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Our Mission

The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
## 2010-11 KBA Officers and Board of Governors

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**Kansas Bar Association Districts**

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For more information or to volunteer, contact Meg Wickham, KBA manager of public services, at (785) 234-5696 or at mwickham@ksbar.org.

Cover photograph by Ryan Purcell
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Lawyers in the Legislature

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When President Braun asked if I would write a guest column, he suggested I reflect on changes in the Kansas Bar Association (KBA) and the profession during the decade since I served as KBA president in 2000-2001. The concept seemed particularly appropriate given the theme of that year: “Navigating New Frontiers – Law in the 21st Century.” Throughout the year, the KBA Board of Governors, members, and staff reflected on where the KBA and the profession stood, contemplated the direction in which both were moving, and discussed plans to position the KBA for the 21st century. To refresh my memory of that process, I reviewed KBA Journal articles for that year and began a trek down memory lane. I invite you to pause for a moment and think about where you stood in 2000 and the direction in which you moved over the past decade. Then, as we start a new year, consider where we stand now and the direction that you, the KBA, and our profession are moving.

In 2000, we asked KBA members: What challenges do you foresee in your practice, your community, our profession, and the KBA? Our predictions, at least those mentioned in Journal articles, suggest that our ability to predict the future will not threaten Nostradamus’ legacy. For example, one prediction forecasted that “90 percent of white collar jobs as we know them” would be gone or unrecognizable in 10 years. The prediction was premised on an expected shift from direct services to “e-based, one-stop shopping mega-service firms.” Certainly, the last 10 years have seen a boom in the e-commerce of goods. Contrary to the prediction, however, the e-based growth of the service industry has been comparatively modest. Another prediction suggested that 60 percent of lawyers would be “practicing in a different area of the law, in a different practice setting or not practicing at all” within 10 years. Look around you and decide; did we get that one right?

The KBA Board did not just ponder the future, we set goals. Ten years later we can proudly say that many goals were accomplished; unfortunately, some others were not. Arguably the biggest accomplishment was the expansion and updating of the KBA headquarters. I ended a president’s column that outlined that goal by declaring that discovery on the question was closed and that the “matter of In re Future of the Kansas Law Center is hereby set for trial.” Seven years later, the trial was completed and we celebrated the completion of the beautiful, highly functional expanded Kansas Law Center. While that timeline would garner poor case management scores, the KBA – its members, leaders, and staff – earned high scores. Thanks to the leadership of many, a highly successful “Raise the Bar” campaign was launched, plans were made, and the project was completed. In contrast, perhaps one of the biggest disappointments is the lack of success in accomplishing our goal of increasing the percentage of our members attending the annual meeting. Over the past 10 years, various strategies have been employed in an effort to reach the goal. Unfortunately, these strategies have not succeeded – low attendance at the annual meeting remains a significant issue, requiring us to balance the benefits against the staff and budgetary demands of the meeting.

Another focus of our efforts in 2000 was the examination of issues facing the profession and the justice system as a whole. We identified several major issues: a bench and bar that did not reflect the diversity of Kansans, a lack of public knowledge regarding the judicial system and its role as an equal branch of government, poor public perception of our profession, and increased stress and time demands that lead to unhealthy lifestyles, depression, and substance abuse. Again, we have employed multiple strategies and progress is difficult to measure. Certainly, each of these is still a serious issue. Yet, while progress has not been as rapid as we may want, I would argue we are making progress in many areas and that many strategies have been successful.

As we start 2011, let us adopt a KBA New Year’s resolution to tackle these issues with renewed energy. Remember, it is not so much where we stand as the direction in which we are moving.
Your Legal Career is a Marathon, Not a Sprint!

By Melissa R. Doeblin, Kansas Corporation Commission, Topeka, melissadoeblin@gmail.com

Last year in November, I finally ran a marathon, an undertaking I can now check off of my bucket list. With the encouragement of family and friends, I muddled through months of training, the heat of summer, and persevered through injuries and illnesses. I give a special thanks to Jennifer Hill, who drove from Wichita to run with and entertain me on the run.

Reflecting on the accomplishment of finishing the marathon, I realize how similar it is to the development of my legal career. If you have never run before and decide you want to run a marathon, you begin with baby steps. Most trainers recommend that you should have been running about a year and be able to comfortably run between three and five miles before beginning a marathon training program. I have also heard it advised that prior to training for the full, a runner should complete a half marathon. Finally, for the big kahuna, you need to put in a full 18 weeks of training.

It took months of preparation, and I almost let injury and sickness get the best of me. I hurt my left foot in a misstep on a 13-mile run, interestingly after running 18 miles the week before. I took off a month to heal and slowly got back to my regimen. As my foot was almost healed luck would have it, I got a mild form of bronchitis. My foot felt almost healed; luck would have it, I got back to my regimen. As my foot was healing, I hurt my left foot in a mishap; I was almost healed luck would have it, I got back to my regimen.

Looking back, I can see that I would not have been able to run with my training program. I have also heard it advised that prior to training for the full, a runner should complete a half marathon. Finally, for the big kahuna, you need to put in a full 18 weeks of training.

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Looking back, I can see that I would not have been able to run with my training program. I have also heard it advised that prior to training for the full, a runner should complete a half marathon. Finally, for the big kahuna, you need to put in a full 18 weeks of training.
In every person’s life there are critical events that make a difference for years to come. Such events often involve one person doing the right thing at the right time to make a difference in another person’s life. Lawyers and judges have the opportunity to witness such events more often than most. It may be a court appointed special advocate (CASA) volunteer who provides exceptional kindness and insight. It may be a scholarship that makes the difference in a student succeeding in completing their education. It may be a witness or juror with a strong commitment to honesty, and the rule of law gained in a school classroom using Law Wise curriculum supported by the Kansas Bar Foundation (KBF). And, of course, the critical event may be the outstanding service and generosity of lawyers and judges who are Fellows of the KBF.

The end of the year is time for most of us to review and reflect on the past year and assess how well we’ve accomplished our goals. As you reflect on what you have given and want to give and why, the KBF suggests that you ask yourself an important question: Did your contributions reflect what you most care about?

Most of us make giving decisions at year-end, based in whole or part on our income and ability to give and on the benefits of taking the tax deduction this year. Thus, year-end giving solicitations no doubt find your mail box or in-box from many charities, few (or none) of which will be law related. If this publication finds your mailbox, we hope that means you care about doing good work in and through the legal system. And it means you care about justice and the rule of law.

Why is that important? The rule of law is the key difference between the life we enjoy in America and third-world poverty and despotism, where people can do nothing more than fight over scarcity. The assurance that a contract will be enforced, that a deal is a deal, and that honesty is not just the best policy but the only policy, that’s what it takes to invest, to make a product, to build a factory, have solvent banks, sell a book, license a computer program, or just hear a song on the radio. It is the difference between freedom of speech and thought and living in fear and dreary sameness. Transmitting those values to future generations, maintaining access to justice for all, and letting people see justice in their lives and those of their neighbors is essential. And it maintains respect for the judicial system and the role of lawyers in society, which is important to each of us.

Annual giving by Fellows on their pledges and after they have completed their initial pledge is especially critical now; because, low interest rates mean Interest on Lawyer Trust Account funds and our investment reserves produce so little current income. During 2010 and in budgeting for 2011, the KBF has been able to fund less than a third of grant applications for legal services for the poor and less than half of what we funded just a couple of years ago. Funding for KBF law-related education for 2011 will be only $6,500 (about one-third of the grant request). Funding for CASA and other programs has been similarly affected. If 100, 200, or 300 more Fellows would make an annual gift of $50 or $100, and if a few would give $500 or $1,000, you can easily see how the Kansas Bar Foundation could change lives and change attitudes about the role of law and lawyers in our society.

You can do the right thing at the right time for someone who really needs it by supporting the KBF with your gift in 2011. Will you make it a priority?

About the Author

James D. Oliver is a partner at the Overland Park office of Foulston Siefkin LLP. He serves as the firm’s lead partner for the appellate practice and the regulatory and administrative practice teams.

Oliver received his Bachelor of Science from Northwest Missouri State University in 1971 and his Juris Doctor, cum laude, in 1975 from Washburn University School of Law, where he served as editor of the Washburn Law Journal.

He is admitted to practice in Kansas, Missouri, the U.S. Courts for the District of Kansas and Western District of Missouri, U.S. Court of Appeals for the Tenth Circuit, and the U.S. Supreme Court.

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Advance Notice
Elections for 2011
KBA Officers
and
Board of Governors

It's not too early to start thinking about KBA leadership positions for the 2011-2012 leadership year.

OFFICERS

KBA President-elect: (Current – Rachael K. Pirner, Wichita)
KBA Vice President: (Current – Lee M. Smithyman, Overland Park)
KBA Secretary-Treasurer: (Current – Dennis D. Depew, Neodesha)
KBA Delegate to ABA House of Delegates: Sara S. Beezley, Girard, is eligible for re-election

The KBA Nominating Committee, chaired by Timothy M. O’Brien, Kansas City, Kan., is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, January 14, 2011. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 21, 2011. In accordance with Article V, Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be eight positions on the KBA Board of Governors up for election in 2011. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jeffrey Alderman by Friday, March 4, 2011. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2011 are:

• District 1: Incumbents Gregory P. Goheen and Mira Mdivani are eligible for re-election. Johnson County.
• District 5: Incumbent Teresa L. Watson is not eligible for re-election. Shawnee County.
• District 7: Incumbent Matthew C. Hesse is eligible for re-election. Sedgwick County.
• District 8: Incumbent Gerald L. Green is not eligible for re-election. Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
• District 11: Incumbent Nancy Morales Gonzalez is eligible for re-election. Wyandotte County.
• District 12: Incumbent William E. Quick is eligible for re-election. Out-of-State.

For more information
To obtain a petition for the Board of Governors, please contact Kelsey Schrempp at the KBA office at (785) 234-5696 or via e-mail at ksksrempp@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Timothy M. O’Brien at (913) 735-2222 or via e-mail at tim_o_brien@ksd.uscourts.gov or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2011 KBA Awards. These awards will be presented at the Joint Judicial Conference and KBA Annual Meeting from June 8-10, in Topeka. Below is an explanation of each award, and a nomination form can be found on page 11. The Awards Committee, chaired by Hon. Michael B. Buser, Topeka, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! Deadline for nominations is Friday, March 4.

**Distinguished Service Award:** This award recognizes an individual for continuous long-standing 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, the award is given only in those years when it is determined that there is a worthy recipient.

**Phil Lewis Medal of Distinction:** The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.
- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

**Professionalism Award:** This 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.

**Outstanding Young Lawyer:** This 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.

**Outstanding Service Awards:** These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA for recognizing nonlawyers 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, nonlawyers, groups of individuals, or organizations.
- Outstanding Service Awards may be given to 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 KBA; and/or Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award:** This 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. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who are not 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 in civil 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.

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

**Courageous Attorney Award:** This award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**Diversity Award:** This award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:
• A consistent pattern of the recruitment and hiring of diverse attorneys;
• The promotion of diverse attorneys;
• The existence of overall diversity in the workplace;
• Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
• Involvement of diverse members in the planning and setting of policy for diversity;
• Commitment to mentoring diverse attorneys, and;
• Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
• Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement. The award will be given only in those years when it is determined there is a worthy recipient.

KBA Awards Nomination Form

Nominee’s Name ____________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

☐ Phil Lewis Medal of Distinction ☐ Diversity Award
☐ Outstanding Service Award ☐ Professionalism Award
☐ Outstanding Young Lawyer Award ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award ☐ Courageous Attorney Award
☐ Distinguished Service Award

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Nominator’s Name ____________________________________________
Address ______________________________________________________
Phone ________________________________ E-mail _______________________

Return Nomination Form by Friday, March 4, 2011, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
The Diversity Corner

Celebrating the Role of Kansans in the Fight Against Discrimination

By Robert Collins, Collins Law Office LLC, Olathe, robert@collinslegal.com

 Occasionally while driving on a Kansas highway I will see a bumper sticker that reads, “Kansas, as bigoted as you think.” While Kansas is not perfect, I believe that the facts in our history tell a more meaningful story. In a month celebrating Kansas’ statehood and commemorating the life and contributions of Dr. Martin Luther King Jr. and the civil rights movement, it is an appropriate time to reflect on the role Kansas and its citizens have played in expanding diversity and equality.

The Kansas-Nebraska Act of 1854\(^4\) drew slaveholders and pro-slavery forces to Kansas in the popular sovereignty push to use statehood to tip the scales in Congress and to upset the balance of free and slave states secured through the Missouri Compromise 34 years earlier.\(^2\) But the Act also drew a large number of abolitionists who established a free-state capital, sought to extend freedoms outside of Kansas’ borders, and fought bloody battles to secure a state free of slavery.\(^3\) The associated raids and battles in a period of the 1850s known subsequently as “Bleeding Kansas”\(^4\) foreshadowed in microcosm the terrible war that would soon befal the nation as a whole. And, in this way, Kansas settlers were at the forefront of the push to end slavery in America.

One hundred years after enactment of the Kansas-Nebraska Act, which triggered this upheaval in Kansas and the eventual end of slavery throughout the nation, Kansas was again at the forefront of doors opening for freedom and equality with \textit{Brown v. Board of Education} of Topeka,\(^5\) which overturned the separate but equal doctrine of \textit{Plessy v. Ferguson}\(^6\) and triggered chains of events that would eventually desegregate the greater part of America.

While the Court in \textit{Brown} had demanded that the states immediately desegregate their schools, many states in the South ignored the ruling or refused to comply, they witnessed mob violence as a means of preventing desegregation, and some of their legislatures voted to withhold funding to districts that did desegregate.\(^7\) But it was around this new legal doctrine – and its predicate moral principle – of separate being unequal – that the civil rights movement coalesced.

The refusal throughout the South to comply with the Court’s order in \textit{Brown} escalated pre-existing tensions in other aspects of society where segregation existed. Frustration was at the boiling point in the midst of legally enforced segregation in restaurants, shops, restrooms, and buses, which now coexisted with this blatantly opposed and unenforced Supreme Court ruling to desegregate schools.\(^8\) It was this frustration that triggered the Montgomery, Ala., bus boycott in response to Rosa Parks’ arrest\(^9\) the year following \textit{Brown} when she refused to be separate, unequal, or to give up her seat to a white passenger.\(^10\) Parks’ act of civil disobedience then unwittingly became the tipping point for the entire civil rights movement.

Tensions and violence continued in the following years, and in 1957 President Eisenhower (a Kansan who had begun desegregating the military as a commander under President Truman’s Executive Order,\(^11\) and completed the task as President himself) finally federalized members of the Arkansas National Guard to accompany federal troops he had sent to Little Rock\(^12\) with the charge of enforcing the Court’s desegregation ruling in \textit{Brown}.\(^13\) While that act did not end the tensions or violence, the significant point is that it was the outgrowth of each of these events that led to the Civil Rights Acts of 1957, 1960, 1964, and amendments thereto. And these Acts then in turn formed the legal framework for all anti-discrimination laws and desegregation that has occurred in America in the last half-century.

But even before \textit{Brown}, in 1949, a Kansan by the name of Dean Smith had tried to integrate the basketball team he played on at Topeka High School by combining the white and black teams. He believed that his team could have won the state title if certain members of the school’s black team had been allowed to play on his team. Smith has said that he wanted desegregation because he wanted the best possible basketball team.\(^14\) Certainly all organizations would benefit from what he understood about diversity of talent leading to success, but success was not his sole motive. As was evidenced by actions throughout his career on and off the court,\(^15\) Smith was driven by the morality of the desegregation issue, not just the profitability margins, which naturally flowed from his diversity efforts.

In 1961, Smith was given the opportunity as a 30-year-old white male from Kansas to become the head coach of the University of North Carolina basketball team, which was just coming off of suspension with the NCAA and suffering severe recruiting challenges as a result. In the height of southern racial tensions over integration described above, Coach Smith began an effort to desegregate this North Carolina team and expand his recruiting options. In so doing he also became one of the chief catalysts for desegregating college basketball as a whole.\(^16\)

Smith eventually won his first college championship as a coach in 1982 with a shot in the final seconds by a player named Michael Jordan, arguably one of the best basketball players of all time. With a team comprised of the best players he could find of any color year after year he became the second winningest college basketball coach of all time before his retirement in 1997.\(^17\)

In another area of diversity, it was a Kansan named Bob Dole from the town of Russell, who championed for the disabled in 1990. Senator Dole had lost the use of his right arm fighting a war triggered by bigotry in World War II Europe, but he used his experiences as a disabled American and veteran, as well as his seniority in the U.S. Senate, to bring about
the Americans with Disabilities Act. At the signing of the Bill on the South Lawn of the White House, President George H.W. Bush stated:

“... This historic act is the world’s first comprehensive declaration of equality for people with disabilities – the first. Its passage has made the United States the international leader on this human rights issue. Already, leaders of several other countries, including Sweden, Japan, the Soviet Union, and all 12 members of the EEC, have announced that they hope to enact now similar legislation...”

He continued:

“... for too many Americans, the blessings of liberty have been limited or even denied. The Civil Rights Act of ’64 took a bold step toward righting that wrong. But the stark fact remained that people with disabilities were still victims of segregation and discrimination, and this was intolerable. Today’s legislation brings us closer to that day when no Americans will ever again be deprived of their basic guarantee of life, liberty, and the pursuit of happiness...”

Passage of the Americans with Disabilities Act was a supremely significant event in the fight against discrimination, and it became law because of a Kansan.

And in one final area, Kansas has advanced in diversity where women in government are concerned. Twenty-four states in the United States have never had a female governor, including California, Colorado, Florida, New York, Illinois, Pennsylvania, Minnesota, and Wisconsin. Several other states, including Michigan, Ohio, New Jersey, Delaware, Hawaii, Oregon, and Vermont have only had one female governor. Kansas, in contrast, has had two female governors who have combined to serve a total of 11 of the last 20 years in that office, and the state has had women fill virtually every other role of leadership in government, including U.S. House and Senate seats and the offices of attorney general, state treasurer, insurance commissioner, secretary of revenue, senate majority leader and chief justice of the Supreme Court.

Kansas indeed has a rich history that we celebrate this month and a large part of that history is comprised of inspiring accounts of the role our state and citizens have played in expanding freedom, diversity, and equality. While much remains to be done to finally end discrimination in all its forms, we can find examples to follow in the leadership roles fellow Kansans have played in extending the blessings of liberty to all.

About the Author

Robert Collins is a Washburn Law School graduate and was a member of the legal team that represented one of the whistleblowers in the largest health care fraud case in U.S. history (United States et al. ex rel. Blair Collins v. Pfizer Inc.). That case recovered $2.3 billion for U.S. Taxpayers, included the largest criminal fine in U.S. history, and established the most comprehensive monitoring program against a defendant in the history of the Department of Health and Human Services, in order to ensure compliance and enhance protections for patient safety in the drug marketing process. Collins also drafted the Kansas False Claims Act, enacted in April 2009. He is a member of the Kansas Bar Association’s Diversity Committee, and currently works as a health care compliance consultant and attorney in Olathe.

ENDNOTES

1. An Act to Organize the Territories of Nebraska and Kansas, 1854; Records of the Interior and Insular Affairs Committee and its Predecessors, 1805-1988; Record Group 11; General Records of the United States Government; National Archives.
2. Conference committee report on the Missouri Compromise, March 1, 1820; Joint Committee of Conference on the Missouri Bill, 03/01/1820-03/06/1820; Record Group 1281; Records of Joint Committees of Congress, 1789-1989; National Archives.
4. Id.
8. Id. at 60.
9. Rosa Parks was arrested December 1, 1955.
11. Executive Order 9981, July 26, 1948; General Records of the U.S. Government; Record Group 11; National Archives.
12. Executive Order 10730, Sept. 23, 1957 (Little Rock Crisis); General Records of the U.S. Government; Record Group 11; National Archives.
15. ESPN.com: Biography, H e’s the Dean of College Hoops, at http://sports.espn.go.com/espn/print?id=2366481&type=story# (last visited Nov. 27, 2010).
16. Id.
20. 42 U.S.C. § 12101. The ADA was amended in 2008 with the ADA Amendments Act of 2008 (P.L. 110-325), which became effective on January 1, 2009. This Act clarified the protections Congress intended for those with chronic and terminal conditions, which Court decisions had been narrowing to exclude over time with their interpretations of the ADA.
22. Id.
23. Id.
Times are tough for all of us, students and professionals alike. A quick glance at the American Bar Association’s Economic Recovery Resources (ABAERR) page reveals the mix of issues all of us face now and in the future. For students, there is growing concern that pursuing a juris doctorate is a significant financial risk and some schools are perpetuating that risk by the way they report graduate statistics. The first two resources on the ABAERR’s page, after the feature, are “Job Search/Networking” and “Career Transitioning” — sort of disheartening isn’t it?

But if law school has taught us nothing else, it has taught us how to make a mountain out of a molehill. And in this time of economic ill, application of that same skill will help all of us come out better on the other end. In this article, I relay my experiences during law school as an example of just what is possible and the benefits that result.

Perhaps the moral of my story could be simply stated as “seek and conquer.” The point is actually quite simple: take care not only to recognize what is set before you, but go out and get more. I started law school a nervous 1L – who didn’t? But I endeavored to take chances. I determined not to wait for opportunities to find me; I went looking for them.

First, take advantage of the many networking opportunities offered by your law school and by the bench and bar. Numbers of my classmates and I decided to take part in the mentor program organized by Washburn’s Professional Development Office. I also took the opportunity early in law school to observe oral arguments before the Kansas Supreme Court and also to see live arguments held in Washburn’s Robinson Courtroom. As a result of these programs, I had the opportunity to meet Justice Marla Luckert. I have also been participating as a student member of the Sam A. Crow American Inn of Court, a local chapter of the American Inns of Court.

As for opportunities to serve the bar, I was elected to the Washburn Law Student Bar Association Executive Council as ABA representative, which has enabled me to serve in many different ways for three semesters now. I also decided to join the ABA during my 1L year – a $25 per year investment. But I didn’t just join; I sought to get involved by applying to be a lieutenant governor in the ABA Law Student Division. In that capacity, I represented Kansas’ voice to the law student division governor for Kansas, Oklahoma, and Arkansas. I also attended the ABA Annual Meeting in Chicago, where I met attorneys and other law student leaders from around the country. Based on those positive experiences, I decided to stay involved in the ABA, and ran for election to the board of governors for the Law Student Division. I presently hold that position, which has already taken me to New Orleans, San Francisco, and Houston and allowed me to meet nationally recognized attorneys and begin my legal career with contacts nationwide.

Second, enroll in experiential learning courses, such as clinic or externships. For example, along with many of my classmates, I spent my first summer as an extern. At the recommendation of a local lawyer, I sought a judicial externship with the Shawnee County District Court. That summer externship grew into another semester externship, and now I work there part time. Skills courses and intramural teams are also excellent ways to obtain practical experience, even during the tryout process itself. For example, I compete as a member of Washburn Law’s Moot Court Council, even winning an award during tryouts for the brief I wrote.

Third, volunteer your time. I took up the charge to volunteer my time in a legally relevant and educational forum — the Topeka/Shawnee County Youth Court. Through the program, I have been able to interact with local high school students who act as lawyers for the Youth Court, many of which have inclinations of one day joining the legal profession, and with judges and lawyer volunteers who work with the program, including Shawnee County’s Judge David Bruns. I also decided to volunteer to judge at the undergraduate mock trial regional tournament hosted by Washburn each spring. In so doing, I have had the opportunity to meet a number of local attorneys.

So, I have tooted my horn more than is reasonably comfortable, but I believe that there is a method to my madness. Life is what you make it. Despite fears about the legal profession and that law school may not be a good investment, attorneys continue to make that investment because they are adjusting and taking advantage of the opportunities available to them. When I am trying to sell the ABA to students, I often find myself telling them that membership will be as great or as little as they want it to be. Law school is no different. I firmly believe that you get out of life what you are willing to put into it. And if you enhance your life by volunteering your time, serving others, and taking chances to test yourself, you will imbue immense value into your life, as well as your juris doctorate.

**About the Author**

Shawn P. Yancy is a third-year law student at Washburn University School of Law, and graduated from Bob Jones University with a Bachelor of Arts in pre-law studies. Yancy currently serves on the ABA Law Student Division board of governors and as Washburn Law’s ABA representative. He is also working as a law clerk for the judges of Shawnee County.

**FOOTNOTES**

3. You can get acquainted with the ABA Law Student Division’s Tenth Circuit by visiting www.abanet.org/lsd/10thcircuit/home.html.
4. For information about the Youth Court, visit http://www.topekayouthproject.org/youthcourt.html.
Inspired genius seems the exception these days. Recent history is brimming with examples of bad ideas. See, e.g., KU season ticket point system.

Every once in awhile, however, someone stumbles onto an idea that represents a gift from the gods. And one need only go to a recent column in the November 14, 2010, New York Times for inspiration.

Times reporter Douglas Quenqua introduces it with the observation that “it is the second biggest fear of flying: sitting next to a screaming, kicking, uncontrollable child. Particularly if that child isn’t yours.” He continued: “Now, travelers without children are doing some fussing of their own. Some are calling for airlines to implement child-free flights, or designate ‘family-only’ sections on planes, in the wake of some high-profile tantrums.” Children-Free flights! Nobel Peace Prize anyone?

Most of us have our own story, but none probably rival those described in Quenqua’s column. Consider this one – the airline Qantas recently settled a suit from a woman who claimed hearing loss after sitting next to a screaming 3-year-old brat from New York to Australia. Or this one – Airtran removed an entire family from a flight because their 3-year-old was smacking the parents. Or this – in March of this year a 42-year-old woman grabbed a 3-year-old for kicking her chair during a Southwest flight to Las Vegas.

I know that kid. He flew next to me on a Southwest flight to Baltimore a couple of years ago. The batteries on his DS died, and he went postal. Meanwhile his mom had taken a pill and passed out, leaving Satan Jr. for others to deal with. I should have strangled him on the spot. It would have saved that poor woman on her flight to Las Vegas.

Like most brilliant ideas, this one has a few yammering critics. One concern is that separating passengers based on age is a “slippery slope.” Does anyone really want to be forced to sit in the obese-only section? I see no issues here.

Think all this talk is crazy? Maybe this will surprise you (and if it does, welcome back from Mars) but airline travel is the most segregated culture in the world. Where classes/stigmas remain, indeed are promoted, yet no one bats an eye.

You start with the rich people and the poor people, e.g., first and coach. Among the beggars, you have subdivisions, e.g., boarding by zones. Low-numbered zones are good and reflect an earlier boarding, meaning you get the best carry-on space. Zones 8, 9, and 10 mean your seat is somewhere on the wing.

The TSA has jumped in too – clearing security has a shortcut – those people who skip ahead of you in line. Frequent travelers get to check bags early and often free. The elite get special status codes – they have special names – Executive Club, Sky Priority Elite Platinum, Blue Diamond Club, Elite Status. Don’t belong? You have your own name: loser.

(Continued on next page)
There is no attempt to disguise it for what it is – the important people and the little people. You and me.

Airports embrace this. There are rooms set aside for smokers, like they have some kind of disease. Bathrooms for toddlers and families that don’t reflect a crime zone like the ones left for, well, you and me.

Quenqena’s column got the bloggers chattering both on the Times’ website and others:

• The problem is getting much worse, primarily because a large subset of Gen X/Y parents (not everyone) does nothing to control their children’s poor behavior in public and think they have no responsibility to others.

• This certainly isn’t unique to air travel. At a local coffee shop, I saw a toddler drag a trash can noisily across the floor, block the door to the entrance, then when that didn’t get him enough attention, try to shatter the door by slamming the trash can repeatedly against the glass – all within feet of his parents who did nothing.

• At least when you are eating you can leave. That’s impossible in an airplane, short of using a parachute. Although with some of the Gen X/Y parents and children next to you, that escape is tempting.

• I want an old people free flight, getting up three to four times or more to go pee ... Let me buy a flight that only allows 30 to 45-year-old men on business and I will be happy. Oh and make sure we ban alcohol, also the handicapped, oh please, why do they get to board first I paid for the first-class ticket. It’s all about me after all and anything that interferes with me on this flight should not be allowed to go.

• I definitely think that there should be child-free flights, and I would certainly be willing to pay for them, especially on long, overnight flights. My husband and I are retired, and we own a home in Maui, and the return flights are almost always overnight. We started booking first-class seats a few years ago, for the extra room and yes, to get away from all the restless, crying children, and guess what, there are still babies in first class. Last year we paid three times as much as a coach seat to have a toddler kick my husband’s seat for three hours. No one complains about child-free resorts or cruises, where adults can go alone, so why not on planes.

• How much “world” do your kids need to see and explore? What is wrong with kids growing up to be let’s say 15 years old and then let them explore the world? Two-year-old kids do NOT need to fly from North America to the Middle East or Far East spending more than 10 hours in an airplane in order to “see and explore the world.”

• I say h*** yes to child-free flights. The last time I was on an airplane was quite possibly the worst moment of my life ... On an 11-hour flight to Spain, had a little brat constantly kicking the back of my chair the whole flight! Literally, he did not stop! And he kicked really freaking hard. I even turned around at one point and peered over my chair to give him a piece of my mind and the mom had the audacity to flip out on me!

So allow me to join the short list for Nobel Peace Prize status. The airlines should have one flight for kids and their parents. It should be early in the morning, when the Ritalin is still circulating. That flight would precede a flight for trade show sales guys. They can all speak in a loud voice on their phones. There are more options – flights for people who watch movies and play games but won’t let others, like me, poach on their computer screen. That is just the beginning.

Let me know when I need to be in Stockholm. I’m taking a boat.

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon since 1985.
Development of Plan for Voluntary Certification of Associate KBA Paralegal Members

By Cheryl L. Clark, ACP, Task Force Chair, KBA Paralegal Committee

This is an exciting time for paralegals in the state of Kansas. For years there has been significant growth in the paralegal profession as a career choice. Many paralegals have obtained either an associate or bachelor’s degree in paralegal studies and have gone on to obtain a national certification designation, such as certified legal assistant or registered paralegal. Many colleges and universities across the country are now offering four-year bachelor’s degree programs in paralegal studies. Washburn University in Topeka is the first to do so in Kansas. Since 1991, The Kansas Bar Association (KBA) has offered paralegals associate memberships.

Along with this growth, there is concern in the profession that anyone can call themselves a paralegal or legal assistant without formal education or training. Application of this terminology to certain persons may be misleading. Several states are looking into state certification in order to define the role and services of these individuals. The most recent states to implement state certification are Florida, North Carolina, and Ohio.

Since 1978, the KBA Paralegal (previously Legal Assistants) Committee has worked hard to make its presence known, including the development of the “Official Standards and Guidelines for the Utilization of Paralegals in Kansas.” The committee promotes making the publication available to paralegals and associate attorneys when they are hired; copies of this publication are available through the KBA. It works behind the scenes to keep up to date on what is happening in the profession and to look at issues that impact the profession.

State certification is the foremost issue at this time. At the September 2006 Board of Governors (BOG/Board) meeting, representatives from the committee requested approval to form a task force to study voluntary state certification of paralegals in Kansas and create a proposed plan for certification. The Board approved formation of the task force, consisting of practicing attorneys, paralegals, and paralegal educators from all parts of the state, having different backgrounds, qualifications, and interests, all of whom are members of the committee.

The task force met several times and developed a “Proposed Plan for KBA Voluntary Certification of Paralegals.” Under the plan, an individual would need to meet educational and training requirements in order to apply for certification. After successful completion of the screening process, the applicant would need to pass a written examination. The examination would be developed and administered by a Paralegal Certification Committee, consisting of qualified volunteer paralegals. If the applicant passes the examination, they would be awarded paralegal certification by the KBA. The certified paralegal would then have to fulfill annual continuing paralegal education requirements and would have to periodically renew the certification.

This program would be self-funded through the collection of fees and KBA staff involvement would be kept to a minimum. A Paralegal Certification Board would oversee the certification process administered by the Paralegal Certification Committee. It is contemplated that the Board would be established and appointed by the Kansas Supreme Court.

Certification under this program would be entirely voluntary and those who elect to become certified would set themselves apart from noncertified paralegals or nonlawyer employees in a law office or other legal setting. It would provide an incentive for paralegals to meet the educational and training requirements for initial state certification and obtain continuing education to maintain the certification.

State certification in Kansas would serve to (1) develop and maintain professionalism among paralegals, and help promote the delivery of high quality legal services in Kansas; (2) promote education, training, and high ethical standards among paralegals; (3) distinguish certified paralegals from other legal staff and provide employers with an objective measure of experience and accomplishment; and (4) increase associate membership in the KBA, generating revenue. In that regard, in order to become certified, a paralegal would have to be an associate member of the KBA.

In February 2008, two members of the task force presented the proposed plan to the BOG. The Board approved the plan in principle and directed the task force to work out the details. In April 2009, these members of the task force met with the Kansas Supreme Court and presented the proposed plan with supporting documentation for review and answered questions from the justices. Justice Carol Beier has since agreed to be the liaison between the Supreme Court and the KBA Certification Task Force. The task force is currently working on submitting additional requested materials to the KBA executive director and to Justice Beier for further consideration.

The purpose of this article is to inform KBA members of these developments as the KBA joins other state bar associations in addressing voluntary certification of paralegals. If you have questions about this, you may direct them to Cheryl Clark at cclark@fleeson.com (task force chair) or Mike Kennalley at mkennalley@stinson.com and your questions or comments will be shared with the members of the KBA Task Force. The KBA is excited about this opportunity to serve our profession and looks forward to the challenges ahead.

About the Author

Cheryl Clark, ACP, Fleeson, Gooing, Coulson & Kitch LLC, has a combined 30 years of experience in the legal field. She obtained her Associates of Applied Science degree in legal assistant studies from Hutchinson Community College in 1990, her certified legal assistant designation in 1993, and her advanced certified paralegal designation in 2006 from the National Association of Legal Assistants. She is a past chair and current member of the KBA Paralegal Committee, past president of the Kansas Association of Legal Assistants, and a past member of the Certifying Board for the National Association of Legal Assistants.
Members in the News

CHANGING POSITIONS

Todd S. Abplanalp has formed Consumer Law KC LLC, Lee’s Summit, Mo.
Stacia G. Boden has joined Mission Group of Kansas Inc./Wright Career College, Wichita.
Shari A. Boppart has joined First American Title, Overland Park, Kan.
Rachelle R. Breckenridge, Rachel N. Parr, and Jonathan D. Stokes have joined Foulston Siefken LLP, Wichita.
Michael J. Burbach has joined Boston Options Exchange Group LLC, Overland Park, Kan.
Katherine S. Clevenger has joined Cordell & Cordell, Overland Park, Kan.
Jaskamal P. Dhillon has joined Garcia & Antosh LLP, Dodge City.
Nathan R. Elliott has joined Withers Gough Pike Pfaff & Peterson LLC, Wichita.
Samuel A. Green and Marc N. Middleton have joined Fisher Patterson Sayler & Smith LLP, Overland Park, Kan., as associates.
Jennifer L. Haaga has joined the Kansas Court of Appeals, Topeka, as a research attorney for Hon. G. Gordon Atcheson.
Nathan R. Hoffman has joined Depew Gillen Rathbun & McInteer L.C., Wichita.
Kimberly A. Honeycutt has joined Polsinelli Shughart P.C., Kansas City, Mo.
Jennifer N. Horchem has joined Deines & Deines Law Firm, Wakeeny.
Brett A. Jarmer has joined Kauffman & Eye, Topeka.
Amber H. Jeffers has joined the Kansas City Missouri School District, Kansas City, Mo.
Jared B. Johnson has been appointed as district judge for the 28th Judicial District, Salina.
Leah E. Kraft has joined Bryan Cave LLP, Kansas City, Mo.
Chad W. Lamer has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo.
Timothy J. Langland has joined Amerco Financial Life and Annuity Insurance Co., Kansas City, Mo., as in-house counsel.
Brett D. Legvold has joined Martin Pringle Oliver Wallace & Bauer LLP, Wichita.
Stephanie Lovett-Bowman has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo.
Darlin L. McCollum and Aaron R. Sauerwein have joined Hinkle Elkouri Law Firm LLC, Wichita, as associates.
Margaret P. Mahoney is now assistant Logan County attorney, Oakley.
Lauren M. Marino and Matthew J. Wengert have joined Wallace Saunders Austin Brown & Enochs Chtd., Overland Park.
Amelia J. McIntyre has joined the Office of the City Attorney, Kansas City, Mo.
Ryan K. Meyer has become a law clerk for Hon. J. Thomas Marten, Wichita.
Douglas L. Miller has joined Mariner Real Estate Management LLC, Leawood.
Juliani Morland has joined Kansas Legal Services, Garden City.
Andrea J. Morrow has joined Husch Blackwell LLP, Kansas City, Mo.
Ashley N. Mulcahy has joined South & Associates, Wichita.
Kathryn M. O’Shea has joined Hasty & Associates LLC, Overland Park.
Andrea K. Ohlman is now an assistant county attorney for Saline County, Salina.
Matthew J. Olson has joined Stinson, Lasswell & Wilson L.C., Wichita.
Mindy J. Olson has joined Paulson Electric, Cedar Rapids, Iowa.
Tyler I. Page has joined Gay, Riordan, Fincher, Munson & Sinclair P.A., Topeka.
Stephanie A. Ralston has joined the Johnson County District Court, Olathe, as a research attorney.
Aisha Reynolds has joined Sprint Nextel Corp., Overland Park.
Jason P. Romero and Megan W. Westberg have joined Stinson Morrison Hecker LLP, Kansas City, Mo., as associates.
Evan A. Rosell has joined Staffer Lombardo Shurin, Kansas City, Mo.
David R. Schapker has joined Evans & Mullinix P.A., Shawnee.
Erica A. Stief has joined the Johnson County District Attorney’s Office, Olathe.
Carl L. Wagner has joined Netspot Law Offices P.A., Wichita.
Matthew S. Walsh has joined Sprint Nextel Corp., Overland Park.

CHANGING LOCATIONS

David G.A. Becker has opened David G.A. Becker Attorney, 14701 E. 42nd St., Independence, MO 64055.
Burnett Evans Banks LLC is now located at 1114 W. Main St., Blue Springs, MO 64015

Kelli N. Cooper has opened Kelli Cooper, Attorney at Law, 201 E. Loula, Ste. 109, Olathe, KS 66061.
Russell W. Davison has moved to 200 N. Broadway, Ste. 320 Wichita, KS 67202.
John R. Dietrick, Creative Business Solutions, has moved to 1240 SW Oakley Ave., Topeka, KS 66604.
Paul E. Evans has started Burnett Evans Banks LLC, 1114 W. Main St., Blue Springs, MO 64015.
Gilliland & Hayes P.A. has opened an additional office at 320 Sunset, Ste. B, Manhattan, KS 66502.
William Grimshaw has moved to 201 N. Cherry, Olathe, KS 66051.
Hoffmeister, Doherty & Webb LLC has moved to 8880 W. 151st St., Ste. 100, Overland Park, KS 66221.
Johnston Ballweg & Tuley has moved to 9393 W. 110th St, Ste. 450, Overland Park, KS 66210.
Lentz Clark Deines P.A. has moved to 9290 Glenwood St., Overland Park, KS 66212.
William M. Mills III and Michael S. Smith are now at the new location of Trust Company of Kansas, 27 E. 30th Ave., Ste. B, Hutchinson, KS 67501.
Mark D. Molner has opened Mark D. Molner, Attorney, 4800 Rainbow Blvd., Ste. 6, Westwood, KS 66205.
Carl W. Quarnstrom has moved to 6021 SW 29th St, Ste. A, PMB 356, Topeka, KS 66614.
Sorense Law Firm LLC has moved to 9229 Ward Parkway, Ste. 370, Kansas City, MO 64114.

MISCELLANEOUS

Robert J. Watson, Overland Park, received the Charles S. Rhyne Lifetime Achievement Award from the International Municipal Lawyers Association.
Bruce B. Waugh, Overland Park, has become a Fellow in the American College of Civil Trial Mediators.
Holman Hansen & Colville P.C. has merged with Martin Pringle Oliver Wallace & Bauer LLP, Overland Park.

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

Edward Stiger Dunn
Edward Stiger Dunn, 75, of Holton, died June 17 at the Holton Community Hospital after a battle with cancer. He was born September 4, 1934, in Holton, the son of Edward S. and Zoe (O’Leary) Dunn. He graduated from Holton High School and then Kansas State University, where he played football. He later received his juris doctorate from the University of Kansas School of Law. Dunn was a member of the Kansas Bar Association, Rotary Club, Masonic Lodge, and Odd Fellows Club.
He is survived by his wife, Susan Gayle Heller, of the home; daughters, Alexandria Morrissey, of Wetmore, and Elizabeth Dunn, of the home; his son, Edward Dunn III, of Topeka; and two grandchildren. He was preceded in death by his half-sister, Kathryn Randle, and half-brother, Gordon Dunn.

Robert D. Gaines
Robert D. Gaines, 59, of Kansas City, Mo., died July 22. He was born May 27, 1951, in Kansas City, the son of Ralph and Betty Gaines and attended public schools in both Prairie Village and Phoenix. Gaines graduated with a bachelor’s degree in economics from the University of Arizona in 1972, a master’s of business administration from Michigan State University in 1973, and a juris doctorate, with honors, from the University of Missouri-Kansas City School of Law in 1983. While in law school, he served as business editor of the UMKC Law Review, a staff member of the Urban Lawyer, and was a member of the Phi Delta Phi legal fraternity.
Gaines was a partner with the Kansas City law firm of Krieg & Kriegel P.C., where he handled commercial litigation, personal injury, leasing and real estate matters, property and business insurance claims, business formations, valuations and projections, and bankruptcy litigation. He was a member of the Kansas, Missouri, Arizona, and Kansas City Metropolitan bar associations; and the Aircraft Owners and Pilots Association’s legal panel.
Survivors include his wife, Shanette Kirch, of the home; daughter, Ariel Kirch Gaines, of Chicago; stepson, Joseph Glanville III, of Lenexa; mother, Betty Gaines, of Kansas City, Mo.; sister, Karen Gaines, of Kansas City, Mo.; and a step-grandchild.

Kenneth Hunter Hiebsch
Kenneth Hunter Hiebsch, 89, of Wichita, died October 23. He was born June 14, 1921, on a farm outside Zenda. He graduated with a bachelor’s degree in social science from Southwestern College, Winfield, in 1943.
Hiebsch then attended officer training with the Navy at the University of Notre Dame, staying on after graduation to train other officers; he also served in the Philippines. He earned his law degree from the University of Kansas School of Law and practiced in civil law for 49 years in Wichita. In 2001, he was bestowed an honorary doctorate in law from Southwestern College. Hiebsch served on the board of trustees at Wesley Hospital and Southwestern College, as well as chair of the board at the college.
He is survived by his wife, Vena, of the home; four children, Clifton, Steve, Carl, and Marcia; 14 grandchildren; and 10 great-grandchildren.

Willis K. Musick
Willis K. Musick, 56, of Hays, died August 23, in Wichita. He was born March 8, 1954, in Emporia to William “Bill” and Marian (Lippoldt) Musick. He graduated from Fort Hays State University in 1976 and from Washburn University School of Law in 1980.
He began the practice of law in Seward County in 1980. He moved to Hays in 1983, where he served in the Ellis County Attorney’s Office for six years. He was engaged in the practice of law in Ellis County and western Kansas for 30 years.
Survivors include his wife, Micki Armstrong, of the home; son, Nathan J. Musick, of Hays; daughter, Saree E. Musick, of San Francisco; two sisters, Kala Musick, of Shawnee, and Marcia Nagle, of San Antonio; and many nieces and nephews.

Renew Your KBA Membership Today!
Why Should Lawyers Join a Section of the Kansas Bar Association?
By Glenn Braun, KBA president

How important is it to your practice of law to stay abreast of recent developments and trends in particular areas? Is networking with fellow attorneys something that would enhance your practice? Are there times you get frustrated and wish you could make suggestions to improve the administration of justice? Have you had the urge to improve the image and lives of lawyers? Have you asked yourself: “How can I make a difference in my chosen profession?”

If any of these questions have crossed your mind recently, I might suggest considering joining a section of the Kansas Bar Association. Belonging to a section gives an attorney opportunity to answer any one or all of the above questions affirmatively. Section membership is one of the easiest ways to impact not only your practice but the law and fellow lawyers. Involvement in a section has been known to open up opportunities for leadership positions, not only in the section, but in the offices of the Bar Association, which can provide professional fulfillment above and beyond the proverbial bottom line.

Find a lawyer who has been involved in one of the sections and ask them about their experience. I am sure you will find them speaking about the many rewards and sense of satisfaction they have experienced as a result of their participation. As pointed out by past president, Tom Wright, a couple of years ago when encouraging attorneys to join a section; “Try it, you’ll like it.” That pretty well says it all.

KBA Sections Seek Volunteers

The KBA relies heavily on members who volunteer their time, talent, and energy to the sections. The KBA has 23 sections that focus on specific practice areas and help develop legislative proposals and CLE offerings.

If you would like to be active in your section, please complete and submit the following form. You may photocopy it.

KBA Section Call Form

Please designate the section(s) to which you belong and are interested in serving as an officer or volunteer, e.g., to help with section newsletters, review legislation, develop CLE programming, etc. Please number your choice to indicate first, second, and third preferences.

( ) Administrative Law ( ) Criminal Law ( ) Litigation
( ) Agricultural Law ( ) Elder Law ( ) Oil, Gas & Mineral Law
( ) Alternate Dispute Resolution ( ) Employment Law ( ) Real Estate, Probate & Trust Law
( ) Appellate Practice ( ) Family Law ( ) Solo & Small Firm
( ) Bankruptcy & Insolvency Law ( ) Government Lawyers ( ) Tax Law
( ) Construction Law ( ) Health Law ( ) Young Lawyers
( ) Corporate Counsel ( ) Insurance Law

Name __________________________________________ Telephone __________________________
Address __________________________________________ KBA/Court # ______________________
City ___________ State ______ Zip Code __________ E-mail ______________________________

Please return by March 11, 2011, to:

KBA Member Services Director
1200 SW Harrison St.
Topeka, KS 66612-1806
Fax (785) 234-3813
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our continuing legal education seminars for September through December 2010. Your commitment and invaluable contribution is truly appreciated.

(Continued on next page)
Nancy A. Ogle, Ogle Law Office LLC, Wichita
Timothy P. O’Sullivan, Foulston Siefkin LLP, Wichita
David D. Oxenford, Davis Wright Tremaine LLP, Washington, D.C.
Dan C. Peare, Hinkle Elkouri Law Firm LLC, Wichita
Prof. David E. Pierce, Washburn University School of Law, Topeka
Jo Ellen Powers, Career Law Clerk for Chief U.S. District Judge Fernando J. Gaitan Jr., Kansas City, Mo.
Bradley J. Prochaska, Prochaska Giroux & Howell, Wichita
William E. “Bill” Quick, Polsinelli Shughart P.C., Kansas City, Mo.
David M. Rapp, Hinkle Elkouri Law Firm LLC, Wichita
Prof. Jesse J. Richardson Jr., Virginia Tech, Blacksburg, Va.
Cody G. Robertson, Goodell Stratton Edmonds & Palmer LLP, Topeka
Mark E. Rosch, Internet for Lawyers, Rio Rancho, N.M.
Prof. David S. Rubenstein, Washburn University School of Law, Topeka
Alan L. Rupe, Kutak Rock LLP, Wichita
Todd W. Ruskamp, Shook Hardy & Bacon LLP, Kansas City, Mo.
Sara Rust-Martin, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Larry R. Rute, Associates in Dispute Resolution LLC, Topeka
Marc A. Salle, Polsinelli Shughart P.C., Kansas City, Mo.
Erin D. Schilling, Polsinelli Shughart P.C., Kansas City, Mo.
Sen. Derek Schmidt, Kansas Legislature, Topeka
Hon. Robert J. Schmisser, State of Kansas District Court, 30th District, Pratt
Linda S. Schroeder, Kansas City Federal Reserve Bank of Kansas City, Mo.
Laurel Klein Searles, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Amy M. Seymour, Career Law Clerk for the Hon. Judge Julie A. Robinson, Topeka
Ashley J. Shaneyfelt, Kutak Rock LLP, Wichita
Wesley F. “Wes” Smith, Stevens & Brand LLP, Lawrence
William W. Sneed, Polsinelli Shughart P.C., Topeka
Jeff C. Spahn Jr., Morris Laing Evans Brock & Kennedy Chtd., Wichita
Dennis J. Stanchik, Dennis J. Stanchik P.A., Olathe
Christian A. Stiegemeyer, The Bar Plan, St. Louis, Mo.
Julianne P. Story, Husch Blackwell LLP, Kansas City, Mo.
W. Thomas Stratton Jr., Kansas Corporation Commission, Topeka
Ann Swegle, Office of the District Attorney, 18th Judicial District, Wichita
Aaron Tax, Servicemembers Legal Defense Network, Washington, D.C.
Mike Theissen, Husch Blackwell LLP Kansas City, Mo.
Trisha A. Thelen, Foulston Siefkin LLP, Wichita
Art Thompson, Office of Judicial Administration, Topeka
Casey Tourtillott, Career Law Clerk for the Hon. Judge Carlos Murguia, Kansas City, Kan.
William P. Tretbar, Fleeson Gooing Coulson & Kitch LLC, Wichita
Ilona Turner, National Center for Lesbian Rights, San Francisco
Patrick A. Turner, Term Law Clerk for the Hon. Eric F. Melgren, Wichita
Glenda D. VanSyoc, Sloan Eisenbarth Glassman McEntire & Jarboe LLC, Topeka
Lyndon W. Vix, Fleeson Gooing Coulson & Kitch LLC, Wichita
Amanda S. Vogelsberg, Henson Mundrick & Gragson, Topeka
A. Scott Waddell, Waddell Law Firm LLC, Kansas City, Mo.
Catherine Moir Walberg, Kansas Medical Mutual Insurance Co., Topeka
Roger N. Walter, Morris Laing Evans Brock & Kennedy Chtd., Topeka
Dr. W. Lynn Watney, Kansas Geological Survey, University of Kansas, Lawrence
Lisa A. Weixelman, Polsinelli Shughart P.C., Kansas City, Mo.
Chris A. Wendlebo, Session Law Firm, Kansas City, Mo.
Gary C. West, Kansas Coalition Against Sexual and Domestic Violence, Topeka
Victoria R. Westerhaus, Stinson Morrison Hecker LLP, Kansas City, Mo.
Laurie B. Williams, Chapter 13 Bankruptcy Trustee, Wichita
John R. Wine Jr., Attorney at Law, Topeka
Steven I. Wolfe, Career Law Clerk for the Hon. Ortie D. Smith, Kansas City, Mo.
Kathy Wood, Kansas Coalition Against Sexual and Domestic Violence, Topeka

Don’t miss a single issue of The Journal
Renew your MEMBERSHIP today!
Law Practice Management Tips & Tricks

Social Media and the Legal Profession

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, kspm@larryzimmerman.com

Are Lawyers Anti-Social?

There are many legitimate reasons to avoid Facebook, Twitter, and similar social media sites. Pick just about any continuing legal education seminar on the topic where a judge or the disciplinary administrator’s office is speaking and they will regale you with the horror stories. Befriending a judge on Facebook is apparently a no-no (Florida, JEAC 2009-20) and opposing counsel happily snoop around your clients’ pages for impeachment material (New York, Opinion 843). The few commentators favoring lawyers participating in social media tend to see it as a billboard for advertising but now the Kentucky Bar Association wants to regulate that too (for a $75 fee). No doubt there are issues lawyers should consider, but there are compelling reasons to become connected to social media.

Social Media is Huge

If you have not followed its rise, it might surprise you to discover that Facebook has more than 500 million users. Were it a country, it would be the fifth largest nation in the world. Facebook is more than a single nation, however. Seventy percent of its users are outside the U.S. logging into the site in one of 65 officially-supported languages. Facebook has risen so dramatically that it is taking on Google’s Gmail, a hugely popular e-mail service. Some pundits are even predicting that Gmail’s days are numbered.

Twitter, another much younger giant of the social networking world released its 2010 statistics showing more than 75 million visitors per month (one third of those from the U.S.) with more than 50 million messages sent per day. Its meteoric rise shows traffic to the site increasing some 1,100 percent in its first year. At last check, alexa.com found Twitter as the 11th most frequented site in the world. Facebook sits at number two behind Google with yet another social networking giant, Youtube, coming in third. In fact, at least one-half of the top 10 Internet sites are now some form of social media. Social media is big – really, really big.

Online Phenomena – Real World Effect

Who cares, right? Why not just dismiss Facebook and Twitter et al. as silly fads? Even if that proves to be true, social media is active in the real world. For example, candidates in the November elections turned to social media in an unprecedented wave and early results show that House candidates with the most followers on Facebook and Twitter won in over 70 percent of their elections (it was more than 80 percent for Senate candidates). In other political news, Twitter users managed to scoop the Wikileaks release of 250,000 top secret diplomatic cables. Social media influence is more than political, however; after Conan O’Brien was sent packing with $45 million by NBC, his fans united on Facebook and Twitter. Conan successfully rode that wave right into a new multimillion-dollar contract with TBS.

Why on earth would lawyers not want to be engaged in such a complex social experiment like social media? We often lament there are not enough lawyers in the legislatures to help direct and shape policy. Perhaps the same lamentation should go up about lawyers participating in social media. The statistics show that more than 200 million people log onto Facebook every day and yet the subtle message to lawyers is to confine our involvement to spamming those folks with ads, stalking them for data, or leave them alone altogether. We really ought to have better notions of how to “… play a vital role in the preservation of society” (KRPC, Preamble 13).

Risk It

At bare minimum, lawyers ought to participate in social media because our clients do and it has profound impact on their lives. Divorce attorneys probably saw it first; surveys of attorneys in the United States and United Kingdom indicate that as many as one in five divorces are related to an extramarital affair that started on Facebook. Merely gathering knowledge to advise clients should be too timid to please lawyers though. Social media is a vibrant public square where policy issues are trumpeted (follow Sarah Palin’s Twitter feed if you doubt this). Lawyers should be weighing in rather than caving in to fears about the new medium. There are surely risks, but lawyers train in risk assessment and are well-equipped for legal, policy, and moral discussion in the social media sphere as attorneys and, where appropriate, we even ought to give counsel.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
U.S. Sen.-elect Jerry Moran, R-Kan., was elected to serve as a U.S. senator for Kansas in November 2010. Prior to his election to the U.S. Senate, Moran served seven terms in the U.S. House of Representatives as the representative for the First Congressional District of Kansas. Prior to his election to Congress, he served eight years in the Kansas Senate, spending the last two years as majority leader.

Previously, Moran practiced law at Stinson, Mag & Fizzell Law Firm in Kansas City, and later joined Jeter & Larson Law Firm in Hays, where he practiced law for 15 years.

Moran received his juris doctorate from the University of Kansas School of Law in 1982 and was elected to the Order of the Coif. Moran earned an economics degree from the University of Kansas in 1976.

Moran is a senior governor of the KU Law Alumni Board of Governors and previously served as president. Moran is also a member of the Kansas Bar Association.

In Hays, Moran volunteers his time at several community organizations. He serves as a trustee of the Eisenhower Foundation, serves on the board of trustees of the Fort Hays State University Foundation, is an honorary member to the Special Olympics Kansas, and serves on the executive committee of the Coronado Area Council of the Boy Scouts of America.

Sen. Terry Bruce, R-Hutchinson, was first elected to the Kansas Senate in 2004, and again in 2008 representing the 34th District. He serves on the Agriculture, Judiciary, Natural Resources, and Utilities committees. He is also a member of the Corrections and Juvenile Justice Oversight and Special Claims Against the State joint committees. He is the chairperson of the Joint Legislative Post Audit Committee.

Bruce is counsel with the Hutchinson law firm of Forker, Suter & Rose LLC, where he practices business law, appellate practice, trusts, wills, and bankruptcy. He earned his bachelor’s degree in political science from Fort Hays State University in 1997 and his juris doctorate from the University of Kansas School of Law in 2000. After his graduation from law school, Bruce served as assistant district attorney for Reno County, spending more than three years in the district attorney’s office. During the 2004 legislative session, he worked for House Majority Leader Clay Aurand, R-Courtland, as his communications director.

Bruce was appointed to the City of Hutchinson Human Relations Commission and the City of Hutchinson Sales Tax Advisory Board. He has also taught law courses part time at Hutchinson Community College.

Sen. Jay Emler, R-Lindsborg, began his first term in the Kansas Senate in January 2001 and represents the 35th District. He currently serves as chair of the Ways and Means, and the joint committees on Kansas Security and Legislative Budget. He is also a member of the Business & Labor, Commerce, and Utilities committees; the Pensions, Investments and Benefits; and State Building Construction joint committees; and the Special Committee on Legislative Streamlining.

He earned his bachelor’s degree from Bethany College, law degree from the University of Denver College of Law, and a master’s degree from the Naval Postgraduate School, Monterey, Calif.

Emler is a volunteer emergency medical technician, chairman of the Lindsborg Chapter of the McPherson County March of Dimes and Kansas Judicial Council Municipal Court Manual Committee, a member of the board of directors and past president of the Lindsborg Community Hospital Board, a member of the Kansas Supreme Court Municipal Judge Testing and Education Committee, past chairman of the Emergency Medical Services Council, and past director of the Lindsborg Volunteer Ambulance Corps.

He was in private practice for 17 years, a municipal judge of Lindsborg for more than 16 years, and spent 10 years as the chief legal officer of Kansas Cellular.

Sen. David Haley, D-Kansas City, Kan., will begin serving his 17th year in the Kansas Legislature. He has served six years in the House of Representatives and 10 years in the Senate. Haley represents the Senate’s 4th District, which covers most of Kansas City in Wyandotte County.

He is the ranking Democratic member of the Senate Judiciary and Public Health and Welfare committees. He is also a mem-
ber of the Senate Redistricting Committee, and the Kansas Sentencing Commission. Haley is a member of the DUI Commission, the Adult Interstate Offender Commission, the joint committees on State Tribal Affairs, Health Policy Authority, Oversight Corrections and Juvenile Justice and served on the Criminal Recodification Committee. He is also a member of the Joint Committee on Corrections and Juvenile Justice. His service includes having served on the Senate Taxation Committee, the President’s Task Force on Health Care and the Child Protective Services Task Force.

Haley’s community board affiliations include the Turner House Children’s Clinic, a Wyandotte County Women’s Domestic Violence Shelter, and the Area Vocational Training School, as well as the Alliance on Aging. He is the prime sponsor of more than 40 pieces of legislation and nine Kansas laws.

His legal career in Kansas began at the firm of McDowell, Rice & Smith prior to becoming a Wyandotte County district attorney.

Haley is a graduate of both Morehouse College, Atlanta, and Howard University Law School, Washington, D.C. Haley’s father, George, who was the first black elected to serve in the Kansas Senate, and sister, Anne, are both attorneys.

Sen. Thomas “Tim” Owens, R-Overland Park, was elected to his first term in the Kansas Senate, representing the 8th District, in 2008. Prior to the Senate, Owens served seven years as a state representative for the 19th District in the Kansas House of Representatives.

Owens currently serves as chair of the Senate Judiciary Committee and the Parole Board Oversight and Special Claims Against the State joint committees. He is also a member of the Confirmation Oversight, Education, Federal and State Affairs committees, and the Corrections and Juvenile Justice Oversight joint committees.

Owens is a graduate of Kansas State University, with a degree in political science and earned his juris doctorate from Washburn University School of Law in 1974. Upon being admitted to the bar, he was employed by Employers Reinsurance Corp. in Kansas City, Mo., and by the city of Overland Park. Owens then became partner in the firm of McAulay, Owens, Heyl & Kincaid for 10 years before becoming general counsel for the Kansas Department of Social and Rehabilitation Services, where he served from 1988 until his return to private practice in 1991.

Owens is currently a solo practitioner in Overland Park and is a member of the Kansas and Johnson County bar associations. He is a retired colonel from the U.S. Army Reserve, a Vietnam veteran, and a graduate of the U.S. Army’s Command and General Staff College. Owens is also an adjunct professor of political science at Johnson County Community College.

Sen. John Vratil, R-Leawood, represents the 11th District and is currently serving as Senate vice president. He serves as vice chairperson on the Education and Ways and Means committees. He also serves as a member on the Interstate Cooperation, Judiciary, Organization, Calendar and Rules; Legislative Educational Planning, Budget, committees; the Parole Board Oversight and State-Tribal Relations joint committees; and the Redistricting Advisory Group.

Vratil was first appointed to the Kansas Senate in 1998, to fill a vacancy created by a resignation. He was elected to the seat in 2000, 2004, and 2008. He also serves on the Kansas Sentencing Commission.

He is a partner with Lathrop & Gage L.C. in Overland Park, focusing on commercial, business, appellate, real estate, and education law.

Vratil received his bachelor’s and law degrees from the University of Kansas, and studied at the University of Southamp- ton, England, on a Rotary Foundation Fellowship. He is a past president of the Kansas Bar Association and Kansas Bar Foundation, and he received the Outstanding Service Award from the Johnson County Bar Association in 1984. He has been president of the Overland Park Chamber of Commerce and a board member of the Shawnee Mission Medical Center Foundation.

Rep. J. Robert “Bob” Brookens was elected to the Kansas House of Representatives in 2008 and for a second term in 2010. He represents the 70th District, which encompasses Chase and Marion counties and the cities of Cassoday and Elbing in Butler County; and the townships of Chelsea, Clifford, Lincoln, Prospect, Rosalia, Sycamore; and Fairmount.

He serves on the Corrections and Juvenile Justice, Education, and Judiciary committees.

Brookens is a member of the Kansas Bar Association and past president of the Marion County Bar Association.

He attended the University of Kansas and earned a Bachelor of Music Education in 1972. He taught music through 1975 and then attended Washburn University School of Law graduating cum laude in May 1978. He has practiced in Marion since that time.
Rep.-elect Rob Bruchman, R-Overland Park, received his undergraduate degree from the University of Kansas in 2001 and his Juris Doctor from the University of Kansas in 2004. He received the CALI award for excellence in Contracts II and was named Spears Scholar for Academic Achievement. Bruchman was a member of the University of Kansas Honors Program and was named an ambassador for the University of Kansas.

Prior to founding The Bruchman Law Firm LLC, he worked at a large law firm in Kansas City in the business department. During law school, he served as a law clerk for the U.S. Attorney’s Office.

Rep. Pat Colloton, R-Leawood, is serving her fourth term in the Kansas House Representative from the 28th District. She currently serves as chair of the Corrections and Juvenile Justice Oversight Committee; as vice chair of the Joint Juvenile Justice Oversight and Parole Board Oversight committees; and is a member of the Judiciary Committee.

Colloton graduated from the University of Wisconsin School of Law and has undergraduate degrees in chemistry and psychology. She worked as a research organic chemist for Eli Lilly before attending law school. She has practiced law in several jurisdictions. She is a member of the Kansas, New York, Massachusetts, Illinois, and Wisconsin bar associations.

She serves on the Counsel of State Government’s National Public Safety and Justice Task Force, their Legal Task Force, and as an executive committee member of the Board of the Justice Center that assists states with public policy and legislation on corrections and juvenile justice issues.

Most recently, Colloton’s law practice has related to school law and charitable foundations. For her first 10 years of law practice, she was a litigator with a large law firm; subsequently, she has been a solo practitioner, representing clients on a wide variety of issues.

She is active in school organizations, several charitable foundations, the Leawood Chamber of Commerce, and the Leawood Rotary. She previously served on the Leawood Planning Commission.

Rep. Paul Davis, D-Lawrence, is serving his fifth term in the Kansas House of Representatives, representing the 46th District in Lawrence. He is the House Democratic Leader.

He serves as ranking minority member of the Legislative Budget Committee and serves as a member of the Calendar and Printing, Insurance, Interstate Cooperation, and Legislative Coordinating Council committees.

Davis is a partner with the law firm of Fagan Emert & Davis LLC, Lawrence. Prior to serving with the Kansas Legislature, Davis was the legislative and ethics counsel for the Kansas Bar Association. He also previously served as assistant director for government affairs for former Kansas Insurance Commissioner Kathleen Sebelius. Davis holds a bachelor’s degree in political science from the University of Kansas and a juris doctorate from the Washburn University School of Law.

He is active in the Lawrence community, having served on the board of directors of the Health Care Access Clinic and the Arc of Douglas County, and the City of Lawrence Housing Trust Fund Advisory Board.

Davis has been active in both the Kansas and American bar associations.

Rep. Aaron Jack, R-Andover, is beginning his second term in the Kansas House and represents the 99th District, which encompasses East Wichita and Andover. He is a member of the Commerce and Labor, Health and Human Services, Judiciary committees.

He began his consulting career in the financial services industry 10 years ago as a wholesaler for Jackson National Life Distributors Inc. While residing in Santa Monica, Calif., he consulted with more than 400 financial planners as a brokerage manager. After Jackson National, Jack joined New York Life, working five years as part of the Individual Annuity Department.

Currently, Jack resides in Andover. He is a member of the Federalist Society, National Rifle Association, Kansas Bar Association, and the National Association of Insurance and Financial Advisors.

Jack received his bachelor’s degree from the University of Kansas in 1998, master’s degree from Friends University in 2007, and a Juris Doctor from Washburn University School of Law.

He co-authored a book on personal finance with Derek Woods of Denver.
Rep. Jeff King, R-Independence, is serving his third term in the Kansas House representing the 12th District, which includes parts of Montgomery, Elk, and Chautauqua counties.

He is vice chair of the Taxation Committee; serves on the Judiciary and Transportation committees and the Special Claims Against the State Joint Committee.

King practices with King Law Offices LLC in Independence in the areas of appellate, business, and trust litigation.

He received his juris doctorate from Yale University, 2002, Master of Philosophy (MPhil) in European studies, 1999, and MPhil in land economy (agricultural economics), 1998, from Cambridge University, and Bachelor of Arts, magna cum laude, in 1997 from Brown University. King is admitted to practice law in Kansas and Missouri and before the U.S. District Court for the District of Kansas, the U.S. District Court for the Western District of Missouri, the U.S. Court of Appeals for the 6th, 8th, 9th, and 10th circuits, and the U.S. Supreme Court. He served as a law clerk for Chief Judge Deanell Tacha, U.S. Court of Appeals, 10th Circuit.

He is a member of the American, Kansas, and American Agricultural Law bar associations and is a graduate of Leadership Kansas, 2003. He serves on the Board of the National Agricultural Center and Hall of Fame.

Rep. Lance Kinzer, R-Olathe, represents the 14th District. He is serving his fourth term and is chairperson of the Judiciary Committee. He also serves on the Corrections and Juvenile Justice, Rules, and Journal committees.

Kinzer received his bachelor’s degree at Wheaton College in Wheaton, Ill., and his juris doctorate at the University of Kansas School of Law. After graduating, he served four years on active duty as a captain with the Army JAG Corps.

Kinzer is currently a member of the Olathe firm Schlagel Gordon and Kinzer LLC, where he has a civil litigation practice.

Kinzer is the former chairman of the Olathe Republican Party and is a member of the Olathe Noon Rotary. He was admitted to the Kansas bar in 1995 and is also licensed to practice in Missouri. He is a member of the Johnson County and Kansas bar associations.

Rep. Michael R. “Mike” O’Neal, R-Hutchinson, is serving his third term as chairperson of the Legislative Coordinating Council and the Redistricting Advisory Group and is vice chairperson of the Calendar Printing Committee. He is a member of the Interstate Cooperation and Legislative Budget committees and the Parole Board Oversight joint committee.

O’Neal is a member of the Kansas Judicial Council and the National Conference of Commissioners on Uniform State Laws. He also serves on the Law and Justice Committee of the National Conference of State Legislatures and Council of State Governments.

He is a member of the Kansas Bar and Kansas Trial Lawyers associations and the Kansas Association of Defense Counsel. O’Neal is a shareholder in the firm of Gilliland and Hayes P.A., Hutchinson.

Rep. Joe Patton, R-Topeka, is serving his third term as representative for the 54th District. He has been appointed vice chair of the Corrections and Juvenile Justice Committee.

A 1977 graduate of Washburn University School of Law, he is founder and senior partner of the firm Patton and Patton Chtd., Topeka. His areas of practice include civil litigation, workers’ compensation, and auto insurance claims.

Patton is active in the Topeka community. He currently serves on the advisory board of Safe Streets, organizing neighborhoods for the prevention of violent crime. Patton is a past president of the organization. He is a member of the Kansas Bar Association and is a Kansas Elder Law Hotline volunteer. He is also member of National Federation of Independent Business, The Voice of Small Business, Topeka Independent Business Association, and the Mayor’s Crime and Safety Committee.
Rep. Janice Pauls, D-Hutchinson, represents the 102nd House District in Reno County. She has served in the Kansas House of Representatives since 1991.

She is the ranking minority member of the Judiciary committee; vice chairperson of the Judiciary committee; and a member of the Corrections and Juvenile Justice and Administrative Rules and Regulations committees.

Pauls, a former district court judge and prosecutor, is a graduate of the University of Kansas School of Law. She is now in private practice in Hutchinson. Pauls is a member of the Kansas Sentencing Commission and is on the Law and Justice Committee of the National Conference of Legislatures. Pauls also serves on the Kansas Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee.

Rep. Michael J. “Mike” Peterson, D-Kansas City, Kan., represents the 37th House District. He served in this position from 1979 to 1990 after he had been appointed to replace the former representative for the district who had resigned. Peterson was elected to the position in 2004.

He serves as the ranking democrat on Federal and State Affairs Committee and is a member of the Elections and Local Government committees, as well as the Redistricting Advisory Group.

Peterson practices law in the Kansas City area and is also the publisher of the Wyandotte Echo, which is the official newspaper for the Wyandotte County Unified Government and the official court paper of the District Court of Wyandotte County.

Rep. James J. “Jim” Ward, D-Wichita, represents the 88th House District. He has served in this position since 2002. Previously, he had been appointed to fill a vacancy in the Kansas Senate during 1992.

Ward is the ranking minority member on the Calendar and Printing Committee and is a member of the Health and Human Services, Interstate Cooperation, Judiciary, and Legislative Budget committees. He is also a member of the Corrections and Juvenile Justice Oversight and Health Policy Oversight joint committees.

He has been in private practice with the firm of Ward & Batt LLC, Wichita, since 1990. He previously served as an assistant district attorney for the 18th Judicial District and as the city prosecutor for the City of Wichita.

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Matthew S. Gough – “A Valuable New Development Resource: Kansas Enacts the Community Improvement District Act” – (February)
William E. “Bill” Quick and Amy Hornbeck Abrams – “Disclosure Obligations of Kansas Private Nonprofit Organizations” (March)
Kathryn Gardner – “Paradigm Shifts in Search and Suppression Law” – (April)
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Daniel E. Lawrence and Stephen E. Robison – “Introducing the Kansas False Claims Act: A Primer” (October)
William Pitsenberger – “What Health Care Reform Means to Your Client” (November/December)
Unraveling the Negotiator’s Ethical Paradox

By David Rubenstein, Washburn University School of Law, david.rubenstein@washburn.edu

The Problem

To what extent may a lawyer ethically mislead an adversary in negotiations? The question unveils an ostensible paradox for negotiating lawyers: On the one hand, lawyers should represent their clients’ interests “zealously”; on the other, lawyers are generally obligated to be “truthful” toward others. If strategic success for a client demands some degree of deception toward opposing counsel, how can a lawyer fulfill the dual ethical ideals of client loyalty and truth to others? In some ways, she cannot – thus the paradox. But a partial solution (if it may be called that) comes from unraveling traditional notions of zeal and truth.

Unraveling Zeal

Although often regarded as an ethical axiom, zealous representation is not required by the black letter of the Kansas Rules of Professional Conduct (Rules). Rather, references to zeal are found only in the nonbinding preamble and comments to the Rules. And even then, it is a qualified zeal.

In particular, the comments to Rule 1.3 note that “[a] lawyer should act with commitment and dedication to the interests of the client and with zeal in advocacy upon the client’s behalf.” In the immediately following comment, however, zeal is qualified by the admonition that “a lawyer is not bound to press for every advantage that might be realized for a client.” Similarly, the preamble to the Rules notes that “[a]s advocate, a lawyer zealously asserts the client’s position under the rules of the adversary system.” That is, zealous representation for a client is limited by the lawyer’s other professional obligations. Most pertinent here, the preamble specifically states that “[a] negotiator, a lawyer seeks a result advantageous to the client but consistent with requirements of honest dealing with others.” (emphasis added)

Unraveling Truth (Out-of-Court)

Like zeal, truthfulness is a qualified concept under the Rules. Kansas Rule 4.1(a) provides that a lawyer “shall not” knowingly “make a false statement of law or fact to a tribunal. And, whereas Rule 3.3 also explains:

But may the lawyer falsely state in an out-of-court settlement negotiation her client’s present intention that her client will not settle for a penny less than $10,000, when she knows her client ultimately would accept much less? “Yes”, according to Rule 4.1, comment 1:

Whether a particular statement should be regarded as one of fact can depend on the circumstances. Under generally accepted conventions in negotiation, certain types of statements ordinarily are not taken as statements of material fact. Estimates of price or value placed on the subject of a transaction and a party’s intentions as to an acceptable settlement of a claim are in this category ... .

Ultimately, context matters. In negotiating with third parties it is generally not a misrepresentation – at least not a material one – to “puff” (e.g., “our case is rock solid”) or “bluff” (e.g., “my client won’t take a penny less ...”). Why are these falsehoods not material? The answer is as debatable as it is simple: we do not expect lawyers on the receiving end to believe them.

Negotiations Before a Tribunal (The Whole Truth and Nothing But …)

In contrast to out-of-court negotiations with third parties, a lawyer’s duty of candor to a judge is unqualified. Specifically, Kansas Rule 3.3(a) provides that a “lawyer shall not” knowingly “make a false statement of law or fact to a tribunal.” Nothing in the rule or comments limits the obligation of candor in settlement conferences before a judge. And, whereas Rule 4.1(a) prohibits only material falsehoods, Rule 3.3(a) contains no (express) limitation for materiality. Comment 2 to Rule 3.3 also explains:

A lawyer acting as an advocate in an adjudicative proceeding has an obligation to present the client’s case with persuasive force. Performance of that duty while maintaining confidences of the client, however, is qualified by the advocate’s duty of candor to the tribunal.

Thus, bluffing a judge is not permitted. Any tension between the duty of candor and zeal is severed at its source: context.

Footnotes

1. The Kansas Rules of Professional Conduct defines “tribunal” as “a court, an arbitrator in a binding arbitration proceeding or a legislative body, administrative agency or other body acting in an adjudicative capacity ...” (emphasis added). See KRPC 1.0(a).

2. Cf. ABA Formal Op. 93-370 (1993) (explaining that it is improper for a judge to ask a party what their settlement limit is; but that if a judge asks, the lawyer should decline to answer and must not lie).

(Continued on Page 41)
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GARCETTI v. CEBALLOS
AND THE ALTERED LANDSCAPE
OF THE FIRST AMENDMENT
FREE SPEECH CLAIMS
By Michael Jilka
I. Introduction

In the popular imagination, Los Angeles District Attorney Gil Garcetti will be forever linked to his unsuccessful double homicide prosecution against O.J. Simpson. But Garcetti’s impact on the law will more likely be associated with a landmark 2006 U.S. Supreme Court decision that altered the law surrounding First Amendment free speech claims. The *Garcetti v. Ceballos* case holds that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes and enjoy no constitutional protection. In so holding, the Court truncated the scope of the constitutional protection afforded to free speech claims.

In 2002, the *Journal of the Kansas Bar Association* published my article entitled “Free Speech Rights of Public Employees.” Unlike manufactured products, articles may not be recalled after subsequent events render them defective. *Garcetti* has “profoundly altered how courts view First Amendment retaliation claims” and added a new layer of complexity to First Amendment free speech claims. This article seeks to explain *Garcetti* and its major impact upon First Amendment jurisprudence.

II. Garcetti Alters the Test for Free Speech Claims

Prior to *Garcetti*, a series of Supreme Court cases had developed a four-pronged test to analyze First Amendment free speech claims. A court deciding such a claim asked: (1) Did the public employee speak as a citizen on a matter of public concern? (2) If the employee spoke as a citizen on a matter of public concern, did the individual’s speech interest outweigh the government’s interest in efficient administration? (3) If the individual’s speech interest outweighed the government’s interest, did the government commit a retaliatory employment action because of the employee’s speech? (4) Even if the government retaliated against the employee’s speech, would the government have taken the same action if the speech had not occurred? The first two prongs were questions of law for the Court to decide, while the latter two prongs were questions of fact. It was against this backdrop that the *Garcetti* case arose.

Richard Ceballos was a deputy district attorney in the Los Angeles District Attorney’s Office. He was a calendar deputy and exercised certain supervisory responsibilities over other lawyers. In February 2000, a defense attorney contacted Ceballos about a pending criminal case. He told Ceballos that an affidavit used to obtain a critical search warrant contained inaccuracies.

Ceballos examined the affidavit and visited the location it described. He determined the affidavit contained serious misrepresentations. The affidavit referred to a long driveway that Ceballos thought should be referred to as a separate roadway. Ceballos also questioned the affidavit’s statement that tire tracks led from a stripped-down truck to the premises covered by the warrant.

Ceballos spoke on the telephone to the warrant affiant, a deputy sheriff, but did not receive a satisfactory explanation for the perceived inaccuracies. Ceballos then relayed his findings to his two supervisors. He followed up by preparing a disposition memorandum on March 2, 2000. The memorandum explained his concerns and recommended dismissal of the case. A few days later, Ceballos submitted another memo to his supervisor describing a second telephone conversation between himself and the warrant affiant.

A meeting ensued between Ceballos, his supervisors, the warrant affiant, and other sheriff’s department employees. Temper flared at the meeting. A sheriff’s department lieutenant sharply criticized Ceballos for his handling of the case. The supervisors decided to continue the prosecution. The defense filed a motion to challenge the warrant and called Ceballos to recount his observations about the affidavit. The trial court ultimately rejected the challenge to the warrant.

In the aftermath of these events, Ceballos claimed he was subjected to a series of retaliatory employment actions. He was reassigned from his calendar deputy position and denied a promotion. Ceballos then filed a lawsuit in federal court alleging he had been retaliated against based on his March 2 memo. The district court granted Garcetti’s summary judgment motion. The court reasoned that Ceballos wrote the memo pursuant to his employment duties, and was therefore not entitled to First Amendment protection. The Ninth Circuit reversed and held that “Ceballos’ allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.” The Supreme Court granted certiorari and reversed.

The Court first canvassed its prior employee-speech case law. Those cases sought to balance and protect both the individual and societal interests that are served when employees speak as citizens on matters of public concern, as well as the needs of government employers attempting to perform their important public functions. Turning to Ceballos’ case, the Court emphasized that Ceballos’ expressions were made pursuant to his duties as a calendar deputy. That consideration distinguished Ceballos’ case from those in which the First Amendment shielded the employee from discipline. The Court formulated a new threshold rule to govern free speech claims: “We hold that when public employees make statements pursuant to their official duties, the employees are not entitled to First Amendment protection. The Ninth Circuit reversed and held that “Ceballos’ allegations of wrongdoing in the memorandum constitute protected speech under the First Amendment.” The Supreme Court granted certiorari and reversed.

The Court reasoned that “[r]estricting speech that owes its existence to a public employee’s professional responsibilities does not infringe any liberties the employee might have

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FOOTNOTES
8. Id.
enjoyed as a private citizen. It simply reflects the exercise of employer control over what the employer itself commissioned or created. The majority’s new rule would deny constitutional protection to the public auditor who speaks on his discovery of embezzlement of public funds, to the building inspector who makes an obligatory report of an attempt to bribe him, or to the law enforcement officer who expressly balks at a superior’s order to violate constitutional rights he is sworn to protect. The dissent took the position that the interests in addressing official wrongdoing and threats to health and safety can outweigh the government’s stake in the efficient implementation of policy. The dissent argued that the Pickering balancing scheme was feasible to handle such claims and did not warrant adoption of the majority’s new rule.

Garcetti does not provide a comprehensive framework for defining the scope of an employee’s official duties. The task has been left to lower courts to flesh out the contours of Garcetti’s holding. In the wake of Garcetti, the Tenth Circuit has interpreted the “pursuant to official duties” holding broadly, thus limiting the scope of public employees’ First Amendment rights.

III. Tenth Circuit Interpretations of Garcetti

The Tenth Circuit has handed down a series of decisions construing Garcetti in the past four years. The Tenth Circuit’s first foray into the Garcetti thicket came in Green v. Bd. of County Comm’rs. In Green, the plaintiff worked as a drug lab technician and detention officer in a juvenile detention facility (Center). Her primary duties were in the drug lab. Green became concerned that the Center did not have a confirmatory testing policy, and she raised her concerns with her direct supervisor and Judge Miller. Neither person was responsive to Green’s concerns. In the summer of 2003, Green suspected that a particular drug test had yielded a false positive. Without contacting her supervisors, Green arranged for a confirmation test at a local hospital. She also informed Department of Human Services representatives about her suspicions. The confirmation test indicated that the test result was indeed a false positive. Green communicated this information to her supervisor. The Center thereafter adopted a formal confirmation testing policy.

Green alleged that her supervisors retaliated against her. They transferred her out of the drug lab and demoted her. Green was subsequently fired. She then filed suit under 42 U.S.C. § 1983, alleging that her termination was in retaliation for her speech.

9. Id. at 421-22.
10. Id. at 422.
11. Id.
12. Id.
13. Id. at 423.
14. Id. at 424.
15. Id.
17. Garcetti, 547 U.S. at 425.
18. Id.
19. Id. at 433.
20. See, e.g., Rohrbough v. Univ. of Colorado Hosp. Auth., 596 F.3d 741 (10th Cir. 2010).
21. Green v. Bd. of Cnty Comm’rs, 472 F.3d at 794 (10th Cir. 2007).
The Tenth Circuit stated that in light of Garcetti, the crux of its inquiry was whether Green’s activities in arranging for a confirmation test were pursuant to her duties as a drug lab technician. After surveying the approaches taken by the Seventh, Ninth, and Eleventh circuits to the issue of the scope of an employee’s official duties, the court determined what speech and conduct was at issue. The court identified four specific communications, particularly Green’s conversations with her supervisors prior to the confirmation test incident. Next, the court examined Green’s job description, cognizant of Garcetti’s directive that a formal job description “is neither necessary nor sufficient to demonstrate that conducting the task is within the scope of the employee’s professional duties for First Amendment purposes.” Those duties required Green to “work closely” with drug lab clients, the equipment manufacturer, and various governmental agencies.

The court stated that Green’s speech and conduct could be viewed in either one of two ways. On the one hand, Green had the responsibility for collecting samples, testing them, and making sure the tests were as accurate as possible. According to this view, by making arrangements for the confirmation test without consulting her supervisors, Green decided to ignore her supervisors’ instruction and was therefore subject to discipline. On the other hand, Green was not a policymaker and her job responsibilities focused on the logistics of taking tests. Under this view, Green was acting outside the boundaries of her day-to-day responsibilities by arranging for the confirmation test to underline the validity of her previously expressed concerns.

The court concluded that the former view was mandated by Garcetti. Green was not communicating with newspapers or her legislators or engaging in similar activity. Instead, her activities stemmed from and were the type of activities she was paid to do. Her job duties included ensuring that the testing machines were working correctly, and it was also part of her job to interact with her supervisors, clients, and third parties regarding testing policies and issues. Green’s disagreement with her supervisors’ assessment of the need for a formal testing policy, as well as her unauthorized procurement of a confirmation test to prove her point, invoked Garcetti’s admonition that public employees have no First Amendment right to perform their jobs however they see fit. In affirming the district court’s entry of summary judgment in favor of the defendants, the Tenth Circuit held that an employee’s on-the-job speech falls within Garcetti’s “pursuant to official duties” holding if the speech is generally consistent with the type of activities the employee is paid to do.

Three weeks later, the Tenth Circuit handled another decision construing Garcetti’s holding. In Casey v. West Las Vegas Independent School District, Barbara Casey alleged she was demoted and later terminated in retaliation for exercising her First Amendment rights. Casey was a school superintendent. As part of her responsibilities, she served as the chief executive officer of the district’s Head Start program. Casey learned that as many as 50 percent of the families enrolled in Head Start had incomes that were too high to qualify for participation. Casey notified school board members and was told “not to worry about it, to leave it alone, or not to go there.” Casey was concerned that she had a legal duty to report the wrongdoing to federal officials, and she instructed her subordinate, District Head Start Director Jacqueline Padilla, to relay her finding to the Head Start regional office. The U.S. Department of Health and Human Services eventually determined that certain enrollments in the Head Start program were improper and ordered the school district to repay more than $500,000.

Casey, a former state legislator, also informed the school district board (Board) that it was violating the New Mexico Open Meetings Act by making personnel and other decisions in executive session without proper notice and meeting agendas. When the defendants ignored her warnings, Casey filed a written complaint with the New Mexico attorney general’s office. The attorney general’s office reviewed the matter and later determined that the Board had in fact violated the Open Meetings Act and ordered corrective action.

The district court denied the Board’s motion for qualified immunity. The Board filed an interlocutory appeal, during the pendency of which the Supreme Court handed down Garcetti. The Tenth Circuit noted that in light of Garcetti, it was obliged to ask whether Casey’s expressions were made in her capacity as a citizen and not pursuant to her “official duties.”

The court divided Casey’s statements regarding the Head Start program into two categories. The first category were those statements directed to the school board conveying her concerns about the district’s lack of compliance with Head Start regulations. The court concluded that Garcetti barred any First Amendment claim based on those statements. The comments were directed only to Casey’s supervisors and sought to raise concerns about the legality of the district’s operations. Due to the fact that advising her employer on “the lawful and proper way to conduct school business” was admittedly part of Casey’s job description, the court concluded that Casey made these statements pursuant to her official duties.

22. Id. at 798.
23. Mills v. City of Evansville, 452 F.3d 646 (7th Cir. 2006).
24. Freitag v. Ayers, 468 F.3d 528 (9th Cir. 2006).
26. (1) Communication with the client regarding how to obtain a confirmation test, (2) communication with the testing equipment manufacturer about a confirmation test, (3) communication with another individual to ensure chain of custody for the sample to be used in the confirmation test, and (4) communication with defendants regarding the confirmation test’s determination of a false positive.
27. Green, 472 F.3d at 800.
28. Id.
29. Id.
30. Id.
31. Id. at 801.
32. Id.
33. Casey v. West Las Vegas Indep. Sch. Dist., 473 F.3d 1323 (10th Cir. 2007).
34. Id. at 1326.
35. Id. at 1328.
36. Id. at 1329.
37. Id.
The court also analyzed whether Casey’s instruction to Padilla, her subordinate, to contact federal authorities and convey her concerns about the legality of the district’s Head Start operations, merited First Amendment protection. The court framed the issue as whether, in doing so, Casey used Padilla as her agent to engage in protected whistleblowing, or whether Casey acted pursuant to her official duties in ordering a subordinate to report the district’s regulatory noncompliance.38

The court found that Casey was acting pursuant to her official duties.39 The court first looked to the Black’s Law Dictionary definition, which defines “pursuant to” to mean “in compliance with; in accordance with.”40 With that definition in hand, the court deemed it undisputed that Casey was designated by the Board as the CEO and the person primarily responsible for the administration of the Head Start program. Her responsibilities included acting pursuant to, or in compliance with, certain federal regulations. Persons in Casey’s position who remained silent in the face of such irregularities risked civil and criminal liability. Casey further conceded that her order to Padilla was aimed at “fixing the problem before it got worse.” Those facts suggested, in the court’s eyes, not ultras pires conduct, but an individual striving diligently to fulfill a federal regulatory obligation imposed on her by virtue of the office she held. Thus, the court held that Casey could not meet her burden to avoid the heavy barrier erected by the Supreme Court in Garcetti.41

With respect to Casey’s statements concerning the Open Meetings Act violation, the court first determined that Casey’s statements directed to the Board were not protected under Garcetti. The court placed significance on the fact that the statements were made solely to Casey’s superiors, and that Casey, as superintendent, had a duty to provide candid advice and counsel to the Board, as would any corporate CEO to their board of directors.42

Casey’s statements to the New Mexico attorney general, on the other hand, were another kettle of fish. Casey was not seeking to fulfill her responsibility of advising the Board. In fact, she was doing just the opposite. She went to the attorney general because she had lost faith that the Board would listen to her advice. And unlike the administration of the Head Start program, which the Board had committed to her care and responsibility, Casey did not have any responsibility to oversee the Board’s compliance with the Open Meetings Act. Thus, the court concluded that Casey’s statements to the attorney general’s office were sufficiently outside the scope of her office to survive Garcetti.43

Six months after handing down Casey, the Tenth Circuit revisited the Garcetti holding in Brummer-Hoelter v. Twin Peaks Charter Academy44 (Academy). In Brummer-Hoelter, a group of teachers at a charter school became concerned about the “operation, management, and mission” of the school. They held meetings, off-campus and after hours, at restaurants, in each others’ homes, and at a church to discuss their concerns. The school superintendent, Dr. Dorothy Marlatt, issued a series of directives ordering the teachers not to talk about school issues outside of work with anyone, including other teachers. The meetings continued. The teachers later expressed their concerns and grievances to the Academy’s board. Shortly thereafter, the teachers received poor performance reviews. The teachers ultimately resigned and filed § 1983 claims alleging they had been retaliated against for exercising their First Amendment rights. The district court held that the matters discussed by the teachers were not matters of public concern and that the teachers had failed to show an adverse employment action as a result of their speech.

The Tenth Circuit stated that cases interpreting Garcetti have made clear that speech relating to tasks within an employee’s uncontested employment responsibilities is not protected from regulation.45 This may be true even though the speech concerns an unusual aspect of an employee’s job that is not part of his or her everyday functions. Under this formulation, the court found that nearly all of the matters the teachers claimed they discussed were pursuant to their duties as teachers. For example, the teachers alleged that they discussed the Academy’s expectations regarding student behavior. But as teachers, the plaintiffs were expected to regulate their students’ behavior. In a similar vein, the teachers discussed the Academy’s curriculum and pedagogy. The court noted that as teachers, the plaintiffs were paid to execute the Academy’s curriculum and utilize an effective pedagogy. These complaints, in other words, concerned the plaintiffs’ inherent duty as teachers and were made pursuant to the plaintiffs’ official duties.46

The court found that plaintiffs’ speech concerning some of the matters fell outside the scope of Garcetti. Those matters included (1) the resignations of other teachers; (2) whether the Academy Code of Conduct could restrict plaintiffs’ freedom of speech; (3) staffing levels; (4) the Academy’s spending on teacher salaries and bonuses; (5) criticisms of the school board; (6) the visibility of Marlatt and the Board at important events; (7) the lack of support, trust, feedback, and communication with Marlatt; (8) Marlatt’s restrictions on speech and association; (9) the treatment of parents by the Board; (10) Marlatt’s favoritism; (11) whether the Academy charter would be renewed; and (12) the upcoming Board elections.47 The teachers had no supervisory responsibility and no duty to report with regard to any of the problems being discussed. In addition, the plaintiffs’ discussion of the matters occurred after hours and outside the Academy, taking the statements outside the ambit of their official duties.

The Tenth Circuit recently held that a plaintiff’s speech at a banquet was made pursuant to her official duties. In Chavez-Rodriguez v. City of Santa Fe,48 the plaintiff served as the di-

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38. Id.
39. Id. at 1331.
40. Id. at 1330.
41. Id. at 1331.
42. Id. at 1332.
43. Id. at 1332-33.
44. Brummer-Hoelter v. Twin Peaks Charter Acad., 492 F.3d 1192 (10th Cir. 2007).
45. Id. at 1203.
46. Id. at 1204.
47. Id.
48. Chavez-Rodriguez v. City of Santa Fe, 596 F.3d 708 (10th Cir. 2010).
rector of the City of Santa Fe’s Division of Senior Services (Division). The Division provided meals, transportation, and health care services to elderly persons. The Division held a banquet to honor senior volunteers, and the plaintiff attended in her role as director and gave opening remarks. The plaintiff sat at the head table with Ben Lujan, the speaker of the New Mexico House of Representatives. During the banquet, the plaintiff had a conversation with Lujan in which she expressed concern about the effect of budget cuts on the Division. The plaintiff claimed that she was later retaliated against due to her comments to Lujan.

The court determined that the plaintiff’s speech was made pursuant to her official duties. The speech occurred at an event sponsored by the Division, was held during work hours, and the plaintiff attended in her capacity as director. Lujan also attended in his capacity as house speaker. Thus, both participants to the conversation were present at the banquet by virtue of their governmental roles.

In addition, the court found that the content of the speech strongly suggested that the plaintiff was communicating with Lujan pursuant to her employment duties. The court characterized the speech as more akin to a work discussion between two public officials than small talk at a party.

The limit of Garcetti’s holding is illustrated in the Tenth Circuit’s recent decision in Thomas v. City of Blanchard. Thomas was fired from his job as building code inspector for the city of Blanchard, Okla. (City), after he discovered a signed and completed certificate of occupancy in the city clerk’s office for a home constructed by a builder, who also happened to be the mayor. Thomas had not yet made the final inspection of the home or approved issuance of the certificate. Thomas responded by storming into a meeting at city hall to inform the city manager and his supervisor that the certificate for the mayor’s house was false. An acrimonious exchange ensued. Thomas ripped up the document handed to him by the city manager. Thomas later shouted at the city clerk and demanded that she hand over to him all of the blank pre-signed certificates. Thomas threatened to report the matter to the Oklahoma State Bureau of Investigation (OSBI) and subsequently followed through on his threat. Thomas was terminated the following week. He sued the city, the city manager, and his supervisor, claiming he had been fired for exercising his First Amendment rights. Thomas’ complaint alleged that in making his report to the OSBI, he was not “fulfilling any requirement of his job nor acting pursuant to a directive imposed by his job description, assigned duties, or a directive from a supervising official.” The district court ruled that Thomas’ speech was not protected by the First Amendment because it was made pursuant to his official duties. The Tenth Circuit reversed.

The defendants argued on appeal that Thomas’ speech, including his decision to take the matter to the OSBI, “was about the type of work and responsibilities of his work at the City.” Thomas was in charge of housing inspection, and he was aware that the certificate for the mayor’s house was fraudulent only because of his official duties as a housing inspector. Further, the fact that a false certificate had been prepared would be relevant to Thomas’ job performance. Thomas would be expected to report such events to his superiors.

On the one hand, the court noted that the fact that it was not expressly Thomas’ duty to report to the OSBI was not dispositive on whether he was acting “pursuant” to his duties. On the other hand, the court recognized that denying constitutional protection to every public employee who discovers alleged wrongdoing related to his job and brings it to the attention of law enforcement or other outside parties was untenable. Thomas’ actions went beyond his official responsibilities, and no one could say he was “commissioned” by the City to report suspected wrongdoing to the OSBI.

The court looked to its decision in Casey v. West Las Vegas Indep. Sch. Dist., to draw the line between “official” and “unofficial” duties. The court compared Thomas’ decision to report what he believed to be illegal activity to the OSBI to the plaintiff’s report to the New Mexico Attorney General’s Office in Casey about potential Open Meetings Act violations. Casey’s speech became protected when she went outside her chain of command about a matter, which was not committed to her care. In a similar manner, Thomas’ speech triggered constitutional protection when he went beyond complaining to his supervisor and instead threatened to report to the OSBI, an agency outside his chain of command.

The court proceeded to analyze whether Thomas had an underlying legal obligation, arising from his official position, to report the suspected wrongdoing. In Casey, the court emphasized that as the director of a federally funded program, the plaintiff would have been subject to civil and criminal liability by “remaining silent” in the face of her knowledge of Head Start violations. This fact was relevant to determining whether reporting that fraud was pursuant to her official duties. In contrast, Thomas was employed by the city, not the state. He was not given “primary responsibility” for ensuring that allegedly fraudulent certificates were subject to criminal investigation or prosecution. The court rejected the notion that a public employee’s official job duties should always encompass a duty to report fraud.

I[t] cannot be the case that a criminal liability statute aimed at every public official should somehow become part of every public official’s job description. That would effectively make the obligation to report and seek the prosecution of fraud part of every employee’s job.

Following Garcetti, the Tenth Circuit has generally identified two factors that suggest that an employee was speaking as a private citizen rather than pursuant to his or her job responsibilities: (1) the employee’s job responsibilities did not relate

49. Id. at 714
50. Id.
51. Thomas v. City of Blanchard, 548 F.3d 1317 (10th Cir. 2008).
52. Id. at 1323-24.
53. Id. at 1324.
54. Id.
55. Id. at 1324-25.
56. Id. at 1325.
57. Id. at 1326.
to reporting wrongdoing and (2) the employee went outside the chain of command when reporting the wrongdoing. At least in the Tenth Circuit, *Garcetti* raises the bar for a plaintiff to make the threshold showing that they speak as a citizen, not an employee. In so doing, it sounds a note of caution to whistle-blowers who seek to expose government corruption, sleaze, and wrongdoing.

### III. Is Law Enforcement Testimony Rendered Pursuant to Official Duties?

*Garcetti* denies constitutional protection to speech that occurs pursuant to official duties. Police officers regularly give testimony about events that occur in the course of their duties. This suggests that such testimony might fall within the scope of *Garcetti*. Under this view, police officers who, for example, give testimony that paints their superiors in a negative light or points out official corruption would enjoy no constitutional protection in the event they face retaliation for their testimony. That possibility poses a dilemma for police officers and creates an incentive for officers to lie to protect their job.

The Third Circuit examined this problem and held that an officer’s truthful trial testimony arising out of the officer’s official responsibilities constitutes protected speech. In *Reilly v. City of Atlantic City*, the plaintiff, an Atlantic City police officer, assisted a state investigation of a fellow officer and testified at the subsequent trial. Reilly was later suspended and demoted. He claimed those actions were taken in retaliation for his testimony.

The court emphasized that the duty to testify has long been recognized as a basic obligation that every citizen owes the government. That obligation is necessary to protect the integrity of the judicial process and to insulate that process from outside pressure. The act of offering truthful testimony is the responsibility of every citizen, and the First Amendment protection associated with fulfilling that duty is not vitiated by a person’s status as a public employee. In the court’s view, the fact that Reilly’s official responsibilities provided the impetus to appear in court was immaterial to his independent obligation to testify truthfully.

While police officers may be protected from adverse employment action for their testimony, the same cannot be said for officers’ internal reports of corruption against their superiors. Consider the plight of the officers in *Morales v. City of Milwaukee*. In that case, two police officers were demoted after informing an assistant district attorney about allegations that the Deputy Police Chief Monica Ray harbored her brother, Vincent Ray, who was wanted on felony drug charges. The Seventh Circuit reversed an $85,000 judgment in favor of the officers, finding that their speech was made pursuant to their official duties.

The officers offered three reasons to distinguish their case from *Garcetti*. First, they argued their statements were not part of their official duties because they occurred after Ray’s arrest. The court rejected the argument and noted that the officers admitted that their duties included “processing arrest through the district attorney’s office, requesting the district attorney’s office for advice on certain methods to utilize on investigations, and completing it through the court system, whether it be a trial or through guilty pleas.”

Second, the officers claimed that the chief of police ended his own internal investigation, and determined that the officers’ discussion with a witness did not pose a threat to the investigation, prior to their speech. In the officers’ view, this fact demonstrated that the officers’ official duties concluded as soon as they arrested Ray. The court disagreed, noting that the officers’ official duties continued after a suspect’s arrest. Further, the chief of police’s own investigation had no bearing on whether the officers’ speech was made pursuant to their official duties.

Finally, the officers argued they were unsure of how to handle allegations made by a witness, and therefore their speech was not made pursuant to their official duties. The court dismissed that argument, stating the officers’ confusion did not indicate that they were not acting pursuant to their official duties as police officers.

The court reasoned that a police officer’s conversation with a prosecutor to discuss and review an arrest report was made pursuant to official duties. A police officer has a duty to assist prosecutors in the proper presentation of charges by providing them with the arrest reports and the details of the investigation. The speech in question concerned a case that Morales was assigned to investigate. Thus, his conversation with the prosecutor was not protected under *Garcetti*.

### IV. Internal Complaints vs. External Complaints

In *Casey*, the plaintiff’s speech to the New Mexico Attorney General’s Office about violation of the New Mexico Open Meetings Act was constitutionally protected, while her speech to members of the Board was not. While an employee’s decision to go outside the ordinary chain of command does not necessarily insulate the speech, *Casey*’s holding suggests that whistle-blowers stand a better chance of surviving *Garcetti* when they complain externally, rather than internally. A pair of recent decisions from other circuits highlight this view.

In *Charles v. Grief*, Charles was a systems analyst with the Texas Lottery Commission (Commission). He sent an e-mail to high-ranking Commission officials raising concerns about racial discrimination and retaliation against him and other minority employees. When he received no response, he sent

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60. *Id.*
61. *Id.*
62. *Morales v. City of Milwaukee*, 494 F.3d 590 (7th Cir. 2007).
63. *Id.* at 579.
64. *Casey*, 473 F.3d at 1232-33.
65. Some commentators have noted that *Garcetti* gives public employees an incentive to raise complaints to other organizations or to the media rather than communicate them to their superiors. Sarah F. Suma, *Uncertainty and Loss in the Free Speech Rights of Public Employees Under Garcetti v. Ceballos*, 83 CHI.-KENT L. REV. 369, 389 (2008); Elizabeth M. Ellis, *Garcetti v. Ceballos: Public Employees Left to Decide "Your Conscience or Your Job,"* 41 IND. L. REV. 187, 209-10 (2008).
the e-mail to members of the Texas Legislature with oversight authority over the Commission. In addition, Charles sent an e-mail to those legislators alleging violations of the Texas Open Records Act, misuse of state funds, and other misconduct by Commission management. Charles was subsequently fired for insubordination.

On appeal, Grief argued that Charles’ free speech claim was foreclosed by Garcetti; because Charles’ speech was made in the context of his employment as a systems analyst for the Commission. The Fifth Circuit disagreed. The most significant factor, according to the court, was that Charles’ speech, unlike that of Ceballos in Garcetti, was not made in the course of performing his job responsibilities, was not even indirectly related to his job, and was not made to higher-ups in his organization, but was communicated directly to elected representatives of the people. Charles voiced his complaints externally, to Texas legislators who had oversight over the Commission, not internally, to supervisors.

In contrast, the Eleventh Circuit’s decision in Abdur-Rahman v. Walker suggests the pitfalls of complaining internally to one’s supervisors. The plaintiffs in Abdur-Rahman were water and sewer department compliance inspectors. Their supervisors instructed them to write an ordinance for the county about the disposal of fat, oil, and grease. Although that responsibility did not require the inspectors to review data about sanitary sewer overflows, the inspectors asked for that data. Their supervisors refused to provide the data and accused the plaintiffs of being “too scientific” and “too thorough.”

The department expanded the plaintiffs’ job duties a few months later and assigned them the task of “investigating [sanitary sewer overflows] ... to determine whether grease was the cause.” The plaintiffs then investigated two sewer overflows, and reported that those overflows “were not being properly reported” to state authorities and not cordoned off as required by state and federal law. Shortly thereafter, the plaintiffs were fired.

The court held that the plaintiffs’ speech was not protected, citing Garcetti. The plaintiffs’ reports about sewer overflows concerned information they requested and investigations they conducted for the purpose of fulfilling their assigned job duties. Their reports could therefore not be divorced from their job responsibilities. The court rejected as artificial the plaintiffs’ attempts to distinguish their responsibilities to determine the causes of sanitary sewer overflows from their reports about the bioremediation of overflows.

V. Conclusion

Garcetti has significantly restricted the scope of a public employee’s free speech rights. A district court adjudicating a free speech claim now applies a five-step framework: (1) whether the speech was made pursuant to an employee’s official duties; (2) whether the speech was on a matter of public concern; (3) whether the government’s interest, as employer, in promoting the efficiency of the public service is sufficient to outweigh the plaintiff’s free speech interests; (4) whether the protected speech was a motivating factor in the adverse employment decision; and (5) whether the defendant would have reached the same employment decision in the absence of the protected conduct. The first three steps are issues of law for the court to decide, while the latter two steps are ordinarily for the jury to decide.

About the Author


67. Id. at 514.
68. Id. (italics in original).
70. Id. at 1280.
71. Id. at 1283.
72. Id. at 1284.
73. Dixon v. Kirkpatrick, 553 F. 3d 1294, 1302 (10th Cir. 2009).
74. Rohrbough, 596 F. 3d at 745.
Uniform Common Interest Owners Bill of Rights Act Checklist

By Michael J. Davis, University of Kansas School of Law, Kansas Judicial Council Homeowners Association Advisory Committee

In the November/December 2010 issue of the Journal a short piece was published on new legislation establishing rights and obligations for owners and managers in Kansas common interest communities. The article covered some provisions of the Uniform Common Interest Owners Bill of Rights Act (the Act) and offered a few observations of its possible effects. This responding article offers some background on the development and passage of the Act, then guides you to a “checklist” of rights and obligations posted on the Kansas Judicial Council website.

The October piece implies that the Act came solely from the 2010 Kansas Legislature. It was, rather, the product of an intense and careful process that spanned several years. Both the 2008 and 2009 legislatures had considered proposals to regulate flashpoints of conflict between management and owners in Kansas home owners associations (HOAs). While nothing passed, the upshot was a June 2009, letter from the chair of the Kansas home owners associations (HOAs). While nothing passed, the upshot was a June 2009, letter from the chair of the Kansas House Local Government Committee (the Chair) to the Kansas Judicial Council (Council) asking it to review legislation on which the House had held hearings the previous term (HB 2553). The Chair requested the Council to evaluate the suitability of the legislation and, if necessary, look beyond that proposal to other legislative solutions. At its meeting that same month the Council appointed the Kansas Judicial Council Homeowners Association Advisory Committee (the Committee) to examine the issues raised by the Chair’s request. The Committee included a Kansas district judge, a state senator, a state representative (later appointed a state senator), a representative of the attorney general, a prominent real estate attorney, the president of a home owners association, an attorney/developer, the president of a real estate management company, the president of a title company, an activist homeowner in a troubled HOA, and the author of this article.

The Committee met four times between July and November 2009. It quickly decided that HB 2553 was neither comprehensive nor balanced enough to resolve fairly and efficiently the issues that had sparked initial interest in the subject. Ultimately, it decided to use the Act as the vehicle to fashion a broader recommendation. Aspects of the Act that attracted the Committee included its relative brevity, its comprehensive approach to management/owner issues, its fair and balanced treatment of those issues, and, particularly, the clarity of its provisions and consequent accessibility to nonlawyers. Attractiveness aside, however, the Committee spent its entire third meeting grinding line-by-line through the Act. The result was a uniform act with a clear Kansas flavor. Among other changes, the Committee: (1) added language stating the public purpose of the legislation; (2) rewrote completely the provision regarding retroactive applicability, (3) added the power to borrow money and pledge dues as collateral, (4) deleted the entire section on foreclosures, (5) re-wrote substantially the provisions for adopting budgets and assessments, and (6) materially altered the damages provision. That completed, at its last meeting the Committee unanimously voted to recommend the Act to the Legislature.

The Council also played a role in the legislative process. The council executive director followed the bill throughout its journey. The author testified twice before House committees and worked closely with the principal Senate sponsor as questions and suggested amendments rolled in from various interest groups. In the end, the Legislature removed the power to borrow and pledge the Committee had added, but otherwise overwhelmingly passed the Act very much as recommended. After passage and at the request of the executive director, the author prepared a “checklist” in an attempt to ease compliance by affected HOAs by the January 1, 2011 effective date. The checklist may be found at http://tinyurl.com/uciobora.
Conclusion

Lawyers have professional responsibilities not only to the clients they serve, but also to opposing counsel, to opposing parties, and (where relevant) to the tribunal. The most pressing ethical challenges for a lawyer generally emerge at the intersection of these competing obligations. Some of the ethical tensions that plague negotiators are ameliorated by close attention to the rules and comments. While it is true that a lawyer generally should provide zealous representation to a client, it is a qualified zeal: a lawyer’s advocacy must be constrained within the bounds of law. At the same time, while a lawyer generally owes a duty of truthfulness to others, it is a qualified truth: one that depends on circumstance. A lawyer cannot lie – either in-court or out-of-court – to serve their client’s interest. But, because it is deemed a legitimate negotiating tactic rather than a material falsehood, a lawyer may misrepresent a client’s settlement limit in out-of-court negotiations and engage in other nonfactual puffery.

About the Author

David Rubenstein is an associate professor of law at Washburn University School of Law. He teaches in the areas of professional responsibility, administrative 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.
ATTORNEY DISCIPLINE

IN RE CHARLES T. FRAHM
ORIGINAL PROCEEDING IN DISCIPLINE
THREE-YEAR SUSPENSION
NO. 103,535 – NOVEMBER 19, 2010

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Charles T. Frahm, of Lenexa, an attorney admitted to the practice of law in Kansas in 1997. Respondent's license to practice law in Kansas was temporarily suspended on April 1, 2008; the suspension remains in effect.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be indefinitely suspended.

HEARING PANEL: The hearing panel determined that respondent violated KRPC 8.4(b) (2010 Kan. Ct. R. Annot. 603) (misconduct) involving Frahm's driving while intoxicated, striking another vehicle causing it to swerve out of control and roll, and driving away because he was too intoxicated to know that he struck another vehicle. Frahm eventually registered a 0.204 on his breath test. The hearing panel unanimously recommended that Frahm be suspended for a period of 18 months.

HELD: Court found Frahm's criminal conduct was neither trivial nor technical. He committed multiple transgressions; he was driving while highly intoxicated, he caused both personal injury and property damage, and he left the scene of an accident with the police in pursuit. Court held that Frahm be suspended from the practice of law in the state of Kansas for a period of three years.

IN RE BOBBY LEE THOMAS JR.
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 104,340 – OCTOBER 29, 2010

FACTS: This is an original proceeding in discipline against Bobby Lee Thomas Jr., of Olathe, an attorney admitted to the practice of law in Kansas in 2000. The proceedings against Thomas are the result of his unethical representation of a myriad of clients in various stages of litigation.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Thomas be indefinitely suspended from the practice of law in the state of Kansas and that Thomas be required to reimburse the Client Protection Fund prior to reinstatement.


HELD: Court held that the evidence before the hearing panel established the charged misconduct and Court adopted the hearing panel's findings and conclusions. Court found the number and severity of violations warranted an indefinite suspension. Court also adopted the hearing panel's recommendations concerning reinstatement requirements for Thomas.

CIVIL

ADOPTION
IN RE ADOPTION OF BABY GIRL P.
JOHNSON DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 102,287 – OCTOBER 29, 2010

FACTS: Lauren P. became romantically involved with Devon M. (Devon) in the fall of 2007. Lauren learned she was pregnant in October 2007. She told Devon. At trial, Lauren said Devon was indifferent about the news, but she had earlier stated in her deposition that Devon was excited about the pregnancy and wanted to create a family relationship. Lauren ended the relationship in mid-December 2007. In January 2008, Lauren reconciled with her husband, C.J. When C.J. learned of the baby, he said that he did not want to raise the child and wanted it placed for adoption. In February or March 2008, Lauren texted Devon that she had miscarried the baby. Devon and his mother learned about Baby Girl P. when an investigator contacted Devon's mother pursuant to the adoption proceedings. Lauren relinquished her parental rights, and the custodial couple filed for adoption. In a bifurcated proceeding, the district court granted the petition to terminate Devon's parental rights based on Devon's failure to provide support, not establishing his parental rights, and to investigate the claims of a miscarriage. The Court of Appeals affirmed the district court, but expressed concerns about the burden Kansas law places on fathers when they attempt to assert parental rights.

ISSUE: Adoption

HELD: The Court first concluded that an order terminating parental rights is an appealable final order. Court held the record and the district court's factual findings support the conclusion that Devon...
on made reasonable efforts to engage with and support his daughter based on several reasons that he had to believe that Lauren had miscarried. Court held that Devon did not neglect his daughter. He made reasonable attempts both to support and to communicate with her. The record contained no clear and convincing evidence showing that Baby Girl P’s best interest is not served by being part of her natural father’s family. Court stated that given the strong preference in Kansas to preserve the ties between natural parents and their children, the Court was compelled to reverse the courts below and to restore the custodial relationship between the father and his daughter.

CONCURRENCE (Luckert, J.): concurred in the decision but wrote separately to emphasize that the Legislature has created different standards for termination of parental rights depending on whether a father appears and asserts custodial rights before an adoption is finalized.

STATUTES: K.S.A. 38-2273(a); K.S.A. 59-2102, -2111, -2136, -2401a; and K.S.A. 60-2102(c)

AUTOMOBILES – SUSPENSION OR REVOCATION OF LICENSES

SMITH V. KANSAS DEPARTMENT OF REVENUE

NORTON DISTRICT COURT – AFFIRMED

NO. 101,744 – NOVEMBER 19, 2010

FACTS: Kansas Department of Revenue suspended Smith’s license for a year after Smith’s DUI conviction. Smith appealed the suspension challenging administration of evidentiary breath test, claiming: there were facts negating any determination of reasonable grounds; his admissions that he had been drinking should have been excluded because he had not been advised of Miranda rights; and the preliminary breath test (PBT) evidence should have been excluded because authorizing statute, K.S.A. 2009 Supp. 8-1012, unconstitutionally requires only officer’s “reasonable suspicion,” rather than probable cause, that person is operating vehicle under the influence. Appeal transferred to Supreme Court.

ISSUE: Reasonable grounds for evidentiary breath test

HELD: Factors supporting Smith’s arrest and subsequent evidentiary breath testing were not diminished or negated by facts cited by Smith. Under facts and circumstances of case there was no custodial interrogation, and officer writing a warning ticket for taillight violation was not required to Mirandize Smith before asking whether a father appears and asserts custodial rights before an adoption is finalized.

STATUTES: K.S.A. 2009 Supp. 8-1001, -1001(b), -1012; K.S.A. 8-1001; and K.S.A. 20-3018(c)

CRIMINAL

STATE V. DANIEL BUTLER – AFFIRMED

NO. 101,622 – NOVEMBER 12, 2010

FACTS: Daniel convicted of possession of methadone discovered during warrantless search of vehicle following her arrest for driving with a suspended license. District court found the search was lawful under K.S.A. 22-2510(c), which at the time authorized searches incident to an arrest for limited purpose of discovering evidence of a crime. During Daniel’s appeal, 22-2510(c) was declared unconstitutional in State v. Henning, 289 Kan. 136 (2009)(applying Arizona v. Gant, 129 S. Ct. 1710 (2009)). Appeal transferred to Kansas Supreme Court. State concedes search was illegal under Gant and Henning, but seeks application of good-faith exception to exclusionary rule because officer relied on facial validity of 22-2501(c) and then-existing case law authorizing the search.

ISSUE: Good-faith exception to exclusionary rule

HELD: Kansas Supreme Court has not previously considered this issue. Kansas case law tying § 15 of Kansas Bill of Rights to U.S. Supreme Court Fourth Amendment precedent compels recognition of good faith exception to exclusionary rule articulated in Illinois v. Krull, 480 U.S. 340 (1987), for objectively reasonable reliance by law enforcement on a statute. Under circumstances of search of Daniel’s vehicle and purse, a reasonable officer would not have known K.S.A. 22-2510(c) was unconstitutional. District court’s denial of motion to suppress is affirmed.

DISSENT (Johnson, J.): Kansas is not bound to make exception for statutory reliance simply because U.S. Supreme Court has recognized it. And under facts of case, the exception would not apply here because officer’s good-faith reliance would be on lower court decisions interpreting New York v. Belton, 453 U.S. 454 (1981), rather than the state statute. Would find admission of the illegal evidence was reversible error.

STATUTES: K.S.A. 8-262(a)(1), K.S.A. 20-3018(c), K.S.A. 22-2501, -2501(c), -2509, -3216(1); and K.S.A. 65-4160

STATE V. DUNCAN

SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

COURT OF APPEALS – REVERSED

NO. 99,463 – NOVEMBER 12, 2010

FACTS: Duncan convicted on plea agreement that waived right to jury trial. On appeal he claimed his departure sentence was illegal because trial court did not empanel a jury to determine whether aggravating factors existed to justify the upward departure as required by K.S.A. 21-4718 and Apprendi. In unpublished opinion, Court of Appeals held Duncan waived right to have jury make this determination. Duncan’s petition for review granted.

ISSUE: Waiver of jury determination of aggravating factors

HELD: Appellate court has jurisdiction to review a sentence that is challenged as being illegal. There was no constitutionally valid waiver of right to have jury determine aggravating sentencing factors because Duncan was not informed of that right in plea agreement or at plea hearing. A guilty or nolo contendere plea to a criminal offense, standing alone, does not constitute a voluntary, knowing, and intelligent waiver of the right to a jury for an upward durational departure sentence proceeding. Case is remanded to district court for resentencing without an upward durational departure because K.S.A. 21-4718(b)(4) does not permit district court to empanel a jury solely to consider Duncan’s aggravating factors.

STATUTES: K.S.A. 2003 Supp. 21-4704; K.S.A. 2001 Supp. 21-4716(a); K.S.A. 20-3018(b); K.S.A. 21-4718, -4718(b), -4718(b) (4), -4721(c)(2); and K.S.A. 22-3403

STATE V. EDWARDS

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 100,457 – NOVEMBER 24, 2010

FACTS: Edwards convicted of felony murder and attempted aggravated robbery. On appeal Edwards claimed trial court erred in: (1) not granting motion to dismiss for statutory speedy trial violation after report from defense requesting competency evaluation was filed; (2) not granting motion to suppress Edwards’ custodial statements as involuntary due to untreated bipolar disorder, and because district court failed to independently view all interview videotape; (3) admitting five prejudicial photographs at trial; (4) jury instructions; and (5) not granting Edwards’ requests to modify aiding and abetting instruction, and to modify limiting instruction on K.S.A. 60-455 evidence. Edwards also claimed cumulative trial errors denied him a fair trial.

ISSUES: (1) Statutory speedy trial; (2) suppression of statements, (3) admission of photographs, (4) jury instructions, and (5) cumulative error

HELD: The record does not support trial court’s reliance on
“crowded docket” provision in K.S.A. 22-3402(5)(d), but denial of motion to dismiss was appropriate under K.S.A. 22-3402(5)(b). Court is required by K.S.A. 22-3202(1) to suspend criminal proceedings if it finds there is reason to believe the defendant is incompetent to stand trial. Such a suspension functions as a continuance under 22-3402(5)(b) regardless of whether the competency inquiry was initiated by a defense motion. If defendant is subsequently found competent to stand trial, K.S.A. 22-3405(5)(b) directs that trial be scheduled within 90 days of competency finding. Here, district court was reasonable in assessing time necessary to obtain competency evaluation, length of continuance used to effect competency determination was reasonable and within statutory parameters, and trial date fell within 90-day period in 22-3402(5)(b).

Under facts and lack of evidence addressing Edwards' condition on date of interview, trial court correctly found Edwards' statement was voluntary. Videotape never proffered as evidence.

No reversible error in admitting photographs. Admission of autopsy photographs to assist understanding a coroner’s report is accepted practice, and courts have approved photographic identification of murder victim.

Although better practice would have been to modify pattern aiding and abetting instruction as requested to fit defense theory, failing to do so was not reversible error. Any error in the overbroad limiting instruction given did not prejudice Edwards.

Cumulative error did not deny Edwards a fair trial.


STATE V. NELSON
MCPHERSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 101,064 – NOVEMBER 12, 2010

FACTS: Nelson convicted of premeditated first-degree murder, burglary, and forgery. All offenses arose from death of stepfather who was repeatedly struck in head with baseball bat. On appeal Nelson claimed: (1) district court failed to give an imperfect self-defense jury instruction, (2) instructions on first-degree murder improperly lessened state's burden of proof; (3) district court erred in admitting K.S.A. 60-455 prior crimes evidence; and (4) district court used wrong standard to determine aggravating circumstances in imposing hard 50 sentence.

ISSUES: (1) Imperfect self-defense instruction, (2) first-degree murder instructions, (3) admission of prior crimes evidence, and (4) standard for imposing hard 50 sentence

HELD: Nelson not entitled to imperfect self-defense instruction. District court's decision to give the requested self-defense instruction was itself suspect under facts of case, and not relevant to whether facts supported an imperfect self-defense instruction.

Applying State v. Ellmaker, 289 Kan. 1138 (2009), the permissible inference instruction is not related to premeditation element. The instruction was not improper taken in context with other instructions, and did not mislead jury when instructions considered as a whole.

Unusual facts because district court initially excluded the evidence, changed its mind and then informed attorneys during trial that the evidence was admissible. Nelson's objection at the time the district court ruled the evidence was admissible, with no objection later that day when the officer testified about the prior crimes, was not sufficient to preserve this issue for appellate review.

Case conflict noted regarding standard of proof for finding aggravating circumstances. Correct standard is preponderance of the evidence, as determined in State v. Spain, 263 Kan. 708 (1998). Here, district court's determination of aggravated circumstances was improperly tainted by viewing the evidence in favor of the state. Appellate court will not make its own factual findings that aggravating circumstances exist. Nelson's mandatory Hard 50 minimum sen-

tence is remanded to district court to determine whether aggravating circumstances exist under a preponderance of evidence standard.

CONCURRENCE (Johnson, J.): Concurs in ultimate result, but disagrees with majority's application of K.S.A. 60-404 to bar appellate consideration of admissibility of prior crimes evidence. Under the circumstances, the purpose of 60-404 was fulfilled.

STATUTES: K.S.A. 21-3401(a), -3403(b), -4635, -4635(c), -4635(d), -4636, -4636(e), -4636(f), -4636(h); K.S.A. 22-3414(3), -3601(b), -3717(b)(1); and K.S.A. 60-404, -455

STATE V. SITLINGTON
FRANKLIN DISTRICT COURT – AFFIRMED AND COURT OF APPEALS - AFFIRMED
NO 99,266 – NOVEMBER 19, 2010

FACTS: Sitington convicted of raping grandparent. On appeal he claimed jury instruction erroneously included three week period outside statute of limitations. In unpublished opinion, Court of Appeals characterized this as a defective complaint claim, finding no prejudice, impairment, or limitation to the defense. Sirtington also claimed the trial court erred in allowing rebuttal testimony of victim's aunt with evidence of other crimes, which were inadmissible in state's case-in-chief. Court of Appeals found this was not proper rebuttal evidence because it was neither probative nor material, but found error was harmless. Sirlington's petition for review granted.

ISSUES: (1) Jury instruction and (2) rebuttal testimony

HELD: Court of Appeals correctly reasoned defective complaint issue, but failed to address argument that jury was erroneously instructed such that jury might have based verdict on a crime occurring outside the limitations period. Because Sirlington failed to raise a statute of limitations defense at trial, he waived the defense. Thus no clear error in trial court's instruction.

Under facts of case, rebuttal testimony was harmless error.

STATUTES: K.S.A. 2004 Supp. 21-3502, -3502(a)(1); K.S.A. 22-3208(3), -3414(3); and K.S.A. 60-261, -455
Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Citations to Additional Authority

Supreme Court Rule 6.09(b) (2010 Kan. Ct. R. Annot. 48-49) provides a means to cite significant relevant authority, which comes to the attention of a party after that party’s brief has been filed. This is a useful tool, particularly when a brief has been on file for a period of time before oral argument is scheduled. Counsel typically should use the rule to alert the court to developments in the law after briefing.

It is important to note what a 6.09(b) letter is not. It is not a vehicle to add new issues on appeal nor is it a means to amend a brief without permission of the appellate court. It is a means to bring a focused citation to the attention of the court and opposing counsel.

The appellate courts do not permit counsel during oral argument to refer to case law or other legal authority not cited in the parties’ briefs or supplied pursuant to Rule 6.09(b) in advance of the hearing. In addition, it is ordinarily not appropriate to file a 6.09(b) letter only a day or two before oral argument because this timing does not provide the court and opposing counsel adequate opportunity to review the additional material cited.

Under the rule, a 6.09(b) letter can be filed after oral argument but before decision. Remember, however, that the appellate courts usually conference cases the same day as oral argument. Accordingly, use of 6.09(b) letters to supply additional authority arising after argument typically should be limited to controlling authority on applicable issues.

Submit 16 copies of the letter to the clerk of the appellate courts, along with proof of service on opposing counsel.

For questions about this or other appellate procedures and practices, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.
CIVIL

ABANDONMENT OF WATER RIGHTS
NELSON ET AL. V. KANSAS DEPARTMENT OF AGRICULTURE, DIVISION OF WATER RESOURCES
RUSSELL DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS
NO. 102,695 – NOVEMBER 19, 2010

FACTS: In 1953, Otto C. Eulert applied for a permit to divert water from the Saline River for irrigation of his adjoining agricultural real property in Russell County. Department of Agriculture, Division of Water Resources (DWR) approved the application in October 1953, and the approval specified the use for the water as irrigation, specified the detailed location of permissible points of diversion, and limited the quantity of water to be diverted to 600 acre-feet per year. The water right was perfected in 1969 for a maximum quantity of 278 acre-feet per calendar year, at a maximum rate of 965 gallons per minute, for irrigation on specific tracts of land owned by Eulert. Before the Nelsons purchased the property and associated water right in 2004 from Eulert, they contacted the DWR to investigate the status of the water right. The DWR assistant water commissioner Stewart advised the Nelsons that there was a potential abandonment issue due to nonuse of the water right. In October 2005, the DWR initiated proceedings to declare the water right abandoned and terminated. The proceedings were provoked by an investigation and resulting verified report filed by the assistant water commissioner that stated the last reported use of water was in calendar year 1978 and found no beneficial use had been made of the water right for 14 consecutive years between 1979 and 1992, and for 11 consecutive years between 1994 and 2004. The chief engineer of the DWR designated a hearing officer and the officer declared the Nelsons’ water right abandoned and terminated. The Nelsons appealed to the Secretary of Agriculture, who denied their petition for review and ordered the chief engineer’s initial order to become the final agency action subject to judicial review. The Nelsons appealed to the district court, which found the agency’s declaration of abandonment was not supported by substantial evidence, that the Nelsons had contradicted the prima facie report of the DWR, and that the agency order should be set aside.

ISSUE: Abandonment of water rights

HELD: Court held that an alfalfa crop rooted to groundwater is not a lawful and beneficial use of a right to divert river water for irrigation. Court agreed with the agency’s construction and application of its regulations in a manner to support its conclusion that “irrigation is not occurring because there is no application of water to the crop” and, even if this was recognized as “irrigation,” natural absorption of groundwater is not a “diversion,” is not “appropriated,” and is irrelevant to the question of beneficial use pursuant to this specific permit. Court concluded that substantial evidence supported the agency’s findings that a reported economic reason in many years at issue did not constitute a due and sufficient reason for nonuse. Court also held there was substantial evidence to support the agency’s rejection of a claim that adequate rainfall should be considered due and sufficient cause for nonuse during the years so claimed by the Nelsons. Court also rejected the Nelsons’ claim that low flows in the Saline River should be considered due and sufficient cause for nonuse. Court stated that challenges to an agency’s proceedings, by an appellant, may not be considered by the court in the absence of a cross-appeal. Court ordered reinstatement of the agency order terminating the Nelsons’ water right.

STATUTES: K.S.A. 77-601, -617, -621; and K.S.A. 82a-701, -702, -732, -718, -1901(b)

CONDITIONAL USE PERMITS AND UTILITIES
EVANS V. CITY OF EMPORIA AND WESTAR ENERGY INC.
LYON DISTRICT COURT – AFFIRMED
NO. 103,616 – NOVEMBER 19, 2010

FACTS: The property owned by Westar had been used as an electric substation since 1937. Westar had made several upgrades. Eventually the substation was surrounded by residential development. The Evans purchased their house in 2004 and it sits next to the substation. In 2008, Westar filed an application for a conditional use permit (CUP) to expand the equipment coverage of the substation 100 feet and add a fourth transformer. Several protest petitions were filed, including one by the Evans. The protestors presented evidence and testimony in opposition to the expansion based on noise abatement, aesthetics, stray voltage, and electromagnet fields (EMFS). The planning commission passed a motion to approve the CUP with two conditions, a nine-foot decorative wall, and any additional expansion would require a CUP. The city of Emporia (City) unanimously approved the CUP with the two restrictions. The district court found the record demonstrated the planning commission and the city commission balanced the interest of Westar with the interest of the surrounding owners and interest of the community. The district court found the Evans failed to prove the unreasonable-ness of the City’s decision.

ISSUES: (1) Conditional use permits and (2) utilities

HELD: Court found there was reasonable evidence in the record, which supported the commission and city’s balancing of the interests of all parties involved regarding noise abatement, aesthetics, stray voltage, and EMFs. Court held the City has the right to deny or accept a conditional use permit, and its decision carries the presumption of reasonableness. As was stated by the city commission, this substation has been a part of this area for a very long time. No one wants to have an electrical substation for a neighbor, but the city commission had to balance all the interests involved, including Westar’s, the Evans’ and other neighbors, and the community as a whole. It is reasonable for the City to plan for the increasing electrical needs of the community and reasonable to make the restrictions it did in granting Westar’s CUP. The decision is not so wide of the mark that it lies outside the realm of fair debate.

STATUTE: K.S.A. 12-712, -760(a)

HABEAS CORPUS – INVOLUNTARY COMMITMENT
MERRYFIELD V. STATE
PAWNEE DISTRICT COURT
REVERSED AND REMANDED
NO. 103,394 – OCTOBER 22, 2010

FACTS: Merryfield, confined 10 years at Larned State Hospital under Kansas Sexually Violent Predator Act, filed K.S.A. 60-1501 petition claiming program does not offer a realistic opportunity to cure or improve the mental abnormality for which he was involuntarily confined. District court summarily dismissed the petition, and denied Merryfield’s motion for appointment of counsel. Merryfield appealed, claiming district court erred in summarily denying the petition. He also challenged the validity of K.S.A. 2009 Supp. 59-292a22, and claimed treating sexual predators differently from those civilly committed as mentally ill or as alcohol or substance abusers violated equal protection.

ISSUES: (1) Summary dismissal of habeas petition, (2) facial challenge to K.S.A. 2009 Supp. 59-29a22, (3) equal protection, and (4) right to counsel

HELD: A person involuntarily confined as sexually violent predator may file K.S.A. 60-1501 habeas corpus petition for declaration
that confinement is wrongful. To avoid summary dismissal, petition must allege either shocking or intolerable conduct, or continuing mistreatment of a constitutional nature. Standard for shocking conduct not met here, but allegations that treatment provided is so inadequate that there is no realistic chance for petitioner to regain his freedom sufficiently allege continuing mistreatment of a constitutional nature to avoid summary dismissal.

K.S.A. 2009 Supp, 59-29a22 is construed to grant right to adequate treatment meeting constitutional standards, but to condition any treatment beyond that constitutionally required minimum level upon availability of funds. While statute survives Merryfield’s facial challenge, he still has opportunity to prove at hearing that lack of funding has resulted in his treatment falling below constitutional standards.

Merryfield did not meet threshold burden of establishing that sexually violent predators are similarly situated to others confined for mental illness with respect to treatment needs and risks to society. Thus department can subject those found to be sexually violent predators to treatment and confinement conditions different from those of other civilly committed persons without violating equal protection clause.

Merryfield has no statutory right to counsel in habeas corpus proceeding, but because allegations were serious enough to avoid summary dismissal, he has constitutional right to counsel in the remedied proceeding.

STATUTES: K.S.A. 2009 Supp. 59-29a22(b)(3); K.S.A. 22-4503(a), -4506(b); K.S.A. 59-29a01 et seq., -29a01, -29a06(b), -29a07, -29a08(b), -29a09, -29a22, -29a22(b)(3), -29a45 et seq., -29b45 et seq. -2965; and K.S.A. 60-1501, -1507

MORTGAGE FORECLOSURE AND TRUTH IN LENDING DISCLOSURES
WELLS FARGO BANK ET AL. V. EASTHAM ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
NO. 103,533 – NOVEMBER 19, 2010

FACTS: A few months after purchasing their home, Jason and Phyllis Eastham stopped making their monthly mortgage payments because of major health problems for Jason, and Wells Fargo, which had obtained rights to their loan and mortgage by assignment, received a foreclosure judgment against them. The Easthams filed a counterclaim against Wells Fargo seeking to hold Wells Fargo liable for their initial lender’s failure to comply with the Truth in Lending Act’s disclosure requirements. The district court granted summary judgment in Wells Fargo’s favor.

ISSUES: (1) Mortgage foreclosure and (2) truth in lending disclosures

HELD: Court held that a party that obtains through a voluntary assignment the creditor’s rights to a residential mortgage subject to the Truth in Lending Act (Act) is not subject to suit for the original creditor’s violations of the Act that were not apparent on the face of the required disclosure statement. The failure to provide disclosures in a timely manner generally will not be apparent on the face of the disclosure statement and, on the facts of this case, the assignee has no liability for violations of the Truth in Lending Act by the original creditor regarding the timing of required disclosures. But even though the Eastham’s initial creditor did violate the Truth in Lending Act’s disclosure requirements, another party who later receives the initial lender’s rights by assignment is not liable for such violations unless they are apparent upon facial examination of a required document called the disclosure statement. Here, the initial creditor violated a timing requirement: it didn’t give the Easthams the disclosure statement when it was supposed to. But a timing violation does not fall within the situations that Congress has deemed to be facially apparent violations – incorrect or incomplete disclosures or disclosures that don’t use the required terms or format – so Wells Fargo is not liable for the violation.

STATUTES: No Statutes cited

NEGLIGENCE, LICENSEE, AND TRESPASSER
WRINKLE V. NORMAN ET AL.
JEFFERSON DISTRICT COURT – AFFIRMED
NO. 103,373 – NOVEMBER 12, 2010

FACTS: Wrinkle lived across U.S. Highway 59 from the Normans in Oskaloosa. The Normans had 20 acres of pasture land along the west side of the highway on which they raised cattle. The pasture is fenced and has a 16-foot panel gate. On March 10, 2006, while riding his lawn tractor, Wrinkle observed four or five cattle running loose in the ditch near the Normans’ property, approximately 10 to 12 feet from the highway. Wrinkle herded the cattle onto the Normans’ property toward a pen with an open gate. Wrinkle was able to get all of the cattle into the pen except for one that became entangled in a clothesline wire. Wrinkle removed the wire from around the animal’s neck. As the animal ran toward the gate, the wire with a T-shaped clothesline pole attached to it flipped and hit the back of Wrinkle’s legs. Wrinkle fell and fractured his back on a concrete path. Wrinkle filed suit against the Normans, alleging they had negligently and carelessly allowed the clothesline wire to run across the ground, thereby creating a dangerous condition that presented an unreasonable risk of harm. Wrinkle claimed that he was lawfully on the Normans’ property when he was injured. The Normans moved for summary judgment, contending that Wrinkle entered their property without an invitation or permission and, as such, he was trespassing at the time of his injury. The Normans denied liability and argued that the only duty they owed Wrinkle was to refrain from willfully, wantonly, or recklessly causing him injury. The Normans further claimed that they had no notice or knowledge of cattle escaping from their fence on March 10, 2006, or of any defective condition relating to their fence or clothesline wire. The district court granted summary judgment in favor of the Normans, finding that they did not breach a duty to Wrinkle.

ISSUES: (1) Negligence, (2) licensee, and (3) trespasser

HELD: Court found there was no evidence the cattle were owned by the Normans. Court found that Wrinkle not only entered the Normans’ property without permission, but also arguably without benefit to the Normans. Court held the duty owed by the Normans to Wrinkle, a trespasser, was to refrain from willfully, wantonly, or recklessly causing him injury. There was nothing in the record to suggest, nor does Wrinkle contend, that a genuine issue of material fact exists regarding whether the Normans breached this duty. The district court properly determined that Wrinkle was a trespasser. Court also held the evidence in Wrinkle’s response to the Normans’ summary judgment motion merely created a conjecture or possibility that the Normans owned the cattle that he herded onto their property on March 10, 2006. Assuming that ownership of the cattle was established, the evidence brought forward by Wrinkle merely raised the possibility that the Normans had failed to exercise due care in containing their cattle. Therefore, Wrinkle’s claim for allowing livestock to run at large presented no genuine issues of material fact.

STATUTES: K.S.A. 47-122, -23; and K.S.A. 60-256(e)

PUBLIC EASEMENT BY PRESCRIPTION
BROWNBACK V. THOMAS M. GILKISON TRUST ET AL.
LINN DISTRICT COURT – REVERSED
NO. 102,355 – NOVEMBER 12, 2010

FACTS: In October 2006, John Brownback acquired 172 acres of land in Linn County. Several months later, Brownback sold 142 acres of the northern portion of his land and retained the remaining 30 acres to the south. Brownback accessed his 30 acres (Brownback property) by utilizing a “road,” approximately 28 feet wide and 285

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feet long, bordered by parallel fences and located on the southeast portion of the Trust property. On December 12, 2007, Brownback filed a petition to establish the “road” he used to access his property as either (1) a public or private easement by prescription or (2) an easement by necessity. After several pretrial hearings, Brownback voluntarily abandoned his claims for a private easement and an easement by necessity. The district court held a three-day bench trial in February 2009. Several individuals testified that they sporadically used the “road” with or without permission over a period of more than 20 years to access the Brownback property to hunt, to cut timber and hay, and to “park.” Additionally, retired Linn County Highway Department (County) employees testified they performed maintenance twice on the “road” in the mid to late 1980s. There was no evidence that the County did any other “road” maintenance before or after the 1980s. The district court found that Brownback had proved by clear, convincing, and satisfactory evidence that the public thought this was a public road, they used it as a public road with the actual or implied knowledge of the landowner, adversely under claim or color of right and not merely by the owner’s permission and said use was continuous and uninterrupted for at least 15 years.

ISSUE: Public easement by prescription

HELD: Court stated that to establish a road or highway by prescription, the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, not merely by the owner’s permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute. When these conditions are present a highway exists by prescription; otherwise it does not. In designating a road as a public road by prescription, public maintenance of the road is most significant. Court found the evidence is that over a period of more than 100 years, the County ditched and graded the “road” twice. This is not evidence of periodic county road maintenance on the “road” for a 15-year period. Court held there was no evidence in the record on appeal that Linn County ever formally dedicated, opened, or officially recognized this “road” as a part of the county road system. The record on appeal does not support by clear and convincing evidence that a public easement by prescription was created on the Trust property.

STATUTE: K.S.A. 60-503

REAL ESTATE, TRUTH IN LENDING, STATUTE OF LIMITATIONS, AND DISCOVERY ABUSES
DEUTSCHE BANK NATIONAL TRUST CO. V. SUMNER ET AL.
RENO DISTRICT COURT – AFFIRMED
NO. 101,424 – OCTOBER 29, 2010

FACTS: The Sumners closed on a home loan and claimed the mortgage company’s employee told them the loan would be a 30-year fixed mortgage and that insurance was part of the mortgage package. The mortgage was eventually assigned to Deutsche. The Sumners fell behind on payments and foreclosure proceedings were filed. The Sumners counterclaimed for slander, slander per se, libel per se, and fraud. The parties attempted mediation, but it failed. The Sumners repeatedly failed to sit for a deposition. The court stated that the Sumner’s continual course of conduct was a willful and deliberate interference with the efficient administration of justice. The court granted sanctions against the Sumners, and dismissed with prejudice the remaining claims of the Sumners as well as granting summary judgment to Deutsche.

ISSUES: (1) Real estate, (2) truth in lending, (3) statute of limitations, and (4) discovery abuses

HELD: Court held that the Sumner’s claims for recoupment or setoff were improperly dismissed by the district court based on statute of limitations. These claims should have survived, at least until the dismissal of their entire action for discovery abuse. Court held the district court did not err in applying equitable estoppel and barring the Sumner’s rescission claims under the Truth in Lending Act. Court held the dismissal sanction was appropriate because the deposition went to a dispositive issue in the case, alternative sanctions were not sufficient to protect Deutsche from further delay and harassment, and the request to depose was not cumulative of other evidence. Court stated that warning litigants of a potential dismissal is the better practice by the trial judge, but the sanction was still appropriate in this case.

STATUTE: K.S.A. 60-237

SUBSTITUTION OF PARTIES
GRAHAM V. HERRING
HARPER DISTRICT COURT
REVERSED AND REMANDED
NO. 102,789 – NOVEMBER 24, 2010

FACTS: Prior to her death, Jones brought legal claims against the Grahams. When Jones died, Grahams filed notice of death, and after more than nine months, filed motion to dismiss lawsuit. Herring appointed as administrator of Jones’ estate shortly thereafter, and on day of appointment filed motion to substitute herself for Jones. District court dismissed Jones’ claim, finding Herring had not sought substitution within a reasonable time after Jones’ death. Herring appealed.

ISSUE: Substitution of successor party

HELD: K.S.A. 60-225 is interpreted. Very few published opinions on issue of how a court should determine reasonable time for filing motion to substitute after a party dies. To determine whether motion was filed within a reasonable time, court should consider all relevant circumstances, including diligence of party seeking substitution, whether any party would be prejudiced by the delay, and whether party to be substituted has shown that action or defense has merit. Disagreement stated with unpublished decision in Johnson v. Farm Bureau Mut. Ins. Co., Inc., 2005 WL 97495 (Kan. App. 2005), that failure to list prejudice in K.S.A. 60-225(a) as a factor to be considered meant prejudice is not relevant. Here, district court’s ruling on substitution motion emphasized delay in court’s own consideration of that motion without any finding of delay due to bad faith by Herring, and without considering whether timing of motion’s filing prejudiced Grahams. Application of incorrect legal standard was abuse of discretion.

STATUTE: K.S.A. 60-217(a), -217(a)(3), -225, -225(a), -225(a)(1), -260(c), -260(c)(1), -31a01 et seq.

WORKERS’ COMPENSATION AND COMMON-LAW MARRIAGE
ANGUIANO V. LARRY’S ELECTRICAL CONTRACTING ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 105,374 – OCTOBER 22, 2010

FACTS: Anthony Anguiano (Tony) was working on scaffolding configured on a movable lift for Larry McCall Electrical Contractors (McCall). As another worker repositioned the scaffolding, the lift’s tire dipped into a drain and caused the scaffolding to tip over. Tony fell approximately 40 feet to his death. Tasha Burns (Tasha) filed an application for a hearing with the Kansas Division of Workers Compensation (Board) alleging she was entitled to Tony’s death benefits under claim or color of right and not merely by the owner’s permission and that Tasha thought this was a public road, they used it as a public road with the actual or implied knowledge of the landowner, adversely under claim or color of right and not merely by the owner’s permission and said use was continuous and uninterrupted for at least 15 years.

ISSUE: Public easement by prescription

HELD: Court stated that to establish a road or highway by prescription, the land in question must have been used by the public with the actual or implied knowledge of the landowner, adversely under claim or color of right, not merely by the owner’s permission, and continuously and uninterruptedly, for the period required to bar an action for the recovery of possession of land or otherwise prescribed by statute. When these conditions are present a highway exists by prescription; otherwise it does not. In designating a road as a public road by prescription, public maintenance of the road is most significant. Court found the evidence is that over a period of more than 100 years, the County ditched and graded the “road” twice. This is not evidence of periodic county road maintenance on the “road” for a 15-year period. Court held there was no evidence in the record on appeal that Linn County ever formally dedicated, opened, or officially recognized this “road” as a part of the county road system. The record on appeal does not support by clear and convincing evidence that a public easement by prescription was created on the Trust property.

STATUTE: K.S.A. 60-503
agreement at the trailer park as Tasha Burns because she considered Tony her boyfriend at the time. After Tony's divorce from Patty in May 2004, Tony asked Tasha to marry him several times but she did not take him seriously because he had been drinking. Tony gave Tasha an engagement ring for Christmas in 2005. Tasha acknowledged there was little, if any, formal documentation prior to Tony's death delineating a legal relationship between herself and Tony.

On May 8, 2009, the administrative law judge (ALJ) denied Tasha's claim for death benefits under K.S.A. 44-510b because Tasha failed to satisfy the prerequisites for a common-law marriage. The ALJ ordered payments of $10,000, less amounts previously paid, to each of Tony's four children and apportioned weekly payments. The Board agreed with and adopted the ALJ's factual findings and conclusions of law.

ISSUES: (1) Workers' compensation and (2) common law marriage

HELD: Court held that even though Tasha may raise a constitutional issue for the first time on appeal, there is no evidence to support her claim that the Board infringed on her constitutional right to marry. Court stated there is considerable evidence suggesting Tony and Tasha did not have a present marital agreement. Court held there is substantial evidence to support the Board's finding that Tasha failed to establish a present marriage agreement with Tony. Therefore, the Board did not err in denying Tasha death benefits under K.S.A. 44-510b because she was not a surviving spouse.

STATUTES: K.S.A. 44-510b, -556(a); and K.S.A. 77-601, -617, -621

WRONGFUL DEATH, PERSONAL JURISDICTION, AND FAILURE TO STATE A CLAIM
IN RE ESTATE OF NILGES V. SHAWNEE GUN SHOP INC.
JOHNSON DISTRICT COURT
REVERSED AND REMANDED
NO. 103,175 – NOVEMBER 5, 2010

FACTS: Luke and Leslie Noble Ballew were shot and killed by Logsdon during a shooting spree outside the Ward Parkway Shopping Center in Kansas City, Mo., on April 29, 2007. On that date, Luke and Leslie were sitting in their separate cars outside the Ward Parkway Shopping Center when Logsdon shot and killed them. The plaintiffs and Leslie's parents, Carolle Noble and Leo Noble, each filed separate wrongful death lawsuits against the defendant. They sought damages against the defendant for the deaths of their children resulting from the defendant's allegedly negligent sale of the magazines and ammunition to Logsdon. The plaintiffs alleged in their petition that a few days before the shooting, Logsdon purchased firearm magazines along with ammunition from the defendant. The plaintiffs' petition further implied that Logsdon purchased the pre-magazines and ammunition to Logsdon. The plaintiffs alleged in their petition that a few days before the shooting, Logsdon purchased firearm magazines along with ammunition from the defendant. The plaintiffs' petition further implied that Logsdon purchased the pre-magazines and ammunition to Logsdon. The plaintiffs alleged in their petition that a few days before the shooting, Logsdon purchased firearm magazines along with ammunition from the defendant. The plaintiffs' petition further implied that Logsdon purchased the pre-magazines and ammunition to Logsdon. The plaintiffs alleged in their petition that a few days before the shooting, Logsdon purchased firearm magazines along with ammunition from the defendant.

ISSUES: (1) Wrongful death, (2) personal jurisdiction, and (3) failure to state a claim

HELD: Court determined that because the defendant would have suffered no legal prejudice had the trial court sustained the plaintiffs' motion for an order dismissing their action without prejudice and because the trial court failed to obtain a result which was fair and equitable to the parties, the trial court abused its discretion in denying the motion. Court reversed and remanded with directions that the trial court vacate the judgment entered in this matter and enter an order dismissing the action without prejudice upon the terms and conditions as the court deems proper.

STATUTE: K.S.A. 60-212(b)(6), -241(a)(2), -513

CRIMINAL
STATE V. BAUGHMAN
JOHNSON DISTRICT COURT – REVERSED AND REMANDED FOR FURTHER PROCEEDINGS
NO. 100,604 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED MAY 28, 2010

FACTS: Clifford Baughman appealed from his conviction in a jury trial of aggravated indecent liberties with a child. Baughman alleges on appeal that the district court erred (1) in giving the "deadlocked" jury instruction over his specific objection; (2) in failing to require an election or giving an instruction in a multiple acts situation; (3) by excluding evidence of the victim's previous sexual history for the purpose of impeachment; and (4) by refusing to remove Baughman's appointed counsel on the morning of the jury trial.

ISSUES: (1) Deadlock jury instruction, (2) multiple acts, (3) victim's prior sexual history, and (4) removal of counsel

HELD: Court held that under the facts of this case where the erroneous instruction was objected to, it is not necessary to have a jury report that it is at an impasse in order for the giving of the admittedly erroneous instruction to have misled a jury and require that a resulting conviction to be reversed and a new trial ordered. Court also held it did not believe this was a multiple acts situation as there appeared to be a limited lapse of time between the two penetrations, and so a unanimity instruction was not required. Court also held the trial court was correct in refusing to allow the defense to cross-examine the victim as to prior sexual conduct as a matter of credibility as such would have been in violation of the rape shield motion in limine that had been filed. Last, court held there was no way to know who will represent Baughman in the future and the court made no comment on the alleged error of failing to remove his appointed counsel on the morning of trial.

CONCURRENCE/DISSENT (Marquardt, J.): Concurred with the court's decision on the multiple acts issue. However, Marquardt dissented from the holding that the deadlocked jury instruction was reversible error because of the overwhelming evidence against Baughman.

STATE V. CALDERON-APARICIO
JOHNSON DISTRICT COURT – AFFIRMED
NO. 101,299 – OCTOBER 29, 2010

FACTS: Johnson County jury convicted Calderon-Aparicio on charges of possession of marijuana with intent to sell, distribute, or deliver, and no tax stamp. On appeal he claimed there was insufficient evidence to prove his crimes occurred in Johnson County. He also claimed the eyewitness show-up identification by a passing motorist who observed someone hiding drug evidence in a culvert was unnecessarily suggestive, and claimed the trial court erred in allowing state to amend the complaint two days before trial to expand the charge of "possession of marijuana with intent to sell" to include "deliver or distribute."

ISSUES: (1) Sufficiency of evidence, (2) eyewitness identification, and (3) amendment of the complaint

HELD: On facts presented to jury, there was sufficient evidence for a rational factfinder to find beyond a reasonable doubt that the crimes were committed in Johnson County. State v. Star, 27 Kan. App. 2d 930 (2000), is distinguished.

Calderon-Aparicio failed to object before or during trial to the eyewitness identification, so issue not preserved for appellate review. But even if it had, it would fail because defense strategy was to challenge weight of the eyewitness identification rather than its admissibility. Also, applying State v. Dukes, 290 Kan. 485 (2010), and State v. Dukes, 290 Kan. 485 (2010), and...
Appellate Decisions

**STATE V. DUNCAN**  
**JOHNSON DISTRICT COURT – AFFIRMED NO. 101,818 – OCTOBER 29, 2010**

FACTS: Jury convicted Duncan of aggravated failure to appear after he did not attend pretrial conference for felony drug possession charge and did not turn himself in for over eight months after knowing arrest warrant had been issued. On appeal, Duncan claimed insufficient evidence supported the conviction because his failure to appear was not willful in that his attorney told him that he did not need to attend. Duncan also claimed a mistake-of-fact instruction should have been given to the jury.

ISSUES: (1) Mistake-of-fact doctrine and (2) jury instruction

HELD: Opinion discusses general-intent and specific-intent crimes. Aggravated failure to appear for a court hearing while on bond is a general-intent offense. Facts of this case do not negate the required mental state that would allow mistake-of-fact doctrine to be a defense to the crime. Duncan knew the court hearing in his felony case was scheduled for a specific day, he read an appearance bond ordering him to attend that day, and he intended to not appear at the hearing on that date.

Duncan’s defense of mistake does not negate this general-intent crime. No error in not giving the requested instruction.

STATUTES: K.S.A. 21-3203, -3419(a), -3503(a)(1), -3612(a)(4), -3701(a), -3715(a), -3814(a); and K.S.A. 22-2807(1), -2807(2), -3414(3)

**STATE V. DIAZ**  
**SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 102,356 – NOVEMBER 19, 2010**

FACTS: Jury convicted Diaz of aggravated failure to appear after he did not attend pretrial conference for felony drug possession charge and did not turn himself in for over eight months after knowing arrest warrant had been issued. On appeal, Diaz claimed insufficient evidence supported the conviction because his failure to appear was not willful in that his attorney told him that he did not need to attend. Diaz also claimed a mistake-of-fact instruction should have been given to the jury.

ISSUES: (1) Mistake-of-fact doctrine and (2) jury instruction

HELD: Opinion discusses general-intent and specific-intent crimes. Aggravated failure to appear for a court hearing while on bond is a general-intent offense. Facts of this case do not negate the required mental state that would allow mistake-of-fact doctrine to be a defense to the crime. Diaz knew the court hearing in his felony case was scheduled for a specific day, he read an appearance bond ordering him to attend that day, and he intended to not appear at the hearing on that date.

Diaz’ defense of mistake does not negate this general-intent crime. No error in not giving the requested instruction.

STATUTES: K.S.A. 21-3203, -3419(a), -3503(a)(1), -3612(a)(4), -3701(a), -3715(a), -3814(a); and K.S.A. 22-2807(1), -2807(2), -3414(3)

**STATE V. ELKINS**  
**DOUGLAS DISTRICT COURT – AFFIRMED NO. 101,350 – NOVEMBER 19, 2010**

FACTS: Cory Elkins was convicted in May 2008 of multiple counts of rape and aggravated criminal sodomy as a result of attacks in Lawrence on J.L. in 1994 and on E.L. in 1995. Neither victim could identify her attacker. However, there were a number of similarities regarding the manner in which the two attacks occurred. Both victims were examined at the hospital and DNA samples were collected. The Kansas Bureau of Investigation (KBI) analyzed the samples and entered the DNA profiles into the national database known as the Combined DNA Indexing System (CODIS). In 2006, CODIS generated a match between E.L.’s and J.L.’s cases, indicating that the attacker in each case was likely the same person. Elkins had been incarcerated in California, which resulted in his DNA profile being entered into the database. CODIS generated a match between Elkins and the J.L. and E.L. samples. Evidence was discovered that the KBI’s DNA analyst had contaminated the DNA samples back in 1996, but that the contamination did not invalidate the result. A jury convicted Elkins on all counts.

ISSUES: (1) DNA testing, (2) expert witnesses, (3) jury instructions, and (4) prosecutorial misconduct

HELD: Court held that the entry of the defendant’s DNA profile into the national database (CODIS) was not a testimonial act, which implicated the defendant’s right of confrontation under the Sixth Amendment of the U.S. Constitution. Court held that the district court did not abuse its discretion in refusing to grant a mistrial for the state’s failure to produce during discovery an expert witness’ handwritten notes, which the expert witness referred to during her testimony. Court held that the district court did not abuse its discretion in refusing to grant a mistrial for the state’s witness’ one-time reference in her testimony to the “offender index” in the CODIS database. Further, the court’s failure to give the jury a limiting instruction with respect to this reference to the “offender index,” when no instruction was requested, did not constitute clear error. Court held that the state did not engage in prosecutorial misconduct by attempting to shift the burden of proof to the defendant when the prosecutor asked the defendant’s expert witness whether he had attempted to conduct any retesting to confirm his results.

STATUTES: K.S.A. 22-3437 and K.S.A. 60-455

**STATE V. EVANS**  
**JOHNSON DISTRICT COURT – AFFIRMED NO. 103,059 – NOVEMBER 12, 2010**

FACTS: Evans convicted in 1998 of aggravated indecent liberties with a child. Sentence included requirement that Evans register as a sex offender for 10 years after parole, discharge, or release. In 2008, Evans filed pro se motion for release from the registration requirement. District court summarily denied the motion, based in part on amendment to Kansas Offender Registration Act (KORA) requiring lifetime registration. Evans appealed, claiming district court erred in denying his motion under K.S.A. 22-4912 without a hearing. Counsel for Evans also claimed first time on appeal that Evans meant to argue his motion under K.S.A. 22-4906, to challenge statutory amendment requiring lifetime registration.

ISSUES: (1) Interpretation of K.S.A. 22-4912 and (2) lifetime registration under K.S.A. 22-4906

HELD: No Kansas case has interpreted K.S.A. 22-4912. Because versions of that statute before and after July 1, 1999, required Evans...
to register as a sex offender, Evans is not an offender that can apply to the sentencing court for an order relieving him of the duty to register under K.S.A. 22-4912(a). District court did not err in refusing to grant Evans a hearing.

The KORA registration requirement does not impose punishment, thus amendments to the act are retroactive. Any person convicted of an offense in K.S.A. 22-4906(d) is now required to register for that person’s lifetime regardless of whether the crime occurred before the Legislature amended KORA. Under current law, Evans will never be relieved from requirement to register as a sex offender.

STATEMENTS: K.S.A. 4901 et seq., -4906(d), -4906(d)(3), -4912, -4912(a); K.S.A. 1999 Supp. 22-4902(b), -4902(c)(3); and K.S.A. 22-3504(a)(3)(A), -4901 et seq., -4906(a)(1)

STATE V. HART
ELK DISTRICT COURT – AFFIRMED
NO. 101,723 – NOVEMBER 19, 2010

FACTS: Hart charged with two counts of aggravated indecent liberties with a child, K.S.A. 21-3503(a)(1), and convicted on amended charges of two counts of indecent liberties with a child, K.S.A. 21-3504(a)(2)(A). On appeal Hart claimed: (1) insufficient evidence supports the conviction of one victim being over 14 and less than 16 years old at the time, (2) prosecutorial misconduct in giving personal opinion that victims were credible, (3) trial court erred in providing jury with indecent liberties instruction that was broader than the charging document, (4) 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. 60-4455, (5) trial court erred in giving limiting instruction on the admitted K.S.A. 60-4455 evidence without explaining terms, (6) cumulative error denied him a fair trial, and (7) constitutional rights violated by aggravated sentence imposed and by increased sentence based upon criminal history.

ISSUES: (1) Sufficiency of the evidence, (2) prosecutorial misconduct, (3) jury instruction broader than charged offense, (4) admission of K.S.A. 60-4455 evidence, (5) jury instruction on K.S.A. 60-4455 evidence, (6) cumulative error, and (7) constitutional sentencing claims

HELD: No Kansas case identified that involves issue of victim unable to recall at what precise age the alleged incident occurred, and this is not a case where the state failed to put on direct evidence at trial to establish victim's age. Based on testimony in case, legislative intent in statutory scheme of punishing sexual offenders for crimes against children, and defense role in having complaint amended to charge crimes occurring when victim would have been 14 years old, there was sufficient evidence to convict Hart of indecent liberties.

In one comment, prosecutor improperly vouched for victims' credibility. 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.

Hart's objection to this evidence was untimely. Issue not preserved for appeal. Even assuming a timely objection as state stipulated, no reversible error. K.S.A. 2009 Supp. 60-4455(d), which prescribed a new rule for conduct of criminal prosecution, applies to Hart's case with no ex post facto violation. Here, the prior bad acts evidence had no real probative value to establish a material fact under K.S.A. 60-4455(b), and any such value was significantly outweighed by prejudice. However, where the prior bad act evidence involved same victims as the charged offenses, it was very relevant and highly probative to relationship of parties. Trial court's admission of this evidence under K.S.A. 60-4455 is right for wrong reason. Application of K.S.A. 2009 Supp. 60-4455(d) to establish propensity is briefly discussed, noting Legislature did not intend for 60-4455(d) evidence to be admitted just to show propensity.

Jury should not have been confused or misled by terms in PIK instruction. No clear error in trial court not defining specific terms in the instruction.

Cumulative error does not apply where only one nonreversible error of prosecutorial misconduct was found.

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

STATUTES: K.S.A. 2009 Sup. 60-455, -455(b), -455(d); K.S.A. 21-3503(a)(1), -3504(a)(2)(A); K.S.A. 60-401(b), -404, -455, -455(b); and K.S.A. 21-3504(a)(3)(A)

STATE V. MCMILLAN
DICKINSON DISTRICT COURT – AFFIRMED
NO. 101,846 – NOVEMBER 12, 2010

FACTS: McMillan convicted of second-degree murder, possession of drug paraphernalia, and possession of marijuana. On appeal, he claimed prosecutorial misconduct when prosecutor referenced Virginia Tech, Columbine, and Kennedy shootings, and when prosecutor told jurors to consider what they feel in their hearts about the defendant's guilt. McMillan also claimed trial court should have allowed two witnesses to testify about hearing another man (Shirack) take responsibility for the victim's death, instructed the jury that voluntary intoxication can sometimes be a defense, given the jury a nonexclusive-possession instruction, and not told the jury that Zig Zag rolling papers were drug paraphernalia. Regarding sentencing, McMillan claimed district court violated constitution by using criminal history not proven to jury, and by not submitting aggravating factors to jury for aggravated second-degree murder sentence.

ISSUES: (1) Prosecutorial misconduct, (2) declaration-against-interest hearsay exception, (3) voluntary intoxication instruction, (4) nonexclusive-possession instruction, (5) drug paraphernalia instruction, and (6) sentencing

HELD: Prosecutor's reference to well known shootings was to show that state did not need to prove motive and not to inflame jury. Although prosecutor telling jurors to consider what they feel in their hearts when determining whether state met its burden to prove guilt beyond a reasonable doubt was error, on facts of case, that error did not prejudice McMillan.

District court properly excluded hearsay testimony from two potential defense witnesses. Shirack's statement did not affirmatively show he confessed to murdering the victim, thus declaration-against-interest hearsay exception not met. Nor did exclusion of this testimony prevent McMillan from pursuing his theory of defense. Failure to give a voluntary-intoxication instruction not clearly erroneous where state did not request it and defense explicitly stated it would not rely on that defense. No possibility the jury would have rendered a different verdict even if the instruction should have been given.

Under facts of case, the district should have given nonexclusive-possession instruction, but no reasonable possibility the jury would have rendered a different verdict had the instruction been given.

District court should have told jury that drug paraphernalia includes wired cigarette papers. It was not established in this case that Zig Zag papers met that definition. No clear error under facts of case, given evidence of other drug paraphernalia.

Kansas Supreme Court has recognized the continuing validity of prior-conviction exception to Apprendi and no Cunningham violation where McMillan's aggravated sentence was within maximum statutory sentence.

CONCURRING (Malone, J.): Concurs in the result, but would find no misconduct in prosecutor's closing argument regarding burden of proof.

STATUTES: K.S.A. 2007 Supp. 65-4150(c)(12), -4150(c)(12) (O); K.S.A. 21-2402(a); K.S.A. 22-3414(3); and K.S.A. 60-460, -460(j)
FACTS: Sybrant convicted in district court on municipal charges of DUI and failure to maintain single lane of traffic. On appeal, Sybrant claimed: (1) he was convicted of an alternative DUI offense for which he had not been properly charged, (2) district court erred in instructing the jury on the DUI offense; (3) insufficient evidence identified Sybrant as perpetrator of the charged offenses; and (4) district court erred in not granting Sybrant’s request for self-representation.

ISSUES: (1) Car stop and (2) pat-down search
Held: Officer violated White’s constitutional rights by searching the vehicle. Under facts of case, officer had no reasonable suspicion that White was driving the vehicle. On record of case, the traffic stop exceeded its initial scope. No evidence the officer had a reasonable and articulable suspicion of illegal activity beyond the traffic infraction, and no evidence the detention had ended and the encounter became consensual. Search of the vehicle was not related to purpose of the stop for traffic signal violation, and White’s consent to that search cannot be considered voluntary.

Under facts of case, officer had no reasonable suspicion that White posed a danger to officer’s safety or to safety of others. The pat-down search violated White’s constitutional rights, and drug evidence seized as a result of the unlawful pat-down is inadmissible evidence under exclusionary rule. Other evidence seized in search incident to White’s arrest is inadmissible evidence as fruit of the poisonous tree. Reversed and remanded with directions to grant motion to suppress.

STATE V. WHITE
WYANDOTTE DISTRICT COURT
REVERSED AND REMANDED
NO. 103,472 – NOVEMBER 12, 2010

FACTS: White convicted of drug offenses based on evidence found in pat-down search after being stopped for traffic offense. On appeal he challenged the district court’s refusal to suppress evidence.

ISSUES: (1) Car stop and (2) pat-down search
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STATUTE: K.S.A. 22-2402, -2402(2)

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WYANDOTTE DISTRICT COURT
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NO. 103,472 – NOVEMBER 12, 2010

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JANUARY

Tuesday, January 11, Noon – 1 p.m.
4th Amendment: Search and Seizure Update
Speaker: Kimberly A. Rodebaugh,
Kansas Law Enforcement Training Center,
Hutchinson
Telephone CLE

Wednesday, January 12, Noon – 1 p.m.
Navigating the Social Media Maze: How to Use
Facebook, MySpace and Twitter as Litigation Tools
Speakers: Jeffrey A. Kennard, Christopher
Tillery, and Shannon Cohorst, Scharnhorst
Ast & Kennard P.C., Kansas City, Mo.
Telephone CLE

Friday, January 14, 9 a.m. – 3:20 p.m.
Hot Topics in the Elder Law World
Courtyard by Marriott, Junction City

Friday, January 21, 9 a.m. – 3:15 p.m.
Focus on the Solo and Small Firm Practice
Courtyard by Marriott, Junction City

FEBRUARY

Wednesday, February 2, Noon – 1 p.m.
Checklist for Closing a Law Practice
Speaker: Anne McDonald, Kansas Lawyers
Assistance Program, Topeka
Ethics Telephone CLE

Tuesday, February 8, Noon – 1 p.m.
Impairments: Aggravating or Mitigating
Speaker: Anne McDonald, Kansas Lawyers
Assistance Program, Topeka
Ethics Telephone CLE

Monday, February 14, 8:40 a.m. – 5:05 p.m.
(Reception following)
Tuesday, February 15, 8:30 a.m. – 12:05 p.m.
11th Annual Slam Dunk CLE
Clarion Hotel, Manhattan
Co-sponsored by Kansas State University
Foundation

Wednesday, February 23, Noon – 1 p.m.
Making the Grade in School Law: Rules, Regs, and
Recent Developments
Speakers: Cynthia Lutz Kelly, Topeka Public
Schools, Topeka and John Rasmussen,
Kansas Association of School Boards,
Topeka
Telephone CLE

Thursday, February 24, Noon – 1 p.m.
Suggested Language for Kansas Powers of Attorney
for Health and Finances Including Recent Law
Changes
Speaker: K. Kirk Nystrom, Attorney at Law,
Topeka Telephone CLE

Friday, February 25, 9 – 11:45 a.m.
Administrative Agency Evidentiary Proceedings:
Trials & Tribulations
Kansas Law Center, Topeka

Friday, February 25, 12:45 – 3:30 p.m.
Government Law
Kansas Law Center, Topeka

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