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2011-12

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Our Mission

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

Join the Kansas Bar Association’s Lawyer Referral Service
Join LRS online at www.ksbar.org/LRS

Why is the LRS good for business?

“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

Your trusted legal source.
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2011 Legislative Update

By Joseph N. Molina III

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.
Leaving Her Corner of the Forest

“You can’t stay in your corner of the Forest waiting for others to come to you. You have to go to them sometimes.”

—Winnie the Pooh

This is one president that is leaving her corner of the forest — or the plains, as the case may be — to see my friends and colleagues. My hope is that this year many of us will also venture out of our corners of the forest. One of my objectives, and thankfully one shared by our president-elect, Lee Smithyman, and our vice president, Dennis Depew, is to create opportunities for us to better communicate with one another. We will facilitate communications between the Board of Governors, the officers, and you. But we will also create opportunities among the members, committees, and sections for networking and communication. We have great lawyers that comprise our Association. Our substantive sections include the best practitioners in their respective areas of the law and each section contributes to our profession, making us all better lawyers. Our committees work to implement our Mission, tirelessly. Now, it is time to get acquainted, regardless of where we live or work.

Last year, for the first time in a long while, the Association facilitated a meeting among section presidents and committee chairs. Wow, put a bunch of smart, passionate lawyers into a room and just sit back and watch the innovative ideas about how to better serve membership fly. Collaboration and networking among our colleagues was instantaneous, the byproduct will be new CLE opportunities and better service to our membership. In the next year, we have planned for three meetings of these key stakeholders in our organization. The work of these sections and committees will ensure the continued vitality and relevance of our Association to each of us. It is from these sections and committees that many of our future leaders will emerge. It is from these committed individuals that value flows to our members. The importance of continued participation by our members in the sections and committees cannot be understated.

We are launching a new program for our sections on best practices. A part of what we will be asking our section leaders to do is review what section members want from their section membership. Are networking opportunities important? Are getting timely updates on developments in their field? Do they want to be provided with opportunities to develop credentials in their field? These are important questions, and the Association and sections are dedicated to finding out how to best produce value to our membership in each and every section of the Bar.

The Association is launching a new and updated website this year. With that will come a software upgrade that will allow for list serves to be maintained by the Association for the benefit of our section members. The first section members that will be asked to subscribe will be Solo & Small Firm Section and young lawyers. As we all know, there has been great growth of small and solo practitioners in this state and around the country. The list serve will give our colleagues a forum to ask for advice about their business, “what has been your experience with XYZ billing software,” or seek answers to questions in the course of practicing law and, most importantly, our colleagues in Solo & Small Firm Section can begin to build relationships with one another that are not constrained by geographic proximity.

Lee, Dennis, and I are going on a listening tour this year, and if necessary, the next few years. We want to visit our members and colleagues around the state to talk to them about their practices, their needs and see how this organization can better serve those needs. At the time of this writing, we have meetings scheduled in Liberal, Colby, Dodge City, Hays, Washington, Topeka, Fredonia, Wichita, Johnson County, Marion, and Ottawa. We will be meeting with the Kansas Women Attorneys Association, the Kansas Association of Defense Counsel, and the Kansas Association for Justice. We are in the process of scheduling additional meetings with local and specialty bars across the state. If you would like for one of us to visit your local bar, please call or email me at rpirner@ksbar.org. The Association can offer one hour of free CLE on the Casemaker legal research database, if that has more appeal than just talking with one another. Along these lines, I plan to make photos of these outreach visits a regular part of my column as I make my report to you about our friends and colleagues around the state. Karl Hesse, my friend and colleague, who claims to read the president’s column, will consider this to be a blatant attempt to write shorter columns (if he is telling the truth about reading the column); I see it as a chance to showcase our greatest strength as an organization, our members.

In closing, I must note that it has been a great year for the Association, under Glenn Braun’s leadership. We achieved many accomplishments, including the creation of a new section for immigration law, a stable membership in a very difficult economic environment, and an effective message that he carried to our new governor and Legislature about maintaining a fair and impartial judiciary. I look forward to working with each of you and our fine staff at the Association this upcoming year.
The KBA Young Lawyers Section is Here for You

By Vincent M. Cox, Fisher, Patterson, Sayler & Smith LLP, Topeka, vcox@fisherpatterson.com

This year, I have the great privilege of serving as the president of the KBA Young Lawyers Section. This honor is quite humbling, considering the great young lawyers and leaders that have come before me. My immediate predecessor, Melissa Doeblin, accomplished many things during her tenure that will help ensure the continued success of the Section for years to come. I can only hope to fill the shoes of those who came before me, but I intend to give it my best.

At the outset, I want to take a moment to recognize the fine young lawyers that will be serving with me this year on the KBA YLS Board of Governors: Brooks Kancel, president-elect; Amanda Kiefer, secretary-treasurer; Melissa Doeblin, past president/KBF liaison; Jeffrey Gettler, ABA liaison; Ali Marchant and Sarah Warner, YLS Forum co-editors; Nathan Eberline, legislative liaison; Stacy Burrows, CLE liaison; Jennifer Hill, pro bono liaison; Jenny Michaels, mock trial liaison; and Justin Farrell, Jeffrey Dazey, and Margaret Mahoney, social chairs. The KBA YLS is the definition of a group effort, and each of these individuals are essential to our success.

Let me take a moment to introduce myself. I grew up in Halstead, a small town in south-central Kansas. I graduated from Benedictine College in 2002 and from Washburn University School of Law in 2005. I have a very supportive wife, Lyndi, and a beautiful daughter, Lauren. They provide much-needed balance in my life.

Following law school, I worked at the Kansas Board of Tax Appeals and in 2006, I took my current position as an associate with the Topeka firm of Fisher, Patterson, Sayler & Smith. My practice consists of civil litigation. I work primarily in the areas of insurance defense, defending personal injury, property damage, construction, and municipal liability cases, among others. My practice takes me all over the state, and I really enjoy getting to practice law in the smaller towns and court houses. I think it helps to give me some perspective on what it is like for other attorneys that practice in other parts of Kansas. I have worked on cases in Oakley, Sublette, Troy, and Pittsburg, and many places in between.

One of my predecessors, Scott Hill, once wrote in this same column that fulfillment in life is best found when we identify and pursue our passions. I think this is great advice, and it is something that I have reflected on in my life. I am passionate about being the best husband and father I can be. I am passionate about being the best lawyer I can be. Finally, I have become passionate about improving the practice of law in Kansas, especially for young lawyers, and for the related interests and concerns of young lawyers.

I’ve been exposed to the practice of law my entire life. My father, Craig, is an attorney and had a solo practice in Halstead for nearly 30 years. Watching his career has taught me a great deal about the importance of integrity and personal relationships in this profession. His career has also taught me the great importance of involvement in bar associations. The KBA and KBA YLS have been invaluable in the development of my legal career. Through the KBA, I have met some of the best attorneys in the state, as well as judges and justices from the Kansas Court of Appeals, Kansas Supreme Court, and even the U.S. Supreme Court. These experiences have truly been incredible.

The legal profession is not easy for the new or young lawyer. Whether your practice is litigation, like mine, or even something more non-traditional, the challenges faced by young lawyers every day can be quite daunting. That is where the KBA YLS comes in, providing assistance to young and new lawyers all across the state. While I think the KBA YLS has always strived to do its best to serve its members, I think there is always room for growth and improvement. I think young lawyers face different challenges today than they did only five years ago, before tough economic times arrived. More young attorneys are opening solo practices and small firms. Mentoring these young lawyers will be crucial in the years to come. I think the KBA YLS can play an important role in making the practice of law better for the young attorneys in this state facing the tough economic times. I also firmly believe that the KBA YLS has something to offer every young and new attorney in Kansas, whether you practice in a small town or in the Kansas City metro area.

Now you know a little bit about me. I hope to spend the rest of my time in this position and in this column attempting to do what I can to serve young lawyers around the state. The KBA YLS is for you, the young lawyer. What do you want from the Section? What can the Section do to assist you in your practice, and enrich your career? How can the Section assist your community? I hope to continue this dialogue throughout the year, and I look forward to working for the young lawyers of Kansas.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Fisher, Patterson, Sayler & Smith LLP, where he maintains a civil litigation practice, consisting primarily of insurance law and defense. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
A few months ago there was an excellent article in the February Kansas Bar Journal by Jim Muehlberger titled, “The Kansas Lawyer Who Saved Lincoln’s Life.” The article, about Kansas’ first U.S. senator, James Lane, piqued my interest not only because of the intriguing title, but because I am also a Civil War buff to the extent of bordering on an addiction.

Of course, the most dramatic incident recounted in the article is when Lane and approximately 50 Kansas Jayhawkers essentially served as Lincoln’s bodyguards at the White House in early 1861 when Confederate troops were threatening an attack on the capitol, probably saving Lincoln’s life. What struck me while reading the article, however, was Lane’s role, in the years leading up to the Civil War, in setting Kansas on course to enter the Union as a Free State. It easily could have gone the other way.

Under the relentless pressure of the pro-slavery forces from neighboring Missouri, the pro-slavery “Lecompton” constitution could have survived and taken root, and the history of Kansas, and the nation, could have been much different.

Muehlberger details the actions Lane took, including: Exhorting farmers and merchants in Lawrence to construct fortifications to protect the town from invaders when they would rather be farming and tending to their shops; raising troops to fight pro-slavery forces on Kansas soil; and touring Chicago and other northern cities raising money to help combat the pro-slavery government that was taking hold in Kansas.

Of course, Lane and those who supported him prevailed, and Bloody Kansas entered the Union as a Free State.

Because James Lane stepped up, we live in a state born of freedom, not of slavery. Because of his actions, Kansas is a better place.

It is a law of nature that actions have consequences. It follows that acts of kindness, generosity and charity breed consequences that make the world a better place.

Lawyers in Kansas have the opportunity to step up and make a difference by way of becoming a fellow of the Kansas Bar Foundation.

Founded in 1957, the Kansas Bar Foundation is the philanthropic arm of the more than 7,000-member Kansas Bar Association, serving the citizens of Kansas through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, quality, and uniformity, by enhancing public opinion of the role of lawyers in our society.

More specifically, the foundation supports programs providing access to the legal system for low-income Kansans, and advocacy for children in need of care and victims of domestic violence. The KBF also provides scholarships, educational materials, and teacher training for public and private schools about the role of the law and lawyers in society.

If you are not now a fellow of the KBF and want to join us in making a difference, complete a membership form and mail it to KBF today with your contribution. If before doing so you have any questions, feel free to contact me or Kelsey Schrempp at the Kansas Bar Foundation and we will help you any way we can.

If you are a fellow, please consider stepping up to the next level:

- Fellow: $1,000
- Fellow Silver: $1,001 – $5,000
- Fellow Gold: $5,001 – $9,999
- Fellow Diamond: $10,000 – $14,999
- Pillar of the Foundation: $15,000 – $49,999

Actions have consequences. Again, contact Kelsey or me, or someone you know who is a Fellow Silver, Gold, Diamond, or Pillar, and we will help start you on your path to the next level.

Help make Kansas an even better place.

About the Author

Daniel H. Diepenbrock has practiced law in Liberal for the past 25 years. In addition to serving as Seward County counsel, he practices primarily in the areas of civil litigation, insurance defense, and local government law. Diepenbrock received his Bachelor of Arts degree from Friends University in 1980 and both his juris doctorate and master’s in business administration from the University of Kansas in 1985. He is admitted to practice in Kansas, Oklahoma, the U.S. Courts for the District of Kansas and Western District of Oklahoma, and the U.S. Supreme Court.
The Blue Book

From compiling to printing to final delivery, we maximize our resources to provide a directory that allows customers to reach you faster and more efficiently. And with over 70 years of publishing expertise we can minimize your effort to accelerate the exposure of your professional business listing across the state. The *KANSAS LEGAL DIRECTORY* can help you reach a bigger market.

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Thinking Ethics

Coping with New Technology

By Hon. Steve Leben, Kansas Court of Appeals, Topeka, lebens@kscourts.org

Sometimes it's just as important to know the questions that need to be asked as it is to know all of the answers. At least that's my hope because all I can do in this column is to raise some questions that many Kansas attorneys will need to give further thought to. Two recent ethics advisory opinions—from New York and California—present interesting questions on the adaptation of our ethics rules to new technology.

The New York opinion, N.Y. Ethics Op. 842 (2010), addresses whether lawyers can store electronic, but confidential, client information in cloud storage sites run by third parties. Lawyers have often contracted to store paper files off-site but there are truly different issues involved in cloud storage: A warehouse in Topeka used to store paper files isn't potentially accessible by anyone sitting at a computer anywhere in the world.

The New York advisory opinion said that an attorney or law firm needs to exercise reasonable care to maintain the confidentiality of client information when it's held electronically by a third party. These steps were among those recommended:

- Ensure that the online data-storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
- Investigate the provider's security measures, policies, recovery methods, and other procedures to determine whether they are adequate under the circumstances;
- Investigate the provider's ability to purge and wipe all copies of the data, and to move the data to a different host if the lawyer becomes dissatisfied with the provider or for other reasons changes providers.

The ethics advisory committee said that available technology should be used to guard against reasonably foreseeable attempts to infiltrate the stored data and that attorneys must “monitor the changing law of privilege to ensure that storing information in the ‘cloud’ will not waive or jeopardize any privilege protecting the documents.”

The California opinion, California Formal Ethics Op. 2010-179, also finds cloud storage acceptable if the attorney takes appropriate steps to evaluate the level of security provided and considers the legal ramifications of third-party interception of data, the possible impact on the client of disclosure, and the client's instructions, if any. But the California opinion is worth a look for a different reason. It takes a broader view than most such opinions, recognizing both that ethics guidance hasn't kept pace with technology and that any advice couched only in terms of present technology will itself quickly become obsolete. So the California opinion reviews the concepts, issues, and questions that should be considered for whatever technologies are being considered.

One of the specific questions discussed in the California opinion is whether an attorney who takes his or her laptop to a local coffee shop is complying with client-confidentiality rules when he or she uses its public wireless Internet connection to do legal research on a client matter and then email the client. The California ethics advisory committee concluded that an attorney would risk violating both duties of confidentiality and competence unless he or she takes “appropriate precautions, such as using a combination of file encryption, encryption of wireless transmissions and a personal firewall.” The committee also concluded that depending upon the sensitivity of the matter, the attorney might have to refrain from using such public Internet connections or notify the client of the risks attendant to such use.

The committee’s reference to a violation of attorney-competence rules is worth noting too. Just as attorneys dealing with an unfamiliar legal area must either gain mastery of the required legal principles or associate with another lawyer who has that knowledge, so must they either master technology concepts or consult with someone who has that knowledge as technology becomes increasingly intertwined with legal practice.

Unless you've got someone else handling all of this for you, take a moment to review these advisory opinions. On the plus side, you can find them, as I did, with a simple Google search. At least there's something I still know I can do with a computer without needing to consult someone else or the ethics rules!

About the Author

Hon. Steve Leben has been a member of the Kansas Court of Appeals since 2007. Before that, he was a district judge in Johnson County for nearly 14 years. He has been a co-presenter of Ethics for Good, a CLE program presented each June in the Kansas City area, for 12 years.
Professional Responsibility: Give Us a Piece of Your Mind!

By Meghan McEvoy, Washburn University School of Law, meghan.mcevoy@washburn.edu

Professional responsibility. We take law school courses on the subject. We must pass the MPRE in order to sit for the bar exam. But what is the true spirit of professional responsibility, and what role should it play in an attorney’s life? Before I took the Professional Responsibility course at Washburn University School of Law, I was not sure what to expect. I had heard some students comment that Professional Responsibility was a sort of “slack off” class. That viewpoint bothered me. From the moment I started law school, I have been told that being an attorney is not just a job or career — it is a profession. The suggestion, then, that the very class introducing us to the responsibilities of our profession was a class to which I should pay little mind astounded me.

Thankfully, my experience in my Professional Responsibility class was much different. Our professor shared personal stories from his own practice, all of which brought up ethical situations that we might one day face. My classmates and I studied the rules of professional conduct and were constantly reminded of the importance of dealing with conflicts appropriately. Never before had I heard the term “zealous representation” used so often. Yet I learned the context behind those words, and explored the duty to zealously represent one’s client within the bounds of law. What I have come to learn so far is that professional responsibility comes down to a fundamental attitude of respect and care for our clients and our legal institutions, and that such an attitude can be learned in part through our relationships with experienced colleagues.

It is one thing to know the applicable rules and select the best answer on an exam question, but putting the rules into practice can prove much more difficult. Practicing attorneys can help law students and young associates bring perspective to the study and practice of professional responsibility, and attorneys can benefit from these encounters as well. Practitioners and judges might wonder whether law students today really care about professional responsibility and ethical lawyering. I posit that law students do care — and care very deeply — about these issues. I will never forget my first week at Washburn Law, when my fellow law students and I took an oath in front of a local judge. Standing proudly, we promised to uphold the law and act in a professional manner. I took that oath very seriously, and I believe the majority of my fellow law students did as well. Taking the time to talk about your experiences to a law student you mentor or a law clerk who works in your firm can serve as a great learning tool. Law students and young associates want to learn how to practice ethically and they search for strong role models. They appreciate any guidance and advice that seasoned attorneys can offer to them.

In addition, one look around the law school will reveal hardworking professors and adjunct professors who dedicate their lives to helping students prepare for practice. Through externships, internships, and clerking positions, law students work with intelligent and passionate attorneys who have stories and advice to share. Law students should make every effort to connect with these role models and take advantage of the mentor relationships available to them.

Finally, I have had the priceless opportunity to observe my role model since I was a young child: my father. A solo practitioner in a small southeast Kansas town, my father is one of the best attorneys — and one of the best people — that I know. My father’s concern for his clients and his desire to do the right thing is admired by many. His willingness to take the extra steps to help his clients and to serve those in need is something I hope to emulate in my future practice.

My father recently shared some words of wisdom with me, telling me that “words have meaning.” While this may not seem like an earth shattering statement, I continued to ponder his words after our conversation ended. As an attorney, our words are very important. We inform clients of their options in situations where a client’s choice may change his or her life forever. We update the judge regarding the status of a case. We tell the jury why they should find for our client. Our words have meaning; understanding their meaning and their strength can only enhance our performance as attorneys.

Next year, after I take and (fingers crossed) pass the bar examination, I will stand with my peers at our swearing-in ceremony. At that time, I will no doubt think back to my first week of law school, when I took an oath with these same students. As attorneys, we promise to uphold the law and to represent our clients to the best of our ability. At the swearing-in ceremony, I will repeat the same words that many attorneys before me have uttered. My experiences in law school, externships, clerkships, bar events, and beyond have all played a role in forming the context behind those words. My future experiences will provide an even deeper understanding. My father was right — words do have meaning. It is important to get out there and start talking. I promise you law students are listening.

About the Author

Meghan McEvoy is a third-year law student at Washburn University School of Law. She will graduate in May 2012 and plans to practice in the Kansas City area. She may be reached at meghan.mcevoy@washburn.edu.
E-Books and Readers

I struggle imagining a more perfect gadget than a book. Even the cheapest tome snatched from an airport kiosk is a compact, weather-resistant invention with a high-contrast screen, an intuitive user interface, and infinite battery life. Buy it once and you own the object; you can keep it, trade it, sell it, or give it away without worry about licenses or software and hardware compatibility. As a bonus, books are potent carriers for nostalgia rekindling memories of blanket forts and flashlights, sunlight-splashed cozy corners, and even a cool, clawfoot tub on a warm summer afternoon via the book's heft, texture, and smell. Any gadget hoping to knock the book from its perch as “best gadget ever” aims at a millennium of history.

E-Books Scratch Different Itch

Electronic books and e-book readers hope to nudge into the readers’ hands by gently reminding of the frustration of books. Heavy backpacks, briefcases, and boxes are replaced with svelte electronic slabs and online bookstores awaken anywhere, anytime to beam more than 2 million books to readers. More excitingly, some of the oddball, quirky, and outrageous authors unable to find homes with staunchly staid publishers deliver their works direct to fans and readers build their own collections of online texts that would never find a way to printed books. Topping it off, technology and price have finally combined to make e-book readers viable tools and pleasures.

Barnes & Noble Nook

My current favorite among the offerings from Sony, Barnes & Noble, Amazon et al. is the newest black and white Nook released in June by Barnes & Noble. The new Nook replaces keyboard and touchpad interfaces with a swipe-able touch screen akin to the iPad. That switch takes advantage of a wildly popular interface but, more significantly, shrinks the size and weight of the Nook (without shrinking the screen). At just 7.5 ounces and 6.5 x 5 inches, the new Nook is the smallest and lightest e-book reader out there. There appears to be serious thought in the case design as well with a shallow dip in the back providing a comfortable handhold — a nod to the feel of a paperback with the cover folded around — and the skin-smooth texture has a great tactile feel. The case also hides a slot for a micro-SD card allowing expansion to as much as 32 GB should you want to tote along the entire Kansas Supreme Court law library.

The e-ink display on the new Nook (and the Kindles) looks like paper. The bright white background and dark black text make reading easier on the eyes and better outdoors under sunlight than LCD displays like the Nook Color’s. (There is also some preliminary research suggesting we do not rest as well at night after reading from LCD displays.) Another advantage of the e-ink displays is their low power consumption; the new Nook boasts the longest battery life at two months (with Wi-Fi powered down). The one downside to the e-ink displays is the “flash” that occurs as pages are turned. The entire page blacks out as the display is reset for the next page, and it is so unlike a book that it breaks the illusion of paper the e-ink otherwise successfully provides. Apparently, the new Nook significantly reduces this though I could not see a noticeable difference between it and the Kindles from Amazon.

The e-book reader market has become competitive, so prices are reasonable with the new Nook and Kindle Wi-Fi coming in at $139. Below that price point are the first generation Nook and the ad-supported Kindle at $119. Go up in price and you find the Nook Color at $249 (essentially an Android tablet) and the 3G Kindle or large-format Kindle (9.7-inch display) at $189 and $379 respectively.

More Tool than Fun

I do not foresee ever giving up my books or afternoons browsing bookshops but the e-book readers do have an appeal — especially for bulky and voluminous reference works like statutes and manuals. Travel is more convenient with a single device loaded with 1,000 titles and an always-open bookstore is hard to beat (Nook wins on content availability at the moment). They do not tweak the human brain’s pleasure centers like a book, but e-book readers are viable readers’ tools.

About the Author

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

To join the LPM Section or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
### Members in the News

#### Changing Positions

- **Robert G. Allison-Gallimore** has joined Kansas Legislative Research Department, Topeka, as a research analyst.
- **Larry D. Crow Jr.** has joined Jacam Chemical LLC, Sterling.
- **Mark A. Fletchall** has joined National Credit Adjusters LLC, Hutchinson.
- **Stephen M. Fletcher** has joined Fletcher Rohrbaugh & Chahine LLP, Olathe.
- **Ashley G. Hawkinson** has joined Polsinelli Shughart P.C., Kansas City, Mo., as an associate.
- **Christopher J. Lemke** has joined DST Systems Inc., Kansas City, Mo.
- **Mary D. Minear** has joined the Kansas Attorney General’s Office, Topeka, as an assistant attorney general.

- **Scott M. Minter** has joined Heathman Law Office P.A., Topeka.
- **Andrew F. Sears** has joined George K. Baum & Co., Kansas City, Mo.
- **Aaron R. Sauerwein** has joined Kutak Rock LLP, Wichita.

#### Changing Locations

- **Jason D. Bahnsen** has moved to 1245 Jordan Creek Parkway, Ste. 120, West Des Moines, IA 50266.
- **Jeffrey A. Harris Jr. Law Firm LLC** has moved to 13200 Metcalf, Ste. 220, Overland Park, KS 66213.
- **Littler Mendelson P.C.** has moved to 1201 Walnut St., Ste. 1450, Kansas City, MO 64106.
- **Rachel B. Rubin** has started her own firm, Rubin Law Firm LLC, 7944 Sante Fe Dr., Overland Park, KS 66204.

#### Miscellaneous

- **James R. Bartimus**, Leawood, has been elected by the International Society of Barristers as secretary/treasurer.

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

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### Obituaries

#### William S. Bowers

Williams S. Bowers, of Ottawa, died March 4 at his residence; he was 93. He was born May 30, 1917, in Ottawa, the son of Ben F. and Carrie (Sheldon) Bowers.

He attended Ottawa public schools and graduated from Ottawa High School in 1935 and Ottawa University in 1939. He received his juris doctorate from the University of Kansas School of Law in 1942. Bowers practiced law with his father as Bowers & Bowers until 1969 and was later a law partner in Bowers and Sheldon Chahed. As a licensed abstracter and in affiliation with his law firms, he operator Franklin County Abstract and Title. He retired from law practice and the land title business in 2002.

Bowers served as Franklin County attorney from 1951-54 and in the Kansas Senate from 1957-68. He was a member of the Franklin County and Kansas bar associations. He served as president of the Ottawa Chamber of Commerce and Ottawa Industrial Development Committee.

He held life memberships in Veterans of Foreign Wars; Warren Black Post #60, American Legion; and Ottawa Lodge #803, Elks; was a Paul Harris Fellow of the Ottawa Rotary Club; and was a member of the Ottawa Masonic Lodge and Abdallah Shrine.

Bowers served as a lieutenant in the U.S. Navy from 1942-46 as an officer aboard the destroyer USS Coghlan in the Bering Sea, the Western Pacific, and Saipin-Tinain invasions, and in the South Pacific. He also served aboard the light cruiser USS Providence in the Mediterranean Sea at the conclusion of World War II.

Survivors include his wife, Virginia Jean Ott, of the home; two daughters, Carolyn Babcock, of Washington, D.C., and Margaret Morris, of Green Mountain Falls, Colo.; three sons, Chris Bowers, of New Braunfels, Texas, Bill Bowers, of Lawrence, and Burt Bowers, of Ottawa; nine grandchildren; and one great-granddaughter.

#### Charles Leroy Buehler

Charles Leroy Buehler, of Great Bend, died April 21 in Andover; he was 84. He was born July 7, 1926, in Claflin, the son of Charles Rudolph and Josephine Martha (Kooci) Buehler. He was a Great Bend resident and served in the U.S. Navy during World War II.

He was a member of the American Legion and the Veterans of Foreign Wars, as well as the American, Kansas, and Barton County bar associations. Buehler practiced law for 50 years in Claflin and Great Bend.

Survivors include his wife, Virginia Ruth Folck, of the home; two sons, Arthur Ray Buehler, of Golden, Colo., and Howard Dean Buehler, of St. Louis; five grandchildren; and three great-grandchildren. He was preceded in death by a half-brother, Joseph K. Buehler, and a half-sister, Flora Bortz.
19 Honored by the Kansas Bar Association for Their Service to the Profession

**Phil Lewis Medal of Distinction**

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

**Chief Justice Robert E. Davis** passed away August 4, 2010, at his home in Leavenworth, a day after he retired from the Kansas Supreme Court following 17 years of service to the Court. In 1993, Gov. Joan Finney appointed him to the Supreme Court, and he became chief justice upon former Chief Justice Kay McFarland’s retirement in January 2009.

Davis was born in 1939 in Topeka and he graduated from Creighton University with a Bachelor of Arts in political science in 1961 and then attended law school at Georgetown University, where he was a staff member of the *Georgetown Law Journal* and earned his LL.B. from Georgetown in 1964.

His professional career began as a member of the U.S. Army Judge Advocate General’s Corps, where he served as trial counsel in the Republic of Korea and as government appellate counsel in Washington, D.C., from 1964-67. In 1967 he returned to Kansas and private practice in Leavenworth until 1984. Davis’ first post was as a magistrate judge in Leavenworth County from 1969-76. He served as an attorney for the State Board of Pharmacy in 1972 and Leavenworth County attorney starting in 1981 until appointed associate district judge in 1984. In 1986 Davis was appointed to the Kansas Court of Appeals. He worked on the bench when many landmark cases came through, including those involving the death penalty, school funding and Native American casino gaming.

Davis earned a reputation as an amiable, caring, hardworking, and dedicated lawyer and judge, and as a formidable advocate for lawyers and the legal profession. During his tenure as chief justice, he oversaw the development of the judicial branch website, e-filing of court documents, credit card acceptance for filing fees, and many other changes designed to modernize the courts and to make them more accessible. While on the Court, he authored 351 majority opinions and took part in thousands of decisions.

He worked with a number of community and service organizations, including the Governor’s Adoption Reform Task Force and the Commission on Alcoholism. Davis had been a Kansas Bar Association member since 1964; chairman of the board of trustees for St. John’s Hospital in Leavenworth from 1980-84, director and president of Leavenworth County Community Corrections Board from 1980-84, director of the Leavenworth National Bank and Trust Co. from 1972-84, and a council member for St. Mary’s College in 1984. He also was an officer of the American Inns of Court.

**Distinguished Service Award**

The Distinguished Service Award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service. The recipient of this award must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.

**Hon. David J. Waxse** is a U.S. magistrate judge for the U.S. District Court in Kansas City, Kan., having been appointed in 1999 and reappointed in 2007. He received his bachelor’s degree from the University of Kansas and his juris doctorate from Columbia University.

Prior to his appointment, he was a partner at Shook, Hardy & Bacon in Kansas City, Mo., where his practice was concentrated in employment law and litigation. In addition, he mediated cases for the U.S. District Court for the District of Kansas.

Waxse was past chair and a member of the Kansas Commission on Judicial Qualifications from 1992-99. During their existence, he was a member of the Civil Justice Reform Act Advisory Committee and the Mediation Panel for the District of Kansas, and was a member of the Kansas Justice Commission established by the Kansas Supreme Court to implement the Citizens’ Justice Initiative review of the state justice system.

He is a past president of the Kansas Bar Association, was a KBA delegate to the ABA House of Delegates, and was a member of the KBA Board of Governors from 1988-2008. He is a member of the Earl E. O’Connor Inn of Court and is a past president of the Inn. He is also a member of the American (Judicial Division), Johnson County, Kansas City Metropolitan, and Wyandotte County bar associations; and the Federal Magistrate Judge’s Association. Waxse is chair of the National Conference of Federal Trial Judges of the Judicial Division of the ABA and a member of the Ethics Committee of the Judicial Division. He is also a Fellow of the Kansas and American bar foundations.
Robert C. Casad was born in Council Grove in 1929. The families of his paternal grandparents had homesteaded in Sedgwick County shortly after the Civil War, so his Kansas roots go back. He was educated in the public schools of Melvern, Atchison, and Wichita. He attended the University of Kansas, receiving his bachelor's degree in 1950 and his master's degree in economics in 1952.

During the Korean War, Casad served in the U.S. Air Force at the Headquarters Air Force Materiel Command in Dayton, Ohio, and at Toul-Rosieres Air Force Base in France. After discharge in 1954, he attended law school at the University of Michigan, where he was an associate editor of the Michigan Law Review and was elected to the Order of the Coif.

He was admitted to the Kansas Bar in 1957 and later to the Minnesota Bar. He practiced law in Winona, Minn., until 1959 when he came back to Kansas to teach at the University of Kansas School of Law. During the 1965-66 academic year, Casad was granted a fellowship at Harvard Law School, where he took courses and ultimately earned the Doctor of Juridical Science. He was named the John H. and John M. Kane Distinguished Professor of Law in 1981.

His teaching focused mainly on civil procedure, federal courts, conflict of laws, and judicial remedies. From time to time, he was a visiting professor at UCLA, University of Illinois, University of California-Hastings, University of Vienna, University of Michigan, London Law Consortium, and Emory University. He has also lectured in Costa Rica, Spain, Japan, and Germany. Casad has written a number of books and articles, mostly on procedural subjects.

He was a member of the Kansas Judicial Council's Civil Code Advisory Committee from 1982-2010. He is a life member of the American Law Institute, as well as the Kansas Bar Association.

After retirement from active teaching in 1997, he continued his research and writing until this year. He is now on the verge of re-retiring.

William L. Frost is a senior partner in the Manhattan law firm of Morrison, Frost, Olsen, Irvine, Jackson & Schartz. He has practiced law as a partner in the firm since 1975. He graduated from Kansas State Teachers College (now Emporia State University) in 1968. After spending four years in the Navy, he returned to law school at Washburn University, graduating with his juris doctorate in 1975.

The focus of Frost's practice is municipal law. He has represented the city of Manhattan as the city attorney for more than 30 years. In his representation of Manhattan he, and his staff, provide legal advice to city administration, the city commission and various boards of the city, including the Manhattan Urban Area Planning Board. He has represented Manhattan in litigation and appeals, involving all aspects of municipal law, including zoning matters. He has also represented other municipalities in litigation and appeals.

He served as president of the City Attorneys Association of Kansas. He has authored and co-authored amicus curiae briefs and state legislation on behalf of the League of Kansas Municipalities. He has presented on legal topics affecting local government for a wide variety of organizations. Frost is a member of the International Municipal Lawyers Association, the Kansas Bar Association, and the Riley County Bar Association.

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

Robert C. Casad

This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service.

William L. Frost

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The Outstanding Service Award is given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the Kansas Bar Association and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA. This year, six recipients have been chosen to receive this award.

Robert R. “Bob” Hiller Jr. is from the Chicago area, where he received his Bachelor of Arts in political science at Northwestern University in 1969. He received his juris doctorate from the University of Kansas School of Law in 1972. He has practiced with Kansas Legal Services, the Legal Aid and Defender Society of Kansas City, Mo.; Social and Rehabilitation Services in Wichita and Topeka; and the Federal Deposit Insurance Corp. Hiller is involved in many community activities, including the Topeka Bar Association, Topeka Jayhawk Club, Kansas Association for Justice, Topeka Area Bankruptcy Council, and many more. In 2003 he graduated from the Topeka Police Department’s Citizens Academy.

Hiller is the past chairperson of the KBA Membership Committee and a past member of the KBA Access to Justice Committee. He currently serves on the KBA Diversity Committee. He is also the author of two articles for the Journal of the Kansas Bar Association, “Personal Injury Law Meets Medicaid Law” (January 2009) and “Diversity and the White Male Attorney” (September 2010).

Hon. Daniel L. Love graduated from Kansas State University in 1973 and Washburn University School of Law in 1976. He had a private practice, served as assistant Ford County attorney, and then Ford County attorney from 1979-89 prior to his judicial appointment. During that time he was president of the Kansas County and District Attorneys Association, as well as being a Kansas delegate to the National District Attorneys Association. He was appointed district judge in 1989 and became chief judge in 2001. He has been a presenter for the Kansas Bar Association concerning domestic law and at the attorney general’s Domestic Violence Symposia.

He has served on numerous community and law related boards and commissions. He served on the Board of Governors of the Kansas Bar Association from 2006-08. He is also the past president of the Ford/Gray County Bar Association and past president of the Dodge City Rotary. In 2008 he received the Distinguished Service Award from the Southwest Kansas Bar Association and was selected outstanding judge from the Crime Victim Service Awards in 1999.

Anne McDonald graduated from the University of Kansas School of Law in 1982. She was in private practice for two years before being appointed court trustee in Wyandotte County. She retired from the trustee’s office in 2006 and then served as a judge pro tem in the district and municipal court in Wyandotte County. She was chair of the Kansas Bar Association Committee on Impaired Lawyers in 2000 and was appointed to the Lawyers Assistance Program Commission when it began in 2001. She is currently executive director of the Kansas Lawyers Assistance Program, having been appointed by the Kansas Supreme Court in 2009.

McDonald is a member of the Kansas, American, and Wyandotte County Bar Associations; and the Kansas Women Attorneys Association. She has been a CLE presenter on child support and lawyers assistance topics across the state.

Philip Ridenour, of the law firm Martindell Swearer Shaffer Ridenour LLP, began law practice in downtown Kansas City, Mo. He currently practices in Cimmarron, where he has been for 40 years.

Over his 41 years of practice, Ridenour has presented about 80 lectures to lawyers, organizations, and bar associations in 15 states. He has also written several articles for the Journal of the Kansas Bar Association, as well as several other law review journals.

Ridenour has participated as an active member of the Probate Law Advisory Committee of the Kansas Judicial Council for 19 years, is past president of the Southwest Kansas Bar Association, and was the recipient of its 2003 Distinguished Service Award. Additionally, he is a fellow and a past Kansas State chair of the American College Trust and Real Estate Counsel.

Ridenour is a fourth generation Kansan and has both his undergraduate degree in English and law degree from the University of Kansas, where he graduated Order of the Coif.

Patricia Scalia is a 25-year public servant who has work for several difference state agencies. She has served as the executive director for the State Board of Indigents’ Defense Services (BIDS) for the last 13 years. In her capacity as executive director of BIDS, she collaborated with Washburn University School of Law to establish the Criminal Appeal Advocacy Class. In continuing with the spirit of collaboration, she helped establish the Defender Project at the University of Kansas School of Law.

During her private practice, Scalia was recognized for providing pro bono legal services to the poor.

Gabrielle M. Thompson is a 1979 graduate of Kansas State University and a 1982 graduate of the University of Kansas School of Law. After serving as a deputy district attorney in
Sedgwick County and as assistant county attorney in Riley County for 12 years, she served as managing attorney of the Manhattan and Seneca offices of Kansas Legal Services until 2007, when she opened her solo practice.

Thompson served as District 6 governor on the KBA Board of Governors from 2003-09 and as secretary-treasurer of the Board of Governors in 2009-10. She is a member of the KBA Access to Justice and Law-Related Education committees and a member of the Elder Law and Solo and Small Firm sections. She is a member of the American Bar Association, Kansas Women Attorneys Association, and the National Academy of Elder Law Attorneys.

**Outstanding Young Lawyer Award**

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

**Melissa R. Doeblin** is practicing as advisory counsel at the Kansas Corporation Commission, the agency in Kansas that regulates utilities by setting rates and ensuring the public interest is protected. Prior to working for the Commission, she worked in the Kansas Legislature for four years, where she drafted legislation for various legislative committees and legislators.

Currently, she serves as the immediate past president of the Young Lawyers Section of the Kansas Bar Association and has been a member of the Kansas Bar Association Young Leaders Section board of directors for six years.

**Courageous Attorney Award**

The Kansas Bar Association created the Courageous Attorney Award in 2000 to recognize a lawyer who displayed exceptional courage in the face of adversity, thus, bringing credit to the legal profession. Past award recipients include a lawyer accepting the representation of a client challenging the application of the Kansas sexual predator law, a judge for his courage in the face of controversy after his decision on state public school funding thrust him into the public eye, and a deputy staff judge advocate for meritorious legal services he performed while in Iraq, often under fire, attack, or high pressure. This award is only given in those years when it is determined that there is a worthy recipient.

**Pedro L. Irigonegaray** was born in Havana, Cuba, in 1948. In 1961, at the age of 12, he and his mother immigrated to the United States as political refugees. Later that year, his two sisters and father joined him and his mother. He grew up in Topeka and graduated from high school at Kemper Military Academy in Boonville, Mo., in 1966. He earned an Associate of Arts degree from Kemper Military Academy in 1968, a bachelor's degree in business administration and economics from Washburn University in 1970, and his Juris Doctor from Washburn University School of Law in 1973, the same year he became an American citizen.

Upon graduation from law school and successful completion of the Kansas and Florida bar examinations, Irigonegaray began the private practice of law in the fall of 1973. He is an active and participating member of the Topeka, Kansas, Florida, and American bar associations; Kansas Trial Lawyers Association; Association of Trial Lawyers of America; American Inns of Court; and Trial Lawyers for Public Justice. He is also a Fellow of the American College of Trial Lawyers.

Irigonegaray and his associate, Elizabeth Herbert, practice primarily in the areas of plaintiffs’ civil rights, personal injury (including medical malpractice and products liability), criminal defense, and environmental issues.

He has served on many civic organization boards of directors. He has held elected offices in professional organizations, including president of the Kansas Trial Lawyers Association (2001-02). Irigonegaray was honored as a recipient of the Daughters of the American Revolution Americanism Award and was also the recipient of the John Adams Award from the Military Religious Freedom Foundation.
DiVersity aw ard

Kansas City Lesbian, Gay, and Allied Lawyers (KC LEGAL) is a nonprofit membership association of the lesbian, gay, bisexual, and transgendered (LGBT) and allied legal community in the Kansas City metropolitan area. KC LEGAL’s goal is to unite attorneys, judges, professors, law students, paralegals, and other members of the legal profession in the Kansas City area around issues facing LGBT individuals.

KC LEGAL has been instrumental in making changes in the legal community, to ensure equal rights not only for those in the legal profession, but all over the community. KC LEGAL hosts many events during the year for the LGBT community, including CLEs based on LGBT impact litigation, networking events, film screenings, and job fairs.

In 2009 KC LEGAL launched a scholarship pilot program at the University of Missouri-Kansas City with plans to broaden the scholarship to other regional law schools. It also launched a radio show that airs every second Saturday of the month. This show is a forum for members of the LGBT community to address local and national issues facing their community.

In the short time it has been in existence, KC LEGAL has been able to get many law firms to offer domestic partner insurance for their employees. Not only does this benefit same sex couples, but it also gives opposite sex couples who are not married access to benefits for their partners.

In the future KC LEGAL plans to expand operation to other areas of the state by promoting the creation of coalitions with other legal associations and organizations. It will achieve that goal by continuing to work with LGBT organization, community groups, and other progressive allied groups and individuals to gain equal rights for all people.

The Mission of KC LEGAL is to:

• Unite attorneys, judges, professors, law students, paralegals, and other members of the legal profession in the Kansas City metropolitan area around issues facing LGBT individuals;
• Promote solidarity and support among LGBT individuals in the law;
• Educate the general public, legal profession, and courts about legal issues facing LGBT individuals;
• Promote the expertise and advancement of LGBT legal professionals in the legal profession;
• Work with LGBT organizations, community groups, and other progressive allied groups and individuals to gain equal rights for all people;
• Promote the creation of coalitions with other legal bar associations and organizations;
• Encourage the adoption of non-discrimination policies in law firms protecting both sexual orientation and gender identity;
• Encourage firms to offer domestic partnership benefits to employees; and
• Empower LGBT individuals to choose law as a career.

The Diversity Award recognizes a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans that include the following criteria:

• A pattern of the recruitment and hiring of diverse attorneys;
• The promotion of diverse attorneys;
• The existence of overall diversity in the workplace;
• Cultivating a friendly climate in a law firm or organization toward diverse attorneys and others;
• Involvement of diverse members in the planning and setting of policy for diversity;
• Commitment to mentoring diverse attorneys; and
• Adoption of plans to continue to improve diversity within the law firm or organization.
**Pro Bono Award**

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

**Zachary Chaffee-McClure** is an attorney in the Kansas City office of Shook, Hardy & Bacon LLP. As a member of the firm’s business litigation practice group, he represents business owners, entrepreneurs, and their companies in contract, employment, and business tort lawsuits. Since joining the firm, he has made appellate practice, UCC and indemnity litigation, and the defense of class actions the focus of his practice.

He regularly appears in state and federal court, as well as general civil and securities arbitration, and he has briefed and argued cases in state appellate courts.

Before joining Shook, Hardy, Chaffee-McClure graduated first in his class from Washburn University School of Law, where he served as a technical editor for the *Washburn Law Journal* and president of the Moot Court Council, receiving the John K. Kleinheksel Prize for Oral Advocacy and the Faculty Brief Award. He submitted the top papers for Torts, Civil Procedure, Criminal Law, Civil Procedure, and Writing for Law Practice. During law school, he interned with Chief Justice Kay McFarland, of the Kansas Supreme Court, and Magistrate Judge David J. Waxe, of the U.S. District Court for the District of Kansas, and he was a pupil in the Sam A. Crow American Inn of Court.

Chaffee-McClure is a member of the Earl E. O’Connor American Inn of Court, the Kansas Association of Defense Counsel, the Defense Research Institute, and the Order of Barristers.

**Emily A. Hartz** is an attorney licensed in both Kansas and Missouri. A native of southern Illinois, she graduated summa cum laude from business school at Millikin University in Decatur, Ill., in 1998 with a bachelor’s degree in marketing. While completing her undergraduate education, Hartz worked in a variety of capacities in the domestic violence program with Dove Inc. Her duties included public outreach, grant writing, and legal advocacy.

During her last year of law school, she worked for the Shawnee County District Attorney’s Office prosecuting domestic violence cases. Upon graduation from law school, she built on her trial experience and opened a law office where she acquired a wealth of experience in general trial practice, namely family, criminal, and juvenile law.

She then practiced law in Kansas City, Mo., as national trial counsel defending personal injury and toxic tort cases in a variety of jurisdictions throughout the country. In April 2010 she joined Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC in an of counsel position.

Hartz is on the board of the GaDuGi SafeCenter in Lawrence, is an active member of Unity Church of Lawrence, and does additional pro bono work for Kansas Legal Services. She is a member of the Judge Hugh Means Inn of Court, the Kansas Bar Association, and the Kansas Women Attorneys Association. She is a past member of the American Bar Association, the Defense Research Institute, and the American Trial Lawyers Association.

**Paige J. Eichert** is an associate at the Topeka firm of Scott, Quinlan, Willard, Barnes & Keeshan. She primarily practices family law and also handles probate, guardianships/conservatorships and business law matters.

Eichert received her bachelor’s degree from the University of Kansas, majoring in classical languages (Greek and Latin), and her juris doctorate from the Washburn University School of Law.

She credits the support of the partners in her firm for her ability to aid clients with lesser means than others. She is currently the entertainment chair for the Topeka Bar Association and is the club secretary for the Topeka South Rotary Club. In addition, Eichert teaches as an adjunct at Friends University, where she teaches mostly business law courses. She has been a pro bono attorney with Kansas Legal Services since 2010.

**Pro Bono Certificate of Appreciation**

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

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

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- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.
Luanne C. Leeds has been in private practice since 2007 with Heath and Kaplan P.A. in Topeka. She practices in the areas of health care, employment, and civil rights.

She is a member of the Topeka, Kansas, and American bar associations; Women Attorneys Association of Topeka; and Inns of Court. She received her bachelor’s degree in urban planning from Rutgers University and her juris doctorate from the Washburn University School of Law.

Ann Soderberg has 19 years of experience in all areas of family law and also provides legal services for juvenile law cases and probate cases, including guardianships and adoptions. She has completed training in the area of family collaborative law and mediation. Soderberg served as the chair of the Wichita Bar Association Family Law Committee for two years and has chaired the Kansas Bar Association Family Law Section for one year. Soderberg assisted in the compilation of the Annual Survey of Family Law cases for several years.

She is a member of the Wichita and Kansas bar associations; and Wichita Women Attorneys Association. Soderberg is the former city administrator of Lindsborg and served as county administrator for McPherson County from 1980-89. She earned both her undergraduate (1978) and law (1992) degrees from the University of Kansas.

John Paul D. Washburn is one of six attorneys in Shawnee County who represent indigent parents in child in need of care (CINC) cases, carrying an active CINC caseload of more than 100 cases. In addition to CINC representation, Washburn handles a variety of different matters ranging from family law to small business representation. Washburn Law Office LLC actively performs pro bono work through Kansas Legal Services referrals and for other individuals in need. Washburn graduated with dean’s honors from Washburn University School of Law in 2007 with a juris doctorate. He also received a bachelor’s degree from Oral Roberts University in 2000, graduating summa cum laude. After receiving his license to practice law in Kansas, he founded Washburn Law Office LLC in Topeka.

Milestones for Members of the Legal Community

Anton C. Andersen, Kansas City, Kan.
Susan Barker Andrews, Topeka
Terri Z. Austenfeld, Overland Park
Thomas J. Bath Jr., Overland Park
David M. Becker, Shawnee Mission
Kevin L. Bennett, Shawnee
Terri Savely Bezek, Topeka
Patrick C. Blanchard, Wichita
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2011
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Golf

Closest to the Pin Contest
Hole #5 Alan Streit
Hole #7 Hon. A.J. Wachter
Hole #13 Jeff Alderman
Hole #17 Bud Cowan

Flag Prizes
Hole #4 – Straightest Drive
Hon. Joey Duncan
Hole #9 – Longest Putt
Blake Hudson
Hole #14 – Longest Drive
Jason Robbins
Hole #18 – Longest Putt
Hon. Jim O’Hara

Golf Tournament Winners
1st Place – 1st Flight
Glenn Braun
Bruce Brumley
Jason Robbins
Steve Tilton

2nd Place – 1st Flight
Bud Cowan
Toby Crouse
Ron Martinek
Alan Streit

1st Place – 2nd Flight
Hon. Ben Burgess
Hon. Jeff Goering
Hon. A.J. Wachter
Hon. Patrick Walters

2nd Place – 2nd Flight
Danny Back
Steve Cavanaugh
Vince Cox
Zack Reynolds

Sporting Clays

Whitney Damron
Steve Doering
Jack Lindamood
Hon. Gary Nafziger

Judge Champion Score
Hon. Gary Nafziger, 88/100

Hon. Allen Slater
Hon. Gunnar Sundby
Chadwick Taylor
John Wine

Lawyer Champion Score
Steve Doering, 79/100
A t the annual Fellows Dinner held in Topeka on Thursday, June 9, the Kansas Bar Foundation awarded McPherson attorney Robert W. Wise the Robert K. Weary Award, the KBF’s highest honor.

In presenting the award to Wise, KBF President Jim Oliver recounted a long list of Wise’s honors and accomplishments, including serving as president of the Kansas Bar Association.

“This award, however, is not a lifetime achievement award,” Oliver said. “It recognizes character and commitment to the values and goals that may call on us to place others ahead of ourselves, to place principle ahead of profit, and to be generous with our time, talents, and financial resources.”

Wise, who grew up on a farm in Iowa, first moved to Kansas to attend McPherson College and play football. He received his law degree with honors from George Washington University in 1961 and returned to McPherson to practice law.

Currently the senior member of Bremyer & Wise, he is known across Kansas for his dedication to the profession. “His profession is his hobby and his life,” said long-time partner Brett Reber. “Other people may be golfers or hunters. Bob is a lawyer.”

The Weary Award recognizes lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation. The award is named for attorney Robert Weary, who over his objection was the initial recipient of the award in 2000, in recognition of his decades of service to his community, the KBF, and the legal profession in Kansas.

Wise’s list of honors and achievements is long. In addition to serving as KBA president, he is past president of the Kansas Association of Defense Counsel, and has served as chairman of the KBA Ethics Grievance Committee, member of the State Board of Law Examiners, and Kansas representative to the Defense Research Institute.

He is the recipient of the KBA’s Professionalism Award and Outstanding Service Award.

In 1990, Wise was a delegate to the Moscow Conference on Law and Bilateral Economic Relationships and a delegate to the 1994 China Trade Conference in Beijing.

But those who know him best, it is his character they talk about most.

“Bob is known as an outstanding lawyer, and more important, an outstanding person,” said Kansas Bar Foundation Trustee Bruce Kent. “He is truly a gentleman who has treated other lawyers with kindness and respect.”

U.S. District Judge Tom Marten, who occupied the office next door to Wise for more than 15 years, remembers well when he was asked to represent a college student accused of a serious sex offense.

“The young man could not pay and Marten knew the case would take a lot of time and perhaps not be a very popular cause to defend him,” Oliver said at the Fellows dinner. “But he felt there was something about this kid that made him want to defend him.”

When Marten asked Wise about it, Wise replied: “Isn’t this the reason you went to law school?”

He told Marten to go do it and don’t look back.

Robert W. Wise
The 2011 Legislative Session opened with a host of new faces attempting to solve last session’s budget problem. The 30 or so new Kansas representatives ran head first into a $500 million budget shortfall. To make matters worse, many of the newly minted representatives came into office vowing to repeal the 1-cent tax increase that was approved the previous session. Those campaign promises eliminated the idea of increasing taxes to help balance the budget. Instead, the 2011 Legislature planned to cut its way out of the state’s fiscal deficit.

Both chambers pushed for their budget package, and things remained uneasy for the majority of the session. The main sticking point was how much of a cushion to create in the FY 2012 budget to avoid making deeper cuts, should the economy stall. The Kansas House proposed a $50 million ending balance, while the Kansas Senate looked for a more moderate balance of $7.5 to $10 million. In comparison, Gov. Sam Brownback initially proposed an ending balance of roughly $7 million. As things played out, the Kansas House used the poor revenue returns in early 2011 to dig in and hold steady on its $50 million benchmark. The Kansas Senate pushed to continue funding needed social services and K-12. In the end, House leadership was able to push through their budget for the first time in three years. In 2009 and 2010, a majority of House Republican moderates and House Democrats passed a budget that was crafted in cooperation with Senate Republican leadership and Senate Democrats. This effectively took the House leadership out of the budget picture. With a solid conservative majority, House leadership was able to dictate their terms this session and pass a budget that cut most state agencies around 2 percent, consolidated a few others, and closed a $500 million budget hole. This, however, was not without controversy as several conservative Republicans voted against that bill because it did not cut enough from the budget. At the end of the day, the Legislature “saved” between $50 million and $100 million, depending on who you ask.

In addition to the budget, the 2011 session saw a number of controversial topics come up for debate, which led to a number of contentious moments under the dome. For instance, new immigration laws allowed a House Republican the opportunity to stick his foot in his mouth. Rep. Virgil Peck (R-Tyro) made what has become the story of the session when he “jokingly” proposed using the program to control feral hogs in Southern Kansas as a solution to the state’s immigration problem. This was by far the most widely covered statement but not the only controversy to gain public attention. In late March, a group of pro-labor protestors disrupted the Kansas House by shouting at House members during the chamber’s debate. The group grew so raucous that they were escorted out of the gallery.

Despite the prolonged budget discussions and all the controversial news coverage, the Kansas Legislature found time to debate a number of bills that have significant legal ramifications. A number of the bills summarized below did not pass this session. However, they remain viable legislative options for the 2012 session.

We hope this information will prove useful to both you and your clients by helping you familiarize yourself with the new laws that impact your practice. For full text of the bills, please
visit the Kansas Legislative Information Systems and Services website at www.kslegislature.com/li.

Judicial Branch Budget

The Kansas Legislature passed a budget that allocs $113.8 million for the judicial branch. This number was the lowest amount that could have been provided without the need to furlough court employees. To reach this final number, the Court proposed increasing the surcharge fee by 25 percent. This proposal was approved in SB 97. While the courts may not close for lack of funding, several other programs have been hampered. For instance, the Legislature failed to fund the electronic filing program or fill the 14th Court of Appeals judge position.

SB 97, Extending the Surcharge Fee

The judicial branch surcharge fee was set to expire on June 30, 2011. SB 97 was introduced to extend that sunset date for one year. However, with the judicial branch facing a significant budget shortfall ($6.5 million) an increase of 25 percent was proposed to ease that burden. SB 97 was signed into law in early May. The 25 percent increase works out to around $2.50 to $5.50 depending on the type of case being filed.

HB 2396, Abolishing the Commission on Judicial Performance

The Commission on Judicial Performance faced two challenges this session. The first was HB 2396, which would abolish the Commission on Judicial Performance by repealing its enabling statutes. This measure passed the Kansas House but failed to make it out of the Senate. Unfortunately, the second challenge to the Commission proved to be more successful. Instead of abolishing the Commission, the Kansas Legislature defunded the program and transferred its funding to the judicial branch. This move does not abolish the Commission on Judicial Performance, an important distinction because efforts could be made in 2012 to have the funding restored. Until then, the Commission intends to work on the final surveys until the end of the fiscal year, June 30. The Commission will also provide judges with a partial report. The Commission will be meeting prior to the end of the fiscal year to decide if it would like to ask the Legislature to restore funding in 2012.

Merit Selection

This session has seen three bills aimed at altering the merit selection process in Kansas.

Amended SB 83, Employing Retired Judges/Court of Appeals

SB 83, which initially proposed eliminating the deadline requirements so that a retired judge can enter into an agreement to serve on a temporary basis, was amended by Rep. Lance Kinzer (R-Olathe) on the House floor to include the language in HB 2101, Court of Appeals. The amended version of SB 83 was passed out of the House on a 66-57 vote but failed to gain any traction in the Senate. As such, no action was taken on this measure during the veto session.

HB 2101, Court of Appeals

HB 2101 focuses solely on the Kansas Court of Appeals. It would eliminate the nominating commission and allow the governor to appoint any candidate. It would require Kansas Senate confirmation and allow the confirmed candidate to serve for a life term. This measure passed the House but failed to move forward in the Senate.

SCR 1603, Supreme Court Justices

This measure, proposed by Sen. Dennis D. Pyle (R-Hiawatha), would eliminate the Supreme Court Nominating Commission and allow the governor to appoint a “qualified” candidate for any vacancy of the Kansas Supreme Court. Once a candidate is appointed, the candidate would need to be confirmed by both the Kansas House of Representatives and the Kansas Senate by majority vote. The newly confirmed justice would then be required to stand for a retention election as required by current law. There was no interest in moving this SCR forward.

Apology Law Bills

There have been three apology bills introduced this session. They include:

SB 142, Expressions of Apology Not Admissible as Evidence

SB 142 is the Kansas Judicial Council’s version of the apology bill; the KBA supported this bill as did the Special Committee on Judiciary. This bill was ripe for discussion during the veto session, but the Judiciary Conference Committee did not meet. As such, the bill did not move forward.

HB 2069, Kansas Adverse Medical Outcome Transparency Act

HB 2069 is the exact same measure the Sisters of Charity of Leavenworth introduced in 2010. The KBA opposed this measure last session and was able to have the issue studied over the summer. The KBA testified in support of the Judicial Council’s version, SB 374, during the summer. The Special Committee on Judiciary recommended the Judicial Council’s version; however, the Sisters of Charity persist in their quest to have their version passed, failing twice to have it considered in a conference committee during the veto session.

HB 2123, Kansas Adverse Medical Outcome Transparency Act

HB 2123 was introduced by Rep. Tom Sloan (R-Lawrence) and contains much of the same language as contained within HB 2069. However, Sloan’s version eliminates references to an “error” or “mistake.” This is a more neutral version of the apology law, but it is not as sufficient as the Judicial Council’s version.

Other Bills of Interest

House Sub. for SB 6, Driving Under the Influence

House Sub. for SB 6 contains several of the DUI provision originally introduced in SB 7. Sen. Tim Owens (R-Overland Park) worked diligently all veto session to craft this legislation. The main focus was the need for a DUI database to track ha-
bitional offenders. The bill also requires the use of an interlock system after the first DUI conviction and increases the penalties for multiple DUI offenses.

**SB 9, Amendments to the Code of Civil Procedure**

SB 9 is a cleanup bill from last session’s in-depth changes to the code of civil procedure. This bill was signed into law by the governor on April 17.

**SB 12, Earned Income Tax Credit Exemptions**

SB 12 allows an individual debtor in a bankruptcy proceeding to exempt the debtor’s right to an earned income tax credit (EITC) for one tax year. The bill does not limit the availability of the EITC for payment of child support or spousal maintenance.

**House Sub. for SB 63, Court Costs; Attorney-Client Privilege and Work-Product Protection**

House Sub. for SB 63 amends the Kansas Code for Care of Children and the Kansas Juvenile Justice Code requiring the board of education of a school district to award a high school diploma to any person requesting a diploma if the person is at least 17 years of age, is enrolled or resides in such school district, is or has been a child in the custody of the Department of Social and Rehabilitation Services or Juvenile Justice Authority after turning 14 years of age, and has achieved the minimum high school graduation requirements adopted by the State Board of Education.

The bill further amends the revised Kansas Code for Care of Children to automatically make a grandparent an interested party in a child in need of care proceeding. Finally, the bill establishes a statutory right to jury trial for juvenile offenders and provides a jury trial procedure within the revised Kansas Juvenile Justice Code.

**House Sub. for SB 23, Children’s Issues**

House Sub. for SB 23 amends the Kansas Code for Care of Children and the Kansas Juvenile Justice Code requiring the board of education of a school district to award a high school diploma to any person requesting a diploma if the person is at least 17 years of age, is enrolled or resides in such school district, is or has been a child in the custody of the Department of Social and Rehabilitation Services or Juvenile Justice Authority after turning 14 years of age, and has achieved the minimum high school graduation requirements adopted by the State Board of Education.

The bill further amends the revised Kansas Code for Care of Children to automatically make a grandparent an interested party in a child in need of care proceeding. Finally, the bill establishes a statutory right to jury trial for juvenile offenders and provides a jury trial procedure within the revised Kansas Juvenile Justice Code.

**SB 24, Domestic Relations Recodification Act**

The Domestic Relations Recodification Act reorganized the domestic relations code into one chapter. This bill has passed both chambers and was signed by the governor on April 7.

**HB 2254, Covenant Marriage**

In 2010, the Domestic Relations Recodification Act was amended to include a provision concerning covenant marriages. As such, the Act stalled. In 2011, proponents of covenant marriage introduced a standalone bill aimed at creating a second type of marriage. The KBA Family Law Section opposed this proposal, and it did not survive the House of Origins deadline.

**SB 98, Removing Tax Exemptions from Various Professions**

SB 98 was introduced by Sen. Dick Kelsey (R-Goddard) very early in the session. However, given the controversial nature of the proposal, no hearings were held. The bill did not survive the “turnaround” deadline.

**HB 2010, Civil Forfeiture**

HB 2010 adds embezzlement, mistreatment of dependent adult, worthless checks, forgery, making a false statement, criminal use of a financial card, unlawful acts concerning computers, identity theft, and electronic solicitation to the list of offenses giving rise to civil forfeiture pursuant to the Kansas Asset Seizure and Forfeiture Act.

**HB 2027, Rules and Regulations Filing Act**

HB 2027 amends K.S.A. 77-415 by removing the definition of “rule and regulations” and replaces it with a simpler definition. It also expands the definition of “person” to include individuals, companies or other legal commercial entities.

**HB 2028, Kansas Uniform Trust Code**

HB 2028 creates a new section in the Kansas Uniform Trust Code giving the trustee of a trust an insurable interest in the life of an individual insured under a life insurance policy owned by the trustee acting in a fiduciary capacity or that designates the trust itself as the owner under certain circumstances. Pursuant to the bill, the trustee has an insurable interest if, when the policy is issued, the insured is either a settlor or an individual in whom a settlor of the trust has, or would have had, if living at the time the policy was issued, an insurable interest.

**HB 2029, Kansas Tort Claims Act**

HB 2029 adds ultrasound technologists working under the supervision of a person licensed to practice medicine and surgery to the list of persons included in the definition of “charitable health care providers” for the purposes of the Kansas Tort Claims Act. The bill requires ultrasound technologists to be registered in any area of sonography credentialed through the American Registry of Radiology Technologists, the American Registry for Diagnostic Medical Sonography, or Cardiovascular Credentialing International.

**HB 2038, Departure Sentence Hearings in Felony Cases**

HB 2038 amends 2010 Session Laws Ch. 136, Sec. 298, concerning hearings to consider a departure sentence in felony cases. (2010 Session Laws Ch. 136 recodifies the Kansas

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Feature Article: 2011 Legislative Update
Criminal Code and will go into effect July 1, 2011.) The bill makes clear that when a court determines it is in the interest of justice to impose a departure sentence, which requires a separate departure sentence proceeding, the proceeding must take place in front of a jury, unless the jury is waived.

HB 2339, Amendments to the Kansas Criminal Code

HB 2339 reconciles all of the changes made to the criminal code in 2010 by HB 2668. This bill contains no substantive changes but merely reinforces the effective date of July 1, 2011. The governor signed this bill into law on April 8.

ERO 34, Abolishment of Kansas Parole Board; Creation of Prisoner Review Board; Transfer of Duties

Executive Reorganization Order No. 34 establishes the Prisoner Review Board within the Department of Corrections, abolishes the Kansas Parole Board, and transfers the powers, duties and functions of the Kansas Parole Board to the Prisoner Review Board, all effective July 1, 2011. The Prisoner Review Board will consist of three members appointed by the secretary of corrections from among the existing employees of the Department of Corrections, and the Review Board will be administered under the supervision of the secretary of corrections. SR 1817 would have disapproved ERO 34 but failed on a Senate vote.

Special Notice

While it may be difficult to think about the 2012 Legislative Session when the 2011 Legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that all legislative proposals be submitted in final form by September 1, 2011. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submitting it to the appropriate section.

The KBA Legislative Committee will meet after the September 1 deadline to consider all legislative proposals for the 2012 session.

All proposals should be mailed or emailed to Joseph N. Molina at:

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

About the Author

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

The Kansas Constitution imposes invalidating conditions on every law enacted by the Kansas Legislature. Article 2, Section 16 of the Kansas Constitution commands that “[n]o bill shall contain more than one subject and the subject of the bill must be “expressed in its title.” Enactments that fail to satisfy these conditions are void.

The operation of Article 2, Section 16 is a matter of importance to every lawyer, legislator, and citizen of Kansas. The importance to the lawyer is the potential winner-take-all defense that is provided when an otherwise valid statute within the Kansas Statutes Annotated is the product of a legislative process that violates Article 2, Section 16. For example: Your client is guilty as hell. The prosecutor is able to establish each element of the crime as set out in the applicable statute. Your client’s rights have been scrupulously honored by law enforcement. It appears to be an open-and-shut case. Before proceeding to the plea bargaining table, consider whether the statute under which your client is charged complies with Article 2, Section 16. If the prosecutor is relying upon a statute that is the product of a bill containing more than one subject, or the subject is not adequately stated in the title of the bill, your client walks.

Article 2, Section 16 has also had significant impact in the civil context. For example, entire taxing systems have been struck down for violating Article 2, Section 16. An act repealing a movie censorship board was held to be void, thereby perpetuating the board. An act authorizing an increase in school district budgets was held void because it was included in a bill with appropriations measures. An act providing funding to the Kansas Law Enforcement Training Center was struck down because it was included in a bill addressing another subject. As will be seen by the end of this article, even the common law rule against perpetuities is likely to again haunt the Kansas practitioner because of Article 2, Section 16.

For the Kansas lawyer the message is clear: To competently represent your client, research of any Kansas statute must begin with an inquiry into the legislative process by which it was enacted. This requires, at a minimum, an examination of the Kansas Session Laws that resulted in the statute to determine whether the bill giving rise to the act creating the statute contained “more than one subject” and whether the subject was properly “expressed in its title.” Depending upon what the Session Laws reveal, further legislative process research may be required. If you are not currently following this research process, you may be failing to discover a major risk or defense your client needs to consider.

Article 2, Section 16 is of major importance to legislators because their work may be nullified by legislative maneuvering and drafting that violate the single subject, express title, requirements. This ties in closely with the importance of the issue to the citizens of Kansas. Article 2, Section 16 was adopted because the citizenry deemed it necessary to restrict how the Kansas Legislature does its business. Most often this is expressed as abhorrence for “logrolling” and “riders” in the legislative process.

“Logrolling” refers to the combining of subjects in a single bill to enhance its likelihood of passage. Although subject “A” may not garner the majority vote needed for passage, and subject “B” is similarly unpopular, perhaps combining the two into a single bill will attract enough votes for each to achieve the majority necessary for passage. The effect is that neither subject A nor B would, on its own, be enacted, but once joined they both become law. The one-subject rule prevents this practice whether the combination occurs prior to introduction of the bill or through amendment as a bill moves through the legislative process. Of course, trading can still occur by legislators agreeing to support stand-alone one-subject bills, but this forces legislators to cast their vote for each separate bill while assuming the risk of the deals they make. The legislative process is long, arduous, and unpredictable; passing two bills is generally twice as difficult as passing one. Article 2, Section 16 strikes an important balance between the executive and legislative branches of government. Article 2, Section 14(b) of the Kansas Constitution gives the governor line item veto power only for appropriation bills. The one-subject rule is therefore necessary to ensure the governor is able to approve or veto non-appropriation bills based upon their individual merit.

“Riders” are the other pock on the legislative process Article 2, Section 16 is designed to avoid. A rider is a legislative proposal, typically unpopular in its own right, appended to a highly popular bill, usually an appropriation bill, that is very likely to pass. The interrelationship of Sections 14 and 16 of Article 2 is fully revealed in State ex rel. Stephan v. Carlson where a rider amending substantive limitations on school district budgets was combined with the Legislature’s final appropriation bill. Although the court held the governor lacked the constitutional authority under Article 2, Section 14 to exercise line item veto power over this non-appropriation measure, the governor did not have to rely upon the veto power because the non-appropriation measure constituted a separate subject that was void under Article 2, Section 16. If the legislature cannot constitutionally include more than “one subject” in a single bill, the governor is enabled, and forced, to approve or reject bills on their individual merit.

Most courts and commentators agree that the “good government” goals of constitutional provisions like Article 2, Section 16 are worth pursuing and create a legislative process superior to that of the federal government. Most citizens would agree with the basic premise for Article 2, Section 16: legislative proposals should be considered individually and legislators, and the governor, should be allowed — indeed required — to accept or reject each legislative proposal on its particular merits.

Another condition imposed by Article 2, Section 16 is that the general content of the legislative proposal must be adequately revealed in the title of the bill. This requirement is designed to alert legislators, and the public, to the general substantive contents of a bill.

As this article reveals, it is likely the Kansas Legislature has passed many statutes in recent years which are open to an Article 2, Section 16 challenge. The most recent judicial interpretation of Article 2, Section 16 may be contributing to lax legislative practices that run counter to Article 2, Section 16. The discussion that follows provides a summary of the basic law practitioners, legislators, and citizens need to consider when evaluating Kansas statutes under Article 2, Section 16.

(Continued on Page 32)
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II. Historical Background

As originally proposed at the Kansas Constitutional Convention by the Committee on the Legislative Department, Article 2, Section 16 stated:

No bill shall contain more than one subject, which shall be clearly expressed in its title, and no law shall be revived or amended unless the new act contain the entire act revived, or the section or sections amended, and the section so amended shall be repealed.18

This was the form in which Article 2, Section 16 appeared in the Constitution of Kansas adopted by the Wyandotte Convention on July 29, 1859.19 The language mirrors that found in Article 2, Section 15 of the Ohio Constitution.20 However, Kansas courts have not looked to Ohio law for guidance in interpreting Article 2, Section 16. Instead, the Kansas Supreme Court made an early and fundamental departure from Ohio’s interpretation that the one-subject, clear-title requirements were merely “directory” instead of “mandatory.”21 Kansas has consistently held that Article 2, Section 16, like other limitations stated in the Kansas Constitution, are “mandatory.”22

Following a 1969 study and report by the Citizens’ Committee on Constitutional Revision23 the House and Senate considered the Committee’s recommendations and, through House Concurrent Resolution No. 1060,24 adopted amendments to the legislative article of the Kansas Constitution that were approved by Kansas voters in the 1974 general election.25

Included were amendments to Article 2, Section 16 that the Committee recommended to exempt appropriations bills, and bills for the codification and revision of laws, from the one-subject rule.26 The Article 2, Section 16 recommendations were modified by the 1974 Legislature that sought to “eliminate the root of some unnecessary litigation” by deleting the word “clearly” and adding: “The provisions of this section shall be liberally construed to effectuate the acts of the legislature.”27 No revisions to Article 2, Section 16 have been made since 1974.

III. The Presumption of Constitutionality

The Kansas Supreme Court has consistently taken a deferential approach when applying Article 2, Section 16 so as to uphold legislative enactments whenever possible.28 In Cashin v. State Highway Commission,29 the Court observed “the liberal rule of construction” has “always been in force in this state” so as “to uphold, if possible, the constitutionality of an act . . . .”30 As noted above, Article 2, Section 16 was amended in 1974 to add the following clause: “The provisions of this section shall be liberally construed to effectuate the acts of the legislature.”31 This should not affect the precedential value of pre-1974 interpretations of Article 2, Section 16 because the 1974 amendment merely memorialized the interpretive practice that had always been applied by the Kansas Supreme Court.

The Court has been careful to note, whether in pre- or post-1974 cases, that although the legislature is entitled to deference, it cannot ignore the requirements of Article 2, Section 16. As stated in Cashin: “[T]his section of the Constitution has likewise been held to be mandatory instead of directory, and, if the act is clearly in violation of this constitutional requirement, it is the duty of the court to hold it unconstitutional.”32 In State ex rel. Stephan v. Thiessen,33 a post-1974 case, the Court quoted from State v. Barrett,34 indicating that the 1882 case “still accurately states the relevant law of Kansas.” Quoting Barrett, the Court noted that Article 2, Section 16 “must not be construed or enforced in any narrow or technical spirit, but must be construed liberally on the one side, so as to guard against the abuse intended to be prevented by it, and liberally on the other side, so as not to embarrass or obstruct needed legislation.”35

IV. The “One Subject” Requirement

Attempts to define what is, and is not, a single subject have been a descriptive challenge.36 For example, the Kansas Supreme Court has used the following language to express the one subject concept: The question is whether the act embraces two or more “dissimilar and discordant subjects that cannot reasonably be considered as having any legitimate connection with or relationship to each other.”37 A subject can be “broad and comprehensive” so as to “include innumerable minor subjects” provided “these minor subjects are capable of being so combined as to form only one grand and comprehensive subject . . . .”38 Provisions of an act constitute a single subject when they “are germane to the subject of the act, and have a natural connection therewith.”39 A single subject exists when the provisions of the act “all pertain to the general subject and principal purpose of the act” so that “the several provisions
all have a definite relation to one another, are germane to the
general purpose, and do not constitute separable, incongru-
ous, independent, or unrelated matters." The subject of the
bill is the matter to which the legislation pertains. "Minor"
subjects are acceptable when they are "germane to the broad
encompassing subject" and are not "so diverse or dissimilar
as to have no legitimate connection or relation to the" broad
encompassing subject.

Although many commentators have suggested new ver-
bal formulas to identify what is "one subject," a functional
analysis may be more useful and is, intellectually, how judges
and justices process the verbal formulae to arrive at a conclu-
sion. One functional analysis is to define the evils sought to
be addressed by the rule and then look for evidence of the
undesirable conduct in the legislative process. As noted previ-
ously, the one-subject rule is designed to prevent joining two
or more separate legislative matters merely to get them passed
when it is likely they could not pass individually. When there
is evidence that the bill at issue is the product of joining two
or more separate legislative matters, that may be an indication
it violates Article 2, Section 16. For example, in State ex rel.
Stephan v. Thiessen, the Court examined how the two pur-
portedly distinct subjects came to be joined into a single bill.
The Court observed: "Initially, these two areas were the sub-
jects of separate bills." The Court then traced the bills, and
their joinder, through the legislative process and concluded
the bill that was passed violated Article 2, Section 16.

The functional analysis, however, is only a tool. The out-
come will ultimately depend upon the language of the bill.
For example, in State ex rel. Stephan v. Board of County Com-
mis sion ers of Lyon County, the Court observed that the act at
issue was the product of the legislature consolidating several
bills into a single bill at the close of the legislative process.
The Court countered this observation with another functional
analysis: "There is absolutely no indication, however, that a
matter of legislative merit was tied to an unworthy matter or
that matters having no relation to each other were inter-
mixed." What the Court is really saying is that even though
several bills were grouped together for consideration as a single
bill at the end of the session, each of the bills that were com-
bined all related to the one subject of "financing of present or
future community colleges and municipal universities."

The Court in the Lyon County case purported to evaluate the
"worthiness" of the content of the act to evaluate whether a
matter of "legislative merit was tied to an unworthy matter ...
In most situations the court, unless it chooses to
become a super-legislature, will be unable to separate the
worthy from the unworthy. When two or more subjects are
combined into a single bill and passed by the legislature, the
reviewing court will often be guessing as to which measures
were worthy and which were unworthy. It could be argued
that even one-subject bills get passed by the Kansas Legis-
lature that fair-minded people would deem "unworthy." The
designation of "unworthy" should be reserved for situations
where a substantive "rider" has been attached to an appropria-
tion bill. In other situations courts will have to consider the
legislative process giving rise to the act and decide whether
it has resulted in multiple subjects. In this regard, the Lyon
County case contains the following problematic language: "No

Legal Article: Void Enactments ...
To explain the context of the bill at issue, the common sense test would encourage the court to consider all available information regarding the legislative process that resulted in the bill. For example, even though two separate bills are combined into the single bill that is ultimately passed, there may have been a common sense reason for joining the bills that has no relationship to logrolling. The subjects of each bill may have been related to such an extent that it made sense to consider them together. Passing one bill, without passing the other, may have resulted in a less than optimal situation. Combining the bills would be the product of a logical grouping of subjects as opposed to an act of logrolling. The appropriate deference to the legislature could be preserved by placing the burden on the party challenging the bill to affirmatively demonstrate there was no common sense basis for combining the separate matters.

Even if the bill fully satisfies the one-subject rule discussed in this section, it must still satisfy the “title” requirement of Article 2, Section 16. The one-subject and title requirements are independent of one another. A bill must satisfy both requirements to be valid.

V. The “Title” Requirement

Prior to the 1974 Amendment to Article 2, Section 16 the Kansas Constitution required that the subject of the bill “shall be clearly expressed in its title ... .” As noted previously, this language was amended in 1974 to remove the word “clearly” so that it now requires: “The subject of each bill shall be expressed in its title.” Although pre-1974 precedent must be considered in light of this change, it appears the practical impact of removing the term “clearly” simply returns the court to a position of giving deference to the legislature on the title issue to the same extent as with the one-subject issue. This conclusion is further supported by the addition of the 1974 Amendment language: “The provisions of this section shall be liberally construed to effectuate the acts of the legislature.” Pre-1974 case law is still useful when it is applied in the proper deferential context. Judging from the post-1974 cases, the deletion of the word “clearly” does not appear to have had a major impact on the outcome of cases because the court has, in most cases, traditionally accorded the legislature a high degree of deference in these disputes.

The Kansas Supreme Court, as with the one-subject rule, has come up with a number of verbal descriptions for the title rule. The bill title must properly identify the subject of the legislation but is not required to be “a synopsis or abstract of the details of the entire act.” It is sufficient if the title indicates clearly the general scope of the act and if details in the body of the act are all germane to the subject expressed in the title.

The underlying goal of the title rule is to ensure that the title of the bill adequately informs legislators and the public about the general content of the bill. This “good government” goal has been described by the Kansas Supreme Court as including: “[T]o direct the attention to the contents of the bill or act so that members of the Legislature and the public may be fairly informed as to what it embraces.”

The constitution does not contemplate that the subject of the act may be hidden away in covert concealment, or masked in secret ambush behind what is openly manifested by the visible and perceptible terms of the title to the act. Nor does the constitution contemplate that the subject of the act may be left to be groped for through doubts and difficulties, through obscurities and uncertainties, and with misgivings and perplexities.

It is arguable that a title could be so broad as to fail to provide legislators and the public with adequate notice of its operative contents. For example, consider a title that states: “An Act relating to crimes” without describing the crime at issue. In that case it can be argued the title is so general as to not convey any meaningful notice regarding the content of the bill. “It does not contemplate that the subject of the act may be hidden away in covert concealment, or masked in secret ambush behind what is openly manifested by the visible and perceptible terms of the title to the act.”

The functional aspect of the title requirement is one of accurate notice about the general content of the bill; notice of what the bill is about. The most common failure arises from titles that are too specific and leave out other significant matters within the body of the bill. For example, assume the bill satisfies the one-subject rule but consists of significant subtopics A, B, and C. If there is a generic topical description that encompasses A, B, and C, it should be
used in the title. Alternatively, the title could specifically describe subtopics A, B, and C. Problems arise when a more specific title is used that encompasses less than A, B, and C. It appears the practice in Kansas has been to open with a generic title that encompasses subtopics A, B, and C followed by a specific reference to subtopics A, B, and C. The only downside to this approach would occur if less than all of the subtopics are listed; then the issue is whether the listed subtopics in effect define, and limit, the scope of the generic reference. The guide, however, should be one of accurate notice of what the bill is about. The more reluctant a legislator is in wanting attention drawn to a subtopic, the more likely the subtopic should be described in the title.

VI. The Appropriate Remedies for Article 2, Section 16 Violations

A. Remedy for violating the “title” rule

To the extent the title of a bill fails to adequately describe a portion of the bill’s contents, that portion of the bill is invalid but the portion properly described in the title will be given effect. In most cases where the title is found to be inadequate, partial invalidation of the act will be the remedy. For example, in Kansas v. Barrett, the body of the act prohibited the manufacture, sale, and use of intoxicating liquors; the title only addressed the manufacture and sale of intoxicating liquors but was silent regarding their use.66 The portion of the act regarding “use” was invalid because the title suggested the act only addressed “manufacture and sale.” The Court stated the governing principle as follows: “Where the title to an act is not broad enough to include everything contained in the act, that which is not included within the title must be held to be invalid ... ”67 In Commissioners of Sedgwick County v. Bailey the court upheld the sections of the act that fit the title “defining the boundaries of counties,” but voided the section of the act imposing a tax on citizens of the reconfigured county because it was not reflected in the title.68 In upholding the balance of the act, the court in Bailey expressly ruled that the boundary section of the act was in no way dependent upon the invalid section on taxation.69

B. Remedy for violating the “one subject” rule

1. Riders on Appropriation Bills

When a non-appropriation matter is attached to an appropriation bill, the proper remedy is to void only the non-appropriation matter. These are the true “rider” situations. For example, in State ex rel. Stephan v. Carlin the non-appropriation matter regarding substantive limitations on school district budgets was invalidated, with the Court holding: “appropriations bills may not include subjects wholly foreign and unrelated to their primary purpose: authorizing the expenditure of specific sums of money for specific purposes.”70 In the Court’s initial ruling it found: “Section 77 [the non-appropriation portion] is severable from the remainder of Senate Bill 470, and, our holding here does not affect the remainder of the bill or the Governor’s veto of other portions thereof.”71

2. Non-appropriation bills

Unless the Kansas Supreme Court wants to set itself up as a super-legislature, the only appropriate remedy when there is a violation of the one subject rule is to void the entire bill. When a bill contains multiple subjects, it is rarely possible to ascertain which subject would have been passed by the legislature had they chosen to consider the matters individually. Any attempt by courts to deconstruct the Legislature’s collective bill into individual components will involve an even greater intervention by the judiciary into the legislative function. The result would be a bill fashioned by the judicial branch that was never voted on by the legislative branch nor approved by the executive branch. This is why once courts take the major step of declaring a bill void for violating the one subject rule, they should refrain from any further action to try and mitigate the effect of their decision.

An example where the Kansas Supreme Court decided to improperly take on a legislative function after it had voided a bill for containing multiple subjects is Cashin v. State Highway Commission of Kansas.72 The title of the bill, resulting in the act, was: “An act relating to motor vehicles, providing for licensing motor vehicle operators and chauffeurs, defining the liability of certain persons for negligence in the operation of motor vehicles on the public highways, and to make uniform the law relating thereto.”73 The bill contained 22 sections dealing with the licensing, control, and liability of motor vehicle operators and chauffeurs. Section 23, which was referenced in the title as pertaining to “certain persons,” provided for a waiver of governmental immunity by the “state and every county, city, municipal and other public corporation” by making them liable for damages caused by the negligence of any operator or chauffeur they employ while driving a motor vehicle within the course of their employment.74 The Court held section 23 addressed a topic fundamentally different from the licensing and liability of “operators and chauffeurs” and therefore should not have been combined in a single bill. The Court observed:

It will be readily noticed that under the provisions of this section...
there is no distinction or difference as to the liability whether the operators and chauffeurs are licensed or not. It is not connected up in any way with the licensing of operators and chauffeurs. It appears to be wholly incongruous with, independent of, and disconnected with the rest of the act, and constitutes a separate subject, thus making the act contain more than one subject. 75

The Court noted that section 23 was a modification of a provision contained in the “Uniform Motor Vehicle Operators’ and Chauffeurs’ License Act,” which also included the other 22 sections. Section 23 was added by the Kansas Senate when the bill was referred to it after being introduced in the House. 76 Once the Court held the statutes were the product of more than one subject in a single bill, instead of invalidating all of the statutes, the Court, in effect, convened itself as a legislature to evaluate the wisdom of section 23. First it noted that other states considering the Uniform Act had rejected section 23, except Indiana, which adopted and then later repealed section 23. 77 The Court seems to have been trying to make the case that section 23 was a bad idea. This would then serve as the premise for the Court’s ultimate holding that the legislature would have passed sections 1 through 22 of the act even though section 23 was not part of the bill. Relying upon cases in which a non-appropriation measure was included as a rider to an appropriation bill, the Court concluded: “that section 23 ... is unconstitutional and void, and that such ruling is not to affect the validity of the remainder of the act.” 78

The Court does not attempt to account for the possibility that the bill may have never become law unless it included a provision addressing the controversial subject of governmental immunity. The record reveals that a waiver of governmental immunity was a major concern for the Kansas Senate. It was part of the original uniform act promulgated by the proponents of the Uniform Motor Vehicle Operators’ and Chauffeurs’ License Act. The governmental immunity provision may have been important to the governor who signed the bill. The Court instead coopts the authority of the Legislature and the governor by validating a law, by judicial declaration, that never stood the legislative process.

The proper course of action, when a court holds a bill violates the one-subject rule, is to invalidate all statutes that were enacted under the bill. This is the approach the Kansas Supreme Court followed in State ex rel. Stephan v. Thiessen, 79 where it held: “Having determined that HB 3129 contains more than one subject, we must conclude that the bill is violative of Article 2, Section 16, of the Kansas Constitution; hence, it is invalid in its entirety.” 80

VII. Current Interpretations and Legislative Practices

A. Larson Operating Co. v. Petroleum Inc.

The most recent examination of Article 2, Section 16 by a Kansas appellate court is in Larson Operating Co. v. Petroleum Inc. 81 where the challenged act was the product of a bill containing the Uniform Statutory Rule Against Perpetuities, the Uniform Conservation Easement Act, and provisions repealing the Bulk Sales Act. 82 The case turned, in part, on whether a preferential right to purchase was enforceable. 83 Party A argued the preferential right to purchase violated the common law rule against perpetuities. 84 Party B argued the common law rule, in this situation, had been eliminated by Kansas’ adoption of the Uniform Statutory Rule Against Perpetuities. Party A responded arguing that the perpetuities statutes were adopted in a bill containing more than one subject in violation of Article 2, Section 16, and therefore the common law rule against perpetuities still applied.

The Court of Appeals was apparently not impressed with Party A’s Article 2, Section 16 argument because it summarily dismissed the argument quoting a few statements from the cases and then concluding:

Here the subject matter of the enactment did not embrace “dissimilar and discordant subjects” but rather embraced a singular purpose: amendment and enactment of certain uniform acts in an attempt to harmonize them with Kansas legislative intent. 85 Joiner of these enactments and amendments of uniform laws in a singular enactment did not offend the constitution, since there was no obvious intent to tie a matter of legislative merit to an unworthy matter. 86

The court’s statement treats “uniform laws” as a unifying subject, and then evaluates the relative merits of the bill to conclude there is nothing “unworthy” about it.

The court’s analysis is in error at two fundamental levels. First, there is nothing about the Article 2, Section 16 limitation that authorizes a court to set itself up as the arbiter of the “worthiness” or “merit” of a legislative enactment. The references to “legislative merit” and an “unworthy matter” relate to the process by which the legislation was assembled, not its content. The process problem is that the merit, or worthiness, of each subject have never been tested by an independent majority vote of the legislature followed by the governor’s approval. Instead, they have been rolled — logrolled — together and voted on as a package where their individual merit, and worthiness, could not be tested. As noted below, had the court examined the process by which the bill giving rise to the perpetuities statutes became law, there was real cause for questioning its “merit” and “worthiness.”

The second error was treating “uniform laws” as a subject. Using the court’s analysis you could combine in a single bill a “uniform” death penalty act, supported by a minority of legislators comprising group A, with a “uniform” unrestricted partial birth abortion act, supported by a minority of legislators comprising group B, and end up with a law comprised of parts which would not, on their own, merit — or be worthy — of passage. These subjects, according to the court in Larson, would not be two “dissimilar and discordant subjects” but instead merely the “enactment of certain uniform acts in an attempt to harmonize them with Kansas legislative intent.” At least in the example given, one might argue the harmonizing concept is “death.” The bill at issue in Larson lacked even that level of harmony among the varied uniform laws.

The court did not consider how Senate Bill No. 624 (SB 624) came to comprise the collection of statutes that would eliminate the bulk sales act, change over a century of perpe-
tuiites analysis, and create a means by which certain property rights can be conveyed to third parties to obtain tax breaks. These three topics, bulk sales laws that protect creditors against fraud, the rule against perpetuities, and a conservation easement program, have nothing in common except their language is derived from various recommended uniform acts put forth by the National Conference of Commissioners on Uniform State Laws, commonly known as the Uniform Law Commission (ULC). The ULC has been preparing uniform laws for consideration by state legislatures since 1892 and has drafted "more than 200 uniform laws on numerous subjects and in various fields of law..." The term "uniform" does not mean with uniform acceptance, or without controversy. For example, of the three "uniform" laws involved in SB 624, to date less than two-thirds of the states have adopted the ULC's perpetuities statutes, less than one-half of the states have adopted the conservation easement statutes, and although most states have repealed Article 6 of the Uniform Commercial Code (UCC) dealing with bulk sales, the ULC found it necessary to develop a revised Article 6 for those states that did not desire to abandon the bulk sales provisions entirely.

The question arises whether these three acts needed to be individually approved by the legislative process, or are they exempt from an independent vote because each act is derived from recommended laws drafted by the ULC? Before answering that question, consider the process by which the components of SB 624 were assembled. On February 11, 1992, SB 624 was introduced as "An act enacting the uniform statutory rule against perpetuities." The Senate passed SB 624 as introduced on March 10, 1992. On May 2, 1992, the House Judiciary Committee recommended SB 624 be amended by adding to it modifications to UCC Articles 1, 2, 6, and 9 to eliminate the bulk sales provisions of the Code. The House passed SB 624, as amended to add the bulk sales provisions, on May 7, 1992. SB 624 was then sent back to the Senate but on May 7, 1992, the Senate did not concur in the amendment proposed by the House and requested a conference committee. The House acceded to the Senate's request. On May 8, 1992, the conference committee again amended SB 624 by adding the conservation easement provisions. This was the content of SB 624 when it was presented to the governor and approved on May 22, 1992.

It apparently took multiple trips through the committee process to come up with a conglomeration of provisions before the bill could work its way through the legislative enactment. It is interesting to note that of the other "uniform laws" addressed by the Kansas Legislature in 1992, each were passed using individual, single act bills. It appears SB 624, in its initial single-subject form, could not get through the committee process. Instead it took a second, and then a third, legislative "subject" to garner the votes to get it out of committee, through the House and Senate, and on the governor's desk. Article 2, Section 16 was designed to prevent this sort of legislative process.

This critique of the Larson case provides a roadmap on the proper way to test a bill for Article 2, Section 16 compliance. If the text of the bill seems to be a patchwork of unrelated topics, the next step is to examine the House and Senate journals to determine how the bill proceeded through the legislative process. Although there may be legitimate reasons for combining topics in a single bill, this legislative process may also indicate logrolling. Although the journals typically do not disclose why bills were combined, it should prompt further inquiry by both sides to collect additional evidence to try and explain the matter. Regardless of whether logrolling in fact took place, if the result is a single bill with "dissimilar and discordant" topics, then it is void under Article 2, Section 16. There is no good faith or inadvertent act exception to the rule because by combining subjects, the merits of each subject, their individual legislative "worth," have never been tested by the legislative process. Despite the Court of Appeals' holding in Larson, if SB 624 is ever reviewed by the Kansas Supreme Court for compliance with Article 2, Section 16, it is possible the common law rule against perpetuities will again exist in its full common law glory.

B. House and Senate rules

Article 2, Section 16 invalidates any "bill" that contains more than one subject or that fails to express the subject in the title of the "bill." Although the reported cases address the validity of the "bill" once it has become law, the issue could, in theory, be addressed at earlier stages of the legislative process. This was acknowledged by the Kansas Supreme Court in Commissioners of Sedgwick County v. Bailey, where the court observed: "if any bill, in any of its stages, should be in conflict with this provision, the legislature should, on or before its final passage, correct it, so as to make it harmonize with said provision, and if the legislature should fail to so correct it, the bill itself, or some portion thereof, would be void." Commentators writing about the one subject and title requirements have focused on the judicial review process to detect legislative violations. Arguably a more productive focus is on providing legislators effective guidance for the law-making process. During the law-making process questionable subject combinations and title descriptions can be identified and corrected to ensure Article 2, Section 16 issues are avoided. The machinery to focus on these issues already exists in the Rules of the Kansas House of Representatives and the Rules of the Kansas Senate. For example, parallel provisions exist in the House and Senate Rules requiring that amendments to bills "shall be germane to the subject of the bill ..." The House Rule goes on to define "germaneness" stating: "The principal test of whether an amendment is germane shall be its relationship to the subject of the bill or resolution, rather than to wording of the title thereof." The Senate Rule states: "the fact that an amendment is to a section in the same chapter of the Kansas Statutes Annotated as an existing section in the bill shall not automatically render the amendment germane." The House Rule further explains germaneness stating: "The amendment ... must be relevant, appropriate, and have some relation to or involve the same subject as the bill or resolution to be amended." The House Rule contains a specific procedure that allows members to raise the germaneness issue by providing: "Any member, upon recognition by the presiding officer, may request a ruling upon the germaneness of any amendment to a bill or resolution." When the Senate adopts amendments to a House bill which materially changes the subject, House Rule 2107 requires the bill to again be vetted through the House committee process.
The House and Senate rules address germaneness when an “amendment” to a bill is offered. Frequently this is where the trading process is first revealed; but it is not the only way the one subject requirement can be violated. The original bill, as introduced, may contain multiple subjects which are never amended but nevertheless can violate Article 2, Section 16. Committee chairs should routinely evaluate bills under their control to determine whether they are susceptible to being construed to contain more than one subject and whether the title of the bill appropriately describes its contents.

C. Attorney general opinions

The first indication of an Article 2, Section 16 problem may be an attorney general opinion. For example, in Opinion No. 2009-2, the attorney general concluded that the 2008 omnibus appropriations bill contained three riders that violated both the single-subject and title requirements of Article 2, Section 16. In 2007, the attorney general found that combining an amendment to the School District Finance and Quality Performance Act with an appropriation measure was improper and concluded the non-appropriation measure was void. Another rider to an appropriations bill was questioned by the attorney general in Opinion No. 2005-1.

The attorney general has also addressed multiple-subject issues in non-appropriation bills. For example, in Opinion No. 83-59, the attorney general found that a bill violated the one-subject rule because what started out as a bill dealing with collection of taxes from nonresidents was amended during the legislative process to add language creating an oil and gas severance tax program. The opinion discusses the House and Senate Rules on germaneness, noting that no issue of germaneness was raised in the legislative process. The opinion also rejects the suggestion that the two subjects in the amended bill, one dealing with the collection of delinquent taxes from nonresidents and the other with a severance tax on oil and gas, can be properly united under the generic label “taxation” to survive an Article 2, Section 16 challenge.

In Opinion No. 92-52, the attorney general concluded that a bill regulating abortion was properly combined with the topic of criminal trespass because the trespass related to obstructing access to medical facilities. The provision amending the criminal trespass statute was therefore “germane to the broadly encompassing subject of health care and regulation of abortion.” The opinion also notes that the bill was introduced with the criminal trespass provisions and was not the product of an amendment during the legislative process.

Opinion No. 89-90 addressed a closer case where a bill dealing with maintenance of natural gas pipelines was combined with provisions creating the Citizens’ Utility Ratepayer Board (CURB). The attorney general concluded: “Though arguably tenuous, we believe the sections addressing gas pipeline maintenance are germane to those creating a board concerned with the cost of utilities in that both are encompassed under the subject and title ‘relating to public utilities.’”

D. Random observations concerning recent legislative sessions

Recently enacted bills reveal potential Article 2, Section 16 problems. For example, Senate Bill No. 150 (SB 150), titled “AN ACT concerning cities; relating to certain municipalities,” was enacted into law during the 2011 Legislative Session. The bill arguably addresses three subjects: incorporation of cities, annexation by cities, and an exemption from the “lowest and best bid” requirement when a board of county commissioners declares an “emergency.” The legislative history reveals that SB 150 began as a single-subject bill when it was introduced on February 8, 2011. The Senate passed SB 150, which addressed incorporation of a city, on February 23, 2011. The title of the bill stated it was “relating to incorporation.” The House added provisions concerning annexation, which were previously contained in a separate bill, House Bill No. 2066. The new title for the two-subject bill stated was “relating to boundaries.” When the Senate nonconcurred with the amendments made by the House, SB 150 was sent to conference committee where it picked up a third subject, which had been the focus of another separate bill, Senate Bill No 40, regarding county bidding procedures. The title, in turn, became even more generic: “relating to certain municipalities.” The bill was enacted into law in this form on May 25, 2011. The shifting titles of the amended bills tell the story: from “incorporation” to “boundaries” to “municipalities.” The title of SB 150 became more generic as it stretched to encompass more subjects.

One of the most problematic recent enactments took place during the 2009 Legislative Session as the governor and legislators struggled to cut a deal over the construction of a coal-fired power plant. The May 4, 2009 settlement agreement between the Sunflower Electric Power Corporation and the governor became part of the “laws” of Kansas. The logrolling resembled a poker game as “renewable energy standards,” “net metering” requirements, and other energy programs were traded for limits on state-imposed air pollution standards that could otherwise be more stringent than requirements under the federal Clean Air Act. For good measure the bill also included special utility rate provisions and required use of a stated percentage of “Kansas coal” in “new coal-fired electricity generating facility.” All of these provisions were collected under the generic title: “AN ACT concerning energy; relating to conservation and electric generation, transmission and efficiency and air emissions ...” It is likely many of these “subjects” would not have been enacted had they not been presented as part of the “big deal.” Depending upon your perspective, this is logrolling at either its “best” or “worst.”

VIII. Conclusions

From the lawyer’s perspective, the Kansas practitioner will be the key to ensuring Kansas legislators are faithfully complying with the one-subject and title requirements of Article 2, Section 16. Every lawyer working with Kansas statutes has the incentive to determine whether they were enacted in compliance with Article 2, Section 16.

From the legislators’ perspective, if they feel strongly about a bill, and want it to work, then they should protect the process by which it is enacted to ensure it is not open to invalidation in a subsequent Article 2, Section 16 challenge. Of course, if the legislators’ main goal is to satisfy a pesky constituent by getting something — anything — passed, with-
out really caring about its ultimate validity, the legislator can package all the pesky-constituent legislation into a single bill and then, when it is invalidated by the courts, blame it on “activist judges.”

From the citizens’ perspective, Kansans expect more from the Kansas Legislature than they do from Congress — a lot more. Article 2, Section 16 is one way of ensuring Kansas legislators, and the governor, make the difficult decisions on a subject-by-subject basis. Saying they had to vote for crappy measure B so the citizenry could have the benefits of laudable measure A may be what we get under our federal Constitution, but it just doesn’t cut it under the Kansas Constitution.

ENDNOTES

1. The complete provision states:
   No bill shall contain more than one subject, except appropriation bills and bills for revision or codification of statutes. The subject of each bill shall be expressed in its title. No law shall be revived or amended, unless the new act contain the entire act revived or the section or sections amended, and the section or sections so amended shall be repealed. The provisions of this section shall be liberally construed to effectuate the acts of the legislature.

Kan. Const. art 2, § 16. Similar one-subject and title provisions are found in the constitutions of 38 other states. See Brannon P. Denning & Brooks R. Smith, Uneasy Riders: The Case for a Truth-In-Legislation Amendment, 1999 Utah L. Rev. 957, 1005 (1999) (collecting the constitutional provisions of each state in a chart found at Appendix A to the article).

2. E.g., Kansas v. Barrett, 27 Kan. 213 (1882) (defendant could not be prosecuted for being intoxicated because title of bill under which the statute was enacted focused on “the manufacture and sale of intoxicating liquors” without any reference in the title to the portion of the bill making it “unlawful for any person to get intoxicated”).


4. State ex rel. Fatter v. Shanahan, 178 Kan. 400, 286 P.2d 742 (1955) (act containing provisions repealing two diverse sets of statutes was void because it addressed two distinct subjects).


7. This is so despite the Kansas Court of Appeals’ attempt to kill and bury the rule in Larson Operating Co. v. Petroleum Inc., 32 Kan. App. 2d 460, 84 P.3d 626 (2004). I predict that if the Article 2, Section 16 issue decided in Larson ever reaches the Kansas Supreme Court, the Kansas Uniform Statutory Rule Against Perpetuities will be voided because it was part of an act which included other subjects. See discussion at § VII.A. of this article.

8. Missouri has similar provisions requiring a similar analysis. For a discussion of the Missouri approach see Alexander R. Knoll, Tipping Point: Missouri Single Subject Provision, 72 Mo. L. Rev. 1387 (2007). Missouri law on the subject is also discussed extensively in Marth J. Dragich, State Constitutional Restrictions on Legislative Procedure: Rethinking the Analysis of Original Purpose, Single Subject, and Clear Title Challenges, 38 Harvard J. on Legis. 103 (2001). Missouri also applies similar single-subject and clear-title requirements to its statewide initiative procedure. For example, in United Gamefowl Breeders Ass’n of Missouri v. Nixon, 19 S.W.3d 137 (Mo. 2000), the Missouri Supreme Court, en banc, considered a challenge to Proposition A, adopted by the citizens of Missouri, which outlawed cock fighting and man-bear fighting (yes, that’s right, man-bear fighting). Id. at 138. Proposition A’s challengers asserted it addressed more than one subject: fights between animals (subject #1) and fights between an animal and man (subject #2). The court concluded only one subject was involved: prohibition of fighting “involving animals for the purpose of amusement, entertainment, wagering, or gain.” Id. at 140. Is it some sort of social commentary that the Missouri Legislature was not able to outlaw man-bear fighting so the matter had to be submitted to the citizens of Missouri in the form of an initiative petition? “Man-bear fighting” should not be confused with Al Gore, climate change, and the elusive “Man-Bear-Pig” of South Park fame. For a discussion of the one-subject rule as applied to statewide initiatives, see Rachael Downey, Michelle Hargrove, Vanessa Locklin, A Survey of the Single Subject Rule as Applied to Statewide Initiatives, 13 J. Contemp. Legal Issues 579 (2004).


[The prevention of a matter of legislative merit from being tied to an unworthy matter, the prevention of hodge-podge or logrolling legislation, the prevention of surreptitious legislation, and the lessening of improper influences which may result from intermixing objects of legislation in the same act which have no relation to each other.


10. Kan. Const. art 2, § 14(b). Section 14(b) provides, in part: “If any bill presented to the governor contains several items of appropriation of money, one or more of such items may be disapproved by the governor while the other portion of the bill is approved by the governor.”

11. Article 2, Section 16 expressly excepts “appropriation bills” from the one-subject limitation.


13. Gov. Carlin stated in his veto message: “I have grave concerns about being asked to accept a substantive and potentially harmful change in the School District Equalization Act simply because the Legislature sandwiched the policy change between a host of appropriation matters necessary to the State.” State ex rel. Stephan, 230 Kan. at 254, 631 P.2d at 671.

14. Id. at 256-58; 631 P.2d at 672-73.

15. “Good government” is in quotation marks because, in reality, what the citizenry seeks is “better” government recognizing that “government” is more of a necessity as opposed to something that is “good” or “bad.” It is revealing that within the Kansas Bill of Rights, the concluding basic right is § 20 which states: “This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people.” (Emphasis added). This recognizes there is no such thing as “good” government in a free capitalist society, but rather only “necessity” government. The basic right to a limited government in Kansas is parallel with that of other enumerated rights under the Kansas Bill of Rights, such as: “life, liberty, and the pursuit of happiness” (§ 1), the “right to bear arms” (§ 4), the right to “trial by jury” (§ 5), the prohibition of “slavery” (§ 6), and “the right to worship God according to the dictates of conscience” (§ 7). Section 20 of the Bill of Rights recognizes that the pursuit of basic individual rights can only be accomplished through a properly limited government. Provisions, such as Article 2, Section 16, are designed to ensure that the limited government is “better” government for the people of Kansas.

About the Author

David Pierce is a professor at Washburn University School of Law in Topeka, where he teaches Property, Oil & Gas Law, Advanced Oil & Gas Law, and Energy Regulation. He is also a Research Fellow with Washburn’s Center for Law and Government. Pierce received his Bachelor of Arts degree from Pittsburg State University, a Juris Doctor from Washburn University School of Law, and a Master of Laws (LL.M., Energy Law) from the University of Utah College of Law.
Legal Article: Void Enactments ...
58. Id.
60. 65 Kan. 60, 62, 68 P.1067, 1068 (1902).
62. Id.
64. Many cases, however, support a broad description when it is, in fact, descriptive of the contents of the bill. For example, in Hiett v. Brier, 2 Kan. App. 2d 610, 618, 586 P.2d 55, 62 (1978), “AN ACT relating to elections” was sufficient to describe a bill that dealt with many different election-related subjects.
65. For example, in City of Concordia v. Hagaman, 1 Kan. App. 35, 37, 41 P.133, 133 (1895), the body of the statute applied to “all officers holding and exercising any office of trust or profit under, and by virtue of, any law of the state.” The title, however, stated: “An act to restrain state and county officers from speculating in their offices.” Id. (Emphasis added). The issue was whether the statute could apply to a “city” officer. Although the body of the act was broad enough to cover city officers, it was constitutionally constrained by Article 2, Section 16, and thereby limited, to state and county officers. Id.
67. Id. at 218, 1882 WL 874 at *2.
68. 13 Kan. 600, 609-10 (1874). The court noted: The title of the act is not broad enough to include assessment or taxation of any kind. Of course, the legislature could have passed a bill under a title broad enough to include all that is contained in said sections 5 and 6, and such bill would have been valid; but they did not do it. Who would think of looking for any kind of assessment or taxation under such a title as that prefixed to said chapter 97 of the Laws of 1872? And who would think of finding under such a title an arbitrary rule of assessment and taxation, differing in almost every particular from the general rule established for the other counties in the state?
69. Id. at 610.
70. 230 Kan. 252, 258, 631 P.2d 668, 673 (1981). The voided non-appointment measure would have amended K.S.A. 72-7055. The bill also contained a provision repealing K.S.A. 72-7055. In voiding the amending provision the Court also held the Legislature would not have repealed 72-7055 were it not to be replaced with the voided provision. Therefore, the portion of the bill repealing 72-7055 was also void and 72-7055, as it existed prior to the bill, remained unchanged. Id. at 258-59, 631 P.2d at 673-74.
73. Id. at 745, 22 P.2d at 939.
74. Id. at 745, 22 P.2d at 940.
75. Id. at 746, 22 P.2d at 940.
76. Id. at 748, 22 P.2d at 941.
77. Id.
78. Id. at 749, 22 P.2d at 942.
80. Id. at 144, 612 P.2d 179.
83. No review by the Kansas Supreme Court was sought in the case. The party raising the Article 2, Section 16 issue essentially obtained the relief it required when the Court of Appeals reversed the district court’s finding that the purchaser of the property at issue was not a bona fide purchaser. Larson, 32 Kan. App. 2d at 469, 84 P.3d at 632. The Kansas Supreme Court has not had an opportunity to evaluate the validity of the bill and the laws enacted under the bill.
84. A preferential right to purchase, also known as a “pre-emptive right,” requires that if an owner of property desires to sell burdened property to a third party, they must first offer the property to the holder of the right on the same terms offered by the third party. If the rule against perpetuities is applied to the pre-emptive right, it can invalidate the right because it is viewed as creating a right in property when and if the owner decides to sell it. Unless there is some limit on the duration of the right, such as a person’s life, or a numerical limitation that requires the sale to occur within 21 years from the date the interest was created, the interest is void. At the time the document creating the pre-emptive right took effect, it could not be said, with certainty, that the owner of the property would sell it, and trigger the right, within 21 years. See generally Gore v. Boren, 245 Kan. 418, 867 P.2d 330 (1994). The court in Larson properly noted that the Kansas Uniform Statutory Rule Against Perpetuities would remove the preferential right at issue from any sort of perpetuities limitation. Larson, Kan. App. 2d at 469-70, 84 P.3d at 633.
85. What does the phrase “attempt to harmonize them with Kansas legislative intent” mean?
86. Larson, 32 Kan. App. 2d at 471, 84 P.3d at 633-34.
91. To demonstrate they indeed possess individual “merit” and are “worthy” legislation.
92. It should be noted that even a self-contained “uniform” law on the subject of traffic has been found by the Kansas Supreme Court to contain more than one subject and therefore violate Article 2, Section 16. Cashin v. State Highway Comm’n, 137 Kan. 744, 747-48, 22 P.2d 939, 940-41 (1933) (Uniform Motor Vehicle Operators’ and Chauffeurs’ License Act).
93. Journal of the Kansas Senate, 1992 Legislative Session 1211 [hereinafter Senate Journal].
94. Senate Journal, supra note 93, at 1389.
96. House Journal, supra note 95, at 2689.
97. Senate Journal, supra note 93, at 2354.
98. House Journal, supra note 95, at 2708.
99. Id. at 2810; Senate Journal, supra note 93, at 2496.
100. Senate Journal, supra note 93, at 2568.
102. Using “uniform laws” as a generic subject to save SB 624 is even less convincing than the generic subjects of “crimes” and “repeal” that have been previously rejected by the Kansas Supreme Court. State ex rel. Stephan v. Thiesen, 228 Kan. 136, 143, 612 P.2d 172, 179 (1980) (these are two separate subjects which cannot lawfully be united under the broad title “crimes.”); State ex rel. Fattzer v. Shanahan, 178 Kan. 400, 404, 286 P.2d 742, 745 (1955) (rejecting argument that “repeal” can be a uniting subject).
103. 13 Kan. 600, 1873 WL 760 (1874).
104. Id. at 609.


108. Senate Rule, supra note 106, at 16 (Rule 44(1)).


110. Id. The issue can also be addressed under House Rule 2105(b) which provides for “a request to divide a motion to amend a bill” that can include a request for a ruling on the germaneness of the motion to amend. House Rule, supra note 106, at 21 (Rule 2105(b)).


115. Id.


117. Id.


119. Id.

120. 30 Kan. Reg. 679 (June 2, 2011).


124. Id.

125. Conference Report, supra note 123, at 6-150. The contents of House Bill No. 2066, concerning taxation of land within a fire district annexed by a city, were also added to SB 150 by the conference committee. Id.

126. Id.

127. Id.


130. 2009 Kan. Sess. Laws 1402 (rate provisions) and 1409 (Kansas coal provisions).

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Taking Care of Business
**FACTS:** In a letter dated May 16, 2011, addressed to the Clerk of the Appellate Courts, respondent Mark P. Tilford, of Corpus Christi, Texas, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2010 Kan. Ct. R. Annot. 362). At the time the respondent surrendered his license, an investigation was pending on a complaint in accordance with Supreme Court Rule 211 (2010 Kan. Ct. R. Annot. 327). The complaint concerns allegations of misconduct that respondent violated Kansas Rule of Professional Conduct 8.4(b) (2010 Kan. Ct. R. Annot. 362). At the time the respondent surrendered his license, an investigation was pending on a complaint in accordance with Supreme Court Rule 211 (2010 Kan. Ct. R. Annot. 327). The complaint concerns allegations of misconduct that respondent violated Kansas Rule of Professional Conduct 8.4(b) (2010 Kan. Ct. R. Annot. 362).

**HELD:** Court, having examined the files of the office of the disciplinary administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred. Tilford is disbarred from the practice of law in Kansas, and his license and privilege to practice law are revoked.

**ATTORNEY DISCIPLINE**

**ORDER OF REINSTATEMENT**

**IN ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 102,925 – MAY 2, 2011**

**FACTS:** On November 25, 2009, Court suspended the respondent, Kevin Peter Shepherd, from the practice of law in Kansas for a period of three years. On November 30, 2010, Shepherd filed a motion to suspend the imposition of the remaining two years of suspension. In the response, the disciplinary administrator acknowledged that the respondent fully complied with the orders in the Court’s November 25, 2009, opinion. The disciplinary administrator approved the respondent’s plan of probation and did not object to the respondent’s request to be placed on probation.

**HELD:** Court granted Shepherd’s motion to suspend the remaining two years of suspension from the practice of law in Kansas and placed him on probation with the following terms and conditions: continued therapy and medication; limitation of practice to domestic relations, criminal defense including driver’s license suspension and drug tax; supervision by Terry Beck; audits by practice supervisor every six months; appropriate office management; continuation of cooperation with disciplinary administrator; maintain professional liability insurance; and no violations of the Kansas Rules of Professional Conduct.

**ORDER OF DISBARMENT**

**IN ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 15713 – JUNE 3, 2011**

**FACTS:** In a letter dated May 16, 2011, addressed to the Clerk of the Appellate Courts, respondent Mark P. Tilford, of Corpus Christi, Texas, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2010 Kan. Ct. R. Annot. 362). At the time the respondent surrendered his license, an investigation was pending on a complaint in accordance with Supreme Court Rule 211 (2010 Kan. Ct. R. Annot. 327). The complaint concerns allegations of misconduct that respondent violated Kansas Rule of Professional Conduct 8.4(b) (2010 Kan. Ct. R. Annot. 362). At the time the respondent surrendered his license, an investigation was pending on a complaint in accordance with Supreme Court Rule 211 (2010 Kan. Ct. R. Annot. 327). The complaint concerns allegations of misconduct that respondent violated Kansas Rule of Professional Conduct 8.4(b) (2010 Kan. Ct. R. Annot. 362).

**HELD:** Court, having examined the files of the office of the disciplinary administrator, found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred. Tilford is disbarred from the practice of law in Kansas, and his license and privilege to practice law are revoked.

**SUPREME COURT**

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**INDEFINITE SUSPENSION**

**IN ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 105,492 – JUNE 3, 2011**

**FACTS:** This is an original attorney discipline proceeding filed by the office of the disciplinary administrator against the respondent, Jimmie A. Vanderbilt, of Baldwin City, an attorney admitted to the practice of law in Kansas in 1995. Respondent eventually signed a stipulation of facts with the disciplinary administrator’s office. The proceedings against Vanderbilt resulted from his failure to pay child support and his representation of two criminal matters where he failed to appear at hearings because he was incarcerated because of child support issues. Vanderbilt was in arrears for child support in an amount more than $75,000.

**DISCIPLINARY ADMINISTRATOR:** The disciplinary administrator recommended that Vanderbilt be indefinitely suspended. If definitely suspended, the disciplinary administrator recommended that Vanderbilt purge himself of the contempt of court prior to reinstatement.

**HEARING PANEL:** A panel of the Kansas Board for Discipline of Attorneys held a hearing on the complaint and determined that respondent violated KRPC 8.4(a) (2010 Kan. Ct. R. Annot. 603) (misconduct); 8.4(d) (engaging in conduct prejudicial to the administration of justice); 8.4(g) (engaging in any other conduct that adversely reflects on the lawyer’s fitness to practice law); and Kansas Supreme Court Rule 211(b) (2010 Kan. Ct. R. Annot. 327) (failure to file timely answer in disciplinary proceeding).

**HELD:** Court held the evidence established the charged misconduct of Vanderbilt by clear and convincing evidence and supported the panel’s conclusions. A majority of the Court agreed that indefinite suspension is appropriate, with reinstatement conditioned upon respondent purging himself of the contempt that is the subject of the proceedings. A minority of the Court would disbar Vanderbilt.

**CIVIL**

**HABEAS CORPUS**

**ALBRIGHT V. STATE**

**KINGMAN DISTRICT COURT**

**COURT OF APPEALS – REVERSED AND REMANDED**

**NO. 102,454 – MAY 20, 2011**

**FACTS:** Albright’s first-degree murder conviction and hard 40 life sentence were affirmed in direct appeal, 283 Kan. 418 (2007). He filed K.S.A. 60-1507 motion alleging ineffective assistance of trial counsel. District court appointed counsel and denied the 1507 motion. Albright sought out of time appeal, arguing his untimely filing
was excused by ineffective assistance of appointed 1507 counsel in failing to file a notice of appeal. District court appointed counsel to represent Albright at State v. Ortiz, 230 Kan. 733 (1982), hearing, and approved an agreed order to allow the appeal out of time. Court of Appeals dismissed the appeal for lack of jurisdiction as untimely filed. Supreme Court granted Albright’s petition for review.

ISSUE: Out of time 60-1507 appeal and ineffective assistance of appointed 60-1507 counsel


STATUTES: K.S.A. 20-3018(c); K.S.A. 22-3210(a)(2), -3424(f), -4505, -4506(b), -4522(e)(4); and K.S.A. 60-1507, -2103(a)

HABEAS CORPUS
HOLMES V. STATE
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 100,666 – JUNE 10, 2011

FACTS: Holmes received hard 40 sentence on first-degree murder conviction that was reversed and remanded for a new trial because of prosecutorial misconduct. State v. Holmes, 272 Kan. 491 (2001) (Holmes I). Second jury convicted him of same offense. Supreme Court affirmed the conviction but vacated hard 40 sentence and remanded for resentencing because insufficient evidence of aggravating circumstances to support that sentence. State v. Holmes, 278 Kan. 603 (2004) (Holmes II). Hard 25 sentence imposed on remand affirmed in unpublished opinion. Holmes then filed post-conviction motion under K.S.A. 60-1507 on allegations including ineffective assistance of appellate counsel in Holmes II. District court denied the motion without an evidentiary hearing. Holmes appealed on three allegations of ineffective assistance of appellate counsel in Holmes II. Court of Appeals affirmed in unpublished opinion (Holmes III). Review granted on two points presented to Court of Appeals.

ISSUES: (1) Appellate counsel’s failure to challenge effectiveness of trial counsel and (2) appellate counsel’s failure to include videotape and transcript in record on appeal

HELD: Under facts in case, performance prong of Strickland not satisfied by trial counsel’s use of alternative guilt and nonguilt theories of defense. Because trial counsel employed a justifiable strategy, Holmes’ appellate counsel was not ineffective for failing to challenge that sound strategy on direct appeal. Language in Holmes II is examined and clarified. Under facts, district court erred in dismissing, without an evidentiary hearing, Holmes’ 1507 claim that appellate counsel was ineffective in failing to include videotape and transcript in record on appeal. Remanded to district court for evidentiary hearing.

STATUTES: K.S.A. 21-3018(b), -3211; and K.S.A. 60-401(b), -455, -1507

KANSAS RECREATIONAL TRAILS ACT
AND PRE-EMPTION
MIAMI COUNTY BOARD OF COMMISSIONERS V.
KANZA RAIL-TRAILS CONSERVANCY INC. ET AL.
MIAMI DISTRICT COURT – AFFIRMED
NO. 101,811 – JUNE 10, 2011

FACTS: Missouri Pacific Railroad Co. sought to abandon a portion of the railroad right-of-way near Osage City. Missouri Pacific
there is no evidence suggesting that the KRTA is intended to accommodate local, nonpublic competitors. The district court found that the KRTA does not provide a benefit to local competitors or burden interstate entities in ways it does not burden local, nonpublic competitors — voiced similar complaints to the Legislature. However, arguments concerning a preemption based on the commerce clause.

The court rejected Kanza’s arguments concerning a preemption based on the commerce clause. Court held that while there could be circumstances where the state regulation and the establishment of a bond amount would be so onerous that it would conflict with the Trails Act, that situation was not presented in this case. Court concluded that the requirement does not preclude the interim trail use or the ability to reactivate rail service in the future and, therefore, does not stand as an obstacle to accomplishing the objectives of the Trails Act. Court rejected Kanza’s arguments concerning a preemption based on the commerce clause.

Court held the bond requirement and the setting of the bond amount at $9,040 did not create a conflict with the Trails Act. Court held that KRTA’s requirement that a bond or escrow account be available to assure fulfillment of a trail operator’s statutory duties is related to the legitimate regulation of the use of the rail-trails and are an appropriate exercise of the state’s authority to control safety, land use, and zoning related to rail-trails, an authority that is not expressly or impliedly pre-empted by the Trails Act. Court also held that while there could be circumstances where the state regulation and the establishment of a bond amount would be so onerous that it would conflict with the Trails Act, that situation was not presented in this case. Court concluded that the requirement does not preclude the interim trail use or the ability to reactivate rail service in the future and, therefore, does not stand as an obstacle to accomplishing the objectives of the Trails Act. Court rejected Kanza’s arguments concerning a preemption based on the commerce clause.

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contract with the first purchaser. The district court erred in granting summary judgment to Oil Company on the conservation fee issue and reversed on that claim.

STATUTES: K.S.A. 20-3018; K.S.A. 55-150, -176; and K.S.A. 79-4216, -4217, -4220

PAROLE

LOUIE R. MARTIN V. KANSAS PAROLE BOARD
LEAVENWORTH DISTRICT COURT – REVERSED
NO. 103,371 – JUNE 10, 2011

FACTS: On February 13, 2008, when Louie R. Martin was released on post-release supervision, he was given an expiration of post-release supervision date of June 29, 2009. Shortly after his release, the Kansas Legislature passed an amendment to K.S.A. 21-4608, which impacted Martin’s previously imposed post-release expiration date by extending it nearly 11 years. After the enactment of the 2008 amendment to K.S.A. 21-4608, the Kansas Parole Board (Parole Board) informed Martin that his new post-incarceration supervision discharge date was April 13, 2020. Martin filed a petition seeking a writ of habeas corpus, which was denied by the district court.

ISSUE: Parole

HELD: Court stated that an increase in the period of parole or post-release supervision constitutes an increase in punishment for ex post facto purposes, because the period of parole or post-release supervision is undeniably part of the sentence imposed. Court concluded that as applied to an inmate who was released on post-release supervision and given a correctly calculated certificate of release prior to the 2008 amendment to K.S.A. 21-4608(e)(2), the amendment is ex post facto because it is retrospective and in this case increases the term of post-release supervision. Court held that Martin’s original post-release supervision expiration date was effective.

STATUTE: K.S.A. 21-3414, -4608, -4704; and K.S.A. 22-3722

RETALIATORY DISCHARGE AND KANSAS WAGE PAYMENT ACT
CAMPBELL V. HUSKY HOGS LLC
PHILLIPS DISTRICT COURT – REVERSED
AND REMANDED
NO. 103,458 – MAY 20, 2011

FACTS: Campbell was an at-will employee with Husky Hogs LLC, for about one year when he filed a complaint with the Kansas Department of Labor (KDOL) alleging Husky Hogs was not paying him as required by the KWPA. Campbell was fired one business day after KDOL acknowledged receiving his claim. Campbell filed this lawsuit in Phillips County District Court alleging Husky Hogs terminated him for pursuing his statutory rights under the KWPA. Husky Hogs denied the allegation. The company also filed a K.S.A. 60-212(b)(6) motion for judgment on the pleadings. The district court granted Husky Hogs’ motion. It held Campbell’s termination did not violate Kansas public policy, even though it was required to assume the discharge resulted from filing the disputed wage claim. And the district court sua sponte determined that even if Campbell had stated a valid common-law retaliatory discharge claim, it was supplanted by the KWPA because that Act provides Campbell an adequate substitute remedy.

ISSUES: (1) Retaliatory discharge and (2) KWPA

HELD: Court held the KWPA embeds within its provisions a public policy of protecting wage earners’ rights to their unpaid wages and benefits. And just as in common-law retaliatory discharge claim when an injured worker is terminated for exercising rights under the Workers Compensation Act, Court found such a cause of action is necessary when an employer fires a worker who seeks to exercise KWPA rights by filing a wage claim. To do otherwise would seriously undermine the public policy and the protections afforded by the KWPA. Court held the allegations stated by Campbell were sufficient to avoid a motion to dismiss. Court also held the KWPA is not an adequate substitute remedy for Campbell’s common-law retaliatory discharge claim.

STATUTE: K.S.A. 20-3018; K.S.A. 44-313, -315, -319, -321, -322, -322a, -325, -501, -603, -615, -628, -701, -1009; and K.S.A. 60-212(b)

CRIMINAL

STATE V. BRICKER
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 99,394 – JUNE 3, 2010

FACTS: Pursuant to agreement recommending sentencing to “Labette Bootcamp Probation,” Bricker entered guilty plea to charges including felony offense of aggravated battery. District court imposed 36-month sentence on that felony charge. Bricker later sought to withdraw his plea, alleging counsel was ineffective in failing to learn that Bricker was ineligible for Labette. District court denied the motion, finding no manifest injustice to allow withdrawal of plea. Court of Appeals affirmed in unpublished opinion.

ISSUE: Post-sentence motion to withdraw plea

HELD: Implication in State v. Aguilar, 290 Kan. 506 (2010), is now plainly expressed. A post-sentence motion to withdraw a plea under K.S.A. 22-3210(d) alleging ineffective assistance of counsel due to deficient performance must satisfy Strickland standards. No manifest injustice demonstrated to justify withdrawal of Bricker’s plea under circumstances of this case. Defense counsel’s failure to familiarize himself with factual admission criteria of Labette Correctional Conservation Camp and to advise Bricker of those facts

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before the plea bargain was not sufficient to meet the Strickland performance prong. Also, defense counsel’s failure to advise Bricker that he could file a presentence motion to withdraw his plea was insufficient to warrant post-sentence withdrawal of the plea, and no showing of prejudice.

STATUTES: K.S.A. 2010 Supp. 22-3210(d), -3210(d)(1), -3210(d)(2); K.S.A. 22-3210(d)(2); K.S.A. 81567, -1567(a)(1); K.S.A. 20-3018(b); K.S.A. 21-3414(a)(2)(A), -3414(b), -4603d, -4608(d), -4720(a); K.S.A. 22-3210(d), -3220; and K.S.A. 40-3104(d), -3104(g)

STATE V. FLORES
FORD DISTRICT COURT – AFFIRMED
NO. 104,099 – JUNE 3, 2011

FACTS: Flores certified to be tried as an adult was convicted on no contest plea to first-degree felony murder and attempted voluntary manslaughter. Consecutive sentences affirmed on direct appeal. 268 Kan. 657 (2000). Second appeal affirmed the denial of motion to correct an illegal sentence. 283 Kan. 380 (2007). Flores then filed motion to withdraw plea, claiming in part the district court lacked subject matter jurisdiction because felony murder with underlying felony of attempted voluntary manslaughter is not a crime. District court denied the motion, finding Flores pled to a nonexistent crime, but received a beneficial plea agreement and entered a knowing and voluntary plea. Flores appealed, conceding he received a “beneficial plea agreement” but contending he pled to a nonexistent crime because K.S.A. 31-3436 (Furse 1995) does not include attempted voluntary manslaughter as an inherently dangerous felony.

ISSUE: Felony murder and K.S.A. 21-3436(a) (Furse 1995)

HELD: District court reached the correct result for a different reason. Claim that Flores pled to a nonexistent crime is rejected. Under circumstances, the amended information charged Flores with felony murder of one person based on underlying felony of attempted voluntary manslaughter of another person. Thus the underlying felony to which Flores pled was distinct from and not an ingredient of the homicide alleged to be the killing under K.S.A. 21-3401(b).

STATUTES: K.S.A. Supp. 22-3210(d), -3210(d)(2); K.S.A. 21-3401(b); K.S.A. 22-3504, -3601b(1); K.S.A. 21-3301(a), -3401(b), -3436, -3436(a), -3436(b), -3436(b)(3); and K.S.A. 381636(l) (Furse 1995)

STATE V. LEE
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 102,004 – JUNE 10, 2011

FACTS: Lee’s neighbor died from heart attack while being attacked by Lee’s dog. Lee convicted of involuntary manslaughter with underlying misdemeanor of violating municipal ordinance against keeping, harboring, or owning a pit bull within city limits. Mistrial declared when jury unable to reach verdict; Lee convicted in second trial. District court denied Lee’s motion for new trial or for judgment notwithstanding the verdict. Lee appealed claiming the municipal ordinance is unconstitutionally vague. Lee also claimed district court erred in: denying Lee’s motion to continue trial to retain DNA expert; giving Allen-type instruction to jury prior to their deliberations; admitting autopsy photographs of victim into evidence; failing to rule on merits of Lee’s motion for new trial alleging ineffective assistance of trial counsel; and using criminal history without requiring it to be proven to jury beyond a reasonable doubt.

ISSUES: (1) Constitutionality of municipal pit bull ordinance, (2) motion to continue trial, (3) Allen-type jury instruction, (4) admission of photographs, (5) motion for new trial, and (6) sentencing

HELD: No merit to Lee’s claim that the municipal ordinance is unconstitutionally vague. Similar ordinance in Hearn v. City of Overland Park, 244 Kan. 638 (1989), is compared. Given Hearn, the common meaning of term “predominately” as used in the ordinance, and existence of physical characteristics that make breed of dogs recognizable upon visual observation by owner, veterinarian, or breeder, court concludes as matter of law the ordinance sufficiently conveys a definite warning and fair notice of the proscribed conduct and adequately guards against arbitrary and discriminatory enforcement.

No error in trial court’s denial of the continuance Lee sought to retain expert to explain state’s dog breed DNA test results. Evidence that dog fell within purview of the ordinance was substantial. No real possibility the jury would have rendered a different verdict if trial error in giving Allen-type instruction prior to jury’s deliberation had not occurred.

Photographs depicting victim’s injuries were relevant to show dog attack was severe enough to produce sufficient stress on victim’s heart to cause her death. Although photographs were gruesome, a reasonable person could have found probative value of the photographs outweighed the potential for undue prejudice.

No appellate jurisdiction to consider Lee’s allegations of ineffective assistance of trial counsel where district court lacked authority to consider Lee’s untimely motion for new trial.

Sentencing claim is defeated by controlling Supreme Court precedent.

STATUTES: K.S.A. 21-3404; K.S.A. 22-3401, -3414(3), -3501; and K.S.A. 60-401(b)
CIVIL

ADVERSE POSSESSION
WRIGHT V. SOURK
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 102,627 – MAY 6, 2011

FACTS: Wrights filed action against Sourk to quiet title to 22.5 boundary strip of land Wrights believed belonged to them. Sourk counterclaimed for removal of encroaching structures and damages for trespass. Jury verdict for Wrights, finding Wrights adversely possessed the property for more than 15 years under good-faith belief in ownership. Sourk appealed, claiming jury's verdict was inconsistent with its answers to special questions, and claiming lack of instruction on tolling resulted in jury error in determining the 15-year period. Sourk also claimed trial court error in (a) refusing to instruct jury regarding establishing new boundary line, constructive knowledge of property line pursuant to legal effect of filing deed, theory of acquiescence or implied agreement, and burden of proof; and (b) instructing the jury with definition of adverse possession that included a theory abandoned by the parties.

ISSUES: (1) Adverse possession, (2) tolling, and (3) jury instructions

HELD: Under facts of case, jury's finding of adverse possession was not inconsistent with answers to special questions, and sufficient evidence supported the jury's verdict. No clear error in jury's determination of 15-year period. All jury instruction claims examined and found to be without merit or harmless error.

STATUTES: K.S.A. 2010 Supp. 60-251(d)(2)(1); K.S.A. 58-2222; and K.S.A. 60-251(b), -503, -503(a), -503(b)

DIVORCE AND MODIFICATION OF CHILD SUPPORT
IN RE MARRIAGE OF JONES
JOHNSON DISTRICT COURT – AFFIRMED
NO. 104,147 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED DECEMBER 23, 2010

FACTS: Shortly after Stacy K. Jones and Matthew Brandon Jones were divorced, Matthew filed a motion to modify his child support obligation. The parties apparently agreed that the original child support order had been set too high, but they argued over what the effective date of the modification should be. The district court con-
ducted a hearing on the motion more than a year after it was filed. In sustaining the motion, the court ordered that the modification be effective back to a date several weeks following the filing of the motion. Stacy appealed the retroactive portion of the order arguing that Matthew failed to file a domestic relations affidavit (DRA) or child support worksheet with the motion, and the modification order could not be retroactive to more than one month following the date that both the DRA and worksheet were filed.

ISSUES: (1) Divorce and (2) modification of child support

HELD: Court held the language of K.S.A. 60-1610(a)(1) that allows for retroactive application of a child support modification back to 1 month after the filing of the motion to modify is clear, unambiguous, and straightforward. It says nothing about what information the motion must contain or what documents must accompany the motion before that retroactive application can take place. Court also held the delay in filing the domestic relations affidavit and the child support worksheet required by Supreme Court Rule 139(f) and (g) until sometime after a party files a motion for a modification of child support does not affect the fact the court may make the modification effective back to one month after the filing of the motion alone under K.S.A. 60-1610(a)(1). Court affirmed, concluding that nothing in the statutes or Supreme Court Rules cited by Stacy require that the motion be deemed filed only after the DRA and worksheet have been filed.

STATUTE: K.S.A. 60-1610

DUI

KATZ V. KANSAS DEPARTMENT OF REVENUE
DOUGLAS DISTRICT COURT – REVERSED
AND REMANDED WITH DIRECTIONS
NO. 103,667 – MAY 6, 2011

FACTS: In 2007, Bryce J. Katz was involved in an early morning automobile accident outside a Lawrence bar. A short time later, he was arrested for driving a motor vehicle while under the influence of alcohol. After his arrest, he failed an Intoxilyzer 5000 breath alcohol test and was informed by the Kansas Department of Revenue (KDR) that his driving privileges would be suspended. In 2008, at the conclusion of an evidentiary hearing, an administrative hearing officer for KDR suspended Katz’ driving privileges. Katz appealed to the district court which reversed the suspension order and reinstated his driving privileges. The district court found the test result of 0.203 alcohol concentration did not reflect the amount of alcohol in Katz’ breath at the time he was operating his motor vehicle. Rather, the district court found that Katz “consumed copious amounts of alcohol after driving,” but before the test, which resulted in the test failure. The district court held KDR’s suspension order was not supported by substantial evidence, was unreasonable, arbitrary, and capricious, involved an erroneous interpretation or application of law, and violated substantive due process of law.

ISSUE: DUI

HELD: Court disagreed with the district court and held that at the time the officer developed reasonable grounds to believe that Katz had operated his motor vehicle while under the influence of alcohol, the officer had no reason to believe any post-driving alcohol consumption had occurred. To the contrary, in addition to the brief time period (one hour and 15 minutes) which occurred between the accident and Officer Elliott’s personal observations of Katz’s intoxicated condition, Katz’s repeated statements to the officer denying post-driving alcohol use provided substantial competent evidence to support the officer’s reasonable belief that Katz had operated his vehicle while under the influence of alcohol. Court also rejected Katz’s constitutional argument. Court found no apparent violation of Katz’s substantive due process rights. Katz failed to identify a fundamental liberty interest at issue and KDR’s action was not
unreasonable, arbitrary, or capricious — let alone an abuse of administrative power which shocks the conscience of the Court. KDR dutifully applied the Kansas statutes to the evidence and suspended Katz’s driving privileges.

STATUTES: K.S.A. 8-1001, -1002(f), -1013(h), -1014, -1020(h) (2), (k), (p), (q); and K.S.A. 77-601, -621

KANSAS CONSUMER PROTECTION ACT AND REAL ESTATE

SCHNEIDER V. LIBERTY ASSET MANAGEMENT
SEDGWICK DISTRICT COURT – REVERSED
NO. 104,361 – MAY 27, 2011

FACTS: Liberty purchases residential property redemption rights. Liberty hired Allegiant GMAC to market a house Liberty had rehabbed. The listed statement included all the upgrades, but also indicated a new roof, which was false. Through a realtor, Schneider purchased the rehabbed house. The roof began leaking several months after the purchase. Schneider sued Liberty for deceptive acts in violation of the Kansas Consumer Protection Act (KCPA). After a trial, the district court found that Liberty did not intentionally deceive Schneider. However it found that the listing statement describing a new roof was inaccurate and constituted a deceptive act for which Liberty was liable. The trial court also found that Schneider was an aggrieved party as a result of the deceptive act and ordered Liberty to pay her $2,000 in civil penalties and $2,000 in attorney fees.

ISSUES: (1) KCPA and (2) real estate

HELD: Court stated that under the KCPA there is no requirement that a consumer has been misled by the deceptive act in order to claim relief under the KCPA. Generally, a consumer may not bring a private action under the KCPA unless the consumer can prove that the seller has aggrieved the consumer. To be aggrieved under the statute, the consumer must prove that the seller’s act has adversely affected the consumer’s legal rights. Additionally, the consumer must show that there was a causal connection between the deceptive act and the claimed injury. Court held that because Liberty listed the house as having a new roof, there is substantial evidence to support the trial court’s finding that the listing statement was a deceptive act. However, court held that Schneider cannot show that her damage was related to the misrepresentation. Schneider’s inspection disclosed the age of the roof and was an intervening event between her seeing the MLS listing and her purchase of the house. Schneider can show no harm to her as a result of the deceptive MLS listing and, therefore, she is not an aggrieved party. The trial court’s determination that she was an aggrieved party is not supported by substantial competent evidence. The judgment against Liberty is reversed.

STATUTE: K.S.A. 50-623, -625, -626, -627

KANSAS HEALTH POLICY AUTHORITY AND OUT-OF-STATE SERVICES

STINEMETZ V. KANSAS HEALTH POLICY AUTHORITY
GRAHAM DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 105,366 – MAY 4, 2011

FACTS: Mary D. Stinemetz, a Kansas citizen and a practicing Jehovah’s Witness, needs a liver transplant, yet her religious beliefs prohibit blood transfusions. Because Stinemetz is a beneficiary of the Kansas Medical Assistance Program (Medicaid), she requested prior authorization from the Kansas Health Policy Authority (KHPA) for an out-of-state liver transplant. The available evidence indicates that the bloodless technique is less expensive than a procedure involving blood transfusions. There is no medical facility in Kansas that performs bloodless liver transplants, but the Nebraska Medical Center in Omaha is willing to perform the surgery. There

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is no question that the KHPA would authorize a liver transplant for Stinemetz in Kansas, including a bloodless liver transplant if a medical facility was available in Kansas to perform the technique. However, the KHPA denied Stinemetz’s request for prior authorization for out-of-state services on the ground that her religious preference did not constitute a medical necessity. The district court affirmed the KHPA’s denial of prior authorization. Stinemetz appeals, asserting that the denial violated her rights under the Free Exercise Clause of the First Amendment to the United States Constitution and § 7 of the Kansas Constitution Bill of Rights.

ISSUES: (1) KHPA and (2) out-of-state services

HELD: Court held that after considering all the evidence, the KHPA’s decision to deny Stinemetz’s request for prior authorization for an out-of-state liver transplant was arbitrary, even without considering Stinemetz’s rights under the Free Exercise Clause of the First Amendment. When Stinemetz’s rights under the First Amendment are considered, the result is clear. Court concluded that the KHPA’s denial of Stinemetz’s request for prior authorization for the out-of-state liver transplant violated her rights under the Free Exercise Clause of the First Amendment to the U.S. Constitution and the greater protection of § 7 of the Kansas Constitution Bill of Rights.

STATUTES: K.S.A. 39-708c; K.S.A. 75-7409, -7413, -7414; and K.S.A. 77-601, -618, -621(a), (c)

LOTTERIES

THREE KINGS HOLDINGS LLC V. SIX
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 103,457 – JUNE 10, 2011

FACTS: Owners of Three Kings invented Kandu Challenge, a modified poker type card game. State officials issued cease and desist letter to stop operation of the game. Three Kings filed action for declaratory judgment and injunctive relief to bar application of gambling restrictions. Finding chance rather than skill the dominating determinative factor of the game, district court held Kandu Challenge was an illegal lottery. Three Kings appealed, challenging district court’s application of predominate factor test to a single hand, rather than the intended and actual extended play.

ISSUE: Meaning of “game” in determining lottery

HELD: Issue of first impression whether skill/chance balance analysis should be based on a single hand or on some longer period based on subjective intent of the player. Here, district court correctly analyzed the game on the basis of a single hand. That decision is reviewed as a question of fact rather than one of law. Under facts of case, district court’s finding that Kandu Challenge is a game of chance, hence a lottery, is supported by substantial competent evidence.

STATUTE: K.S.A. 21-4302, -4302(b)

PATERNITY AND NAME CHANGE
STABEL ET AL. V. MEYER
ELLIS DISTRICT COURT – REVERSED

FACTS: Jessika Meyer was dating Christopher Stabel when she became pregnant. On Kamryn’s birth certificate Jessika named Christopher as the father but gave Kamryn her last name — Meyer. Later, Christopher requested that the district court change Kamryn’s last name to Stabel as part of his paternity action filed shortly after Kamryn’s birth under the Kansas Parentage Act (KPA). As the paternity action progressed, Jessika and Christopher were unable to resolve the issue of Kamryn’s last name. The district court ordered them to submit written arguments on that issue. Jessika argued the court lacked statutory authority to change Kamryn’s last name without her consent, but even if the court had such authority, Kamryn’s last name should remain Meyer. Christopher insisted the court had discretion to grant his request based on Kamryn’s best interests. The district court concluded it had authority to change Kamryn’s last name.

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name after it heard evidence to determine if the change was in her best interests. After conducting an evidentiary hearing, the court ordered Kamryn’s last name changed to Stabel.

ISSUES: (1) Paternity and (2) name change

HELD: Court held the KPA provides that when the parents of a minor child desire to change the last name of the child to the last name of either parent, both parents must appear and request the relief. Court stated that a Kansas court’s jurisdiction over a proceeding to change a child’s last name is limited to situations where both parents agree to the request. Court held the statutory provisions of the KPA exclude the possibility of changing the last name of the child over the objection of one of the parents and the district court did not have authority to do change Kamryn's name.

STATUTE: K.S.A. 20-3018; K.S.A. 38-1110, -1121, -1128, -1130; K.S.A. 60-1401, -1610; and K.S.A. 65-2409a

SERVICE AND GOOD CAUSE EXTENSION MANGUS V. STUMP ET AL.
ELLIS DISTRICT COURT – AFFIRMED
NO. 105,040 – JUNE 3, 2011

FACTS: On May 29, 2008, Mangus filed a petition against Stump and Eddy (defendants) alleging medical negligence. The petition claimed the defendants negligently performed a laparoscopic cholecystectomy on Mangus. On April 27, 2009, Mangus' petition was voluntarily dismissed without prejudice. Mangus refiled his petition on October 23, 2009, pursuant to K.S.A. 60-518. On January 19, 2010, Mangus filed a motion for extension of time for good cause to serve process upon defendants under K.S.A. 60-203. On January 20, 2010, the district court issued an ex parte order granting Mangus an additional 30 days to serve the defendants. Thereafter, summons was served upon Stump on February 10, 2010, and upon Eddy on February 12, 2010, within the 30-day extension of time. On March 9, 2010, the defendants filed a motion to dismiss pursuant to K.S.A. 60-212(b)(6) due to the expiration of the statute of limitations and failure of good cause by Mangus. The district court determined that an attempt to serve process prior to requesting an extension of time is not a sine qua non of good cause, but it is one crucial factor to consider. The district court revisited the good-cause issue, and after hearing full argument from each side, the district court found “that good cause did not, in fact, exist at the time the Court signed the Order of Extension.” The district court found there was substantial reason to believe that Mangus’ attorney could have obtained service of process on the defendants before the initial deadline expired, but “she was deprived of that opportunity by relying on the Court’s order.” The district court also found that “resolution of the good cause issue in this case [was] not so obvious that [Mangus’] counsel should have disregarded the Court’s order.” The district court granted an interlocutory appeal.

ISSUES: (1) Service and (2) good cause extension

HELD: Court held this case presented a situation where Mangus relied in good faith on the district court’s order extending the time for service of process, and this reliance played a substantial role in causing Mangus to miss the statute of limitations. There was no dishonesty or negligent misrepresentation by Mangus to the court. The district court carefully weighed the equities and found that application of the unique circumstances doctrine served the interests of justice. Court concluded the district court properly applied the unique circumstances doctrine to the facts of this case to prevent Mangus’ cause of action from being barred by the statute of limitations.

STATUTE: K.S.A. 60-203, -208, -212, -259, -513, -518, -2102(c), -2103(h)

CRIMINAL

STATE V. BANNON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 103,368 – JUNE 17, 2011

FACTS: Pursuant to stipulated facts in diversion agreement, Bannon convicted of DUI and failure to drive within single lane. Sentence included six months in jail. Bannon appealed, claiming as he did in unsuccessful pretrial motions that the agreement was invalid because it omitted reference to waiving his rights to "preliminary
examinations and hearings” and to counsel, and that the evidence from the traffic stop should be suppressed. Bannon appealed.

ISSUES: (1) Validity of diversion agreement and (2) motion to suppress

HELD: State v. Moses, 38 Kan. App. 2d 840 (2007), is discussed and distinguished. Under facts of case, omission of waiver of right to counsel and of preliminary examinations and hearings in Bannon's misdemeanor diversion agreement, although at variance with K.S.A. 22-2909(a), did not invalidate the entire agreement because Bannon exercised his right to counsel at all critical stages of the prosecution, and he had no right under K.S.A. 22-2902 to a preliminary examination in this nonfelony case.

Based on plain language of the diversion agreement, the stipulated facts, and Bannon's admission of guilt to charges in the complaint, there was no error or denial of due process in trial court's refusal to consider Bannon's motion to suppress evidence.

STATUTES: K.S.A. 8-1522, -1567(a), -1567(a)(2); K.S.A. 12-4416, -4416(a); K.S.A. 21-3716(b)(1); K.S.A. 22-2902, -2902(1), -2902(4), -2909, -2909(a), -2909(c); and K.S.A. 60-2105

STATE V. DILLON
SHAWNEE DISTRICT COURT – APPEAL DISMISSED NO. 102,724 – JUNE 17, 2011

FACTS: Court of Appeals vacated Dillon’s sentence, finding district court's refusal to consider relevant factual arguments in support of a deportation sentence violated Dillon's right to due process. About two minutes of a DVD of events at the scene and at the police station were played during trial. On appeal, Everett claimed for first time that district court erred in failing to sua sponte declare a mistrial because DVD sent to jury also included officer’s observations about Everest’s credibility, Everest also claimed insufficient evidence supported his convictions.

ISSUES: (1) Credibility testimony, (2) evidence of DUI, and (3) evidence of obstruction of official duty

HELD: Pure speculation that jury had the means to view, or did view, the DVD beyond the portion played in court. Also, issue not preserved for appeal because no contemporaneous objection to the State v. Elnicki, 279 Kan. 47 (2005), violation alleged by Everest. Under facts of case, sufficient evidence supported Everest’s conviction for DUI.

After State v. Parker, 236 Kan. 353 (1984), the act of providing false identification during the course of a criminal investigation can result in obstruction of official duty under K.S.A. 21-3808, but to be found guilty of that offense it must be shown that the defendant substantially hindered or increased the burden of the officer in carrying out his or her official duty. Under facts of this case, state failed to prove this additional element. Following Parker, Everest’s conviction for obstruction of official duty is reversed.

STATUTES: K.S.A. 21-3808, -3808(a); and K.S.A. 8-1001(I)

STATE V. HAND
SEDGWICK DISTRICT COURT – VACATED AND REMANDED NO. 103,677 – MAY 6, 2011

FACTS: Hand pled guilty to burglary and four thefts in various criminal episodes. Trial court placed him on probation and ordered restitution to victims. In one instance, Hand stole a big screen television. Trial court did not consider value of the television set, but instead ordered Hand to pay the owner’s insurance deductible plus the three-year premium surcharge imposed by the insurance company. Hand appealed, challenging the restitution for the premium surcharge.

ISSUE: Restitution

HELD: Kansas cases addressing restitution issues reviewed, distilling guiding principles. Applied to present case, district court erred as a matter of law in basing restitution order on amount of premium surcharge rather than fair market value of the stolen television. Abuse of discretion to ignore settled legal standards.

DISSENT (Leben, J.): Reads statutory language in K.S.A. 21-4610(d)(1) as sufficient to sustain district court’s restitution order for increased insurance premiums the crime victim must pay.

STATE: K.S.A. 21-4610, -4610(d), -4610(d)(1)

IN RE H.N.
SEDGWICK DISTRICT COURT – AFFIRMED NO. 105,017 – JUNE 10, 2011

FACTS: H.N. was charged as a juvenile with acts that would have constituted one count of felony burglary and two counts of misdemeanor theft if they had been committed by an adult. H.N. was subjected to pretrial detention and he requested a probable cause
determination through a preliminary hearing similar to the hearings required by the adult criminal code. The district court granted the motion for determination of probable cause, but denied the request for a full adversarial preliminary hearing. Instead, the district court conducted a hearing at which H.N. was present with counsel, and the district court determined probable cause based on a sworn affidavit submitted by the state. The district court also allowed H.N. to present evidence at the hearing on the issue of probable cause, but H.N. declined to present any evidence.

ISSUES: (1) Juvenile proceedings and (2) preliminary hearing

HELD: Court stated that in a proceeding under the Revised Kansas Juvenile Justice Code, a juvenile respondent possesses the constitutional right to have a judicial determination of probable cause as a prerequisite to an extended restraint of liberty. However, the pretrial custody probable cause determination need not be accompanied by the full panoply of adversary safeguards. Court held that under the facts of this case, where the district court conducted a hearing to determine probable cause at which the juvenile respondent was present with counsel and the district court reviewed a probable cause affidavit and gave the juvenile respondent the opportunity to present evidence on the issue of probable cause, the district court provided a fair and reliable determination of probable cause as a condition of the juvenile respondent's pretrial restraint of liberty.

STATUTES: K.S.A. 22-2902; K.S.A. 38-2301, -2302, -2354; and K.S.A. 60-460

STATE V. LONG
SEDGWICK DISTRICT COURT – SENTENCE VACATED IN PART
NO. 103,969 – MAY 20, 2011

FACTS: In each of three separate criminal cases in which he was convicted and placed on probation, Long was assessed $100 Board of Indigents’ Defense Services (BIDS) application fee. Motion to revoke probation filed in each case. District court appointed counsel, and assessed $100 BIDS application fee in each case. Long appealed, claiming district court erred in assessing BIDS application fees a second time.

ISSUE: BIDS application fee and probation revocation proceedings

HELD: Authority to assess BIDS application fees derives from K.S.A. 22-4529, and that fee is only mandated in cases where the defendant is entitled to counsel under K.S.A. 22-4503. Because probation revocation is not a stage of the criminal prosecution, a defendant facing probation revocation is entitled to court-appointed counsel under K.S.A. 22-3716(b) rather than K.S.A. 22-4503. Because K.S.A. 22-3716(b) is not cited in K.S.A. 22-4529, defendants facing probation revocation proceedings who apply for court-appointed counsel are not required to pay BIDS application fee. Portion of Long's sentence requiring payment of a second BIDS application fee in each case is vacated.

STATUTE: K.S.A. 22-3716, -3716(b), -4503(a), -4529

STATE V. ORLOSKE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 103,379 – JUNE 10, 2011

FACTS: Jason E. Orloske contends it was torture when, in an attempt to get him to spit out the drugs he had hidden in his mouth, a police officer bent Orloske over the hood of a patrol car, placed his hands on Orloske's throat, and kneed him twice in the thigh. In Orloske's view, the trial court should have suppressed the drugs he had coughed up. After hearing all the evidence, the trial court overruled Orloske's objection to the admission of the baggy. The court explained that before the stop, Orloske was in a vehicle parked at a known drug house; after the stop, the officers saw a glass pipe being tossed from the passenger window. The court held that under these circumstances, the drugs were properly admitted.
facts, Butcher was justified in arresting Orloske because a reasonably prudent person would have believed that a drug crime had occurred. The court said that in this case, the preventative measure Butcher took by placing his hands around Orloske’s throat was reasonable because Butcher had observed Orloske’s attempt to swallow the evidence and saw the baggy in his mouth. Orloske was convicted of possession of methamphetamine.

**ISSUE:** Motion to suppress

**HELD:** Court stated that when an officer has probable cause to believe that a criminal offense is being committed in his or her presence, he or she has the right and duty to take reasonable measures to ensure that incriminating evidence is not destroyed, and the officer may use reasonable force to subdue the suspect and prevent the suspect from swallowing the evidence. Court held the two strikes by the deputy’s knee to Orloske’s thigh, causing no bruising and therefore, no apparent injury, are similar to the actions taken by the officers in other cases held to be permissible action. Consequently, the actions were not shocking or unreasonable.

**STATUTE:** K.S.A. 65-4160

**STATE V. PERRY-COUTCHER**

**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED**

**NO. 104,222 – MAY 6, 2011**

**FACTS:** Perry-Coutcher convicted of attempted possession of opiates. Sentence included completion of a community corrections drug treatment program pursuant to K.S.A. 21-4729. Perry-Coutcher appealed, challenging district court’s authority for that order where she was convicted of attempted possession of opiates. State acknowledged district court erred in requiring drug treatment under 21-4729, but argued it was within district court’s discretion to place Perry-Coutcher in a community corrections alcohol and drug treatment program.

**ISSUES:** (1) Mandatory drug treatment and K.S.A. 21-4729, and (2) community corrections treatment program

**HELD:** A conviction for an attempt to commit a crime under K.S.A. 21-3301 is not covered in K.S.A. 21-4729. District court thus erred in ordering Perry-Coutcher to complete mandatory drug treatment under K.S.A. 21-4729.

Issue raised for first time on appeal is considered as to whether drug treatment ordered was within district court’s discretion to require community corrections treatment program. Because Perry-Coutcher did not satisfy criteria in K.S.A. 2007 Supp. 75-5291 for placement in community corrections, district court had no discretionary authority to sentence her to any community corrections treatment program. Reversed and remanded for resentencing.

**STATUTES:** K.S.A. 2007 Supp. 65-4160, -4610(a), -4610(b), -4162; K.S.A. 75-5291, -5291(a)(2)(E); K.S.A. 20-346a; and K.S.A. 21-3301, -4603d(a)(4), -4603d(a)(7), -4603d(a)(11), -4610(a), -4610(b), -4610(c), -4705(a), -4729

**STATE V. RALSTON**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 103,358 – JUNE 10, 2011**

**FACTS:** Ralston was passenger in stolen vehicle that crashed during police pursuit. When Ralston encountered officer, Ralston was walking from crash site, denied involvement in the car, and denied possession of purse retrieved by officer to help with identification. Ralston charged with possession of methamphetamine found in the purse. District court overruled Ralston’s motion to suppress that evidence. Ralston appealed her conviction, challenging district court’s finding that she had abandoned her purse. State argued on appeal that Ralston lacked standing to challenge the search.

**ISSUES:** (1) Abandonment of purse and (2) passenger in stolen vehicle

**HELD:** Under circumstances of case, Ralston’s expectation of privacy in the purse was not objectively reasonable. She thus lacked standing to challenge the search. Holding in State v. Wickliffe, 16 Kan. App. 2d 424 (1992), that a thief acquires no legitimate ownership or possessory interest in a stolen vehicle, is extended to a passenger in a stolen vehicle if the passenger was aware the vehicle was stolen. Under facts of case, Ralston failed to show she was unaware the vehicle was stolen. She thus lacked standing to challenge search of the vehicle or any item seized from the stolen vehicle.

**STATUTE:** K.S.A. 65-4160(a)

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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
Kansas Law Center, Topeka

Features the 2011 Kansas Annual Survey as seminar materials.

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

Friday, August 19, 12:30 – 4:10 p.m.
The Relevance of Civil Rights Video Replay
Kansas Law Center, Topeka

SEPTEMBER

Friday, September 9, 9 a.m. – 3:30 p.m.
Insurance Institute*
Kansas Law Center, Topeka

Wednesday, September 21, Noon – 1 p.m.
Padilla v. Kentucky Update*
Speaker: Michael Sharma-Crawford,
Sharma-Crawford Attorneys at Law LLC,
Kansas City, Mo.
Telephone seminar

Thursday, September 22, Noon – 1 p.m.
Immigration and Criminal Consequences*
Speaker: Michael Sharma-Crawford,
Sharma-Crawford Attorneys at Law LLC,
Kansas City, Mo.
Telephone seminar

Friday, September 23, 9 – 3:30 p.m.
Construction Law Update*
Ramada Inn, Salina

Thursday, September 29, 1:30 – 2:45 p.m.
Applying Practical “Steps as You Prep” to Appear Before the High Court*
Wichita Bar Association, Wichita

Friday, September 30, 9 – 11:45 a.m.
Outdoor Recreational Law CLE and Clay Shoot*
Flint Oak Resort, Fall River

Lunch and clay shoot following.

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