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• Metropolitan Organization to Counter Sexual Assault (MOCSA)
• Kansas Bar Foundation
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Todd LaSala, Stinson Morrison Hecker LLP
Lori Schultz, Shook, Hardy & Bacon LLP

Questions?
Contact Deana Mead, KBA CLE Director, at dmead@ksbar.org or at (785) 234-5696.

June 23, 2011, 2:30 – 4:10 p.m.
Folly Theater
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June 24, 2011, 2:30 – 4:10 p.m.
Polsky Theatre, JCCC Carlsen Center
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Focus

30

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By Teresa L. Watson

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The American Bar Association Members/Northern Trust Collective Trust (the “Collective Trust”) has filed a registration statement including the prospectuses therein (the “Prospectuses”) with the Securities and Exchange Commission for the offering of Units representing pro rata beneficial interests in the collective investment funds established under the Collective Trust. The Collective Trust is a retirement program sponsored by the ABA Retirement Funds in which lawyers and law firms who are members or associates of the American Bar Association, most state and local bar associations and their employees and employees of certain organizations related to the practice of law are eligible to participate. Copies of the Prospectuses may be obtained by calling (877) 947-2272, by visiting the Web site of the ABA Retirement Funds Program at www.abaretirement.com or by writing to ABA Retirement Funds, 301 N. 3rd St., 10th Floor, Phoenix, AZ 85004. This communication shall not constitute an offer to sell or the solicitation of an offer to buy, or a request of the recipient to indicate an interest in, Units of the Collective Trust, and is not a recommendation with respect to any of the collective investment funds established under the Collective Trust. Nor shall there be any sale of any Units of the Collective Trust in any state or other jurisdiction in which such offer, solicitation or sale would be unlawful prior to the registration or qualification under the securities laws of any such state or other jurisdiction. The Program is available through the Kansas Bar Association on a member benefit. However, this does not constitute an offer to purchase, and is in no way a recommendation with respect to any security that is available through the Program.

Join or renew online at www.ksbar.org
Implementing the Estate and Gift Tax Changes Before 2013’s Sunset

By Susan A. Berson

Cover layout & design by Ryan Purcell
rpurcell@ksbar.org

Give a Hand Up to Those in Need

- Help is needed to provide pro bono legal services to low-income Kansans; ALL areas of practice are needed.
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For more information or to volunteer, contact Kelsey Schrempp, KBA manager of public services, at (785) 234-5696 or at kschrempp@ksbar.org.
That Thing You Do

When was the last time you contemplated why you became a lawyer? Was it after a particularly tough day, a negative verdict, harsh words from a judge, opposing counsel that was beyond difficult, or the client that simply could not be pleased? I have had all of those kinds of days plus a host of others that made me question my choice of career. Recently, an old song came on the radio that got me thinking about this decision to be a lawyer. The song was “That Thing You Do,” which was also the title of a movie produced by Tom Hanks about a band called The Wonders. The movie and the song had nothing to do with the law but the title made me wonder why attorneys do the things (practice law) they do.

Some people become lawyers because of the opportunity to make a good living, others use it as a gateway to a political career, some may desire to become the next Perry Mason, and a few want the ability to exercise power over others. We all know lawyers who were motivated by one or more of those reasons. Recently, I attended the ABA midyear meeting, which gave me the opportunity to associate with attorneys from across our country. We shared experiences and discussed common problems. During these conversations, it was remarkable how often the talk turned to how each of us ended up in law school and entering this profession. While each story was unique, there seemed to be a common thread; I realized that the major actions of this courageous jurist came as no surprise. His actions were an extension of his life as a lawyer and judge, and the actions of this courageous jurist were part of his calling.

It has often been said that no higher purpose exists than helping people solve problems. The satisfaction of helping others was a gage in this profession. While each story was unique, there seemed to be a common thread; I realized that the major actions of this courageous jurist came as no surprise. His actions were an extension of his life as a lawyer and judge, and the actions of this courageous jurist were part of his calling.

... that he will neither delay nor deny any man his right through malice, for lucre, or from any unworthy desire; that he will not knowingly foster or promote, or give his assent to any fraudulent, groundless, or unjust suit; that he will neither do, nor consent to the doing of, any falsehood in court and that he will discharge his duties as an attorney and counselor of the Supreme and inferior courts of the State of Kansas with fidelity both to the court and to his cause and to the best of his knowledge and ability ...

When I receive emails attacking lawyers and placing blame for most of society’s ills on our shoulders, I remind the authors that of the 56 original signers of the Declaration of Independence, 24 were lawyers, far more than any other single occupation. If the Revolution had failed, that document served as a death sentence for those that signed. What an incredible example of courage and the duty of lawyers to serve others. To a large extent, this nation was founded by lawyers and we should take pride in that fact. What does all this mean? The next time you wonder why you do that thing you do, maybe this column will provide some assistance in finding the answer. ■

KBA President Glenn Braun may be reached by email at grbraun@haysamerica.com, by phone at (785) 625-6919, or by posting a note on our Facebook page at www.facebook.com/ksbar.
Some of my loyal readers (do I have any?) may remember that I have previously written about the construction project at our home at the Kansas Law Center. Now that we’ve finally completed all phases of this project, I thought that I would reflect one final time about this historical and very successful endeavor.

The first time I ever walked into 1200 Harrison St. was for my initial interview during the KBA executive director search process back in January 2004. Even though the Law Center was only 30 years old, and despite the best efforts of our dedicated volunteers and staff, the building was clearly in need of a face lift as well as some good old-fashioned TLC.

I remember that it was a cold and rainy wintery day when I entered the back (south end) of the building. I sat down in what appeared to be an art deco orange chair from the 1960s and glanced up at the ceiling and noticed it was actually leaking in the lobby. Right then, I reconsidered and modified my action plan for the interview.

While the meeting incorporated numerous subjects and organizational plans for the future, it was evident the Board of Governors was ready to move forward to redevelop the headquarters and had already signed a fundraising agreement with ALPS Foundation Services and was working with an architect, the Schwerdt Design Group of Topeka.

I had been involved in a similar undertaking while working at the Detroit Bar Association in the early 1990s and indicated that my experience might be beneficial with such a venture. Fortunately for me, and perhaps unfortunately for the Bar, I was hired. And so, the Raising the Bar Campaign (RTB) was born.

Our RTB efforts sought to increase the size of the Kansas Law Center through renovation and expansion including adding technological enhancements and modernization that were necessary to enhance member benefits.

The campaign also sought to strengthen the Bar’s ability to fund projects to foster the welfare, honor, and integrity of the administration of justice by increasing funding for civil aid to the poor and improving the accessibility of the legal system.

With interest rates at all time lows, the state of the Interest on Lawyers’ Trust Accounts (IOLTA) program was sketchy at best so we needed to increase the Bar Foundation’s endowment to make up for this shortfall.

Salina attorney Frank Norton, who served as our statewide chairperson, led this joint effort between the Foundation and Association, and we were joined by dozens of hardworking members who were involved in each stage of the campaign and construction project.

We all owe these people, too many to recognize by name here, a huge debt of gratitude and we cannot thank them enough for their unwavering dedication and hard work.

Fast forward seven years into the future and we can finally declare: mission accomplished.

As you enter the headquarters, you are clearly walking into something that is high-tech, yet not too ostentatious. The expansion has added more than 3,000 square feet of prime meeting space which offers attendees all the modern amenities they would come to expect in a state-of-the-art facility.

Out of town guests will enjoy a dedicated office complete with a desktop workstation with Internet access and printer as well as a staff committed to assisting their every need.

Add to that a small old-fashioned “book” law library and a historical law museum displaying memorabilia with some (Continued on Page 19)
Best-Selling Author to Deliver Keynote

“Where are you Perry Mason?” Scott Turow, who is a New York Times best-selling author and practicing attorney, will be discussing the popular images of lawyers and focusing on the dizzying ambivalence that Americans believe about lawyers and tracing the reasons for both their liking and loathing.

Turow was born in Chicago and graduated with honors from Amherst College in 1970. He taught creative writing at Stanford University as an E.H. Jones lecturer from 1972-1975 before going to law school at Harvard University. After graduating with honors in 1978, Turow began work as an assistant U.S. attorney in Chicago and served as lead counsel in a number of prosecutions related to corruption in the legal profession connected to Operation Greylord, a federal investigation of corruption into the Illinois judiciary.

He said his father was a prophet in his own time, in that he disliked lawyers long before that was common.

“My friends went to law school and I was fascinated by them,” Turow said. To him, it was either be an academic or do something else. Turow chose to do something else; he chose law school.

Since 1986, he has had an active law practice at SNR Denton in Chicago, where he concentrates on white collar criminal defense and devotes a substantial amount of time to pro bono matters.

Despite his legal background, Turow said he still remains the novelist he is trying to become.

“My mom had literary ambitions,” he said. “From 11 or 12 years old, I knew I always wanted to be a novelist. I think I willed myself into that.”

Turow is the author of multiple best-selling legal thrillers, such as “The Burden of Proof,” “Presumed Innocent,” “Pleading Guilty,” and “Personal Injuries.” Turow also wrote “One L,” an autobiographical book about his first year at Harvard Law and “Ultimate Punishment,” a memoir of his experience of dealing with capital punishment as a lawyer. His latest novel, “Innocent,” is a sequel to his first novel “Presumed Innocent.” “Innocent” continues the story of Rusty Sabich and Tommy Molto who are pitted against each other in a psychological match after the mysterious death of Rusty’s wife.

Turow, who began writing fiction in high school, has enough unpublished manuscripts that could carpet a large room. He said his experiences have always contributed to the novels, but while he remains inspired by the legal milieu, he tries not to steal from life.

He is keenly aware of the way lawyers are admired, envied, and sometimes loathed as there can be a deep-seeded ambivalence with the cultural forces in the last 25 years. “I am sometimes guilty of the popular image,” he said.

“We’re a little bit myopic and centered in our world,” he said. “Why do they pay so much attention to us?”

Turow has finally had a chance to get acclimated to the small degree of celebrity and success he has acquired selling more than 25 million copies of his novels worldwide in more than 25 languages. The books have been adapted into a full-length feature film and two television miniseries.

“These are the terms of my life,” he said, “and there is a lot of luck involved.”

n
Join a Bar Association!

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

Recently I participated as a panelist at Washburn University School of Law talking to law students about the benefits that are available to them now, and in their future careers, through involvement in various bar associations. Joining me on the panel were other current members of the board of directors for the Kansas Bar Association’s Young Lawyers Section (KBA YLS), namely Vincent Cox, president-elect; Jennifer Hill, immediate past president and Kansas Bar Foundation delegate; and Scott Hill, American Bar Association (ABA) delegate to the KBA YLS. Not only did each of us discuss with the students our involvement and leadership with the KBA YLS, but also with other bar associations locally, across the state, and throughout the country. Although we spoke particularly about involvement in law school and as new lawyers, I think the same comments apply to seasoned lawyers everywhere.

Vincent talked to students about his bar involvement, particularly with the Topeka Bar Association’s Young Lawyers Division (TBA YLD) as he has served as president for the TBA YLD this bar year. He pointed out that there are many levels of bar associations that a young lawyer or law student can get involved in, beginning with local bar associations. Associations at the local level can provide lawyers in a city or county with the chance to network with others practicing specifically in that region, who know the judges in district courts and who know attorneys in particular fields of practice in the area. Local bars tend to have more events and activities available for members, such as monthly meetings and other philanthropic and networking events.

Jennifer also shared her experience with both local and state bar associations. She has served as the president of the Wichita Bar Association’s Young Lawyers Association (WBA YLA), as president of the KBA YLS, and now as a member on the WBA’s board of governors. Calling herself a “bar junkie,” Jennifer spoke with students and provided insight about all connections we make through the bar associations to continue to prosper and succeed as attorneys. And, as Jennifer Hill said to law students, “It’s just the right thing to do.”

My advice to law students, new attorneys, or those who have yet to join a bar association is to examine what your interests are and what membership in an association can give to you. Of course, I would definitely encourage membership in local, state, and national bar associations, since each can assist you and your career in different manners. It takes the connections we make through the bar associations to continue to prosper and succeed as attorneys. And, as Jennifer Hill said to law students, “It’s just the right thing to do.”

Please consider becoming a member in one of the many bar associations out there, locally, across the state, or nationally, which are available to help you thrive in the fine profession you have chosen for your career.

About the Author

Melissa R. Doeblin graduated from Washburn University School of Law in 2005 and received a certificate in Natural Resources Law. She currently serves as advisory counsel for the Kansas Corporation Commission in Topeka.
Changing Lives

By Anne McDonald, Kansas Lawyers Assistance Program, Topeka, executive director, mcdonalda@kscourts.org

“During National Volunteer Week, we honor the ordinary people who give of themselves to accomplish extraordinary things, and we encourage more Americans to strengthen our country by volunteering.”

– Presidential Proclamation, April 16, 2010

Many organizations devote the entire month of April to honoring and celebrating their volunteers. We here at the Kansas Lawyers Assistance Program (KALAP) will do no less. All those laudatory descriptions leap to mind: foundation, life blood, sine qua non, invaluable, priceless, useful, important. Kind of reminds me of the Elizabeth Barrett Browning poem “How do I love thee? Let me count the ways” from “Sonnets from the Portuguese, XLIII.”

How do we appreciate you, describe you, praise you, thank you? Let us count the ways. Well, with words like these but – we know, because you’ve told us: the best thanks and compensation is the joy the volunteer gets from giving.

KALAP volunteers give their time, their knowledge and experience, their support, their caring, and concern to other Kansas lawyers. They serve as life coaches, mentors, and monitors. Most volunteers agree to work one on one with another lawyer who’s going through a rough patch so to speak and they do this through regular, periodic meetings, and contacts for as long as is needed – usually three to six months. Initially, most KALAP volunteers were recovering alcoholics and we still have many of those and we still need all of them. But as more lawyers struggle with stress, anxiety, depression, or aging, there’s a need for other kinds of volunteers. People with some wisdom and a lot of patience.

KALAP does offer training, resources, and support to volunteers. However, what’s often needed most is kindness and compassion, which is a side of us we may not get to show all that often.

Kansas Supreme Court Rule 206 addresses volunteers in several sections:

(f) KALAP shall provide the following services:

(1) Immediate and continuing assistance at no cost to lawyers.

(g) Confidentiality.

(1) All records and information maintained by KALAP, its Board, employees, agents, designees, volunteers, or reporting parties, shall be confidential and privileged ...

(2) ... volunteers, or reporting parties are relieved from the provisions of Rule 8.3 of the Kansas Rules of Professional Conduct and Supreme Court Rule 207 as to work done and information obtained in carrying out their duties and responsibilities under this rule.

(h) Immunity

... they [volunteers] shall be absolutely immune from liability for any omission or conduct in the course of carrying out their official duties and responsibilities or failing to fulfill their duties and responsibilities under these rules.

Over the years, I’ve heard KALAP volunteers say things like these:

“I like working one on one with someone.”

“It is good to know I can make a difference in someone’s life.”

“I’ve been blessed and I’m glad to be able to give back.”

And, I’ve heard lawyers they’ve helped say:

“I can’t thank you enough. It really made a difference to have someone to talk to.”

“My KALAP monitor became my friend.”

“It really helped to have someone help me be accountable for my recovery.”

KALAP presently has approximately 100 volunteers. If we have around 10,000 lawyers in Kansas, I’ll do the math: that computes to about one volunteer per 100 lawyers. Now, fortunately, we don’t currently have even 1,000 lawyers receiving assistance – but we have well more than 100 and the number is climbing. I know how dedicated our Kansas lawyers are and many of you are already committed to the max. But if you want to reach out and be there for another lawyer, and experience gratitude, humility and satisfaction in a new dimension, consider being a KALAP volunteer. Consider being an ordinary person who gives of him or herself to accomplish extraordinary things and strengthen our Kansas legal community by volunteering.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She frequently hikes or backpacks with her husband and other Sierra Club members. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.
Giving to others is not only for the recipient, but also for the one giving as well. The legal profession is full of wonderful people who give to their communities, places of worship, and other worthy charitable organizations, including the work of the Kansas Bar Foundation (KBF).

The KBF was founded in 1957 as the philanthropic arm of the Kansas Bar Association (KBA). The mission of the KBF is to serve the citizens of Kansas by funding projects that foster the welfare, honor and integrity of the legal system by improving its accessibility, equality, and uniformity. Those who give to the KBF give to exceptional civics educational programming K-12 as one of the many charitable groups. In recent years the KBF has established scholarships to be given to law students to further their education into law school.

The KBF has established four scholarships given to students in the 2010-11 school year. The four scholarships are: Justice Alex M. Fromme Memorial Scholarship Award; Maxine S. Thompson Memorial Student Scholarship Award; Case, Moses, Zimmerman & Martin P.A. Law Student Scholarship Award; and the John E. Shamberg Memorial Law Student Scholarship Award. All four awards are an annual $1,000 scholarship.

The Justice Alex M. Fromme and the Maxine S. Thompson Memorial scholarships are given to those students planning to practice in Kansas and attend either Washburn University or the University of Kansas schools of law. Last year was the inaugural year for both of these awards. The recipient of the Justice Alex M. Fromme award was Whitney Casement of Washburn. The Maxine S. Thompson award was given to Adam Dees of KU.

The Case, Moses, Zimmerman & Martin P.A. Law Student Scholarship Award was the first established KBA scholarship and first awarded in 2008. This too is intended to go to a future Kansas lawyer attending either Kansas law schools or Creighton University School of Law. This award is specifically given to a second-year law student. In 2010, the awardee was Daniel J. Keating of KU.

The John E. Shamberg Memorial Law Student Scholarship Award is specifically given to a Washburn law student planning to practice in Kansas. The first John E. Shamberg Memorial Scholarship was given to Meghan McEvoy in February 2011.

We are always looking for more scholarship opportunities to foster the incoming legal professionals of the future. A KBF scholarship is a perfect way to honor an individual or firm. The KBF Scholarship Committee is chaired by Katherine L. Kirk of Lawrence. If you are interested in honoring someone by creating a KBF law student scholarship, please contact Kelsey Schrempp, manager of public services, by email at kschrempp@ksbar.org or by phone at (785)234-5696.

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Life is a gift, and it offers us the privilege, opportunity, and responsibility to give something back by becoming more.

– Anthony Robbins
Let Your Voice be Heard!

2011 KBA Officers and Board of Governors Elections

CONTESTED POSITION – SECRETARY-TREASURER

Gerald L. Green, of Hutchinson, graduated from Washburn University in 1973 and the Washburn University School of Law in 1976. In law school, he was an editor of the Washburn Law Journal. Admitted to practice in 1976, Green has been with Gilliland & Hayes in its Hutchinson office since 1981, where his practice is focused on civil litigation, health care law, and employment law.

He handles the defense of professional liability claims for attorneys and insurance agents, the defense of personal injury cases, insurance defense, and business litigation. He advises clients on employment matters and represents employers in the defense of employment claims. Green also advises and represents health care clients regarding a variety of health care-related issues.

Green is a Fellow in the American College of Trial Lawyers and is a member of both the Kansas Association of Defense Counsel and the Kansas Association of Hospital Attorneys. He is a past president of the KADC and the KAHA. He has served on the American College of Trial Lawyers’ Kansas State Committee and is currently the District 8 representative on the Kansas Bar Association Board of Governors. He also serves on both the county and state bar associations’ ethics committees.

He is also involved in his community and church, having served on various nonprofit boards in Hutchinson, the Washburn University School of Law Alumni Association, Board of Governors, and his church board. He is on the Hutchinson Community College Legal Assistant Advisory Committee and on the board of the Kansas Cosmosphere & Space Center.

Teresa L. Watson is a partner in the law firm of Fisher, Patterson, Sayler & Smith LLP in Topeka. Watson practices in the areas of civil rights litigation, governmental liability and appellate law.

She has served two terms on the KBA Board of Governors (BOG), representing District 5 (Shawnee County); she is a current member of the BOG Executive Committee. Her service to the KBA includes a term as president of the Insurance Law Section, a term as secretary/treasurer and section editor of the Government Lawyers Section, and membership on the Media-Bar Committee, Appellate Law Section, Criminal Law Section, and Young Lawyers Section. She wrote appellate opinion digests for the Journal of the Kansas Bar Association and has published multiple substantive articles in the Journal. She also is a member of the Commission on Professionalism.

Watson has served as president of the Topeka Bar Association, the Kansas Women Attorneys Association, and the Women Attorneys Association of Topeka. She was named to the list of Best Lawyers in America in the area of appellate law in 2010 and 2011. She was named Boss of the Year by the Topeka Legal Professionals in 2010. She received the Outstanding Young Lawyer Award from the Topeka Bar Association in 1998.

She is a magna cum laude graduate of the Washburn University School of Law and a summa cum laude graduate of Washburn University.
Rachael K. Pirner, of Wichita, is a member of Triplett, Woolf & Garretson LLC and currently serves as president-elect of the Kansas Bar Association. She has chaired the KBA Litigation Section and has also served on numerous KBA committees.

She has served on numerous Wichita Bar Association committees, been active in the Wichita Women Attorneys Association since she graduated from the University of Nebraska School of Law in 1989, and has served the Kansas Women Attorneys Association. Pirner has long participated in the Lawyer’s Care Project through Kansas Legal Services, volunteered to represent women seeking Protection from Abuse orders, and prepares advance directives for indigent persons in hospice care.

Lee M. Smithyman, of Overland Park, practices with Smithyman & Zakoura Chtd. He earned both his bachelor’s and master’s degrees from Carnegie-Mellon University. After serving four years in Germany as an Army officer in the Air Defense Artillery, he returned to Washburn University School of Law, where he graduated cum laude in 1976.

He is a member of the Wyandotte County, Johnson County, Kansas, and American bar associations. He is a certified.
Sara S. Beezley has been a solo practitioner in Girard since 1983. She graduated with high honors from Southern Methodist University, Dallas, with a Bachelor of Arts in political science and economics in 1976. She earned her juris doctorate from Duke University in 1979. She is a member of the Kansas, American, and Crawford County bar associations; Kansas Trial Lawyers Association; and Kansas Association of Criminal Defense Lawyers. Beezley serves on the KBA Nominating Committee, Ethics Grievance Panel, and Fee Dispute Resolution Panel; she is also a trustee for the Kansas Bar Foundation. She is a member of the Commission on Judicial Performance; Family Law Advisory Committee to the Kansas Judicial Council; 11th Judicial District Nominating Commission; and chair of the Kansas Board for the Discipline of Attorneys.

**KBA Delegate to ABA House**

**Vice President**

Dennis D. Depew, of Neodesha, has been in private practice with the Depew Law Firm since 1983. He received his Bachelor of Science in business administration in 1980 and his Juris Doctor in 1983 from the University of Kansas School of Law. Depew is a member of the Wilson County, Southeast Kansas, 31st Judicial District, and Kansas bar associations.

He is a past president of the KBA Alternative Dispute Resolution; a member of the Family Law; and Real Estate, Probate, and Trust sections. He is the State ADR Committee representative for the 31st Judicial District, Kansas Bar Foundation Fellow, and assistant Neodesha City attorney.

He has been a member of the Kansas Board of Discipline of Attorneys since 1999 and served as the District 3 representative on the KBA Board of Governors from 2005-2010 and secretary/treasurer since 2010.

Depew serves as president-elect of the Kansas Association of School Boards (KASB) and is a 16-year board member and past president of USD 461; past member of the KASB board of directors, National School Boards Associations Federal Relations Network, Kansas School Attorneys Association, and KSAA board of directors. He co-founded the Neodesha High School Alumni Association Scholarship Fund and the Neodesha Educational Foundation.

**District 1**

Greg Goheen, of Kansas City, Kan., is a partner with the law firm McAnany, Van Cleave & Phillips P.A. Born in Manhattan, he attended college at the University of Kansas before heading to law school at Southern Methodist University in Dallas. Goheen’s practice consists primarily of complex civil litigation at both the appellate and trial levels in state and federal courts. He is active in numerous professional and community organizations, including serving as the immediate past president of Federal Courts’ Advocates Section for the Kansas City Metropolitan Bar Associations, current vice president of the Kansas Association of School Attorneys, and a trustee for the Kansas Bar Foundation.

Mira Mdivani is president of the Corporate Immigration Compliance Institute and a corporate immigration lawyer with the Mdivani Law Firm in Overland Park. Her practice is focused on defense of employers in Department of Homeland Security investigations, Form I-9 employment eligibility verification audits, and visas for international personnel. Her pro bono practice is on behalf of immigrant victims of domestic violence and trafficking. She is past president of the Association for Women Lawyers of Greater Kansas City and a current board member of the Kansas City Metropolitan Bar Association. She is the immediate past chair of the Missouri Bar Immigration Law Committee. Mdivani serves as adjunct professor of law at the University of Missouri-Kansas City School of Law. Her books include “I-9 Audits, the Best Way to Prevent I-9 Disasters”; “Corporate Immigration Compliance Plans, Policies and Procedures”; and “Violence Against Women Act: Hope for Survivors.”

**District 3**

Eric L. Rosenblad, of Pittsburg, is the project director of the Kansas Legal Services program serving the Southeast Kansas region. He began his career in 1982 as a staff attorney for Kansas Legal Services and has directed those efforts in the region since 1984.

Rosenblad is a 1982 graduate of the University of Kansas School of Law and a 1979 graduate of Kansas State University. Rosenblad previously served on the KBA Media-Bar Committee. He is a member of the Crawford and Cherokee county bar associations. He is a founding member of the Crawford County Domestic Violence Task Force and...
has assisted in leading similar efforts in Cherokee and Montgomery counties. He is a frequent speaker at community legal education events on topics in elder, consumer, and access to justice matters.

**District 7**

Matthew C. “Matt” Hesse is associate general counsel with Via Christi Health Inc. in Wichita. He received his bachelor’s degree from Wichita State University in 1982 and his juris doctorate with honors from Washburn University School of Law in 1985.

He is a member of the Kansas and Wichita bar associations, KBA Health Law Section, American Health Lawyers Association, past president of the Kansas Association of Healthcare Attorneys, and Kansas Bar Foundation Fellow. He is concluding his first term on the KBA Board of Governors for District 7.

Hesse served as president of the Wichita Young Lawyers and served on the WBA Board of Governors as secretary/treasurer and vice president. He has served on many committees for the WBA, including Medical Legal, Buildings Management, Unauthorized Practice of Law, Mentoring Program, and Summer Intern.

Hesse is also active in other community organizations. He has served many years on the Gerard House Inc. board of directors, Children’s Miracle Network advisory board in Wichita, and vice president of Kansas Health Ethics Inc. He previously served two terms on the Washburn School of Law Board of Governors.

**District 8**

John B. Swearer was born and raised in Hutchinson. He graduated from Grinnell College, Grinnell, Iowa in 1980 and received his J.D. from the University of Kansas in 1983.

He has practiced law in Hutchinson with the firm of Martindell Swearer Shaffer & Ridenour LLP since 1983. His practice is focused on wills, trusts, and estate planning and the representation of businesses throughout central Kansas.

Swearer has been active in the community, serving in a leadership role for a number of nonprofit and civic organizations. He served as president of the Reno County Bar Association in 2010. He has served as president of the Reno County Historical Society, chairman of the Reno County Republican Party, treasurer of the Hutchinson/Reno County Chamber of Commerce, as well as serving on numerous other civic boards and committees.

**District 11**

Nancy Morales Gonzalez is a life-long Kansas City, Kan., resident, practicing in the Office of the General Counsel, Social Security Administration. Prior to government service, she engaged in an employment defense practice. She served as a judicial law clerk at the U.S. District Court for the Western District of Missouri and the Eighth Circuit Court of Appeals. Gonzalez also is active in the Missouri Supreme Court’s Gender and Justice Council, the Missouri Bar Association’s Client Security Fund, a board member for the O’Connor Inn of Court, and a past president and active member of the Hispanic Bar Association of Greater Kansas City.

**District 12**

William Quick is the current KBA Governor for District 12. He also serves as the president-elect of the KBA’s Corporation, Banking, and Business Law Section. Quick’s legal practice encompasses a broad array of business legal matters, including counseling clients on portfolio company management, corporate governance and compliance, strategic alliances, joint ventures, asset and equity purchases, sales, mergers and acquisitions, reorganizations, financing, securities law compliance and reporting, and other general business and commercial matters. He is a shareholder in the Kansas City office of Polsinelli Shughart P.C.

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The Definition of Economy

By Ganesh Nair, University of Kansas School of Law, gnair@ku.edu

Did you know that 10 out-of-state law students together make a $1 million investment to come to law school? That sum may seem outlandish, but it reflects the reality that finances are a crucial aspect of the legal profession and legal education. As a law student with a business background through undergrad and in corporate America, I see one crucial element that law students often lack exposure to. That element is the business side of law. I’m not talking about transactional or bankruptcy law, but the actual operations of a law firm. As law students, we would be wise to learn more about this aspect of legal practice because the business operations of law firms are very closely tied to our future.

Law school does a very good job educating its students in several different areas. Among other things, law school teaches us to understand substantive and procedural law, to be ethical and maintain professional responsibility, and how to create memoranda using CRAC. With so much other ground to cover, there is not a lot of time left to discuss the intricacies of law firm business plans and related topics. Savvy law students should recognize this and spend some time acquainting themselves with these important components of a legal career. I know, sometimes it is tough to focus on anything other than outlines and papers, but it really isn’t that difficult to become familiar with the basics of law firm business operations. In fact, the KU Law Legal Entrepreneurs is a new organization that will help students build awareness and gain knowledge of the business operations side of legal practice. The organization will aim to bring in speakers like solo practitioners, managing partners, partners, CMOs, and CFOs. The organization aims to be a resource for students to understand business development, legal practice trends, and the general financial aspects of a law firm.

The genesis of our new student organization was the recognition that the legal employment market, like most other employment markets, is tougher than it has been for a while. Why are students having a more difficult time getting legal employment, be it internships or jobs? The obvious answer is the economy, which InvestorWords.com defines as “activities related to the production and distribution of goods and services in a particular geographic region.” To make this relate to law students, let’s substitute some words:

- **Activities** = include, but not limited to the Hiring of Law Students
- **Services** = Legal Services
- **Geographic Region** = Kansas City

The math breakdown is Services – Activities = Profits. From this perspective, the new law student definition of economy is: “Hiring of Law Students in relation to the Legal Services in Kansas City.”

You don’t have to be a genius to understand that law firms do not always make quick returns from law students, at least not to the degree they did in the past. Many factors, including increased specialization and increased competition, contribute to this problem. My take on this is that law students might not be able to come into a law firm being able to provide the optimal “Services” part of the definition of economy, but we may be able to improve at the “Activities” side of the definition. Yeah, activities do include hiring, but they also include marketing and being a shrewd business person. After all, any company that has a balance sheet is a business, including law firms.

How can we strengthen the activities side? To provide just one example, this semester the organization is setting up a charity book drive. The drive is designed to help low income families, specifically children. The organization will not only collect books from the law school, but will reach out to area law firms to create a community wide book drive. The books will then be delivered to health clinics that serve low income and uninsured families. The overall goal is to encourage kids to read.

You may be wondering, how does this charity drive build the business etiquette of future lawyers? The answer is that it cultivates many of the skills necessary to succeed in the business aspects of legal practice, including:

- **Community Involvement** = Knowing your environment
- **Network for Charity** = Reaching out to area law firms and local hospitals
- **Branding** = How do we make this charity an annual event?
- **Teamwork** = How can we work together to bring ultimate success?
- **Marketing** = How do we get people excited and interested in joining our mission?

I think lawyers from all types of practices will agree that the above mentioned items are activities that every attorney must be proficient with. KU Law Legal Entrepreneurs is an organization that strives to help students think outside of the box, help employers’ overall margins, and do some good charity work at the same time. We invite law students and practicing lawyers to join us in our efforts.

**About the Author**

Ganesh Nair is a second year law student at the University of Kansas School of Law. He is vice president-elect of the Student Bar Association, president of the Asian Law Student Association, and co-founder of the KU Law Legal Entrepreneurs. Contact him at gnair@ku.edu if you would like to be involved with the activities of the KU Law Legal Entrepreneurs.
Thinking Ethics

Tapping the Social Network

By Mark M. Iba, Stinson Morrison Hecker LLP, Kansas City, Mo., miba@stinson.com

Years ago, the buyers of a large, delinquent note accomplished what had long eluded the selling bank: obtaining a quick payoff. The buyers attributed their success to their discovery that the borrower owned a successful sports team, a fact that was not in the loan files and was not otherwise readily available. They had done their homework, and it literally paid off.

Lawyers know only too well that there is no substitute for good intelligence on an adversary. Whether the representation involves a transaction or litigation, obtaining the right information about the other side can make all the difference. Accordingly, in this age of social networking, Facebook, Twitter, YouTube, and numerous other Internet sources present “attractive new weapon[s] in a lawyer’s arsenal of formal and informal discovery devices” that can and should be used.

There are, of course, ethical risks associated with using – and not using – these so-called discovery weapons. In particular, using social networking sites to obtain information about an opposing party or witness implicates a lawyer’s obligations relating to honesty, supervision of nonlawyers, and communication with represented persons.

Public Pages on Social Networking Sites

Perhaps the easiest issue to resolve is whether a lawyer may view and access the information that an adversary or a witness posts on Web pages that are available to the public or at least to all members of a particular network like Facebook, MySpace, or LinkedIn. This does not require deception or communication with the person and does not appear to implicate other ethical rules. In addressing this issue, the New York State Bar Association recently observed that accessing and viewing publicly posted information on social networks like Facebook or MySpace is comparable to obtaining information from publicly accessible online or print media, or through a subscription research service, such as Nexis or Factiva. This, the opinion holds, “is plainly permitted.”

Private Pages on Social Networking Sites

The analysis changes with respect to the non-public profile pages that are available only to people to whom the account owner has granted access, such as “friends” on Facebook. First, if the account owner is represented in the matter, the lawyer would be prohibited under Rule 4.2 of the Kansas Rules of Professional Conduct from communicating with (or “friending”) the represented person to gain access to his or her non-public pages absent consent from that person’s counsel. The lawyer also could not circumvent the rule by directing someone else to seek access from the account owner. See Rule 8.4(a). Parties, of course, may communicate directly with each other and, presumably, may “friend” each other; and, although lawyers may not direct those communications, they may provide legal advice concerning them. Ultimately, lawyers should exercise at least the same degree of caution to avoid violating Rules 4.2 and 8.4(a) with respect to social networking communications as they would in any other context.

In the case of unrepresented persons, recent opinions from the New York City and Philadelphia bar associations diverge. Both agree that it is misconduct to use deception to obtain access to someone’s profile, but they differ on whether a lawyer’s agent must disclose the reason for seeking access. The Philadelphia view holds that a lawyer may “forthrightly” ask the unrepresented person for access, but that it would be misconduct to have a lawyer’s agent make that same contact. That is because the unrepresented person might be more likely to grant access to someone he or she does not recognize or associate with the lawyer and, thus, be deceived because the lawyer’s agent would be omitting that he or she was seeking access only to obtain information that the lawyer might use against that person. By contrast, the New York City Bar concludes “that an attorney or her agent may use her real name and profile to send a ‘friend request’ to obtain information from an unrepresented person’s social networking website without also disclosing the reasons for making the request.”

The bright line rule in New York City is certainly easier to follow and arguably preferable, but Kansas lawyers should exercise caution in “friending” or having agents “friend” unrepresented persons without providing additional disclosure. While predating the social networking phenomenon, two Kansas ethics opinions suggest that lawyers might have an affirmative duty under Rule 4.3 (dealing with unrepresented persons) to disclose not only their identity but also their role.

(Continued on Page 19)

Footnotes

5. See Rule 4.2, Cmt. 4.
7. Id.
“Don’t reinvent the wheel – just realign it.” This motto is being followed by the Kansas Bar Association Paralegal Committee in the development of a proposed self-funded voluntary certification plan for associate Kansas Bar Association members. Several states have successfully implemented similar voluntary certification programs, including North Carolina in 2004 (http://www.nccertifiedparalegal.org) and Ohio in 2008 (http://www.ohiobar.org). The Kansas Committee is exploring these plans in order to map out an appropriate plan for the Sunflower State.

The paralegal profession was started in the 1960s. Under the leadership of President Lyndon Johnson, legal secretaries were asked to perform more paraprofessional tasks and fewer clerical jobs in the implementation of federal government programs like the “War on Poverty.” These “paralegals” or “legal assistants” began to perform duties that, absent the paralegal, an attorney would perform.

In the past 45 years, the paralegal profession continues to mature and paralegals’ duties expand. Paralegals continue to work in the traditional environments of law firms and governmental agencies. They also are employed in bank trust departments, hospital risk management areas, title insurance companies, and corporate law departments. For the past ten years, the U.S. Bureau of Labor Statistics has listed the paralegal profession as one of the fastest growing fields.

There has been, however, a specific dilemma which haunts the paralegal profession: anyone can call himself/herself a paralegal and begin working as a paralegal without any formal education or training. In order to address this troubling situation, the national legal community has been considering ways to improve the services offered by the professional paralegal to the public, under the supervision of an attorney. As an outgrowth of these discussions, states have started to offer voluntary certification plans, which assist in the establishment of paralegal standards.

The KBA Paralegals Committee is traveling down this voluntary certification road at a cautious and safe speed. The initiative began in September 2006. The committee received approval from the KBA Board of Governors to form a task force for the purpose of creating a tentative voluntary certification plan. In February 2008, the Board of Governors approved a proposed plan. In April 2008, several members of the Committee met with the Kansas Supreme Court. The Court informed the committee that it will consider the certification plan. The KBA Paralegal Certification Task Force is in the process of submitting detailed materials on paralegal certification to the Court.

The KBA voluntary certification proposal continues to evolve. From studying the outstanding North Carolina and Ohio plans, one notes several common denominators. Both are rooted in the goal that legal service to the general public should be improved by the development of a paralegal voluntary certification plan. A much needed benchmark will be established to ensure paralegal competency and enhance the quality of legal services provided by the attorneys, with the assistance of well-qualified paralegals.

Proponents of the North Carolina and Ohio models quickly learned that they must agree on a definition of who a paralegal is in order to implement a successful plan. Both relied heavily on the American Bar Association definition: “A legal assistant or paralegal is a person, qualified by education, training, or work experience who is employed or retained by a lawyer, law office, corporation, governmental agency, or other entity and who performs specifically delegated substantive legal work for which a lawyer is responsible.”

Once a state accepts a definition of a paralegal, then it can move to a concrete plan for voluntary certification. North Carolina and Ohio have five basic requirements for voluntary certification. The candidate must:

a) Meet the state’s definition of a paralegal;

b) Meet education/experience requirements;

c) Provide acceptable references;

d) Pass a written examination; and

e) Complete continuing legal and ethical education.

In addition, following certification the paralegal must periodically receive additional legal and ethical education to maintain certification. This is one of the key components of a successful plan, according to Marisa Campbell, director of the Meredith College Paralegal Program, in Raleigh, N.C.

The paralegal is a vital member of the legal team. The individual must understand critical ethical principles, such as unauthorized practice of law, confidentiality, and conflict of interest. When a paralegal understands and practices these ethical principles, the general public receives better legal service, the goal of any voluntary certification plan.

In the six years following the implementation of the North Carolina voluntary certification plan, more than 5,000 paralegals are qualified to use the designation, “North Carolina Certified Paralegal, North Carolina State Bar Certified Paralegal,” or “Paralegal Certified by the North Carolina State Bar Board of Paralegal Certification,” after their names.

Since adoption a few years ago, a steady stream of Ohio paralegals have been certified. In the past year, 26 paralegals earned the distinguished title of Ohio State Bar Association Certified Paralegal, which brings the total number to 165 state bar certified paralegals. Laura Barnard, director of the Lakeland Community College Paralegal Program, located in
KBA Headquarters a True Treasure
(Continued from Page 7)

pieces being more than 400 years old, you get an idea of what was envisioned many years ago.

Since our “grand opening” in 2008 during the last time the KBA Annual Meeting was held in Topeka, we have hosted numerous seminars, legislative symposiums, and other gatherings – all to glowing reviews. We allow groups of all shapes and sizes to use the facilities free of charge.

In September of last year, we completed the west parking lot across Harrison, adding more than 50 parking spaces, so off-street parking concerns are no longer an issue.

Next month, I will spend some time discussing how wonderfully successful we were with increasing the Foundation, including the establishment of six law student scholarship awards.

If you have not had a chance to see the Law Center, please be sure to stop by the next time you are visiting or passing through Topeka!

Jeffrey Alderman may be reached by email at jalderman@ksbar.org or by phone at (785) 234-5696.

Tapping the Social Network
(Continued from Page 17)

in the matter. Rule 4.3 might not apply when a lawyer’s agent makes the contact, but that contact, without comparable disclosures, might run afoul of the lawyer’s responsibility under Rule 5.3 to ensure that a nonlawyer assistant’s conduct is compatible with the lawyer’s professional obligations and the prohibitions in Rule 8.4 against assisting or inducing another to violate the Rules of Professional Conduct or to engage in conduct involving dishonesty and deceit. 10

The Bottom Line

The circumstances of every representation will dictate the degree to which information on social networking sites may be useful, but the sites cannot be ignored. Lawyers can and should tap these resources through formal discovery (if in litigation) and through informal, non-deceptive discovery, including, where appropriate, “friending” unrepresented persons, but must carefully evaluate these activities and consider the disclosures that should be made to keep within the scope of their ethical boundaries.

About the Author

Mark M. Iba is a partner with Stinson Morrison Hecker LLP and practices in the firm’s business litigation division, focusing on complex civil litigation and arbitration. He also currently serves as assistant general counsel for the firm. He received his juris doctorate from the University of Chicago and is a member of the Kansas and Missouri bars.

About the Author

Anita Tebbe, a graduate of Washburn University School of Law, is licensed to practice law in Kansas. She is chair of the Legal Studies Department at Johnson County Community College. Besides being a member of the Kansas Bar Association, Tebbe is member of the Johnson County Bar Association and chairs the Naturalization Committee. She is also a member of the American Bar Association and former chair of the ABA Approval Committee of Paralegal Programs.

Kansas Paralegals con’t.

a suburb of Cleveland, summarized the Ohio paralegal voluntary certification plan, “I wish that even more paralegals would take advantage of this impressive process, which only further validates their importance to the legal community.”

With the support of the Kansas Supreme Court and the KBA, the KBA Paralegals Committee is excited and optimistic that our state will soon offer a voluntary certification for paralegals. Building on the expertise of other states’ plans, we are confident that this model will promote professional legal services and allow the attorneys of Kansas to better meet the demands for high quality legal services.

9. See Kansas Ethics Ops. 92-7 (lawyer interviewing former employees of adverse corporate party must identify self, role, and adversity of former employer) and 94-15 (lawyer collecting debt must identify self and role).


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Members in the News

Changing Positions

Molly A. Aspan has become shareholder of Hall Estill, Attorneys at Law, Tulsa, Okla.
Andrew L. Bolton has become a partner with PeterFish, Immel, Heeb & Hird LLP, Lawrence.
Alyssa C. Brockert has joined Crow & Associates, Leavenworth, as an associate.
Steven R. Faber has joined the Kansas Attorney General’s Office, Topeka.
Sarah E. Fertig has joined Kansas Sentencing Commission, Topeka.
Kelvin J. Fisher has joined Shaffer Lombardo Shurin, Kansas City, Mo.
NicoLe Forsythe has joined KPMG LLP, Kansas City, Mo.
Luke R. Hertenstein has joined Fondi, Wickens, Eisfelder, Roper & Hofer P.C., Kansas City, Mo.
Katie M. Martens has joined Ritmou, Payne & Coon LLP, Lincoln, Neb.
Tiffany A. McFarland has joined McDowell, Rice Smith & Buchanan P.C., Kansas City, Mo.
Julia A. Mowers has joined the 18th Judicial District Attorney’s Office, Wichita.
Lucas J. Nodine has joined the Labette County Attorneys Office, Parsons.
Terri J. Pemberton has joined Cafer Law Office LLC, Topeka.

Obituaries

Charles S. Arthur
Charles S. Arthur, 93, of Manhattan, died February 16 in Manhattan. He was born July 16, 1917, in Spirit Lake, Iowa, the son of Charles S. and Anna Hope (Pearson) Arthur. When he was young, his family moved to Olathe, where he attended school and graduated from Olathe High School in 1935. Following high school, Arthur attended college at the University of Kansas, earning his Bachelor of Science in business in 1939. During his college years he played varsity football at KU from 1935-36.

He was in his first year of law school in 1941 when he joined the U.S. Navy, just three months prior to Pearl Harbor. Arthur was a carrier pilot, flying in America’s first full-scale attack on Tokyo. During his military service, he was shot down over the ocean near Okinawa and was rescued an hour-and-a-half later out of the water when he was picked up by an U.S. destroyer. On another occasion, while landing his plane on an aircraft carrier, 200 Japanese bombers attacked the carrier fleet, severely damaging the plane he was in; he spent two weeks recovering from shrapnel wounds. His distinguished military career was highlighted when he received the Purple Heart, in addition to a Distinguished Flying Cross with star in lieu of a second Air Medal with six stars. He was honorably discharged in 1945 with the permanent rank of lieutenant commander.

Following the war he returned to law school and received his law degree in 1947; he was a member of the Alpha Tau Omega social fraternity. In 1947 he moved to Manhattan and went on to established the Arthur-Green law firm with Charles Green in 1950. In 1955 he was elected to the Manhattan City Commission, serving as mayor in 1956-57, and then served as state representative for 12 years, eight years in the House (1957-65) and four years in the Senate (1965-69). In 1963 he became speaker of the House for two years. Arthur received the James E. Butler Civil Rights Award for advancing the cause of civil and human rights.

Arthur served as general counsel for Kansas Farm Bureau and Affiliated Companies from 1975 until his retirement in 1992. He continued to practice law until

Andrew I. Reed has joined Brown & James PC, Kansas City, Mo.
Jessi R. Reed has joined Husch Blackwell LLP, Kansas City, Mo.
Gina M. Riekof has been promoted to shareholder at Gilmore & Bell P.C., Kansas City, Mo.
Hilary L. Velandia has joined Conner & Winters LLP, Tulsa, Okla.
Sara Zafar has joined Kansas Legal Services, Hutchinson.

Changing Locations

The Law Offices of Brian R. Barjenbruch LLC have moved to 309 S. Washington St., Raymore, MO 64083.
Norman E. Beal and Cheryl L. Reinhardt have opened Beal & Reinhardt LLC, 9120 W. 135th St., Ste. 204, Overland Park, KS 66221.
James C. Dodge has moved to 419 N. Kansas Ave., Liberal, KS 67901.
Jerry D. Fairbanks has opened Jerry D. Fairbanks, Attorney at Law, 1011 Main St., PO Box 743, Goodland, KS 67735.
Gary D. Justis has started The Justis Law Firm LLC, 7300 W. 110th St., Ste. 700, Overland Park, KS 66210.
Katie A. McClain has started the Law Office of Katie McClain LLC, 201 E. Loula, Ste. 108, Olathe, KS 66061.

Mayer & Rosenberg P.C. has relocated to 9229 Ward Parkway, Ste. 260, Kansas City, MO 64114.

Sethe L. Rundle has started his own practice, Law Office of Seth L. Rundle L.C., 940 T. Tyler, Ste. 203, Wichita, KS 67212.
Margie M. Wakefield Law Office P.A. has moved to 901 Kentucky St., Ste. 201, Lawrence, KS 66044.

The principal office location for The Law Office of F.A. “Al” White Jr. is 7924 N. Cherry, Kansas City, MO 64118.

Miscellaneous

Hinkle Elkouri Law Firm LLC has changed its name to Hinkle Law Firm LLC, Wichita and Overland Park.
Carl W. “Bill” Ossmann, Topeka, received the Sterbenz-Keating Award from the State Capital Area Firefighters Association at the organization’s annual Spring Fire School in Topeka.

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.

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Obituaries con’t.

he fully retired in 1998, following 51 years of service. He was a member of the Manhattan Chamber of Commerce; Rotary International; the Riley, Kansas, and American bar associations; and a fellow of the American College of Probate Counsel. He also served on the Kansas Governmental Ethics Committee (1971-75), Kansas Judicial Qualifications Commission (1974-94, past chairman), the Union National Bank & Trust Co. board (since 1953), the Manhattan Mutual Life Insurance Co. board and general counsel, the Kansas State University Foundation board of trustees, the Baker University board of trustees (past member), the KPL Gas Services board (1975-88), and the governor’s Kansas Tax Review Commission (1984-86).

Arthur is survived by his wife of nearly 67 years, Ann, of the home; five children, Charles S. “Terry” Arthur, of Manhattan, Robert B. Arthur, of Manhattan, Cynthia A. Sheern, of Abilene, Thomas P. Arthur, of Manhattan, and Deborah Heidorn, of Corinth, Texas; one brother, James T. Arthur, of Wichita; and 14 grandchildren.

He was preceded in death by his parents; one son, Richard T. Arthur; and two brothers, William and Wade Arthur.

Glenn Dale Cogswell

Glenn Dale Cogswell, 89, of Topeka, died February 7 at his home. He was born February 1, 1922, on a farm in Kingman County, the youngest of four sons, to Carl and Susie Cogswell; the family moved to Topeka in 1933. After graduating from Topeka High School in 1939, he attended the University of Kansas, graduated from officer’s training at Northwestern Midshipmen’s School in Chicago, and was called into active service as an ensign with the U.S. Naval Reserve in 1943. That same year he obtained his bachelor’s degree, in abstentia, from Washburn University.

He was a lieutenant junior grade in the U.S. Naval Reserve and served on active duty from 1943-46 with the Naval Amphibious Forces, European Theater, including the D-Day landings on Omaha Beach and the Normandy Invasion. After the war, he returned to Washburn, receiving his law degree and being admitted to the Kansas Bar in 1947.

He was elected a judge of the court of Topeka in 1948 at the age of 26 and was recognized by the Junior Bar Section of the American Bar Association in 1948 as the “youngest judge sitting on any bench in the United States.” He served as judge of the probate and juvenile courts of Shawnee County from 1951-57, was a delegate to the Republican National Convention in 1956, and was the Republican nominee for lieutenant governor in 1958. He partnered in law practice with Frank Miller, the law firm of Goodell, Casey, Briman, Rice and Cogswell, and Cogswell and Storey with Bob Storey.

Cogswell is survived by his wife, Peggy; children, Carolyn and David Cogswell, Dia Fox, Niki Fincham, and Shea Cogswell; stepchildren, Ann Anderson and Mike Vigola; and granddaughter.

Steven L. Davis

Steven L. Davis, 57, of Emporia, died January 11 in Topeka. He was born July 20, 1953, the son of Frank A. and Barbara J. Holzapfel Davis in Emporia. He graduated from Emporia State University and received his juris doctorate in 1977 from Washburn University School of Law.

He was a lawyer and served as assistant Lyon County attorney in 1978 and 1979. He was a member of Mason Lodge 12 A.S. and A.M.; Neosho Valley Shrine; Community Corrections Advisory Board; Lyon County, Chase County, Kansas, and American bar associations; Association for Justice; and Delta Beta Phi.

Davis is survived by his wife Debbie Jo Davis, of the home; children, Scott Davis, of Mason City, Iowa, Samuel Davis, of Portland, Ore., Seth Davis, of Omaha, Sadj L.S. Davis, of Emporia; three stepchildren, Jessica Alexander, S’Kylan Russell, and Sesstani Russell, all of Emporia; a brother, Brad Davis, of Emporia; a sister, Brenda Gehring, of Olpe; five grandchildren; and three stepgrandchildren.

Wendell S. Holmes

Wendell S. Holmes, 103, of Tryon, N.C., died January 14. He was born October 14, 1907, in Oswego, the son of Ernest L. Holmes and June Currier Holmes. He was a graduate of Humboldt High School, the University of Kansas School of Business, and Catholic University of America School of Law, Washington, D.C.

Holmes practiced law in Hutchinson from 1945 until 1991. He was a member of several boards of directors, including the First National Bank of Hutchinson, the Hutchinson Bar Corp., the Hutchinson Chamber of Commerce (past president), and the Colorado Springs Co. He served on the first board of directors of Hutchinson Hospital when St. Elizabeth and Grace hospitals were merged and a new hospital was built. He was also on the board of trustees of the Hutchinson Hospital Foundation.

He served in the U.S. Army during World War II, where he attained the rank of lieutenant colonel. He was awarded the Legion of Merit for extraordinary service. He was a colonel in the Army Reserve until 1967.

His lifelong dedication to the University of Kansas included being president of the alumni association and the university’s Development Committee. He was a life member of the Chancellor’s Club and Friends of the Watson Library. In 1983 he received the Fred Ellsworth Medallion for meritorious service and in 1998, the Distinguished Alumni Award from KU’s School of Business.

Holmes is survived by his daughters, Nancy Holmes and Sally McPherson, both of Tryon, N.C.; and two grandchildren. He was preceded in death by his wife, Alice “Pink” Fonton; and sons-in-law, Jim Freeman, Neil McPherson, and Ron Stegall.
The Lion Roars this Summer

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

Online case management provider, Clio, released results of a survey of more than 800 lawyers late last year that revealed an interesting trend – upwards of 55 percent of lawyers are Apple Mac users. While I suspect that survey is based on a biased sample of Clio users, anecdotal observations at the law schools, colleagues’ offices, and continuing legal education seminars does hint at a growing fan base for Macs among lawyers. For those who have made the switch, the latest version of the Mac OS X, dubbed Lion, promises some interesting new features lawyers ought to appreciate.

App Focus

Sales of the iPhone and iPad seem less driven by the hardware and are focused instead on the nigh-infinite customization possible via access to more than 400,000 apps available through Apple’s App Store. The average user has about a hundred of them on their iPhone/iPad, helping explain why projections are anticipating App Store revenues to hit $15 billion in 2011. By way of context, the iPhone/iPad hardware accounted for $15 billion or 56 percent of Apple revenues in its first fiscal quarter ending on December 25, 2010. As Google’s Android Market and Blackberry’s App World hope to erode those revenue numbers, Apple is looking to expand the App Store distribution to its desktop and laptop offerings.

The Mac App Store offers more than 1,000 Apps, including workout tracking tools, a home.office inventory database, and a la carte download of Apple’s office suite components. While the Mac App Store is accessible via the current OS X version, Snow Leopard, it will be more tightly integrated into Lion via a Launchpad tool that puts all apps in a single screen as on the iPhone/iPad. Many of those apps will also function in a full-screen mode in which the Menu Bar and Dock disappear. Certainly not huge developments but indicative of the direction Apple hopes to push computer interfaces – simple, purpose-driven, and intuitive. It works on portable, touch-screen devices but it will be interesting to see how it translates to desktops and laptops where touch-screens are replaced with large, multi-touch trackpads.

The Clio survey may help clarify why this shift in interface design is so important to users – especially small firm lawyers. Thirty-two percent of respondents indicated they appreciated Mac’s usability. Fifty percent of respondents use iPhones as their primary device and 26 percent are using iPads. Lion looks clearly aimed both at unifying the iPhone interface across all devices and further simplifying key tasks for which lawyers would turn to a desktop or laptop computer.

Security and Reliability

Military-grade encryption of files has been available for some time, but Lion adds a revised FileVault tool that can encrypt the entire hard drive and external drives in the background as you work. In addition, it can “shred” data on drives and in files such that they are virtually unrecoverable. As various data security requirements creep up on attorneys from regulators and clients, these tools become mandatory.

Complementing the security enhancements are reliability tweaks like Auto Save, Resume, and Versions. Auto Save continuously saves your work in the background without requiring your attention and can work with the Resume feature to allow you to shut down and reboot right back to where you were in your work. My personal favorite feature is Versions; Lion creates a version of your file each time you open and every hour while working. Should you need to go back a version (or five) you can visually scroll through a virtual Rolodex of every prior version of the file. Though I love the feature (having first used its grandpa in Digital’s OpenVMS), I can imagine it introduces all sorts of wonderful eDiscovery questions.

Sharing and Networking

Moving and sharing files is greatly simplified in Lion. First, a new feature called AirDrop allows you to wirelessly send files to other nearby AirDrop users by clicking an icon then dragging-dropping the file onto the recipient’s name. Lion will also include a server software as well making configuration of an office or home network a breeze. The server package helps centralize calendars, mail, contacts, and even setup of your own wiki services for building a personalized office knowledge database akin to Wikipedia.

When and How Much

OS X Lion is announced for summer delivery but Apple has not been more specific than that. The price too is still under wraps with guesses putting it at $129.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
KBA Celebrates Constitution Day

The Kansas Bar Association has recently decided to shift its emphasis from Law Day, typically held the first week in May, to Constitution Day, which is on or around September 17, based on input from teachers and the KBA’s Law-Related Education Committee. Constitution Day, established by federal statute in 2004, commemorates the formation and signing of the U.S. Constitution on September 17, 1787. The law urges state and local observance of Constitution Day, in stating:

State and local observances
The civil and educational authorities of states, counties, cities, and towns are urged to make plans for the proper observance of Constitution Day and Citizenship Day and for the complete instruction of citizens in their responsibilities and opportunities as citizens of the United States and of the state and locality in which they reside.

36 U.S.C. § 106
The Kansas Bar has been committed for many years to law-related education because as lawyers we realize that the survival of our system of governance, the preservation of our freedoms, and the understanding of our responsibilities depend on our young people getting an effective civic education. Celebrating Constitution Day is a good way to help meet that goal. Unless we educate every generation of our citizens about our Constitution, we could lose our country’s most valuable resource.

On a practical level, our experience with teachers has taught us that in early May, teachers are trying to wrap up the school year and meet their deadlines for state standards, and students are becoming increasingly disinterested in school. Focusing our outreach efforts in mid-September meets teachers’ preferences for having guest speakers or other law-related education events earlier in the school year.

The KBA recognizes strong support among some local bars for Law Day, which is celebrated around May 1. Law Day was first celebrated in 1958. The date of May 1 was selected to contrast our rule of law to the Soviet Union’s May Day parade of its war weapons. The Cold War has now ended and the date of May 1 lacks the legal significance to our citizens that September 17 has. Focusing on Constitution Day will educate Kansans on a relevant and meaningful day and carry out Congress’ intent. Nonetheless, in recognition of the long and strong Law Day tradition in some local bars, the KBA will continue to offer its support to local bars sponsoring Law Day activities, upon request.

Great Constitution Day Programs are Available
Many resources are available to assist you in presenting effective Constitution Day programs to schools or civic groups. The KBA has several engaging resources of its own, including:

1. Sam Snead’s School Search – a short, interactive DVD made in 2010 by Kansas students for Kansas students, which teaches about the Fourth Amendment in the context of a principal’s search of a student’s backpack.

2. Reproductions of oral arguments before the U.S. Supreme Court in the constitutional law cases of: Brown v. The Board of Education of Topeka (school desegregation); Miranda v. Arizona (warnings to persons in custodial interrogation); and Sullivan v. New York Times (First Amendment).

3. A new DVD on the First Amendment and Sunshine laws, made in conjunction with the Kansas Press Association.

If you would like copies of these or other resources, please contact Kelsey Schremp, public services manager, at Kansas Bar Association, 1200 SW Harrison St., Topeka, KS 66612-1806 or call her at (785) 234-5696.

Also, one click of your mouse can bring you many great resources and lesson plans specific to the Constitution, ready to download and take into classrooms or community meetings. A non-exclusive list follows:

- http://www.ourcourts.org

- The site http://www.icivics.org/ (formerly Our Courts) is a Web-based education project designed to teach students civics and inspire them to be active participants in our democracy. ICivics is the vision of Justice Sandra Day O’Connor, who is concerned that students are not getting the information and tools they need for civic participation, and that civics teachers need better materials and support.

- http://www.abanet.org/publiced/constitutionday/home.shtml

- http://www.constitutionday.us

- http://www.crf-usa.org (Constitutional Rights Foundation)


So get out of your office and into the classroom or other community venue on Constitution Day. Doing so will add variety to your life, will help educate our future generation of leaders, and will project a positive image of lawyers to the community. Besides, it’s lots of fun! Take the initiative. Don’t wait for your bar committee chair to ask if you’d be willing to speak to some class for an hour — call your children’s teachers or principal and volunteer. This makes a great impression. Also, speaking to a class is really a win-win proposition for you — if you get a great group of students who interact well, you’ll have a blast; if not, you’ll be even happier to be a lawyer instead of a teacher!
Implementing the
Estate and Gift Tax
Changes Before
2013’s Sunset
By Susan A. Berson

The Tax Relief, Unemployment Insurance Reauthorization, and Job Creation Act of 2010 (the Act) presents two years’ worth of temporary changes for estate planners to use as tools in helping clients minimize their federal tax burdens. A new $5 million exemption, with a 35 percent tax rate, applies to 2011 and 2012 estates, and a special provision is available for estates of decedents in 2010. The provisions of the Act bringing change to estate and gift planning opportunities are detailed herein by year.

I. Background

Just a few months ago, and for the first time since 1916, there was no federal estate tax. In 2010, taxpayers also received a reprieve from the generation-skipping transfer taxes, along with a carry-over basis rule that calculated the basis in property received from a decedent as the lesser of carry-over basis, or the fair market value of the property on the date of death of the decedent. For 2011 and 2012, the Act unifies the federal tax rates and exemption amounts for gift, generating-skipping and estate taxes; meaning, the maximum estate exemption is $5 million and the tax rate on gifts in excess of the $5 million exemption is 35 percent, same as the maximum estate tax rate, as shown below.

The Act’s consequence is that the amount an individual gifts under the lifetime gift tax exemption will reduce the amount of the exemption for estate and generation-skipping taxes for 2011 and 2012; for 2013, uncertainty exists. Prior to expiration of the Act on December 31, 2012, a presidential election occurs. This will likely impact the legislative course estate planners will have to navigate. Currently, the $1 million exclusion and 55 percent tax rate of prior law will return effective January 1, 2013.

II. Provisions Applicable to 2010

For estates of decedents dying after December 31, 2009, and before January 1, 2011, a special election exists. The executor of such an estate may elect an application of the

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<tr>
<th>YEAR</th>
<th>ESTATE TAX</th>
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<tr>
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<td>Max. Rate</td>
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<td>2011</td>
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<tr>
<td>2012</td>
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<tr>
<td>2013*</td>
<td>55%</td>
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*Presumes Congress does nothing, whereby rates revert to pre-EGTRRA law on January 1, 2013.
carry-over basis provisions of Section 1022, instead of having the estate tax provisions of the new law applicable to 2010. Thus, the choice is either to: (a) pay the estate tax with a $5 million exemption, 35 percent maximum rate and receive a stepped-up income tax basis, or (b) pay no estate tax, yet receive carry-over basis subject to Section 1022. Any election would be revocable only with the consent of the IRS. Unless affirmatively electing option (b), the IRS will deem the estate to have chosen to pay the estate tax with the $5 million exemption applying.

Example of 2010 Special Election: Assume that John died on September 30, 2010, with an estate valued at $15 million. John was single. His executor can elect not to have the revived estate tax apply to the estate. So, free from the maximum estate tax rate of 35 percent, and the $5 million exclusion amount, the estate would not be subject to the estate tax, and the carry-over basis rules under Economic Growth and Tax Relief Reconciliation Act (EGTRRA) would apply to John’s estate.

Practitioners should be prepared that this election involves an evaluation of all the factors that would ordinarily weigh on the decision of whether to elect carry-over basis. Evaluating what is best for the estate to do involves a calculation of the decedent’s cost basis in individual asset items as well as future projections. At the very least, executors must gather information necessary to determine the basic tax costs of a future sale of estate assets.

To the extent a practitioner relies upon a computer program for calculations, be sure that it is updated to include provisions for entering the decedent’s cost basis in individual asset items, allocating the Section 1022 basis increases to individual items, and projecting the tax cost of future sale of those estate items. Necessary projections of future tax costs of sale must account for: (i) depreciation recapture applicable to real estate, (ii) various forms of personal property, and (iii) various tax rates which will depend on the tax character of the asset being sold. Factors relating to the allocation of the basis increases include: (i) the marginal income tax brackets of each beneficiary, (ii) the allocation of the estate’s assets among the beneficiaries, and (iii) the timing of any likely sale of the assets and whether the beneficiary intends to hold the asset until his or her death.

The earliest deadline for filing the carry-over basis Form 8939 is the later of nine months after the date of the Act’s enactment (i.e., September 17, 2011, since enactment was December 17, 2010), or the regular due date. For deaths occurring from January 1, 2010, through December 16, 2010, the due date of estate tax returns for estates of decedents is also the same, no earlier than nine months after the date of enactment of the Act. The due date for making any disclaimers for such estates under Section 2518(b) is also the same.11

Regarding the 2010 gift tax exclusion, it remains at $1 million, with the maximum gift tax rate at 35 percent. Because the generation-skipping transfer (GST) tax rate is 0 percent, no GST tax will be payable with respect to gifts or deaths occurring in 2010. Finally, the Act extends the exclusion for qualified charitable distributions to distributions made in tax years beginning after December 31, 2009 (and before January 1, 2012).

III. Provisions Affecting 2011 and 2012

In addition to the lower estate tax rate and the higher estate tax exemption for deaths in 2011 and 201212 (as indexed for inflation), a new tool is found in the portability of the deceased spousal unused exclusion.

A. “Portable” deceased spousal unused exclusion amount (DSUEA)

The “portable” characteristic of this exclusion ultimately can result in a surviving spouse benefiting from a larger exclusion amount. Applicable only to the estate of decedents dying after December 31, 2010, the unused estate tax exemption of the first spouse to die can be transferred to the surviving spouse, and added to his or her own exemption. Any unused GST tax exemption of a deceased spouse goes unused, however, because the surviving spouse is not allowed to use it.

Example of 2010 Special Election: Assume that John died on September 30, 2010, with an estate valued at $15 million. John was single. His executor can elect not to have the revived estate tax apply to the estate. So, free from the maximum estate tax rate of 35 percent, and the $5 million exclusion amount, the estate would not be subject to the estate tax, and the carry-over basis rules under Economic Growth and Tax Relief Reconciliation Act (EGTRRA) would apply to John’s estate.

Assume Jay and Mary had two children. Jay may leave them his $3 million estate without any federal estate tax. The executor of Jay’s estate can elect to pass along his $2 million unused exemption to Mary. Mary is a U.S. citizen, so, the unlimited marital deduction applies. If Mary dies in 2011 or 2012, she can leave up to $7 million to the children without any federal estate tax hit. The calculation would be her $5 million exemption, plus Jay’s unused $2 million exemption.

Limitations exist on receiving the exemption from more than one predeceased spouse. The DSUEA (as to the surviving spouse) applies only to the unused exclusion amount flowing from the estate of the deceased current spouse, and must be elected in that estate.13 If the surviving spouse remarries after the death of a spouse, the DSUEA of the prior deceased spouse is lost upon the death of the prior new spouse. However, if the surviving spouse dies prior to the death of the new spouse, the estate of the surviving spouse may still use the DSUEA. Further, the estate of the surviving spouse may also make the DSUEA election that will result in making its DSUEA available to the estate of the new spouse. The limitations, however, prevent any DSUEA from the first estate from being transferred through the estate of the former surviving spouse to the subsequent estate of the new spouse. Likewise, if the surviving spouse is predeceased by more than one spouse, the deceased spousal unused exclusion amount available for use by the surviving spouse would be limited to the lesser of $5 million, or the unused exclusion of the last deceased spouse.

Though morbid for most clients to contemplate, ideally, for planning purposes the value of the DSUEA is exemplified where both spouses die within the two-year window of its existence, that is, 2011 to 2012 (because the exclusion expires with the Act by January 1, 2013).

In such a situation, a practitioner could prepare a plan where the DSUEA election would allow a married couple to shield up to $10 million from the estate tax by having each spouse maximize his or her $5 million applicable exclusion. Procedurally, DSUEA is only available via a timely filed return. Thus, the executor of the estate of the first deceased spouse must timely file an estate tax return on which the DSUEA is computed. The executor must clearly make an election on that return that the DSUEA may be taken into
owe any federal capital gains taxes on asset appreciation that
stated unlimited basis step-up rule
for heirs of decedents who die in 2011 and 2012, the rein
stepped up to reflect the date-of-death fair market value.
herited capital-gain assets (such as real estate and stock) is
B. Silver lining for heirs
Reinstated by the Act, the federal income tax basis of in-
herited capital-gain assets (such as real estate and stock) is
stepped up to reflect the date-of-death fair market value. So, for heirs of decedents who die in 2011 and 2012, the reinstated unlimited basis step-up rule means that they will not owe any federal capital gains taxes on asset appreciation that occurs through the date of death.

Assume Jay dies in 2011 with a $3 million estate. Mary is Jay’s wife and is a U.S. citizen. In conjunction with the unlimited marital deduction, Jay died leaving everything to Mary without any federal estate tax bill. So, he leaves his entire $3 million estate to Mary without any federal estate tax bill and without using up any of his $5 million exemption. The executor of Jay’s estate elects to pass along Jay’s unused $5 million exemption to Mary. If Mary dies in 2011 or 2012, her estate will have a $10 million exemption available (her $5 million exemption plus Jay’s unused $5 million exemption). Thus, Mary could leave up to $10 million to her heirs without any federal estate tax bill.

C. Lifetime gift tax exemption increased
The federal gift tax applies to transfers of property from one person to another when the recipient does not pay fair market value for the property, or, in the case of gifts of cash, the recipient does not give anything of value in return for the cash. As the chart previously details, the tax rate on 2011 and 2012 gifts in excess of the $5 million exemption is 35 percent, same as the estate tax rate.

The $5 million lifetime gift exemption represents the amount of money (or other property) that an individual can gift during his or her lifetime without incurring a gift tax. This $5 million lifetime gift exemption is in addition to gifts that are already sheltered by the annual federal gift tax exclusion, which is currently $13,000 per gift, per recipient. To the extent gifts are made utilizing part of the $5 million federal gift tax exemption, a deceased’s $5 million federal estate tax exemption will be reduced dollar-for-dollar.

Otherwise, transfers up to $13,000 per recipient, per year, can be made by a taxpayer without incurring any gift tax. Individuals can make annual gifts up to this amount to as many persons as they wish. “Gift splitting” by married couples, that is pooling their individual gift exemptions to make gifts worth up to $26,000 per recipient, per year, continues without incurring any gift tax.

Remember, IRS Form 709, U.S. Gift (and GST) Tax Return, must be filed if (1) the total value of all gifts made to the same person within the same tax year exceeds the $13,000 limit; or (2) gift splitting occurs between a married couple.

Assume during 2011 that John gives his son $10,000 to buy a car and another $5,000 to pay off his credit card debt. The entire $15,000 came from a joint account he has with Mary, his wife, who is the stepmother to John’s son. John can: (a) File Form 709 and report $2,000 in taxable gifts to John’s son ($15,000 - $13,000 = $2,000); or (b) File Form 709 and report that both John and Mary have elected to divide the gifts between the two of them, with each making a $7,500 gift to John’s son.

When an individual or couple makes gifts of more than the limit, a gift tax will be assessed. The individual or couple has the option of paying the gift taxes that year, or to use some of the “unified credit” that would otherwise reduce the estate tax. In some situations it may be advisable to pay the gift tax in advance to reduce the size of the estate; though, clients typically choose not to pay a gift tax until the lifetime exemption is exceeded.

In addition, unlimited payments directly to medical providers or educational institutions, on behalf of others, without incurring a taxable gift can be done. Obviously, the total amount of credit used against the gift tax during an individual’s lifetime reduces the credit available to use against the individual’s estate tax. For a recipient of the gift, however, no gift tax or income tax is owed, nor is any reporting requirement triggered, unless the gift came from a foreign source.

Most clients will choose to take advantage of the annual $13,000 exclusion, make payments directly to medical and educational providers on behalf of their loved ones, and preserve the lifetime exemption. When counseling clients, remind them that proper documentation of valuation discounts

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(which deem the gift worth less than its apparent value for gift tax purposes) is a must-have. Of course, the gift must be irrevocable, or its utility for tax purposes is lost. Another important caveat for counsel to disclose is the uncertainty of the future tax laws. Obviously, if the estate tax were repealed in the future, and the client’s goal was simply to use gifting as a way to minimize estate taxes, then the client could regret paying gift tax now.

IV. Sunset: The Return of Pre-EGTRRA Provisions in 2013

On January 1, 2013, the applicable law governing the estate, gift and generation-skipping transfer taxes will revert to what was in place on June 7, 2001, prior to the EGTRRA enactment.17 Deaths occurring on or after January 1, 2013, will have the 2001 estate tax exemption of $1 million apply, and a lifetime gift tax exemption of $1 million, with a maximum rate of 55 percent for gifts above $1 million. EGTRRA had repealed the family-owned business interest (FOBI) deduction beginning after the year 2003.18 Though the Act extended this repeal through 2010, the return of pre-EGTRRA law in 2013 will include the FOBI deduction.

V. Planning Techniques19

Giving the maximum amount possible, to as many people or charities as possible, in order to reduce the size of the estate, is a common strategy. The Act’s temporary nature makes 2011 to 2012 a possible “use it or lose it” planning opportunity.

A. Gifting

The obvious strategy to reduce a client’s taxable estate under the Act is additional gifting. Should a client have maxed-out gifting at $1 million under the previous rules, it is possible to gift an additional $4 million during the next two years without incurring a gift tax liability. Further, if married, the spouse can also gift an additional $4 million; thereby, potentially reducing the couple’s taxable estate by $8 million. Careful scrutiny to select appropriate assets for gifting is, as always, paramount.

Ensuring that a married couple maximize the annual gift tax exclusion also remains good advice. Depending on the number of people who receive such tax-free gifts, the amount by which the taxable estate is reduced each year could be significant (e.g., gifting tuition and medical payments).

B. Valuation discount vehicles

No limits on existing discount vehicles, such as grantor retained annuity trusts (GRATs) and family limited partnerships (FLPs), were enacted.20 The increased exemption amounts enhance those vehicles. Planning techniques, especially in the context of family-controlled enterprises such as the use of FLPs, GRATs, and GST trusts for grandchildren, may be considered as a way to leverage the lifetime gifting exemption through the use of value freezes and valuation discounts. Cautiously counsel clients that these techniques may be targeted for future legislation, and continued IRS audit scrutiny, however. Obviously, the effectiveness of these techniques also depends on the lifespan of the transferor, along with the number of donees. For qualified family-owned business interests, the Act also provides for the installment payment of estate tax for closely-held businesses.

C. Trusts: Back-up a failed DSUEA

Trusts remain a protective measure in an estate planner’s arsenal. Remember, portability of the DSUEA is dependent on the executor making an affirmative election to pass the remaining exemption amount to the surviving spouse, and timely filing an estate tax return – in situations where one may not have otherwise been required. Full advantage of credit shelter/bypass trusts, and splitting ownership of assets between married couples, may be of use because (i) appreciation of assets placed in the credit shelter/bypass trusts will escape estate taxation in the survivor’s estate, (ii) potential creditor protection for beneficiaries is achieved, (iii) the GST tax exemption is not portable, and (iv) the consequence of an executor who untimely handles the DSUEA can be minimized. Also, since uncertainty surrounds 2013, a practitioner would be wise not to archive those trust forms just yet.

D. Audit considerations

Most estate planning practitioners are aware that administering an estate is a process, not an event. When the IRS selects a return for audit, the same adage applies. A good estimate for when the clients inquire, “how long should it take,” is that the expectation to complete an audit, absent unusual circumstances or supporting documentation problems, is within 18 months of filing the return. There is a three-year statute of limitations on estate tax returns that cannot be extended, so, if additional tax must be assessed, it will be done during that period. If additional assets are located, or if a mistake was discovered in the original return, amended returns/refund claims can be filed during this three-year period. Refund claims after this time can be made up to two years after payment was made, but are limited to the amount of the payment. Interestingly, the most recent statistics suggest that for each hour IRS estate tax compliance agents work, on average, an amount of $2,200 of taxes are found to be owed.21

VI. Conclusion

Experienced practitioners know that the only thing certain in the world of estate planning is change. As with every election cycle, predictions swirl around what the 2012 presidential election will bring to our country’s overall tax system. The Act’s new exemptions and gift tax rates present planning opportunities, if only in the short-term.

About the Author

A former Justice Department tax litigator, Susan A. Berson is a partner at The Banking & Tax Law Group LLP in Leawood. Exclusively representing banks and small business owners, along with their boards of directors, she is also the author of “The Lawyer’s Retirement Planning Guide” (ABA 2009), “The Modern Rules of Personal Finance for Professionals” (ABA 2008), and “Federal Tax Litigation” (Law Journal Press 2001). She may be reached at sberson@banktaxlaw.com.
Legal Article: Implementing the Estate and Gift Tax...

ENDNOTES


3. Unless otherwise stated, all further section references are to the Tax Relief, Unemployment Insurance Reauthorization and Job Creation Act of 2010.


6. Certain new returns were also required to be filed to provide information for administration of the basis rules under Section 542 of EGTRRA, amending 26 U.S.C. §§ 6018 and 6019.

7. Section 301 (a) through (c).

8. See P.L. 107-16, §§ 511 (c ) and (d) (The EGTRRA also modified the gift tax. Mechanically, the top rate of the gift tax declined with the top rate of the federal estate tax. After the repeal of the estate tax, the top gift tax rate was lowered to 35 percent of the excess more than $500,000. The applicable exclusion amount was raised to $1 million, for the year 2002. This amount remained through 2010. Thus, when the applicable exclusion amount increased for the estate tax in the phase-out period, only $1 million may be used to cover lifetime gift transfers.)


10. Section 301(c).

11. Section 301(d) extends the due date for the large transfers tax return (carry-over basis allocations) to nine months after the Act’s enactment.

12. Pursuant to Section 303(a)(3), the exemption for 2012 deaths is indexed for inflation.

13. Section 303(a)(4).

14. Section 303(a)(5).

15. Section 303(a)(2).

16. The modified carry-over basis rule which limited basis step-ups to a maximum of $1.3 million, plus up to another $3 million for assets inherited by a surviving spouse, applies for heirs of decedents who died in 2010.

17. EGTRRA’s sunset rule was made applicable to the Act’s exemptions and rates.


19. In Kansas, the taxable estate includes both probate and non-probate assets. Probate is beyond the scope of this article. It is governed by Chapter 59 of the Kansas statutes. Concerning Kansas estate tax law, the “pick-up” tax and “stand alone” tax provisions continue to exist until their sunset provisions occur in 2017 and 2020, respectively. The “pick-up” tax provisions are found in K.S.A. 79-15,100 through 79-15,125, and K.S.A. 79-15,127 through 79-15,145. In 2006, the “pick-up” tax was replaced with a “stand-alone” estate tax, pursuant to K.S.A. 79-15,203 and K.S.A. 79-15,251. The “stand alone” tax applies to the estates of decedents dying on or after January 1, 2007. As of this writing, the Kansas legislature has not enacted any new estate tax legislation, which would amend or modify these statutory provisions.

20. It should be mentioned that during discussion of the House bill, it was widely publicized that certain restrictions had been proposed to grantor retained annuity trusts, but those proposed restrictions did not make it into the Act.

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Adult Entertainment and Zoning: A Starting Point for Adopting or Updating Adult Business Ordinances

by Teresa L. Watson
**I. Introduction**

The adult entertainment industry is booming. Since 2006, adult business industry experts report that revenue hovers near $12 billion per year.² Though the recent tough economy – along with the proliferation of free websites and pirated videos – may have slowed the growth of the industry, adult entertainment remains a lucrative market.³

Many local governments in urban areas of the state have adopted ordinances regulating sexually-oriented businesses. Increasing numbers of rural cities and counties are following suit as it becomes apparent that some adult businesses – primarily retail – have targeted truckers and other interstate travelers as an important customer base. This brand of adult business has been dubbed “freeway porn.”⁴ Adult stores “are increasingly common on the nation’s rural Interstate highways, where they find relatively cheap land, few zoning restrictions and a steady stream of potential customers.”⁵

In 2003, a national adult retail chain arranged to purchase an empty building along Interstate 70 in Dickinson County, Kan. A semi-trailer truck full of fixtures and merchandise arrived in the middle of the night and employees quickly set up shop. The next morning, surprised citizens of Dickinson County discovered that The Lion’s Den Adult Superstore was open for business. It was just outside the Abilene city limits and directly across the interstate from a candy manufacturing facility – a popular destination for passing tourists and grade school field trips.

Dickinson County adopted a series of adult business ordinances following the opening of the store. The Lion’s Den immediately challenged them, and the county was obliged to spend the next several years defending the ordinances in federal court. The case was ultimately settled and the ordinances remain in place. Dickinson County is not alone as a number of local governing bodies in Kansas have litigated challenges to adult business ordinances.⁶

Each city and county government must evaluate whether it needs and wants ordinances regulating sexually-oriented businesses. If so, counsel to the governing body must draft an ordinance that contains the regulations desired in a manner consistent with the constitutional requirements set out by the courts. This is complicated by fact-driven decisions that vary by federal circuit and seem to ebb and flow over time.⁷ Even if your municipal client has an ordinance in place, it is a good idea to review its provisions to make sure it is complete and remains relatively safe from challenge under more recent case law.

This article summarizes the law as it pertains to the regulation of adult businesses. Part II provides some background regarding relevant Kansas statutes. Part III explores U.S. Supreme Court precedents interpreting the constitutional requirements for the regulation of adult businesses. Finally, Part IV reveals how the constitutional requirements have been interpreted and applied by the Tenth U.S. Circuit Court of Appeals.

**II. Kansas Law**

Before exploring the constitutional parameters of regulating adult businesses, it is helpful to be aware of some state law provisions that speak to the ability of local governments to regulate adult businesses.

**A. Zoning statutes**

K.S.A. 12-770 and 12-771 give cities and counties authority to enact zoning regulations applicable to sexually-oriented businesses. Specifically, they allow the governing body to adopt “reasonable regulations for the gradual elimination of sexually-oriented businesses which constitute non-conforming uses.”⁸ The regulations must be adopted in the manner prescribed by K.S.A. 12-741 et seq., which governs planning and zoning ordinances in general.

K.S.A. 12-770 defines different types of sexually-oriented businesses, including adult arcades, adult book/novelty/video stores, adult cabarets, adult motels, adult motion picture theaters, adult theaters, escort agencies, nude model studios, and more.

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**Footnotes**

1. My most sincere thanks to Samuel Green and Brian Lindquist, Fisher, Patterson, Sayler & Smith LLP, for their assistance in editing this article.


7. There are many pertinent decisions from other circuits not explored here. This article focuses on U.S. Supreme Court and Tenth Circuit precedent.

8. K.S.A. 12-770(b). An existing or nonconforming use is defined as “a lawful use of land or buildings which existed prior to the enactment of a zoning ordinance and which is allowed to continue despite the fact it does not comply with the newly enacted use restrictions.” *Crumbaker v. Hunt Midwest Mining Inc.*, 275 Kan. 872, 881, 69 P.3d 601 (2003).
dios, and sexual encounter centers. It also defines terms such as escort, nudity, semi-nude, and specified anatomical areas. These definitions are a good reference point when adopting a local ordinance.

Although these statutes were adopted in 1997, they have not been the subject of any reported state or federal judicial decisions or attorney general opinions. Thus, there is little Kansas guidance regarding the constitutionality of adult business ordinances at the state level. Rather, much of the constitutional guidance has developed over time in the federal courts.

B. Criminal laws

At least two state criminal laws have impacted adult businesses in Kansas. An effort to enforce an alleged violation of criminal laws by an adult business may occur contemporaneously with civil litigation, or in some cases precipitate it. Coordination with state or local law enforcement officials is critical when defending a challenge to local adult business ordinances at or near the time a criminal investigation or prosecution is in process.

1. Regulation of highway signs

In 2006, the Kansas legislature passed SB 35, an act regulating the placement of sexually-oriented business signs on state highways, which was codified at K.S.A. 68-2255(a)(4). Though enforcement of the statute has been enjoined following a decision by a federal district court in Kansas, the contents of the statute and the successful legal challenge against it are instructive.

The statute prohibits placement of signs advertising adult businesses within one mile of any state highway. There is an exception when the business itself is located within one mile of a state highway, in which case the business may place a maximum of two signs on the exterior of its premises. One sign must give notice that the premises are off limits to minors. The second sign may identify the business by name, street address, telephone number, and operating hours. The second sign cannot be larger than 40 square feet. Violation of the act is a class C misdemeanor, and the attorney general is tasked with representing the state in all proceedings arising out of the statute.

The sign statute defines sexually-oriented businesses more generally than the zoning statute, K.S.A. 12-770. In K.S.A. 68-2255(a)(4), a “sexually-oriented business” is defined as one that offers patrons “goods of which a substantial portion are sexually-oriented materials.” Further, a business is presumed to be a sexually-oriented business when “more than 10% of display space is used for sexually-oriented materials.”

K.S.A. 68-2255(a)(5) defines “sexually-oriented materials” as “textual, pictorial or three dimensional material that depicts nudity, sexual conduct, sexual excitement, or sadomasochistic abuse in a way which is patently offensive to the average person applying contemporary adult community standards with respect to what is suitable for minors.” The sign statute also articulates the government interests supporting the regulation of adult business signs, which include: (1) To mitigate the adverse secondary effects of sexually-oriented businesses; (2) to improve traffic safety; (3) to limit harm to minors; and (4) to reduce prostitution, crime, juvenile delinquency, deterioration in property values, and lethargy in neighborhood improvement efforts.

The statute was challenged by The Lion’s Den store located in Dickinson County. The Lion’s Den has at least three large billboards along Interstate 70 to advertise its “Adult Superstore.” A federal district court in Kansas granted plaintiff’s request for a preliminary injunction prohibiting enforcement of K.S.A. 68-2255 because it found plaintiff was likely to succeed on the merits of its claim. In so holding, the court applied the test for evaluating commercial speech, including billboards, set forth by the U.S. Supreme Court in Central Hudson Gas & Electric Corp. v. Public Service Comm’n. The court concluded that the signs were protected expression, and the state had proven substantial government interests, but the regulation did not advance the government interest asserted, and it was more extensive than necessary to serve the interest. The court said: “Assuming signs and outdoor advertising for sexually-oriented businesses increase the chances that minors will attempt to patronize those businesses, there is no evidence of a ‘direct and material link’ to an all-out ban on signs, including those that merely include the name and location of the business.”

Following this decision, the state of Kansas agreed to submit to the court’s judgment that K.S.A. 68-2255 is unconstitutional under the First and Fourteenth Amendments for the reasons set forth in the opinion. This was apparently in exchange for plaintiff’s agreement to waive its claim against the state for attorney fees and costs. The court entered an or-
der permanently enjoining the state of Kansas from enforcing the provisions of K.S.A. 68-2255.24

2. Obscenity
K.S.A. 21-4301 prohibits promoting obscenity and K.S.A. 21-4301a addresses promoting obscenity to minors.25 Obscenity is defined as any material or performance that “[t]he average person applying contemporary community standards would find ... appeals to the prurient interest,” and contains “patently offensive” representations or descriptions of various sex acts or excretory functions, and “lacks serious literary, educational, artistic, political, or scientific value.”26 The first conviction for violating either of the statutes is a Class A nonperson misdemeanor.27 The second or subsequent conviction for violating K.S.A. 21-4301 is a severity level 9 person felony.28 A second or subsequent conviction for violating K.S.A. 21-4301a is a severity level 8 person felony.29

In 2003, the citizens of Dickinson County convened a grand jury to determine whether there was probable cause to believe that The Lion’s Den violated K.S.A. 21-4301.30 The grand jury alleged The Lion’s Den disseminated “obscene devices” as defined by statute, but the state district court dismissed the indictment based on defects in the petition that convened the grand jury.31 In 2004, the county attorney re-filed charges alleging similar crimes.32 That case was also dismissed after the district court concluded that the statute as then written was unconstitutional.33 The county did not appeal.34

III. U.S. Supreme Court
Counsel tasked with drafting or reviewing an adult business ordinance cannot rely exclusively on Kansas statutes and very limited Kansas state court decisions, but must read the signposts placed by the federal courts. Modern case law on the subject of adult business ordinances began more than 30 years ago in the federal courts but was very slow to develop. The following discussion describes the building blocks of the constitutional analysis of these ordinances in order to prevent, or if necessary, defend a specific challenge in your jurisdiction.

First, the Court established that the police power of local government, along with its interest in preserving the character of its neighborhoods, justified its regulation of the location and operation of adult businesses. Second, the Court devised a test to determine whether content-neutral time, place, and manner regulations met the requirements of the First Amendment. This test parallels that applied to regulation of commercial speech in Central Hudson.

Content-neutral time, place, and manner regulations must serve a substantial government interest and allow some alternative avenues of communication to remain in place. The Court later refined this test by adding a burden-shifting analysis to determine whether a regulation serves a substantial government interest.

A. The police power of local government justifies regulation of adult businesses
In Young v. American Mini Theatres Inc.,35 two adult movie theaters challenged amendments to Detroit’s “Anti-Skid Row Ordinances” that prohibited an adult theater from locating within 500 feet of a residential area or within 1,000 feet of any two other regulated uses, including other adult businesses.36 The amendments were adopted to address the city’s view that clustering of certain types of businesses attracted transients, lowered property values, increased crime, and prompted individuals and businesses to abandon the area.37 The U.S. Supreme Court upheld the ordinances, concluding that they were not unconstitutionally vague, did not violate due process or equal protection concerns, and did not run afoul of the First Amendment.38

The significance of Young is that, for the first time, the Court recognized that the police power of local government, supported by its legitimate interest in “preserving the character of its neighborhoods,” allowed it to adopt ordinances regulating the location and operation of adult businesses.39 The Court afforded local government a great deal of flexibility.

25. There is little difference in the two statutes other than available defenses.
27. K.S.A. 21-4301(f)(1); K.S.A. 21-4301a(c)(1).
29. K.S.A. 21-4301a(c)(2).
31. Id. at 1189.
32. Id.
33. Id. at 1188-89. The Dickinson County district court found that one of the constitutional defects identified by the Kansas Supreme Court in Kansas v. Hughes, 246 Kan. 607, 792 P.2d 1023 (1990), had not been removed by the legislature after that decision. Hughes struck the statute to the extent it impermissibly equated sexuality with obscenity and because it did not provide an exception for therapeutic use. The legislature amended the statute following Hughes to add in a therapy exception, but did not strike the “sexually provocative aspect” language from the statute until 2006, after the complaint/information was dismissed against The Lion’s Den.
36. Id. at 50, 54. Besides adult businesses, other regulated uses included bars, hotels, pawnshops, pool halls, and secondhand stores. Id. at 52 n.3.
37. Id. at 55.
38. Id at 61, 63, 70-71, 72-73.
39. Id. at 71.
in its regulation of these businesses:

It is not our function to appraise the wisdom of its decision to require adult theaters to be separated rather than concentrated in the same areas. In either event, the city’s interest in attempting to preserve the quality of urban life is one that must be accorded high respect. Moreover, the city must be allowed a reasonable opportunity to experiment with solutions to admittedly serious problems.\(^40\)

**B. Renton provides a test to determine whether content-neutral regulation of adult businesses survives First Amendment scrutiny**

Nearly 10 years later, in *City of Renton v. Playtime Theatres Inc.*,\(^41\) plaintiff challenged an ordinance that prohibited operation of adult motion picture theaters within 1,000 feet of any residential zone, single- or multiple-family dwelling, church, park, or school. Renton, a smaller city in the state of Washington with a population of 32,000 people, adopted the ordinance prior to the existence of any sexually-oriented business there, for the stated purpose of preventing the negative impact of such businesses on the surrounding area.\(^42\)

The U.S. Supreme Court adopted a test for evaluating whether the adult business ordinance ran afoul of the First Amendment. First, is the ordinance a time, place and manner regulation of speech? In other words, is it content-based or content-neutral? A content-based regulation is subject to strict scrutiny and presumptively invalid. If the regulation is content-neutral, intermediate scrutiny applies, and the Court looks at whether the ordinance was designed to serve a substantial governmental interest, and whether alternative avenues of communication remain.\(^43\)

In applying the test, the Renton Court examined whether the ordinance was aimed at the content of the adult films or the negative secondary effects of showing them in a place of business. The Court concluded that the ordinance was content-neutral because it targeted the secondary effects of the speech, rather than the speech itself.\(^44\)

The Court had little difficulty concluding that the ordinance was designed to serve the substantial government interest of preserving the quality of municipal life.\(^45\) In making this determination, the Court recognized that Renton was entitled to rely on the studies of other jurisdictions (even urban ones) and information about such studies contained in other court opinions in justifying an ordinance regulating adult businesses.\(^46\)

The Court rejected the Ninth Circuit’s requirement that Renton’s ordinance must be supported by studies specifically related to the problems and needs of that city, calling the requirement “an unnecessarily rigid burden of proof.”\(^47\) Indeed, the Court held that a city need not “conduct new studies or produce evidence independent of that already generated by other cities” to demonstrate the problem of secondary effects, “so long as whatever evidence the city relies upon is reasonably believed to be relevant to the problem that the city addresses.”\(^48\)

Finally, the Court looked to whether the ordinance left alternative avenues of communication open to the regulated businesses. The plaintiff complained that the ordinance left only a limited number of properties available for use by adult theaters, and none of those properties at that time were for sale or lease.\(^49\)

The Court turned aside these concerns, concluding:

That respondents must fend for themselves in the real estate market, on an equal footing with other prospective purchasers and lessees, does not give rise to a First Amendment violation. And although we have cautioned against the enactment of zoning regulations that have “the effect of suppressing, or greatly restricting access to, lawful speech,” we have never suggested that the First Amendment compels the Government to ensure that adult theaters, or any other kinds of speech-related businesses for that matter, will be able to obtain sites at bargain prices.\(^50\)

**C. Licensing schemes cannot operate as a prior restraint on speech**

Four years after Renton, the Court in *FW/PBS Inc. v. City of Dallas*\(^51\) considered a comprehensive ordinance that the

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40. Id.
42. Id. at 44.
43. Id. at 46-47.
44. Id. at 47-48.
45. Id. at 50.
46. Id. at 51-52.
47. Id. at 50.
48. Id. at 51-52.
49. Id. at 53.
50. Id. at 54 (internal citation omitted).
city of Dallas adopted to regulate adult businesses. Most notable among the issues before the Court was the requirement that adult businesses procure a city license prior to operation. Plaintiffs argued that the licensing scheme did not set time limits upon the city’s decision to grant or deny the license, nor did it provide an avenue for prompt judicial review of the city’s decision, creating the potential for arbitrary delay and denial of applications.\(^{52}\)

The Court analyzed the licensing scheme as a prior restraint on speech under standards set forth in *Freedman v. Maryland*.\(^{53}\) According to the Court, the Dallas licensing scheme imposed no real time limits on the licensing decision and made no provision for prompt judicial review of a license denial.\(^{54}\) Consequently, the Court invalidated the licensing scheme as an unconstitutional prior restraint and remanded the case to the Fifth Circuit for a determination of whether the licensing scheme was severable from the balance of the ordinance, which had been upheld in the lower courts.\(^{55}\)

**D. Regulation of nude dancing implicates symbolic speech and is not analyzed under Renton**

Fourteen years after *Renton*, in *City of Erie v. Pap’s A.M.*,\(^ {56}\) a nude dancing establishment challenged the city’s ordinance prohibiting public nudity. A similar ordinance had been upheld several years earlier by the U.S. Supreme Court in *Barnes v. Glen Theatre Inc.*\(^ {57}\) As it did in *Barnes*, the *Pap’s* Court began its analysis by observing that nude dancing is expressive conduct within the “outer ambit” of First Amendment protection.\(^ {58}\) Next, rather than apply the *Renton* analysis, the Court looked to *United States v. O’Brien*,\(^ {59}\) which had previously applied a *Renton*-like First Amendment analysis to content-neutral symbolic speech.\(^ {60}\)

The Court concluded that the Erie ordinance met each of the four *O’Brien* factors: (1) it was within the city’s police power to protect public health and safety by enacting the ordinance; (2) it furthered a substantial government interest – combating the negative secondary effects of nude dancing; (3) the government’s interest was unrelated to the suppression of free expression; and (4) the restriction was no greater than necessary to accomplish the government’s objective.\(^ {61}\)

In its analysis of the second factor, the majority underscored that Erie need not conduct new studies or produce new evidence to demonstrate the existence of negative secondary effects. Given the evidence described in *Renton*, the Court stated “it was reasonable for Erie to conclude that such nude dancing was likely to produce the same secondary effects.”\(^ {62}\) The Court approved of Erie’s reliance on *Renton* and earlier cases in its justification of the ordinance. It also approved of Erie’s statement in the preamble to its ordinance that the governing body believes that these businesses cause certain harmful secondary effects, including violence, prostitution and other serious criminal activity.\(^ {63}\) The Court said:

The city council members, familiar with commercial downtown Erie, are the individuals who would likely have had firsthand knowledge of what took place at and around nude dancing establishments in Erie, and can make particularized, expert judgments about the resulting harmful secondary effects.\(^ {64}\)

**E. Alameda Books provides a burden shifting analysis to determine whether an ordinance is designed to serve a substantial governmental interest**

In *City of Los Angeles v. Alameda Books Inc.*,\(^ {65}\) the city enacted an ordinance prohibiting adult businesses from locating within 1,000 feet of each other or 500 feet of a religious institution, school or public park. The city later amended the ordinance to prohibit more than one type of adult business from locating within a single building. The ordinance, passed initially in 1978 and amended in 1983, was based on the results of the city’s 1977 study that found a concentration of adult businesses caused crime rates to increase in the surrounding area.\(^ {66}\)

Two adult businesses challenged the ordinance. The businesses rented and sold sexually-oriented products, including videos, and rented booths on site where patrons could view videos for a fee. The city alleged each business violated the ordinance because each operated a separate adult business on the same premises.\(^ {67}\)

The Supreme Court applied the *Renton* analysis and focused on the third element: whether the Los Angeles ordinance was designed to serve a recognized substantial government interest in deterring crime.\(^ {68}\) At issue was whether the city could reasonably rely on the 1977 study to determine that the ordinance as amended would serve its interest in reducing crime. The Ninth Circuit held that the city could not reasonably rely on the study because it did not specifically examine multiple-use establishments such as the one at issue – it only addressed the effects of clusters of single adult businesses on the surrounding community.\(^ {69}\) The U.S. Supreme Court disagreed, concluding that it was reasonable for the city to assume, based on the 1977 study, that a concentration of adult establishments – whether a cluster of several separate storefronts or a single building housing multiple adult businesses – would

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52. *Id.* at 223.
54. *FW/PBS* 493 U.S. at 229.
55. *Id.* at 229-30.
60. *Pap’s*, 529 U.S. at 289, 296-97. *The Renton* test is applied to time, place, and manner restrictions on speech. See *Renton*, 475 U.S. at 46-47. The ordinance at issue in *Pap’s*, however, was not a time, place, and manner restriction because it completely banned one form of conduct, public nudity. See *Pap’s*, 529 U.S. at 290. Further, the *O’Brien* test had been adopted specifically to analyze content-neutral restrictions on symbolic conduct, and the Court had already determined that nude dancing was symbolic conduct. *Id.* at 289.
62. *Id.* at 296-97.
63. *Id.* at 297.
64. *Id.* at 297-98.
66. *Id.* at 430-31.
67. *Id.* at 432.
68. *Id.* at 433.
69. *Id.* at 4356-37.
create negative secondary effects.\(^70\)

In reversing the Ninth Circuit’s decision, the U.S. Supreme Court created a burden shifting analysis to determine whether an ordinance is “designed to serve” a substantial government interest. The analysis was as follows: (1) did the governing body rely on evidence reasonably believed to be relevant in demonstrating a connection between the regulated speech and a substantial government interest; (2) if so, can plaintiff demonstrate that the governing body’s evidence does not support its rationale, or can plaintiff furnish evidence that disputes the governing body’s findings; and (3) if so, the burden shifts back to the governing body to supplement the record with evidence renewing support for a theory that justifies the ordinance.\(^71\) Ultimately, the Court recognized that it must defer to the evidence presented by the city in support of its ordinance as a result of the careful balance between the “obligation to exercise independent judgment when First Amendment rights are implicated” and the fact that local governing bodies are in the best position to gather and evaluate information about local problems.\(^72\)

IV. Tenth Circuit

The Tenth Circuit cases considering the constitutionality of regulating adult businesses are of much more recent vintage. Most have developed since the decision in *Alameda Books*, and, with one important exception, are highly deferential to the municipality’s police power and interest in preventing harmful secondary effects.

**A. Regulation of “retail only” adult book and video stores is judged according to the same standards as regulation of other adult businesses**

In *Z.J. Gifts D-2 LLC v. City of Aurora*,

\(^73\) plaintiff was a “retail only” adult business. In other words, it offered adult items for sale or rent for use off-site, but did not offer on-site adult entertainment. The city later adopted an ordinance that required all adult businesses to be located within industrial zones, prohibited them from locating within 1,500 feet of schools, churches, parks or residences, and established a comprehensive licensing scheme. Plaintiff challenged the ordinance.\(^74\)

The Tenth Circuit applied the *Renton* analysis.\(^75\) First, it held that the ordinance – like most other ordinances regulating adult businesses – was content-neutral. The court cited the preamble to the ordinance, which stated that its purpose was to protect citizens from increased crime; preserve quality of life, property values, and character of neighborhoods; and deter the spread of urban blight and the spread of sexually transmitted diseases. Further, the court concluded that this statement of purpose was not affected by alleged motives of individual city council members to close the plaintiff’s business.\(^76\)

Next, the court observed that in passing the ordinance the city relied upon evidence reasonably believed to be relevant to the impact of sexually-oriented businesses on the community. The court held that the city could rely on studies done in other cities, as well as studies that focused only on businesses with on-site entertainment.\(^77\) Indeed,

Aurora need not wait for sexually oriented businesses to locate within its boundaries, depress property values, increase crime, and spread sexually transmitted diseases before it regulates those businesses. It may rely on the experience of other cities to determine whether the harms presented by sexually oriented businesses are real and should be regulated.\(^78\)

Consequently, the court rejected plaintiff’s attempt to draw a distinction between regulation of on-site adult entertainment and retail only businesses, finding any difference “constitutionally irrelevant in determining whether Aurora’s interests are important or substantial.”\(^79\) Finally, the court held that the ordinance left approximately 11 percent of the city’s land (all zoned industrial) available for use by adult businesses, thus meeting the alternative avenues prong of the *Renton* analysis.\(^80\)

**B. Licensing provisions must address administrative appeal and judicial review**

In *Essence Inc. v. City of Federal Heights*,\(^81\) a nude dancing establishment and two women denied employment as dancers challenged the city’s adult business ordinances. The challenge focused on a number of licensing provisions, rules about lighting and stage configuration, and the requirement that no one under the age of 21, including dancers, could enter the establishment.\(^82\)

The Tenth Circuit applied the *O’Brien* test for symbolic speech instead of using the *Renton* analysis because the regulated conduct at issue was nude dancing. The court first determined that the city failed to provide evidence that an age restriction furthered the admitted substantial government interest in combating the negative secondary effects of nude dancing establishments. In other words, the city’s general regulation of nude dancing furthered the governmental interests identified, but the age restriction, on its own, did nothing more to further these interests and thus failed the second prong of *O’Brien*.\(^83\)

The Tenth Circuit also determined that the licensing scheme ran afoul of *FW/PBS* because it failed to provide for an administrative appeal and judicial review of the licensing decision.\(^84\) Consequently, the court held that both the age restriction and the challenged licensing requirements were facially unconstitutional and struck them. Because the court concluded that

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70. Id. at 436-37.
71. Id. at 438-39.
73. 136 F.3d 683 (10th Cir. 1998).
74. Id. at 685.
75. This case was decided prior to the Supreme Court’s adoption of the burden shifting approach in *Alameda Books* in 2002.
76. Id. at 686-87.
77. Id. at 687-88.
78. Id. at 688.
79. Id.
80. Id.
81. 285 F.3d 1272 (10th Cir. 2002).
82. Id. at 1276-79.
83. Id. at 1287-89.
84. Id. at 1289-91.
these provisions were severable, however, it left the other portions of the city’s regulatory scheme intact.95

C. Local government may support an ordinance with citation to case law and “pre-packaged studies” from other jurisdictions

In Heideman v. South Salt Lake City,86 plaintiffs, performers in nude dancing establishments, challenged a city ordinance banning nudity in all adult businesses. The district court denied their request for a preliminary injunction and plaintiffs appealed.87 In determining the likelihood of plaintiffs’ success on the merits, the Tenth Circuit applied the O’Brien test for symbolic speech.88 The court affirmed, emphasizing that there was evidence of a substantial government interest and the restriction was no greater than necessary to further the interest.89

Most notable was the court’s discussion of the second factor – the existence of a substantial government interest. South Salt Lake supported its ordinance by reference to the findings of courts in other cases and “seemingly pre-packaged studies” performed by other municipalities. The court found such reliance “common” and sufficient to support the existence of a substantial government interest in the case at hand, particularly where plaintiffs submitted no evidence “that might call the city’s empirical judgments into question.”90

D. Location restrictions are acceptable even where less than one percent of the city’s land area is available for use by an adult business

In Z.J. Gifts D-4 LLC v. City of Littleton,91 another adult bookstore in the Z.J. Gifts retail chain challenged the city of Littleton’s adult business ordinance, including its licensing scheme for adult businesses and its location requirements, as an unconstitutional prior restraint on speech.

Under the Littleton regulations, those who wished to operate an adult business were required to submit an application and obtain a license. The ordinance also restricted adult businesses to locating within certain limited areas of the city and from locating within certain minimum distances of specified sites.92 The license application sought names of all owners, managers, and employees of the business; information about whether the applicant held adult business licenses in other jurisdictions; the address, driver’s license number, and Social Security number of the applicant and all owners, managers, and employees; a floor plan for the proposed business; a location compliance statement from the city zoning official; and information about whether an owner, manager, or employee of the business had been convicted of certain crimes. Certain persons associated with the businesses were also required to be fingerprinted and photographed by the city police department.93

Upon receipt of the application, the city had 30 days to grant or deny the license. If denied, the applicant had 20 days to appeal the decision to the city manager, who was required to hold a hearing within 30 days. If relief was denied, the applicant could seek judicial review under Colorado state law procedures.94

The Tenth Circuit analyzed the licensing scheme applying the standards set forth in FW/PBS. It observed that while the Littleton ordinance specified a time frame for the license decision, it did not specify a time frame for the city to meet other pre-application requirements, such as providing a location compliance statement or taking required photos and fingerprints. Further, while the ordinance provided for judicial review of licensing decisions, including expedited review in the trial court’s discretion, it did not guarantee expedited review. For these reasons, the court held that the licensing scheme was an unconstitutional prior restraint.95

The court upheld the location restrictions, despite the fact that Littleton’s ordinance left only a few hundred acres – little more than 1 percent of the city’s land area – available for use by adult businesses. Further, the properties were largely manufacturing or industrial sites or owned by government entities. The court concluded, nonetheless, that this met the test for alternative avenues of communication under Renton.96

The Supreme Court granted certiorari to consider a split in the federal circuit courts in regard to whether FW/PBS requires a city’s adult business licensing ordinance to simply provide access to judicial review of a city’s licensing decisions or to somehow guarantee a prompt judicial determination.97

85. Id. at 1291.
86. 348 F.3d 1182 (10th Cir. 2003).
87. Id. at 1184.
88. Id. at 1196-97.
89. Id. at 1199-1200.
90. Id. at 1197, 1199-1200.
91. 311 F.3d 1220 (10th Cir. 2002), rev’d in part, 541 U.S. 774, 124 S. Ct. 2219, 159 L. Ed. 2d 84 (2004).
92. 311 F.3d at 1224.
93. Id. at 1225.
94. Id. at 1225-26.
95. Id. at 1232-38.
96. Id. at 1238-41.
97. Z.J. Gifts, 541 U.S. at 776, 778-81.
The Court concluded that the First Amendment requires a prompt judicial determination of a city’s decision to deny an adult business license. \(^{98}\) However, the Court reversed the Tenth Circuit’s decision, holding that Colorado’s ordinary rules of judicial review provided adequate safeguards for obtaining a quick decision. Notably, courts have the ability to expedite cases, courts have expressed willingness to expedite cases where First Amendment concerns are implicated, and the reasons for denying a license are objective criteria, which are relatively easy for courts to evaluate.\(^{99}\)

### E. Regulation in rural areas may be treated differently

In *Abilene Retail #30 v. Board of County Comm’rs, Dickinson County*,\(^{100}\) plaintiff, an adult bookstore, opened a store in a rural area adjacent to Interstate 70. The board of county commissioners adopted an ordinance regulating the location and mode of operation of adult businesses. Plaintiff challenged Dickinson County’s ordinance in federal court. The board thereafter adopted a new ordinance with modifications. Plaintiff amended its complaint to challenge several aspects of the new ordinance. Following the close of discovery, including the depositions of competing experts, the district court granted summary judgment for the county.\(^{101}\)

On appeal, the Tenth Circuit applied *Renton* and *Alameda Books* in its analysis of whether the ordinance violated the First Amendment.\(^{102}\) First, the court found that the ordinance was content-neutral because its preamble stated that the purpose was to combat the negative secondary effects of adult businesses. The court was willing to take this statement of purpose at face value and rejected the plaintiff’s efforts to present evidence of anti-pornography animosity by individual county commissioners.\(^{103}\) The court also rejected plaintiff’s complaint that the purpose of the ordinance was suspect because the commissioners did not thoroughly review the studies and case law cited in the preamble. Indeed, the court observed that “we have never required legislators to engage in monastic rumination on cited cases and studies to establish their good-faith reliance on them.”\(^{104}\)

Next, the court acknowledged that combating the secondary effects of adult businesses is a substantial government interest. Thus the court focused its analysis on whether the ordinance was designed to serve this interest.\(^{105}\) The court concluded that there was a dispute of material fact regarding whether the cases and studies cited by the county were “reasonably believed to be relevant” to its interests, such that the ordinance was “designed to serve” the goal of preventing or reducing the negative secondary effects.\(^{106}\) The dispute of fact arose, according to the Tenth Circuit, because the county relied upon studies and cases from other jurisdictions which were based upon urban – rather than rural – experience.\(^{107}\) Ultimately, the grant of summary judgment to the county was reversed and the matter was remanded for trial.\(^{108}\)

The concurring opinion focused on the nature of the shifting burdens under *Alameda Books*. Under *Alameda Books*, the county was required to adduce evidence it “reasonably believed to be relevant” to demonstrate a connection between the government interest and the regulation. This burden is “very light”; in fact, other courts had been satisfied with reliance on pre-packaged case law and studies very similar to those relied upon by the county.\(^{109}\)

The concurring judge further identified the difficulty at stage two of *Alameda Books*, where the plaintiff is given the opportunity to cast doubt upon the county’s rationale.\(^{110}\) The concurring judge concluded that through use of its expert, plaintiff cast direct doubt upon the county’s basis for regulation, and the county supplemented the record with expert rebuttal of its own. This, however, created a “battle of the experts” requiring resolution by a trier of fact.\(^{111}\)

### F. Defining adult businesses

In *Doctor John’s Inc. v. City of Roy*,\(^{112}\) plaintiff was an adult book and video store that also sold clothing and sexual devices. It challenged the city’s licensing scheme for adult businesses.\(^{113}\) The ordinance required licensing of a business fitting the definition of an adult book, video, or novelty store: an establishment “which has significant or substantial portion of its stock-in-trade or derives a significant or substantial portion of its revenues or devotes a significant or substantial portion of its interior business or advertising, or maintains a substantial section of its sales or display space” to the sale or rental of merchandise “characterized by [its] emphasis upon the exhibition or description of specified sexual activities or specified anatomical areas.”\(^{114}\) The district court granted summary judgment for the city.\(^{115}\)

The Tenth Circuit rejected plaintiff’s challenge that the ordinance was vague on its face, concluding that “people of ordinary intelligence” had a “reasonable opportunity to understand” what was meant by a “significant or substantial portion” of a store’s inventory, and also what it means for material to “emphasize” sex acts or body parts.\(^{116}\) The court also rejected plaintiff’s argument that the city failed to justify the ordinance under *Renton* and *Alameda Books* because it relied upon pre-packaged secondary effects studies. Plaintiff argued that it was a retail-only adult business, and studies relating to on-site entertainment businesses could not support regulation of book

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98. Id. at 781.
99. Id. at 781-84.
101. Id. at 1167-70.
102. Id. at 1170-71.
103. Id. at 1171-73.
104. Id. at 1172.
105. Id. at 1173.
106. Id. at 1174.
107. Id. at 1174-78.
108. Id. at 1178, 1180.
109. Id. at 1180-83 (Ebel, J., concurring).
110. Id. at 1185-87.
111. Id. at 1187-88.
112. 465 F.3d 1150, 1169 (10th Cir. 2006); decision on remand aff’d sub nom., *Doctor John’s v. Wahlen*, 542 F.3d 787 (10th Cir. 2008).
113. Id. at 1153-55.
114. Id. at 1158.
115. Id. at 1155.
116. Id. at 1158-61.
Because it was unclear in the record what evidence the district court considered in this regard, the question was remanded to the district court for application of the Alameda Books burden shifting analysis. On remand, the district court considered evidence in support of and against the city’s rationale for its sexually-oriented business ordinance to determine whether the ordinance was narrowly tailored to the city’s interest in preventing the secondary effects of such businesses. The district court upheld the ordinance and this was affirmed on appeal.

V. Conclusion

The contents of zoning ordinances regulating sexually-oriented businesses can be as diverse as the local governing bodies that craft them. Most city and county attorneys look to several resources to help begin the drafting process. The most popular resource is existing ordinances, whether from other cities and counties in Kansas or even other states. Another resource is government or private organizations devoted to compiling and studying these types of ordinances, or individuals who devote their professional practice to drafting them.

The key is to make your local governing body aware of these issues if there is no regulation in place. If your client already has an ordinance, review it occasionally to determine whether changes should be considered. The U.S. Supreme Court and Tenth Circuit cases described in this article are a starting point for your analysis. Counsel must beware of the apparent higher burden placed on rural local governments to prove that existing or pre-packaged studies concerning negative secondary effects are relevant and designed to serve the goal of preventing secondary effects in a non-urban area. Further, you must be prepared to hire an expert to assist you in overcoming this burden when defending a challenge to your ordinance.

About the Author

Teresa L. Watson is a partner in the law firm of Fisher, Patterson, Sayler & Smith LLP in Topeka. Watson practices in the areas of civil rights litigation, governmental liability, and appellate practice. She has defended a number of complex civil rights cases against cities, counties, and other quasi-governmental entities in state and federal courts. In state court, she has handled several matters of first impression, including the application of the Kansas veterans preference law. She is a magna cum laude graduate of the Washburn University School of Law.

117. Id. at 1164-65.
118. Id. at 1169.
120. Doctor John’s v. Wahlen, 542 F.3d 787 (10th Cir. 2008).
ATTORNEY DISCIPLINE

DISBARMENT
IN RE PATRICK S. BISHOP
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 104,495 – OCTOBER 15, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Patrick S. Bishop, of Fort Scott, an attorney admitted to the practice of law in Kansas in 1979. On March 28, 2008, the respondent's license to practice law was indefinitely suspended by the Supreme Court.

On July 15, 2009, the Office of the Disciplinary Administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving his failure to include a creditor in a client's bankruptcy case and his failure to communicate with clients. The respondent filed an answer to the formal complaint on September 27, 2009.

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

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on October 1, 2009, where the respondent was personally present. The hearing panel determined that respondent violated KRPC 1.1 (2009 Kan. Ct. R. Annot. 410) (competence); 1.3 (2009 Kan. Ct. R. Annot. 426) (diligence); 1.4(a) (2009 Kan. Ct. R. Annot. 443) (communication); 8.4(c) (2009 Kan. Ct. R. Annot. 602) (engaging in conduct involving misrepresentation); and Kansas Supreme Court Rule 211(b) (2009 Kan. Ct. R. Annot. 321) (failure to file answer in disciplinary proceeding). The hearing panel unanimously recommended that the respondent be disbarred.

HELD: Court stated the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. The respondent failed to appear at this hearing.

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

HELD: Court commented on the respondent’s failure to respond or comply with virtually any proceeding or hearing before the disciplinary administrator’s office. The evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law.

DISBARMENT
IN RE TERENCE A. LOBER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 104,496 – OCTOBER 15, 2010

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Terence A. Lober, of Leavenworth, an attorney admitted to the practice of law in Kansas in 1991. On May 12, 2010, the Office of the Disciplinary Administrator filed a formal complaint against the respondent, alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving her representation in a divorce case. Ivester failed to file an answer to the formal complaint. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on June 24, 2010. Ivester failed to appear at this hearing.

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

HELD: Court commented on Ivester’s failure to respond or comply with virtually any proceeding or hearing before the disciplinary administrator’s office. The evidence before the hearing panel established the charged misconduct of Ivester by clear and convincing evidence and supported the panel’s conclusions of law.

INDEFINITE SUSPENSION
IN RE MARY IVESTER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 104,806 – FEBRUARY 4, 2011

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against respondent Mary Ivester of Overland Park, an attorney admitted to the practice of law in Kansas in 1979. On September 15, 2009, the Office of the Disciplinary Administrator filed a formal complaint against Ivester, alleging violations of the Kansas Rules of Professional Conduct (KRPC) involving her representation in a divorce case. Ivester failed to file an answer to the formal complaint. A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on November 19, 2009. The respondent failed to appear at this hearing.

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

HELD: Court commented on Ivester’s failure to respond or comply with virtually any proceeding or hearing before the disciplinary administrator’s office. The evidence before the hearing panel established the charged misconduct of Ivester by clear and convincing evidence and supported the panel’s conclusions of law.
Criminal

STATE V. SMITH
DOUGLAS DISTRICT COURT – REVERSED AND
REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NO. 99,655 – FEBRUARY 11, 2011

FACTS: Charles E. Smith appealed his robbery conviction, based in part on an allegation that the district court had abused its discretion in denying his motion for the appointment of new counsel. Smith was captured on the store’s surveillance videotape. Smith’s attorney attempted to withdraw, arguing to the court that there was no doubt that the face on the video was Smith, and that Smith denied it was him and wanted his attorney to present testimony that he was physically infirm and unable to perform the robbery and had no motive. The district court denied the motion for new counsel finding any lawyer would have the same problem as his current counsel and that no attorney can present evidence he or she knows is false. The Court of Appeals agreed with Smith and reversed and remanded the case for a new trial, finding the district court’s acceptance of the state’s argument was based on a hasty generalization, because it does not logically follow that all attorneys would view the videotape in the same way as Smith’s attorney and that Smith was denied the opportunity to present relevant evidence in his defense.

ISSUE: Motion for new counsel

HELD: Court agreed with the Court of Appeals decision that Smith’s counsel exceeded the scope of his duties as defense counsel and invaded the province of the jury when he performed the fact-finding function of identifying the robber in the videotape as his client and made the determination that his client was guilty. However, Court stated the Court of Appeals’ hasty generalization analysis was misplaced, because the opinion of any replacement counsel as to the identity of the person depicted in the videotape would be equally irrelevant to the performance of the defense counsel’s function in the criminal proceedings. Court held the fact that defense counsel openly expressed his opinion that Smith was guilty should have alerted the court that the problem might be more fundamental than false evidence. Court held defense counsel’s refusal to present truthful evidence based upon the attorney’s belief that his client was guilty would have presented a case of justifiable dissatisfaction and the court’s failure to make further inquiry into the exact nature of the conflict when presented with defense counsel’s admission that he was invading the province of the jury falls squarely within the parameters of the abuse of discretion standard.

STATUTES: No statutes cited.

Appellate Practice Reminders . . .

The Importance of Checking Appellate Jurisdiction

An attorney who files an appeal must master the principles of appellate jurisdiction, if only to the extent of determining whether jurisdiction exists in the individual appeal. The right to appeal in Kansas is statutory, and the attorney should be able to cite appropriate statutory provisions to establish jurisdiction. There are few more discouraging events in the practice of law than to have fully briefed an appeal and arrive at oral argument to discover that the court wants to talk about jurisdiction.

Choose the Right Court: Most appeals are filed in the Court of Appeals, and it is not fatal jurisdictionally if an attorney files an appeal in the wrong court. The docketing clerk in the Appellate Clerk’s Office will attempt to steer the attorney toward the right court. And there are means to transfer a case from the Court of Appeals to the Supreme Court if the case is erroneously docketed in the Court of Appeals.

Timing is Everything: Know the statutory provision setting the time in which to appeal. Be aware that appeal times may vary, depending on the type of action. And the appellate courts will be checking jurisdiction through every level of appeal if the case began in an administrative agency or before a municipal or magistrate judge.

Determine Whether the Order is Appealable: Generally, a final order in a civil case disposes of all issues as to all parties. There are exceptions though. For example, an order denying a motion to intervene is appealable as is denial of a motion to arbitrate. An order denying a motion to dismiss is not appealable nor is an order vacating a default judgment.

The jurisdictional rules in both criminal and civil appeals are long and complex. This discussion simply suggests that further study is necessary. A starting point to learn more or refresh your recollection would be Chapter 5 of the Appellate Practice Handbook, available online at no charge. Go to www.kscourts.org, choose “Appellate Clerk” in the banner, and go to “Appellate Handbook.”

For questions about these 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

DRIVER'S LICENSE SUSPENSION
DELONG V. KANSAS DEPARTMENT OF REVENUE
BARTON DISTRICT COURT – AFFIRMED
NO. 104,270 – FEBRUARY 25, 2011

FACTS: DeLong challenges the notice of the administrative suspension of her driver's license as violating her constitutional due process rights. The notice informed DeLong that her driver's license privilege would be suspended as of 30 days following the administrative decision suspending her license. The Kansas Department of Revenue also sent out a follow-up notice informing her that her request for judicial review had been received and that her driving privileges would continue until a final court ruling.

ISSUE: Driver's license suspension

HELD: Court stated DeLong failed to present even a semblance of a fully articulated due process argument, let alone one that might be considered colorable. She made no effort to describe a deprivation that resembled anything even remotely rising to the level of a constitutionally protectable interest in property or liberty. Ultimately, the argument looked less like the defense of a legitimate constitutional right than a tool for delay. Court upheld the suspension of DeLong's license.

STATUTE: K.S.A. 8-1002, -1014(b), -1020, -1567

HABEAS CORPUS - LIMITATIONS
VONTRESS V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,904 – FEBRUARY 25, 2011

FACTS: Vontress' 1996 conviction on charges, including premeditated first-degree murder, was affirmed in 1998. In 2008, he filed K.S.A. 60-1507 post-conviction motion asserting due process, equal protection, and separation of power claims regarding Kansas law on premisedation. District court dismissed the motion as untimely without addressing merits of Vontress' claims. On appeal, Vontress argued reason of case was necessary because failing to address merits of his claims would be manifestly unjust.

ISSUE: Extending time for filing K.S.A. 60-1507 motion to prevent manifest injustice

HELD: Motion was clearly untimely, and Vontress alleged no circumstances preventing him from filing his motion prior to the 2004 deadline. Absent such circumstances, there was no basis for finding that consideration of merits of Vontress' claims would prevent a manifest injustice. District court's decision to dismiss motion as untimely was affirmed.

CONCURRENCE (Leben, J.): Agreed that Vontress made no showing that his claims must be heard to prevent manifest injustice, but for different rationale. No manifest injustice shown in this case because Vontress presented neither a reason for his delayed filing nor any potentially valid claim.

STATUTE: K.S.A. 60-1507, -1507(f)(1), -1507(f)(2)

HOSPITAL LIENS AND KANSAS CONSUMER PROTECTION ACT
VIA CHRISTI REGIONAL MEDICAL CENTER V. REED
RENO DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 101,690 – FEBRUARY 18, 2011

FACTS: Ivan Reed's car collided with a Union Pacific train, and he received treatment for his traumatic injuries at Via Christi Re-
once this litigation began. Kansas City further claimed Thoroughbred drained the tract covered by the OXY lease from wells it drilled on the adjacent land. The trial court granted summary judgment to Kansas City on its revenue claims but entered judgment against Kansas City following a bench trial on the drainage claim. The parties ultimately stipulated to the amount due on the revenue claim. Kansas City sought prejudgment interest and attorney fees and the trial court awarded Kansas City prejudgment interest but only one-third of the requested attorney fees.

Thoroughbred filed an appeal, and Kansas City cross-appealed.

ISSUE: Oil and gas leases

HELD: Court applied prior case law to hold that revenue from hydrocarbons extracted as a constituent element of the gas produced should be distributed proportionately to the parties having interests in the gas unit when the unitization agreement itself addressed gas rights without some limiting language. Court stated the declaration of unitization in the present case contained the same gas rights phrase without any elaboration as to the treatment of incidental production of oil or other hydrocarbons and that the trial court properly included revenue from nongas production in determining the amount due Kansas City. Court also found Kansas City failed in its proof of the necessary predicate—that drainage was occurring at all. Court found the trial court heard a large amount of evidence on the drainage issue depicting starkly contrasting pictures, one depicting drainage and the other not. The trial court weighed the evidence and concluded Kansas City failed to show that drainage was more probably occurring than not. Court held the trial court found Kansas City’s evidence wanting on drainage and that ended the matter.

Court found that the trial court did not error in awarding prejudgment interest or the amount of attorneys fees granted.

STATUTES: K.S.A. 55-223, -1614, -1615, -1617; and K.S.A. 60-208, -216, -233

Reminders from the Kansas CLE Commission…

The Kansas Continuing Legal Education Commission is the office that tracks and reports your CLE credits to the Kansas Supreme Court for annual compliance. Non-compliance could result in additional fees and even the suspension of your license to practice law. The annual CLE requirement in Kansas is 12.0 hours of CLE credit, including 2.0 hours of professional responsibility, by June 30, 2011.

The Kansas CLE Commission 2011-2012 Annual CLE Fee Form will be mailed to your address of record in early May. This is the only notice you will receive. For the first time, this year you will be able to pay this fee easily, and securely, ONLINE using a credit card at www.kscle.org. The CLE annual fee form and payment are due by July 1, 2011. Please note that incomplete forms will be returned and may result in a delay of processing your annual fee. The annual CLE fee is due on July 1 and is delinquent if not paid before August 1. A fee postmarked on or after August 1 of the year in which the fee is due must be accompanied by a $50 late fee.

If you have enrolled for online access to your record, you can access your record to pay your annual fee and view your online transcript of hours. Your online transcript is available free-of-charge, 24 hours a day.

IMPORTANT – DON’T MISS – DATES:

June 30 – End of CLE year
All CLE hours must be attended by this deadline to avoid further penalties.

July 1
Annual CLE fee due.

July 31
Last day to file 2010-2011 hours and fees. All paperwork must be postmarked no later than July 31 to avoid late filing penalties.

Fax and email submissions will not be accepted.
plan for Barbara's siblings and John's children upon the death of the surviving spouse. After Barbara signed a durable power of attorney in 1997, allowing John to create a revocable trust with dispositive provisions "substantially similar" to her 1987 will, John created revocable trusts for both him and Barbara that contained virtually the same asset distribution plan to Barbara's siblings and John's children as their 1987 joint contractual wills. In 2002, approximately three years after Barbara's death, John executed an amendment greatly changing the asset distribution between Barbara's siblings and John's children. Harriet Eggeson, Barbara's sister, filed a declaratory action against Gertrude DeLuca, John's daughter and the trustee of John's trust, challenging John's 2002 amendment to the 1997 trust and asking for reformation of the trust. The trial court determined that John's 2002 amendment to the trust was not authorized by the 1987 joint contractual wills or by Barbara's durable power of attorney and granted summary judgment to Eggeson.

Issues: (1) Wills and (2) amendment

Held: Court held statements made by John as to his reasons for executing the 2002 amendment, which were made approximately 15 years after the 1987 wills were executed and approximately three years after Barbara's death, constituted inadmissible hearsay and were not relevant to the issues in the case. Moreover, no genuine issue of material fact existed as to whether John's 2002 amendment resulted in an estate plan "substantially similar" to the 1987 joint contractual wills. Because John's 2002 amendment completely changed the asset distribution plan in the 1987 joint contractual wills and was contrary to John's and Barbara's agreement regarding the distribution of their assets, Court determined that the trial court properly granted summary judgment to Eggeson. Court affirmed in part and remanded with instructions.

Statute: K.S.A. 60-460

**Workers' Compensation, Agricultural Pursuits, Independent Contractor, and Insolvency**

**Olds-Carter v. Lakeshore Farms**

**Workers Compensation Board – Affirmed No. 104,047 – February 18, 2011**

Facts: Margaret LeAnn Olds-Carter was injured in an accident while driving a semitrailer that she leased from Lakeshore Farms Inc. (Lakeshore). Olds-Carter was granted workers' compensation benefits from the administrative law judge (ALJ). The ALJ's decision was affirmed by the Appeals Board for the Kansas Division of Workers Compensation (Board). Lakeshore and the Kansas Workers Compensation Fund (the Fund) appealed the Board's decision, contending that the present claim is not subject to the Kansas Workers Compensation Act because Olds-Carter was engaged in an agricultural pursuit when she was injured, because Lakeshore's payroll is insufficient to trigger coverage under the Act, and because Olds-Carter was an independent contractor, not an employee of Lakeshore. The Fund also appealed the Board's decision that it is obligated to pay the award because Lakeshore is insolvent.

Issues: (1) Workers' compensation, (2) agricultural pursuits, (3) independent contractor, and (4) insolvency

Held: Court held that when the claimant was injured, the respondent's business did not constitute an agricultural pursuit (cultivating and harvesting of agricultural products) as the term is commonly understood. As a result, respondent's business was not exempt from the Workers Compensation Act. Court stated the principal test of whether one is an independent contractor or an employee is based upon the control exercised: Who has the right to direct what work will be done and when and how the work will be performed? Court held that under the facts of this case, evidence supported findings that the respondent exercised or had the right to exercise as much control over the claimant-driver as the respondent desired, so that the claimant-driver was an employee and not an independent contractor and was covered by the Workers Compensation Act.

Court stated that K.S.A. 44-532a(a) clearly states that if an employer of an injured employee is insolvent and uninsured, the state pays compensation benefits to the employee out of the Kansas Workers Compensation Fund (Fund). Moreover, the Kansas insurance commissioner can then sue the employer under K.S.A. 44-532a(b). Court stated the burden is properly placed on the Fund to pursue a subrogation action against an insolvent and uninsured employer under K.S.A. 44-532a(b). Court held there was substantial competent evidence to support the Board's finding that owing to Lakeshore's insolvency, the Fund is obligated to pay Olds-Carter's award.

Statutes: K.S.A. 44-501, -503, -505(a)(1), (2), -512, -532(a), (b); and K.S.A. 77-601, -621(c), (d)

Criminal

**State v. Edgar**

**Cowley District Court – Affirmed in Part, Reversed in Part, and Remanded No. 103,208 – February 11, 2011**

Facts: Edgar appealed felony DUI conviction, claiming district court erroneously denied motion to suppress evidence because investigating officer lacked reasonable suspicion to request preliminary breath test (PBT) after Edgar had passed two field sobriety tests. Edgar also claimed his consent to the PBT was involuntary because officer told him he did not have a right to refuse the test, and failed to provide Edgar with appropriate statutory notices when test was requested pursuant to K.S.A. 2010 Supp. 8-1012(c). Edgar also claimed district court erred in ordering Board of Indigents’ Defense Services (BIDS) reimbursement for attorney fees in an amount “to be determined.”

Issues: (1) Reasonable suspicion to request PBT, (2) consent to PBT, and (3) BIDS attorney fees

Held: Question of first impression in Kansas. Whether law enforcement officer has reasonable suspicion to request a driver submit to PBT is determined under totality of circumstances. A driver's performance on field sobriety tests may be considered along with all other evidence available to the officer. Fact that a driver passes one or more field sobriety tests does not dispel reasonable suspicion, as a matter of law; if other evidence justifies the PBT request.

Under totality of circumstances in this case, officer had reasonable suspicion to justify request for PBT.

Under K.S.A. 8-1012, as amended to overrule State v. Jones, 279 Kan. 71 (2005), consent is implied and is not required to be knowing, intelligent, and voluntary. Notice provisions in K.S.A. 2010 Supp. 8-1001 and 8-1012 were compared. A person's implied consent to submit to testing under K.S.A. 2010 Supp. 8-1012 is not subject to receiving oral notice an officer must provide before testing. Fact that officer failed to notify Edgar that refusal to submit to PBT was a traffic infraction does not negate Edgar's implied consent to the test, and provides no basis for suppressing the evidence.

Before assessing BIDS attorney fees, sentencing court is to consider financial resources of the defendant and nature of the burden that payment will impose. A sentencing court cannot adequately evaluate the amount of attorney fees the defendant is able to pay without knowing the specific amount of attorney fees being requested. Remanded for reconsideration of BIDS attorney fees based upon a request for a specific amount of fees.

Statutes: K.S.A. 2010 Supp. 8-1001, -1001(a), -1001(k), -1012, -1012(a), -1012(b), -1012(c), -1012(d); K.S.A. 8-1001, -1012; and K.S.A. 22-4513
STATE V. GROSSMAN
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,644 – FEBRUARY 25, 2011

FACTS: Grossman sentenced to prison term with post-release supervision and placed on probation to run consecutive to time still required on earlier parole revocation. In subsequent revocation of probation, district court found Grossman had waived a formal hearing and admitted to allegations in probation violation warrants, later revoked. On appeal Grossman claimed district court: (1) failed to determine whether there was a knowing waiver of evidentiary hearing and admission of violations; (2) lacked jurisdiction to modify terms of probation to set start date after an off-the-record conversation with probation officer regarding Grossman’s earlier revocation term; and (3) abused its discretion in revoking probation in part based on failure to pay for drug/alcohol treatment without first making the ability to pay finding required in K.S.A. 22-3716(b), and in not assigning Grossman to community corrections.

ISSUES: (1) Due process, (2) modification of terms of probation, and (3) probation revocation

HELD: Considering probation revocation hearing as a whole, Grossman clearly had opportunity to be heard and to present evidence and witnesses. Through his attorney, Grossman admitted violations and argued for reinstatement of probation. District court’s acceptance of admissions as a knowing and voluntary waiver of statutory right to evidentiary hearing did not deny Grossman due process. Any subsequent modification to conditions of Grossman’s probation did not affect his sentence, thus no merit to allegation of illegal sentence based on modification of probation. The hearing and finding of necessity under K.S.A. 21-4611(c)(8) was not required because district court’s setting of start date did not modify the sentence imposed for consecutive service of probation terms. K.S.A. 21-4610(b) is discussed and applied, finding district court complied with the statute and did not deny Grossman due process.

STATE V. HALL
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, REMANDED
NO. 102,297 – FEBRUARY 11, 2011

FACTS: Hall convicted of theft of inventory from veterinary clinic and computer crime. Trial court imposed underlying 16-month prison term, and 18-month probation with payment of restitution as condition of probation. Restitution initially set at $10,860.38, but sentencing court retained jurisdiction for 30 days for objections to that amount. In post-sentencing hearing, restitution set at $14,293.11. In consolidated appeals, Hall claimed trial court lacked jurisdiction to increase amount of restitution and claimed trial court erroneously determined amount of restitution to include retail value of inventory taken and victim’s auditing expenses. Hall also claimed abuse of trial court’s discretion to deny motion for mistrial based on violation of order in limine barring testimony regarding other possible theft by Hall.

ISSUES: (1) Jurisdiction to consider objection to amount of restitution set at sentencing, (2) amount of restitution - fair market value, (3) amount of restitution - auditing expenses, and (4) violation of order in limine

HELD: No Kansas decision has decided whether trial court may provisionally retain jurisdiction to modify amount of restitution ordered at sentencing if the defendant objects, within the time al-
lotted, to the amount of restitution initially ordered. A sentencing court may retain jurisdiction at sentencing to decide at a later date the amount of restitution owed as condition of probation. Here, Hall was given option of waiving right to restitution hearing and accepting $10,860.38 restitution amount, or of filing motion requesting restitution hearing where court would consider proper amount of restitution, whether more or less. Hall chose the second option.

Actual loss the clinic suffered is fair market value (wholesale market price) paid for items taken, not the amount the clinic would have received if customers had purchased inventory at retail prices. Restitution based on inventory’s retail market value, as opposed to clinic’s wholesale coast for the inventory, gave clinic a windfall and failed to yield a defensible restitution figure. Reversed, amount of restitution vacated, and remanded to trial court to redetermine amount of restitution.

Victim’s testimony about estimated time spent on audit and its value was reliable evidence to support trial court’s inclusion of defensible figure for clinic’s auditing expenses in the restitution order.

No abuse of discretion by trial court in denying motion for mistrial where testimony in violation of order in limine was unsolicited and not further mentioned during trial, and there was substantial evidence of Hall’s guilt. Trial court’s failure to give a curative instruction to the jury was not clearly erroneous.

STATUTES: K.S.A. 2001 Supp. 21-4603d(b)(1); K.S.A. 21-3701, -3755, -4610(d)(1), -4721, -4721(1); K.S.A. 22-3414(3), -3424(d); and K.S.A. 60-455

STATE V. KACSIR

SHAWNEE DISTRICT COURT – AFFIRMED
NO. 102,559 – FEBRUARY 25, 2011

FACTS: Kacsir drove car onto shoulder of Interstate 70 in front of parked trooper, who turned on lights and approached Kacsir to see if she had mechanical problems, needed directions, or had a medical emergency. Investigatory stop resulted when officer suspected Kacsir had been drinking. District court denied Kacsir’s motion to suppress all evidence from the detention, finding stop was a legitimate public safety stop under the circumstances and the officer’s reasons for the stop. Kacsir then applied for diversion, which state denied because application not filed within 30 days of first court appearance. Kacsir ultimately convicted of DUI. District court denied Kacsir’s motion to compel state to enter a diversion. On appeal, Kacsir claimed the trooper’s stop was an illegal seizure rather than a valid public safety stop, and district court erred in denying motion to compel diversion.

ISSUES: (1) Safety stop and (2) diversion application policy

HELD: This car stop was not a voluntary encounter. Once trooper turned on patrol car’s lights, no reasonable person would feel free to leave without trooper’s permission. District court correctly held this was a legal public safety stop because trooper gave specific and articulable facts and reasons for stopping and approaching the car for public safety concerns.

By law, each county and district attorney must adopt written policies and guidelines for setting up any diversion program so defendants and their counsel may know how to go about seeking deferred prosecution of their cases. District attorney’s policy here is clear and facially reasonable. State did not arbitrarily or unreasonably deny Kacsir diversion. Kacsir’s argument that she would have had to waive right to discovery to comply with 30-day limit is incorrect in fact and theory.

STATUTES: K.S.A. 8-2567(d); and K.S.A. 22-2907, -2907(1), -2907(2), -2908

STATE V. REED

SALINE DISTRICT COURT – AFFIRMED
NO. 102,390 – FEBRUARY 18, 2011

FACTS: Reed convicted of aggravated robbery, aggravated assault, and obstruction of official duty. On appeal, Reed claimed district court erred in: (1) failing to suppress eyewitness identification of him by victim while Reed was handcuffed in back seat of patrol car; (2) denying Reed’s request for a unanimity jury instruction on the aggravated robbery charge because state alleged multiple acts to support that charge; and (3) giving a deadlocked jury instruction prior to deliberations that included language that another trial would burden both sides.

ISSUES: (1) Motion to suppress identification, (2) unanimity instruction, and (3) Allen-type instruction

HELD: Substantial competent evidence supported district court’s finding that identification procedure used in this case was unnecessarily suggestive. Reliability factors in State v. Hunt, 275 Kan. 811 (2003), were applied, finding under totality of circumstances that identification was reliable. District court’s motion to suppress the show-up identification is affirmed.

This is an alternative means case rather than a multiple acts case. District court did not err in failing to give unanimity instruction because there was sufficient evidence to support each alternative means of committing aggravated robbery.

No reversible error in giving the Allen-type instruction in this case. Substantial evidence supported the jury’s verdict, and Reed failed to show a real possibility the jury would have rendered a different verdict if this trial error had not occurred.

CONCURRENCE (Buser, J., joined by Bukaty, J.): Concurred with affirming trial court’s denial of motion to suppress. Writing separately to disagree that the trial court ruled the show-up identification was unnecessarily suggestive, and to disagree with suggestion that State had burden to prove alternative means of identification were considered and reasonably ruled out by the officers.

STATUTE: K.S.A. 22-3414(3)
STATE V. WILSON
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,082 – FEBRUARY 4, 2011

FACTS: Wilson convicted of burglary and criminal damage to property. Over Wilson’s objection, instructions to the jury included the deadlocked Allen-type instruction, PIK Crim.3d 68.12. On appeal, Wilson claimed the decision to give that instruction was reversible error, and claimed that insufficient evidence supported burglary conviction.

ISSUES: (1) Allen-type jury instruction and (2) sufficiency of evidence

HELD: History of PIK Crim. 3d 68.12 is reviewed through revision of the instruction after State v. Salts, 288 Kan. 263 (2009), to remove language regarding burden of another trial on the parties. Under facts of case, advising jury in Allen-type pattern jury instruction – that if it fails to reach a decision on a charge, that charge is left undecided for the time being and it is then up to the state to decide whether to resubmit the undecided charge to a different jury at a later time – is an instruction that properly and fairly states the law as applied to the facts here and could not have reasonably misled the jury.

Sufficient evidence supported Wilson’s burglary conviction.

STATUTE: K.S.A. 21-3715(b)
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APRIL

Friday, April 29, 9 a.m. – 3:45 p.m.
Bankruptcy & Insolvency: A Review of Tille 11 in 2011
DoubleTree Hotel, Overland Park

Co-sponsored by The Bar Plan; Bruce, Bruce & Lehman LLC; Case, Moses, Zimmerman & Martin P.A.; Cricket Debt Counseling; Evans & Mullinix P.A.; Gary E. Hinck P.A.; Henson, Hutton, Mudrick & Gragson LLP; Lentz Clark Deines P.A.; Stevens & Brand LLP; Stumbo Hanson LLP; Topeka Area Bankruptcy Council Inc.; Woner, Glenn, Reeder & Girard P.A.; and Gay, Riordan, Fincher, Munson & Sinclair P.A.

MAY

Friday, May 6, 9 a.m. – 3:20 p.m.
2011 Intellectual Property Law CLE
Doubletree Hotel, Overland Park

Co-sponsored by CPA Global; R2FACT Inc.; CT Corsearch; Hovey Williams LLP; Rex Flowers Illustration; Harshaw Research Inc.; Lillygren Drafting Services; Kutak Rock LLP; Lathrop & Gage LLP; Shook, Hardy & Bacon LLP; and Stinson Morrison Hecker LLP

Friday, May 6, 9 a.m. – 3:45 p.m.
The Future is Now: Health Care Reform
Kansas Law Center, Topeka

Wednesday, May 11, Noon – 1 p.m.
International Trade Compliance
Speaker: Bret J. Holder, Esq., Simon Gluck & Kane LLP, Kansas City, Mo.
Telephone CLE

Friday, May 13, 8:30 a.m. – 12:05 p.m.
The Relevance of Civil Rights Encompassing the Daily Practice of Law Video Debut
Dodge City, Overland Park, Topeka, and Wichita

Inaugural presentation of the John E. Shamberg Memorial CLE Series

MAY (CON’T.)

Wednesday, May 18, Noon – 1 p.m.
An Overview of Current Ethics Issues: From Facebook to Fees
Speaker: Eric G. Kraft, Duggan, Shadwick, Doerr & Kurlbaum P.C., Overland Park
Telephone CLE

Thursday, May 19, 8:45 a.m. – 12:30 p.m.
Wake Up with YLS
Kansas Law Center, Topeka

Friday, May 20, 9 a.m. – 4:30 p.m.
2011 KBA Criminal Law CLE
Crowne Plaza Hotel, Lenexa

Wednesday, May 25, Noon – 1 p.m.
Asset Protection for Kansas Clients
Speaker: Scuyler Kurlbaum, Kurlbaum Rinne LLC, Overland Park
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