 before the U.S. Supreme Court decided Gant.

STATUTE: K.S.A. 20-3018; and K.S.A. 22-2501

STATE V. MILLER
RENO DISTRICT COURT – AFFIRMED
NO. 105,050 – JUNE 7, 2013

FACTS: Miller convicted of rape and aggravated indecent liberties with a child. Three concurrent hard 25-year life sentences imposed. He appealed, claiming the state failed to present sufficient evidence at trial to prove the various alternative means of committing each crime. He also claimed that his sentence violated § 9 of Kansas Constitution Bill of Rights.

ISSUES: (1) Alternative means claims and (2) cruel and unusual punishment


The three-part test in State v. Freeman, 223 Kan. 362 (1978) is applied with consideration to each prong. Miller’s sentences for aggravated indecent liberties with a child do not violate Kansas Constitution.


STATE V. MIRELES
BUTLER DISTRICT COURT – AFFIRMED
NO. 104,474 – MAY 10, 2013

FACTS: Israel G. Mireles was convicted of capital murder and rape of E.S. The district court sentenced him to a life sentence without the possibility of parole for the murder conviction and imposed a consecutive 203-month prison sentence for the rape conviction. Mireles now brings this appeal in order to challenge the district court’s decision to allow numerous photographs into evidence and its failure to instruct the jury on felony murder as a lesser included offense of capital murder. Mireles also argues that due to prosecutorial misconduct, he was denied a fair trial.

ISSUES: (1) Photographic evidence, (2) lesser included offense of capital murder, and (3) prosecutorial misconduct

HELD: Court held the gruesome photos depicting the victim’s injuries were either not objected to, relevant to establishing intent and premeditation, not repetitive, relevant to showing injuries inflicted prior to victim’s death, or relevant to demonstrate rape. Court found no abuse of discretion in admitting the photographs. Next, Court held the evidence presented at trial clearly established that E.S.’s death was an intentional, premeditated killing and not merely the result of Mireles engaging in an inherently dangerous felony. This conclusion is supported by the jury’s refusal to find Mireles guilty of second-degree intentional murder. Court stated the jury obviously viewed the evidence as establishing premeditation, eliminating the possibility of Mireles being found guilty of not only second-degree murder but felony murder as well. Also, by not finding Mireles guilty of premeditated first-degree murder, the jury concluded that the evidence clearly established that Mireles not only intentionally and with premeditation killed E.S., but also brutally sodomized her prior to her death, qualifying the crime as a capital murder under K.S.A. 21-3439(a)(4).

Court held that even if the jury would have received an instruction on felony murder, the jury would have still convicted Mireles of capital murder. Consequently, the failure of the district court to instruct the jury sua sponte on felony murder does not constitute clear error. Last, Court held the prosecutor’s comment at issue here came after the prosecutor gave a lengthy discussion of the evidence presented at trial establishing Mireles’ guilt for capital murder. After finishing this discussion, the prosecutor essentially stated that he did not believe, based on the evidence he discussed, that the defendant could be found guilty of the lesser included offenses. Court held the prosecutor’s statement was merely directional and not an expression of the prosecutor’s personal opinion. The comment at issue was within the wide latitude a prosecutor is allowed in discussing the evidence and no prosecutorial misconduct.

STATUTES: K.S.A. 21-3107(2)(a), -3401(b), -3402, -3414, -3426, -3436, -3439, -3501, -3502, -3506; K.S.A. 22-3414(3), -3505, -3506; and K.S.A. 60-404

STATE V. MORALEZ
SHAWNEE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 102,342 – MAY 17, 2013

FACTS: Moralez initiated contact with two police officers checking an expired license on a legally parked car owned by Moralez’ friend. Officers retained Moralez’ identification card and detained him while conducting warrants check, all without reasonable suspicion of criminal activity by Moralez. Police arrested Moralez on outstanding warrant, and seized drugs found on him during search incident to arrest. In prosecution for felony drug possession, district court denied Moralez’ motion to suppress drug evidence, finding Moralez’ encounter with police was voluntary. Divided Court of Appeals’ panel affirmed, 44 Kan. App. 2d 1078 (2010), applying attenuation analysis in State v. Martin, 285 Kan. 994 (2008), to conclude that even if Moralez was unlawfully detained, subsequent discovery of arrest warrant purged taint of unlawful detention.

ISSUES: (1) Detention and (2) outstanding arrest warrant – attenuation exception to exclusionary rule

HELD: Court agrees that Moralez’ contact with officers began as voluntary encounter, but under facts of case, officer seized Moralez when officer requested and took possession of Moralez’ identification card and retained it while running check for outstanding warrants. Because officer did not suspect Moralez of involvement in any criminal activity, seizure was unlawful.

Holding in State v. Martin is revisited and clarified. To extent Martin or State v. Jones, 270 Kan. 526 (2001), have been or could be read to suggest that discovery of an outstanding arrest warrant always constitutes an intervening circumstance that dissipates taint of an illegal detention, that interpretation is expressly disapproved. Court also expressly disapproves any language in Martin suggesting that “fishing expeditions” by law enforcement officers are generally acceptable as long as encounter is brief and officers are courteous. The preceding unlawful detention does not taint the unlawful arrest on the outstanding warrant, nor does it prevent officer from conducting safety search pursuant to that arrest; but it does taint any evidence discovered during the unlawful detention or during search incident to the lawful arrest. Applying Martin as clarified to facts in this case, first factor in attenuation analysis weighs heavily in favor of Moralez; second factor is neutral; and third factor of officer flagrantly retaining Moralez’ identification for stated purpose of “documenting” who he was talking to tips balance to Moralez and requires application of exclusionary rule. Court of Appeals’ decision is reversed. District court’s suppression ruling and Moralez’ conviction are reversed.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-2402(1); and K.S.A. 60-2101(b)

STATE V. PRINE
RENO DISTRICT COURT – AFFIRMED
NO. 103,242 – MAY 31, 2013

FACTS: Prine convicted in 2004 of rape, aggravated criminal sodomy, and aggravated indecent liberties. Kansas Supreme Court reversed and remanded for new trial, finding district judge erred in admitting evidence of Prine’s sexual abuse of two victims other than the one making allegations underlying this case. Prior to retrial in which
STATE V. RANDOLPH
WYANDOTTE DISTRICT COURT – CONVICTION
AFFIRMED AND SENTENCE VACATED AND REMANDED
NO. 103,918 – MAY 10, 2013

FACTS: Randolph convicted of rape of child under age 14. Sentencing court denied Randolph’s motion for departure from Jessica’s Law sentence, and imposed mandatory 25 year minimum sentence with lifetime post-release supervision. On appeal Randolph claimed: (1) his conviction was not supported by sufficient evidence for each alternative means stated in statutory definition of “sexual intercourse” given to the jury; (2) trial court erred in admitting Randolph’s statement to law enforcement officers after finding the statement was voluntarily made; and (3) trial court erred in admitting testimony regarding absence of DNA evidence. Randolph also claimed sentencing judge erroneously applied the general departure statute under Kansas Sentencing Guidelines Act to Randolph’s motion for departure sentence, rather than the departure factors unique to Jessica’s Law.

ISSUES: (1) Alternative means, (2) voluntariness of confession, (3) testimony about absence of DNA evidence, and (4) sentencing

HELD: Jury was not instructed on alternative means. Randolph’s argument fails under recent cases holding that K.S.A. 21-3502 does not create an alternative means crime by incorporating statutory definition of sexual intercourse from K.S.A 21-3501(1). Randolph’s confession was voluntary under facts in this case. Specific arguments regarding Randolph’s intellect, manner of interrogation and officer’s interview techniques, and fairness of the interrogation are reviewed. Partial recording of Randolph’s interview is addressed, finding better practice, and the one advised for law enforcement officers, is to record the entire interview with a suspect when they are planning to record parts of the interview and recording equipment is available.

Randolph’s challenge to testimony regarding absence of DNA evidence was not preserved for appeal.

Sentencing judge abused his discretion by applying wrong statute, thus a wrong legal standard, when denying Randolph’s motion for departure from statutory sentence under Jessica’s Law. Error was not harmless under facts in this case, Sentence vacated and case remanded for resentencing. For guidance on remand, Randolph is eligible for parole. Lifetime post-release supervision does not apply.

STATUTES: K.S.A. 21-3501(1), -3502, -3502(a)(2), -4716, -4716(c)(1), -4643, -4643(a)(1), -4643(d), -4643(d)(6); K.S.A. 22-3601(b)(1); and K.S.A. 60-404, -2105

STATE V. RUGGLES
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 104,262 – JUNE 21, 2013

FACTS: Ruggles pleaded guilty to two counts of aggravated indecent liberties with a child involving his 11 and 13-year-old step daughters. Because Ruggles was over 18 years old when he committed these crimes, the district court, pursuant to K.S.A. 21-4643(a)(1) (C), imposed a life sentence with a mandatory minimum term of 25 years’ imprisonment for each count and ordered the sentences to run consecutively. On appeal, Ruggles argues that K.S.A. 21-4643(a)(1) (C) violates the proscription against cruel and unusual punishment of the Eighth Amendment to the U.S. Constitution because a hard 25 life sentence is disproportionate to the crime K.S.A. 21-3504(a)(3)(B) defines, i.e., soliciting a child under 14 years of age to “engage in any lewd fondling or touching of the person of another with the intent to arouse or satisfy the sexual desires of the child, the offender or another.” The district court denied Ruggles’ Eighth Amendment claim.

ISSUES: (1) Cruel and unusual punishment and (2) Jessica’s Law

HELD: Court held that a person who is 18 years of age or older who stands convicted of soliciting a child under the age of 14 to engage in lewd fondling or touching has committed a serious offense. Along with the category of offender that Ruggles belongs to, there is nothing discernible about the nature of the offense at issue here that would make us conclude that the Eighth Amendment categorically prohibits a hard 25 life sentence from being imposed in this case. Based on controlling U.S. Supreme Court precedent, it cannot be said that the legislature went beyond the bounds of the Eighth Amendment when it prescribed a hard 25 life sentence for violators of K.S.A. 21-3504(a)(3)(B) who are 18 years of age or older. Such a sentence naturally serves legitimate penological goals of deterrence and incapacitation. Court concluded that imposition of a hard 25 life sentence under Jessica’s Law for each of Ruggles’ aggravated indecent liberties with a child convictions is not categorically disproportionate and, therefore, not cruel and unusual punishment under the Eighth Amendment to the U.S. Constitution.

STATUTE: K.S.A. 21-3502, -3504, -3506, -4643

STATE V. SAMPSON
SEDWICK DISTRICT COURT – AFFIRMED
NO. 102,535 – MAY 3, 2013

FACTS: Jury convicted Sampson of first-degree felony murder, aggravated robbery, and aggravated burglary. On appeal he claimed he was denied a fair trial when trial court granted defense motion to sequester witnesses but allowed testifying law enforcement officer to remain in courtroom at prosecution table throughout the trial. Sampson also claimed he was denied right to present his theory of defense when trial court refused to allow defense counsel to introduce evidence of accomplice’s prior felony conviction.

ISSUES: (1) Sequestration order – presence of testifying officer at prosecution table and (2) evidence of accomplice’s prior felony conviction

HELD: Court holds that from today forward, a trial court has no discretion to permit a testifying law enforcement officer to sit at prosecution’s table during a jury trial, regardless of the practical benefits of that practice to the prosecution. While trial court retains discretion regarding sequestration of witnesses, including whether to permit testifying law enforcement officer to remain in courtroom despite a sequestration order, under circumstances of this case, trial court abused that discretion. Error was harmless in this case.

Trial court properly applied K.S.A. 60-421 and 60-422 in refusing to admit evidence of accomplice’s conviction. Claim that accomplice’s prior conviction was admissible under K.S.A. 60-446 and 60-447 was not preserved for appellate review.

STATUTES: K.S.A. 2012 Supp. 22-3601(b)(3), -3601(b)(4); and K.S.A. 60-420, -421, -422, -422(d), -446, -447
STATE V. WILLIAMS
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
COURT OF APPEALS – REVERSED
NO. 101,617 – MAY 17, 2013

FACTS: Williams was charged with cocaine possession after officers stopped him in a high crime area for the purpose of a pedestrian check, arrested him on outstanding warrant, and then discovered cocaine in his shoe. District court granted motion to suppress the drug evidence, concluding that officers unlawfully detained Williams before discovering the arrest warrant when they took Williams’ identification to run the warrant check, and that the unlawful detention tainted evidence found in the search. Divided panel of Court of Appeals reversed in unpublished opinion, finding that the stop started as and remained a voluntary encounter, and that the unlawful detention tainted evidence in State v. Martin, 285 Kan. 994 (2008).

ISSUE: Detention and Attenuation Doctrine

HELD: District court’s finding that the stop began as a voluntary encounter, and Court of Appeals’ conclusion that the encounter began and remained voluntary, are reversed. Under facts in case, officers unlawfully detained Williams at the beginning of the encounter with no reasonable suspicion of Williams’ involvement in any criminal activity. Applying attenuation analysis in Martin as clarified this date in State v. Moralez (see digest), officer’s discovery of outstanding arrest warrant did not purge the taint of Williams’ unlawful detention. Court of Appeals’ decision is reversed. District court’s suppression ruling is affirmed but reversed in part to the extent district court found the stop began as a voluntary encounter.

STATUTE: K.S.A. 22-2401(1)
FACTS: After Gregory Coker’s new home was damaged, he filed a lawsuit for breach of express warranty against the company that sold him the house and for negligence against Chaney, the plumber whose act caused the damage. The district court ultimately dismissed Coker’s claim of negligence against Chaney based on the economic loss doctrine, which—as it existed under Kansas law at the time—prevented a homeowner from bringing a tort action under circumstances governed by contract.

ISSUES: (1) Contracts, (2) torts, (3) economic loss doctrine

HELD: Court held that although the district court properly relied on the law as it existed at the time of its ruling, the intervening change in the law necessarily renders the conclusion reached by the district court erroneous as a matter of law. Although this means that the economic loss doctrine does not preclude Coker from seeking economic damages from Chaney for negligently performed residential construction services, Coker’s tort claims will survive only if Coker can establish that Chaney owed Coker a duty imposed by law, independent of the underlying construction contract. Court held that the record reflected that Coker’s implied warranty claim against Chaney was based on Chaney’s failure as an individual plumber to provide services skillfully and in a workmanlike manner. Because there is no evidence of an underlying agreement between Coker and Chaney to provide those plumbing services in the first instance, Coker’s claim that Chaney breached an implied duty within such a contract fails as a matter of law. However, Court held that Chaney is liable for injuries sustained by third parties as a result of any torts he may have committed as an individual plumber. Under this theory of recovery, then, Chaney owed Coker a duty independent of Coker’s contract with J.M.C. Construction. Because the district court found Coker offered sufficient evidence to present a question of fact as to whether there was a defect that caused the leak at the time the home left J.M.C.’s possession, Coker’s claim of negligence against Chaney in his individual capacity as a plumber must be reinstated. Court reversed the district court’s decision and remanded the case so that Coker may go forward with his tort claim against Chaney.

STATUTES: No statutes cited.

DEFAMATION, PRIVILEGE, AND FIRST AMENDMENT
Purdum v. Purdum et al.
Johnson District Court—Affirmed
No. 106,181—May 17, 2013

FACTS: In this defamation case, Purdum sued his former wife, Harcsar, for allegedly libelous statements she made to the Archdiocese of Kansas City in Kansas. These alleged defamatory statements were made to the Archdiocesan Tribunal when Harcsar sought to annul her sacramental marriage to Purdum. Harcsar moved to dismiss Purdum’s defamation action under K.S.A. 60-212(b)(6) for failure to state a claim upon which relief can be granted. She maintained that because the statements were made in the context of the annulment action, they were absolutely privileged as part of a “quasi-judicial proceeding.” The Archdiocese submitted an amicus brief in favor of dismissal. It argued that the defamation action should be dismissed under K.S.A. 60-212(b)(1) for lack of subject matter jurisdiction because it impermissibly interfered with the free exercise of religion under the First Amendment to the U.S. Constitution, that the statements were absolutely privileged, and that the suit ran afoul of the church autonomy doctrine. The Archdiocese further argued that church autonomy doctrine prevented the courts from reviewing or interfering with church affairs that involve faith, doctrine, governance, and policy. When the trial court denied Harcsar’s motion to dismiss, the Archdiocese moved to intervene and to become a party in the action. In its motion to intervene, the Archdiocese argued that the church autonomy doctrine prevented the trial court from exercising subject matter jurisdiction over the action. After reviewing the briefs and hearing arguments, the trial court again rejected the Archdiocese’s argument based on the church autonomy doctrine and also denied its motion to intervene. In rejecting the church autonomy doctrine, the trial court recognized that no claims were made against the church, that the statements about Purdum’s mental condition were secular in nature, and that determining the truth or falsity of such statements would not require interpretation of ecclesiastical doctrine or other such entanglement with the church. Nevertheless, the trial court held that the alleged defamatory statements were made in the context of a written statement to the Archdiocesan Tribunal, an activity that was “absolutely privileged as made pursuant to the defendant’s First Amendment right to Free Exercise of her religion.” As a result, the trial court dismissed the defamation action against Harcsar for lack of subject matter jurisdiction under K.S.A. 60-212(b)(1).

ISSUES: (1) Defamation, (2) privilege, and (3) First Amendment

HELD: Court agreed with Purdum that the trial court erred by holding that the statements made in Harcsar’s petition for annulment were absolutely privileged and it lacked subject matter jurisdiction as a result of absolute privilege. Court found the trial court reached the correct result for another reason. Harcsar’s alleged defamatory statements are inextricably part of the Archdiocesan Tribunal. Moreover, Purdum conceded that the only defamatory publication allegedly made by Harcsar was made to the Archdiocesan Tribunal, within its ecclesiastical procedure. Harcsar raised defenses of consent and qualified privilege to the allegedly defamatory statements she made to the Archdiocesan Tribunal. Purdum’s suit thus would require the civil courts to interpret canon law concerning Harcsar’s consent defense. Harcsar’s consent defense and her qualified privilege defense would excessively entangle the civil courts in a matter that the First Amendment to the U.S. Constitution forbids. Because the Establishment Clause of the First Amendment precludes jurisdiction over the subject matter of Purdum’s defamation action, this court determines that the trial court properly concluded that the First Amendment precluded its exercise of subject matter jurisdiction in this defamation action.

CONCURRING: Judge Bruns concurred with the majority, but wrote separately to explain why he believed the church autonomy doctrine applied and thus the Court must decline to exercise subject matter jurisdiction.

DISSENT: Judge Atcheson dissented and stated that the case presented two substantive issues—the district court’s ill-conceived absolute privilege and the Archdiocese’s argument for broad application of church autonomy to bar Purdum’s suit simply because it has some general association with a religious proceeding. Judge Atcheson stated that on those issues and the limited evidentiary record, the court ought to reverse and remand for further proceedings. Neither the Free Exercise Clause nor the Establishment Clause of
the First Amendment to the U.S. Constitution supports an absolute privilege of the kind the district court recognized. Similarly, the church autonomy doctrine has not been applied to bar litigation merely having a factual connection to a church or religion when a court may resolve the legal dispute without passing on the validity of ecclesiastical doctrine or beliefs or the selection of spiritual leaders.

STATUTE: K.S.A. 60-212, -224, -226, -429

GUARDIAN AD LITEM FEES AND SANCTIONS IN RE MARRIAGE OF BERGMANN AND SOKOL JOHNSON DISTRICT COURT – AFFIRMED NO. 106,962 – JUNE 14, 2013

FACTS: Bergmann and Sokol have been litigating custody issues since 1993 and this is the eighth appeal before the Court of Appeals involving the family. Sokol appeals the district court’s setting of guardian ad litem (GAL) fees at $175 per hour and the assessment of sanctions against him pursuant to K.S.A. 2011 Supp. 60-211 for a motion filed by Sokol where he accused the GAL of “conscious theft,” called her a “bad attorney” and a “bad apple” who reflected poorly on other GALs, and questioned her ability to be a GAL.

ISSUES: (1) Guardian ad litem fees and (2) sanctions

HELD: The discussion regarding the GAL’s fees took place within ongoing proceedings. Court found the district court heard evidence about the conflicting email and order, heard testimony regarding which fee was applicable, and then decided the order controlled. The trial court’s ruling was based in fact, and the court found $175 per hour reasonable. Court held the district court had the authority to clarify its orders. Court also stated the sanctions against Sokol were imposed for Sokol’s harassment of the GAL, not for failing to state a claim or a shortcoming in legal analysis. Court held Sokol’s pleading speaks for itself and was clearly inappropriate and done with the intent to harm. Sanctioning Sokol for his language was not “arbitrary, fanciful, or unreasonable,” and there was no abuse of discretion. Sanctions levied against Sokol, and not his attorney, were also proper under K.S.A. 2011 Supp. 60-211(c).

STATUTE: K.S.A. 60-211


FACTS: Hubbard sued Dr. Mellion for medical malpractice after a surgical instrument (rongeur) broke during microdiscectomy surgery and a small piece of metal remained lodged in Hubbard’s spinal disc. Hubbard appeals the district court’s granting of summary judgment in favor of Dr. Mellion. The district court held that Hubbard had filed a medical malpractice cause of action but she had failed to provide medical expert testimony establishing a standard of care and causal deviation and that neither res ipsa loquitur or the common knowledge exceptions applied to relieve Hubbard of her duty to present medical expert testimony.

ISSUES: (1) Medical malpractice and (2) standard of care

HELD: In granting summary judgment in favor of Dr. Mellion on Hubbard’s medical malpractice claim, the district court concluded that the doctrine of res ipsa loquitur was not applicable under the facts of the case. Court disagreed with the district court’s analysis and found sufficient evidence in the summary judgment record from which a jury could find each of the elements necessary to prove medical malpractice under a theory of res ipsa loquitur: (1)(a) Hubbard was injured as a result of the tip of the rongeur breaking off and lodging in her disc space during surgery; (1)(b) the rongeur which caused her injury was within the exclusive control of Dr. Mellion during her surgery; (2) the tip of a rongeur does not ordinarily break off and become lodged in a patient’s disc space absent a surgeon’s failure to use proper care; and (3) Hubbard herself did not contribute in any way to her injury. Court held Hubbard may rely upon res ipsa loquitur in presenting her case to a jury. Whether the inference of negligence arising from res ipsa loquitur will be convincing to a jury is a question to be answered by that jury.

STATUTE: K.S.A. 60-456


FACTS: Steven McConnell executed an adjustable rate promissory note for $94,500 with U.S. Bank secured by the home and then later a “Balloon Loan Modification Agreement.” Both Steven and Janet signed the mortgage. After the McConnell’s defaulted, Bank filed an action to foreclose the mortgage and ended up with a default judgment and an order for a sheriff’s sale on the property. After several additional judgments and motions to set aside the judgment, the district court again granted summary judgment in favor of the Bank, finding that the Bank was the holder of the note and was entitled to enforce both the note and the mortgage; that the McConnell’s claims that the Bank violated the KCPA were not properly identified as counterclaims and were also not substantiated by anything of evidentiary value; and that Janet McConnell, by signing the mortgage, consented to the alienation of the homestead under K.S.A. 60-2301; therefore, the mortgage was enforceable as to her.

ISSUES: (1) Mortgage foreclosure, (2) standing, (3) Kansas Consumer Protection Act, (4) severance of note and mortgage, and (5) homestead rights

HELD: Court held that because the mortgage followed the note and there is no genuine fact issue about the Bank being the holder of the note at the time suit was filed, the Bank had standing to pursue this foreclosure action. The formal assignment of the mortgage after the date suit was filed did not create a genuine issue of material fact that stood in the way of summary judgment because, under Kansas law, the fact that the Bank held the promissory note was sufficient to give it standing to pursue this action. Court held that summary judgment on the KCPA was proper given that the McConnells failed to provide any argument to support their contentions that the Bank violated the KCPA and no genuine issue existed. Court rejected the McConnell’s argument that summary judgment was improper because the note and mortgage were severed when the note was held by the Bank and the mortgage held by another party. Court held the McConnell’s position was inconsistent with principles of equity and contrary to the Restatements’ admonition against unwarranted windfalls. Court also held Janet signed the mortgage whereby the family residence became security for Steven’s loan. The homestead rights described in K.S.A. 60-2301 do not apply when both spouses have consented to a lien on the property. Janet clearly consented to the mortgage lien which the Bank now seeks to foreclose.

STATUTES: K.S.A. 58-2323; K.S.A. 60-208, -217, -256, -2301; and K.S.A. 84-3-302


FACTS: Edwin S. Dana Sr. and Douglas E. Dana (plaintiffs) appeal from the decision of the district court to grant summary judgment in favor of the defendants—a funeral and cremation company and staff—on plaintiffs’ claims related to the temporary loss of the
remains, the district court properly granted summary judgment on plaintiffs’ claim of intentional interference with the remains. Next, the court held that because there is no evidence showing that the defendants committed deceptive or unconscionable acts to Edwin Jr.’s remains, the district court properly granted summary judgment on plaintiffs’ claims of punitive damages.

ISSUES: (1) Outrage, (2) willful interference with cremated remains, and (3) Kansas Consumer Protection Act

HELD: Court held Dana could not establish a claim for outrage. There is no suggestion that the defendants’ actions here—temporarily misplacing Edwin Jr.’s cremated remains, delaying shipment to Edwin Sr., and claiming that the remains may have been stolen—were so outrageous in character or so extreme in degree as to go beyond the bounds of decency. Nor were they so atrocious as to be regarded as utterly intolerable in a civilized society. Plaintiff’s claimed injuries did not rise to the level of extreme or severe distress. Court also held there is no evidence or allegation that the defendants mishandled Edwin Jr.’s corpse or cremated remains or that the defendants intentionally or maliciously kept the remains from Edwin Sr. Rather, it appears that the remains were accidentally mislabeled, and when the labeling error was discovered and the remains located, they were mailed to Edwin Sr. Because there is no evidence that the defendants committed an intentional or malicious act with regard to Edwin Jr.’s remains, the district court properly granted summary judgment on plaintiffs’ claim of intentional interference with the remains. Next, court held that because there is no evidence showing that the defendants committed deceptive or unconscionable acts in connection with the temporary loss/misplacement of Edwin Jr.’s remains, the district court properly granted summary judgment on plaintiffs’ claims of KCPA violations. Court found no fiduciary relationship and that the facts did not demonstrate anything beyond a normal relationship between a bereaved family and a funeral home. Court found the issue of punitive damages was moot based on the granting of summary judgment to defendants.

STATUTE: K.S.A. 50-623(b), -626, -627

REAL PROPERTY, RAILROADS, AND FEDERAL PREEMPTION
WICHITA TERMINAL ASSOC. ET AL. V. F.Y.G. INVESTMENTS INC. ET AL.
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 107,666 – MAY 31, 2013

FACTS: This is the third appeal in a dispute over access to real property. The Wichita Terminal Association, Burlington Northern & Santa Fe Railway Co., and Union Pacific Railroad (collectively WTA) own and operate railroad tracks in Wichita. F.Y.G. Investments Inc. and Treatco Inc. (collectively FYG) own real property adjacent to the WTA’s tracks. In 2008, the WTA was ordered to provide access—by way of a permanent railroad crossing—from a public street to FYG’s real property. In the present appeal, although the WTA does not dispute the district court’s authority to require it to install a permanent railroad crossing to provide access to FYG’s property, it contends that federal law preempts state courts from requiring interstate rail carriers to remove or reconstruct existing tracks in order to install a permanent railroad crossing. Specifically, the WTA argues that provisions of the Interstate Commerce Commission Termination Act (ICCCTA), 49 U.S.C. 10101 et seq. (2006), preempted the remedies ordered by the district court.

ISSUES: (1) Real property, (2) railroads, and (3) federal preemption

HELD: Court found that Congress has granted the Surface Transportation Board (STB) exclusive jurisdiction over the construction, acquisition, operation, abandonment, or discontinuance of railroad tracks and facilities. Furthermore, Congress has expressly stated that the remedies with respect to regulation of rail transportation set forth in the ICCCTA are exclusive and preempt other remedies provided under federal or state law. Court remanded the case to the district court and directed it to enter an order requiring the WTA to file an application with the STB to resolve any issues concerning the STB’s jurisdiction no later than 14 days following the issuance of a mandate from this court. Until the STB has completed its review, the district court shall retain jurisdiction to enforce its order requiring the WTA to keep open a temporary crossing over its railroad tracks in order to provide reasonable access to FYG’s real property.

STATUTE: K.S.A. 60-260(b)

SERVICES AGREEMENT, ARBITRATION, AND ATTORNEYS FEES
ALLIANCE PLATFORMS INC. V. BEHRENS ET AL. (MOXY SOLUTIONS)
JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 108,345 – JUNE 14, 2013

FACTS: This appeal arises out of a Services Agreement entered into by Alliance Platforms Inc. (Alliance) and Moxy Solutions, LLC (Moxy). Alliance sued Moxy and several other defendants in Johnson County District Court. In response, Moxy filed a counterclaim and successfully sought to compel arbitration under the terms of the Services Agreement. At the conclusion of the arbitration, the arbitrator found that neither Alliance nor Moxy were entitled to attorney fees under the “prevailing party” provision of the Services Agreement. Although the district court confirmed the arbitrator’s
award regarding the substantive claims asserted by the parties, it vacated the arbitrator's decision on attorney fees. Specifically, the district court found that Alliance was the prevailing party in the arbitration and remanded the matter to the arbitrator for a determination of the amount of attorney fees to be awarded.

**ISSUES:** (1) Services agreement, (2) arbitration, and (3) attorney fees

**HELD:** Court concluded that the district court erred in finding that the arbitrator exceeded his power when he determined that neither party was entitled to attorney fees under the terms of the Services Agreement. Court reversed the district court's decision regarding attorney fees and remanded the case to the district court for it to confirm the arbitrator's original award in its entirety.

**STATUTE:** K.S.A. 5-401, -412(a)(3)

**WORKERS COMPENSATION AND FINAL HEARING**

**WELTY V. USD NO. 259**

**WORKERS COMPENSATION BOARD – AFFIRMED NO. 106,383 – JULY 27, 2012 (MOTION TO PUBLISHED, OPINION FILED MAY 9, 2013)**

**FACTS:** Welty injured her left knee on September 3, 2003, when she slipped on water and fell. She had surgery in 2004. Her altered gait caused injuries in her right knee and she had surgery on the right knee in June 2008. Welty filed an application for a hearing in April 2004. The matter did not proceed to a final hearing until April 2010. In 2006, the legislature enacted law that a workers compensation matter must proceed to a final hearing within five years of the filing of the application for a hearing. The administrative law judge held that the statute does not affect accidents occurring before the law was enacted in July 2006 and therefore awarded Welty temporary total disability benefits. The Workers Compensation Board affirmed.

**ISSUES:** (1) Workers compensation and (2) final hearing

**HELD:** Court stated that under the Workers Compensation Act, any right to compensation by an injured worker accrues on the date of injury. The substantive rights of an injured worker are determined by the laws in effect at the time of the injuries. Court also stated that K.S.A. 2006 Supp. 44-523(f) amended the law to provide that any workers compensation claim that has not proceeded to a final hearing within five years from the date of the filing of an application for hearing shall be dismissed for lack of prosecution. Court held that K.S.A. 2006 Supp. 44-523(f) does not apply retroactively to bar claims of workers injured prior to the effective date of this statute.

**CONCURRENCE:** Judge Leben concurred in the opinion writing separately to note that the Kansas presumption that statutes operate prospectively unless the statute clearly provides otherwise reflects the same rule applied by the U.S. Supreme Court.

**STATUTES:** K.S.A. 2006 Supp. 44-523(f); K.S.A. 44-534(b), -535; K.S.A. 1999 Supp. 74-2426(c)(3); and K.S.A. 77-621(c)(4)

**WORKERS COMPENSATION AND GOING-AND-COMING RULE**

**WILLIAMS V. PETROMARK DRILLING LLC ET AL. WORKERS COMPENSATION BOARD – REVERSED NO. 108,125 – JUNE 7, 2013**

**FACTS:** Williams was injured in a one-vehicle accident as he rode back home from Petromark’s drilling site. The vehicle blew a tire and Williams was ejected because he did not have his seat belt on. Williams rode to the work site with Roach, his supervisor, but was injured on the way home when he rode with another employee, LaMaster. Williams filed a workers compensation claim. The administrative law judge (ALJ) held that Williams’ injuries were not compensable because they did not arise out of and in the course of his employment. The ALJ also concluded that Williams’ claim would not have been barred due to his failure to wear a seatbelt. The Workers Compensation Board reversed the ALJ by finding that Williams’ injuries did arise out of and in the course of his employment and that Williams was not barred by his failure to wear a seatbelt despite Petromark’s company policy.

**ISSUES:** (1) Workers compensation and (2) going-and-coming rule

**HELD:** Court found that Petromark did not hire a new crew at every drill site. Williams, a crew member, had no permanent work site. Instead, he was required to travel to ever-changing drill sites. Roach, the driller, was paid mileage for driving his crew members to and from the drill site. Whether they drove themselves or rode with Roach, crew members, like Williams, were not paid for their travel to and from the drill site. Court stated he key to resolution of this case is whether Williams’ travel, at the time of his accidental injury, was furthering Petromark’s interests. There was a mutually beneficial transportation arrangement between Williams (free ride to and from the drill site) and Petromark (did not have to pay for crew’s food or lodging or find a new crew at every drill site). But Williams chose to ride from the drill site with LaMaster instead of Roach. Roach’s travel was definitely inherent to his employment because it furthered Petromark’s interests. The same cannot be said of Williams’ travel at the time of his accidental injury. He was on a personal mission to get home sooner. The proximate cause of Williams’ injury was LaMaster’s rather than Petromark’s negligence. Court held the Board misapplied the law to the facts of this case. The ALJ correctly found that Williams’ claim was barred by the going-and-coming rule. The Board erred by reversing the ALJ and finding the inherent-travel exception to the going-and-coming rule was applicable.

**STATUTE:** K.S.A. 44-501, -508(f)
CONCURRENCE (Buser, J.): Concur with majority's affirmance of district court's ruling upholding legality of the warrantless search, but under the myriad of suspicious circumstances in their totality and employing necessary common sense, would hold that officer had probable cause with exigent circumstances to search Beltran's pocket for drugs.

STATUTES: K.S.A. 2010 Supp. 21-36a06; K.S.A. 21-3105, -3808, -3808(a), -3808(b)(1), -3808(b)(2); and K.S.A. 22-2502, -2509

STATE V. EWERTZ
RENO DISTRICT COURT – AFFIRMED
NO. 107,297 – JUNE 7, 2013

FACTS: Officer stopped and arrested Ewertz on suspicion of DUI, and discovered drug evidence during search of Ewertz' after putting Ewertz in patrol car. Ewertz filed motion to suppress, arguing search of her car was not permissible as search incident to arrest, and search of her open makeup bag in the car was not permissible under plain view doctrine. District court denied the motion. Ewertz appealed from her drug convictions.

ISSUES: (1) Search incident to arrest and (2) plain view doctrine

HELD: Kansas Supreme Court has not yet interpreted "reasonable to believe" language in Arizona v. Gant, 556 U.S. 332 (2009). Two approaches are discussed – one requiring categorical link between nature of crime of arrest and right to search; the other applying a standard akin to reasonable suspicion. Under facts of case, both standards were satisfied and search of car was legal. Following a lawful traffic stop of a defendant, an officer's warrantless search of a vehicle incident to arrest for DUI is lawful if officer's observations regarding the defendant's appearance and clues exhibited on field sobriety tests, coupled with odor of alcohol coming from car itself, make it "reasonable to believe" evidence relevant to crime of DUI might be found in vehicle.

District court's factual findings support legal conclusion that search of makeup bag was constitutional under plain view exception to warrant requirement.

CONCURRENCE (Malone, C.J.): Under totality of circumstances, an objective law enforcement officer would have reasonable suspicion that evidence relevant to DUI arrest might be found in vehicle. He writes separately to suggest that Kansas courts should reject a per se rule of a categorical link between nature of the crime of arrest and the right to search.

STATUTES: None

STATE V. HANNEBOHN
RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 107,754 – MAY 3, 2013

FACTS: Hannebohn was convicted of criminal threat following a guilty plea. At the initial sentencing hearing, the district court ordered restitution but left the amount to be determined at a later time. The district court also notified Hannebohn of his statutory appeal rights and the deadline for filing an appeal. At a subsequent hearing, the district court determined the amount of restitution but did not advise Hannebohn of his right to appeal. Hannebohn later filed a motion to file an appeal out of time, claiming that he mistakenly believed that his court-appointed attorney was pursuing an appeal. The district court denied the motion without hearing evidence on the ground that the court had informed Hannebohn of his appeal rights at the initial sentencing hearing.

ISSUES: (1) Jurisdiction and (2) appeal out of time

HELD: Court held that under the facts of this case in which the defendant filed a motion to file an appeal out of time and the record reflected that the district court failed to notify the defendant of his statutory appeal rights at the completion of the restitution hearing, the district court should hold a hearing and make findings of fact and conclusions of law as to whether the defendant should be permitted to file an out-of-time appeal pursuant to State v. Ortiz, 230 Kan. 733, 640 P.2d 1255 (1982).

STATUTES: K.S.A. 22-3405, -3424, -3601, -3608(c); and K.S.A. 60-4301, -4304

STATE V. HARDIN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,558 – JUNE 21, 2013

FACTS: Hardin purchased a Volkswagen from a car dealership, trading in his previous vehicle, a Pontiac, as part of the transaction. He then affixed the license plate from the Pontiac to the Volkswagen. Eleven days later, Sedgwick County Sheriff's Deputy Jared Bliss observed Hardin's Volkswagen and ran a computer check on the car's license plate. Although the computer program did not report that the car had been stolen, the program reported that the license plate was registered to a Pontiac. Bliss could not determine the reason for the registration discrepancy, and he stopped Hardin's car. During the stop, Hardin exhibited several signs of intoxication, including an odor of alcohol, slurred speech, and bloodshot eyes. He eventually refused a breath test and was charged with DUI and driving a vehicle with a nonregistered license plate, in violation of K.S.A. 2009 Supp. 8-142. First, the state subsequently dropped the license plate charge after determining that Hardin had complied with the transfer provisions set forth in K.S.A. 8-127(c). The court denied Hardin's motion to suppress and he was convicted on stipulated facts.

ISSUES: (1) DUI, (2) motion to suppress, and (3) transfer of license plates

HELD: Court stated that when a law enforcement officer has information that a license plate observed on one vehicle is registered to another vehicle, the proper inquiry is whether the officer would reasonably suspect a motorist of criminal activity for driving with an improper license plate. Court held that evidence of other crimes discovered as a result of a lawful vehicle stop based on reasonable suspicion of a license plate violation may be admissible even though the license plate is subsequently determined to be proper.

STATUTES: K.S.A. 8-127; K.S.A. 2009 Supp. 8-142, -1567; and K.S.A. 22-2402

STATE V. SARABIA-FLORES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 106,662 – MAY 10, 2013

FACTS: Sarabia-Flores appeals from the district court's order denying his post-sentencing motion to withdraw his guilty plea to misdemeanor drug paraphernalia charges. Sarabia-Flores entered his guilty plea in 2002 and filed the motion to withdraw his plea in 2011. Sarabia-Flores contends his counsel at trial was ineffective for failing to advise him of potential immigration consequences arising from his plea as required by Padilla v. Kentucky, 559 U.S. 356, 130 S. Ct. 1473, 1483, 176 L. Ed. 2d 284 (2010). But after briefing and oral argument in this matter, the U.S. Supreme Court held in Padilla v. United States, 568 U.S. __, 133 S. Ct. 1103, 1105, 185 L. Ed. 2d 149 (2013), that defendants whose convictions became final prior to Padilla cannot benefit from its holding.

ISSUES: (1) Motion to withdraw guilty plea and (2) risk of deportation

HELD: Court decided the holding in Padilla that the Sixth Amendment to the U.S. Constitution requires defense counsel to advise a defendant about the risk of deportation arising from a guilty plea does not apply retroactively to a defendant whose conviction became final before Padilla was decided. Because the rule announced in Padilla does not apply retroactively to a defendant whose conviction became final before Padilla was decided, Court
affirmed the district court’s decision to deny Sarabia-Flores’ motion to withdraw his plea.

STATUTE: K.S.A. 2012 Supp. 22-3210(d), (e)

STATE V. SMITH
SALINE DISTRICT COURT – AFFIRMED
NO. 107,836 – JUNE 7, 2013

FACTS: After his latest conviction, Smith filed a motion for modification or correction of sentence arguing that his 1982 convictions for aggravated burglary and robbery were incorrectly classified as person felonies, rather than nonperson felonies, when calculating his criminal history score. Smith claimed that because his convictions were committed before Kansas began classifying crimes as person or nonperson crimes, his convictions should be considered unclassified and scored as nonperson crimes.

ISSUE: Criminal history

HELD: Court held that Smith’s aggravated burglary conviction would be classified as a person crime if compared to the current offense of aggravated burglary and the same can be said for his robbery conviction. Court found that neither of these offenses has substantially changed from the pre-Guidelines versions of the statutes. Court concluded Smith has provided no persuasive reasons for this court to depart from its long held view that pre-Guidelines offenses may be classified as person offenses if the analogous statute now in effect is classified as a person crime.

STATUTE: K.S.A. 21-3426, -3716, -4701, -4710, -5420, -5807

STATE V. SMITH
LEAVENWORTH DISTRICT COURT – AFFIRMED

FACTS: Smith was charged with and pled no contest to one count of contributing to a child’s misconduct, three counts of burglary of a motor vehicle, five counts of theft of property, one count of possession of methamphetamine, and one count of possession of drug paraphernalia. Although Smith was convicted of all of the crimes, he objected to his criminal history score. Over the state’s objection, the district court modified Smith’s criminal history score from A to B after determining Smith’s six prior misdemeanor juvenile adjudications had decayed because his current crimes were committed after he turned 25 years of age. The district court sentenced Smith to a controlling sentence of 41 months’ imprisonment. The state filed a timely appeal challenging the district court’s decision to modify Smith’s criminal history score from A to B.

ISSUE: Criminal history

HELD: Court held that K.S.A. 2011 Supp. 21-6810 looks to the offense to determine whether a prior juvenile adjudication has decayed. Because the nature of the offense never changes, if a person commits a crime after he or she turns 25, his or her prior misdemeanor juvenile adjudications decay under K.S.A. 2011 Supp. 21-6810(d)(4)(C) and cannot be used in the calculation of his or her criminal history score. It is irrelevant that the misdemeanor juvenile adjudications have, at some prior time, been converted to person felony adjudications for sentencing purposes under K.S.A. 2011 Supp. 21-6811(a).


STATE V. VRABEL
JOHNSON DISTRICT COURT – REVERSED AND REMANDED

FACTS: The state appeals from the district court’s suppression of the evidence obtained through a controlled drug buy conducted by police outside their jurisdiction. A confidential informant (CI) advised Cpl. Ivan Washington, of the Prairie Village Police Department (PVPD), that Vrabel was selling hash. Washington had the CI arrange to purchase hash from Vrabel at a grocery store in Leawood,
Kansas. Washington did not know where Vrabel was when he spoke to the CI on the phone. The grocery store was selected because it was located on a main road into Missouri, where Vrabel lived, and was one of law enforcement’s traditional buy locations. Vrabel sold hash to the CI at the grocery store in Leawood. The state charged Vrabel with distribution of marijuana and use of a communication facility to sell a controlled substance. Before trial, Vrabel filed a motion to suppress, arguing that PVPD unlawfully exercised its jurisdiction by “set[ting] up and investigat[ing] a crime” in Leawood. The district court granted the motion. The state filed for an interlocutory appeal which was allowed.

ISSUES: (1) Motion to suppress and (2) police outside jurisdiction

HELD: Court stated that under K.S.A. 2012 Supp. 22-2401a(2), law enforcement officers employed by any city may exercise their powers as law enforcement officers anywhere within the city limits of the city employing them and in any other place when a request for assistance has been made by law enforcement officers from that place or when in fresh pursuit of a person. Court held that under the facts of this case, Prairie Village, police officers were authorized to conduct a controlled drug buy in Leawood under the “request for assistance” exception in K.S.A. 2012 Supp. 22-2401a(2)(b).

CONCURRENCE: Chief Judge Malone disagreed with the majority that the Prairie Village police officers were authorized to organize and conduct the controlled drug buy in Leawood, Kansas, under the “request for assistance” exception in K.S.A. 2012 Supp. 22-2401a(2)(b). But because Vrabel’s constitutional rights were not violated by the police officers’ conduct, C.J. Malone concluded that suppression of the evidence is not the appropriate remedy for the statutory violation.

STATUTES: K.S.A. 2012 Supp. 22-2401a(2); and K.S.A. 22-2202(13), -2401, -2402, -2405, -2408

STATE V. WETRICH
JOHNSON DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCE VACATED, AND REMANDED
NO. 106,002 – JUNE 14, 2013

FACTS: Wetrich was convicted of kidnapping, aggravated assault, possession of marijuana, violation of a protective order, intimidation of a witness, and domestic battery. District court did not allow defense counsel to cross-examine victim about her previous statement to police that Wetrich had held gun to her head to force a sex act on another person. District court also did not allow Wetrich to challenge the criminal history score, finding collateral estoppel barred Wetrich’s claim that a Missouri conviction was incorrectly scored as a person felony when Wetrich had previously challenged his criminal history without success. Wetrich appealed, claiming: (1) district court erred in victim’s prior alleged “false allegation” was inadmissible under K.S.A. 60-422, and (2) district court erroneously interpreted K.S.A. 2009 Supp. 21-4715(c) to disallow Wetrich’s challenge to criminal history.

ISSUES: (1) K.S.A. 60-422(d) evidence and (2) challenge to criminal history

HELD: District court correctly ruled that Wetrich’s evidence of a specific instance of misconduct was inadmissible to prove that victim had a character trait of dishonesty. Also, proffered photograph of victim did not show victim was lying. Wetrich’s convictions are affirmed.

Sentencing statutes now permit an offender to challenge a criminal history that has been previously established. Offender has burden of proving criminal history by a preponderance of the evidence. Here, district court incorrectly denied Wetrich an opportunity to contest his criminal history. Sentence is vacated and case is remanded.

STATUTES: K.S.A. 2009 Supp. 21-4715(a), -4715(b), -4715(c); K.S.A. 2008 Supp. 21-3412a, -3832, -3843; K.S.A. 2008 Supp. 65-4162(a); K.S.A. 21-3410, -3420, -3832, -4204, -4709; and K.S.A. 60-422, -422(c), -422(d)
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