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

Amendment to the KBA Bylaws

The Board of Governors made the following changes to the KBA Bylaws at its last meeting on Friday, April 15, 2011:

ARTICLE V, Section 5.1 — ELECTIONS AND TERMS OF OFFICE

(b) Election of the Board of Governors members shall by secret confidential electronic or mail ballots cast by members of the Association practicing within the respective districts in which elections are to be held.

The Executive Director shall cause such ballots to be prepared and not less than 45 days prior to the first day of the next Annual Meeting shall cause such ballots to be provided postage prepaid to each member eligible to vote. The ballot shall contain instructions that it must be returned to the Association by a day certain, which shall not be less than 15 days from the date of mailing notice.
NEW TOOLS TO HELP YOUR CLIENTS RECEIVE OR PAY SUPPORT ELECTRONICALLY.

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IOLTA Grant Spotlight

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.
- No potential clients will be given your name without approval and all will be screened for financial eligibility through Kansas Legal Services.
- KLS may be able to help with extraordinary litigation expenses when the interests of justice require it.

For more information or to volunteer, contact Kelsey Schrempp, KBA manager of public services, at (785) 234-5696 or at kschrempp@ksbar.org.
Arrivederci!

What is a Volga German attorney from Hays, America, doing titling his last column with an Italian word? Well, the word means “goodbye for the present,” or “until we see each other again,” which seemed appropriate for my last written address as president of the KBA. Plus, the word just rolls off the tongue and has a friendly feel.

As I sat down to write my last column, I thought of so many things that are left to be covered. I would be remiss if I did not express my appreciation to Jack Focht, Justice Marla Luckert, and Jack Dalton, who all contributed guest columns as past presidents of our Association. They connected us to the past and made it relevant to the present. They gave us the benefit of their wisdom and challenged us to live up to the ideals of our honored profession. Go back and read their words when you are in need of a little inspiration or need a reminder of why it is important to be principled and to give back to the law that has given us so much.

My last column would not be complete without recognizing the KBA staff for being marvelous people. The minute you enter the KBA building, you are greeted warmly and with a genuine smile. The folks that work diligently in the offices and behind the cubicle walls providing services to practicing lawyers all make our lives a little easier. The KBA staff are our ambassadors to the Legislature, courts, media, and general public and do an outstanding job. Their efforts improve our public image and our quality of justice. If you happen to run into one of the staff members, take a moment to say thank you, it will be welcomed and appreciated.

In previous columns I have mentioned the service of the members of the Board of Governors and would like to include recognition of the section and committee chairs. These women and men sacrifice their valuable time to benefit not only our organization but also each of us as lawyers. They take a leadership role on many important issues and keep us on the cutting edge of legal trends that affect our daily practice. They are volunteers in the true sense of the word and if you find the opportunity, express your thanks for all of their hard work on your behalf.

At the start of my term as president, Chief Justice Nuss scheduled time to have a frank discussion about issues facing the judiciary and their impact on the practice of law. He invited the participation of the KBA and welcomed our efforts during trying times. Gov. Sam Brownback, Attorney General Derek Schmidt, and legislative leaders also sat down with KBA officers and staff to begin a dialogue on how we can preserve our quality of justice during the present budget difficulties. More work needs to be done but through these initiatives we have opened lines of communication that shows promise for our future.

No one can serve as KBA president without the strong support of their family, partners, associates, and office staff. The people of Glassman, Bird, Braun & Schwartz make my life easier both in practicing law and serving the bar. In addition, they were also good at dragging me to a bar for little therapy when necessary. My wife, Amy, and my children often reminded me that what we do is important by never complaining when absences were necessary and by being supportive through words of encouragement or a swift kick in the “you know where” when called for.

To my fellow lawyers, particularly the members of the Ellis County and Northwest Kansas bars, you have made practicing law and serving as a governor and officer of the KBA a truly rewarding experience. Whether it was in accommodating the scheduling of a hearing or simply a pat on the back for a job well done, it was all appreciated.

Finally, it is time to begin the ending of this last column. What better way than to talk about the incoming KBA president, Rachael Pirner. She has devoted countless hours to improving our Association and she will continue with that commitment during her term as president. She will bring a unique energy and style to the office and will be a wonderful leader in a long line of leaders. We will all be anxious to see her accomplishments and it is with great confidence that we place the gavel in her capable hands.

So, my friends, with fond memories and a deep sense of appreciation, it is time to say “goodbye for the present” and “until we see each other again.” ARRIVEDERCI! ■

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.
Thanks for a Great Year!

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

It is finally June and that means we are wrapping up this bar year for the Kansas Bar Association (KBA), and particularly for me, the Young Lawyers Section (YLS) as its President. I would like to welcome a great new board of directors for the KBA YLS — a very talented group of individuals who will continue to do good work and provide many opportunities for young lawyers across the state. I particularly want to thank those individuals who dedicated time despite their already busy lives to serve on the 2010-2011 KBA YLS Board of Directors.

I could not have carried out all I attempted without the steadfast dedication of Vincent Cox, who served as YLS president-elect this year. Vince will undoubtedly lead the KBA YLS to accomplish a great deal when he officially takes over as YLS president at the KBA Annual Meeting. I also heavily relied on Jennifer Hill, the KBA YLS liaison to the Kansas Bar Foundation, as well as the immediate past president of the KBA YLS. Jennifer was always my sounding board when I had an idea that I wasn’t sure would quite work and allowed me to bother her with incessant questions asking for advice.

The rest of the board of directors of the KBA YLS contributed significantly to the success of the section. Jennifer Horchem and Brooks Kancel helped produce four outstanding issues of the YLS Forum as our editors. Jenny Michaels dedicated countless hours to the Mock Trial Program, the public service project of the KBA YLS. Scott Hill served the board well as the district representative for the American Bar Association’s Young Lawyers Division. Nathan Eberline provided the section with his knowledge of legislative issues. Danny Back served as secretary-treasurer and also put in a great deal of time with the Mock Trial Program. Carly Farrell and Will Wohlford provided section members with great social networking opportunities. Amanda Kiefer developed and worked with other sections to offer some great CLEs for members. And last but not least, Erik Bailey, our Washburn Law student representative, kept us connected with our members at the law schools.

The YLS board could not have achieved all it did without the capable staff at the KBA. In particular, I thank Jeff Alderman for his leadership and advice on issues relating to young lawyers. Also, my thanks goes out to Kelsey Schremp and Danielle Hall, not only for their precision in getting things done but also particularly for the speed at which they did it — I always knew if Kelsey and Danielle were on a task, it would be done fast and would be perfect! All of the KBA staff deserves a big thank you from members of the bar association.

This year I had the opportunity to be the young lawyer representative on the KBA Board of Governors and what an experience it was! Glenn Braun led the bar association this year in his service as KBA president, and I am thrilled to have gotten the opportunity to learn from him. A special thanks to the whole of the Board of Governors for educating me about legal issues and board governance. Specifically, I would like to thank David Rebein for the support he lent the KBA YLS this year, for years past, and years yet to come.

The key to a successful year as president of the KBA YLS is having an understanding boss! Martha Coffman, with her active involvement in the KBA, understood when I would need to ask for a vacation day now and then to attend meetings and conferences as part of my YLS duties. Martha, thank you for all you have done for me since I came to work at the Kansas Corporation Commission — you have been a great mentor and taught me a lot, I will always look to you for advice.

I could not thank my friends and family more for all they have done to push me, not only this year but throughout my life in helping me get to this point. My parents encouraged me to set my goals high when it came to education and career, and I cannot find enough good words to thank them for all their support. My mother pressed hard to ensure I would receive the best education available, and was a central reason I decided to attend Washburn University School of Law. My father continually challenges me to be the best I can be, and I have great respect for all he has accomplished in his life and hope one day I can come close to measuring up to even half of what he has done.

I have been honored to serve as the president this year, and thank everyone for their support. I look forward staying active as a member of the bar association as it continues to fight for matters that affect attorneys across the state.

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.
IOLTA Grant Spotlight

Kansas Bar Foundation President James D. Oliver presented Young Lawyer Section (YLS) President Melissa Doeblin and YLS Mock Trial Committee Chair Jennifer Michaels with a check for $4,500 from the Interest on Lawyers’ Trust Accounts (IOLTA) grant funding to support the high school mock trials project. The goal of the project is to promote better communication and cooperation between educational and legal communities, and to inspire future advocates in a competitive and academic atmosphere throughout the state of Kansas. Mock Trial gives high school students an operational understanding of substantive and procedural legal issues, as well as the judicial process. The program is a challenging and exciting learning experience giving students first-hand knowledge of courtroom procedures.

IOLTA grant recipient Douglas County Legal Aid Society Inc. (DCLAS), of Lawrence, received a grant for $5,000. The goal for this money awarded will go to staffing an additional attorney. DCLAS has been in existence since 1969 and provides no-cost legal services to members of the community who are financially disadvantaged. This program is decidedly different from Kansas Legal Services Inc. (KLS), in that they are staffed by third-year law students who work under the supervision of licensed attorneys.

KLS received an IOLTA grant for $52,000. “The IOLTA funds are an increasingly critical component in our effort to maintain the availability of direct legal assistance to low-income Kansans. These monies will fund legal assistance to low income victims of domestic violence, sexual assault, and stalking,” said Marilyn Harp, KLS executive director.

Olathe Youth Court was the recipient of $1,000 in IOLTA grant monies. Olathe Youth Court provides for 3,000 youth of Olathe, a dual educational opportunity: (1) For student officers — an avenue to explore law-related education, prevention strategic and service; and (2) student defendants — a positive intervention and alternative to district court, as well as a customized individual sanctions plan (ISP) directly influencing areas of behavior that may impede the student defendant’s academic success. The Olathe Youth Court officers also host an annual Law Day event for all sixth grade classes within the school districts.

The main goals of the Olathe Youth Court are to:

1. Educate students about the juvenile justice system, namely consequences of breaking the law;
2. To improve students’ grades, especially in civics/social studies through ISP monitoring;
3. To decrease absenteeism and truancy among students;
4. To increase student involvement in civic engagements and community service through peer mentoring opportunities; and
5. To increase students’ self-worth through positive peer mentoring, youth court-related programs, and school visits.

Other IOLTA grant recipients for 2011 included The Topeka Youth Project, National Institute for Trial Advocacy, CASA of Kansas, and KBA Law-Related Education. The KBF encourages nonprofit agencies that are law related to apply for IOLTA grant funding, and for all Kansas attorneys to “opt in” with IOLTA.

Please contact Kelsey Schrempp, public services manager, at (785) 234-5696 or email at kschrempp@ksbar.org for more information on IOLTA.
Race and the Attorney-Client Relationship


Criminal defense attorneys face significant challenges in their efforts to zealously represent their clients. We are often greeted with mistrust and misconceptions perpetuated by the media and popular culture. Because our client’s trust and confidence are essential to the preparation of a good defense, we strive to put them at ease and to reassure them that they can discuss anything that will assist in their defense. This distrust is exacerbated when the attorney and the client are of different races.

According to U.S. Bureau of Justice Statistics, non-Hispanic blacks accounted for 39.4 percent of the total prison and jail population in 2009, while Hispanics (of all races) made up 20.6 percent of the total jail and prison population in 2009. Also, according to the Bureau of Justice Statistics, in 2009, black, non-Hispanic males were incarcerated at a rate more than six times higher than white, non-Hispanic males and 2.6 times higher than Hispanic males. Yet, blacks (including Hispanic blacks) comprised only 12.6 percent of the US population, while Hispanics comprised 16.3 percent of the US population. 2010 census of the U.S. Census Bureau. Finally, in a study conducted by the American Bar Association, it was estimated that African-Americans make up only 4 percent of the legal profession.

Thus, the majority of all criminal defendants are minorities, represented by an attorney of a different race. Because the attorney-client relationship is so important, it is imperative that criminal defense attorneys acknowledge and address the underlying mistrust that arises under these conditions.

I am a criminal defense attorney, practicing in Wyandotte, Johnson, and Lyon counties. Recently, a prospective client asked me whether he might be better served by an attorney of a different race. He explained his belief that he might get a better result if his attorney was of the same race as the judge, prosecutor, and most of the jurors. Thinking of my credentials, trial record, and various accolades accumulated from past clients and colleagues, I was initially offended. I thought that the question was borderline racist and definitely stereotypical. However, I simply advised the client that, if he was uncomfortable with me due to my race or any other factor, he should hire another attorney.

Although he hired me and expressed satisfaction with my representation, I now believe that I failed to address his unspoken concerns. Having never encountered an African-American attorney, he wanted to know whether I could or would represent him as competently as an attorney of another race. He was further concerned that differences in our backgrounds might impede his ability to express his opinions and beliefs. Although I have repeatedly encountered the same unspoken questions and concerns, I no longer take offense. Whether a potential client’s concerns are borne of racism or a basic mistrust of the legal system, I endeavor to foster the trust and confidence which are the basis of a successful attorney-client relationship. In a sincere attempt to understand my clients, I ask them about their childhood, family, and goals; acknowledging their lives aside from their pending cases. While the time I can spend with each client is limited, I attempt to view the world from their perspective.

As a new attorney, I felt that my clients should trust my legal judgment unconditionally. I believed that my status as an attorney was sufficient to warrant trust in my ability to provide a good defense. I now know that it is up to me to inspire the trust and confidence needed to form a successful attorney-client relationship. I accept that zealous advocacy includes creating an atmosphere that encourages a client or potential client to confide in me, providing the information needed to present the best possible defense.

It appears inevitable that the number of minority attorneys will grow to better reflect the population. Thus, assuaging a client’s concerns regarding a minority attorney’s effectiveness may become obsolete. Until that time, under the mantle of zealous advocacy, each attorney bears the responsibility of fostering the best attorney-client relationship possible.

About the Author

Timothy L. Dupree is a native of Kansas City, Kan. He attended Kansas City Kansas Community College, where he received his associate degree in 1999, and in 2001 he graduated from the University of Kansas, where he earned his bachelor’s degree in psychology with a minor in women’s studies. He furthered his education at Washburn University School of Law, earning his juris doctorate with a certificate in family law in 2003.

While at Washburn University, Dupree served as president of the Black Law Student Association and as a student ambassador for the Department of Law School Admissions. He was admitted to the Kansas Bar in 2004.

He decided to pursue his dream by founding the Law Office of Timothy L. Dupree P.A. in 2008.
No Place Like Home? Why Kansas is More Than You Think It Is

By Anna Smith, University of Kansas School of Law

Every spring, KU’s opposing fans at the NCAA basketball tournament think it is terribly clever to hold up a sign saying, “You’re not in Kansas anymore.” It is then that I’m reminded of how little the rest of the country knows, or cares to know, about Kansas.

Typically, the only things people associate with the state are the Wizard of Oz, tornadoes, and farming. This ignorance is mildly annoying for any Kansan vacationing on the East or West coasts, but it becomes particularly obnoxious if you actually move away from Kansas long term. All I heard when I went to Tulane was “So, you’re a farmer?” or “What is there to do in Kansas, anyway?” It got even worse when I moved to North Carolina, but New Yorkers really took the taco in terms of arrogant comments about my home state. When I told them I was moving back home to Kansas, they couldn’t figure out why anyone would want to live anywhere other than New York.

Don’t get me wrong, I think most Kansas jokes are hilarious. The flat jokes, for instance, are pretty good. For example, Kansas is so flat that:

- When your dog runs away from home, you can watch him for three days;
- The church choir sings off key;
- It is against state law to sell carbonated beverages;
- You can steal a chicken on Thursday and get shot on Saturday;
- If you stare long enough at the horizon, you can see the back of your head;
- The natives get nosebleeds going over overpasses;
- Prairie dog mounds are protected as state landmarks;
- Topographical maps double as pool tables;
- Water runs uphill;
- The state animal is road kill; and
- Flat jokes are not appreciated.

And technically, some of these jokes are based in truth. A 2003 study compared the topography of Kansas to an IHOP flapjack and found that the state of Kansas is actually “flatter than a pancake,” noting “that degree of flatness might be described, mathematically, as ‘damn flat.’” The problem is that most of the jokes are much more negative. They tend to imply that Kansas is boring and desolate. Once you start looking, you’ll find these Kansas references everywhere in pop culture. The Wall Street Journal once printed an article titled, “It isn’t too late to change your vacation plans and come to Kansas. [Laughter].” In the James Bond movie “Diamonds Are Forever,” the villains want to test a new weapon in a remote area, suggesting that “if we zap Kansas, the world wouldn’t learn about it for a year.” In the ’80s sitcom, “Night Court,” a newlywed couple ponders where to go on their honeymoon; the woman asks, “What about Kansas?” and one character sarcastically responds, “They’re overbooked now, it’s the high season.”

For many people, Kansas is just one of those square farming states in “flyover country.” In a 1995 survey of the most desirable vacation destination states, Americans ranked it dead last. When Andy Rooney polled his readers to see which state should be sold off to pay the national debt, Kansas ranked as the ninth most expendable state because, according to respondents, “There’s nothing there.”

But then, we’ve never been particularly popular historically. A lot of it has to do with Kansas being a harsh and dangerous place to settle, thanks in part to the settlers’ political fervency and radicalism in the battle over statehood during the Bleeding Kansas days. But mostly, it’s that we took the lead in the Prohibition movement. People don’t like it when you take away their alcohol. Add to that L. Frank Baum’s hugely popular Oz books and the iconic movie based on them, and you’ve got an image of the state as pious and backwards, gray and dull, and constantly besieged by tornadoes. Our penchant for “world’s largest” attractions — like the world’s largest ball
of twine, the world’s largest hairball, and the world’s largest concrete prairie dog — doesn’t help much either.

However, there is also a more positive image. The rest of the country likes to think of Kansas as “the heartland.” The state’s centrality (Kansas is the geographic center of the 48 contiguous states) lends itself to this perception, as Charles Sumner observed in his 1856 “Crime Against Kansas” speech: “To such advantages of situation, on the very highway between two oceans, are added a soil of unsurpassed richness, and a fascinating undulating beauty of surface, with a health-giving climate, calculated to nurture a powerful and generous people, worthy to be a central pivot of American Institutions.”

The “heartland” term became especially popular during the Progressive era, when Kansans led the nation in moral political issues. Because of this traditional morality, Kansas is often viewed as the perfect place to raise a family and to live out the traditional, ideal American lifestyle. Superman himself, the champion of “truth, justice, and the American way” was raised on a farm in “Smallville,” Kansas.

I, personally, am fiercely proud of being from Kansas — so much so that I wrote an enormous, 90-page thesis in college to figure out where everyone else’s negative image of it came from. I always defend my home state and remind people that Kansas pretty much has everything every other state has (OK, except beaches). Plus, we’ve got the best barbecue, the best basketball, and the best sunsets I’ve ever seen. The people are nice, the schools are great, and the neighborhoods are clean and safe. And, yes, there is not much besides farmland in western Kansas, but those farmers help feed the entire nation.

If all else fails, I always like to remind New Yorkers of how little I pay in rent and watch their jaws drop.

### About the Author

*Anna Smith* is a second-year law student at the University of Kansas School of Law and is originally from Overland Park. She is a lawyering teaching assistant and a staff member of the Kansas Law Review. While at Tulane University, she wrote her senior thesis on tracing the popular cultural image of Kansas through literature. After receiving a Bachelor of Arts in English in 2005, she worked in book publishing in Durham, N.C., and New York City before moving back home to Kansas.

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**KWAA’s Annual Conference will be Hot, Hot, Hot!**

By Nancy Ogle, Ogle Law Office LLC, Wichita, nancy@ogle-law.com

Each year the Kansas Women Attorneys Association (KWAA) offers at least 12 hours of informative, motivating, and entertaining CLE at its annual conference at Bethany College in Lindsborg. KWAA’s 22nd “Lindsborg Conference” will be held July 14-16. This year’s theme, “Hot, Hot, Hot!” was inspired by the weather during last year’s conference. “Hot, Hot, Hot!” is truth in advertising and more inviting than “Eek, Mosquitos!”

One highlight of every conference is the keynote address. The keynote speaker will be Mary Snapp, an attorney in Microsoft’s Law and Corporate Affairs Department. Snapp is corporate vice president and deputy general counsel of the Products and Services Division. Snapp was one of the first attorneys hired by Microsoft when she joined the company in 1988. She is currently the chair of the Minority Corporate Counsel Association board of directors and often speaks on issues of diversity. Best of all, Snapp is from Newton and can combine her speaking engagement at the conference with a trip to see her family. Snapp’s keynote address is Thursday, July 14 and is open to the public at no charge.

The Appellate Court All-Star Review is a staple at the KWAA conference. Justice Marla Luckert, Justice Carol Beier, and Judge Karen Arnold-Burger will discuss notable appellate decisions from the past year. This two-hour CLE will include the bonus topic of what turns law clerks on and off presented by research attorneys for appellate judges. CLE subjects range from social media’s ethical issues, criminal law, family law, and bankruptcy to pet law, elder abuse, and issues related to serving on nonprofit boards.

Although the CLE programs are important, conference attendees can look forward to a few “off-topic” distractions. At lunch on Friday, July 15, Beth Tully, of Coco Dolce in Wichita, will speak on the entrepreneur’s dream. Tully gave up more traditional career to follow her dream of making fine chocolates. The conference planning committees hope Tully will demonstrate her success by providing samples. On Friday evening, a luau-themed dinner will be held at the McPherson Country Club.

KWAA’s conference has a casual atmosphere and plenty of opportunities for browsing and buying in Lindsborg’s unique galleries and shops. The chance to network with attorneys from across Kansas makes attending the Lindsborg Conference worth attending. The 12 hours of CLE is the icing on the cake.

Despite “women” being in KWAA’s name, the organization and the annual conference are open to men. Anyone interested in attending the conference will be able to access the full schedule and registration form online at www.kswaa.com once they are finalized. The attendees will have a hot time at KWAA’s “Hot, Hot, Hot!” conference!
Luring Lawyers and Pro Se Litigants to Online Services

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ks/lpm@larryzimmerman.com

Online Lawyering

An exciting attribute of Internet culture is the do-it-yourself mindset it encourages. Lawrence Lessig, professor at Harvard Law School, writes in “Remix: Making Art and Commerce Thrive in the Hybrid Economy,” “Using the tools of digital technology — even the simplest tools, bundled into the most innovative modern operating systems — anyone can begin to ‘write’ using images, or music, or video. And using the facilities of a free digital network, anyone can share that writing with anyone else.” Exciting as it is, that do-it-yourself culture threatens traditional media outlets as publishers, record labels, and movie houses battle amateurs for content and mindshare. Lawyers are in the same boat.

More pro se litigants than ever arrive at the courts armed with Internet “expertise.” An Illinois Legal Aid survey showed 35 percent of pro se litigants forego legal counsel believing they could handle a legal matter themselves. Many are successful but these litigants uniquely burden the courts and counsel prompting a variety of experiments in pro se case management. Many believe if we simply provide enough coaching, the pro se will glide through the system. When they get cross-wise, some district courts quietly narrow Mangiaracina v. Gutierrez with a wink and a nod to move a pro se log jam forward. Not all pro se litigants want to go it alone, however. The Illinois Legal Aid survey also indicates 25 percent of pro se litigants go it alone fearing a lawyer will be too expensive.

Luring the Potential Pro Se

Many lawyers and firms are targeting both pro se groups with interesting online approaches. The ABA’s James I. Keane Award, recognizing “law offices or legal organizations that have developed legal service innovations delivered over the Internet,” provides several case studies in lawyers’ successful attempts to adapt law practices to tempt potential pro se litigants. One award recipient was the firm behind illinoisdivorce.com — a rather radical approach at its inception. Potential clients landing on the home page are presented with two options: a quick online divorce where the attorneys prepare and file the papers and appear in court for a stunning $500; or a divorce coach option at $185 where the attorney prepares the papers then the litigant files and appears in court pro se. The firm first feared the website would erode their client base but discovered it generated more revenue than any other marketing approach combined.

The illinoisdivorce.com site carefully addresses the findings of the Illinois Legal Aid survey of pro se litigants. By providing prices up front and giving an option where a hands-on client could do more for themselves, the law firm taps some of that amateur spirit of the Internet. Another Keane Award recipient, Stephanie L. Kimbro, of kimbrolaw.com, follows the same example. Her website advises potential clients of various “packages” designed to accomplish legal tasks and clearly states the price for each. Clients can shop for services, hire her with a click of a button, and create an online for sharing documents and data necessary for representation. Her approach is especially appealing to younger clients used to accessing virtually everything online.

Kimbro is also author of the ABA publication, “Virtual Law Practice: How to Deliver Legal Services Online.” In addition to being a guide to testing the online waters, Kimbro’s book provides case studies from other lawyers who are exploring ways to lure Internet-savvy clients, including J. Tom Morgan and John Tarley. Morgan maintains a Facebook page answering teens’ legal questions related to his book, “Ignorance Is No Defense: A Teenager’s Guide to Georgia Law.” Tarley uses Twitter to pass on legal advice related to real property law and home owner associations. Both seem specifically aiming toward introducing legal services to younger audiences.

What the Future Holds …

Many lawyers enter online services in baby steps. One lawyer simply puts his public calendar online and allows clients to schedule their own appointments. Another scans his entire file to online storage where his clients can access it anytime. One of the largest California law firms has used Facebook messaging to close a multimillion dollar acquisition and is expecting to soon close another using Twitter. Whatever the tool, the goal of lawyers should be to persuade clients we are as useful and as affordable tools to their legal aims as YouTube is to their dreams of fame.

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.

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“I participated in the KBA Lawyer Referral Service for much of the nearly 20 years that I practiced in Dodge City. During the time I was involved with the LRS, I also advertised intensively in the local telephone directory. Although paid advertising and LRS referrals both generated a substantial volume of inquiries from potential new clients, I found that LRS-generated clients tended to bring more ‘solid’ legal matters and were more reliable than those who initially responded to phone book advertising.”

“The effectiveness in my experience of LRS referrals is demonstrated by my having sent a check to LRS for its 10 percent referral fee of nearly $54,000.”

- Henry Goertz, Goertz Law Office, Dodge City

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CHANGING POSITIONS

Alan C. Anderson has joined Polsinelli Shughart P.C., Overland Park, as a shareholder. Holly A. Streeter-Schafer has joined the firm’s Kansas City, Mo., office as counsel.

Brian R. Barjenbruch has joined Castle Law Office of Kansas City P.C., Kansas City, Mo.

Paula L. Brown has joined Walters Bender Strohbehn & Vaughan P.C., Kansas City, Mo.

Anthony J. Candelario has joined Douthit Frets Rouse Gentile & Rhodes LLC, Kansas City, Mo., as an associate.

Julie A. Carroll has joined the Office of Dennis J. Keenan, Attorney at Law P.A., Great Bend.

Chad E. Chase has been promoted to vice president of the Trust Company of Manhattan.

Bret T. Christiansen has joined Wise & Reber L.C., McPherson, as an associate attorney.

John A. Christensen has joined Blue Creek Investment Partners, Leawood.

Erin E. Clark has joined Cordell & Cordell P.C., Fort Worth, Texas.

Paul M. Croker has been elected as shareholder and director of Wallace, Sanders, Austin, Brown & Enochs Chtd., Overland Park.

Mark D. Dodd has been named executive director of the Kansas State Gaming Agency, Topeka.

Nathan R. Elliott has joined Withers, Gough, Pike, Pfaff & Peterson LLC, Wichita.

Denise F. Fields has joined Fisher & Phillips, LLP, Kansas City, Mo.

Ashley N. Gillard and Christopher C. Grenz have joined Bryan Cave LLP, Kansas City, Mo.

Karen M. Gleason has been named a shareholder at the Halbrook Law Firm, Kansas City, Mo.

Jesse T. Landes has joined the Reno County Public Defender’s Office, Hutchinson.

Nancy M. Leonard has been promoted to equity partner at Constangy Brooks & Smith LLP, Kansas City, Mo.

Scott A. Long has joined Armstrong Teasdale LLP, Kansas City, Mo., as a partner.

Scott K. Martinussen has joined Kirkland, Woods & Martinussen P.C., Overland Park, as a shareholder.

Mark D. Molner has joined Price Law Group, Westwood.

Erik H. Nelson has joined Sanders Warren & Russell LLP, Kansas City, Mo., as an associate.

Nicole Reeves Piskuric has joined Gates Shields & Ferguson PA, Overland Park.

Margaret H. Richards has joined Lathrop & Gage LLP, Kansas City, Mo.

Jason R. Scheiderer has been promoted as partner at SNR Denton US LLP, Kansas City, Mo.

Laura E. Seaton has joined Simmons Perrine Moyer Bergman PLC, Cedar Rapids, Iowa.

Gavin L. Smith has joined the Federal Reserve Bank of Kansas City, Kansas City, Mo., as a staff attorney.

Jonathan M. Snyder has joined Henson, Hutton, Mudrick & Grason LLP, Topeka, as an associate.

Mandi J. Stephenson has joined Williams & Williams P.A., Kingman.

Linda H. Tabory has been named as a principal of the Hardwick Law Firm LLC, Kansas City, Mo.

Deannell R. Tacha has been named dean of the Pepperdine University School of Law, Malibu, Calif.

Zach V. Thomas has joined Franke, Schultz & Mullen P.C., Kansas City, Mo.

Gerald F. Tremblay has joined Goza & Honnold LLC, Leawood.

Grace R. Willnerd has joined the Nebraska Secretary of State John Gale’s office in Lincoln as assistant general counsel.

David R. Wolfe has joined Advisors Excel LLC, Topeka.

Laura L. Wood has joined Russell & Barron Inc., Washington, D.C.

Paul D. Cramm Chtd. has moved to 7450 W. 130th St., Ste. 305, Overland Park, KS 66213.

Cary W. Eldridge II has started his own practice, Eldridge Law Office LLC, 753 State Ave., Kansas City, KS 66101.

Heater S. Esau Zerg has been elected as shareholder, Zerger & Mauer LLP, 110 Main St., Ste. 2100, Kansas City, MO 64105.

Karen M. Gleason, Attorney at Law, has moved to 3500 W. 75th St., Ste. 300, Prairie Village, KS 66224.

Gleason & Doty Chtd. has moved to 401 S. Main, Ste. 10, Ottawa, KS 66067.

Graybill & Hazlewood LLC has moved to 218 N. Mosley St., Wichita, KS 67202.

Larry C. Hoffman, Attorney at Law Chtd. has moved to 11225 College Blvd., Ste. 110, Overland Park, KS 66210.

The Jones Law Firm P.A. has moved to 7015 College Blvd., Overland Park, KS 66211.

CHANGING LOCATIONS

Clyde & Wood LLC has moved to Compass Corporate Centre, 11225 College Blvd., Ste. 110, Overland Park, KS 66210.
Obituaries

Michael F. Brunton

Michael F. Brunton, of Topeka, died March 24. He was 62. He was born September 15, 1948, the son of Charles Ray Brunton and Margaret Jane Brunton Smith.

He enlisted in the Army in 1969 and was stationed in Okinawa, Japan, during the Vietnam War before being honorably discharged in 1972. After finishing his military service, he earned a bachelor’s degree in philosophy from Washburn University and a law degree from Washburn University School of Law.

Brunton began his career as an attorney in criminal law and later shifted his focus to bankruptcy law, a practice in which he thrived.

He is survived by his wife, Janet Brunton, of the home; a son, Bryan Brunton, of Colorado Springs, Colo.; four daughters, Kara Stranz, of Olathe, Erin Bess Pennington, of Topeka; Terra Brunton, of Lawrence, and Marlee Brunton, of Montpelier, Va.; a sister, Dr. Jolee Brunton, of San Diego; and 10 grandchildren. He was preceded in death by his parents and his stepfather, Dr. Lawrence Smith.

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 and Slaytn L.J. Davis, both of Emporia; stepchildren, Jessica Alexander, S’Kylan Russell, and Desstani Russell, all of Emporia; a brother, Brad Davis, of Emporia; a sister, Brenda Gehring, of Olpe; five grandchildren; and three stepgrandchildren.

Gary L. Pauley

Gary L. Pauley, of Normal, Ill., died April 8 at Headland Healthcare Services. He was 75. He was born November 5, 1935, in Hays, the son of Kenneth N. and Ruth L. Leighty Pauley.

He was a U.S. Army veteran. Pauley graduated from Fort Hays State University in 1957 with his bachelor’s degree and then from Washburn University School of Law in 1961 with his juris doctorate. In 1961, he joined State Farm Insurance Cos. as a field claims representative in Topeka and then he moved to Bloomington in 1964 to join the State Farm corporate law department. He retired in 1994 as associate general counsel.

Survivors include his wife, Joy “Jody” Miller Sutter, of Normal; three sons, Dr. Michael Pauley, of Bloomington, Ill., Kevin Pauley, of Mahomet, Ill., and Dr. Scott Pauley, of Rochester, Minn.; one stepson, Kenneth Sutter, of Hudson, Ill.; 14 grandchildren; and one greatgrandchild. He was preceded in death by his parents and one sister, Le Vonne Ives.

Members in the News (cont’.)


Michael J. Nichols has started his practice, Michael J. Nichols P.A., Attorney at Law, 831 Armstrong Ave., Kansas City, KS 66103.

Nichols and Wolfe Chtd. has moved to 2715 SW 29th St., Ste. A, Topeka, KS 66614.

Osman & Smay LLP has moved to 8000 Foster, Overland Park, KS 66204.

Jennifer A. Passiglia has started her own practice at 1041½ W. 9th Ste. 528, Topeka, KS 66615.

Nicholas J. Porto has started his own firm, Porto Law Firm LLC, 1600 Baltimore, Ste. 200A, Kansas City, MO 64108.

Alan W. Rosenak has started his own firm, Rosenak Law Firm, Deer Creek Woods, 7381 W. 133 St., Ste. 218, Overland Park, KS 66213.

Timothy A. Short has started his own practice, Short Law Office, 112 W. 4th St., 2nd Fl., Pittsburg, KS 66762.

Snyder Law Firm LLC has moved to 13401 Mission Rd., Ste. 207, Leawood, KS 66209.

Christopher S. Stover has opened his own practice, The Law Office of S. Spence Stover, 102 S. Cherry St., Ste. 5, Olathe, KS 66061.

Vermillion Morrison LLC has moved to 5330 College Blvd., Leawood, KS 66211.

Woodard, Hernandez, Roth & Day LLC has moved to 245 N. Waco, Ste. 260, Wichita, KS 67202.

SNA Miscellaneous

John D. Jurcyk, Kansas City, Kan., has been inducted into the College of Workers Compensation Lawyers in Boston.

Jon M. King, Lawrence, has been elected president of the Douglas County Bar Association. Cheryl L. Trenholm, Lawrence, has become vice president; Jody M. Meyer, Lawrence, has become secretary; Curtis G. Barnhill, Lawrence, has become treasurer; and Sarah E. Warner, Lawrence, has become president of the Young Lawyers Section.

Jonathan P. Small, Topeka, has been elected president of the Jayhawk Area Council of the Boy Scouts of America; Robert S. Maxwell has become treasurer; and H. Philip Elwood has become legal counsel.

Ardith R. Smith-Woertz, Topeka, has been elected president of the Topeka Bar Association; and W. Thomas Stratton Jr., Topeka, has become president-elect.

Susan K. William, Topeka, received the Warren W. Shaw Distinguished Service Award at the Topeka Bar Association Annual Meeting.

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.
Win Some, Lose Some, and Catch Some Fish Along the Way

By Rachel Mackey, Topeka, Kansas Lawyers Assistance Program volunteer

This past weekend, I learned something about myself in terms of “success and failure” and “winning and losing” — I participated in my first bass fishing tournament. On the way to the lake, I realized that I was not too concerned about whether I would win or lose the tournament. My primary goal was simply to not make a complete fool of myself. Well, I caught one decent bass and helped my partner net his winning bass. I did not place first or last, coming in a close second to last. I only lost one lure, and I did not fall out of the boat. A highly successful day.

While the lessons learned on the lake were new to me in the bass fishing arena, they were not new lessons in my life, and certainly not in my law practice. I have learned in my career that when I keep primary focus on “winning and losing,” and that when I use that focus to measure personal “success and failure” my life becomes quite unsatisfactory. When I recognize that winning and losing are natural parts of the business of a law practice, they do not carry those heavily charged personal feelings of success or of failure.

I recently shared some stories with a colleague about difficult times I have faced during my legal career. I graduated from law school with honors and great career outlook. My vision of the future followed what has been described as our “mother’s vision of success,” where every year as time progressed, there would be promotions, more money, more prestige, and so on. Only the best would be ahead of me.

In his book, “Bounce!: Failure, Resiliency, and Confidence to Achieve Your Next Great Success,” Barry J. Moltz describes precisely the secret fear that lay beneath my post-graduation rosy future: “The deepest fear for many businesspeople is not actually failing (probably because it is so hard for us to admit that the possibility to fail exists); rather, it is being less successful than we think we ought to be or that our mothers, or bosses, or society expect us to be.” As was true last weekend with bass fishing, when I began my career, I just did not want to make a fool of myself in the eyes of others.

Since I began my career, I have had some successes. I have also been fired twice, have made employment decisions that looked promising and turned sour, have struggled with learning how to run my own office, and have faced financial challenges. I have had personal difficulties, and there was even one time when you could say that I fell out of the boat and stayed in the water for a couple of years. I have experienced the death of my only child, attended to my parents during their deaths, nine days apart, and most recently, I have experienced diagnosis and treatment of cancer. Am I where I thought I would be 20 years after that graduation with honors? Certainly not. Am I okay with where I am? Some days yes, and some days no. Will I keep getting up and getting in the boat? You bet.

Moltz has offered some excellent words that I apply to some of my experiences. His book outlines some tools for developing business confidence. He does this with full recognition of the fact that “winning and losing/success and failure” in business has a random element to it that is beyond our control. There will always be wins and losses, successes and failures. Recognition of that fact brings with it the humility that keeps our confidence right-sized.

I would like to leave you with a quote from Barry J. Moltz. Whether you are a recent law school graduate or an experienced attorney, I believe the power of these words can keep you moving on in your practice, especially when faced with tough times.

To develop a sense of ease, we must come to the personal realization that we can survive almost any outcome, despite how treacherous it may be. Beyond that, we must learn how to look forward to what will come (genuinely rather than with false bravado) because we have the confidence that we will be okay no matter what.

I plan to keep practicing law, keep fishing, keep winning and losing, and keep succeeding and failing. It is the best life I know.

About the Author

Rachel Mackey is a member of the Kansas Bar Association, who practices probate and estate planning law from her home north of Topeka. She is a 1991 graduate of Washburn University School of Law, a KALAP volunteer, and a novice bass fisherwoman.

Footnote

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Protecting Personal Information from Identity Theft: An Integrated Approach

By Johnathan Rhodes
I. Introduction

The most stolen Social Security number in United States history is 078-05-1120. In 1938, two years after Social Security numbers were first issued, a wallet manufacturer promoted its product by demonstrating how a Social Security card could easily fit inside its wallets. One executive decided to use the actual card of his secretary, Hilda Schrader Whitcher, as the sample card. Wallets with Whitcher’s reproduced card were sold across the country and many purchasers adopted her Social Security number as their own. In 1943, 5,755 people were using this number. Although the Social Security Administration later voided Whitcher’s number, people continued to use it. More than 40,000 people have reported this as their number over the years. As late as 1977, 12 people were found to still be using this number. It is unlikely that the federal government fully comprehended the ramifications of identity theft when it first issued Social Security cards in 1936. A search for “identity theft stories” on the Internet will produce numerous stories in which identity thieves have ruined victims’ credit. Identity theft has exploded in recent years and, because we all have identities, we are all potential victims. Although the state and federal governments have enacted various safeguards against identity theft, some believe that it is not a top priority. Inspector General Glenn Fine, of the U.S. Department of Justice, stated that the effort to combat this problem has lagged in recent years. He further noted, “We found that to some degree identity theft initiatives have faded as priorities.” At a minimum, all of us are consumers who should be concerned with what lawmakers, government agencies, and businesses are doing with our personal information. This article will analyze what state and federal lawmakers have done to curb this pervasive crime and what businesses are obligated to do to protect our identity.

II. The Magnitude of the Problem

Identity theft is one of the fastest growing crimes in the nation. In 2008 alone, more than 10 million Americans became victims of identity theft. In 2006, victims spent an average of 40 hours resolving identity theft cases, which was a 17 percent increase over the previous two years. According to a Federal Trade Commission (FTC) survey, 10 percent of victims spent more than 100 hours resolving problems associated with identity theft, and 5 percent spent more than 1,200 hours. In total, more than 40 million hours are lost each year resolving identity theft issues. The monetary loss is equally startling. In 2006, the average monetary loss of an identity theft case was $6,383 and the total cost of identity theft in the United States was $56.6 billion.

Most identity theft does not occur on the Internet. Ninety percent occurs through lost or stolen wallets, checkbooks, or credit cards. But, as discussed below, shrewd identity thieves have found other avenues to commit this crime.

A. Unsecured wireless networks

Some identity thieves drive through residential neighborhoods looking for unsecured wireless networks, or they stay home and simply log into their neighbors’ unsecured wireless networks. These “hackers” can steal bank and credit card information located on the victim’s computer. They can also download illicit material and make fraudulent purchases, making it appear as if the victim had committed these acts. One San Diego detective reported that drug addicts will connect to unsecured wireless networks and steal identities, order credit cards, or open bank accounts. This is particularly dangerous because it appears as if the owner of the network is the one committing these acts. The detective noted that drug users will typically barter stolen identifications for drugs.

B. Copy machines

Digital copy machines are ripe for identity theft because they can contain enormous amounts of confidential information. Almost 60 percent of the American public is unaware that, just like computers, many copy machines contain hard drives that store every document that has been scanned, printed, faxed, or emailed. If you have made a copy in the last ten years, there is a good chance that an image of that copy is sitting on a hard drive somewhere. Nearly every digital copy machine built since 2002 contains a hard drive storing this information.

Copy machines can contain 15,000 to 20,000 documents, which will stay on the hard drive until someone removes them or new documents replace the old ones. After
digital copiers are disposed of, many of them go to wholesale warehouses and are placed on the used copier market. There they sit, containing thousands of confidential documents, to be sold. One expert noted, “It basically becomes an identity thief's dream.” Anyone can purchase a used copy machine and connect a computer to the machine, allowing the purchaser to download and print any document on the hard drive. One company in California purchased a used copy machine and found numerous confidential documents, including a document containing Caroline Kennedy’s private information. This copy machine also contained emails, account summaries, budgets, non-disclosure agreements, and other highly confidential documents. Regarding the potential security exposure of these copy machines, one person noted, “[It’s an] issue that’s going to have major ramifications. It’s going to hit like a ton of bricks when it does hit.” Think about the copy machines at law firms that contain vast amounts of privileged material or those at other businesses that contain trade secrets. This information is being spread across the globe. Approximately 70 percent of used copy machines ultimately land overseas, mostly in China and Europe.

Health care providers should be particularly wary of the information stored on their copy machines. Two components of the Health Insurance Portability and Accountability Act (HIPAA) are the Privacy Rule and the Security Rule. Unless otherwise permitted, HIPAA’s Privacy Rule prohibits entities covered by HIPAA, including health care providers, from using or disclosing protected health information without an individual’s authorization. HIPAA’s Security Rule requires entities that electronically transmit protected health information or maintain that information in electronic media to maintain reasonable and appropriate administrative, physical, and technical safeguards to keep the information secure. Specifically, covered entities must protect against reasonably anticipated threats or hazards to the security of this information. Providers and entities subject to HIPAA must think about the information that is being stored on their copy machines and secure it accordingly.

In Kansas, not only is it a good idea to take appropriate steps before disposing of digital copiers, it is also the law. Before disposing of customer records within their custody or control, individuals and business entities are required by K.S.A. 50-7a03 to take reasonable steps to destroy, shred, or erase those customer records. This requires reasonable measures, such as erasing or encrypting personal information before disposing of digital copiers. The FTC chairman stated, “[B]usinesses and government agencies should ensure that the information on the hard drives in digital copiers are wiped clean of personal information after the conclusion of use.” On April 29, 2010, Rep. Edward J. Markey, of Massachusetts, asked the FTC to investigate the retention of documents on hard drives of digital copy machines. Rep. Markey noted, “I am very concerned that these copy machines can be a treasure trove for identity thieves, allowing criminals to easily access highly sensitive personal information.” In response, the FTC began contacting copy machine manufacturers, resellers, and office supply stores about these privacy concerns. In a letter to Rep. Markey, FTC Chairman Jon Leibowitz wrote that the FTC was trying to “determine whether [copy machine manufacturers and resellers] are warning their customers about these risks ... and whether [they] are providing options for secure copying.”

In November 2010, the FTC published Copier Data Security: A Guide for Business, which provides steps businesses can and should take before acquiring a digital copier, while using it, and before disposing of it. While using the copier, the FTC recommends taking such measures as securely overwriting the hard drive at least once per month and integrating the copier with your secure network. Before disposing of the copier, businesses should check with the manufacturer, dealer, or servicing company for options to secure the hard drive.

C. Medical identity theft

Imagine getting a $12,000 bill for a liposuction that you never had, or reviewing your credit report to discover that you owe more than $100,000 in unpaid medical bills for treatment you never received. Rhonda Strawmyre, of Bensalem, Pennsylvania, was recently surprised to discover that another female used Rhonda’s dental insurance and identity to procure oral surgery. Medical identity theft has been labeled, “the nation’s fastest growing crime.” In 2009, there were more than 275,000 reported cases of medical identity theft in the United States, which doubled over the previous year. Medical identity theft is the “inappropriate or unauthorized misrepresentation of individually identifiable health infor-

13. Id.
14. Id.
15. Id.
16. Id.
17. Id.
19. Id.
20. 45 C.F.R. § 164.508(a)(1).
21. Id. §§ 160.103, 164.306.
22. Id. § 164.306(a)(2)-(3).
23. K.S.A. 2010 Supp. 50-7a03.
25. Id.
26. Grant Gross, Computerworld, FTC Targets Privacy Concerns Relat-
27. Id.
29. PogoWasRight.org, Mistress Allegedly Uses Wife’s ID to Get Teeth Fixed, Aug. 1, 2009, http://www.pogowasright.org/?tag-marie-swidra. Rhonda was even more surprised when she discovered that the identity thief was her husband’s mistress. Id.
Medical identity theft could have life threatening consequences because it can lead to the alteration of the victim’s medical charts. One expert noted,

“We’ve had people who, all of a sudden, their health care record has different blood types, ... they have health care records with different genders and ages. Different medications. There are people we’ve talked with who, their imposter went in and had a hospital stay and put down that they were allergic to one drug, and then the real person is not allergic to that drug, but they’re allergic to other drugs.”

The problem is that the false medical information lives forever, or at least until the real patient discovers and corrects it. After the health insurance information is stolen, a false insurance claim is filed, and a false medical record is created. “This false information then impacts future decisions made regarding the real patient’s medical care.”

The Department of Justice estimated that someone’s health insurance information is worth between $25 and $50 on the street. This amount quickly adds up when hundreds or thousands of identities can be stolen within seconds. Therefore, identity thieves aggressively pursue this information and often work with employees of the health care facilities to obtain it.

Increasingly, medical identity thieves are regular employees of the health care facility who have access to this information. Stephen Niemczak, a special agent with the U.S. Department of Health and Human Services Office of the Inspector General stated, “It is a large problem that affects most corners of our country. Multiple states are involved and these little groups work with one another across state lines.”

[Knowingly and with intent to defraud for economic benefit, obtaining, possessing, transferring, using, or attempting to obtain, possess, transfer, or use, one or more identification documents or personal identification number of another person other than that issued lawfully for the use of the possessor.]

Classifying the crime as merely a misdemeanor was likely the result of failing to foresee the devastating consequences of identity theft.

The Legislature has amended K.S.A. 21-4018 four times since it was originally enacted in 1998. In 2000, it reclassified “identity theft” as a level 7 felony. In 2005, it eliminated the requirement that the defendant intend to obtain an “economic benefit.” After this amendment, a defendant could be convicted of identity theft if the defendant intended to defraud “for any benefit.” In 2005, the Legislature also criminalized “identity fraud,” a level 8 felony. “Identity fraud” is defined as:

(1) Using or supplying information the person knows to be false in order to obtain a document containing any personal identifying information; or

Health care costs on the rise, this crime is likely to become even more pervasive. It is easier to pay $50 for someone’s health information than to pay thousands of dollars for necessary or elective treatment.

III. Kansas Identity Theft Law

On December 10, 2009, then-Kansas Attorney General Steve Six announced that 15 people had been charged with various identity theft-related crimes. He noted that there is a rise in “fraudulent driver’s license application[s] wherein the applicant presents genuine birth certificates and other identification documents that were actually issued to someone else.” He continued, “It is becoming more common for impostors to be arrested and convicted for unrelated crimes using the victim’s name. It is possible for an innocent person to end up with a criminal record as a result of the impostor’s illegal behavior.”

Federal and state governments have taken measures to curtail the rise of identity theft. In Kansas, identity theft is a level 8 felony unless the loss to the victim is more than $100,000, in which case it becomes a level 5 felony.

The Kansas Legislature enacted identity theft in 1998 by enacting K.S.A. 21-4018, many expressed concern that it was not illegal. In his testimony before the Legislature, Kyle Smith, assistant attorney general for the Kansas Bureau of Investigation (KBI), stated that the surreptitious acquisition of information done with the intent to defraud was not illegal and urged the statute’s enactment.

Dave Schroeder, also from the KBI, stated that individuals who are armed with a stolen identity can commit numerous forms of fraud. He was particularly concerned with the theft of personal information such as social security numbers, birth certificates, passports, driver’s licenses, dates of birth, and other similar information.

The Kansas Legislature reacted by making identity theft a class A person misdemeanor, and defined it as:

32. Reba L. Kieke, Although a Relatively New Risk Area, Medical Identity Theft Should Not Be Taken Lightly, 11 No. 1 J. HEALTH CARE COMPLIAN-CENCE 51 (Feb. 2009).
34. Kieke, supra note 32, at 53.
35. Id.
36. Id. at 52.
37. Id.
38. Moore, supra note 33.
39. Id.
41. Id.
42. Id.
43. K.S.A. 2010 Supp. 21-4018(c).
44. Statement of Kyle Smith, assistant attorney general for the KBI, Minutes of the House Committee on Federal and State Affairs, Feb. 12, 1998.
46. Id.
(2) altering, amending, counterfeiting, making, manufacturing, or otherwise replicating any document containing personal identifying information with the intent to deceive. 49

These amendments demonstrate the growing concern over identity theft as the crime has become more pervasive.

Over the years, Kansas courts have addressed and interpreted the identity theft statute several times. In City of Liberal v. Vargas, the Kansas Court of Appeals held that the defendant did not commit identity theft under K.S.A. 21-4018. 50 The defendant was in the United States illegally and acquired documents under a false name to obtain employment. 51 The court found that this was not identity theft because the statute was intended to protect real—not fictional—people. 52 The court also concluded that the defendant did not have the “intent to defraud” because he only intended to use the identity to gain employment, not to commit fraud. 53 Further, his actions were not “identity theft” because he received no “economic benefit”—he was compensated for the time he worked. 54 Several years later, however, the court noted that the real holding in Vargas was that the stolen identity must belong to a real person. 55 The other findings were merely dicta. Although he was not convicted of identity theft, the defendant would likely be charged with identity fraud under today’s statute.

In State v. Oswald, the Kansas Court of Appeals upheld the defendant’s conviction for violating the identity theft statute. 56 The victim gave her Social Security and credit card numbers to the defendant to pay the defendant’s cellular phone bill. 57 The defendant, however, opened a new cellular phone account in the victim’s name and purchased two new phones, for which the state charged her with identity theft. 58 The defendant argued that K.S.A. 21-4018 did not apply because the victim voluntarily provided her credit and Social Security card numbers. 59 The court rejected this argument because “[the victim] did not authorize the use of that information beyond [its] limited purpose.” 60 The defendant also argued that she did not have the intent to defraud the defendant for her “economic benefit” because the victim suffered no economic loss. 61 The court held that K.S.A. 21-4018 does not require proof of economic loss to the victim. It is sufficient that the evidence show the defendant’s intent to defraud the victim for her benefit. 62

In State v. Meza, the defendant was in the United States illegally and purchased a Social Security card and a Kansas identification card in someone else’s name, which she used to obtain employment. 63 After the victim discovered the theft, the defendant was arrested and charged with identity theft. 64 Deviating from its language in Vargas, the court of appeals held that K.S.A. 21-4018 is satisfied if the defendant, “for her own economic benefit, used [the victim’s] social security number knowingly and with the intent to defraud [her employer] by inducing it to create for her a right with respect to property.” 65 Upholding her conviction, the court reasoned that the defendant intended to defraud her employer by receiving benefits such as wages, employee benefits, rights under federal and state employment laws, workers compensation, and unemployment benefits. 66 The court distinguished Meza with Vargas by noting that Vargas involved the identity of a fictitious person and the court’s language on whether the defendant obtained an economic benefit was merely dicta. 67

A new issue arose in State v. Hardesty, in which the court of appeals held that stealing the identity of a dead person was identity theft. 68 The court indicated that neither Vargas nor Meza controlled that issue because the term “real person” in those cases was used as a distinction from a “fictitious person”

49. K.S.A. 2010 Supp. 21-4018(b).
51. Id. at 867.
52. Id. at 869-70.
53. Id. at 870.
54. Id.
57. Id. at 145.
58. Id.
59. Id. at 147.
60. Id. at 148.
61. Id. Although the term “economic” had been removed from the statute before this opinion was written, the defendant had committed the crime before the amendment. See id. at 149-50.
62. Id. at 149.
64. Id. at 247. The victim discovered the theft when she received a letter from the Internal Revenue Service indicating that she owed over $3,000 in unpaid taxes. Id.
65. Id. at 248.
66. Id. at 249.
67. Id.
and was not intended to distinguish between living or deceased persons. The court found that the legislature intended to include the theft of a deceased person’s identity within the scope of K.S.A. 21-4018 and thus held that a deceased person was a “person” for purposes of this statute.

Several hard and fast rules may be gleaned from this line of identity theft case law. First, fabricating the identity of a fictitious person is not identity theft, but stealing the identity of a deceased person is identity theft. Second, the statute can be violated even if the victim suffers no economic loss. Third, to uphold a conviction, it is sufficient that the defendant intended to defraud the victim for the defendant’s benefit.

Obtaining, possessing, transferring, using, selling, or purchasing any personal identifying information or document containing the same, belonging to, or issued to another person, with the intent to defraud that person, or anyone else, in order to receive any benefit.

Notably, this most recent amendment removed the term “knowingly” from the statute. But this change is likely immaterial because the statute still requires the specific “intent to defraud.” The amended statute also broadens the type of information that is subject to identity theft. Before, the statute prohibited obtaining, possessing, transferring, or using, one or more “identification documents” or “personal identification numbers.” Now, the statute prohibits obtaining, possessing, transferring, using, selling, or purchasing “personal identifying information.” The amended statute contains a non-exhaustive list of information that constitutes “personal identifying information,” such as, name, date of birth, address, telephone number, place of employment, and electronic signatures. Finally, it is now expressly not a “defense that the person did not know that such personal identifying information belongs to another person, or that the person to whom such personal identifying information belongs or was issued is deceased.” This codifies the Hardesty court’s holding that a deceased person is a “person” for purposes of this criminal statute. It also clarifies that, to violate this statute, the defendant only needs to know that the personal identifying information does not belong to the defendant.

IV. Security Breach Statutes

Security breaches of records containing confidential information are pervasive in today’s high-tech world. From January 2005 through June 2010, there were approximately 354,568,900 records containing personal information involved in security breaches in the United States. Businesses and other entities that hold confidential information constantly confront security

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breach attempts. Additionally, small pieces of hardware, such as laptops and thumb drives, can hold large amounts of confidential personal information, making the information difficult to contain. For example, on May 13, 2010, a single laptop containing names, addresses, and Social Security numbers of more than 207,000 Army reservists was breached from a government contractor in Georgia. On April 21, 2010, Affinity Health Plan notified more than 400,000 current and former customers that they were potentially affected by the disposal of an un-erased digital copy machine hard drive. In 2006, the personal information of 26.5 million veterans was breached when a VA employee’s hard drive was stolen from his home. In 2007, TJX Companies Inc. reported an “unauthorized intrusion” into its computer systems, which included credit card, debit card, and check information affecting more than 46 million people. Security breaches can have devastating consequences as personal information belonging to millions of people can be compromised in a matter of seconds. As a result, federal and state governments have enacted legislation over the years to enhance the security of personal information.

A. Kansas security breach statute

The Kansas Legislature responded to this growing problem by enacting a security breach statute in 2006 as part of the Unfair Trade and Consumer Protection Act. This statute requires businesses and government agencies to notify individuals affected by security breaches of personal information.

Government agencies and Kansas businesses must “conduct in good faith, a reasonable and prompt investigation to determine the likelihood that personal information has been or will be misused” if they become aware of a security breach. If there has been misuse of personal information caused by a security breach, the business or government agency must notify any “affected Kansas resident” once it discovers the security breach of personal information that it owns or licenses. This notice must be made in “the most expedient time possible and without unreasonable delay,” unless otherwise delayed by the legitimate needs of a law enforcement investigation or to determine the scope of the breach and to restore the integrity of the computerized data system. If the individual or entity does not own or license the information, notice must be given to the owner or licensee of the personal information if there is a security breach by an unauthorized person. If a single security breach affects more than 1,000 consumers, the individual or entity maintaining the data must also notify “all consumer reporting agencies that compile and maintain files on consumers on a nationwide basis ... of the timing, distribution, and content of the notices.” The attorney general may bring an action in law or equity in response to violations of this statute. In the case of unauthorized access and acquisition of unencrypted or unredacted computerized data that compromises the security, confidentiality or integrity of personal information ... and that causes, or such individual or entity reasonably believes has caused or will cause, identity theft to any consumer.

Therefore, the notification requirements of this statute do not apply if the data was encrypted or redacted. Further, it does not apply if the individual or entity maintaining the data does not reasonably believe there is a risk of identity theft. Notably, the statute does not require economic loss to the consumer for individuals and entities to be liable for improper notification. It merely requires a reasonable belief that the unauthorized access has or will cause identity theft to any consumer.

The statute also requires individuals and business entities to destroy or arrange for the destruction of a customer’s records within its custody or control if those records contain personal information, such as a name, Social Security number, driver’s license number, financial account number, credit or debit card number, etc. Before the individual or business entity may dispose of the records, the personal information must be erased, shredded, or otherwise modified to make the information unreadable or undecipherable.

B. Federal privacy and security breach laws

In addition to the Kansas laws governing the issue, there are several federal privacy and security laws relating to the safekeeping of consumers’ personal information.

1. The Privacy Act of 1974

The Federal Privacy Act of 1974 regulates federal agencies that “collect, use, or disseminate records containing information about an individual.” “Federal agencies” include executive departments, military departments, government corporations, government-controlled corporations, establishments in the executive branch of the federal government, or any independent regulatory agency. The Act contains a broad definition of “record,” which includes “any item, collection, or grouping of information about an individual that is maintained by any agency ... and that contains his name, or the identifying number, symbol, or other identifying particular assigned to the individual, such as a finger or voice print or a photograph.” A “record” must be retrievable by the individual’s name or a separate individual identifier.

89. Id. 2010 Supp. 50-7a02(h).
90. Id. 2010 Supp. 50-7a01(b).
91. Id. 2010 Supp. 50-7a03.
92. Id.
94. Id. § 552(f).
95. Id. § 552a(a)(4).
The Privacy Act contains a privacy and a security component to protect the personal information held by federal agencies. 97 The privacy component prohibits federal agencies from disclosing a “record” to any person, including other agencies, by “any means of communication,” without the individual’s written consent, unless one of twelve statutory exceptions applies. 98 The security component requires each agency that maintains a system of records to establish appropriate safeguards to “insure the security and confidentiality of records and to protect against any anticipated threats or hazards to their security or integrity which could result in substantial harm, embarrassment, inconvenience, or unfairness to any individual on whom information is maintained.” 99

The Office of Management and Budget added further security requirements for federal agencies in May 2007 when it issued guidance on “Safeguarding Against and Responding to the Breach of Personally Identifiable Information.” 100 This guidance requires all federal agencies to implement a breach notification policy to safeguard personally identifiable information. 101 Along with several new privacy standards, it requires the implementation of five new security standards: (1) encrypt all data on mobile computers/devices carrying agency data; (2) employ two-factor authentication for remote access; (3) use a “time-out” function for remote access and mobile devices; (4) log and verify all computer readable data extracts from databases holding confidential information; and (5) ensure that individuals with authorized access to personally identifiable information annually sign a document describing their responsibilities. 102 Like the Kansas security breach statute, the Privacy Act requires the agency to assess the likely risk of harm caused by the breach and the level of that risk. 103 Additionally, notification may not be required if the data was encrypted. 104

2. The Financial Services Modernization Act of 1999

The Financial Services Modernization Act 105 of 1999 applies to financial institutions that regularly engage in traditional banking, lending, and insurance functions, along with other financial activities. 106 It also applies to mortgage brokers, check cashing businesses, and car dealers that arrange for the financing or leasing of a personal car. 107 The Act requires financial institutions to establish administrative, technical, and physical safeguards

(1) to ensure the security and confidentiality of customer records and information;

(2) to protect against anticipated threats or hazards to the security or integrity of such records; and

(3) to protect against unauthorized access to or use of such records or information which could result in substantial harm or inconvenience to the customer. 108

Three years later, the FTC promulgated regulations to enforce the Act against those institutions under the FTC’s jurisdiction (FTC Safeguards Rule). The FTC Safeguards Rule applies to all businesses that are “significantly engaged” in providing financial products or services. 109 Under this rule, the financial business must “develop, implement, and maintain a comprehensive information security program ... [that] contains administrative, technical, and physical safeguards.” 110 The plan must include a designation of employees to coordinate the security program, identification of risks to security and confidentiality, employee training, detection and prevention, and post-implementation oversight. 111 The FTC believed that the standard would “ensure a comprehensive, coordinated approach to security.” 112

The FTC has brought several actions against businesses for violating the FTC Safeguards Rule. One of its first actions was against Sunbelt Lending Services, Inc. in 2002. In that case, the FTC claimed that the defendant failed to assess risk and implement the required safeguards to protect customer information, failed to implement proper oversight, and failed to provide online consumers with privacy notices. 113 It found that Sunbelt collected personal information from its customers but failed to implement reasonable policies and procedures to protect the security and confidentiality of that information. 114 Sunbelt Lending Services, Inc. in a consent agreement in which Sunbelt was enjoined from violating the FTC Safeguards Rule and required to have a security program that was certified by an expert annually for ten years. 115

Although the FTC Safeguards Rule only applies to “financial institutions,” as the term is broadly defined, the FTC has aggressively threatened enforcement actions against nonfinancial institutions that had their customers’ private information stolen through data compromises. 116 For example, in 2005, the FTC found that BJ’s Wholesale Club violated the Safeguards Rule by (1) storing information longer than thirty days; (2) allowing anonymous employees access to consumer accounts; (3) failing to encrypt data; (4) failing to secure wireless access

97. The Privacy Act also enables individuals to determine what information the agency maintains and to verify the accuracy of that information. 5 U.S.C. § 552a(d). It also allows individuals to challenge the records and request corrections. Id. § 552a(g).
98. 5 U.S.C. § 552a(b). The 12 statutory exceptions are found at 5 U.S.C. § 552a(b)(1)-(12).
99. Id. § 552a(e)(10).
100. Stevens, supra note 96, at CRS-8.
101. Id.
102. Id. at CRS-8 to CRS-9.
103. See id. at CRS-9.
104. Id.
105. The Act is also known as the Gramm-Leach-Bliley Act named after its co-sponsors, Senator Phil Gramm, Representative Jim Leach, and Representative Thomas J. Bliley, Jr.
107. 16 C.F.R § 314.3(k)(2).
109. Stevens, supra note 96, at CRS-16.
110. 16 C.F.R. § 314.3(a).
111. Id. § 314.4.
ports; and (5) failing to detect intrusions or conduct follow-up security investigations. To settle the case, BJ’s agreed to 20 years of FTC supervision and third-party verification of security procedures. Later, the FTC brought a similar action against Petco Animal Supplies, Inc. after an online theft of its stored customer credit card information. Petco’s online privacy policy stated that it encrypted consumers’ personal information. But after the theft occurred, it was discovered that the information was not encrypted in accordance with its policy. The FTC brought an action against Petco, stating that the false promises Petco made to consumers regarding their personal information was in violation of the Safeguards Rule. Petco’s settlement with the FTC required periodic audits for the following 20 years.

**3. HIPAA/HITECH**

The Department of Health and Human Services has issued both security and privacy regulations implementing HIPAA. The security regulations generally require entities covered by HIPAA that electronically transmit individually identifiable health information or maintain such information in electronic media to maintain reasonable and appropriate administrative, physical, and technical safeguards to keep the information secure. The security component establishes four essential compliance requirements: (1) ensure the confidentiality, integrity, and availability of all protected health information that is created, received, maintained, or transmitted by the covered entity; (2) protect against reasonably anticipated threats or hazards to the security or integrity of protected health information; (3) protect against reasonably anticipated unauthorized uses or disclosures; and (4) ensure compliance by the covered entity’s workforce.

The recently enacted Health Information Technology for Economic and Clinical Health Act (HITECH) imposes notification requirements on covered entities in the case of a security breach. It requires a covered entity that “accesses, maintains, retains, modifies, records, stores, destroys, or otherwise holds, uses, or discloses unsecured protected health information” to notify the individuals whose unsecured information has been used or disclosed due to the breach. “Unsecured” protected health information is information that is not encrypted. HITECH also imposes the notification requirements onto business associates of covered entities that have access to protected health information.

The enactment of HITECH arguably demonstrates the increased effort to ensure the protection of information in an increasingly paperless world. Georgina Verdugo, of the Office of Civil Rights Director at the Department of Health and Human Services, said, “The benefits of health IT can only be fully realized if patients and providers are confident that electronic health information is kept private and secure at all times.”

**4. The Red Flags Rule**

The Red Flags Rule was set in motion by § 114 of the Fair and Accurate Credit Transactions Act of 2003 (FACT Act), which requires the FTC to establish guidelines and issue regulations regarding identity theft. The FTC issued the regulations, commonly known as the “Red Flags Rule,” on November 9, 2007. Originally, full compliance with the Red Flags Rule was required by November 1, 2008, but the FTC delayed enforcement numerous times, and it is now effective as of December 31, 2010.

The Red Flags Rule requires “creditors” and “financial institutions” that hold consumer accounts for which there is a reasonably foreseeable risk of identity theft to develop a program to combat identity theft. “Red Flags” are suspicious patterns...
or practices, or specific activities, which indicate the possibility of identity theft. In the final rule, the FTC provided numerous red flags indicating that identity theft may have occurred, including (1) a material change in the use of credit; (2) documents that appear to have been forged or altered; (3) inconsistent personal information; and (4) a material change in telephone call patterns in connection with a cellular phone account.

Originally, the FTC interpreted the term “creditor” to include health care providers and law firms, which many argued was an overreach of its authority for purposes of the Red Flags Rule. Nevertheless, in a letter to a director at the American Medical Association, the FTC emphasized that health care providers were “creditors” for purposes of the Red Flags Rule:

When a physician submits a claim to an insurance carrier first and then bills any remaining unpaid amounts to the patient — whether she does so as a courtesy to the patient or because she is required to do so as a matter of contractual or state law — the physician is deferring the consumer’s payment of his or her share of the claim (i.e., the physician is deferring the patient after having provided the patient with medical services).

The FTC also reasoned that health care providers are open to identity theft because thieves can obtain treatment using a victim’s identity.

Congress passed the Red Flag Program Clarification Act of 2010 on December 9, 2010, in response to concerns regarding the rule’s applicability to health care providers and lawyers, as well as its burden on small businesses. President Barack Obama signed this Act on December 18, 2010. Now, a “creditor” includes any person who

(1) regularly extends, renews, or continues credit; regularly arranges for the extension, renewal, or continuation of credit; or is the assignee of an original creditor who participates in the decision to extend, renew, or continue credit; and

(2) obtains or uses consumer reports directly or indirectly in connection with a credit transaction; furnishes information to consumer reporting agencies in connection with a credit transaction; or advances funds to or on behalf of a person who has an obligation to repay the funds.

Exempted from this definition are those who advance funds for expenses incidental to a service provided by the creditor to that person. This includes any individual or entity that accepts payment after services are provided, which is typical for health care providers and lawyers. Therefore, unless a health care provider or lawyer falls within another “creditor” category, they are exempted from the Red Flags Rule. For example, a health care provider or lawyer who regularly furnishes information to credit reporting agencies or obtains and/or uses consumer reports may still be considered a “creditor” under this rule. The new law also gives the FTC some discretion and authority to designate persons as “creditors” if it determines that the person “offers or maintains accounts that are subject to a reasonably foreseeable risk of identity theft.”

The Red Flags Rule requires creditors and financial institutions that offer or maintain “covered accounts” to develop and implement a written identity theft prevention program. The program must be designed to detect, prevent, and mitigate risks. 16 C.F.R. § 681.1(b)(9).

137. 16 C.F.R. § 681.1(b)(9).
138. 12 Fed. Reg. 63771-72. The FTC identified 26 red flags of which creditors and financial institutions must be aware.
139. 1681m(e) (2010).
144. Id. § 2(a)(4)(B).
145. Id. § 2(a)(4)(C).
146. A “covered account” is (1) an account that a creditor or financial institution maintains, primarily used for personal, family, or household purposes, that is designed to permit multiple transactions, such as a credit card account, mortgage loan, automobile loan, margin account, cell phone account, checking account, savings account, etc.; and (2) any other account maintained by the creditor or financial institution that presents a reasonably foreseeable risk of identity theft, including financial, operational, compliance, reputation, or litigation risks. 16 C.F.R. § 681.1(b)(3).

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gate identity theft in connection with a covered account, and must be appropriate to the size and complexity of the financial institution or creditor. The program must contain four basic elements:

1. It must include reasonable policies and procedures to identify the red flags of identity theft;
2. It must include procedures to detect the red flags that have been identified;
3. It must include procedures indicating the actions that must be taken when red flags are detected so as to prevent and mitigate identity theft; and
4. It must address how the program will be re-evaluated periodically to reflect new risks of identity theft.

The initial written program must be approved by the board of directors or a committee of the board. The “creditor” or “financial institution” must also ensure oversight of the development, implementation, and administration of the program. It must appropriately train its staff to identify red flags and follow proper procedure.

C. The missing private cause of action

Many federal and state security breach and privacy laws lack any type of private cause of action for the individuals harmed. The exception to this is the Privacy Act of 1974, which allows individuals who are adversely affected by a federal agency’s violation of the Act to “bring a civil action against the agency” in a federal district court. In contrast, the Financial Services Modernization Act of 1999 does not create a private cause of action, nor is one implied. Similarly, although HIPAA governs the security and privacy of protected health information, it provides no private cause of action for any person whose personal information has been breached. HITECH also does not contain a private cause of action. But an individual harmed by a covered entity’s violation of HITECH’s provisions may receive a percentage of any civil monetary penalty or monetary settlement collected with respect to the violation. Finally, although consumers can file complaints with the FTC regarding violations of the Red Flags Rule, there is no private right of action. As further explored below, the federal laws that do not contain a private right of action would likely not pre-empt a state law that provided such a right.

D. Pre-emption issues surrounding federal and state law

While the federal laws pre-empt less strict or inconsistent state laws, they do not preempt Kansas’ security breach statute. If a person is governed by and complies with a federal security breach law, the person is deemed to also comply with the Kansas security breach law. Further, federal privacy and security laws, such as the Financial Services Modernization Act, generally preempt state laws unless the state law provides greater protection. Similarly, HIPAA pre-empts state law on privacy and security of protected health information unless the state law is “more stringent.” In In re Estate of Broderick, the Kansas Court of Appeals recognized that HIPAA regulations create the “minimum requirements” for disclosure of protected health information and that “state laws must be followed if they afford additional protection.” Finally, the FACT Act, which contains the Red Flags Rule, does not pre-empt state law “with respect to the collection, distribution, or use of any information on consumers, or for the prevention or mitigation of identity theft, except to the extent that those laws are inconsistent with [the Act].” Therefore, a “creditor” must comply with both the Kansas security breach statute and the Red Flags Rule because they are not inconsistent. It is important that those in Kansas who possess records containing personal information understand which, if any, federal laws apply and ensure that they are in compliance with those laws.

V. What Consumers Can Do to Prevent Identity Theft

Federal and state governments have taken specific measures to combat identity theft. But, as technology advances on a seemingly daily basis, thieves find new and more sophisticated ways to steal identities. While no measure is full proof, there are certain steps that consumers can also take to prevent identity theft.

One commentator made the following suggestions to take a proactive approach in preventing identity theft:

- Only share identity information when necessary. Although sometimes businesses may legitimately request your Social Security number for credit check or financing purposes, others request it simply to use as a unique identifier. Although most businesses have terminated this practice, be wary about giving out your Social Security number and request that an alternative number be used.
- Do not carry unnecessary identity information in a purse or wallet. Only carry the identity information necessary for use during the course of daily activities.
- Secure your mailbox. Do not place outgoing mail in a residential mailbox. You can also secure your mailbox by lock and key.

148. Id. at 63720.
149. Id.
150. Id.
151. Id.
152. 5 U.S.C. § 552a(g)(1)(D).
154. 42 U.S.C. § 17939(g)(3).
155. K.S.A. 2010 Supp. 50-7a02(e) (emphasis added).
157. 45 C.F.R. § 160.203.
• Secure information on your personal computer. Install a firewall on your personal computer to prevent unauthorized access. Do not open emails from unknown sources. Remove your email address from marketing lists to reduce the risk that a damaging program will access your computer. If you have a wireless network, secure it with a unique password.

• Keep financial and medical records in a secure location. Keep this information in a secure location under lock and key.

• Shred nonessential documents containing personal information. Any document that you are not required to retain by law or policy should be shredded before disposition.

• Carefully review financial statements. Promptly review all bank and credit card statements. Pay attention to bill cycles and investigate any missing bills, a process that online banking has made much easier.

• Periodically request copies of credit reports. Reviewing your credit report is the surest way to verify if someone has opened unauthorized accounts under your identity. The reports can typically be obtained annually without charge.

There are many more recommendations online to protect yourself from identity theft. The Kansas Insurance Department recommends procuring identity theft insurance. Some companies now offer such identity theft insurance, which covers the cost of reclaiming your identity — the cost of making phone calls, mailing documents, making copies, lost wages, and hiring an attorney. The policies, however, generally do not cover direct monetary losses.

It is also important to know when you may have been a victim of identity theft. Regarding medical identity theft, the FTC advises that a person may be a victim if:

• The person gets a bill for medical services that the person did not receive;

• A debt collector contacts the person about medical debt that the person does not owe;

• The person orders a copy of a credit report and sees medical collection notices that the person does not recognize;

• The person tries to make a legitimate insurance claim and the health plan says that the person has reached the limit on benefits; or

• The person is denied insurance because the person’s medical records show a condition that the person does not have.

Therefore, it is imperative to review all medical documents and take immediate action to mitigate potential loss or health risks.

VI. Conclusion

More than 70 years ago, neither Hilda Schrader Whitmer nor the federal government that issued the first Social Security cards could have imagined how prevalent identity theft would become. And today we have laws that would prohibit Whitmer’s employer from reproducing and distributing her Social Security card to thousands of people without her consent. While Whitmer’s number was used out of general ignorance, identity theft typically occurs today out of a specific intent to defraud. Despite state and federal attempts to curb identity theft, it continues to be a growing and pervasive crime. Identity thieves have invaded our mail, our homes, our health care facilities, and our businesses. It is virtually impossible to conduct business in today’s marketplace without exposing our personal information. Businesses and government agencies must take control of the personal information in their possession and safeguard it accordingly. Additionally, consumers must take their identities seriously and take appropriate measures to prevent identity theft.

About the Author

Johnathan Rhodes is an associate at the Topeka office of Foulston Siefkin LLP, practicing in the area of health law, and is also an adjunct instructor at Friends University. Before earning his juris doctorate, cum laude, from Washburn University School of Law in 2009, he earned a bachelor's degree in information technology and a master’s degree in business administration from the University of Phoenix.

163. Id.
164. Id.
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Supreme Court

ATTORNEY DISCIPLINE

PUBLISHED CENSURE
IN RE BART A. CHAVEZ
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,258 – APRIL 8, 2011

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against Bart A. Chavez, of Omaha, Neb., an attorney admitted to the practice of law in Kansas in 1991. Chavez’s disciplinary problems involve his practice in the immigration courts and his treatment of court personnel in the U.S. Department of Justice, Executive Office for Immigration Review (EOIR). Chavez self-reported his public censure by the EOIR to disciplinary authorities in Kansas and Nebraska.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that respondent be censured and the censure be published in the Kansas Reports.


HELD: Court held the evidence before the hearing panel established the charge misconduct of Chavez by clear and convincing evidence and supports the panel’s conclusions of law. Court agreed with hearing panel and disciplined Chavez by published censure.

ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
IN RE CONRAD E. DOUDIN
NO. 105,137 – APRIL 15, 2011

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against the respondent, Conrad E. Doudin, of Wichita, an attorney admitted to the practice of law in Kansas in 1994. Doudin’s disciplinary problems resulted from his representation of clients in cases involving child visitation, divorce, bankruptcy, and probate, as well as his failure to cooperate with disciplinary proceedings.

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


HELD: Court commented on several matters in this disciplinary case. Court stated that it understood that the disciplinary administrator and the Kansas Board for Discipline of Attorneys would want to encourage attorneys faced with a disciplinary complaint to retain counsel. However, every attorney admitted to practice law in this state is charged with the individual, independent responsibility “to aid the Supreme Court, the Disciplinary Board, and the Disciplinary Administrator in investigations concerning complaints of misconduct, and to communicate to the Disciplinary Administrator any information he or she may have affecting such matters.” Supreme Court Rule 207(b) (2010 Kan. Ct. R. Annot. 308). A respondent who retains an attorney to represent him or her in a disciplinary proceeding is not relieved of the responsibilities in KRPC 8.1(b) and Supreme Court Rule 207(b) to cooperate with and provide information to the disciplinary administrator. Retaining counsel simply reassigns those responsibilities to the attorney who is acting on respondent’s behalf. Retained counsel must comply with those duties just as thoroughly as if respondent is communicating directly with the Disciplinary Administrator’s Office. It is only under the unusual circumstance when respondent could not reasonably know that retained counsel was violating the rules as respondent’s representative that respondent may argue he or she should be insulated from retained counsel’s failure to comply. In other words, contrary to the panel’s suggestion, rules violations by a retained attorney may be imputed to the respondent unless the respondent demonstrates he or she could not reasonably know that retained counsel was obstructing the investigation. As noted by the hearing panel, respondent had not complied with our rules governing probation at the time of the hearing. See Supreme Court Rule 211(g)(3) (2010 Kan. Ct. R. Annot. 327). Even at the hearing before this court, respondent had yet to implement the plan. Moreover, we agree with the hearing panel’s assessment that probation is not appropriate for the respondent. The number and nature of respondent’s violations indicate an inability or unwillingness to accept and perform the most basic and fundamental responsibilities of an attorney. Court concluded that to adequately protect the public the respondent should be sanctioned with an indefinite suspension.

ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
IN RE GILLIAN LUTTRELL
NO. 105,339 – APRIL 8, 2011

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against Gillian Luttrell, of
Overland Park, an attorney admitted to the practice of law in Kansas in 2006. On October 18, 2010, the respondent’s license to practice law was administratively suspended by the Supreme Court for failure to pay the attorney registration fee for 2010; failure to fulfill the minimum continuing legal education requirements; and failure to pay the continuing legal education annual fee, late filing fee, and noncompliance fee. Luttrell’s disciplinary problems resulted from this failure to respond or litigate several pending matters.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that Luttrell be suspended for three years.


HELD: Court held the evidence before the hearing panel established the charged misconduct of the respondent by clear and convincing evidence and supported the panel’s conclusions of law. Court indefinitely suspended Luttrell from the practice of law in the state of Kansas.

ONE-YEAR SUSPENSION
IN RE JAMES M. ROSWOLD
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,257 – APRIL 22, 2011

FACTS: This is an original proceeding in discipline filed by the Office of the Disciplinary Administrator against James M. Roswold, of Kansas City, Mo., an attorney admitted to the practice of law in Kansas in 1994. Roswold’s disciplinary action involved his representation of plaintiffs in a medical malpractice claim.

DISCIPLINARY ADMINISTRATOR: The disciplinary administrator recommended that the respondent be suspended for a period of six months.


HELD: Court held that for the most part, its review of the record satisfied them that the panel’s findings of fact were supported by clear and convincing evidence and justified its conclusions of law. However, Court took exception to the panel’s determination that respondent’s violations resulted entirely from negligence. Court found the record supported a different conclusion that respondent knowingly disregarded his professional responsibilities, especially as it concerned Roswold’s partner’s unauthorized practice of law in Kansas. Court commented at length on the requirements for pro hac vice admission. Court suspended Roswold for one year from the practice of law in the state of Kansas.

CIVIL

GAMBLING AND GRAY MACHINES
DISSMEYER ET AL. V. STATE OF KANSAS
SHAWNEE DISTRICT COURT – REVERSED
NO. 102,786 – APRIL 8, 2011

FACTS: During the 2007 legislative session, the Kansas Legislature passed and the governor signed the Kansas Expanded Lottery Act. The law authorized operation of certain gaming facilities, electronic gaming machines, and other lottery games at certain designated locations. This Court upheld the constitutionality of the Act as it related to ownership and operation of the lottery in State ex rel. Six v. Kansas Lottery, 286 Kan. 557, 186 P.3d 183 (2008). On March 20, 2008, the executive director of the Kansas Lottery sent a letter to all lottery retailers warning them that the Kansas Expanded Lottery Act prohibited participating retailers from owning or operating gray games. The plaintiffs own or lease amusement game machines in Wyandotte County. The pleadings do not reveal the precise nature of their machines. On October 16, 2008, they filed a declaratory judgment action seeking a determination that K.S.A. 2010 Supp. 74-8702 and K.S.A. 74-8761 are unconstitutional. They also sought injunctive relief barring enforcement of those statutes. The district court granted the state’s motion for summary judgment and found that the statutes were not unconstitutionally vague and that injunctive relief was therefore not appropriate. David A. Dissmeyer, Lester L. Lawson, and Terry L. Mitchell appealed for injunctive relief and for clarification of the Kansas statutes regulating certain gaming machines.

ISSUES: (1) Gambling and (2) gray machines

HELD: K.S.A. 74-8702(g), defining gray machines, in combination with its enforcement provisions, K.S.A. 74-8750(d) and K.S.A. 74-8761, make it unlawful to own or operate a broad spectrum of property that does not relate to a legitimate government interest in controlling gambling. Those statutory provisions, as they relate to gray machines, are overbroad and unconstitutional.

STATUTES: K.S.A. 21-4302, -4303, -4304, -4307, -4308; and K.S.A. 74-8702, -8733, -8750, -8761

SECURED TRANSACTIONS, COLLATERAL, AND POST-BANKRUPTCY REPOSESSION
HALL V. FORD MOTOR CREDIT CO.
SALINE DISTRICT COURT – AFFIRMED
NO. 103,370 – APRIL 29, 2011

FACT: Hall purchased a pick-up truck from Long McArthur Ford in Salina and financed the purchase through Ford Motor Credit. Some nine months after the purchase, Hall and his wife filed for Chapter 7 bankruptcy wherein Hall claimed the truck as exempt. Ford sent Hall a letter indicating the bankruptcy was a default under the security agreement and requested him to sign a reaffirmation agreement. Hall’s bankruptcy filing, by itself, constitutes a default under the security agreement and Hall was required to sign a reaffirmation agreement, but he would not. After the bankruptcy, Hall continued to make payments and insure the truck. Ford attempted to repossess the truck. Hall appeals the district court’s denial of his petition for an injunction to restrain Ford Motor Credit from proceeding with a post-bankruptcy repossession of the vehicle upon which Ford Credit retained a lien.

ISSUES: (1) Secured transactions, (2) collateral, and (3) post-bankruptcy repossession

HELD: Hall contends that the district court erred in finding that Hall’s filing of a Chapter 7 bankruptcy petition, by itself, constitutes a default under the security agreement that can be enforced by the creditor under the Kansas Uniform Consumer Credit Code. Court held the district court considered other facts, in addition to Hall’s bankruptcy filing, and that all of the factors present in this case supported the district court’s holding that the prospect of pay-
ment, performance, or realization of collateral had been significantly impaired.

STATUTE: K.S.A. 16a-5-109

**SEXUAL VIOLENT PREDATOR**

**IN RE CARE & TREATMENT OF DARWIN C. WILLIAMS**

**MONTGOMERY DISTRICT COURT – AFFIRMED**

**COURT OF APPEALS – REVERSED**

**NO. 99,235 – APRIL 22, 2011**

FACTS: Darwin C. Williams was convicted of two counts of indecent liberties with a child. Before his prison term ended, the district court found he was a sexually violent predator and committed him to the Larned State Security Hospital. Williams challenges the sufficiency of the determination that he is a sexually violent predator.

ISSUE: Sexually violent predator

HELD: Court held the evidence that supported the state’s case included evidence that the sexual assessment tests placed Williams in a moderate to high risk of recidivism, staff members were concerned about lapsing behaviors while Williams was in prison, Williams had engaged in what were viewed as high risk behaviors while on parole despite repeated participation in the sex offender treatment program, Williams admitted to engaging in sex with an underage individual while on parole, and Williams admitted to difficulty controlling his use of alcohol and drugs. Moreover, Dr. Reid opined that Williams is likely to reoffend because he suffers from paraphilia not otherwise specified and an antisocial personality disorder that predisposes Williams to commit sex offenses. Court held the district court that heard their testimony found Dr. Reid’s opinion to be more persuasive. This opinion and the factors on which it was based presented sufficient evidence for a rational factfinder to have found, beyond a reasonable doubt, that Williams is a sexually violent predator as defined by the Sexually Violent Predator Act.

DISSENT: Justice Rosen dissented arguing that the district court cannot consider dismissed charges of criminal wrongdoing or uncharged sexual conduct absent a K.S.A. 60-455 analysis.

STATUTES: K.S.A. 21-3503; and K.S.A. 59-29a01, -29a02, -29a06(b), -29a07(a)

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**CRIMINAL**

**STATE V. ADAMS**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 101,236 – APRIL 29, 2011**

FACTS: Adams convicted of first-degree felony murder in death predicted upon felony child abuse. On appeal, Adams claimed district judge erred in: (1) responding to jury’s question during deliberations by providing written response that inaccurately summarized portion of witness’s testimony instead of offering readback; (2) expanding PIK Crim. 3d 52.09 instruction on witness credibility to include expert witness language in PIK Crim. 3d 52.14, which put undue weight on expert witness testimony; and (3) denying motion for mistrial based on ineffective assistance of trial counsel.

ISSUES: (1) Handling of jury question, (2) witness credibility instruction, and (3) motion for new trial

HELD: On record of case, Adams invited any error that might have occurred during district court judge’s handling of jury question, thus claims of procedural and substantive error are not reviewed. Better practice would be to deal with jury questions only in open court and to ensure recording of presence of defendants, prosecutor, and defense counsel.

District court’s error in deviating from standard jury instructions on credibility was not error in this case where any practical effect would have been to Adams’ benefit, and instructions given were fair and accurate statements of law that would not reasonably have misled jury. Under facts, district court’s finding under Strickland of no deficient performance or prejudice were supported by substantial competent evidence.

STATUTES: K.S.A. 21-3609 and K.S.A. 22-3420(3)

**STATE V. ADAMS**

**WYANDOTTE DISTRICT COURT – AFFIRMED**

**NO. 101,432 – APRIL 15, 2011**

FACTS: Taurus Adams was convicted by a jury of premeditated first-degree murder and criminal use of a weapon after he shot and killed Ratsamy Phanivong in a fight outside a bar after earlier scuffle inside in the evening. The jury heard multiple stories about what went on inside and later outside the bar. Adams argues (1) the prosecutor committed misconduct during closing argument, (2) the trial court erred by giving the jury instructions on premeditated first-degree murder and its lesser-included offenses in descending order of severity, and (3) the trial court erred by instructing the jury regarding criminal intent and premeditation in a manner that impermissibly lessened the state’s burden of proof.

ISSUES: (1) Prosecutorial misconduct and (2) jury instructions

HELD: Adams challenged three statements by the prosecutor: (1) during rebuttal that “[t]his case doesn’t just mean something to the defendant. It means something to Ratsamy Phanivong. This is the only chance he will ever have to have someone held accountable for taking his life. So this day is as much about him if not more than anyone else.” Court found strong evidence supporting the state’s theory and concluded the misconduct would likely have had little weight in the minds of the jurors when considering the issues of intent, premeditation, and self-defense; (2) during main portion of the state’s closing argument: “Do not, I implore you, sanction this behavior. You agree to the defendant’s theory that this was self-defense you are sanctioning his behavior.” Court held prosecutor was not making some type of appeal to community interests; rather, the prosecutor was arguing that the evidence did not support Adams’ theory of self-defense; and (3) during rebuttal portion of the state’s closing argument: “We agree on one thing. This sure as heck would have been a different situation if the defendant had just walked away. He could have gone to the bouncers, he could have run to the parking garage.” Court held that although Adams’ testimony contained some support for his theory of self-defense, there was strong evidence supporting a criminal conviction and any error was harmless. Next, Court rejected Adams’ argument that instructing the jury on first-degree murder and then all of the lessers in descending order of severity infringed on his constitutional right to presumption of innocence. Court stated the jury received PIK instructions and was fully and accurately informed on lesser include offenses. Last, Court held the criminal intent and premeditation jury instructions were not clearly erroneous, and PIK Crim. 5d 54.01, which states that ordinarily a person intends all of the usual consequences of his voluntary acts, did not mislead the jury into believing that the State did not have to prove the defendant premeditated the killing.

DISSENT: Justice Beier dissented and would hold the prosecutorial misconduct was unavoidably reversible error. Justice Johnson joined in the dissent.

STATUTES: K.S.A. 21-3109, -3201(b), -3218(a), -3401(a), -3601(b)(1), -4201; K.S.A. 22-3414(3); and K.S.A. 60-261

**IN RE D.M.-T.**

**WYANDOTTE DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS DISMISSING THE APPEAL IS AFFIRMED**

**NO. 102,241 – APRIL 8, 2011**

FACTS: Following a bench trial, D.M.-T. was adjudicated a juvenile offender for having committed acts at age 13, which would have constituted the crime of rape if he had been an adult.
FACTS: Fredrick adjudicated a delinquent in Minnesota and required to register in that state as “predatory offender.” He subsequently moved to Kansas and was charged with failing to register under Kansas Offender Registration Act (KORA). District court granted Fredrick’s motion to dismiss the complaint, finding KORA did not apply pursuant to K.S.A. 22-4906(i). State’s appeal transferred to Supreme Court.

ISSUE: KORA and juvenile offender required to register in other state

HELD: District court properly dismissed the complaint. K.S.A. 22-4906(i), which provides length of time for registration under KORA for person moving to Kansas who was convicted in another state and required to register under that other state’s laws, does not apply to a person required to register in another state because of a juvenile adjudication in the other state.

STATUTES: K.S.A. 20-3018(c); and K.S.A. 22-3602(b)(1), -4901 et seq., -4902, -4902(a)(1), -4902(b), -4902(c), -4902(c)(3), -4902(c)(12), -4906, -4906(h), -4906(h)(1). -4906(i)

STATE V. SELLERS

HARVEY DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCE VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS
NO. 101,208 – APRIL 22, 2011

FACTS: Jerry Sellers was convicted by a jury of two counts of aggravated indecent liberties with a child involving the 13-year-old daughter of the woman he was living with. He was charged with three counts of aggravated indecent liberties, but he was acquitted of one of the charges. Sellers raised five issues on appeal: (1) Whether the district judge erred in denying his motion for a psychological evaluation of the victim; (2) whether his convictions were multiplicitous; (3) whether the order for lifetime post-release is unconstitutional; (4) whether the district judge erred in modifying his sentence; and (5) whether the district judge erred by ordering lifetime post-release and lifetime electronic monitoring.

ISSUES: (1) Psychological evaluation of victim, (2) multiplicity, and (3) sentencing

HELD: Court reviewed and considered Sellers’ arguments on the three factors relevant to allowing a psychological evaluation of a victim. Court held that the district judge did not abuse his discretion in denying the motion for a psychological evaluation of M.R.C. Sellers did not meet his burden to demonstrate a compelling need for such an evaluation, under the totality of circumstances. Next, Court noted the multiplicity issue was a close call, but Sellers left the room for 30 to 90 seconds, breaking the chain of causality and giving him an opportunity to reconsider his felonious course of action. The district judge ultimately determined that Sellers had to make a second conscious decision to touch M.R.C., and the Court agreed there was no multiplicity of the charges. Court held that Sellers did not challenge the constitutionality of the lifetime post-release supervision under Jessica’s Law and the Court would not reach the issue. Last, Court held that Seller’s lifetime post-release term must be vacated as an illegal sentence because the state failed to prove a constitutional right to a jury trial. The opinion specified that its holding regarding a juvenile’s right to a jury trial “will apply only to cases pending on direct review or not yet final on the date of filing of this opinion.” On July 15, 2008, D.M.-T. filed a pleading titled, “Post Trial Motion to Set Aside Judgment and Sentencing.” The six-sentence motion summarily contended that D.M.-T. was “within the time period of the case law decision in L.M. and prayed that the Court set aside the Bench Trial Conviction and grants the defendant a new Trial by Jury.” Subsequently, another attorney filed “Suggestions in Support” of D.M.-T.’s motion, expanding the argument to assert that D.M.-T.’s direct appeal was not final at the time L.M. was decided because the deadline for filing a petition for writ of certiorari with the U.S. Supreme Court had not expired. The district court overruled D.M.-T.’s motion, noting that the juvenile had not requested a jury trial, notwithstanding that court’s policy of granting such requests where the alleged acts would constitute a person felony for an adult. Further, the district court found that D.M.-T.’s failure to raise the jury trial issue on direct appeal was fatal to his postappeal motion. The Court of Appeals dismissed the appeal for lack of jurisdiction finding the right to appeal is entirely statutory and stated that K.S.A. 2010 Supp. 38-2380, which governs appeals in juvenile offender cases, provides no authority to appeal an adverse ruling in a postadjudication motion.

ISSUES: (1) Juvenile offender, (2) jury trial, and (3) appellate jurisdiction

HELD: Court held that the juvenile justice code made no provision for the appeal of the district court’s order denying D.M.-T.’s post-appeal motion to set aside adjudication and sentence. Therefore, Court held the Court of Appeals lacked appellate jurisdiction to review D.M.-T.’s claims, and the panel was correct in dismissing the appeal.

STATUTES: K.S.A. 38-2301, -2380; and K.S.A. 60-1501, -1507

STATE V. FREDICK

MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 102,848 – APRIL 29, 2011

FACTS: Jerry Sellers was convicted by a jury of two counts of aggravated indecent liberties with a child involving the 13-year-old daughter of the woman he was living with. He was charged with three counts of aggravated indecent liberties, but he was acquitted of one of the charges. Sellers raised five issues on appeal: (1) Whether the district judge erred in denying his motion for a psychological evaluation of the victim; (2) whether his convictions were multiplicitous; (3) whether the order for lifetime post-release is unconstitutional; (4) whether the district judge erred in modifying his sentence; and (5) whether the district judge erred by ordering lifetime post-release and lifetime electronic monitoring.

ISSUES: (1) Psychological evaluation of victim, (2) multiplicity, and (3) sentencing

HELD: Court reviewed and considered Sellers’ arguments on the three factors relevant to allowing a psychological evaluation of a victim. Court held that the district judge did not abuse his discretion in denying the motion for a psychological evaluation of M.R.C. Sellers did not meet his burden to demonstrate a compelling need for such an evaluation, under the totality of circumstances. Next, Court noted the multiplicity issue was a close call, but Sellers left the room for 30 to 90 seconds, breaking the chain of causality and giving him an opportunity to reconsider his felonious course of action. The district judge ultimately determined that Sellers had to make a second conscious decision to touch M.R.C., and the Court agreed there was no multiplicity of the charges. Court held that Sellers did not challenge the constitutionality of the lifetime post-release supervision under Jessica’s Law and the Court would not reach the issue. Last, Court held that Seller’s lifetime post-release term must be vacated as an illegal sentence because the state failed to prove a constitutional right to a jury trial. The opinion specified that its holding regarding a juvenile’s right to a jury trial “will apply only to cases pending on direct review or not yet final on the date of filing of this opinion.” On July 15, 2008, D.M.-T. filed a pleading titled, “Post Trial Motion to Set Aside Judgment and Sentencing.” The six-sentence motion summarily contended that D.M.-T. was “within the time period of the case law decision in L.M. and prayed that the Court set aside the Bench Trial Conviction and grants the defendant a new Trial by Jury.” Subsequently, another attorney filed “Suggestions in Support” of D.M.-T.’s motion, expanding the argument to assert that D.M.-T.’s direct appeal was not final at the time L.M. was decided because the deadline for filing a petition for writ of certiorari with the U.S. Supreme Court had not expired. The district court overruled D.M.-T.’s motion, noting that the juvenile had not requested a jury trial, notwithstanding that court’s policy of granting such requests where the alleged acts would constitute a person felony for an adult. Further, the district court found that D.M.-T.’s failure to raise the jury trial issue on direct appeal was fatal to his postappeal motion. The Court of Appeals dismissed the appeal for lack of jurisdiction finding the right to appeal is entirely statutory and stated that K.S.A. 2010 Supp. 38-2380, which governs appeals in juvenile offender cases, provides no authority to appeal an adverse ruling in a postadjudication motion.

ISSUES: (1) Juvenile offender, (2) jury trial, and (3) appellate jurisdiction

HELD: Court held that the juvenile justice code made no provision for the appeal of the district court’s order denying D.M.-T.’s post-appeal motion to set aside adjudication and sentence. Therefore, Court held the Court of Appeals lacked appellate jurisdiction to review D.M.-T.’s claims, and the panel was correct in dismissing the appeal.

STATUTES: K.S.A. 38-2301, -2380; and K.S.A. 60-1501, -1507

STATE V. FREDICK

MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 102,848 – APRIL 29, 2011

FACTS: Jerry Sellers was convicted by a jury of two counts of aggravated indecent liberties with a child involving the 13-year-old daughter of the woman he was living with. He was charged with three counts of aggravated indecent liberties, but he was acquitted of one of the charges. Sellers raised five issues on appeal: (1) Whether the district judge erred in denying his motion for a psychological evaluation of the victim; (2) whether his convictions were multiplicitous; (3) whether the order for lifetime post-release is unconstitutional; (4) whether the district judge erred in modifying his sentence; and (5) whether the district judge erred by ordering lifetime post-release and lifetime electronic monitoring.

ISSUES: (1) Psychological evaluation of victim, (2) multiplicity, and (3) sentencing

HELD: Court reviewed and considered Sellers’ arguments on the three factors relevant to allowing a psychological evaluation of a victim. Court held that the district judge did not abuse his discretion in denying the motion for a psychological evaluation of M.R.C. Sellers did not meet his burden to demonstrate a compelling need for such an evaluation, under the totality of circumstances. Next, Court noted the multiplicity issue was a close call, but Sellers left the room for 30 to 90 seconds, breaking the chain of causality and giving him an opportunity to reconsider his felonious course of action. The district judge ultimately determined that Sellers had to make a second conscious decision to touch M.R.C., and the Court agreed there was no multiplicity of the charges. Court held that Sellers did not challenge the constitutionality of the lifetime post-release supervision under Jessica’s Law and the Court would not reach the issue. Last, Court held that Seller’s lifetime post-release term must be vacated as an illegal sentence because the state failed to prove Sellers’ age at the time of his crimes and thus he cannot be subject to lifetime post-release under K.S.A. 22-3717(d)(1)(G). Rather, he is subject only to the punishment tied to the grid form of aggravated indecent liberties; and that means a 36-month post-release term under K.S.A. 22-3717(d)(1)(A). Court also vacated the electronic monitoring element of Seller’s sentence in consideration of the Court’s recent decisions on electronic monitoring.

DISSENT: Justice Johnson dissented holding there was no intervening event or a fresh impulse to justify two convictions for a single offense of aggravated indecent liberties and Seller’s convictions were multiplicitous.

STATUTES: K.S.A. 21-3504(a)(3)(A), -4643(d), -4703(p); and K.S.A. 22-3717(d), (u)
FACTS: Kansas birth certificate of infant daughter did not name natural father, but hyphenated name included name of New Hampshire man the mother had lived with prior to moving to Kansas to live with her brother and wife (J.W.C./J.R.C.). After mother committed suicide, district court in July 2009 granted J.W.C./J.R.C. petition for guardianship, for temporary 30-day period. In October 2009, J.W.C./J.R.C. filed petition for adoption and termination of father’s parental rights, and as temporary guardians, consented to the adoption. November 2009 blood tests submitted in guardianship case showed 99.99 percent probability of father’s paternity. District court consolidated the two cases, held a two-day hearing, found father’s paternity had been established by DNA, but terminated father’s parental rights based on lack of support and best interests of child. Father appealed the termination of his parental rights.

ISSUES: (1) District court’s jurisdiction over adoption proceedings and (2) father’s claim to paternity

HELD: District court’s judgment of adoption and termination of father’s parental rights are void for lack of jurisdiction. Under facts of case, temporary guardianship of J.W.C./J.R.C. expired prior to their filing petition for adoption. Because adoptive parents had no statutory standing when they filed that petition, district court lacked jurisdiction over the adoption proceedings or associated request to terminate father’s parental rights.

District court had independent subject matter jurisdiction over guardianship proceeding. Under facts of case, at point in guardianship proceeding when genetic testing results were received and established probability of paternity higher than required by K.S.A. 38-1114(a)(5), father entitled to a presumption under Kansas law that he was the natural father. The suicide of natural mother, the vacatur of adoption proceedings, and the statutory presumption of paternity entitles father to have parental rights to infant daughter restored.

STATUTES: K.S.A. 2010 Supp. 59-2129, -2135(e), -2316(e), -3059(a)(1), -3060(a)(1), -3073(b)(3), -3075, -3075(e), -3075(e) (3); K.S.A. 38-1110 et seq., -1114(a), -1114(a)(5), -1114(b); K.S.A. 59-2102, -2111 et seq., -2112, -2128, -2128(f), -2128(l), -2129(a), -2136; K.S.A. 1993 Supp. 59-2114, -2115, -2129; and K.S.A. 59-2102 (Weeks 1976)

AMENDMENT OF PLEADINGS AND SUBSTITUTION OF PARTIES

MCDANIEL ET AL. V. SOUTHWESTERN BELL ET AL. MONTGOMERY DISTRICT COURT – AFFIRMED.

NO. 103,038 – APRIL 29, 2011

FACTS: In July 2001, McDaniel tripped over an uncovered telephone wire while playing catch and injured his wrist. McDaniel sent a claim to Southwestern Bell (SWBT) and filed a lawsuit in June 2003 after he received no reply. In June 2003, they served an alias summons to the Corporation Company but it was returned. In August 2003, they served an alias summons to Southwestern Bell Claims in Mission, and it was apparently accepted by an employee at that facility who signed as agent for SWBT.

In August 2003, they served an alias summons to SWBT. SWBT had been defunct for at least six years. For the next several years, McDaniel tried to figure out how to make SWBT responsible for the default judgment and tried to amend the pleadings. The district court denied the motion to amend finding that a constructive notice theory regarding service of process did not relieve McDaniel of the duty to obtain proper service on SWBT and the Kansas statutes do not allow substitution of parties post default judgment.

HELD: Court stated that McDaniel is seeking to amend their pleadings after a default judgment. Court held that Kansas statutes clearly do not allow the amendment of pleadings after a default judgment has been entered. Court stated that the relation back of amendments to petitions is not a stand-alone provision and is only applicable when an amendment is allowed because the parties have received such notice of the institution of the action that the party would not be prejudiced in maintaining a defense on the merits or knew or should have known that, but for a mistake concerning the identity of the proper party, the action would have been brought against the party.

STATUTE: K.S.A. 60-215, -255, -260

INSURANCE AND MINOR CHILD

HALL V. SHELTER MUTUAL INSURANCE CO. LABETTE DISTRICT COURT – AFFIRMED

NO. 104,321 – APRIL 22, 2011

FACTS: Clayton Hall, father of a minor child (Kinnie) who was killed in a motor vehicle accident, appeals the district court’s order granting summary judgment to Shelter Mutual Insurance Company. Hall argues the court erred in ruling as a matter of law that the minor child was not an insured under the policy. Specifically, the court ruled that the language of the policy excluded coverage because the minor child was not primarily a resident of Hall’s household.

ISSUES: (1) Insurance and (2) minor child

HELD: Court held that because Kinnie did not reside primarily with Hall, she did not meet the definition of “insured” under the policy. Thus, no underinsured motorist benefits were owed to Hall by Shelter. Pointing to the unambiguous language of the policy, Court held Shelter established there were no triable issues as to any material facts in this case. Kinnie was not primarily a resident of Hall’s household. Shelter’s decision to deny coverage on the basis that Kinnie did not qualify as an insured is confirmed by the clear language of the insurance policy. Thus, the district court correctly granted summary judgment in favor of Shelter.

STATUTES: No statutes cited.

INSURANCE BENEFITS AND MENTAL DISTRESS

PARTRIDGE ET AL. V. MONG ET AL. GOVE DISTRICT COURT – AFFIRMED

NO. 102,541 – APRIL 22, 2011

FACTS: A vehicle being driven by Marilyn Mong struck a tractor being driven by her husband, Tim Mong, resulting in Tim’s death at the scene. Inside Marilyn’s vehicle at the time as a passenger was Kolt Mong, stepson of Marilyn and the natural son of Tim. In one case, Kolt, through his natural mother and guardian, Jessica Partridge, filed suit against Marilyn for her negligence and requested damages for his mental distress resulting from witnessing his father’s death.
die very soon after the accident. In another case, Tim's estate and his heirs filed both a survival and a wrongful death claim. State Farm Mutual Automobile Insurance Co. (State Farm) provided liability coverage to Marilyn with limits of $100,000 for each person and $300,000 for each accident and defended Marilyn in both suits. State Farm has apparently paid or offered to pay the $100,000 limit for one person's injury. In the third case, which is the subject of this appeal, Kolt filed an action for declaratory judgment against Marilyn and State Farm asking the district court to determine that State Farm's policy provided up to $100,000 in liability coverage for his mental distress claim over and above the $100,000 limit for the wrongful death and survival claims resulting from his father's death. State Farm argued that any claim that Kolt had was included in the $100,000 limit of its coverage for those wrongful death and survival claims. The court found in favor of State Farm and ruled that the policy limit of $100,000 for each person constituted the total liability insurance proceeds available for the combination of Kolt's individual claim, the wrongful death claim, and the survival claim.

ISSUES: (1) Insurance benefits and (2) mental distress

HELD: Court held that under the insurance policy language in this case, when a child who was not physically injured claims he or she suffered mental distress that later manifested itself in physical symptoms as a result of witnessing a parent's injuries and death in a vehicle accident, the amount of any insurance coverage provided to him or her by the negligent party's insurer is included in the limit of coverage provided in the policy for the death of the parent. Court held the district court correctly ruled as a matter of law that the plain language of the policy provides $100,000 for the wrongful death and survival claims filed by Tim's estate, and his heirs and any mental distress damages Kolt suffered from witnessing his father's injuries and death are included in that $100,000 limit.

STATUTE: K.S.A. 40-3101

KANSAS CONSUMER PROTECTION ACT, ALTER EGO, DAMAGES, FRAUD-IN-THE-INDUCEMENT, AND NOTICE OF DEFECTS

LOUISBURG BUILDING & DEVELOPMENT CO. ET AL. V. ALBRIGHT

MIAMI DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

NO. 102,511 – APRIL 8, 2011

FACTS: Louisburg Building began constructing a home for Troy and Kris Albright that had several deficiencies. The district court found Louisburg Building liable to the Albrights based on breach of contract and violations of the Kansas Consumer Protection Act (KCPA). The court found that Louisburg Building failed to construct the Albrights' home in a workmanlike manner and that Louisburg Building committed KCPA violations by failing to keep the Albrights informed about exceeding the budget during construction. As a result of these violations, the district court awarded breach-of-contract damages ($33,306.54) and civil penalties ($90,000) under the KCPA, although the district court did not agree with the Albrights' damage calculation. The Albrights added two other parties to the lawsuit: Louisburg Building's owner, Damon Williams, and a subcontractor in which Williams had an ownership interest, Carson Group, Inc., db/a The Homeowner's Helper (Carson Group). The Albrights attempted to hold Williams and Carson Group liable for Louisburg Building's debts on the basis that Williams and Carson Group were the alter egos of Louisburg Building, but the district court disagreed. The Albrights also asserted fraud-in-the-inducement claims against Louisburg Building and Williams, but the district court dismissed those claims.

ISSUES: (1) KCPA, (2) alter ego, (3) damages, (4) fraud-in-the-inducement, and (5) notice of defects

HELD: The Albrights argued six issues, but the court found one...
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FACTS: Owner (Nordyke) entered into agreement with Sacco to lease empty retail space to start El Gaucho Steakhouse, with Sacco as sole operator and primary owner of El Gaucho. Nordyke hired Christensen as general contractor to construct necessary infrastructure. Sacco hired Christensen as architect with contract stating in part that Christensen had workers comp insurance. Trevizo injured finger on power saw while constructing restaurant table. ALJ found Christensen was general contractor for the project, and was responsible for workers' compensation and payment of temporary total disability compensation awarded Trevizo. Workers Compensation Board (Board) reversed, finding Trevizo was an employee of El Gaucho, and rejecting El Gaucho's argument for equitable estoppel. El Gaucho appealed.

ISSUES: (1) Evidence supporting Board’s finding, (2) contractual liability, (3) equitable estoppel, and (4) statutory liability

HELD: Substantial competent evidence supports Board's determination that Trevizo was an employee of El Gaucho.

Agreement between Sacco and Christensen examined. That contract was insufficient to create an employee and employer relationship between Trevizo and Christensen, or to illustrate Christensen's intent to insure all workers on the jobsite. Board properly interpreted the agreement and determined that Christensen was not liable for Trevizo's injury under the contract.

Claim or equitable estoppel is rejected. Doctrine of equitable estoppel cannot be extended to affirmatively create a duty for Christensen to insure an individual where the law would not otherwise demand he do so. Nor can El Gaucho prove misrepresentation or detrimental reliance.

El Gaucho's statutory argument under K.S.A. 44-503 fails. Under facts, Trevizo not a statutory employee of Christensen, thus liability cannot be extended to Christensen under that statute.

STATUTES: K.S.A. 2010 Supp. 44-501(a), -508(b), -532(b), -556(a); and K.S.A. 44-503, -503(a),-503(f)

WORKERS' COMPENSATION
TREVIZO V. EL GAUCHO STEAKHOUSE
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 102,985 – APRIL 8, 2011

FACTS: Designer of storm sewer and drainage improvement project and “provide construction administration services and full-time construction observation services” for storm sewer and drainage improvements. Crossland Heavy Contractors won the general contractor bid for the project, and Crossland used large, elliptical-shaped concrete pipe manufactured by Moores Manufacturing to build the system. Crossland completed the original installation of the elliptical concrete sewer pipe in September 2001. On January 7, 2002, Wilson notified Crossland that the original elliptical concrete pipe needed replacement. Crossland replaced the pipe and put sections of the extracted failed pipe on a vacant lot adjacent to the project for testing. The pipe replacement was completed on March 29, 2002. Crossland and the original elliptical concrete pipe needed replacement. Crossland replaced the pipe and put sections of the extracted failed pipe on a vacant lot adjacent to the project for testing. The pipe replacement was completed on March 29, 2002. Crossland retained Anderson Engineering Inc. to test the failed pipe to determine whether it was defective. On the day Edwards was killed, April 1, 2002, Crossland and a representative from Anderson were on site for the sole purpose of cutting sections of the failed elliptical concrete pipe for testing. Edwards, as an employee of Crossland, commenced cutting the pipe, but when the Anderson representative determined the process would take some time, he left the site. Edwards stood on top of the concrete pipe to effect a longitudinal cut with a saw. The pipe split open, separated, and rolled outward, causing Edwards to fall and be crushed when the pipe rolled back in on him. The district court granted summary judgment in favor of Wilson and Moores, concluding that neither had a duty to Edwards and that their acts and omissions were not the proximate cause of Edwards’ death.

ISSUES: (1) Wrongful death and (2) proximate cause

HELD: Court agreed with the district court's holding that the acts or omissions of the defendants were entirely “too attenuated” to be a usual, likely, or legally cognizable cause of Edwards' fatal injuries. Court viewed these facts as establishing intervening negligent acts of others, which broke the connection between the initial negligent acts and the harm caused. Here, there were several such “intervening acts,” including independent testing after an agreed replacement by Moores, cutting the pipe for such testing in a manner that violated OSHA standards, and cutting the pipe longitudinally as directed by Anderson, resulting in catastrophic if not unanticipated failure and the uncontrollable rolling and crushing movement that led to Edwards' death. These intervening acts or consequences cannot be said to be foreseeable by either Moores or Wilson.

STATUTES: No statutes cited.

CRIMINAL
STATE V. BARNES
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
NO. 102,290 – APRIL 8, 2011

FACTS: Barnes convicted of aggravated robbery. On appeal he claimed trial court denied constitutional right to public trial when during trial it closed courtroom to the public after jurors complained a defense relative/witness had been taking cell phone photos of jurors, and denied motion for mistrial. Barnes also claimed trial court erred in failing to instruct jury on lesser included offenses of aggravated robbery.

ISSUES: (1) Sixth Amendment right to public trial and (2) jury instructions on lesser-included offenses

HELD: Alleged violation of right to public trial is considered even though Barnes did not object below. Two United States Supreme Court decisions distinguished as not dealing with closing the court during an actual trial. Overriding interest test is stated, and applies where entire gallery is removed even for only one witness. In this case, trial court failed to consider reasonable alternatives to closing the courtroom, including banning cell phones or removing a spectator acting in an unruly manner. Trial court erred in closing the court when less extreme and easily implemented methods for ensuring a fair trial existed. Violation of a defendant's right to a public trial is never harmless error. Reversed and remanded for new trial.

No evidence supported instructing jury on lesser included offenses of theft or robbery, and theft as defined by K.S.A. 21-3701(a)(4) is not a lesser included offense of robbery.

STATE V. CHAVEZ-AGUILAR
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 102,910 – APRIL 22, 2011

FACTS: Claiming improper admission of gang affiliation evidence, insufficient evidence, and various jury instruction errors, Carlos Chavez-Aguilar appealed his convictions for aiding and abetting the killing of two people and the injuring of a third when he rode with his brother who drove a truck through a crowd outside a night club.

ISSUES: (1) Gang evidence, (2) sufficiency of the evidence, and (3) jury instructions

HELD: Court held Chavez's gang affiliation was directly related to the crimes charged and was an essential part of the events surrounding the commission of the crimes. Court held the evidence explained
reckless conduct as well as intentional behavior and the district court did not err in admitting the evidence. Court also rejected Chavez’s sufficiency arguments. Chavez was convicted of abetting crimes of a reckless nature. Any question about how much time Chavez and his brother had to conspire over committing the crimes was irrelevant. Further, the location of the persons who may have started the fight was irrelevant. And, contrary to Chavez’s claim, witnesses testified the truck was indeed speeding and “revving up” as people tried to get out of the way. Court held there was sufficient evidence to support the convictions. Court rejected Chavez’s challenges to the aiding and abetting instruction, there was no reason to instruct on the lesser crime of voluntary manslaughter, the district court did not err when it did not give a mistake of fact or diminished capacity jury instruction, and the refusal to instruct on vehicular homicide.

**STATUTE:** K.S.A. 21-3402(b), -3403, -3405, -3414(a)(2)(A)

**STATE V. HOGAN**

**SEDGWICK DISTRICT COURT – REVERSED AND REMANDED**

**NO. 102,681 – APRIL 15, 2011**

**FACTS:** Joseph C. Hogan was stopped by officers after his brake light and taillights did not appear to function and he failed to signal a lane change. He does not challenge the stop, but the events thereafter leading to his conviction for possession of methamphetamine and no drug tax stamp. Hogan claims the court should have granted his motion to suppress because the officers lacked reasonable suspicion or had consent to search his vehicle.

**ISSUE:** Search and seizure

**HELD:** Court held there were several factors that bore against finding the situation was a voluntary encounter: (1) the fact that two officers were directly involved; (2) both officers were wearing SCAT police uniforms and their side arms; (3) the stop was effected by a marked patrol vehicle; and (4) the overhead light bar remained flashing throughout the encounter. Court also stated given the totality of the circumstances, a reasonable person would not have felt free to leave upon a second officer’s request to search the vehicle after the first officer disengaged, and even if the court were to conclude otherwise, it said it was unable to conclude that Hogan’s consent to search his black bag was voluntary after he protested to that search.

**DISSENT:** Judge Buser dissented and would hold the district court did not err in concluding that under the totality of the circumstances the officers’ conduct conveyed to a reasonable person that he or she was free to refuse the officers’ requests or otherwise terminate the encounter. Judge Buser disagreed with the majority’s determination of issues not raised by Hogan or ruled on by the district court.

**STATUTES:** No statutes cited.

**STATE V. MITCHELL**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 101,611 – APRIL 8, 2011**

**FACTS:** Mitchell convicted of aggravated battery and attempted aggravated robbery. During trial, Mitchell requested mistrial because juror appeared to be texting. On appeal, Mitchell claimed trial court erred in denying motion for mistrial, denying Mitchell’s challenge to state’s peremptory strike of African-American juror, and giving jury an Allen-type instruction in the general pre-deliberation instructions. Mitchell also claimed cumulative error denied him a fair trial, and trial court violated Sixth and 14th amendments by enhancing sentences without either aggregating factors or criminal history score proven to a jury beyond a reasonable doubt.

**ISSUES:** (1) Mistrial for juror misconduct, (2) Batson challenge, (3) Allen-type jury instruction, and (4) constitutional challenges to sentencing

**HELD:** Mitchell failed to request inquiry into juror’s alleged misconduct, or utilize any posttrial procedure to investigate the matter. Although better practice for trial court to have made inquiries, no abuse of discretion in denying motion for mistrial. Agreement stated with Indiana Supreme Court decision that best practice is to prohibit use of such electronic devices. Encourages PIK committee to consider revision to general instruction on juror communication as used in New York.

**APPLYING Batson to facts of case, state’s reasons for striking juror were race-neutral. No abuse of trial court’s decision that state’s strike of the juror was constitutionally permissible.**

**Jury instruction claim is controlled by State v. Salts, 288 Kan. 263 (2009). No showing the trial court’s error was clearly erroneous.**

**Single trial error in instructing jury does not support claim that cumulative error denied Mitchell a fair trial.**

No appellate jurisdiction to consider claim raised for first time on appeal that sentencing court denied Mitchell due process by basing sentence, in part, on information contained in Kansas Department of Corrections website. Trial court imposed sentence within presumptive grid box. Constitutional challenges to trial court’s consideration of aggravating factors and criminal history score are rejected pursuant to controlling Kansas Supreme Court precedent.

**STATUTES:** K.S.A. 21-4704(f), -4721(c), -4721(c)(1); and K.S.A. 22-3423(1)(c)

**STATE V. PHILLIPS**

**RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 103,216 – APRIL 22, 2011**

**FACTS:** Gabriel Phillips pled no contest to one count of felony theft of three dirt bikes in violation of K.S.A. 21-3701(a)(4), a severity level 9 nonperson felony. He received a six-month prison term but was granted six months’ probation in lieu of his prison term. At sentencing, the district court retained jurisdiction to set the amount of restitution at a future hearing. Approximately six months later, Phillips was ordered to pay restitution in the amount of $19,127.36. Phillips appeals the order of restitution.

**ISSUE:** Restitution

**HELD:** Court found the state failed to introduce evidence of the fair market value of the bikes. The estimated cost of repairing the bikes was $18,396.45. In 2007, Stephens purchased the three bikes for a total of $18,640.16. After the theft, the victim purchased three same or similar bikes for a total of $16,526.44. Instead of basing the restitution order on the fair market value of the property, the district court ordered Phillips to pay restitution based primarily on the cost to repair the bikes to “showroom new” condition. This order of restitution is not supported by the facts or the law. The district court did not make a finding regarding the fair market value of the bikes. The only evidence presented regarding the fair market value of the bikes was presented by Phillips. However, it is clear that the cost of repairs to restore the bikes to “showroom new” condition exceeded the fair market value of the bikes. Court held the award of restitution must be reversed and the amount of restitution vacated. Court remanded to the district court with directions to make a factual determination regarding the fair market value of the bikes. After making a factual determination regarding fair market value, the district court should determine an amount of restitution that does not exceed the fair market value of the bikes.

**STATUTES:** K.S.A. 21-4610(d)(1) and K.S.A. 22-3424(d)

**STATE V. PLUMMER**

**RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 101,684 – APRIL 15, 2011**

**FACTS:** Douglas Plummer was convicted of aggravated robbery in what started as a shoplifting spree at a Target store and ended in a slugfest with company employees. Plummer argues the trial court
failed to instruct on theft, attempted aggravated robbery, and the legal distinctions between robbery and theft coupled with a later use of force. Plummer also suggests the court reverse with directions that the trial judge enter a judgment of conviction for attempted aggravated robbery. Plummer raises an issue regarding use of his past convictions at sentencing.

ISSUE: Jury instructions

HELD: Court held that reasonable jurors could find Plummer guilty of theft, though they might reach some other conclusion. Plummer spent about two hours in the Target store picking up merchandise. Some of his actions, as observed by store security personnel, were indicative of an intent to steal, rather than to purchase. Plummer commandeered Target property to facilitate the crime — the knife and backpack — and tampered with other property — he took the shaver out of its packaging. But the security personnel did not immediately challenge Plummer and instead waited until he had begun to leave the store, long after he had taken possession of much of the merchandise. The crime of theft is completed once a store patron “conceals” merchandise “on his person” with the intent to permanently deprive the owner of that property. The thief needn’t leave or attempt to leave the store. Accordingly, the trial court erred in failing to charge the jury on theft, as a lesser degree of robbery, in conformity with Plummer’s request. Court reversed and remanded for a new trial. Court rejected the State’s argument that no theft instruction was necessary on the theory Plummer used force during the course of the theft, as opposed to after it had been completed, making the crime a form of robbery as a matter of law. That determination requires an assessment of detailed factual circumstances and should be left for the jury. Court considered Plummer’s last two issues moot in light of the decision to reverse his conviction and remand for a new trial.

STATUTES: K.S.A. 21-3301(a); K.S.A. 21-3426, -3427, -3701; and K.S.A. 22-3414(3)

STATE V. TURNER
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
102,478 – APRIL 22, 2011

FACTS: In March 2008, pursuant to a citizen-filed petition under K.S.A. 22-3001(2), the district court of Wyandotte County impaneled a grand jury to investigate allegations of criminal activity by the Board of Public Utilities (BPU) of the Unified Government of Wyandotte County/Kansas City, Kansas. After six months of hearings, the grand jury returned an indictment against Rodney Turner for two counts of theft and 55 counts of presenting a false claim. Turner filed a motion to dismiss the indictment for abuse of the grand jury, and the district court granted the motion. The State appeals the dismissal of the indictment and Turner cross-appeals, seeking clarification of whether the dismissal was with or without prejudice.

ISSUE: Grand jury

HELD: Court concluded the district court erred by finding that the State violated Turner’s Fifth Amendment rights by requiring him to invoke those rights in front of the grand jury on a question-by-question basis. However, Court agreed with the district court that it was improper for Special Agent Delaney, of the KBI, to comment on Turner’s silence after he had appeared before the grand jury and expressly invoked his Fifth Amendment rights. Court also agreed with the district court that Delaney’s testimony included multiple references to Thompson’s 20-year-old murder investigation that were completely irrelevant to the grand jury proceedings. However, in light of the fact that due process rights do not attach in grand jury proceedings in the same manner as in a criminal trial, and in light of the fact that Turner is unable to show that he was prejudiced by the improper statements, court concluded the errors in the grand jury proceedings did not warrant the district court’s decision to dismiss the indictment against Turner. There was substantial evidence presented during the grand jury proceedings to support probable cause for the indictment. Turner’s constitutional rights can be protected at trial by suppressing any evidence of the Thompson murder investigation and by prohibiting the prosecutor and any witnesses from commenting on Turner’s right to remain silent. Court concluded the district court erred by granting Turner’s motion to dismiss the indictment. Court found Turner’s cross-appeal to be moot based on its reversal.

STATUTES: K.S.A. 22-3001, -3003, -3004, -3005, -3008, -3009, -3102; and K.S.A. 60-423(a)
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Wednesday, July 13, 8:30 a.m. – 12:10 p.m.
The Relevance of Civil Rights Video Replay
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Thursday, July 14, 9 – 10:40 a.m. and 1 – 2:40 p.m.
Brown Bag Ethics Video Replay
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Thursday, July 21, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
Kansas Law Center, Topeka

Thursday, July 21, 12:30 – 4:10 p.m.
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AUGUST

Wednesday, August 3, 8:30 a.m. – 12:15 p.m. (Session I); 1:30 – 5:15 p.m. (Session II)
Legislative & Case Law Institute Video Replay
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Wednesday, August 10, 9 – 10:40 a.m. and 1 – 2:40 p.m.
Brown Bag Ethics Video Replay
Kansas Law Center, Topeka

Friday, August 19, 9 – 10:40 a.m.
Brown Bag Ethics Video Replay
Kansas Law Center, Topeka

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The Relevance of Civil Rights Video Replay
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