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The Greatest Generation of Kansas Lawyers: Part II
By Matthew Keenan
Taking a Tour Once Again

Even if you’re on the right track, you’ll get run over if you just sit there.
– Will Rogers

We are very fortunate that our Association is financially healthy and that our membership is strong. I applaud our members and the staff of the Association for this accomplishment, particularly at a time when sister voluntary bar associations are seeing a decline in membership. Our Association offers members many benefits, such as CasemakerElite; access to health, life, and disability insurance through ISI Insurance Specialists; Lawyer Referral Services, free Journal advertising; and many discounts on goods and services. That said, we continue to look for ways to provide members with an exceptional value for the price of a membership.

Toward that end, the Association now has six of our sections live on listserves. This gives section members a “virtual” partner to discuss ideas and issues. The listserves are live for Young Lawyers; Immigration Law; Law Practice Management; Agricultural Law; Construction Law; and Oil, Gas & Mineral Law. Before year end, I expect all sections to be up and running on listserves. On September 14, we will be meeting with our Section presidents and our Committee chairs in Topeka to start the “best practices” program, where we will try to figure out what Section members value and how the Association can deliver what members want from their Section membership.

In August, we were far from sitting still on the right track; our Association continued meeting with local and specialty bars. The Kingman County Bar Association was kind enough to invite Jeff Alderman and me out for their monthly meeting. Traditionally, the bar met at Jeri’s Kitchen, but it burned down last December and was reopening the day of my visit. So, Ron Mason was waiting for us when we arrived at the Kingman Country Club (really nice new clubhouse with a new restaurant). It was wonderful to meet Bob Wunsch, Matt Ricke, Mandi Stephenson (a recent Wichita transplant), Curt Watkins, Greg Graffman, Frank Meisenheimer, and Ted Geisert. It was also good to see Judge Solomon again. I am advised that the Kingman bar will begin meeting again at Jeri’s in September; stop by for lunch if you are in Kingman for civil docket day.

Then onto Marion County where Rep. Bob Brookens and his law partner Keith Collett hosted 40 or so of their closest friends and colleagues for a few hours of CLE, golf, and steaks. Judge Powers’ assistant, Anita, had the whole event firmly in hand. Thanks Anita! Judge Powers was there, as were Judges Hornbaker, Platt, Segarra, and Sexton. Marion County also invites colleagues from Harvey and McPherson counties, and a few find their way from Geary and Chase coun-

Kansas Bar Association’s meetings with local bar associations.
ties. Bob Wise was there from McPherson, as was Joe Robb from Newton. And importantly, I finally got to meet the legendary Charlie Rayl from Cottonwood Falls, who arrived to shouts of “the dean is here!” Jack Bender was there from Halstead. Jack, a Washburn Law graduate, who still has his cane from his third year of law school (you will have to ask a Washburn Law graduate) took all of his law classes in trailers, on campus, as a result of the 1966 F5 tornado that tore through Topeka.

Jeff Alderman and I visited the Geary County bar and had lunch with Andrea Patrick, Roger Unruh, Eric Stahl, Paul Shipp, Krista Blaisdell, Ralph DeZago, Mike McKone, Keen Umbeh, and Linda Barnes at the Tyme Out Lounge. I know you will be shocked, but these lawyers had some strong opinions about the Blue Ribbon Commission and potential court consolidation.

Meanwhile, Lee Smithyman (our president-elect), Jeff Alderman, and Joe Molina met with the Hispanic Bar Association in Kansas City (HBA). Lee reports that “there was a remarkable diversity of Kansas and Missouri practices in the group.” The president of the HBA, Gabe Zorogastua, and President-Elect Maria Salcedo both attended, as well as 14 others. The group discussed an academic immigration study presently being completed by Dr. Peter Eton, of Kansas University, and Joshua Rosenblum, of Kansas State University. HBA expects that the study will relate to several immigration bills, which will be considered by next year’s legislature.

Eric Rosenblad, governor for District 3, Jeff Alderman and Joe Molina attended a CLE and social event in Erie, where about 60 judges and lawyers gathered. Among those attending were Tim Grillot, Angela Meyer, and Fred Spigarelli.

Finally, Lee Smithyman tells me that congratulations are in order for Fritz Edmunds Jr., who received the Don Miller Award from the Johnson County Bar Association. Chief Judge Vratil and Larry Gates presented the award. Congratulations Fritz! I understand that there were two standing ovations at the presentation. More to come next month my friends and colleagues …

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.
I’ll admit it, becoming an attorney was one of the last things on my mind when I was in high school. I think I was too busy building my CD collection and working hard to be the skinny kid to make the varsity basketball and golf teams. Mock trial was not on my radar. In fact, there wasn’t even a mock trial program at my small rural Kansas high school. Maybe if mock trial had been available to me when I was in high school, I would have participated and had a jump start on what was to become my career as a lawyer.

Through the efforts of the KBA Young Lawyers Section, every year hundreds of high school students across the state are getting the chance to participate in mock trial. The KBA YLS organizes and runs the annual statewide Kansas High School Mock Trial Tournament. This is by far one of the biggest and most important programs of the KBA YLS.

For those of you unfamiliar with mock trial, it is a program and competition designed to provide high school students with an opportunity to learn the skills, procedures, and law involved in a jury trial setting. Teams consisting of typically six students prepare a case for trial, including providing the attorneys and witness. Teams are given a specific case problem to prepare. A unique part of mock trial is that each student team prepares to try the case as the prosecution or the defense, and will compete against other teams in each role within the course of one tournament. The ultimate goal of the mock trial program is to promote a better understanding of the legal process and to inspire a future generation of attorneys.

The Kansas High School Mock Trial Tournament consists of a weekend of regional tournaments, which is then followed several weeks later by a state championship tournament for teams who qualify from the regional tournaments. Presently, there are two regional tournaments, one in Wichita and one in Olathe.

Last year, I participated in my first mock trial tournament by volunteering for the Olathe regional. As a volunteer, I had the opportunity to judge, score, and assist with running the tournament. Consequently, I had the chance to watch a couple of rounds of the tournament, and I was blown away by the trial skills demonstrated by the high school students. Many of the students demonstrated a working knowledge of not only the rules of evidence, but also the strategy involved in trial practice. If I meet one of these students in the court room 10 years from now, I may be in trouble. The skills they demonstrated were fantastic.

While there have been only two regional tournaments in the past, we hope to grow the tournament into at least one more regional, if not more, in the near future. That’s where all attorneys across the state come in. The KBA YLS needs your help to continue to expand the mock trial program. Volunteering to coach a mock trial team, or to be a judge at a mock trial tournament, is a great way to have a positive impact on young people in the state. On top of that, you will enjoy and be thoroughly impressed watching how skilled high school-aged people can be in the courtroom. I know I was. So, please take a moment and consider how you can help with the Kansas mock trial tournament. Is there a high school in your area that you think could have interest in starting a team that you could coach? Do you have any high school-aged children that would be interested in getting involved in mock trial? Could you spare one or two weekends this year to volunteer to be a judge at one of the mock trial tournaments?

The KBA YLS needs your help to grow the Kansas mock trial program, to give more high school students the chance to compete in mock trial, and to learn the skills required for trial practice. This program is not only important for those high school students who want to become attorneys, but it also develops respect and understanding of the legal system for those students who go into different professions and helps develop confidence, speaking skills, and critical thinking that is required in all careers.

Last year, the mock trial program was directed by the KBA YLS mock trial liaison, Jenny Michaels. Jenny did a fantastic job with the program, and she has graciously volunteered to run the program again this year. If you’re interested in learning more about the Kansas mock trial tournament, or if you want to volunteer or start a team, please contact Jenny at kansasmocktrial@gmail.com or contact me directly at (785) 232-7761 or at vcox@fisherpatterson.com.

**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.
The State of Kansas Courts

By Chief Justice Lawton Nuss, Kansas Supreme Court

I n the October 2010 issue of the Journal of the Kansas Bar Association, I wrote to inform you about the lengthy project the Supreme Court was undertaking. One component of this endeavor called “Project Pegasus” is a Court-appointed Blue Ribbon Commission tasked with reviewing the operations of the Kansas Judicial Branch and making recommendations for possible changes. The other component is Kansas’ first-ever weighted caseload study to assist the Court in measuring the actual workloads in all district courts as accurately as possible. On behalf of my fellow justices, I am pleased to now update you on the progress of Project Pegasus since my article.

Blue Ribbon Commission

In November, the month after my Journal article, the Supreme Court began to form the Blue Ribbon Commission by inviting then-Gov. Mark Parkinson, Gov.-elect Sam Brownback, President of the Senate Steve Morris, and Speaker of the House Mike O’Neal to appoint one member each to the Commission. The Court next invited local bar associations and professional organizations to nominate members. We received a nominee list of more than 150 talented Kansans from 63 nominating entities. Between the elected officials’ 4 appointments, and those of the Court, 25 hardworking Kansans now serve on the Commission. We took care to make the appointments representative of a variety of backgrounds and leadership positions. Judge Patrick McAnany of the Kansas Court of Appeals agreed to serve as Commission chair, and Professor Jeff Jackson of Washburn University School of Law agreed to serve as reporter. (The names of Commission members are contained in the shaded box.)

The Blue Ribbon Commission held its first meeting on March 9 where I presented the Commission’s charge. Its members are to review the operations of the Kansas state courts; discuss with the Supreme Court justices their view of issues confronting the Judicial Branch, including technology, structure, records, administrative supervision, financing, and workload of judicial and nonjudicial personnel; visit communities around the state and discuss with interested groups the impact of the courts on those communities; and ultimately make recommendations in a report to the Court.

Per the Commission’s charge, it conducted information-gathering meetings in 18 cities around the state. Each city had two meetings, with Topeka hosting four. One meeting was for invited guests such as county officials, attorneys, domestic violence prevention groups, and others who are frequently involved with the courts. The second meeting was open to the general public.

The Commission’s first community meeting was held in Norton on April 18; the last was held in Topeka on June 6. Every meeting was guided by a panel of three Commission members while notes were taken by a member of the staff of the Kansas Judicial Branch. The many ideas and sentiments expressed at the meetings – some conventional, some not – were consolidated in minutes that are available for viewing at the Commission’s website: www.kscourts.org/Judicial-Branch-Review/Blue_Ribbon_Commission/default.asp

In addition to the Commission members serving on three-person panels to guide these community meetings, they also divided into three work groups to study different issues in the Kansas court system. One work group, chaired by Judge Meryl Wilson, of Manhattan, considers structure; the second group, chaired by Senator Jeffrey King, of Independence, considers finance; and the third group, chaired by Finney County Attorney John Wheeler, considers technology and processes. Each of these groups met several times this summer and fall in order to eventually submit recommendations for the full Commission’s consideration.

The full Commission met a second time on July 13 to study the preliminary recommendations from the three work groups and the preliminary results from the weighted caseload study described below. The full Commission met a third time on September 28 and will further meet this fall and winter. Experienced professionals from the National Center for State Courts have been assisting the Commission in all of the members’ efforts, and staff from the Office of Judicial Administration has been responding to the Commission’s numerous requests for additional information.

Per the Commission’s charge, it will present its final report to the Supreme Court in early January 2012. Based upon the Commission’s recommendations, the Court will look at possible improvements in various aspects of the Kansas court system. Should any of the Court’s eventual plans require legislation, we intend for them to be presented to the legislature in sufficient time for its action during the 2012 session.

Weighted Caseload Study

Pegasus’ second component is the weighted caseload study. This essentially means that all district judges and district magistrate judges, as well as many nonjudicial staff members, tracked how their working hours were spent, according to case types and task types, by entering their time into an online database.

I am pleased to inform you that the professionals from the National Center who guided the study were very impressed with our Kansas judges and staff. They gave a number of reasons, but I will share just two. First, while nearly all of the 33 other states conducting weighted caseload studies have been satisfied with one data collection period, our judges and

www.ksbar.org
staff agreed to perform in two such periods: one in January-February and one in April-May. Second, while most states working with the National Center have been pleased to obtain participation rates that are typically in the 90 percent range, 100 percent of Kansas judges in the district courts participated. Additionally, more than 99 percent of the staff in district court clerks’ offices participated.

Kansas judges and staff performed this extra work at such high participatory rates because they wanted the most accurate results possible. Accordingly, I believe Kansas may have the most reliable data on weighted caseloads in the history of the National Center. I consider this a real tribute to your local judges and their staffs as well as a demonstration of the Kansas work ethic.

Based upon this data, the National Center produced reports for analysis by the Judicial Needs Assessment Committee (composed of 14 Kansas judges) and the Staffing Needs Assessment Committee (composed of 14 staff members). These two committees have met numerous times with the National Center’s experts to thoroughly evaluate the data, to consider a variety of potentially influencing factors, and to receive input from judges and staff across the state.

As mentioned, these committees shared their preliminary results with the Blue Ribbon Commission this summer. The committees’ completed report, containing their best efforts at weighting the caseloads, will be presented to the Commission for its consideration by November 1. The weighted caseloads eventually will assist the Court in allocating human resources and other assets in the Kansas Judicial Branch.

Additional Studies

In addition to the weighted caseload study, judges and staff were asked to complete an online “adequacy of time” survey. The survey asked the participants to assess whether sufficient time was allowed for the various tasks they were asked to perform. These survey results were then provided to the two needs assessment committees to help determine case weights. After all, if the raw data from the caseload survey was accurate, but the adequacy of time survey revealed that people had insufficient time to satisfactorily perform their recorded functions, then adjustments would need to be made. The National Center professionals were again extremely pleased with the high rate of Kansas participation.

Summary

As I wrote in last October’s *Journal* article, economics is not the Supreme Court’s sole consideration as we look at possible improvements in the Kansas court system and for ways to make better use of taxpayer money. We also consider Kansans’ access to justice and will work hard to ensure it. I additionally wrote, and again emphasize, that the Court has no preconceived ideas on what, if any, changes should be made to Kansas courts. But throughout Project Pegasus the Court has been committed to the principle that if changes are made, it is essential they be the right changes. Kansans deserve no less.
PRIVILEGE, POWER, AND RESPONSIBILITY

By Daniel H. Diepenbrock, Law Office of Daniel H. Diepenbrock P.A., Liberal, Kansas Bar Foundation president, dhd@diepenbrockpa.com

I hold every man a debtor to his profession; from the which, as men of course do seek to receive countenance and profit, so ought they of duty to endeavor themselves, by way of amended, to be help and ornament thereto.
– Sir Francis Bacon

Over the years, I often have paused to reflect upon the value of my law school education. I have come to the conclusion that a law degree, diligently sought and obtained, prepares one to do just about anything he or she should choose, except perform surgery. Think about it.

Consider how many executives, including CEOs of corporations, large, small and medium size, are lawyers. Think about the range of college courses a juris doctorate degree qualifies one to teach: business law, of course, but also any course in an administration of justice program, constitutional law, not to mention basic business and tax courses.

Financial planner, stockbroker, hospital administrator, city manager, or county administrator, any position in administration in higher education: law degree, I would argue, supremely qualifies a person to fill and succeed at any one of these professions. With these many opportunities – and many more I’m sure I failed to list – what a privilege it is to be a recipient of a law school education.

With privilege, there is responsibility.

For those of us who choose to practice law, what power and authority a license to practice law bestows upon us. Of course, we can appear in court or file a pleading on behalf of another person – no one else is empowered to do that. Having the ability and authority to file a lawsuit and appear and argue in court is a significant privilege.

But the authority to issue a subpoena is on another level completely. As a licensed attorney, I can sit at my desk and either type out, or dictate for my secretary to type, a document that will compel another man, woman, or corporation to appear at a certain place, at a designated time, and submit him or herself to questions I may have. In addition, I can request a person to bring documents, including tax returns or other financial records, correspondence, or various other papers or things, for my review.

With power and authority, there is responsibility.

There never has been a time that I was not inspired about becoming, or being a lawyer. From the time I sat in my first class at KU Law School, I knew I was embarking on an education and a career that a relative few are privileged to experience. While in law school, my wife worked at the engineering school, so most mornings she and I would drive to campus together and park in the permit lot just west of Learned Hall. I would walk across the street to Green Hall and enter through the main entrance. Every morning, as I walked through those doors, I would look up and see the big bronze letters “LAW,” and it would give me a rush – still does.

As I write this, a new crop of law graduates are anxiously and eagerly awaiting the results of the bar exam. By the time this is published, several hundred new lawyers will have passed the bar, taken the oath of office, and commenced practicing law in our state, equipped with the power and authority I described above.

There is no shortage of advice for young lawyers. The best I’ve read, however, is a letter a lawyer from McKinney, Texas, wrote to his son, who at the time was in his last year of law school. In the letter, Roland Boyd set out 21 steps to succeeding as a lawyer. When several fellow lawyers saw the letter, they prevailed upon Boyd to allow it to be published in the Texas Bar Journal. Boyd agreed, and the letter appeared in the November 1962 issue. Each one of the 21 steps is a priceless piece of advice for a lawyer, young or not so young. If I could pick one to live by, however, it would be Step No. 17:

17. Remember, to live for your 50th birthday.

Soon after I graduated and opened my office, one of the service clubs had as guest speaker an evangelist who was holding a revival in a big tent on the trade lot. In

(Con’t. on Page 16)
Thinking Ethics

Avoiding Client Ethics Complaints by Communicating Properly and Acting Diligently

By Stanton A. Hazlett, Office of the Disciplinary Administrator, Topeka, hazletts@kscourts.org

The Office of the Disciplinary Administrator receives approximately 1,000 complaints against lawyers every year. About 60 percent of those complaints are filed by clients of the attorney. A substantial percentage of those complaints will contain an allegation that a lawyer has not communicated properly, has not acted diligently, or has failed in both respects. Clients have little tolerance for a lawyer who does not return phone calls or perform tasks in a timely fashion. KRPCs 1.3 (diligence) and 1.4 (communications) set out a lawyer's obligations to a client in these two areas. These two rules are the rules most often violated by Kansas lawyers.

Lawyers can take steps to reduce the possibility of a complaint being filed against them for lack of diligence and communication by following a few simple tips. This guidance is not foolproof. Our experience has shown that difficult or distressed clients often file non-meritorious complaints no matter how attentive the lawyer has been.

KRPC 1.3 states that a lawyer shall “act with reasonable diligence and promptness in representing a client.” The comment to KRPC 1.3 states the following:

Perhaps no professional shortcoming is more widely resented than procrastination. A client's interests often can be adversely affected by the passage of time, by the change of conditions; in extreme instances as when a lawyer overlooks a statute of limitations, the client's legal position may be destroyed. Even when the client's interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer's trustworthiness.

Clients retain lawyers to solve a dilemma for them. Unreasonable delay causes anxiety for the client. If there is not an appropriate explanation for the delay then the client is likely to terminate the services of the lawyer and in many instances file a complaint with the Office of the Disciplinary Administrator. If there is not sufficient time to handle a case for a client, decline the representation. If something comes up during the representation which causes a delay, be certain to explain immediately why the delay has occurred. Clients are generally understanding and will accept a legitimate explanation from the lawyer for why there has been a delay. What a client does not understand and what leads to the filing of a complaint is when a delay occurs in the case and the lawyer does not explain why the case is not proceeding.

KRPC 1.4 requires that a lawyer keep a client reasonably informed about the status of the matter and to promptly comply with requests by the client for information. Further, the rule requires that a lawyer explain the case to the client adequately to permit the client to make informed decisions regarding the representation. The comment to the rule explains that a client should have sufficient information so that the client may participate intelligently in decisions concerning the objectives of the representation and by the means by which the objectives are to be pursued. Keep clients happy by responding to communications from them within 24 hours and providing clients with copies of correspondence and pleadings.

In 2007, the ABA Journal published an article titled, “Top Ten Ethics Traps.” In that article, Susan Martyn addressed the issue of failing to communicate with clients. Martyn is a professor at the University of Toledo College of Law, and she is a member of the ABA Standing Committee on Ethics and Professional Responsibility. Martyn advised that lawyers have the duty to initiate communications on six occasions:

1. When the client needs to consent about the objective of the representation, such as the decision to settle or appeal.
2. When the client is asked to waive any fiduciary obligation, such as confidentiality and conflicts of interest.
3. When the client needs to consent about the means to be used to accomplish client objectives, such as whether to litigate, arbitrate or mediate a matter.
4. When clients should be updated on the status of a matter, especially information about developments in the representation itself.
5. When the client requests information.
6. When the client expects assistance the lawyer cannot provide, such as counsel and committing crimes.

Martyn concluded that the duty to communicate with clients is simple enough to understand. She pointed out that the difficult part is carrying out that duty and the many different and often complex circumstances. Obviously, any communication with a client should be memorialized in a fashion so that the lawyer may document and prove his or her compliance with KRPC 1.4.

Attorney discipline cases that generate publicity involve sensational topics, such as lawyer dishonesty, conversion of (Con’t. on Page 16)
Technology and Rural Health

At the same moment our state seems ready to abandon judicial obligations to rural Kansans, the University of Kansas School of Medicine launched an intriguing experiment to support and sustain underserved communities in those same remote areas. The aim of KU’s new medical school in Salina is focused carefully toward attracting and training doctors ready to become part of rural Kansas communities. While aimed at addressing the health of rural Kansans, the school is also poised to aid the ailing health of remote cities and towns. It is an experiment imminently relevant to the question of how – or if – the state should address the judicial needs of rural Kansans.

The Rural Dilemma

KU’s Salina medical school is an accredited, four-year medical school with an incoming class of eight students. (The school will admit eight students per year reaching 32 when fully enrolled.) According to Dr. Heidi Chumley, senior associate dean at KU Medical Center, the Salina campus is the smallest medical school in the country and Salina will be the smallest city in the United States to have a medical school. The school is part of efforts to shore up the ranks of rural physicians including loan forgiveness for graduates committing to practice in rural areas and preferential admission for rural students.

Traditional efforts to boost rural practice have struggled to make a dent. Research indicates urban-trained doctors struggle adjusting to the stripped-down life as a country doctor. Other evidence suggests doctors tend to practice near where they train – especially if they marry and settle into the community while in school. The theory for the Salina school is that moving the school to students who enjoy small town life may provide a more natural means of ensuring small towns have access to a primary care physician. It is a bold experiment worth cheering for all it could mean to rural communities.

The Lawyer Link

So what? There is more than a passing difference between a gavel and a scalpel and medical school is most certainly not a courthouse, law school, or law firm. Regardless, the technology and methods allowing a tiny, eight-student medical campus to sprout on the prairie far away from the “mother ship” school is suitable for medical or judicial goals.

One of the simplest tools deployed at the campus are interactive video links and display equipment connecting students in Salina to lecturers in Kansas City and allowing shared review and manipulation of documents and images. Many courtrooms and law firms already use such tools but generally within the confines of the courthouse. Imagine instead the appeals court available to hear argument from anywhere in the state providing ready and affordable access for rural Kansans. No need even to stop there when cheap tools exist to allow remote hearings – or even bench trials – in district court cases. The nostalgia of hitching your buggy at the courthouse and tipping your Bowler in the flesh is appealing, though no longer always practical.

The Blue Ribbon Commission public meetings certainly seem to suggest broad public support for video and phone conferencing. It is notable, however, that some criticize such tools, suggesting that actual appearance is the only way to judge credibility or establish proper courtroom decorum and authority. There may be something to that as an ideal, but interactive video has been used daily for more than a decade now to facilitate multi-billion dollar business deals across the globe and, more tellingly, to allow military personnel a world away to share the home life they might miss in deployment. Little of a routine day in court is so much more important that it cannot be achieved with cheap, available video conferencing as a means to supplement and shore up rural courts and practices.

Risks of Efficiency

Reproducing some of the rural experiment KU is trying in Salina can be risky for the courts. Many of the critics using alleged judicial inefficiency as a bludgeon to plunder the budget also threaten to use any gained efficiency as proof the courts can be significantly dismantled. That sort of huffing and puffing does not make it easy to go forward, but the way is clear regardless. The health of rural Kansas communities is worthy of serious, technological, and methodological efforts to broaden access to the courts.

About the Author

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

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Spending Hangover

By Chelsea Good, Washburn University School of Law, Topeka

You know that feeling when you wake up and immediately realize you had a few too many glasses of wine the night before? All you want to do is roll over and hope the throbbing headache will magically disappear. Yep, it’s a good, old-fashioned hangover. Well, America has a hangover – a spending hangover to be exact.

If the U.S. government were a family making $55,000 a year, it would be spending $96,500 a year, or 175 percent of its annual income. In 2011, this family would add $41,500 to its current credit card debt of $366,000. That’s according to Dave Ramsey, who kept the proportions of federal budget and debt the same but brought them down to a level more relatable to most individuals.

We live in a debt culture. People have a “charge it today, think about it later” mentality that allows them to bankroll a lifestyle out of line with what they can afford. Unfortunately, I see this same kind or reckless spending with some of my law school classmates.

I’m the first to admit that it is not always fun being a professional student while most of your friends have careers and salaries. I also realize that many law students work between undergraduate and law school, during which time they grow accustomed to a certain standard of living. However, the fact of the matter is, we are students, and our budgets should reflect that fact.

Student loans have to be repaid some day. Responsible uses include things such as tuition, books and reasonable living expenses. Not so responsible uses include buying a new BMW, wearing only designer label clothes bought at full price, or, my personal favorite, the biannual trip to Vegas when financial aid checks are cut each semester. Carrying a balance on one or more credit cards is another bad habit of all too many people, lawyers and law students included.

By shopping around for deals and curtailing discretionary spending, law school debt can be minimized. While this leads to a pretty basic existence in the meantime, I’m sure we’ll thank ourselves in the future. Less debt to pay off means less stress in the long run.

When I bring this up to some of my less-than-thrifty law school friends, they blow it off by telling me they will soon be rich lawyers.

This common response is based on the assumptions that, one, we will all get legal jobs and, two, these jobs will be high-paying employment opportunities.

Neither of these things are a given; just ask the Thomas M. Cooley Law School and New York Law School alums suing in an attempt to expose the universities’ alleged misrepresentation of post-graduation salaries and employment rates.

However, I don’t think it’s appropriate to lay all of the blame on the law schools. A juris doctorate is not a golden ticket to a life of privilege and, honestly, it shouldn’t be. Just as in any other profession, as law school graduates we should have to compete and work hard to obtain and retain jobs.

Nobody is entitled to a job as a lawyer, or any job for that matter, regardless of whether or not he or she attended law school. The economy is in bad shape and the job market for new attorneys is no better. In June, the New York Times published an article reporting the lawyer surplus, state by state. According to calculations by Economic Modeling Specialists Inc., there will be 27,269 more law school graduates than annual openings each year through 2015. Of these, 161 of the surplus lawyers created each year will be in Kansas.

Even those of us who will have the good fortune to gain employment will not necessarily rake in the big bucks. According to U.S. News and World Reports, the median public service starting salaries for Washburn Law and University of Kansas School of Law are $45,000 and $50,000 respectively. Additionally, median private sector salaries for these law schools are $55,000 and $61,000.

Finally, even those who get the high-paying jobs often take their time paying off their debt, choosing instead to raise their standard of living to one that is not in line with their income once again.

Chicago Law professor Todd Henderson came under fire last year after publishing a blog post complaining about struggling make ends meet on $250,000 a year in household income. In between a nanny, private school and a lawn keeper, he argued he and his family were strapped for cash. In reality, most lawyers are dealing with a household income much lower than this amount.

(Con’t. on Page 16)
Privilege, Power, and Responsibility
(Con't. from Page 11)

his talk he said: “I don’t care what your life’s work is; if you are a young man just beginning, I am going to tell you what to expect from life. If from now until your 50th birthday you will make every decision in your business or profession in such a way as you think helps society, from your 50th birthday on, for the balance of your life, the pleasure you get from your life’s work will double every 12 months. On the other hand, if your decisions are against society, your disappointments and your miseries will double every 12 months.” I am now three years past my 50th birthday. I believe the man was right.


As members of the Kansas Bar, we are beneficiaries of a community of lawyers that decided it was the lawyers’ obligation to do what he or she can to help society. Since the formation of the Kansas Bar Foundation in 1957, lawyers in Kansas have had an opportunity to assist in the service of 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 rule of lawyers in our society.

If you are not a fellow of the Kansas Bar Foundation, consider joining us in the endeavor to “be help and ornament thereto.” Your contribution and effort will make a difference.

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.

Avoiding Client Ethics Complaints
(Con't. from Page 12)

client funds, and other serious breaches of a lawyer’s fiduciary responsibility to clients, such as sexual relationships with clients. However, the majority of complaints filed with the disciplinary administrator’s office, which are found to have merit, involve violations of the rules involving diligence and communication. In 439 Supreme Court disciplinary cases, there has been a finding that a Kansas lawyer has violated KRPCs 1.3 or 1.4. Prompt attention to client requests for information and diligent prosecution of client’s cases will result in fewer disciplinary complaints being filed against Kansas lawyers.

About the Author

Stanton A. Hazlett, Topeka, received his Bachelor of General Studies from the University of Kansas and his Juris Doctor from Washburn University School of Law. From 1977 through 1986 he was engaged in private practice in Lawrence. He has been with the Disciplinary Administrator’s Office since 1986. In September 1997, he was appointed disciplinary administrator.

Spending Hangover
(Con't. from Page 15)

This spending culture has to stop. Students and lawyers alike need to be realistic about their salary expectations and start to live within their means. Minimizing law school debt and paying it off as soon as possible are vital to a healthy financial future.

I’m not suggesting you should never spend money or have any fun. However, if you’re going to drink a few too many glasses of wine and you’re still in law school, I’d suggest you go for the boxed variety rather than bottle service.

About the Author

Chelsea Good is a 3L at Washburn University School of Law with an interest in agricultural law and policy. She can be reached at chelsea.good@washburn.edu.
Members in the News

Changing Positions

Kyle L. Barscewski has joined the Henry Law Firm P.A., Olathe.
Adam C. Dees has joined Condray & Thompson LLC, Concordia.
Denise F. Fields has joined Fisher & Phillips LLP, Kansas City, Mo., as an associate.
Holly L. Fisher has joined the Kansas Board of Pharmacy, Topeka, as compliance counsel.
William L. Hall has become partners with McElligott Ewan Hall Kimminnan P.C., Independence, Mo.
Chantz N. Martin has joined Hines & Ahlquist PA, and will serve as interim city attorney for the City of Erie.
Grant M. Reichert has joined Gillette Law Firm P.A., Mission.

Changing Locations

James B. Biggs has moved to 2942A SW Wanamaker Dr., Ste. 100, Topeka, KS 66614.
John W. Kerns Law Office has moved to 123 W. 8th St., Ste. 300, Lawrence, KS 66044.
Timothy P. Price has started his own practice, Timothy P. Price P.C., 2502A W. Mechanic, Harrisonville, MO 64701.
Cary S. Smalley Law Firm LLC has moved to 7015 College Blvd., Ste. 375, Overland Park, KS 66211.
Bryan W. Smith, Attorney at Law, LLC has moved to 5930 SW 29th St., Ste. 200, Topeka, KS 66614.

Obituaries

Richard B. Clausing
Richard B. Clausing, 92, of Wichita, died March 9. He was born June 8, 1918, in Cushing, Okla., the son of Bertha Burns and Walter F. Clausing. He graduated from Enid High School, the University of Wichita, and Washburn University School of Law, and was admitted to the Kansas Bar in 1942 before enlisting in the U.S. Navy.

He retired with the rank of captain from the Naval Reserve, having served during World War II on the USS Cascade and the USS Eugene E. Elmore in the Atlantic and later at Guadalcanal and New Guinea; on the USS Hamul during the Korean Conflict; and as commander of the Naval Reserve Training Center in Wichita.

Clausing practiced law in Wichita from 1945 to 1986, except from 1954-55 when Gov. Hall appointed him to serve in Topeka as Kansas director for the Federal Housing Administration. He served on the board of governors of the Wichita Bar Association, was president of the Reserve Officers Association, and was a lifetime member of the Kansas Bar Association.

He is survived by his wife, Nancy; sons, Richard Clausing Jr. and Kurt Clausing; daughters Carroll Hoke, Nancy Little, Mary Elliott, and Jamie DeWitt; seven grandchildren; and six great-grandchildren.

Jerry L. Griffith
Jerry L. Griffith, 80, of Derby, died May 25. He was born January 26, 1931, in Tulsa, Okla., the son of Bert and Corinne Griffith and grew up primarily in Ellinwood until he moved to Winfield.

Griffith received a Bachelor of Arts degree in history from Southwestern College in 1953 and then served in the U.S. Army Counter Intelligence Corps from 1953-55. After his service, he earned his Juris Doctor from Washburn University School of Law in 1957 and moved to Derby, where he practiced as an attorney until he retired in 2001. He served as Derby city attorney for more than 17 years and as a state representative from 1960 to 1968. He was a lifetime member of the American, Kansas, and Sedgwick County bar associations, and belonged to numerous civic organizations.

Griffith is survived by his children, Jeffrey Griffith, of Derby, Scot Griffith, of Glendale, Ariz., Lynn Robertson, of Edmond, Okla.; nine grandchildren; and four great-grandchildren. He was preceded in death by his parents; his brothers, Bert and Floyd; and two sons, Bruce and Mark.

Gregg D. Martin

He practiced law with Payne & Jones in Overland Park before returning to Pittsburg in 1990 to farm on the family farm, Oak Hill Farm. Martin continued to practice law with his wife, Patricia, at Martin and Martin Law Firm. He also served as a judge for the Frontenac Municipal Court. Martin was a member of the Crawford County, Jasper County, Kansas, and Missouri bar associations.

He is survived by his wife, Patty, of the home; two sons; Dan Martin, of Manhattan, and Scott Martin, of Fayetteville, Ark.; daughter, Jenny Martin, of Overland Park; his parents, Danny and Judy Martin, of rural Asbury, Mo.; his sister, Angie Sarley, of rural Pittsburg; and nieces and nephews.

Michaela M. Warden Law Firm LLC has moved to 520 Nichols Rd., Ste. 200, Kansas City, MO 64112.

Miscellaneous

Arnold & Keck LLC has changed to Arnold & Pfanziel LLC, Olathe.
Marvin W. Maydew, Topeka, is the Topeka Bar Association honorary president.
Joshua A. Ney, Osskaloosa, has been appointed by Gov. Sam Brownback to join the Kansas Human Rights Commission.

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.
Civil Legal Services for the Poor in Kansas

By KBA Access to Justice Committee

I. Background

Kansas has long recognized the need to protect and provide for its indigent citizens. Article 7, Section 4 of the Kansas 1859 Constitution provides that the counties of the state “shall provide as may be prescribed by law, for those inhabitants who by reason of age, infirmity or other misfortune may have claims upon the aid of society.” In the 1920s, the American Bar Association created a Committee on Legal Aid. The purpose of the committee was to address the concern that equal access to justice could not be realized by persons who did not have the means to participate in the justice system. The American legal profession has long been committed to the concept of free legal assistance to poor people. Until the 1960s, the courts and conscientious lawyers tried to keep the system fair. Churches and service organizations occasionally helped but there was little structure. The first historically recognized legal aid office opened in 1876 in New York City when the German Society of New York under leadership of Edward Salmon, a Prussian born lawyer and former governor of Wisconsin, hired an attorney to help poor German immigrants. The organization was soon named the Legal Aid Society. Its mission statement declared “the Society’s object and purpose shall be to render legal aid gratuitously if necessary, to all who, may appear worthy thereof and who from poverty, are unable to procure it.” By the middle of the 20th century, virtually every major metropolitan area had some kind of legal aid program. Sometimes these were sponsored by bar associations and some were run by schools or social agencies or even municipalities. In the early 1960s, the Ford Foundation and several other organizations began to fund legal services programs as part of an overall anti-poverty effort. Access to justice for the poor emerged as a flash point issue during the civil rights, social and cultural upheavals of the 1960s when social injustice was being attacked on all fronts.

ACCESS TO JUSTICE COMMITTEE

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Sheila P. Hochhauser, Manhattan
Katherine L. Kirk, Lawrence
C. David Newbery, Topeka
Prof. Lynette F. Petty, Topeka
Hon. Sally D. Pokorny, Lawrence
E. Lou Bjorgaard Probasco, Topeka
Larry R. Rute, Topeka

II. The OEO

In 1964, the U.S. Department of Health, Education, and Welfare held a conference on the extension of legal services to the poor. In 1965 Congress passed an act establishing the Office of Economic Opportunity (OEO). The OEO was the agency charged with administering the war on poverty. By the end of fiscal year 1966, the OEO had made 130 legal services program grants. By 1968, OEO grants funded programs that covered at least part of every state except North Dakota. Since energized young people played a key part in the social changes developing in the Vietnam-era/civil rights years, it was socially attractive for young lawyers to become involved in these new programs. At first, the focus was on routine advocacy for poor people in housing, consumer law, education law, and in domestic matters. Soon, however, some of the more zealous and idealistic attorneys began using the law as a tool to “engineer” policy changes to improve the legal/social circumstances of low income Americans. This development was extremely controversial and the push back led to regulations that eventually limited the scope of organized legal aid advocacy. Some of this controversy continues today.

III. The Legal Services Corporation Act of 1974

By the early 1970s, it became clear that OEO advocacy on socially and politically sensitive issues was creating a backlash of serious political interference with the operations of certain legal aid programs. In California, Gov. Ronald Reagan vetoed the grant to California Rural Legal Assistance as a result of its advocacy for farm workers and challenges to California’s Medicaid policies. This led the ABA, Congress, and the executive branch to begin thinking of an independent legal services corporation. In May 1971, President Richard Nixon introduced legislation calling for a legal services corporation that would be “immune to political pressures and a permanent part of our system of justice.” Nixon also proposed to dismantle the OEO. On July 25, 1974, both Houses of Congress passed the Legal Services Corporation Act of 1974.

IV. The Birth of Kansas Legal Services

The mid-60s produced three community-based legal aid societies in Kansas. These were the Legal Aid Society of Topeka, Legal Aid Society of Wichita, and Legal Aid Society of Wyandotte County. In 1977, the Kansas City, Topeka, and Wichita Legal Aid Societies merged to form Kansas Legal Services Inc (KLS). The purpose of this merger was to aggregate resources, create a single program with services extended to all Kansans and to eliminate the redundant effort required to obtain and manage individual program grants from the newly created national Legal Services Corp (LSC). The first director of the new KLS was Roger McCollister. McCollister had been the director of The Legal Aid Society of Topeka. Brian Moline, the director of the Wichita Legal Aid Society and former legislator, stayed on in Wichita, and Richard Wallace, the di-
rector of the Legal Aid Society of Wyandotte County, became the deputy director of KLS.

V. Kansas Legal Services Today

A. Funding and resources

Today KLS operates with a budget of approximately $9 million or $17 per poor person in Kansas. Revenue comes from a variety of sources. The single largest funding source is the LSC. The current grant for Kansas is $2.6 million, down 4 percent in 2011. Other revenue allows KLS to provide services to domestic violence victims, applicants for Social Security disability, and senior citizens. The Kansas Bar Foundation has had to decrease its support for civil legal services to low-income persons as the interest earned through IOLTA has declined. This fund currently provides $52,000 annually to KLS.

B. Offices, services and staff

KLS has 13 offices. These offices are located in Dodge City, Emporia, Garden City, Hays, Hutchison, Kansas City, Lawrence, Manhattan, Pittsburg, Salina, Seneca, Topeka, and Wichita. In addition to providing civil legal services with its staff attorneys and legal assistants, KLS also provides mediation services, employment training, and other specialized activity. KLS operates the Kansas Lawyer Referral Service for the Kansas Bar Association through its statewide call center. Today KLS has a total staff of 145, 34 of which are attorneys.

C. Organization and management

Kansas Legal Services is governed by a 23-member board of directors. The corporate bylaws require the board to be composed of geographically diverse attorneys and client representatives. Each KLS office has its own local advisory board of clients and local attorneys. All attorney members of the board are approved by the Kansas Bar Association. In addition, the KBA appoints one member to the board. This representative is former judge and Kansas attorney general, Bob Stephan.

D. Law-related programs

In addition to providing general legal representation and advocacy in civil cases, KLS has other law/poverty programs. The newest of these is the Medical-Legal Program. This program partners KLS with charitable health care clinics that serve low-income persons. Five partnerships now exist, located in Pittsburg, Kansas City, Southwest Kansas, Wamego, and Junction City. The goal is to help families resolve legal issues that interfere with effective medical treatment and afterward. Kansas Legal Services also has a grant from HUD to provide job training for basic job readiness and basic computer skills to homeless persons. The KLS Expecting Success Program provides specialized job training and case management to pregnant women who receive temporary assistance for needy families.

E. Private bar partnerships

KLS has always had a close and positive relationship with the KBA and the private bar. KLS operates the Kansas Bar Association’s Lawyer Referral Service and has done so since 1987. This is done from a call center in Wichita. Kansas Legal Services contracts with several attorneys called “retainer attorneys” to augment its staff, in areas where there is no KLS office. Although the retainer attorneys receive a small fee for the cases they handle, this work is largely considered pro bono work.

Another cooperative KLS-KBA program is the Elder Law Hotline. This program involves 60 volunteer attorneys backed up by KLS staff and lawyers. Calls from senior citizens come through a central KLS call center and are screened, then routed to the attorney-volunteer. Volunteers answer the callers’ questions from their own offices. Each KLS office and local board is also responsible for recruiting and maintaining a group of private attorneys who agree to provide pro bono assistance to Kansas Legal Services’ clients.

The KLS Reduced Fee Program provides assistance to individuals who are just above poverty level. This program provides reduced fee assistance to individuals with incomes less than 250 percent of poverty. Reduced fee clients are required to pay the fee upfront. Representation is provided by private attorneys or KLS staff.

F. Prohibited activity

Because KLS receives federal funds, it is prohibited from engaging in certain activities. These restrictions apply to all activities of KLS even though the federal grant accounts for less than one-fourth of KLS’ operating revenues. The restrictions imposed by the federal regulations prevent Kansas Legal Services from representing clients in fee-generating cases, class actions, lawsuits challenging public benefit policy, abortion litigation, redistricting, upgrading military discharges, and representing incarcerated felons. Over the years new restrictions have been added.

G. Client eligibility

Applicants seeking assistance from KLS have to pass a four-part test. First the assistance must not involve a restrictive activity. The second part of the test requires the case to be the type of case KLS accepts. KLS allocates its resources for priority needs determined by the KLS board. Domestic cases and cases involving housing are always high on this list. Other matters like name changes, wills, boundary disputes, and so forth receive low priority and may be rejected on the basis of case-type. Part three is a test of the applicant’s income. To receive free service, an individual’s income must be less that 125 percent of poverty [$22,800 per year for a family of three in 2010]. Low-fee eligibility extends to 250 percent of poverty. The fourth and last part of the eligibility screening test is a review of the applicant’s assets. The applicant’s “countable assets” must be less than $2,000. KLS generally follows the federal Supplemental Security Income criteria for countable resources.

H. Statistics and outcomes

In 2010, KLS provided legal services to 22,369 low-income Kansans. Sixty-five percent of KLS clients were women. About 10 percent were under 18, reflecting work with children in foster care and juvenile offenders. Eighteen percent were over 60, reflecting the variety of services provided to senior citizens. KLS provided 1,694 victims of domestic violence with a Final Protection from Abuse order, protecting them and their families from further physical abuse. Social Security or SSI disability benefits through KLS representation were provided to 789 adults. In 2010, KLS provided legal advice to 10,162 persons with problems involving family law, housing, or consumer matters. This represents less than 5 percent of Kansas’
low-income population. Demand for services exceeds KLS’ capacity. KLS has developed an extensive on line library, providing users access to legal information that can help them resolve their legal problems. In addition, KLS has worked with the Kansas Judicial Council to make available forms for self-represented litigants on the KLS website (www.kansaslegalservices.org). Users can prepare the appropriate Kansas forms for a simple divorce, name change, or expungement through an interactive interview similar to how Turbo Tax assists with simple tax forms. Under the Kansas limited scope representation rules, the self-represented litigant can, also, have those forms reviewed by a Kansas lawyer. More than 2,500 legal forms have been prepared in this way during the first six months of 2011. Before these interactive self-representation forms were available, many persons were appearing pro se using incorrect pleadings and documents they had downloaded from the Internet or purchased from an office supply store. Court personnel now have a place to direct those who, due to poverty, must represent themselves in Kansas courts.

I. KLS achievements and contributions

Over the years, the legal advocacy of KLS has played a large role in developing appellate-level and administrative poverty, public welfare and domestic law in Kansas. In the late 1960s and early 1970s KLS had significant and lasting influence in landlord-tenant, public utility access, and consumer law. More recently, KLS has often been on the front line of protection from domestic abuse cases. In 2008, Kansas Legal Services lawyers successfully litigated In re L.M.1 in the Kansas Supreme Court. This case established for the first time a juvenile’s right to a jury trial. Many lawyers practicing in Kansas today are KLS alumni or gained experience as a volunteer with a KLS office or law school clinic.

VI. Law School Clinics

The Kansas Supreme Court Rule 709 allows clinic interns enrolled at the KU, Washburn, or UMKC law schools to practice law and represent clients in court under the supervision of licensed attorneys. This makes it possible for schools to offer a meaningful educational experience while helping to expand the availability of free legal services to needy Kansans. Both Washburn and University of Kansas schools of law have legal aid clinics.

A. Douglas County Legal Aid/KU Law Legal Aid Clinic

In 1967, KU Law School first offered the legal aid clinic as a law school course. Concerns about competition raised by the Douglas County Bar led to the creation of the Douglas County Legal Aid Society (DCLAS). The incorporators were L.E. Blades, dean of the law school, Jerry Cooley, and Fred Six.2 Thereafter, the clinic was operated as a joint venture between the law school and DCLAS. Today the director of the program is Professor Chuck Briscoe. There are 14 students in the program. The clinic is divided into three main components: court-appointed representation of juvenile offenders, court-appointed representation of indigent defendants in municipal court, and civil practice that is mostly domestic relations. In 2010, the clinic accepted approximately 350 new clients per year and closes about 350 cases per year. Student interns work under the supervision of three staff attorneys. The program estimates that it provides about $330,000 of free legal services per year. Other matters handled include probate, mainly guardianships/conservatorships, living wills and powers of attorney, landlord/tenant, debt collection defense, emancipation, and plaintiff only PFAs. All DCLAS clients must meet financial eligibility requirements similar to those of KLS.

B. Washburn Law Clinic

The Washburn Law Clinic is located at the law school and was started more than 40 years ago. The clinic is divided into four separate areas: children and family law, criminal defense, state tribal court practice, and civil litigation. There is also an appellate clinic and a transactional clinic that focus on small business and business transaction of law. The clinic co-directors are Janet Thompson Jackson and Aliza Organick. There are five other professors working for the law clinic. There are 26 students involved in the clinic for 2010-11. The clinic has recently been involved in representing women filing for relief under the domestic violence against women act seeking petitions to obtain lawful status without the assistance or cooperation of the battering spouse.

VII. The Future

While the U.S. Constitution grants criminals the right to counsel, there is no similar interpretation for attorney representation in civil matters. Nevertheless, the members of our profession have always upheld the notion that justice for all means equal access to justice. As Eleanor Roosevelt once stated “justice cannot be for one side alone, but must be for both.” It is for this reason that the organized bar, the judiciary and concerned attorneys and citizens have worked hand in hand with KLS and the law school programs for the last 35 years. But, the high water mark for federal funding for civil legal services occurred in fiscal 1980. The current level of federal participation adjusted for inflation is only two-thirds of what it was in 1980. The challenge for KLS and the law clinics has become increasingly to do as much or more with less. Paradoxically, the need increases at times when the resources decrease. Economic downturns like the present recession increase both the number of poor people needing help and the number of legal problems they face. Although the delivery system for providing civil legal services to the poor and the resources available to do it changed since the program began more than 40 years ago, the nature of poverty has not changed. For the next decade, the biggest challenge facing Kansas poverty law programs will be finding the resources to maintain current levels of service. The need just does not go away. Doing a lot with tenuous and often fragmented, limited use and non-renewable funding is nothing new. Marilyn Harp, director of KLS, says “We have a good track record for doing this … but we can always use a little help.” If you would like to help out or have other interests in the program, please contact Marilyn Harp at harpm@klsinc.org or at (785) 233-2068. A volunteer attorney sign up form is available on the KLS website at www.kansaslegalservices.org.

Footnotes

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.
The Greatest Generation of Kansas Lawyers: Part II
by Matthew Keenan
Introduction

This article is a reprise of the April issue dedicated to 19 Kansas lawyers still living who served our country in World War II. In the reader feedback that followed that cover story, we identified 12 additional Kansas lawyers who also served, with ages ranging from 83 to 104. All defended our land and returned to lead distinguished lives as attorneys in the Kansas Bar.

They are the following:

- Don Concannon, 83, Gunner’s Mate/3rd Class, U.S. Navy
- John Shaffer, 83, Seaman 1st Class, U.S. Coast Guard
- Donald Schnacke, 84, 1st Marine Division, U.S. Marines
- Theodore Geiert, 86, Intelligence and Reconnaissance Platoon, U.S. Army
- Robert Martin, 87, 2nd Lieutenant, U.S. Air Force
- Robert Sharp, 87, Lieutenant, U.S. Army
- Lawrence Bengtson, 88, Pilot, U.S. Army Air Corps
- Francis Hesse, 89, 2nd Lieutenant, Heavy Weapons Unit, U.S. Army
- Elvin Perkins, 89, 1st Lieutenant, U.S. Navy
- Gordon Lowry, 92, Lieutenant, U.S. Navy
- George Reynolds, 92, Master Sergeant, U.S. Army
- Wesley Brown, 104, Lieutenant, U.S. Navy

On behalf of all of us, I express a heartfelt appreciation for their contributions and hope this tribute educates our younger attorneys of the sacrifices these members of the Greatest Generation made.

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**DON O. CONCANNON, AGE: 83**

Kansas Lawyer  
Admitted: 1952  
Military Experience: U.S. Navy (1945-46)  
Gunner’s Mate/3rd Class

**My Story:** I enlisted in the Navy on May 1, 1945. During my stint with the Navy, I was stationed at the Great Lakes Naval Station for 10 weeks prior to my transfer to Guam for permanent duty. I was discharged on July 19, 1946. My service in Guam occurred after the peace treaty was signed and thus nothing other than living on a patrol craft for over a year is worthy of comment. Nonetheless, if it hadn’t been for the 27 months of my GI Bill, which I saved to pay for my legal education, I would not have had the opportunity to attend Washburn Law School. My service truly changed my life.

I attended Garden City Community College and Washburn University, and opened a law office in Hugoton. Just 30 days after my arrival, I received the Republican nomination for Stevens County attorney and served two terms. My practice was limited only by what came in the front door. A simple farm boy from rural Kansas who pursued a legal education simply because I was comfortable talking in nearly any situation and had a sincere interest in the law, I was not expected to do anything special in my profession. As such, I received a great deal of advice.

Sorting out the good advice from the bad, the most valuable guidance I received undoubtedly came from Bob Fowlks, a Washburn professor, who drilled us on the need to work hard, keep your word, return phone calls, and ask for help from more experienced lawyers when necessary. Although simple, incorporating this advice into my practice, seeking always to keep a tight schedule, seldom requesting extension, finishing what I had started in a timely manner, and becoming involved in the community led me to great success, allowing not only my practice but also my passion for the law to continuously grow.

The 2010 Lifetime Achievement Award bestowed upon me by the Washburn Alumni Association was exceptionally touching, as I have lived and practiced in a small, rural town of only 3,500 people for more than 50 years. The people of this town have always been good to me, and I have tried to return the favor through my practice. I never took a case I didn’t believe I could win, and thus, while I admit the days were few, I was greatly disappointed each time I was unsuccessful.

**Personal:** Married to Sharon Concannon. Two of our children followed in my footsteps, obtaining law degrees from Washburn Law School, and our third and youngest graduated from KU Medical School. Although I continue to keep my license, I retired in 1995, but returned to work when cancer took my oldest son and partner, Chris, from us. Today, at the age of 83, I do only pro bono work.

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**JOHN H. SHAFFER, AGE: 83**

Kansas Lawyer  
Admitted: 1954  
Military Experience: U.S. Coast Guard (1945-46)  
Seaman, 1st Class

**My Story:** I am a veteran and served in the U.S. Coast Guard in World War II. I graduated from Washburn University School of Law in 1954 and have been in practice for 56 years. As I have gotten older, my practice has been largely centered in the “elder law” area (including wills, estates and trusts, and advance directives). I come from a “family” of lawyers. My mother, father, and dad’s younger brother were all lawyers, and, as a result, I was exposed to the law during most of my formative years.

Your word is your bond, and as a professional, you should conduct yourself accordingly. My father and mother, after graduating from law school, as well as my law partners and the older lawyers I came into contact with over the years, taught me to be a dedicated professional, be passionate in your practice, and be true to your family and profession. I attained 50 years in the practice of law, but my father, mother, and my uncle were not able to achieve that milestone.

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I am not able to identify with the saddest “day” in my professional career. It would be more accurate to identify the saddest “days” as those when I lost my parents, law partners, and close colleagues. A highlight is doing pro bono work at the local senior center and giving back for all of the “blessings” I received over the years. I can’t think of anything I would change about my practice as I have enjoyed every minute of the years I have practiced law. Here is an excerpt from an article posted in the Hutchinson News: “Every year the Reno McPherson Counties Legal Secretaries Association thinks long and hard about who has been the best boss to work for. Secretaries write letters listing the reasons their legal eagle is the best, and the most persuasive letter wins a lawyer a traveling trophy for a year.

At a Friday night dinner at the Moose Lodge, Gloria Roberts’ letter was chosen the winner. Why does Gloria like working for John Shaffer? He is kind, considerate, concerned about others more than himself, makes ‘very few’ unreasonable demands, and is easy to work for. Gloria worked for Weinlood, Cole, and Shaffer nearly twelve years.”

Personal: I married my wife, Lorene F. Shaffer on August 17, 1951, and we will be celebrating our 60th wedding anniversary. We have three sons who now reside in Aurora, Colo., Houston, and Dallas. I am still practicing law as “of counsel” in the firm bearing my name and have been practicing for 57 years. Hobbies include reading and volunteering at the local senior center doing pro bono consults once per week.

DONALD P. SCHNACKE, AGE: 84
Kansas Lawyer
Admitted: 1957
Military Experience: U.S. Marines (1941-45)
1st Marine Division

My Story: World War II had a great influence on my life and the life of my family. My older brother, Phil, joined the U.S. Marine Corps following the attack at Pearl Harbor and served as a machine gunner in the 4th Marine Raider Battalion. After finishing high school, my other brother, Austin, also joined the Marines and served on a “baby flat top” carrier supporting Marine island landings.

Near the end of the hostilities, at the age of 17, I also joined the Marines. Age 17 may seem pretty young these days, but at the time many young people were signing up to defend their country. Nevertheless, to join at age 17 required me to obtain my parents’ formal permission. In fact, all three of the Schnacke brothers got parental permission to join early and, fortunately for our family, all three survived the war.

When I went in, I served with the First Marine Division, first on Guam and then in China. Guam had been attacked by Japan on December 8, 1941, and was ultimately occupied by the Japanese for approximately 30 months. The Battle of Guam was an important victory for the United States armed forces, as afterward the island became a base for allied operations in the Pacific Ocean. More than 54,000 Americans were involved in the retaking of Guam, with more than 7,000 killed or wounded. The Japanese lost more than 18,000 soldiers, and we took 485 prisoners. My brother, Phil, was seriously wounded in Guam, but he was quickly repaired and was on his way back into combat when hostilities ceased in 1945.

When I got to Guam, we were preparing for the invasion of Japan, which we were told would be bloody. Little did we know that President Truman would soon order the use of two atomic bombs against Japan, first on August 6 and then on August 9, 1945, forcing the immediate surrender of Japan. Once Japan surrendered, the invasion of Japan was canceled and my division was diverted to China.

Our mission in China was to try to keep peace with the Chinese Communists, repatriate Japanese prisoners of war to Japan and serve as a warning to Russia not to invade China. I had several combat experiences while in China supporting the Chinese Nationalist Army led by Chiang Kai-Shek, and many Marines were killed during this period of time. In one serious incident, persons in a nearby village fired on our convoy, killing six of my fellow Marines. Our commander asked for permission to respond to the attack, but permission was denied because we had failed to properly fly American flags to clearly indicate who we were (a “peacetime” requirement). Accordingly, our commander put flags on nearly every vehicle and circled the village, practically daring someone to shoot. Fortunately for all, no one did.

World War II also had an impact on my post-war life as both an engineer and a lawyer. The GI Bill, or the Service-man’s Readjustment Act of 1944, provided free college education, and I quickly took advantage of that Act to continue with my own education. I entered Oklahoma State University and, ultimately, earned a degree in petroleum engineering. Later, my father-in-law, A. Harry Crane, a prominent Topeka attorney, urged me to pursue a law degree. I went to Washburn and, upon graduation from law school, joined the law firm of Crane, Martin, and Claussen in Topeka.

I was soon retained to form a new state association for Kansas consulting engineers. This particular experience led me into Kansas politics, and I was later elected the Shawnee County Republican chairman, the Kansas State Republican chairman, and then a member of the National Republican Committee. In my political role, I assisted then-Attorney General John Anderson Jr. in his successful race for governor in 1960. Anderson was elected twice and was the first Kansas governor to occupy Cedar Crest.

The combination of my engineering and legal backgrounds assisted me in my service to the Kansas Independent Oil and Gas Association (KIOGA) for 24 years. My retirement from KIOGA led me to start my own private legal practice, which has, over the years, served a number of important oil and gas clients.

As I approach 84 years of age and 54 years of practice of law in Kansas (including 54 years as a member of the KBA), I am now thinking seriously of retiring altogether to pursue pro bono and other volunteer community activities. I see this move as an opportunity to keep active and to wake up every
morning with new issues in our community to be solved.

The impact of World War II on my life cannot be underestimated. There are likely parallels between battles in the Pacific and battles in business, politics, and even retirement, but I will not draw them here. Suffice it to say that I, like every other person alive at the time, was forever changed by the war and I will never forget my participation in it.

My advice to attorneys is to become more involved in pro bono activities and other things outside the pure practice of law. Lawyers are well equipped to help people in lots of different ways.

**Personal:** Married to Marjorie Crane Schnacke for 54 years. We have two sons, both lawyers, currently living in Colorado. My hobby is working in the yard.

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**THEODORE C. GEISERT, AGE: 86**

Kansas Lawyer
Admitted: 1952
Military Experience: U.S. Army (1944-46)
Intelligence and Reconnaissance Platoon

**My Story:** I graduated from Chapman High School in Dickinson County in the spring of 1943 and had a farm deferment, being necessary to work on my father’s farm. After a year the draft board determined that I needed to go, and I was drafted into the Army in August 1944. I was sent to Fort Leavenworth and from there to Camp Hood in Texas for basic training. After the 17-week basic training was completed, right at Christmastime, I received leave as a “delay en route” and went back to my home in Abilene for something like 10 days, after which I shipped from Newton by railroad to the west coast, went up home in Abilene for something like 10 days, after which I

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**ROBERT MARTIN, AGE: 87**

Kansas Lawyer
Admitted: 1948
2nd Lieutenant

**My Story:** I enlisted into the Army Air Force in January 1943, at the age of 19. At that time, I was living with my parents in
Kansas City, Kan., and took my basic training in the winter of 1943 at Jefferson Barracks, Mo. I was assigned to the 8th Air Force and served with the 458th Bombardment Group. At the time that I went to England to become the pilot of a B-24, I understood I was the youngest bomber pilot in the European Theatre. During the time that I served in the Army Air Force, my crew and I flew numerous bombing missions into France and Germany. Many of the missions were flown at night, and I have vivid memories of watching the enemy fire at us from the ground, as we made our way to bomb railroads, industrial facilities, and other strategic targets. I flew other aircraft, but flying a B-24 was an amazing experience, and piloting aircraft served me well later in life when my law practice focused on aviation matters. I was released from active duty in October 1945 and remained in the Reserves after my release. I was fortunate to have been awarded the Air Medal with Oak Leaf Cluster, the European Theatre Medal, and the Good Conduct Medal.

[Editor's note: Bob was stationed at Horsham St. Faith airbase in England, which was where he flew out for his missions. In one of his missions, Bob’s plane was shot down over Dunkirk, Belgium, which was enemy territory. The gas line to his plane’s #4 engine was destroyed and the gas was spilling out, so Bob was forced to land near Dunkirk as were several of the other planes in his formation. Bob’s plane did not have enough gas in the remaining engines to get back to England. Bob and his crew of 10 men managed to repair the leak. While on the ground, word of his plane’s location and the fact that they were going to be able to take off again was radioed to the other downed planes in the area from Bob’s formation and more than 20 servicemen from these other planes found their way to Bob’s plane and were flown back to England with him.]

After the war I obtained my law degree from the University of Colorado and practiced in western Kansas for a short period of time before coming to Wichita. My long-time partner and friend, Kenneth Pringle, and I formed what is now the Martin Pringle Firm in 1951. I served as the president of the Kansas Bar Association in 1971.

Personal: I was married to my wife, Ann, from 1978 until 2011 and have been survived by five grown children, Marshall, Carrie, Roger, Oakley, and Illinois.

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Robert Martin

I was 18 years old and a freshman in college on December 7, 1941. I enlisted in the Army Air Corps Aviation Cadet program in January 1942, but as no training facilities were available, I was instructed to stay in college. I was called to active duty on February 22, 1943. I went through pilot training and received my wings as a fighter pilot in May 1944.

Robert E. Sharp

Texas, as rank-sergeant. Land in Normandy, France, and proceeded through Austria into Germany. Fought in the Battle of the Bulge (tough conflict with many casualties) and was promoted to rank of lieutenant.

My parents wrote weekly. Before leaving for Europe, father said, “Don't be afraid. Do what you know to do.” While in Germany, Gen. Patton asked me to be an advance scout because of my ability to speak fluent German. I went at night and secretly listened to Germans outline a plan and then reported back to Gen. Patton. I was there when the Germans surrendered. I received the Bronze Star for valor in combat and was called back to service for the Korean War and sent to Seoul, Korea.

I worked in high school for a lawyer in Hawarden, Iowa, and if you want to become a lawyer, participate in debate and oratory classes. In 1945, after World War II, I enrolled at the University of Missouri. With my juris doctorate, I started my own law practice in Kansas City, Mo. I was invited to join a large law firm, Sheridan, Sanders, Millin, Peters, Carr & Sharp, where I practiced law for many years. It was during the 1960s that my dedication to religion led to a desire to become a minister in my church. After several years of studying religion on the weekends, I became an Episcopal priest in 1966. I was assigned two small parishes in the state of Kansas; one in Tonganoxie and the other in Edwardsville. Each Saturday, I would write my sermon and on Sundays conduct church services in each parish.

Although having dual careers would seem likely to severely limit any free time activities, I was an excellent golfer and long-distance runner. During the 1960s I participated in the Kansas City Chamber of Golf league and won numerous league honors, and as a runner, I participated in many 10k and half-marathon races until the age of 75, with many trophies to show for my efforts. Now 87 years of age, I live in Leavenworth.

Best advice for lawyers is to get a good education, internships, have a lot of fortitude and work hard for clients. I was asked to serve as a circuit court judge in Springfield, Mo. I lost a case in federal court after months of preparation.

Personal: Married to Virginia Limb in April 1948 and have four children. I continue to practice law and uphold my duties as an Episcopal priest until my retirement in 2003. Today, I live in Leavenworth, Kan. and am in good health.
In January 1945 I was assigned to the 8th Air Force and was a P-51 Mustang pilot with the 353 Fighter Group stationed at Raydon, England. I served with the Army of Occupation at Munich, Germany, until June 1945, when I returned to the United States and was discharged as a lieutenant.

I graduated from Washburn University in 1950 and practiced law in Salina from September 1950 until 2002.

**Personal:** My wife, Marge, and I were married in 1953 and have two sons who are both lawyers. Michael, 53, is a partner with Baker-Botts in Austin, Texas, and David, 52, is a partner with Stinson Morrison Hecker in Wichita.

**J. Francis Hesse, Age: 89**

*Kansas Lawyer*

Admitted: 1950

**Military Experience:** U.S. Army (1942-46)

2nd Lieutenant, Heavy Weapons Unit, 423rd Infantry, Company D

**Europe/Battle of the Bulge**

From the *Bar-o-Meter*, November 1990, by Martin R. Ufford:

“I volunteered on the first call after I graduated from high school in 1944. I was commissioned as second lieutenant in the U.S. Army before I was 19. It’s one of my early accomplishments of which I am very proud.

For the moment, they said they were going to assign me to the baking unit, and I didn’t know anything about baking. They took me under their wing and I learned from the masters. At one time, we were shipping 100,000 pounds of bread a day. It was a great experience for me.

After 1946, I joined the Reserves and, in 1950, I was called to active duty and sent to Korea as a platoon leader in Company L, 35th Regiment, 25th Division. I was wounded there and evacuated. I received the Presidential Unit Citation, the Combat Infantry Badge, the Purple Heart, and the Korean Presidential Citation.

It was much different for me in Korea than it was in World War II. I got to Korea in July 1951, and the Army had been there for about a year. Everything was blown flat. The poor Koreans were living in ditches and rice paddies.

Gen. Douglas MacArthur wanted to cross the river in Northern Korea and eventually invade China, and Truman wasn’t going to have any part of that. China already had 1 billion people vs. 150 million Americans. It was a no-win situation.

I thought I was going to be assigned to a combat unit because, after all, in World War II, I never heard a shot fired. We were on a line that was established parallel to the 38th parallel, across the peninsula in Korea. The Turkish brigade was on one side of us and the Second Division was on the other side.

Peace treaty talks were beginning there, so the Army was frozen in this position where we were to hold a line only if attacked. At about 11 p.m., they hit us head on. The Presidential Citation said that two divisions hit us. One round exploded so great and hit the corner of a roof on our foxhole and swung 6 and 10-inch logs down on top of us. I knew I’d been hit because I could feel blood on my uniform.

The men in my platoon helped get the logs off of us and put me in storage in another depot that hadn’t been hit. I guess the battle lasted the better part of an hour or an hour and a half, but they didn’t break our line.”

Article about escape from Nazis:

**Corp. James Hesse Makes Way to Warsaw with Aid of Russian Friends**

**IS HEADED FOR HOME**

Corp. James Hesse, 1421 Coolidge, one of approximately 1,200 Americans who arrived at a Mid-East port recently aboard a repatriation ship after their escape from the Germans during the Soviet winter Offensive, made the round-trip from freedom to prisoner to freedom again in little more than a month, Frank O’Brien, Associated Press writer reported.

He was captured during Field Marshal von Rundstedt’s Adrennes offensive while fighting inside the Siegfried line. He was freed by the Russians a little more than a month later.

O’Brien said he saw a 20-year-old Hesse aboard the repatriation ship. Wearing a Russian fur cap, he looked jaunty, healthy and little worse for wear, although he was thin, he added.

“Hesse had little to say about his capture, imprisonment and escape but his story is a tale of courage and endurance especially after January 20 when the Germans broke up the prison camp for a march west over the frozen Polish plains. This is the story Hesse, who incidentally turned out to be a friend of my cousins in Wichita, Walter and Robert Churchill of 309 South Holyoke, told me:

**Shipped to Poland**

“Along with about 20 others I got cut off at Schoneburg inside the Siegfried line during the German surprise offensive in December. The Germans marched us east for a few days then put us in box cars and shipped us to a camp somewhere near Altburgand, in Poland.

“Less than a month after we got there the Germans ordered the camp broken one night – January 20th, I believe – and we started walking west. I didn’t know where we were going – just west.”
“We kept marching for a couple of days and then decided to get away. A lot of us hid in old barns or houses and the Poles did everything possible for us and hid us for a long time while the Germans were still moving by.

“Finally, we decided to try to get back east. We heard Warsaw was a collecting point so we just hitch-hiked along the Russians going that way. Then we were moved down to Odessa and here I am. I am glad to be going home.”

Personal: Awarded the Bronze Star and a Purple Heart. Practiced law for more than 50 years in areas of health care/medical malpractice defense, general civil trial and appellate practice, probate and nonprofit/church law. Hesse was married to Jean Kimel for 54 years, who died in 1999. Together, they have 13 children, three of whom are practicing Kansas lawyers: Paula Hlobik (Idaho), Steve (Kansas), Tom (Kansas), Suzanne McHenry (Derby), Tim (Kansas), Dr. James F. Jr. (Kansas), Joel (Kansas lawyer), Anne Warner (California), Mike (Colorado), Matthew (Kansas Lawyer), Cary (Kansas), Dr. Christopher, DVM (Kansas), and Karl (Kansas Lawyer). He has 42 grandchildren and 16 great-grandchildren.

ELVIN D. PERKINS, AGE: 89
Kansas Lawyer
Admitted: 1948
Military Experience: U.S. Navy
1st Lieutenant

My Story: My name is Elvin D. Perkins, and I am a veteran of World War II. I was in general practice of law in Emporia for 50 years, with several partnerships. My areas of practice were quite diverse as is often the case in a city, such as Emporia.

It is difficult to state what caused me to be a lawyer. My father was quite active in community affairs, including being a legislator, which led me to a history and government major in college. My parents drilled honesty and integrity into our system so I had an early learning in that direction. My father was my idol and role model.

The best advice I remember receiving about the practice was to do the very best job I could for my client, no matter how difficult or how simple the task might be. I would try to impress younger lawyers to recognize and honor the trust and reliance their client places with them. I was most proud of the trust placed with me by a widow with young children who reared those children with frequent business and legal matters entrusted with me. The saddest day was the loss of a case in a will contest case.

One way I enjoyed my practice was the close relationship within and with the excellent office staff. If I could start over I probably would not be working the long hours I did.

WWII Service: I was a junior in college when Pearl Harbor was attacked. I wanted to finish college before entering the service so I enlisted in the program that permitted me to complete my senior year then enter midshipman school and get a commission. After receiving my commission, I was sent to anti-submarine warfare training and from there, to Destroyer USS Trippe DD403, on which I spent the rest of my military career. That ship escorted convoys to Italy and North Africa and did other escort work to guard against submarine attacks. After Germany surrendered, the Trippe was transferred to the South Pacific where we were escorting other ships to Iwo Jima and Okinawa.

Two events in which my ship and I were involved were somewhat unique. In the Atlantic on the return to the United States with a convoy, somewhere north and east of Bermuda a U.S. Navy PBM Mariner seaplane, based in Florida, because of a compass failure, ended up afloat on the high seas, out of fuel. Our captain offered to take the plane in tow and directed me as the first lieutenant of the ship to take charge. From early evening until the next morning we towed the plane at the highest speed it could endure. A rescue mission based in Bermuda took over, I am certain, with a PBM manned with a seacrew.

In the Pacific, after Japan surrendered, the Trippe was designated as the occupation force as the harbor of Chi Chi Jima, one of the Bonin Islands. This was the island near which George Bush’s plane was shot down. Our ship became the site where U.S. Naval Intelligence conducted its investigation of suspected cruel treatment of U.S. airmen whose planes were shot down and some of the fliers were known to have been rescued by the Japanese forces based on the island. As officer of the deck periodically, I was at the gangplank to give permission for the Japanese officers and enlisted men to come upon the ship, where they gave their testimony. Among those I met were two Japanese majors, Maj. Matoba and Maj. Horie. We later learned that both of these men were convicted of war crimes and executed.

Personal: I married my wife, Kathryn Prosser, while on a short military leave, August 9, 1944. We have three children, John, Steven, and Janet; with two great-grandchildren, Andrew and Sophia. I had a law office with several partners and, in addition to practicing law, my wife and I were active in community activities. I served on the Emporia City Commission and Kathryn on the Emporia School Board. I was also active with the Kansas Bar Association, serving for years on the Continuing Legal Education Committee and was a member of the commission appointed by the Kansas Supreme Court to mandate CLE. Kathryn and I enjoy traveling and made several foreign trips. I was one of the six founders of the Emporia Community Foundation and served on its board of trustees for a number of years. I was also active with the Emporia Chamber and with Emporia Regional Industrial Association.

GORDON K. LOWRY, AGE: 92
Kansas Lawyer
Admitted: 1946
Military Experience: U.S. Navy (1942-45)
Lieutenant

My Story: I enlisted in the U.S. Navy in the fall of 1941 right after my first year in law school and was called to active service in January 1942 and reported to Great Lakes just outside of Chicago. After basic training I was transferred to
Philadelphia as a Yeoman support for a psychiatrist doing testing for the Naval Aviation Cadet Recruiting Office. In the fall of 1942 they opened the V-7 program for married men, and I applied and was accepted into the midshipmen program at Columbia University. On graduation I was assigned to amphibious training at Little Creek, Va. We trained in small boats (mostly 36-foot LCVPs). We were then transferred to Fort Pierce, Fla., for more training in the surf. I had been promoted to assistant boat group commander and just before leaving Florida to join our ship in Baltimore, I was promoted to boat group commander and instructed to lead our boat group of 140 men and 13 officers to the USS Sumter APA 52. The Sumter had just been commissioned in Baltimore. None of our group had ever been to sea. We trained a short time in Baltimore, and then sailed through the Panama Canal to San Diego and on to San Clemente Island to train with the Marines.

Our ship was an attack transport with small boats aboard (36-foot LCVPs) and three LCMs. Each boat had a coxswain, a motor mac, and a signalman. Every four boats also had an officer in charge. The ship was to transport troops to the staging area for invasions, and it was my responsibility to lead the boats to the designated beach at the proper time.

After training in San Diego we left for Hawaii and more training with other ships in the Islands. Our first invasion was the Marshall Islands and shortly after that we started training for the invasion of Saipan. This was a large invasion, and we first landed Marines and then during the first night we spent all night boating in Army backup. I was awarded the Bronze Star for my actions in that invasion. Our next invasion was Palau, and we took in Army troops for the Angaur Island phase of it. It was the second day of that invasion that I was wounded in the upper leg with small arms fire from the beach. Our ship became a hospital ship following initial invasions so I was removed directly to the Sumter for recovery. I had recovered sufficiently to be involved with the Leyte Gulf invasion of the Philippines.

Shortly after that invasion I was returned to the States and given additional training and assigned to a new APA Niagara, and we returned to the S.W. Pacific and were there a short time before the end of the war. Our ship carried the first U.S. personnel to the northern shore of Japan. Shortly thereafter I was discharged, and I went back to law school.

**Personal:** My wife, Margaret, and I will celebrate our 70th anniversary next month. I practiced law in Valley Falls for 58 years before retiring. We have five children. Our oldest, Kem, recently retired as a professor from the University of Hawaii. Our oldest daughter, Susan, lives in Kansas City. Our granddaughter, Lynne, is vice president of global sales for IDEX, in Long Beach, Calif. Our granddaughter, Meg, graduated from the University of Kansas this May and will start law school in the fall.

**GEORGE S. REYNOLDS, AGE: 92**

**Kansas Lawyer**

**Admitted: 1942**

**Military Experience:** U.S. Army (1942-45)

**Master Sergeant – Order of Battle Specialist**

**My Story:** I was in my senior year of law school at Washburn Law School when Pearl Harbor was attacked. I was an assistant librarian working at the library when I heard the newsboy at 17th and College yelling “Extra—Pearl Harbor Attacked.” The next day I tried to enlist in the Navy with several friends, but they said I was too short. I finished law school in May 1942 and passed the bar in June. On August 4, 1942, I enlisted as a buck private in the Army. I was selected for Army Specialized Training Program and sent to the Army Intelligence Military Training Center. I met my future wife, Matilda, at Camp Ritchie, Md.

I became a photographic interpreter and took extra training to become a Japanese Order of Battle specialist. I was sent over for the invasion of Leyte in November 1944, following Gen. Douglas McArthur and, like him, went in on a landing craft LCT and waded ashore. I spent the rest of the war in the Philippines (Mindanao) until the atomic bombs were dropped. I found out the war was ending in an announcement over the loudspeaker just days later. It was a tremendous sense of relief when the bombs ended the war, because we were preparing to invade the mainland and we knew the casualties would be high. Because of my job I knew the invasion would have to be into treacherous mountainous country. After the surrender, I went to Hiroshima in occupied Japan. While there I witnessed the devastation and destruction from the atomic bomb.

I came home from the war in December 1945, and married “Tillie” on June 22, 1946. I opened a law practice in Eureka on April 1, 1946, and spent two terms as Greenwood County attorney and after being in general practice was appointed to the district court bench in May 1955 by Gov. Fred Hall. I received the Kansas Bar Association’s Outstanding Service Award in 1990 and joined the Knights of Columbus in 1947.

**E. Dudley Smith**

Overland Park

(913) 339-6757

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Mediation services for civil litigation.
Award in 1970 (my son, Zack, received the same award in 1992). I retired from the bench in 1972.

**Personal:** Tillie and I have been married 64 years and have seven children (who, incidentally, all have degrees from the University of Kansas): daughter, Sylvia Eckes, and sons, Mark, Nathaniel, Daniel, Eric, Zackery, and Aaron.

**WESLEY E. BROWN, AGE: 104**  
Kansas Lawyer  
Admitted: 1933  
Military Experience: U.S. Navy (1944-46)  
Lieutenant

**My Story:** I entered the Navy in 1944 as a lieutenant junior grade and came out two years later a lieutenant. I was told that line officers would eventually receive different titles, but I don't know if we ever did.

Even though at 37, I was the oldest man in my unit, I had enlisted because I thought it was the right thing to do. Besides, I was about to be drafted, and I never doubted that I would serve. Because I served, I was spared the embarrassment often suffered by men my age who had to explain why they weren't in the war. I went in with a positive attitude and, had it not been for the grim seriousness of the undertaking and my separation from my family, the whole experience would have been quite enjoyable. One thing that allowed me to enjoy the experience was the fact that I shared in the law firm's profits while I was in the Navy, so with the family allowance from the Navy it felt Mary and the kids were provided for while I was away.

A U.S. Navy line officer is supposed to know everything about the Navy and be able to do anything to which he's assigned. He must gather facts, weigh evidence and options, make decisions, and be subject to reversal by higher authorities. It's a great deal of responsibility, and I thrived on it. Much of my Navy experience was in the training programs required to be able to handle my Navy assignments.

I enjoyed the regimentation and training because it was designed to keep us physically and mentally awake and morally straight. I also enjoyed the company of men from all walks of life who were good and decent, meeting in every way the criteria for gentlemen.

At the end of the war, I was sent overseas to the Philippines as Executive Officer of the Housekeeping Branch (called the Anchor Section). I was stationed at the Com Phil Sea Fron-tier, a giant operation with a couple of admirals and a lot of ships coming in and out. To tell the truth, I never did know exactly what we were about. But I kept busy providing the clothing, housing, and feeding of thousands of sailors.

Often in the evening, I'd play host to a friend from Kansas, Delmas Hill, known as “Buzz” to his friends. Buzz was a respected Wabaunsee County and Topeka attorney I knew from our work with the Kansas Democratic Party. He was a knowledgeable and fascinating fellow and the epitome of a “gentleman,” even though he served in the Army, rather than the Navy. He was in the Philippines as a prosecutor of high-ranking Japanese officers.

I'd invite him to the base for some superior Navy food and whiskey, and, more than 12,000 miles from home, we'd talk about the law and life in general far into the night. It was during one such discussion that I recall thinking seriously about becoming a federal judge. Not that I hadn't thought about it before. Several lawyers had mentioned me as a possible judge. But I had no idea how to go about getting such an appointment. Well, Buzz had the same ambition. We talked about it and, when an appointment came open, wired President Truman from the Philippines asking that the vacancy be held open until we got out of the service.

The president couldn't wait, and Arthur Mellott, Mary's and my former teacher at law school, got the appointment.

I was discharged in 1946 and said goodbye to a host of new friends. We swore on an oath over a grog that we'd meet every
Feature Article: The Greatest Generation ... 

Christmas. But, as was the case with so many well-meaning veterans when they got back to their lives, it never happened. I joined the American Legion and VFW (but didn’t go to the meetings).

My boyhood friend and inspiration, Judge Williams, had died while I was overseas. And almost immediately after his return from the military, Buzz Hill found himself appointed federal judge. I believe the news of both events made me hope all the more that I would someday become a judge. I just didn’t know when or how. In the meantime, I happily immersed myself in my family and the law firm Williams, Martindell, Carey and Brown, where I was now a senior partner.

**Personal:** Wesley Brown was married to Mary with two children, Miller and Loy Brown. He is a federal district judge in Wichita.

**About the Author**

Matt Keenan has practiced with Shook, Hardy & Bacon since 1985. He may be reached at mkeenan@shb.com.
The Register of Deeds Office in every county in Kansas is a busy place. People come to the office to record documents, research records, and even to get their passport. The Register of Deeds, one of the “row” offices in county government, is a creature of statute, and it is an important component of the private property system. Because it is limited in nature to the legislative grant of authority and responsibility, the office cannot accept just any document for recording; nor can it simply charge whatever fee thought appropriate.

This article will provide an overview of the basic authority and responsibilities of the office, particularly what documents can be recorded, as well as on what grounds the register of deeds can reject a document. The article will also update the reader on subsequent statutory changes, case law, and attorney general opinions regarding the mortgage registration fee act, which was the subject of a prior Journal article. The next section will review common problems noted in documents being submitted for filing, with ways to avoid or resolve those issues. The final section will address various other issues that arise in the day to day operations of the office. For example, the 2001 revised Uniform Commercial Code (UCC) has been previously covered in a Journal article, but this article will briefly review the responsibilities of the register of deeds related to the UCC.

I. Introduction

The Kansas Constitution empowers the legislature to “confer powers of local ... administration upon political subdivisions.” The legislature may also “provide for such county ... officers as may be necessary.” Although references to the authority of the register of deeds can be found throughout the Kansas Statutes Annotated, the primary source of authority and responsibility is in Chapter 19, Article 12. The register of deeds can appoint a deputy register of deeds, as well as assistants to fulfill the statutory responsibilities of the office. The register of deeds may also administer oaths.

Footnotes
II. Recording of Real Estate Documents

The primary function of the office is the recording of real estate related documents, whether instruments of conveyance (e.g., deeds), mortgages, assignments of mortgages or other interests in real estate, easements, or other documents involving real estate. The register of deeds’ responsibility is to “have custody of and safely keep and preserve all books, records, deeds, maps, papers and microphotographs” submitted for recording.10 The office is also the repository for “maps and plats of cities, subdivisions or additions to the same within [each] county.”11 The documents must be appropriately indexed, and copies may be maintained in paper or other authorized formats.

K.S.A. 58-2221 authorizes the register of deeds to record written instruments that convey real estate, oil and gas interests or estates, “estates or interest created by any lease or easement involving wind resources and technologies to produce and generate electricity,” and instruments that may affect real estate. The person recording the instrument must provide the name and address of the person who is receiving the real estate. The register of deeds’ responsibility is to “have records for tax statements.”12 This information is used by the county clerk to update the mailing address records for tax statements.

Other real estate-related documents that are expressly authorized for recording, including the following:

- Statutory liens;13
- Designations of pesticide management areas;14
- Government ordinances, resolutions and orders (these are usually required to be certified copies of the ordinance, etc.);15
- Maps, plats, and surveys;16
- Affidavits of platting errors;17
- Annexation agreements between cities and landowners;18
- Applications, certificates of appointment, and appraisals of abandoned watercourses;19
- Certificates of incorporation of drainage districts;20
- Planned unit development plans;21
- Municipal energy agency agreements;22
- Statements or certificates regarding artesian wells;23
- Leases, affidavits and other documents related to oil and gas;24
- Releases of abandoned pipeline easements;25
- Discharges, releases, and assignments of mortgages or liens;26
- Notices under the marketable title act;27
- Revocations of grantee beneficiary under transfer on death deeds;28
- Statements of lis pendens filings;29
- Environmental notices;30
- Releases and abandonments of railroad right of way;31
- Certificates or notices of water appropriation and reservation rights;32 and
- Certified copies of death certificates.33

Authority to record real estate related documents may also be found in the Kansas Administrative Regulations.34

Some instruments are required to have specific information included, or meet other types of statutory requirements. For example, instruments conveying real estate interests related to wind resources and technologies must have information regarding limitations on any obstructions that are prohibited or limited.35 Assignments or releases of mortgages may only be signed by certain persons: the mortgagor or the mortgagee’s authorized attorney-in-fact; an assignee of record, a personal representative, or by the lender or a designated closing agent if the property is subject to sale, financing, or refinancing.36 Kansas real property tax law also provides for separate taxation of buildings and land, where the building is owned by one taxpayer and the land is leased to that taxpayer by another taxpayer.37 The lease agreement must be filed with the register of deeds, and must be clearly identified with the words “building on leased ground” on the first page of the agreement.

Recording instruments that convey real estate interests involve more than the register of deeds office. Copies of those instruments, after recording, are forwarded to the county clerk to update the transfer record showing the new ownership.38 If the grantor on the instrument conveying title is not the prior grantee shown on the last preceding conveyance, the clerk will be unable to update the transfer record until the discrepancy

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13. K.S.A. 2-1332; 2010 Supp. 8-143a, 8-1,115; 44-717 (amended L. 2011, Ch. 85, § 7); 58-201; 58-204; 58-220; 58-30a05; 79-3413; 79-2613.
22. K.S.A. 12-888.
29. K.S.A. 60-2201.
32. K.S.A. 82a-714; 82a-1304.
34. K.A.R. 5-10-6; 5-40-73a; 28-29-20; 28-29-25c; 28-29-121; 28-29-325; 28; 28-55-3; 28-71-11; 28-73-3; 30-60-25; 31-264a; and 82-3-402.
is resolved. The clerk may also transfer ownership if presented with a final district court decree or judgment that directs the change of real estate ownership.  

III. Other Documents Recorded or Filed in the Office of the Register of Deeds

In addition to the real estate documents noted above, the following documents are authorized, and sometimes required, to be recorded.

- Interlocal agreements between municipalities
- Certificates of dissolution of credit unions
- Savings and loan associations merger agreements
- Articles of incorporation
- Orders of appointment of receivers for insolvent corporations
- Bonds for certain elected officers
- Amendments to articles of incorporation for irrigation districts
- Powers of attorney
- Military discharge papers
- Declarations regarding grain elevators and warehouses
- Certificate of incorporation of groundwater management or water assurance districts
- Minutes and records of dissolved groundwater management districts

IV. Mortgage Registration Act

The statutory text of the Mortgage Registration Act has not changed, with a minor exception, since the prior journal article. There have been several reported appellate opinions, and attorney general opinions, since that time. Before those authorities are reviewed, a brief overview of the key provisions of the act may be helpful. The definition of a “mortgage” is very broad, going beyond the traditional mortgage form; and the definition has two separate types of documents that can be determined to be mortgages. First, a mortgage, for the purposes of the act, is “every instrument by which a lien is created or imposed upon real property” even when the instrument may also involve personal property as security. Second, the term “mortgage,” under the act, includes:

An executory contract for the sale of real estate, or a bond for a deed, the complete performance of which is deferred for a longer period than ninety days from its execution, under which the grantee or vendee is entitled to possession of the real estate, by the terms of which the grantor holds the legal title as security for the unpaid purchase money ...

Before a document that meets either of these definitions can be recorded, either the required fee must be paid, or it must be shown an exception to the fee applies. If a mortgage has been recorded, without showing an exemption or paying the registration fee, the mortgage cannot be received into evidence in any state court proceeding. The fee is set at 0.26 percent of the principal debt or obligation secured by the mortgage. There are three ways the fee can be reduced or avoided: (1) use of limiting language in the body of the mortgage that states the amount of debt or obligation to be secured by the mortgage which is less than the total debt or obligation; (2) claiming an exemption from the fee under one of the grounds set out in the act; or (3) where the real property covered by the mortgage is located both inside and outside the state of Kansas, the submitter can provide an affidavit used to reduce the fee based on the appraised or fair market value of the real estate in Kansas, related to the value of the real estate outside of the state.

The two reported cases since 1993 both concerned the exemption for prior indebtedness where the registration fee had been paid, which reads:

any mortgage or other instrument upon that portion of the consideration stated in the mortgage tendered for filing which is verified by affidavit to be principal indebtedness covered or included in a previously recorded mortgage or other instrument with the same lenders or their assigns upon which the registration fee herein provided has been paid.

In the older of the two cases, In re Application of Zivanovic, a mortgage was recorded between two parties, and the registration fee was paid. The original lender assigned the mortgage to a third party (who then assigned it to a fourth party). The two assignments were recorded. The mortgagor then returned to the original lender to refinance the debt. The court noted that all parties agreed that if the second assignee of record had assigned the mortgage back to the initial lender, the exemption would clearly apply. The court saw no reason to interpret the statute to require the useless act of reassignment, and found the exemption applied to eliminate the fee for recording the refinanced mortgage.

41. K.S.A. 17-2230.
42. K.S.A. 17-5545.
44. K.S.A. 17-6902.
46. K.S.A. 42-730.
50. K.S.A. 82a-1025; 82a-1338.
51. K.S.A. 82a-1034.
52. K.S.A. 79-3101, et seq.
53. K.S.A. 2010 Supp. 79-3107c, governing protests of mortgage registration fee payments, was amended in 2008.
54. K.S.A. 79-3101.
55. Id. See also In re Coffelt, 395 B.R. 133, 139 (2009) (treating a contract for deed as an equitable mortgage).
56. K.S.A. 79-3107; 79-3102(d).
57. K.S.A. 79-3107.
58. K.S.A. 79-3102(a).
60. K.S.A. 79-3102(d).
In the second case, *GT, Kansas, LLC v. Riley County Register of Deeds,* the initial borrower/mortgagee was Bowman and Curtin Enterprises (BCE). Two mortgages were recorded and the registration fees paid. BCE transferred title to the two general partners in BCE, as individuals, who subsequently transferred title to GT, Kansas, LLC (GT). The transfer of title was subject to the recorded mortgages (which had also been assigned to a successor mortgagee). The subsequent assignee-mortgagee refinanced the debt with GT, and claimed the exemption for the previously paid registration fee charge to BCE and the initial lender. Because the language of the statutory exemption addresses the lender, and not the borrower, the court held the change in the nature of the entity of the borrower does not affect the right of the lender to claim the exemption.

On the same exemption, the attorney general noted that where a future advance clause is involved, this exemption can be claimed even though advances are made, the balance is paid down, and then more advances are provided. The attorney general opinions filed since 1993 cover several other matters addressed in the mortgage registration act. In reverse order, the attorney general has opined:

Assignments of Conservation Reserve Program payments are not subject to mortgage registration fees.

A nonexempt lender is not required to pay the registration fee when it is assigned a mortgage that is exempt under K.S.A. 79-3102(d)(8) [where the fee is not otherwise due by law, e.g., the lender is a federal entity not subject to state tax].

Under K.S.A. 79-3102(d)(2), which exempts from additional fees when the instrument is providing additional security for indebtedness that has already had the registration fee paid in full, real estate security can be added, or released, from the mortgage without payment of additional fees.

Finally, since 1993, the attorney general has addressed an issue arising under the multicounty mortgage statute, which allows persons submitting mortgages for recording that cover property in more than one Kansas county to pay the fee in the first county only, and that county then apportions the fee collected to the other counties on the basis of the county appraised valuation of the various properties in each county. Once the mortgage is submitted to the first county for recording, the mortgages can be recorded in the other counties if sufficient evidence is provided the fee has been paid to the first county, even if the subsequent counties have not yet received their portion of the fee.

V. Register of Deeds Responsibilities Under the UCC

Although the 2001 changes to the UCC reduced the number of filings in the register of deeds in favor of more centralized filing with the secretary of state, there are still some filings that are made locally in each county. The register of deeds is the filing office for: as-extracted collateral or timber to be cut or fixture filings where the collateral is or will become fixtures. A UCC filing is not effective if rejected for specific reasons, including but not limited to: a sufficient filing fee is not paid; the name of the debtor is not provided; a sufficient legal description is not included; or the form cannot be read or deciphered.

VI. Common Problems with Documents Submitted to the Register of Deeds

The error, or reject, rate for documents in the Sedgwick County Register of Deeds office runs at about 5 percent. The following are a sampling of problems noted in recent submittals to the Sedgwick County Register of Deeds:

- Identity of grantee uncertain – deed refers to A or B;
- Acknowledgment states two persons signed the instrument, however only one signed the instrument;
- Sales validation questionnaire submitted is incomplete, second page of form is missing;
- Title of person signing in representative capacity not stated in acknowledgment;
- Mortgage submitted for recording, however, it fails to state the amount of the lien or principal indebtedness;
- Document submitted missing attachments that provide the legal description;
- The notary’s last name provided in the acknowledgment is different from the name provided on the notary stamp;
- The affidavit submitted to claim an exemption from the mortgage registration fee is not signed and notarized;
- The acknowledgment is missing the notary’s stamp; and
- Legal description of property stated in document is not in Sedgwick County.

These errors and others, and how to avoid them, will be reviewed separately as follows.

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64. 271 Kan. 311, 22 P.3d 600 (2001).
70. K.S.A. 79-3105.
74. Davis v. Vermillion, 173 Kan. 508, Syl. ¶ 3, 249 P.2d 625 (1952) ("or" should be read as a disjunctive ordinarily, unless the context dictates otherwise).
A. Documents not authorized to be recorded

As noted at the beginning of this article, the register of deeds can only record those documents authorized to be recorded in the office. Documents, such as graduation certificates from hypnosis school are not authorized, nor are verifications of death signed by funeral directors (although certified copies of official death certificates can be filed). Sometimes the documents may be properly recorded or filed in other offices; e.g., a registration of a farm name should be recorded in the county clerk’s office. Generally this should not be a problem if the document has a real estate description, but otherwise the submitter should be able to identify the statutory authority relied on for recording the document.

B. Unusual documents

Occasionally, a register of deeds will be asked to record a document that defies description. These documents usually are exceedingly verbose, sometimes from 10 to 20 pages single-spaced. The documents often include assertions the submitter is a sovereign citizen, or have statements concerning the significance of whether a U.S. flag has a fringe. More often than not the drafter quotes copiously from historical documents, such as the Magna Carta or the Mayflower Compact. These documents, simply by their character, should not be rejected but should be reviewed for the same reasons to reject any other document: it must affect real estate or have some other statutory source of authority for recording; it must be properly signed and acknowledged; and any fees must be paid, including mortgage registration fees if it qualifies as a lien on real estate.

C. Copies instead of original documents

Although not expressly stated in any statute, the standard practice of Kansas registers of deeds is to only accept original documents for recording. The attorney general has opined that this rule can be inferred from consideration of various statutes. The technological developments in copying have made the register of deeds task of identifying a document as an original much harder. One way to avoid any question is to use a colored ink to sign documents, such as a blue pen. If the original document is unavailable, generally the problem may be resolved by providing an affidavit stating the reason why the original document is not available for recording, and that the submitted copy is a true and correct copy of the original. Another problem is alterations to the document, including white-out of terms, which suggests the document may have been altered after being signed and acknowledged.

D. The document contains apparent errors

In reviewing documents submitted for recording, the register of deeds may catch typographical or other types of errors, that while not a basis for refusing recording, could present problems if not corrected. These may be anything from misspellings, legal descriptions that have some minor discrepancies, or perhaps something as simple as blank spaces not being filled in. The register of deeds may bring these errors to the attention of the submitter; and if the submitter can fix them fine, but if not, and the submitter wants the document recorded as is, the register of deeds should accept it for recording.

On the other hand, if the errors or missing information impact the recordability of the document, the problems must be corrected before the document can be recorded. For example, if the amount of the lien imposed by a document is not clear, in order for the proper mortgage registration fee to be charged, the amount of principal indebtedness will need to be provided. If the document is missing pages, that is another material error that would need to be corrected before recording. Problems related to UCC filings include where the required addendum is missing; the forms are missing necessary information such as the identity or address of the debtor; or failure to use the required forms for UCC filings.

E. The document is not properly executed or acknowledged

Most documents authorized for recording must be properly executed and acknowledged. For example, where the spell-
ing or form of the names provided in the body of the text, the signature block and the acknowledgment have differences, the register of deeds may require correction. Occasionally a document may be intended to be signed by a person acting in a representative capacity, but the signature block or the acknowledgment fails to show the representative capacity, and it appears the person is actually signing in an individual capacity.

The requirement that the names provided in the text of the document, the signature block and the acknowledgment is sometimes referred to as the “rule of three” and may be stringently enforced by some register of deeds who are unwilling to accept any variation. There does not appear to be any statute or Kansas reported court decision that supports this stringent enforcement. Minor variations should not bar recording; however, if the scrivener, the parties and the notary public (or other official that acknowledges the signatures) can be consistent with how the names are stated, problems can be avoided.84

Occasionally, the documents submitted will have been acknowledged outside of Kansas, and perhaps even outside the United States. Those acknowledgments are considered valid for recording purposes in Kansas, to the extent they comply with the acknowledging jurisdiction’s requirements for acknowledgments.85 The National Notary Association publishes an annual U.S. Notary Reference Manual: A Guide to Notarization Requirements for All U.S. States and Jurisdictions. The manual also includes information regarding the 1961 Hague Convention on Authentication to validate signatures on foreign documents.

F. The document refers to another unrecorded document

The Kansas Supreme Court has held the register of deeds has a duty to examine any unrecorded document that is referred to in a document submitted for recording.86 The usual situation is when a memorandum of lease is submitted for filing that refers to the unrecorded full lease. The purpose of the examination is to verify that the unrecorded document is not a mortgage for the purposes of the mortgage registration act. The problem that arises is lessors and lessees may prefer to not record the full lease due to confidential or proprietary information included in the lease. Registers of deeds may be able to address these concerns, either by having the county attorney or county counselor review the lease, in camera so to speak, to verify it is not a disguised mortgage, or through other measures intended to preserve the confidentiality of the terms.

G. Real estate sales validation questionnaire not submitted

Every deed or instrument transferring title to real estate property, and affidavits of equitable interest, must be either accompanied by a real estate sales validation questionnaire, or be claimed as exempt from the requirement, before the document can be recorded by the register of deeds.87 The exemptions that can be claimed are:

- 1) recorded prior to the effective date of this act;
- 2) made solely for the purpose of securing or releasing security for a debt or other obligation;
- 3) made for the purpose of confirming, correcting, modifying or supplementing a deed previously recorded, and without additional consideration;
- 4) by way of gift, donation or contribution stated in the deed or other instrument;
- 5) to cemetery lots;
- 6) by leases and transfers of severed mineral interests;
- 7) to or from a trust, and without consideration;
- 8) resulting from a divorce settlement where one party transfers interest in property to the other;
- 9) made solely for the purpose of creating a joint tenancy or tenancy in common;
- 10) by way of a sheriff’s deed;
- 11) by way of a deed which has been in escrow for longer than five years;
- 12) by way of a quit claim deed filed for the purpose of clearing title encumbrances;
- 13) when title is transferred to convey right-of-way or pursuant to eminent domain;
- 14) made by a guardian, executor, administrator, conservator or trustee of an estate pursuant to judicial order;
- 15) when title is transferred due to repossession; or
- 16) made for the purpose of releasing an equitable lien on a previously recorded affidavit of equitable interest, and without additional consideration.88

84. Kansas Title Standards, Chapter 10, provide examples of variations that may or may not be problematic.
85. K.S.A. 58-2228.
87. K.S.A. 79-1437c.
The exemption must be clearly stated on the document submitted, and can be referenced simply by stating “Exemption #X” with the appropriate number in place of the X. Other problems may be that the questionnaire is not completely filled out, or there are errors in the answers to the questionnaire. The entire form, back and front, should be submitted with the deed or affidavit of equitable instrument.

H. The required fees have not been paid
Most documents submitted for recording must be accompanied by a filing fee; and in some cases, in addition to the filing fee, as discussed above, the legislature has set additional fees for mortgage registration purposes. The legislature has also authorized a special fee to pay for technological expenditures. One sometimes overlooked fee is the extra one dollar fee charged if the names of the person signing the document, or the notary public, have not had the names plainly typed or printed under the signatures.

I. The document submitted is illegible or cannot be copied
Any document submitted for recording must be sufficiently legible so that it can be copied into the format used by the register of deeds. In order to provide space for any recording stamps or other information, there must be enough margin space, or an additional cover sheet may be required, and a filing fee will be charged for the necessary additional page.

VII. Other Matters
The legislature has provided for an expedited method of challenging liens on real property filed in the register of deeds office. Documents filed with the register of deeds are public records subject to the Kansas Open Records Act. However, consistent with that act, the register of deeds can refuse to disclose information that is exempted under the act. The register of deeds may be held liable for negligent acts.

VIII. Conclusion
By the time a document has been received, reviewed, rejected, returned and resubmitted in a form sufficient for filing (or with the right amount of fees), there could be questions of priority raised, or other problems that could have been avoided. Following this simple checklist, and carefully reading the documents, may help reduce the chance your document will not be promptly recorded:

1. Make sure you submit the original, or if the original is not available, provide an original affidavit as a cover page.
2. Check that you have provided the required filing fee, and any other fees required.
3. Carefully review the document to check for any errors that could lead to rejection; review the legal description if one is provided; check the names of the signers for spelling; have blank spaces filled in or marked as N/A, etc.
4. If the document does not have a real estate description included, be prepared to inform the register of

94. Id.
95. K.S.A. 58-4301, et seq.
97. Cf. Mid Am. Credit Union v. Bd. of County Com’rs of Sedgwick County, 15 Kan. App. 2d 216, Syll. ¶1, 806 P.2d 479 (1991) (“K.S.A.1990 Supp. 8-135(c)(1) requires the county treasurer to use "reasonable diligence" in ascertaining whether the facts stated in an application for a motor vehicle title are true. The duty of the county treasurer, a public employee, is owed to the lienholder whose interest the procedure under the statute seeks to protect.”).
deeds the statutory authority for recording the document in case he or she asks.

5. Make sure the acknowledgment is correct, e.g., the notary’s term of office has not expired and the representative capacity of the signer (if not as an individual) is provided.

6. If you have any questions on the recordability of a document, or the amount of fees due, call the register of deeds to check on the issues or to verify the right amount of fees.

7. If the document conveys title to real estate, or is an affidavit of equitable interest, prepare and submit a property valuation questionnaire (properly filled out) or note on the document the exception claimed if one applies.

The registers of deeds are very aware they are the registers, and not the rejecters, of deeds. However, they take their responsibilities very seriously, as they should, and when there are problems, they must refuse recording until the problems are corrected. Following the steps noted above should make it less likely that your document will be rejected rather than recorded. Above all else, never be afraid to call, visit or email the register of deeds – they are public servants and every one I have had the occasion to work with is willing to work with anyone to get their documents recorded.

Legal Article: On the Record...

Robert W. Parnacott, Wichita, graduated with dean’s honors from Washburn University School of Law in 1991. Following law school he was a research attorney on the Central Staff for the Kansas Court of Appeals and subsequently for Justice Tyler C. Lockett, of the Kansas Supreme Court. He then served as a staff attorney for the Kansas Corporation Commission and later for the Kansas Department of Health and Environment. Prior to joining the County Counselor’s Office for Sedgwick County, he was in private practice with Woodard, Hernandez, Roth & Day LLC. He has represented the Sedgwick County Register of Deeds since August 2000. He has made presentations to the Kansas Register of Deeds Association and has also previously published several articles in the Journal of the Kansas Bar Association on topics including appellate standards of review, civil procedure, annexation, public health, and election petition law.

About the Author

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After several years of engineering, programming and reprogramming, and meetings with the Kansas Supreme Court, the district court judges, staff, and members of the bar, studying best practices, and listening to input from our design team volunteers from the practicing bar in various practice areas, we are pleased to be making electronic filing available to the bar, beginning September 19, 2011.

Attorneys will be able to access the e-filing system directly through the Johnson County District Court website with their Kansas bar number login and password, or by link through the Kansas Judicial Branch website.

We have completed the basic modules for civil case filings. In order to use the e-filing system, lawyers will need to first be registered to access the case records with their Kansas bar number and password to the system. Then, to e-file you need to obtain e-filing security clearance from the court’s Justice Information Management System (JIMS) Department. The waiting line to be registered and given the security for e-filing, at least initially, may be quite long. So, please be patient. You will be able to request this security clearance from the secure JIMS login page that you currently use to access the case records, https://www.jococourts.org. That will direct your request to the JIMS Help-Desk, and we will begin to process your request.

You will be able to file all pleadings and motions without travelling to the courthouse. If a filing requires payment of a fee, the e-filing system will require you to enter your bank routing number and account number. A $1 charge will be added to the transaction to cover the administrative charges of the banking vendor. You will be able to request service of process and alias service by simple clicks of the mouse and by entering the appropriate names and addresses in the fields on the form provided. Please note, if you request personal or mail service by the sheriff of Johnson County and your service packet is more than 30 pages per person (“person” includes service upon an “a/k/a” or “f/k/a” or “d/b/a” etc.) you will need to provide a sufficient number of hard paper copies at the Clerk’s Office for that service. Service by special process server or by the filing attorney, regardless of the service packet size or number, is issued back to the requesting lawyer electronically.

The e-filing system will also allow you to submit chamber copies of your motions (as required by Local Rule 8) by a simple click of the mouse. You may need to check with the assigned court on your individual cases to determine whether that judge may request hard paper copies also. And, if your motion includes a significant number of exhibits or is several pages in length, you may be contacted to deliver a hard copy to the assigned division or a separate indexed electronic copy to the judge and opposing counsel. We are not able to index the attachments to the imaged documents at this time.

You will also be able to submit proposed Journal Entries, agreed orders, etc., for the judges’ signatures through the e-filing system.

Please note, your signature may be in the form: “/s/ Your Name” on the line above your typed full name in the place where your cursive signature would normally appear, or, you can submit your scanned cursive signature. Your signature is accepted as genuine and valid based upon the secure login under your bar number and password. If you authorize anyone to use your login and password, then you must be certain they are uploading your signature. Security of your login and password are your responsibility. If a document is uploaded with your signature under your login and password, it will be accepted as being your signature on the document. Every document must have a “signature” on a signature line.

There will be training offered. We have prepared a short audio/visual presentation that you can review at your convenience on the secure website. That presentation will get you started. You may also submit your written e-filing questions to the District Court Clerk’s Office at this special email address: DCC-CVeFiling@jocogov.org. Telephoned emergency questions to the Clerk’s Office may be addressed, but a written articulation of your issue will make it easier to answer pre-
cisely and get a timely response back to you. That email in-box will be monitored throughout the day by several deputy clerks. In addition, some of the design team law firms have offered their facilities and staff to help train other users of the e-filing system.

You are not required to take the training. We have constructed a simple, fairly intuitive system. However, training may help avoid some missteps and will help to avoid overloading our clerks with questions and user problems. We are also compiling a Frequently Asked Questions page on the court’s website that we will hope you will access before calling or sending an oft-repeated question to the clerk. You can begin using the system as soon as you have received verification that you are registered to e-file with the appropriate security assigned. You will know that you have the e-filing security when you see the new e-filing button on your secure JIMS screen.

A couple of matters to keep in mind: this is still a work-in-progress. Please be patient if you find a glitch that we have not yet uncovered. Also, the “filing date and time” are determined by the JIMS computer as the time when you submit your documents, not when the clerk has posted them to the ROA of the case file. When you submit documents, your submissions are reviewed by the clerk’s staff (to be certain you have signed the document, make sure you did not upload your vacation pictures instead of the motion or petition you intended, etc.) prior to posting them to the ROA of the case file. Also, keep in mind that some additional modules to make e-filing work even better for you and your clients are still being developed. We will keep you advised on the progress.

For your information, we will be next developing the criminal e-filing program, followed by juvenile/CINC and probate. We appreciate your help and value your feedback.

There have been many people involved with the development of the Johnson County e-filing system. Without mentioning everyone, special appreciation is expressed for Tim Mulcahy in the JIMS Department and his programmers and staff and to the Kansas Supreme Court, particularly Justices Marla Luckert and Dan Biles and the Office of Judicial Administration staff, for their suggestions, encouragements, and enthusiastic support for this project. We also acknowledge the funding and support provided by the Johnson County commissioners in their continuing efforts to make this system available and accessible to you for the benefit of your clients and the Johnson County community. Finally, we want to acknowledge our gratitude for the design team lawyers who volunteered their time, talents and facilities to make this a workable system, and to our clerk, Sandy McCurdy, and the Clerk’s Office staff for their unselfish service, time, and dedication in this project.

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Rule 203(c)(1), (2), (4), and (7) are hereby amended, effective the date of this order:

(c) Automatic temporary suspension of attorneys convicted of a felony crime or any crime mandating registration by the attorney as an “offender” as defined by the Kansas Offender Registration Act, K.S.A. 22-4901 et seq.

(1) Duty of attorney to report. An attorney who has been charged with a felony crime (as hereinafter defined) in Kansas or a crime that upon conviction mandates registration by the attorney as an “offender” as defined by the K.S.A. 22-4902(a), or with an equivalent offense in any federal court of the United States or the District of Columbia or in any other state, territory, commonwealth, or possession of the United States shall promptly within 14 days inform the Disciplinary Administrator in writing of the charge. The attorney shall thereafter promptly inform the Disciplinary Administrator of the disposition of the matter within 14 days of disposition. Notice of appeal does not stay the reporting required under this rule.

(2) Duty of judicial administrator or clerk of court. The judicial administrator or clerk of any court in this state in which an attorney is convicted of a felony crime or a crime mandating registration as an “offender” pursuant to K.S.A. 22-4902 shall within 14 days after the conviction transmit a certified copy of the judgment of conviction to the Disciplinary Administrator.

(4) Automatic temporary suspension. Upon the filing with the Supreme Court of the certificate of conviction showing that any attorney licensed to practice law in Kansas has been found guilty, whether sentenced or not, in any federal court of the United States or the District of Columbia or of any state, territory, commonwealth, or possession of the United States of a felony crime as hereinafter defined, or of a crime mandating registration by the attorney as an offender as defined in K.S.A. 22-4902, the Court shall enter an order immediately and temporarily suspending that attorney from the practice of law until final disposition of the disciplinary proceeding commenced upon such conviction, whether the conviction resulted from a plea of guilty, no contest, or nolo contedere, or from a verdict after trial or otherwise, and regardless of the pendency of any appeal. A copy of the order of suspension shall immediately be served upon the attorney, who then must immediately be served upon the attorney, who then must timely comply with Rule 218. Nothing herein shall be construed to preclude an application by the Disciplinary Administrator for a temporary suspension otherwise allowable by Supreme Court rule of any attorney convicted of any other crime.

(7) Disciplinary proceedings. Any disciplinary proceedings arising out of a conviction for a felony crime shall proceed as any other matter under the Supreme Court’s disciplinary rules.

BY ORDER OF THE COURT, this 7th day of July, 2011.

FOR THE COURT

Lawton R. Nuss
Chief Justice
Save the Date!

29th Annual Plaza Lights Institute
Friday, December 9, 2011
Marriott Country Club Plaza, Kansas City, Mo.

Course Schedule

8:30 a.m.  Registration & Continental Breakfast

9 a.m.   Professionally Responsible Operation of Professional Business Entities in Kansas
William Quick, Polsinelli Shughart P.C., Kansas City, Mo.
Randy E. Stookey, Assistant General Counsel, Kansas Board of Healing Arts, Topeka

9:50 a.m.  Visas for International Personnel
Pat Mack, Corporate Immigration Compliance Institute, Overland Park
Kathleen A. Harvey, Kathleen A. Harvey P.A., Overland Park
Kyle Vena, Baseball Operations Assistance, Kansas City Royals, Kansas City, Mo.

10:40 a.m.  Break

10:55 a.m.  Contracting with Indian Nations
Burton W. Warrington, President/CEO, Prairie Band LLC, Mayetta

11:45 a.m.  Lunch (on your own)

1 p.m.   Step Up in Basis Issues
Hugh W. Gill IV, Hinkle Law Firm LLC, Wichita

1:50 p.m.  Buy/Sell Agreements
Nancy Schmidt Roush, Lathrop & Gage LLP, Kansas City, Mo.

2:40 p.m.   Break

2:55 p.m.  How to Draft Support & Discretionary Trusts
Timothy P. O’Sullivan, Foulston Siefkin LLP, Wichita
Kent A. Meyerhoff, Fleeson, Gooing, Coulson & Kitch LLC, Wichita

3:45 p.m.   Adjourned

Registration coming soon.

The Kansas Bar Association has applied for 6.0 CLE credit hours, including 1.0 hour ethics and professionalism credit for this seminar.
ATTORNEY DISCIPLINE

SIX-MONTH SUSPENSION
IN RE MICHAEL E. FOSTER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,458 – AUGUST 19, 2011

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against Michael E. Foster, of Wichita, an attorney admitted to the practice of law in Kansas in 1973. Foster’s disciplinary proceedings involved probate matters of one of his clients.

DISCIPLINARY ADMINISTRATOR: At the time of the hearing, the deputy disciplinary administrator made no specific recommendation for discipline. Instead, the deputy disciplinary administrator informed the Hearing Panel that she wished to wait until the time of the oral argument before the Kansas Supreme Court to make a recommendation. The deputy disciplinary administrator argued that because the respondent had not completely put his plan of probation into effect, she was not able to join the respondent’s request that he be placed on probation, subject to the terms and conditions of his proposed plan.


HELD: Court held the evidence presented to the Hearing Panel established the charged misconduct of Foster by clear and convincing evidence and supported the panel's conclusions of law. Court stated reinstatement is conditioned upon respondent demonstrating that he has addressed his depressive disorder, establishing that he is in good mental health and fit to resume the practice of law, and complied with the conditions previously agreed upon with the disciplinary administrator’s office.

CHILD CUSTODY AND RELIGIOUS BELIEFS
MONICA HARRISON V. ADIEL TAUHEED
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,214 – AUGUST 5, 2011

FACTS: When child was 4 years old, Adiel admitted paternity to child’s mother, Monica. District court heard evidence on child custody. Mother’s motion for modification of child custody was granted. Father appealed, claiming district court proceeded with modification of order rather than an initial custody determination, and refused to consider the parents’ religious beliefs against his potential for future custodial care of the child. Court of Appeals affirmed, 44 Kan. App. 2d 235 (2010), finding Kansas law prohibits consideration of parent’s religious beliefs in custody determination absent threshold showing of actual harm to health or welfare of child caused by those religious beliefs and practices. Dissent argued that no showing of “actual harm” is required, and that “impact” on best interests of child is sufficient. Petition for review granted.

CIVIL

ADMINISTRATIVE AGENCY REVIEW
AND JURISDICTION
BARLETT GRAIN CO. L.P. V. KANSAS CORPORATION COMMISSION
SCOTT DISTRICT COURT – APPEAL DISMISSED
NO. 103,297 – AUGUST 5, 2011

FACTS: The KCC issued a show cause order alleging Bartlett aided and abetted unauthorized motor carriers. Specifically, the order alleged Bartlett solicited three for-hire motor carriers who violated motor carrier safety laws by operating farm-registered vehicles in interstate commerce, operating the vehicles over the gross weight allowed in Kansas, lacking a U.S. Department of Transportation number, lacking medical examiner’s certifications, lacking commercial driver’s licenses, and failing to comply with Unified Carrier Registration Agreement requirements. The order further alleged that each violation was intentional and could subject Bartlett to a fine of up to $5,000 per violation. Bartlett answered the show cause order, contesting the KCC’s jurisdiction over it with respect to this matter and denying the alleged violations. At a prehearing conference, Bartlett argued the KCC lacked jurisdiction with respect to its hiring of third-party motor carriers. The KCC found it had authority and jurisdiction over Bartlett to proceed. The district court concluded the KCC had “jurisdiction to proceed with civil penalties under ‘aiding and abetting’ as the facts may justify.”

ISSUES: (1) Administrative agency review and (2) jurisdiction

HELD: Court held the appeal was an improper interlocutory appeal. Court found under the facts of this case, the appeal must be dismissed for lack of jurisdiction when (1) the appellant prematurely sought review of the agency’s jurisdictional decision before the agency considered the underlying substantive allegations against the appellant and (2) the appellant neither sought interlocutory review under K.S.A. 77-608 nor established its entitlement to do so.

STATUTES: K.S.A. 20-3018; K.S.A. 66-118a, -1,129; and K.S.A. 77-607, -608, -609
ISSUE: Consideration of parent’s religious beliefs and practices in custody determination based on best interests of child

HELD: District judge employed correct best interests of the child legal standard in initial custody determination. Judges who preside over child custody disputes must differentiate between parent’s religious beliefs on one hand and religiously motivated actions or conduct with implications for paramount best interest of the child on the other. Disapproval of mere belief or non-belief cannot be considered in custody determination, but consideration of religiously motivated behavior with impact on child’s welfare cannot be ignored. It is one of the many relevant factors that must be part of the holistic custody calculus required under Kansas law. Judge may not speculate about behavior that a parent’s religious beliefs may motivate in the future, and may not weigh the merit of one parent’s religious belief against the other’s. Here, district court applied the correct legal standard in considering ways currently religiously motivated conduct affected the child’s best interests.


DUI AND PRELIMINARY BREATH TEST
DANIEL STEPHEN ALLEN II V.
KANSAS DEPARTMENT OF REVENUE
ELLSWORTH DISTRICT COURT – REVERSED AND REMANDED
NO. 102,134 – AUGUST 5, 2011

FACTS: Allen was pulled over for multiple traffic violations and failed several field sobriety tests. Allen agreed to a preliminary breath test and failed the test with a 0.087 result. The Kansas Department of Revenue issued an administrative order suspending Allen’s driving privileges. Allen appealed the administrative action to the district court. The district court reversed the administrative order, holding there were no reasonable grounds for the officer to administer an evidentiary breath test under K.S.A. 2007 Supp. 8-1001. Additionally, the district court found K.S.A 2007 Supp. 8-1012 unconstitutional both on its face and as applied in this case. The district court ruled that the PBT result could not be used to determine if there were reasonable grounds to request the evidentiary breath test.

ISSUES: (1) DUI and (2) preliminary breath test

HELD: Court held that under the facts of this case, the trooper had good reason to “believe that guilt [was] more than a possibility” and that he possessed reasonable grounds to request a breath test under K.S.A. 2007 Supp. 8-1001 without the results of the PBT. Court found it was unnecessary to address Allen’s constitutional challenge to K.S.A. 2007 Supp. 8-1012 because the trooper possessed reasonable grounds for requesting the breath test.

DISSENT: Justice Johnson dissented and would defer to the district court’s weighing of the evidence and affirm its determination that the trooper did not possess reasonable grounds to request a breath test without the PBT results.

STATUTES: K.S.A. 2007 Supp. 8-1001, -1012; K.S.A. 41-727(a); and K.S.A. 60-2101(b)

HABEAS CORPUS
WIMBLEY V. STATE
SEDGwick DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED
NO. 101,595 – AUGUST 12, 2011

FACTS: Wimbley’s conviction for premeditated first-degree murder and criminal possession of firearm affirmed on direct appeal. 271 Kan. 843 (2001) (Wimbley I). In unpublished opinion, Court of Appeals affirmed district court’s denial of ineffective assistance of counsel claims raised in K.S.A. 60-1507 motion (Wimbley II). Four years later, Wimbley filed second 1507 motion, challenging prosecutor’s statement that premeditation can occur in an instant and cited intervening change in law by Supreme Court’s decision in State v. Holmes, 272 Kan. 491 (2001, decided four months after Wimbley II). Wimbley also speculated DNA on murder weapon might be exculpatory. District court denied the motion as successive. Court of Appeals reversed in unpublished opinion (Wimbley III), finding 1507 second motion was not procedurally barred because Holmes provided exceptional circumstances and triggered manifest injustice exception. Instead of remand for reconsideration of second 1507 motion, Court of Appeals found Wimbley was entitled to relief as matter of law, reversed the convictions, and remanded for new trial in which district court was to conduct comprehensive hearing on questions surrounding DNA evidence. Review granted.

ISSUES: (1) Intervening change in the law and (2) DNA retesting

HELD: Holding in Holmes is analyzed and clarified. Holmes did not change legal definition of premeditation and did not create new structural rule. Case simply reiterated that prosecutor’s statement that premeditation can occur in an instant is misstatement of law, and that if such error denied the defendant a fair trial, reversal for new trial is required. Wimbley could have pursued current prosecutorial misconduct claim either in direct appeal, or with benefit of Holmes in first 1507 motion. Court of Appeals is reversed.

District court erred in finding Wimbley could not obtain testing of biological material on firearm under K.S.A. 21-2512 because State had not presented evidence of that material at trial. Statute only requires the material to be related to either the investigation or prosecution. Also, Wimbley made a sufficient initial showing that state possessed the biological material he wanted tested. However, district court was justified in declining Wimbley’s request because under facts of case that retesting, standing alone, cannot produce noncumulative exculpatory evidence, and no showing of reasonable likelihood of more accurate and probative results.

STATUTES: K.S.A. 21-2512, -2512(a), -2512(a)(1), -2512(a)(2), -2512(a)(3), -2512(c); and K.S.A. 60-1507, -1507(c), -1507(f)

NEGLIGENCE, CONSUMER PROTECTION, AND KANSAS NURSES ASSISTANCE PROGRAM
BERRY V. NATIONAL MEDICAL SERVICES INC. ET AL.
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 99,953 – AUGUST 12, 2011

FACTS: Judith Berry brought negligence and consumer protection claims against National Medical Services Inc. (NMS) and Compass Vision Inc. (Compass) based on urinalysis tests conducted as part of Berry’s participation in the Kansas Nurses Assistance Program (KNAP). Berry alleged the defendants acted negligently in establishing arbitrary and scientifically unreliable cutoffs over which test results were reported as positive and in failing to reevaluate cutoff limits to allow for incidental or involuntary exposure or consumption of products containing alcohol. Further, Berry claimed defendants knew that because she was a participant in KNAP, her nursing license would be in jeopardy if she tested positive. The district court, without analysis or explanation, dismissed Berry’s petition with prejudice for failure to state a claim upon which relief may be granted. The Court of Appeals reversed on the negligence claim, finding that Berry was a foreseeable plaintiff, that the probability of harm was foreseeable, and that there was no public policy against imposing a duty on defendants.

ISSUES: (1) Negligence, (2) consumer protection, and (3) KNAP

HELD: Court held that Berry was a foreseeable plaintiff, and the probability of harm was foreseeable. There is a duty to report test results that are qualitatively and quantitatively accurate. A laboratory testing facility owes a duty to those whose specimens it tests to accu-
rately report results and not to mischaracterize or misinterpret those results. Court held the public policy of legislation authorizing the Board to regulate the competency of nurses is intended to protect medical consumers. That worthy goal is not hindered by allowing a nurse to file a claim against a substance abuse testing company for negligent testing. Berry will not get her nursing license reinstated as a result of this negligence claim. There is no public policy to extend protection to a tortfeasor simply because the tortfeasor contracts with a government agency. Court reversed the district court on the negligence claim.

Dissent: Justice Biles dissented arguing the majority’s decision opens a door for administrative licensees to select tort actions against third-party contractors instead of pursuing their due process rights through established licensing procedures. In the end, the result may make it more difficult for licensing agencies to offer rehabilitation alternatives for impairments such as substance abuse. STATUTES: No statutes cited.


FACTS: Gabriel Gaumer’s father purchased a used hay baler “as is” from Rossville Truck. The baler was missing a safety shield on its side, which would have been part of the baler when it was originally manufactured and sold. When Gaumer attempted to fix the baler, he slipped and his arm entered the baler causing him an amputation just below his left elbow. Gaumer claimed Rossville was negligent by failing to warn about the potentially dangerous condition of the baler without the safety shield, negligent by failing to inspect the baler before the sale to Gaumer’s father, and strictly liable for selling a product in an unreasonably dangerous condition. Gaumer provided an expert witness report from engineer Kevin B. Sevart. Sevart opined that Gaumer’s injuries were “significantly enhanced due to the absence of a safety device designed to specifically limit injuries in an accident such as he experienced.” The report also stated: “It has long been known by engineers and the agricultural equipment industry that shields which must be removed for, or which interfere with, routine maintenance will not likely be maintained on the machine.” The district court judge granted summary judgment on the negligence and strict liability claims, holding that the expert report’s failure to mention any legal duty of Rossville to warn or inspect meant that he could not simply “piggyback the opinion of defectiveness from the manufacturer to the seller.” The Court of Appeals affirmed the summary judgment on the negligence claims for failure to provide expert testimony on the standard of care of a used implement dealer. The panel reversed, however, on the strict liability claim, holding that (1) the expert opinion was sufficient to establish a prima facie case for strict liability and (2) Kansas law, as so far enunciated by this court, supports a strict liability claim against a seller of used goods.

ISSUES: (1) Products liability, (2) negligence, (3) strict liability, and (4) used products

HELD: Court held that the Kansas Products Liability Act (KPLA) does not supersede Kansas common law on the question of whether Kansas law supports a strict liability claim against a seller of used goods. Court stated that the legislature’s removal of language from the KPLA that would have differentiated between new- and used-product sellers in Kansas and the precedents adopting and applying § 402A of the Restatement, which also does not distinguish between sellers of new or used products, point to a ruling in favor of Gaumer. Court found that neither policy considerations nor the persuasive force of contrary decisions from sister state courts would appear to shield sellers of used products from the potential of strict liability in Kansas, § 402A(1), (2). Court held that Kansas law permits pursuit of a strict liability action against the seller of a used product.

STATUTES: K.S.A. 60-3301, -3302, -3304, -3305, -3306, -3307; and K.S.A. 77-109

REAL ESTATE AND ZONING 143RD STREET INVESTORS LLC ET AL. V. THE BOARD OF COUNTY COMMISSIONERS OF JOHNSON COUNTY ET AL. JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 102,350 – AUGUST 5, 2011

FACTS: The landowners own approximately 95 acres of land on the southeast corner of 143rd Street and Pfumm Road, located in the city of Olathe and Johnson County. A portion of the property lies within the primary flight corridor of the Johnson County Executive Airport, which is a 500-foot-wide corridor centered along the extended centerline of the existing runway. Most of the property is located adjacent to this corridor and is not on the direct path of landings or takeoffs. For several decades, this property has been zoned agricultural. Seeking to change this zoning, the landowners filed an application with the city to classify the property as “RP-1” (planned single-family residential) and to approve a “preliminary plat for a subdivision with 230 lots and 16 tracts to be known as Amber Ridge.” The Amber Ridge development would have an overall density of approximately 2.4 dwellings per acre. In this case, the city approved the proposed rezoning, but the county did not. On judicial review of the county’s decision to disapprove the proposed rezoning, the district court found the county’s authority was limited to conducting a quasi-judicial review of the county’s approval. Applying general principles related to quasi-judicial review of zoning decisions, the district court held the county had to approve the proposed rezoning unless the county could establish that the city’s decision was unreasonable. Concluding the county did not satisfy its burden, the district court upheld the city’s decision to approve the rezoning.

ISSUES: (1) Real estate and (2) zoning

HELD: Court agreed with the county that the district court erroneously interpreted K.S.A. 3-307e to mean that the county had to approve the proposed rezoning unless the county could show that the city’s decision was unreasonable. Court held that K.S.A. 3-307e allows the county to reach an independent determination that a court must presume to be reasonable. As a result of that presumption, to successfully challenge the county’s action under K.S.A. 3-307e, a landowner must prove by a preponderance of the evidence that the county’s action was unlawful or unreasonable. Because these rules were not applied by the district court in this case, Court reversed and remanded for further proceedings.


SPOLIATION OF EVIDENCE SUPERIOR BOILER WORKS INC. V. KIMBALL ET AL. JOHNSON DISTRICT COURT – AFFIRMED NO. 103,367 – AUGUST 12, 2011

FACTS: In 2002, Superior began correspondence with Kimball regarding the names of all products sold to Superior and the quantity of asbestos in the products for Superior’s boilers. Five years later Superior again contacted Kimball for all information regarding asbestos in Kimball’s products because Superior was involved in asbestos-related litigation. After received the contact, Superior destroyed the company’s old records dating back to the 1930s, including those used to compile the 2002 information. Superior brought
suit against the defendants on two counts, labeling Count I as “Intentional Interference with Actual and Prospective Actions by Destruction of Evidence” and Count II as “Negligent Interference with Actual and Prospective Actions by Destruction of Evidence.” Court considered the question of whether Kansas would recognize the tort of spoliation of evidence if a defendant or potential defendant in an underlying case destroyed evidence to their own advantage. Superior argued a special relationship existed between it and the defendants that required the defendants to preserve evidence and recognized the tort of spoliation of evidence and applying it to give Superior the right to recover from the defendants. The district court rejected these arguments and granted the defendants summary judgment, finding there was not a contract, agreement, voluntary assumption of duty, or special relationship requiring the defendants to preserve evidence and the reserved question did not apply to spoliation claims between those who are potential codefendants in the underlying action.

ISSUE: Spoliation of evidence

HELD: Court stated that the tort of spoliation of evidence is not recognized in Kansas absent an independent tort, contract, agreement, voluntary assumption of duty, or special relationship of the parties. Court held that simply being in the chain of distribution of a product or in the stream of commerce, without more, is not a special relationship that gives rise to a duty to preserve evidence. Court held that an independent tort of spoliation will not be recognized in Kansas for claims by a defendant against codefendants or potential codefendants, including potential indemnitors under a theory of comparative implied indemnification.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-3201

TRADE SECRETS

KANSAS PROGRESSIVE PRODUCTS INC. V. SWARTZ
CRAWFORD DISTRICT COURT – AFFIRMED IN PART; REVISED IN PART; AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART

FACTS: Progressive Products Inc. (PPI) manufactures and sells ceramic coating for pipe elbows that significantly lengthens life of the pipe. Former PPI employees left PPI to start competing company, VIN Manufacturing LLC (VIN). PPI sued, alleging misappropriation of trade secrets and seeking permanent injunctive relief. After bench trial, district court found misappropriation of PPI’s trade secrets, but no exceptional circumstances for indefinite injunctive relief. Instead, VIN allowed to continue manufacturing and selling ceramic coating but to refrain from divulging, selling, or advertising any part of PPI’s trade secrets for three years. VIN also to pay 20 percent royalty on sales for three years. PPI appealed from relief granted. VIN cross-appealed on sufficiency of evidence to find trade secret misappropriation. Court of Appeals affirmed in part finding sufficient evidence that PPI owned protected trade secrets related to formula and calculation of batch amounts, and that price lists were not as matter of law or under facts; and reversed royalty injunction as not supported by district court’s findings and not within available statutory remedies. 41 Kan. App. 2d 745 (2009). Review granted on all issues.

ISSUES: (1) Trade secrets and (2) royalty injunction

HELD: Agrees with Court of Appeals that there was sufficient evidence to find formula and batch calculations were protected trade secrets misappropriated by VIN and that batch mixing process and price lists were not.

Royalty relief may have been appropriate and equitable grounds may have justified limited injunctive relief, but district court’s findings are too incomplete to determine from record what factors, if any, district court relied on regarding extraordinary circumstances or statutory provision for royalty relief. Court of Appeals’ opinion reversing remedy ordered by district court is reversed. Case is remanded to district court for limited purpose of entering order specifically correlating legal conclusions to facts in trial record in manner consistent with this opinion and relating to basis for imposing royalty injunction and other short term relief.

STATUTE: K.S.A. 60-3320 et seq., -3320(4)(ii), -3321(b), -3322, -3322(a)

WORKERS’ COMPENSATION

HERRELL V. NATION BEEF PACKING CO. ET AL.
FORD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND THE CASE IS REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 99,451 – AUGUST 12, 2011

FACTS: Plaintiff Shelly K. Herrell successfully sued defendant National Beef Packing Co. LLC (National Beef) to recover for a knee injury she suffered while working in its Dodge City beef-packing plant. National Beef appealed, arguing that Herrell’s status as an employee of an independent contractor, Terracon Consultants Inc. (Terracon), and her receipt of workers’ compensation meant that it did not owe her the landowner’s usual duty of reasonable care.

The district judge denied National Beef’s pretrial motion for summary judgment and mid-trial motion for judgment as a matter of law on the duty issue. The Court of Appeals reversed and remanded. A majority of the panel remanded only for entry of judgment as a matter of law in favor of National Beef and held that Herrell’s remedy was limited to workers’ compensation because National Beef did not maintain substantial control over her employer’s activities on the premises. In a concurring and dissenting opinion, Judge McAnany would have remanded for retrial on all but one claim dependent upon National Beef’s alleged noncompliance with an Occupational Safety and Health Administration (OSHA) regulation.

ISSUE: Workers’ compensation

HELD: Court held that a landowner bears a duty of reasonable care under the circumstances under premises liability law to an employee of an independent contractor working on the landowner’s property, as long as the employee is not pursuing direct liability for the landowner’s violation of a nondelegable statutory or regulatory duty or vicarious liability for the contractor’s negligence. Court held Herrell’s premises cause of action alleging direct negligence by National Beef in creating a hazardous condition and failing to warn of it is not based on a nondelegable statutory or regulatory duty of National Beef or based on negligence of Herrell’s employer for which National Beef may be exposed to vicarious liability. Court was unwilling to absolve National Beef of any duty to Herrell and turned to the workers’ compensation statutory scheme to find that the statutes do not address the general common law of premises liability. Thus National Beef owed Herrell the same duty it owed to the other entrants onto its property – a duty of reasonable care under the circumstances. Court held the district judge was correct to deny judgment as a matter of law to National Beef. However, the district judge had included OSHA regulations in his instructions and the jury was told Herrell alleged that her injuries and damages were caused by National Beef’s violation of the “industry standard” set by the regulation, and the general verdict form did not permit the jury to designate whether all or part of the damages awarded to Herrell were attributable to any particular legal theory. Court held it could not be certain on the record whether the OSHA regulation played any role in the jury’s decision or, if it did play a role, how to account for it on this appeal.

STATUTE: K.S.A. 44-501, -504

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WORKERS’ COMPENSATION
SAYLOR V. WESTAR ENERGY
WORKERS COMPENSATION BOARD – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,012 – AUGUST 5, 2011

FACTS: Cory Saylor suffered from a degenerative condition in his left knee, which was aggravated by his job duties at Westar. In February 2006, Saylor’s condition worsened to the point that he needed knee replacement surgery. After telling his supervisor that his knee injury was work related, Saylor took leave from Westar under the Family Medical Leave Act. Saylor issued a notice of intent to file a workers’ compensation claim to Westar. The administrative law judge (ALJ) found that Saylor’s knee injury qualified as an accident under the Workers Compensation Act. The ALJ also ruled that Westar was liable for all medical costs associated with Saylor’s knee replacement treatment. In a 3-2 concurring decision, the Workers Compensation Board upheld the ALJ’s rulings. Three of the Board members ruled the date of the accident was the day Saylor gave notice to Westar, March 28, 2006. Two of the Board members thought the date of Saylor’s accident should be his last day of work, February 6, 2006. Westar argued that Saylor could not have been injured on the job since he was actually at home recuperating from knee surgery on the date of the accident and that Saylor did not give timely notice in order to preserve his workers’ compensation claim. Westar states that it should not be responsible for the medical bills associated with the knee replacement surgery since the procedure was not authorized. Court of Appeals affirmed the Board’s majority decision holding that pursuant to the plain and unambiguous statutory language, Saylor’s date of injury was March 28, 2006; and that Saylor’s notice of accident was timely; and that Westar was responsible for the entire amount of Saylor’s medical bills.

ISSUE: Workers’ compensation

HELD: Court held where an accidental injury to a worker occurs as a result of a series of events, repetitive use, cumulative traumas, or microtraumas, the designated date of accident shall be governed by the provisions of K.S.A. 2010 Supp. 44-508(d). Where K.S.A. 2010 Supp. 44-508(d) designates, the date upon which the employee gives written notice to the employer of the injury shall be the date of accident, regardless of whether that date may be subsequent to the last day the employee physically worked for the employer. The provisions of K.S.A. 44-510(h) which impose liability on an employer for an employee’s unauthorized medical bills under certain circumstances are not restricted to cases in which the worker received emergency medical services. If an employer knows that an employee is suffering from a work-related injury and refuses or neglects to provide or authorize medical services to address that injury, the employee may obtain his or her own medical services at the employer’s expense. Consequently, Court held the Workers Compensation Board did not err by ruling the date of the accident was the day Saylor gave notice of injury to Westar. Court also rejected Westar’s argument that it was not responsible for the medical costs associated with Saylor’s left knee replacement, even though it was not authorized by Westar.

STATUTES: K.S.A. 44-508(d), -510(h)(a), (b)(2), -510(j)(b), -511, -520, -534(a), -535, -556; K.S.A. 60-2101(b); and K.S.A. 77-601, -621

CRIMINAL

STATE V. COLEMAN
RENO DISTRICT COURT – REVISED
COURT OF APPEALS – REVISED
NO. 101,621 – AUGUST 12, 2011

FACTS: Coleman convicted on drug charges based on evidence discovered by parole officer during search after Coleman’s rental car was stopped for speeding. District court denied motion to suppress, finding reasonable suspicion justified the search where Coleman was on parole, car rental agreement had expired, and officer with drug enforcement unit was aware of information that Coleman was known for trafficking drugs. Court of Appeals affirmed in unpublished opinion. Coleman’s petition for review granted.

ISSUES: (1) Traffic stop of parolee and (2) duration of traffic stop

HELD: Circumstances of traffic stop are detailed. Because Coleman was speeding, initial stop was valid. Fact that car rental agreement had expired did not deprive him of reasonable expectation of privacy with respect to contents of car. Here the expired rental agreement, combined with Coleman’s parolee status and drug enforcement unit report, provided reasonable individualized suspicion of criminal activity justifying a temporary detention and allowing further investigation.

Officer detained Coleman for sole purpose of providing parole officer enough time to arrive and conduct search under Kansas Department of Corrections’ rules. Officer did not have statutory authority to arrest Coleman as a parole violator and had no grounds to arrest Coleman prior to parole officer conducting search and finding incriminating evidence. Because officer had no reasonable and legal basis for detaining Coleman while waiting for parole officer to arrive, the duration of Coleman’s detention was not lawful. Evidence seized as a result of Coleman’s unlawful arrest must be suppressed.

STATUTES: K.S.A. 22-2405(1); K.S.A. 65-4152(a)(3); and K.S.A. 79-5204, -5217(a)

STATE V. DENMARK-WAGNER
PRATT DISTRICT COURT – CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED
NO. 102,234 – AUGUST 5, 2011

FACTS: Denmark-Wagner entered guilty plea to one count of felony first-degree murder. Prior to sentencing, he filed motion to withdraw his plea, saying he entered it due to family pressure and did not fully understand his sentence could be more than 20 years. District court denied the motion and imposed life sentence with minimum 20-year term, lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. Denmark-Wagner appealed.

ISSUES: (1) Withdrawal of guilty plea and (2) lifetime post-release and offender registration

HELD: Conviction is affirmed. No error in district court not allowing Denmark-Wagner to withdraw his plea as unknowingly or unintelligently made. Whatever family pressure existed did not rise to level of good cause, and district court confirmed at plea hearing Denmark-Wagner’s comprehension of the possibility of imprisonment for rest of his life. Also, no abuse of discretion in district court failing to ask Denmark-Wagner about specific prescription medication for rest of his life. District court considered that Denmark-Wagner’s comprehension of the possibility of imprisonment was vacated. Because he was sentenced to lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. District court denied the motion and imposed life sentence with minimum 20-year term, lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. Denmark-Wagner appealed.

STATE V. COLEMAN
RENO DISTRICT COURT – REVISED
COURT OF APPEALS – REVISED
NO. 101,621 – AUGUST 12, 2011

FACTS: Coleman convicted on drug charges based on evidence discovered by parole officer during search after Coleman’s rental car was stopped for speeding. District court denied motion to suppress, finding reasonable suspicion justified the search where Coleman was on parole, car rental agreement had expired, and officer with drug enforcement unit was aware of information that Coleman was known for trafficking drugs. Court of Appeals affirmed in unpublished opinion. Coleman’s petition for review granted.

ISSUES: (1) Traffic stop of parolee and (2) duration of traffic stop

HELD: Circumstances of traffic stop are detailed. Because Coleman was speeding, initial stop was valid. Fact that car rental agreement had expired did not deprive him of reasonable expectation of privacy with respect to contents of car. Here the expired rental agreement, combined with Coleman’s parolee status and drug enforcement unit report, provided reasonable individualized suspicion of criminal activity justifying a temporary detention and allowing further investigation.

Officer detained Coleman for sole purpose of providing parole officer enough time to arrive and conduct search under Kansas Department of Corrections’ rules. Officer did not have statutory authority to arrest Coleman as a parole violator and had no grounds to arrest Coleman prior to parole officer conducting search and finding incriminating evidence. Because officer had no reasonable and legal basis for detaining Coleman while waiting for parole officer to arrive, the duration of Coleman’s detention was not lawful. Evidence seized as a result of Coleman’s unlawful arrest must be suppressed.

STATUTES: K.S.A. 22-2405(1); K.S.A. 65-4152(a)(3); and K.S.A. 79-5204, -5217(a)

STATE V. DENMARK-WAGNER
PRATT DISTRICT COURT – CONVICTION AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED
NO. 102,234 – AUGUST 5, 2011

FACTS: Denmark-Wagner entered guilty plea to one count of felony first-degree murder. Prior to sentencing, he filed motion to withdraw his plea, saying he entered it due to family pressure and did not fully understand his sentence could be more than 20 years. District court denied the motion and imposed life sentence with minimum 20-year term, lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. Denmark-Wagner appealed.

ISSUES: (1) Withdrawal of guilty plea and (2) lifetime post-release and offender registration

HELD: Conviction is affirmed. No error in district court not allowing Denmark-Wagner to withdraw his plea as unknowingly or unintelligently made. Whatever family pressure existed did not rise to level of good cause, and district court confirmed at plea hearing Denmark-Wagner’s comprehension of the possibility of imprisonment for rest of his life. Also, no abuse of discretion in district court failing to ask Denmark-Wagner about specific prescription medication for rest of his life. District court considered that Denmark-Wagner’s comprehension of the possibility of imprisonment was vacated. Because he was sentenced to lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. District court denied the motion and imposed life sentence with minimum 20-year term, lifetime post-release supervision, and lifetime registration under Kansas Offender Registration Act. Denmark-Wagner appealed.

STATE V. COLEMAN
RENO DISTRICT COURT – REVISED
COURT OF APPEALS – REVISED
NO. 101,621 – AUGUST 12, 2011

FACTS: Coleman convicted on drug charges based on evidence discovered by parole officer during search after Coleman’s rental car was stopped for speeding. District court denied motion to suppress, finding reasonable suspicion justified the search where Coleman was on parole, car rental agreement had expired, and officer with drug enforcement unit was aware of information that Coleman was known for trafficking drugs. Court of Appeals affirmed in unpublished opinion. Coleman’s petition for review granted.

ISSUES: (1) Traffic stop of parolee and (2) duration of traffic stop

HELD: Circumstances of traffic stop are detailed. Because Coleman was speeding, initial stop was valid. Fact that car rental agreement had expired did not deprive him of reasonable expectation of privacy with respect to contents of car. Here the expired rental agreement, combined with Coleman’s parolee status and drug enforcement unit report, provided reasonable individualized suspicion of criminal activity justifying a temporary detention and allowing further investigation.

Officer detained Coleman for sole purpose of providing parole officer enough time to arrive and conduct search under Kansas Department of Corrections’ rules. Officer did not have statutory authority to arrest Coleman as a parole violator and had no grounds to arrest Coleman prior to parole officer conducting search and finding incriminating evidence. Because officer had no reasonable and legal basis for detaining Coleman while waiting for parole officer to arrive, the duration of Coleman’s detention was not lawful. Evidence seized as a result of Coleman’s unlawful arrest must be suppressed.

STATUTES: K.S.A. 22-2405(1); K.S.A. 65-4152(a)(3); and K.S.A. 79-5204, -5217(a)
STATE V. DUONG  
SEDGWICK DISTRICT COURT – CONVICTION  
AFFIRMED AND SENTENCE VACATED  
NO. 101,700 – AUGUST 12, 2011  

FACTS: Duong convicted of aggravated indecent liberties with a child. District judge departed from Jessica’s Law and sentenced Duong to 61-month prison term and lifetime post-release supervision with lifetime electronic monitoring. On appeal, Duong claimed: (1) during closing argument prosecutor improperly commented on credibility, shifted burden of proof to the defense, and inflated passions or prejudices of the jury; (2) district court erred in failing to instruct jury on eyewitness identification; (3) district court erred in giving erroneous Allen-type instruction; (4) cumulative errors denied him a fair trial; and (5) error in lifetime electronic monitoring portion of sentence.

ISSUES: (1) Prosecutorial misconduct, (2) eyewitness identification instruction, (3) Allen-type instruction, (4) cumulative error, and (5) lifetime electronic monitoring  

HELD: Under facts of case, no error in prosecutor’s closing argument. In commenting on credibility, prosecutor drew reasonable inference from trial evidence and merely directed jury to specific testimony. Duong’s burden of proof claim is based on prosecutor’s mere comment on weakness of Duong’s defense, and jury was properly instructed on state’s burden of proof. Duong’s claim that remarks were intended to inflame passions or prejudices of jury is rejected.


Under facts of case, Allen-type instruction given to jury was not clearly erroneous, and Duong’s timely objection to the instruction was not specific enough for district court to know it was focused on “burden” language eventually held to be misleading and erroneous in State v. Salts, 288 Kan. 263 (2009).

No error supports Duong’s claim of cumulative error. State concedes there is no statutory authority for ordering lifetime electronic monitoring after Duong’s release from prison. Pursuant to K.S.A. 22-3717(u) and State v. Jolly, 291 Kan. 842 (2011), lifetime monitoring is associated with parole rather than post-release supervision. Lifetime electronic monitoring provision of Duong’s sentence is vacated.

STATUTE: K.S.A. 22-3414(3), -3717(u)

STATE V. FULTON  
SHAWNEE DISTRICT COURT – AFFIRMED  
NO. 101,336 – AUGUST 5, 2011  

FACTS: Fulton and two others charged in shooting death. Fulton convicted of first-degree murder. On appeal Fulton challenged the sufficiency of the evidence for that conviction. He also claimed the district court erred in denying motion for new trial based on new evidence regarding witness testimony, and claimed he was entitled to a new trial because his counsel failed to request that his trial be severed from his codefendant’s trial.

ISSUES: (1) Sufficiency of the evidence, (2) motion for new trial, and (3) ineffective assistance of trial counsel

HELD: Viewing evidence in light most favorable to the prosecution, there was sufficient evidence to support the first-degree murder conviction

No abuse of discretion in denying motion for new trial. Trial court appropriately weighed the evidence and determined credibility of witnesses testifying at motion for new trial.

Ineffective assistance of counsel claim presented for first time on appeal is not properly before the court.

STATUTES: K.S.A. 21-3401(a), -4304(a)(3); and K.S.A. 22-3601(b)(1)

STATE V. HERNANDEZ  
RILEY DISTRICT COURT – AFFIRMED  
NO. 101,837 – JULY 29, 2011  

FACTS: Hernandez convicted of premeditated first-degree murder, aggravated robbery, aggravated burglary, and residential bur-
glary. On appeal Hernandez claimed: (1) prosecutor’s closing argument that prosecutor observed the victim’s body being removed from a vehicle was an improper statement of fact not in evidence and bolstered state’s case; (2) evidence of Hernandez’s consumption of alcohol and/or marijuana consumption required a voluntary intoxication instruction; (3) premeditation required for premeditated first-degree murder is no different from intentional killing required for second-degree murder; (4) the hard 50 sentencing scheme is unconstitutional, (5) trial court erred in sentencing to highest presumptive sentence without a jury finding aggravated; and (6) although trial court considered Hernandez’s ability to pay, the attorney fees order defied logic and was unconstitutional because the court acknowledged the fees may never be fully paid.

ISSUES: (1) Prosecutorial misconduct, (2) voluntary intoxication instruction, (3) identical offense doctrine, (4) hard 50 sentencing scheme, (5) sentence to highest term in presumptive grid block, and (6) attorney fees

HELD: Prosecutor’s statement was error, but Court is persuaded beyond a reasonable doubt that the statement was little more than harmless retrospection and did not contribute to jury’s verdict. No showing of ill will by prosecutor, and evidence against Hernandez was overwhelming.

Trial court used appropriate standard to determine whether voluntary intoxication instruction was appropriate. Court will not infer impairment based on evidence of consumption alone.

No reason presented to change Supreme Court’s analysis or holding in State v. Warledo, 286 Kan. 927 (2008), that the two crimes are not identical.

No appellate jurisdiction to consider a presumptive sentence.

No abuse of discretion in attorney fees imposed. Trial court found Hernandez would have some ability to pay BIDS fees due to possible remunerative employment during his lengthy incarceration.

STATE V. JONES
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 103,816 – AUGUST 12, 2011

FACTS: Charles Jones appeals from the district court’s summary denial of his motion to correct an illegal sentence. Jones, who was 16 years of age in 1998 when he was charged with first-degree murder and aggravated burglary, argued in his motion that the district court did not have jurisdiction to sentence him as an adult because the state and the district court did not comply with statutory and constitutional requirements regarding notice to him and his parents. The district court summarily denied the motion as a successive appeal because the issue of the sufficiency of the juvenile waiver proceeding was raised and denied on direct appeal.

ISSUE: Motion to correct illegal sentence

HELD: Court rejected the district court’s finding that Jones’ motion was successive. However, the Court affirmed the denial of his motion finding that although the state did not comply with the notice provisions, his argument fails because the procedural defects did not deprive the district court of jurisdiction to impose a sentence. Consequently, there was no basis for finding that Jones received an illegal sentence.


STATE V. MARQUIS
BUTLER DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 100,423 – AUGUST 19, 2011

FACTS: State sought revocation of Marquis’ probation, claiming he failed to successfully complete Labette program. At hearing, director of community corrections testified but Marquis’ caseworker submitted sworn affidavit stating Marquis had been removed from Labette due to discipline. District court considered the affidavit, revoked probation, and ordered Marquis to serve underlying prison sentence. Marquis appealed, claiming revocation hearing denied federal and state constitutional right to confrontation and due process. In unpublished opinion Court of Appeals affirmed district court’s rejection of confrontation claim, finding district court’s consideration of reliability of affidavit substantially complied with State v. Palmer, 37 Kan. App. 2d 819 (2007).

ISSUES: (1) Confrontation and (2) due process in revocation hearing

HELD: Sixth Amendment right of confrontation, and its state counterpart, do not apply to probation revocation hearings.

Two part test in State v. Yara, 250 Kan. 198 (1992), for finding whether admission of hearsay evidence at probation hearing comport with minimum due process, is applied. First factor satisfied by district court’s correct assessment that case worker’s affidavit was reliable, but second factor not satisfied because nothing in record addresses why caseworker could not or should not have testified. Reversed and remanded to district court to determine whether good cause existed to dispense with caseworker’s live testimony.

STATUTE: K.S.A. 22-3716(b)

STATE V. MCKNIGHT
SHAWNEE DISTRICT COURT – REVERSED
AND SENTENCE VACATED
COURT OF APPEALS – REVERSED
NO. 100,246 – AUGUST 12, 2011

FACTS: McKnight entered no contest plea to drug charge. Trial court imposed 30-month sentence with 24-month post-release supervision, suspended the sentence, and put McKnight on probation. When probation was later revoked for technical violations, McKnight sentenced to 22-month prison term with no post-release supervision. On state’s motion to correct illegal sentence, district court modified sentence to reinstate 24-month post-release supervision. Court of Appeals affirmed, finding sentence originally imposed upon probation revocation was illegal, and trial court properly corrected it. 42 Kan. App. 2d 945. Review granted on McKnight’s challenge to reinstatement of post release supervision. While appeal was pending, Supreme Court was notified of McKnight’s discharge from sentence.

ISSUES: (1) Mootness and (2) sentencing after revocation of probation

HELD: Appeal is not moot. Sentencing issue raised is likely to recur.

Sentence imposed upon revocation of McKnight’s probation was not illegal. K.S.A. 22-3716(b) authorizes a trial court revoking a defendant’s probation to require the defendant to serve the sentence imposed or any lesser sentence. Such lesser sentence might be a shorter prison sentence, a shorter term of post release supervision, or any combination thereof. Once a legal sentence is pronounced from the bench, trial court does not have jurisdiction to modify it. Sentence imposing post release supervision is vacated, and sentence originally imposed at revocation hearing of 22-month prison term with no pretrial separation is affirmed.

STATUTES: K.S.A. 21-4705; and K.S.A. 22-3504(1), -3716(b), -3716(e), -3717(d)(1)(B)

STATE V. MENDOZA
SEWARD DISTRICT COURT – SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 102,502 – AUGUST 19, 2011

FACTS: Luis Mendoza appeals from the sentence imposed following his plea of no contest to one count of rape with a victim who was 11 years old, in violation of K.S.A. 21-3502(a)(2). As part of
the plea agreement, the state dismissed all other charges and agreed to recommend a downward departure to the sentencing grid. Mendoza filed a motion for a downward sentencing departure based on his lack of criminal history. The district court denied the departure motion and sentenced Mendoza to life in prison without parole for 25 years. The court also imposed lifetime post-release supervision and lifetime electronic monitoring because Mendoza was convicted of a "child sex offense."

ISSUES: (1) Sentencing, (2) Jessica's Law, and (3) electronic monitoring

HELD: Court found Mendoza's conviction subjected him to Jessica's Law and a mandatory minimum term of not less than 25 years. However, Court held the trial court improperly sentenced Mendoza to lifetime electronic monitoring. Court stated that the parole board is in control of parole conditions and the trial court did not have jurisdiction to impose parole conditions. Court also stated that although the district court did not expressly consider the mitigating factors that Mendoza presented, it was difficult to conclude that no reasonable person would take the view adopted by the district court in denying Mendoza's downward departure given the facts of the case.

STATUTES: K.S.A. 21-3502, -4643; and K.S.A. 22-3717

STATE V. NEAL
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 100,366 – AUGUST 5, 2011

FACTS: Neal convicted of charges including second-degree murder. In sentencing, three municipal person misdemeanors that were aggregated to form single person felony for purposes of calculating his criminal history. Some seven years later, Neal filed motion to correct illegal sentence, K.S.A. 22-3504, to contend error in the aggregation of municipal misdemeanor convictions, claiming two were uncounseled and he was never advised of waived his right to counsel. District court denied the motion without conducting an evidentiary hearing. In unpublished opinion, Court of Appeals found Neal's motion was procedurally barred as improper substitute for a second hearing. In further finding the motion still failed on the merits.

ISSUES: (1) Summary denial of motion to correct illegal sentence and (2) right to counsel

HELD: Neal's motion not procedurally barred. His argument fits with parameters of an illegal sentence, and motion to correct illegal sentence can be filed any time.

Court of Appeals holding, based on "actual imprisonment" rule in State v. Delacruz, 258 Kan. 129 (1995), is rejected because that bright line rule was eliminated in State v. Youngblood, 288 Kan. 659 (2009). Under facts of case, trial court's summary dismissal of Neal's motion to correct illegal sentence under K.S.A. 22-3504 significantly reduced his ability to meet burden of proving invalidity of his prior convictions used to enhance his present sentence. Case is reversed and remanded for evidentiary hearing.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-4711, -4703(1), -4704(c), -4711(a); and K.S.A. 22-3504, -3504(1)

STATE V. PACE
LABETTE DISTRICT COURT – SENTENCE AFFIRMED IN PART AND VACATED IN PART
NO. 103,822 – AUGUST 19, 2011

FACTS: Joseph Allen Pace was charged with aggravated criminal sodomy, battery against a law enforcement officer, two counts of obstructing official duty, attempted residential burglary, and assault of a law enforcement officer. Pursuant to a plea agreement, Pace pleaded guilty to one count of aggravated criminal sodomy and all other counts were dismissed. Pace filed a motion for a downward durational sentencing departure. Pace's testimony was the only evidence offered at the sentencing hearing. The district court denied Pace's motion for downward durational departure and imposed a life sentence with a mandatory minimum term of imprisonment of 25 years. The court also ordered lifetime electronic monitoring when Pace was paroled.

ISSUES: (1) Sentencing, (2) Jessica's Law, and (3) electronic monitoring

HELD: Court found Pace's conviction subjected him to Jessica's Law and a mandatory minimum term of not less than 25 years. However, Court held the trial court improperly sentenced Mendoza to lifetime electronic monitoring. Court stated that the parole board is in control of parole conditions, and the trial court did not have jurisdiction to impose parole conditions. Court also stated that the district court orally reviewed the mitigating and aggravating factors advanced by Pace and the state, engaging in an appropriate weighing of the competing considerations. The court considered each of the factors presented and concluded that there were no substantial and compelling reasons to grant Pace's motion for a downward durational sentencing departure. The court's denial of the downward departure motion was reasonable.

STATUTES: K.S.A. 21-4643; and K.S.A. 22-3717

STATE V. PEREZ
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 100,682 – AUGUST 12, 2011

FACTS: Perez convicted of first-degree felony murder, criminal discharge of a firearm at an occupied dwelling, and conspiracy to commit criminal discharge of a firearm at an occupied building. On appeal he claimed district court erred in: (1) deciding state's motion for adult prosecution without a jury determining the facts; (2) instructing jury that another trial would be a burden on both sides; and (3) not instructing jury on second-degree reckless murder as a lesser-included offense of felony murder.

ISSUES: (1) Motion for adult prosecution, (2) Allen-type instruction, and (3) lesser-included offense of felony murder

HELD: Kansas decisions have rejected Perez's Apprendi claim about adult prosecution, and as in State v. Kunellis, 276 Kan. 461 (2003), Court declines to consider this constitutional issue for first time on appeal.

Under facts of case, instruction informing jury that another trial would be a burden on both sides was not clearly erroneous.

Under facts of case, district court did not err by failing to instruct jury on second-degree reckless murder as a lesser-included offense of felony murder. Although second-degree reckless murder may be a lesser-included offense of felony murder in some situations, here there was no trial evidence that would have reasonably justified a conviction of second-degree reckless murder beyond a reasonable doubt.

STATUTES: K.S.A. 21-3401(b), -3402(b), -3436(a)(15), -4219; K.S.A. 22-3414(3), -3601(b); and K.S.A. 38-2347

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COURT OF APPEALS

CIVIL

HABEAS CORPUS
SWAFFORD V. MCKUNE
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 104,965 – AUGUST 26, 2011

FACTS: Swafford filed 1501 petition claiming denial of due process in prison disciplinary action in which hearing officer denied Swafford’s requests for documents and for video surveillance tape to be made available at hearing. Trial court held evidentiary hearing on Swafford’s procedural due process claims and denied relief. Swafford appealed.

ISSUE: Procedural due process in prison discipline

HELD: Swafford was given adequate notice of nature of charges, he received a fair and impartial hearing, there was sufficient evidence to support the disciplinary adjudication, and he was given opportunity to call witnesses and present documentary evidence at the hearing. Record shows hearing officer reviewed the security video prior to making final determination. Howard v. U.S. Bureau of Prisons, 487 F.3d 808 (10th Cir. 2007), is distinguished, and inconsistent decisions in other courts are cited. In a prison disciplinary proceeding, inmate does not have right to be present when hearing officer views a security video.

DISSENT (Greene, C.J.): Fundamental due process requires that prison security video of incident giving rise to disciplinary report should generally be available to inmate, subject only to security concerns. Unavailability to Swafford in this case reveals applicable regulations are inadequate and do not comport with due process principles consistently applied to such proceedings. Sufficient evidence does not excuse a due process challenge. Review and revision of existing regulations is encouraged to address the production and presentation of documentary evidence. Would reverse disciplinary conviction and remand for new hearing.

STATUTE: K.S.A. 60-1501

MENTAL HEALTH
IN RE TWILLEGER
COWLEY DISTRICT COURT – AFFIRMED
NO. 104,274 – AUGUST 26, 2011

FACTS: Twilleger civilly committed to SRS custody in 2003 as sexually violent predator, progressing to phase six placement in transitional housing in 2007, then demoted to phase three inpatient treatment in 2008. In 2009 counsel for Twilleger sought reinstatement of transitional release program and appointment of independent expert pursuant to K.S.A. 59-29a08(a). In 2010 annual review, district court found appointment of independent expert to perform evaluation was not necessary at that time, found 59-29a08 procedures did not apply because court had never ordered Twilleger into transitional release, but writes separately to voice due process concern for broad deference to staff decision to demote Twilleger, and for an overbroad reading of Merryfield v. State, 44 Kan. App. 2d 817 (2010).

STATUTES: K.S.A. 59-29a01 et seq., -29a02(a), -29a02(b), -29a07(a), -29a08, -29a08(a), -29a08(c)(1), -29a08(c)(3), -29a08(f), -29a08(g), -29a10(a), -29a11(a), -29a19(a), -29a19(b); and K.S.A. 2007 Supp. 59-29a08(a)

NEGLIGENCE AND ENCLOSURE OF FARM ANIMALS
JEWETT V. MILLER, ET AL.
LINN DISTRICT COURT – AFFIRMED
NO. 105,020 – AUGUST 26, 2011

FACTS: William Jewett and Antwon Caffey were injured when the car they were occupying struck a horse that had escaped from Michael Miller’s farm. Jewett and Caffey brought suit against Miller, alleging that he had negligently failed to inspect and maintain his fence, which had allowed the horse to escape. The trial court reversed summary judgment in favor of Miller.

ISSUES: (1) Negligence and (2) enclosure of farm animals

HELD: Court held the evidence showed that Miller enclosed his horses in a barbed wire and electric fence. He inspected the fences regularly, repaired them as necessary, and had never before had a problem with his animals escaping their enclosures. Court stated that Jewett and Caffey essentially want this court to apply the doctrine of res ipsa loquitur and conclude that Miller must be liable because his horses got out of their enclosure. Kansas law requires them to show some evidence that Miller was negligent. Court held that because they have failed to meet this burden, the trial court properly granted summary judgment in favor of Miller.

STATUTE: K.S.A. 60-451

RES JUDICATA, COLLATERAL ESTOPPEL, NEGLIGENCE, AND JAIL OR PRISON MAINTENANCE
ESTATE OF Belden V. Brown County
BROWN DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 104,246 – AUGUST 26, 2011

FACTS: On August 14, 2002, Jeffrey Ray Belden died by his own hand while in custody at the Brown County jail on felony drug charges. Belden had been held there for about seven weeks awaiting trial. He was 21 years old. Over the past decade, Belden’s heirs and his estate, suing through Belden’s mother, Marie Gaston, have pursued civil litigation against Brown County, the county sheriff, and several jail employees on the basis they failed to take legally required precautions that would have prevented the suicide. The litigation started in federal court, and asserted federal constitutional and state tort claims. After State did not have independent experts testify at annual review hearing, and instead relied on evaluations by mental health professionals treating Twilleger. Under facts of case, no abuse of discretion in denying Twilleger’s request for appointment of an independent examiner.

De novo review of district court’s probable cause determination. Viewing record in light most favorable to Twilleger, there was insufficient evidence to cause person of ordinary prudence to conscientiously entertain a reasonable belief that Twilleger’s mental abnormality or personality disorder had so changed that he was safe to be placed in transitional release at time of 2010 hearing.

CONCURRING (Greene, C.J.): Concurs with ultimate conclusion that overwhelming evidence supported denial of request for placement in transitional release, but writes separately to voice due process concern for broad deference to staff decision to demote Twilleger, and for an overbroad reading of Merryfield v. State, 44 Kan. App. 2d 817 (2010).

STATUTES: K.S.A. 59-29a01 et seq., -29a02(a), -29a02(b), -29a07(a), -29a08, -29a08(a), -29a08(c)(1), -29a08(c)(3), -29a08(f), -29a08(g), -29a10(a), -29a11(a), -29a19(a), -29a19(b); and K.S.A. 2007 Supp. 59-29a08(a)
the constitutional claims were thrown out, the federal court dismissed the
state law claims without prejudice for lack of jurisdiction. Belden's
heirs and estate filed this case in Brown County reasserting the state
claims. They sued Brown County through its board of commissioners,
individual commissioners, Brown County Sheriff Lamar Shoemaker,
sheriff's Sgt. Brett Hollister, and Deputy Brandon Roberts. They al-
leged: a breach of the duty of care owed Belden as a pretrial detainee
based on the events immediately preceding his suicide; legally inade-
quate jail facilities and procedures; and negligent hiring, training,
and supervision of jail personnel. On February 17, 2010, the Brown
County District Court granted defendants' motion for summary
judgment on all of those claims. The district court held res judicata
and collateral estoppels barred defendant's state claims and that the
undisputed facts failed to support liability on the defendants.

ISSUES: (1) Res judicata, (2) collateral estoppel, (3) negligence,
and (4) jail or prison maintenance

HELD: Without a request from defendants, the district court
found that res judicata, based on the federal suit, required dismissal.
Court held this was error. The district court also found that collat-
estoppel applying particular factual findings in the federal litiga-
tion barred the state claims. Court held that ruling was correct as to
any liability theory dependent upon defendants’ actual knowledge
that Belden was suicidal but erroneous as to those theories premised
on grounds that defendants should have known or were otherwise
negligent. Finally, the district court alternatively ruled that the un-
disputed facts failed to support any basis for imposing tort liability
on defendants. Court held the trial court erred in that determina-
tion on the breach of duty claim. The record contains disputed ma-
terial facts that if resolved in favor of Belden’s estate and heirs would
allow a jury to return a verdict for them on that theory against Sgt.
Hollister and Deputy Roberts. Brown County would be liable as a
matter of law for a judgment entered on such a verdict.

STATUTES: K.S.A. 19-805, -811, -1903; K.S.A. 60-207, -208,
-215-256, -259, -456, -513; and K.S.A. 75-6101, -6102, -6103,
-6104, -6109

TAX APPEAL AND AIRPORT EXEMPTION
IN RE TAX EXEMPTION OF STROTHER FIELD AIRPORT
COURT OF TAX APPEALS – AFFIRMED
NO. 104,762 – AUGUST 26, 2011

FACTS: Strother Field Airport and Industrial Park (Strother
Field) appeals a decision of the Court of Tax Appeals (COTA) de-
nying its application for an ad valorem tax exemption on property
leased by General Electric Engine Services Inc. (GE) for its busi-
ness of refurbishing aircraft engines. Strother Field argues that the
79-201q(a)(2) or K.S.A. 79-201r. COTA denied the exemption ex-
plaining that K.S.A. 79-201r only provides an exemption for prop-
erty owned on and prior to January 1, 1992; because it found that
Strother Field did not qualify for an exemption under K.S.A. 2010
Supp. 79-201q(a)(2) solely because the generation of income was of assistance to the
property leased by an airport solely for the purpose of generating revenue do
not qualify for an exemption under K.S.A. 2010 Supp. 79-201q(a)(2).

-201r, -2426(b); and K.S.A. 2010 Supp. 77-529, -601

TERMINATION OF PARENTAL RIGHTS
IN RE K.E. AND S.D.E.
FRANKLIN DISTRICT COURT – REVERSED
AND REMANDED
NO. 105,623 – AUGUST 19, 2011

FACTS: Following a remand order vacating a prior order termin-
nating Father's parental rights, the state filed a subsequent motion to
terminate his rights. The matter was set for hearing. Despite notice
of the hearing, Father did not appear in person. He had indicated an
intention to be present but called his counsel on the day of the hearing
to advise that he was unable to afford transportation from Georgia
to Kansas. At the beginning of the hearing, Father was called on
the telephone by the district court. His counsel requested a continuance
because Father had planned and wanted to be present but was un-
able to arrange transportation due to financial issues. Both the state
and the guardian ad litem objected to the continuance, and the court
denied the request because “it is in the best interest that these children
have this proceeding concluded one way or the other.” The court then
ther's testimony was necessarily unquantifiable and indeterminate. In a termination of parental rights case, the error in precluding the father from such contact by state actors, also other factors, without a full exploration of the parent's clear protest was appropriate "under K.S.A. 38-2271 as far as the list that's provided there," as well as under the statutory factors in K.S.A. 2010 Supp. 38-2269(a)(3) or (a)(4).

Held: Court held that under the facts of this case, in a termination of parental rights hearing, the employment of the presumption of unfitness under K.S.A. 2010 Supp. 38-2271 against a parent without any opportunity for him to mount a rebuttal under K.S.A. 2010 Supp. 38-2271(b), especially where the parent was in phone contact during the hearing, substantially risked an erroneous deprivation of his fundamental interest in his children. Moreover, consideration and reliance by the district court on such a presumption and other factors, without a full exploration of the parent's clear protest that he had been prohibited from such contact by state actors, also risked an erroneous deprivation of the parent's fundamental liberty interest in the children. Court also held that under the facts of this termination of parental rights case, the error in precluding the father's testimony was necessarily unquantifiable and indeterminate. Thus, the due process violation was structural and entitles the father to reversal and remand for further proceedings.

Concurrence and Dissent: Judge Marquardt concurred with the majority that Father had abandoned his appeal of the district court's denial of his motion for continuance. However, Judge Marquardt dissented that Father was denied his due process rights at the termination of parental rights hearing.

Statutes: K.S.A. 38-2269, -2271; and K.S.A. 60-243

Workers' Compensation and Burden of Proof

Rausch v. Sears Roebuck & Co. et al. Workers Compensation Board – Affirmed
No. 104,990 – August 26, 2011

Facts: Tina C. Rausch was employed by Sears Roebuck & Company (Sears) in Wichita as “receiving lead,” a position principally involving unloading merchandise from trucks but also dealing with packages, scheduling, and in her words “anything and everything that needs to be moved around.” In late 2007 and into early January 2008 she began to experience pain in her shoulders and neck. She reported this to her supervisors, but it is disputed whether she indicated to them that her condition had been caused by an injury on the job. Sears accommodated Rausch, changing her job from one of physical labor to one of management and payroll. This accommodation apparently reduced the pain, but she claims to have continued to suffer from headaches, neck spasms, and sleepless nights. She was fired in late March 2008 due to “integrity issues” and responded with a statement that she would make Sears “pay for this” in a lawsuit. She filed her workers compensation claim in April 2008. The ALJ found that Rausch was entitled to benefits. The
Board reversed and found that Rausch did not meet her burden of proof to establish that she suffered an accidental injury arising out of and in the course of employment where she told her supervisors that her injury problems were not work-related and where the evidence of her lifting injuries did not correlate to the time when she had lifting responsibilities.

ISSUES: (1) Workers’ compensation and (2) burden of proof

HELD: Court stated that to prove an injury arose out of his or her employment, a workers’ compensation claimant is required to show that a causal connection existed between his or her injury and the nature, conditions, obligations, and incidents of her work. The task of the Court reviewing a decision of the Workers Compensation Board is not to weigh the competing evidence, but rather to focus on the Board’s material findings in light of the record as a whole and to examine the Board’s explanation of why the relevant evidence in the record supports those findings. Court held that under the facts of this case, the Board adequately explained the basis for its decision, and its conclusion that Rausch failed to sustain her burden of establishing an injury arising out of and in the course of her employment is fully supported by the evidence.

STATUTES: K.S.A. 44-501, -508, -555(c), -556; and K.S.A. 77-601, -621(c)

CRIMINAL

STATE V. BROWN

SHAWNEE DISTRICT COURT – AFFIRMED

NO. 104,865 – AUGUST 19, 2011

FACTS: During heated verbal argument, Brown shoved girlfriend down and away from door so he could leave the dwelling. Brown convicted of domestic battery. On appeal he claimed insufficient evidence supported the conviction because his actions were not done in a “rude, insulting or angry manner,” and because Kansas law justified his use of force to allow him to leave and get away from the argument.

ISSUES: (1) Sufficiency of evidence and (2) justified use of force, K.S.A. 21-3211(a)

HELD: No dispute that Brown and girlfriend were household members for purposes of domestic battery statute. Evidence that contact was made during intense argument was sufficient to find contact was done in a rude, insulting, or angry manner.

Brown’s reliance on K.S.A. 21-3211 is discussed and rejected. Statute only intends self-defense against physical force, and under facts of case, Brown was not protecting himself from imminent physical force or attack.

DISSENT (Atcheson, J.): Agrees that self-defense did not justify Brown’s conduct as a means of protecting himself. However, district court and majority disregarded undisputed context of Brown’s actions where Brown asked girlfriend to step aside so he could leave, and she understood that request. Under these circumstances, the physical contact was sufficiently distinct from rude, insulting, and angry conduct that is criminal. Would reverse the conviction.

STATUTE: K.S.A. 21-3211(b), -3211(a), -3211(c), -3412, -3412(a),-3412(a)(1), -3412(a)(2), -3414(a)(1)

STATE V. FOSTER

SHAWNEE DISTRICT COURT – AFFIRMED

NO. 104,083 – AUGUST 26, 2011

FACTS: Foster convicted of offenses including forgery based on attempting to cash stolen business checks. At trial, Riddens testified with immunity that he gave checks to Foster and drove Foster to check cashing site. Foster appealed, claiming: (1) insufficient evidence of alternative means of both “issuing or delivering” a fraudulent check to support the forgery conviction under K.S.A. 21-3710(a)(2); (2) district court erred in failing to give jury an accomplice instruction; and (3) constitutional error to enhance sentence based on prior criminal history not proven to jury.

ISSUES: (1) Alternative means and forgery statute, (2) accomplice instruction, and (3) sentencing

HELD: Not an alternative means case. In light of UCC definitions for issuing and delivering a negotiable instrument, as well as overall structure and organization of K.S.A. 21-3710, legislature intentionally segregated three alternative means of committing forgery into three different subsections – creating (21-3710(a)(1), transferring (21-3710(a)(2), and possessing (21-3710(a)(3). Consistent Court of Appeals opinions identified, and contrary Court of Appeals opinion is discussed. Here there was sufficient evidence for reasonable factfinder to find Foster guilty under 21-3710(a)(2) of delivering a fraudulent check knowingly and with intent to defraud.

Sufficient facts to establish that Riddens was an accomplice, but under facts, no clear error in not giving jury an accomplice instruction.

Sentencing claim presents no reason to depart from controlling Kansas Supreme Court precedent.

STATUTES: K.S.A. 2010 Supp. 84-2-201(15), -3-103(a)(5); K.S.A. 21-3710(a), -3710(a)(1), -3710(a)(2), -3710(a)(3); K.S.A. 22-3414(3); and K.S.A. 84-3-105(a), -204(a), -407(a)

NOTICE OF AMENDMENT OF THE LOCAL RULES OF PRACTICE AND PROCEDURE OF THE UNITED STATES BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS

The U.S. Bankruptcy Court for the District of Kansas gives notice of Proposed Local Rules of Practice and Procedure. The Proposed Local Rules amend the present Local Rules as recommended by the Bench and Bar Committee of the United States Bankruptcy Court for the District of Kansas with the approval of the Court.

Interested persons, whether or not members of the bar, may submit comments on the Proposed Local Rules addressed to the Clerk of the U.S. Bankruptcy Court for the District of Kansas at 401 N. Market, Room 167, Wichita, KS 67202. All comments must be in writing and must be received by the Clerk no later than December 16, 2011, to receive consideration by the Court.

Copies of the Proposed Local Rules will be available for review by the bar and the public from November 15, 2011, through December 15, 2011, at:

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167 U.S. Courthouse
401 N. Market
Wichita, KS 67202

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Copies of the Bench and Bar Committee Minutes, at which most of the proposed changes were discussed, are also available at http://www.ksb.uscourts.gov.
IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

2012 SUPREME COURT SESSION SCHEDULE

February 6-13
March 29
April 10-16
*May 21-25, 29
August 27-31
October 3
October 22-16
December 10-14

BY ORDER OF THE COURT this 15th day of September, 2011.

Lawton R. Nuss
Chief Justice

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2011-12
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Overview of the Domestic Violence Designation Law*
Speakers: Jennifer Ananda and Sara Rust-Martin Telephone seminar

- Co-sponsored by the Kansas Coalition Against Sexual and Domestic Violence

**Thursday, November 3, Noon – 1 p.m.**
Sexual Violence and Civil Legal Remedies*
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- Co-sponsored by the Kansas Coalition Against Sexual and Domestic Violence

**Friday, November 4, 9 a.m. – Noon and 1 – 3:45 p.m.**
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Country Club Plaza Marriott, Kansas City Mo.

**Monday, November 7, Noon – 1 p.m.**
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