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Focus

What Every Lawyer Should Know About Crime Victims’ Rights in Kansas

By Suzanne Valdez

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The Journal of the Kansas Bar Association

November/December 2011

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Kansas Bar Association, Topeka, Kan.
Friends, it has been quite a busy month with local and specialty bar visits. If Will is right, I have been learning quite a bit this past month, by my association with smarter people. I began in Dodge City for the Southwest Kansas Bar Association annual meeting. About 140 attorneys attended the meeting on September 9 for CLE and camaraderie. The event is spearheaded by Dave Rebein and Shane Bangerter. Among those attending were Phil Ridenour, Sally Shattuck, Tom Black, Gene Sharp, Kerry McQueen, Court of Appeals Judge Stephen Hill, Judge Kim Schroeder, Judge Robert Schmisseur, and L.J. Leatherman. The speakers each received mounted steer horns. Kurt Kerns remarked that he was going to figure out how to affix the steer horns to the grill of his truck. Keep an eye out in your rear view mirror, the next time you are in Wichita.

We then hosted our fall leadership retreat at KBA headquarters in Topeka. About 50 of our section presidents and committee chairs attended the meeting. We discussed new and different ways to bring value to our members through CLE and networking opportunities. It was a great meeting with smart and dedicated colleagues, such as Margann Bennett, Tim O’Sullivan, Tyler Garretson, Bill Quick, and Vivian Olson.

Next onto Washington, Kan., for the 12th Judicial District meeting. All but two practicing attorneys were in attendance from that district. Justice Nancy Moritz and L.J. Leatherman (at this point I was pretty sure that he was just following me around) provided CLE to the attendees. Judge Kim Cudney and Hon. Richard W. Wahl attended as did Frank Spurney, Dan Metz, Curt Frasier, Regine Thompson, and Harry Ganntenbein, who received his 50-year pin from the KBA. Now this group is not shy about expressing options about the KBA, Blue Ribbon Commission and I suspect, anything you might want to talk about.

The Wichita Bar Association hosted its an annual Judges Day, with golf and barbecue, and this year about 340 attended. It is always a wonderful event, and offered perfect weather this year. Among those attending were Wichita Bar Association President Jay Fowler, President-Elect Hugh Gill, Vice President Jennifer Magana, Mike Stout, Linda Parks, Judge Douglas Roth, Laura Ice, and Judge Terry Pullman. The KBA was also fortunate to co-sponsor a reception for the Kansas Supreme Court with the Wichita Bar Association, after the Court heard arguments in Wichita.

I then had the chance to meet with several members of the Kansas Association for Justice in Topeka, the president, of that association, Karen Renwick, attended as did Kathy Kirk, membership chair; Mike Fleming, legislative chair; and Dave Rebein, public affairs chair. We were joined by KBA District Governors Terri Bezek and Natalie Haag.

The Topeka Bar Association graciously invited me to attend a monthly meeting, which was attended by about 70 lawyers and judges. At the meeting I had the pleasure of honoring World War II veterans in the audience, including Don Patterson, Wayne Probasco, and the Hon. Richard Rogers. President Ardith Smith-Woertz presided over the business section of the meeting. Also in attendance were Jim Parrish, immediate past president of the Topeka Bar Association, Angel Zimmerman, Terri Bezek, Emily Donaldson, Court of Appeals Judge Christel Marquardt, Judge Evelyn Wilson, and Rich Hayse. I sus-
pect that if you find yourself in Topeka, on monthly meeting day, the Association would welcome you to attend the Bar meeting.

I had yet another free lunch with the Kansas Credit Attorneys Association (yes, you are detecting a common element to these visits). This statewide group meets twice each year, on Presidents Day and Columbus Day. KBA made a Casemaker presentation for CLE credit and there were about 40 attorneys in attendance, including Larry Zimmerman, Dana Milby, Fred Johnson, Lou Wade, Tom Valentine, Keith Richey, Jay Vander Velde, and Kent Hollins. I had great conversation over lunch with this group of colleagues.

I wrapped up this month’s meetings with lunch at the Kansas County and District Attorneys Association mid-year meeting in Topeka. The Association honored Gerald Kuckleman as prosecutor of the year, and I was pleased to enjoy lunch with my friends Christine Ladner, Barry Disney, Gerald Kuckleman, and Dennis Jones. Meanwhile, Lee Smithyman, KBA president-elect, attended the Wyandotte Bar Association meeting, where it is reported that he, Mike Sexton, David Kious, and Don Taylor performed the “YMCA” at the conclusion of a comedy routine (not surprisingly, Lee failed to send photos). In the audience were John Jurcyk, Byron Loudon, Jim Scherzer, Phil Carson, Ruth Benien, and Karen Shelor.

Then, on October 7, Lee attended the Douglas County Bar Meeting held at the home and farm acreage of Rick Hird, past Douglas County Bar president. Rick and Debbie Hird have a several acre vineyard adjacent to their house, large tree house for kids, small barn, skeet shooting, horseshoes, badminton, etc. Everyone had a wonderful time as they had dinner and watched the sun set. District Governor Charles Branson attended as did Judges Sally Pokorny and Jean Shepherd.

I am humbled to have the opportunity to serve our great Association and to have the benefit of meeting so many smart, funny, dedicated and inquisitive people who happen to be lawyers. This outreach is proof that lawyers with these traits are all over the state and practicing in all areas of the law.

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.
These Young Lawyers are Serving the Profession and Our Country

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

The past two years, I have had the privilege of attending the Annual Meeting of the American Bar Association Young Lawyers Division. Each year at the Annual Meeting, the ABA YLD honors young lawyers who are serving in the armed forces. Their stories are amazing and inspiring. Hearing their stories stirred my curiosity about the KBA YLS members that are currently serving in the military. So, a couple months ago, I sent out a message on the KBA YLS listserv seeking responses from members who are in the military. The response was impressive. While I wish I could write a profile on each of the young lawyers I heard from, I don't have the space to do that in this column. Nevertheless, I wanted to tell you a little bit about a couple of those young lawyers.

Danielle Crowder – Air Force

Danielle Crowder is a captain and a judge advocate general (JAG) in the Air Force, and is currently stationed at Aviano Air Base in Italy. Danielle is a native of Endwell, N.Y., and she attended college in nearby Missouri at the University of Central Missouri and graduated from law school at KU in 2010. While in college and law school, Danielle's goal was to serve the federal government in one capacity or another. Danielle received her degree in criminal justice and saw law school as a natural fit because she enjoyed the law and procedures classes she had taken in her undergraduate studies. After she finished law school, the Air Force was an attractive option to her, because she enjoys structure, rules, and physical activity. She also wanted a job where she would be doing something different every day and would have the opportunity to travel.

Danielle is currently the chief of legal assistance in her office. She coordinates the legal services that her JAG office can provide to the base population. This includes estate planning, Servicemembers Civil Relief Act issues, family law issues, landlord-tenant issues, and other legal issues that members of the Air Force face. In addition to those duties, she also has a military justice caseload. She has served as trial counsel on court-martial proceedings and discharge boards. Finally, Danielle also handles other general law-type issues. She performs legal reviews for Freedom of Information Act requests and analyzes lease contracts for the government.

Although Danielle has only been in the Air Force for about a year, she has thoroughly enjoyed the experience so far. She enjoys the different challenges she faces every day, the people she gets to work with, and living overseas. Danielle has not decided if she wants to make a career out of the Air Force, as she entertains the thought of joining the FBI someday. However, for now, she is enjoying her life as an Air Force JAG.

Paul Cope – Kansas National Guard

Paul Cope is another KBA YLS member serving in the armed forces. Paul is a full-time member of the Kansas National Guard. He is a JAG, and currently holds the rank of captain. Paul is originally from Joplin, Mo., and graduated from Pittsburg State in 2006 and Washburn Law School in 2009. Prior to being commissioned as a JAG, Paul served as an enlisted forward observer. He enlisted during his first year of law school.

As a JAG, the majority of Paul's service is directly related to the practice of law. However, he points out that he is a soldier first. While he has his law-related responsibilities as a JAG, he is also required to maintain his physical fitness, weapons proficiency, and basic combat skills. So, while some days he is sitting at his desk, other days he is out shooting machine guns.

Paul is currently assigned as the command judge advocate to the 1-108th Aviation Regiment in Topeka. In that position, he is the primary legal officer to the commander of that unit. He provides legal advice and support to the commander and his staff to ensure that missions are carried out in accordance with the law. Additionally, he is also assigned as trial counsel to the Joint Forces Headquarters-Kansas and is the legal advisor to the Wolf Creek Incident Response Team. While serving in his various duties as a JAG, Paul has had the opportunity to practice administrative law, criminal law, civil law, contract law, family law, legal assistance, and estate planning, just to name a few. Paul enjoys the variety of experiences that he gets, and says that his service has pushed him to do things that he did not think he was capable of achieving. His experience has been so positive, that he plans to make a career out of his service in the National Guard. This October, Paul was deployed for the first time and will be on a tour of duty in the Middle East. I know everyone in the KBA and the KBA YLS joins me in wishing Paul safety while on his tour of duty.

(Con’t. on Page 14)
The Kansas Bar Association and Kansas Legal Services partner in a statewide effort to provide pro bono legal representation to low-income Kansans. The pro bono program continues to grow with KLS staff providing training and support to a group of volunteer attorneys. The opportunity is available for Kansas lawyers willing to donate time to help in the mission of equal justice for all.

Being involved in pro bono offers awareness of the desperate needs for legal services and nourishes the desire to make a difference. KLS offers several ways of expanding legal services to low income individuals and groups.

The demand for representation in family law cases remains high. Volunteers with experience in family law or who are willing to learn are always in demand. In 2011, KLS added the opportunity for involvement in limited scope document preparation. A pro bono attorney can limit their involvement to meeting with a family law client in an uncontested matter and reviewing documents the client has prepared using Kansas Judicial Council forms. The attorney may coach the self-represented litigant on the court appearance that will be required to finalize a divorce. This pro bono opportunity is offered statewide. During the week of Celebrate Pro Bono, KLS held Limited Scope Document Preparation Clinics in Kansas City and Topeka. KLS was able to assist 27 people through these events.

KLS also teamed with the KBA young lawyers to create opportunities for Kansas and low-income seniors to obtain advance directives. Clinics have been held in Kansas City, Wichita, and Pittsburg.

KLS offers attorneys who share a passion for justice an opportunity to assist those in need. They may help clients who have lived in fear from an abusive spouse or help a proud, hard working man who is unemployed and in financial ruins. The list of needs is long and varied, but, as much as we want to help each person that needs legal representation, there will be those that are turned away. For every three clients KLS accepts, two are turned away. Support of the KLS pro bono project will mean more clients will have access to the legal help they need.

During Celebrate Pro Bono Week, KLS held four pro bono events, providing assistance to 43 persons. It is with the dedication of volunteer attorneys that people were able to be served. The KBA and KLS also partnered in having representatives from both organizations, along with volunteer attorneys, discuss the need for pro bono attorneys and to give first-hand experiences to law students at Washburn University and the University of Kansas. This was a combined effort to encourage law students to become active participants in pro bono early in their careers, making it a lifelong practice to help those in need.

If you are interested in volunteering for the KLS pro bono program, you can complete an application at http://www.kansaslegalservices.org/node/375.

**Upcoming KLS Events:**

- On November 18, the Kansas City office, along with volunteer attorneys, will have an area set up at the Stand Down event in Memorial Hall, 601 N. 7th St., Kansas City, Kan., from 8 a.m. to 4 p.m.

- On December 7, KLS is asking for pro bono attorneys to assist in a veteran’s outreach held at Colmery-O’Neal VA Medical Center, 2200 SW Gage Blvd., Topeka, from 1 to 4 p.m.
This list of pipeline initiatives contains ways for you and your organization to make a difference in the lives of our future colleagues. Get involved! This is not an exhaustive list, so please send me additional opportunities that I can add.

<table>
<thead>
<tr>
<th>Activities:</th>
<th>For Students In:</th>
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<tbody>
<tr>
<td>Adopt and help a school, student group or nonprofit organization, including:</td>
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<tr>
<td>• Big Brothers, Big Sisters (<a href="http://www.bbs.org">http://www.bbs.org</a>)</td>
<td>Elementary School</td>
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<tr>
<td>• College and law school affinity groups, including Black Student Union,</td>
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<tr>
<td>Hispanic Law Student Association, Indigenous Nations Student Association,</td>
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<tr>
<td>National Asian American Association Program, OUTlaws</td>
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<tr>
<td>• Lawyers Encouraging Academic Performance (<a href="http://leapaccount.homestead.com/">http://leapaccount.homestead.com/</a>)</td>
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<tr>
<td>Advocate for students; circulate their resumes to colleagues</td>
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<tr>
<td>Aid in completion of school application</td>
<td>✓</td>
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<tr>
<td>Assist with completing registration forms or standardized tests</td>
<td>PSAT, ACT, SAT</td>
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<td>Become familiar with, and refer students to, available resources, including:</td>
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<tr>
<td>• ABA Law Student Division (<a href="http://www.americanbar.org/groups/law_students.html">http://www.americanbar.org/groups/law_students.html</a>)</td>
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<tr>
<td>• Discover Law (<a href="http://www.discoverlaw.org/">http://www.discoverlaw.org/</a>)</td>
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<tr>
<td>• Law School Admission Council (<a href="http://www.lsac.org">http://www.lsac.org</a>)</td>
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<tr>
<td>• Practicing Attorneys for Law Students (<a href="http://www.palsprogram.org/">http://www.palsprogram.org/</a>)</td>
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<tr>
<td>Call admitted law students for recruitment purposes</td>
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<tr>
<td>Coach moot court and debate teams</td>
<td>✓</td>
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<tr>
<td>Conduct mock interviews</td>
<td>✓</td>
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<tr>
<td>Coordinate on-campus visit of area schools for students</td>
<td>✓</td>
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<tr>
<td>Encourage attendance in national academic or career-centered summer programs, including:</td>
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<tr>
<td>• American Indian Law Center's Pre-Law Summer Institute (<a href="http://www.ailc-inc.org/">http://www.ailc-inc.org/</a>)</td>
<td>✓</td>
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<tr>
<td>• CLEO (<a href="http://www.cleoscholars.com/">http://www.cleoscholars.com/</a>)</td>
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<tr>
<td>• NBA's Crump Law Camp (<a href="http://www.nationalbar.net/">http://www.nationalbar.net/</a>)</td>
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<tr>
<td>• HNBF’s Future Latino Leaders Law Camp (<a href="http://www.hnbf.org/content/future-latino-leaders">http://www.hnbf.org/content/future-latino-leaders</a>)</td>
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<tr>
<td>• INROADS (<a href="http://www.inroads.org">http://www.inroads.org</a>)</td>
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<tr>
<td>Fund diversity scholarships and tie-in clerkships</td>
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</table>
### Get involved with local summer programs, including:
- KU’s Civic Leadership Program ([http://www.doleinstitute.org/students-civicleadership.shtml](http://www.doleinstitute.org/students-civicleadership.shtml))
- KU’s Journey to J.D. ([http://www.law.ku.edu/centers/journeytojd](http://www.law.ku.edu/centers/journeytojd))
- KCMB’s Summer Law Internship Program ([http://kcmba.org/PublicService/slip.htm](http://kcmba.org/PublicService/slip.htm))
- WBA’s Grow Your Own Lawyer ([http://www.wichitabar.org/resources/growyourownlawyer.php](http://www.wichitabar.org/resources/growyourownlawyer.php))
- WU’s Pre-Law Camp ([http://www.washburn.edu/cas/communication/pre-law_camp.html](http://www.washburn.edu/cas/communication/pre-law_camp.html))
- UMKC’s Prelaw Undergraduate Scholars Program ([http://law.umkc.edu/prospective-students/discoverplus.asp](http://law.umkc.edu/prospective-students/discoverplus.asp))

#### Guide student in selecting courses that will develop analytical skills and prepare students for the rigors of law school

- [Checkmark](#)

#### Help applicants complete bar exam application forms

- [Checkmark](#)

#### Hire students for summer and part-time school year jobs

- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)

#### Host firm receptions and office tours

- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)

#### Invite students to CLEs, bar events

- [Checkmark](#)

#### Offer scholarships for review courses for standardized test

- PSAT, ACT, SAT

#### Contact company for discounts of multiple participants

- LSAT  
- Bar, MPRE

#### Organize IRAC workshop/review, before law school begins, for students in area

- [Checkmark](#)

#### Participate in diversity job programs, including:
- KCMB’s IL Summer Diversity Clerkship

#### Serve as mentor to students

- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)

#### Sponsor students to attend national and regional conferences

- [Checkmark](#)  
- [Checkmark](#)

#### Start law-related programs with local schools and communities, including:
- Youth Court ([http://www.youthcourt.net/](http://www.youthcourt.net/))

#### Tutor students

- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)

#### Visit schools; serve on panels during career days

- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)  
- [Checkmark](#)

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### About the Author

**Karen Hester** is the director of Career Services and director of Diversity and Inclusion at University of Kansas School of Law. Prior to joining KU in 2005, she practiced elder law, including estate planning and probate. Hester has a Bachelor of Science in mathematics, a Master of Science in student personnel and counseling, a juris doctor and a Master of Law in taxation.

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I heard a very respected and prominent attorney say the sweetest thing a couple months ago. It was at the conclusion of a CLE presentation and he said to the audience, “Take care of each other out there.” Reminded me of that old TV classic “Hill Street Blues,” when the sergeant, at the end of roll call just as the new shift was about to hit the streets, would say “Be careful out there” — in the same tone the attorney used: caring. In both instances there was a shift from the matter of fact, almost monotonous, tone of information imparting; the voice softened and I swear I heard a whisper of something a little like love — for his colleagues, his mates, his fellow warriors. That particular bond which grows from shared experience and shared endeavors was in those words, along with a bit of the “us vs. them” attitude. “It’s sometimes a jungle out there and we’ve got to watch each other’s backs” may not have been put into words but the sentiment was there between the lines.

And hey, don’t look now but it is a jungle out there and we do need to watch each other’s backs. I’m not sure that lawyers have risen in popularity the last couple years, so much as other groups may have simply outpaced us in unpopularity. Times are tough for a lot of folks and while we may be adversaries in the courtroom, at the end of the day, we’re the lawyers of Kansas and we need to stand together. We need to take care of each other.

Now let me hasten to add what taking care of each other is not, at least in my world. It is not doing for someone else that which he or she can do, and ought to do, on his/her own. That is caretaking in an unhealthy meaning and not the same as taking care. Which is not to say we should forego the occasional good deed. But unhealthy caretaking robs the receiver of the opportunity to handle his own life and gain the self esteem derived from doing that well. And it may also rob her of experiencing the consequences of poor choices just when those consequences might be what she needs to spur her to make a change.

Along those same lines, taking care of each other, in a healthy sense, shouldn’t mean covering up another’s mistakes, again, removing accountability for choices and actions. I think the thought my lawyer friend at the end of the CLE was expressing was, “If you think somebody’s hurting, in trouble with alcohol or drugs or depression or some other malady, reach out to them.” Either reach out yourself, or ask KALAP or some other helping entity to reach out to them. Isolation is often a hallmark of depression and alcoholism so they may push you away and assure you they are fine. It’s important to find a way to express caring concern without being harsh or judgmental.

Don’t just leave them to their own devices at a time when they really don’t know what to do, or are afraid to admit to themselves or someone else how bad they feel, how scared they are. Just because a saying is an old chestnut doesn’t mean it isn’t still true and so I offer you this old saying: “You may never know when a kind word or gesture changes someone’s life”. In fact, it will always change someone’s life — yours. Here is how an ancient sage, Basil, put it: “A good deed is never lost: he who sows courtesy reaps friendship; and he who plants kindness gathers love.”

Tis the season of thanking and giving. Happy Holidays and take care of each other out there.

About the Author

Anne McDonald graduated from University of Kansas School of Law in 1982 and spent most of her legal career as court trustee in Wyandotte County. After she retired in 2006, she has served as a judge pro tem in Kansas City, Kan., Municipal Court and in Wyandotte County District Court. She is a member of four boards or commissions and three book clubs, along with the Sierra Club. She is a prior chair of the KBA Committee on Impaired Lawyers and has been a KALAP commissioner from its inception, and now serves as executive director.

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Experience Counts

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The Town That Built Me

By Melissa Plunkett, University of Kansas School of Law, Lawrence

As a small girl, I would walk in circles around the giant metal cross that stood outside my church. As my parents caught up with their friends after mass, I would trace my hand across its rough surface, rusted from the weather, biding my time until I could pick out a Sunday donut. After a few trips around, I would stop, stare up at the towering roof, and slap my hand against it to listen to the echo move through its hollow center up to the sky.

In that stage of my life, I told my parents I wanted to be a hospital when I grew up. Impossibility meant nothing to me, and not a single real worry wandered my way. Life was a given, just like that cross standing tall to greet us every Sunday morning, or my brother walking home from Irving Elementary with me every Monday afternoon, or a stadium of fans cheering on the Eagles at home football games on Friday nights. But even as a young girl, that town began to build skills in me that I would need somewhere down the line, slowly teaching me lessons about respecting others, facing challenges head on, and never giving up. Because two blocks away from that church, at a small two-story brick elementary school, I learned that sometimes just being nice to others can change their whole day when a classmate helped dust off my jeans after a spill on the playground. A few more blocks down the road at South Middle School, I learned that perseverance pays off after spending hours and hours squeaking notes out of my clarinet before I could play the song just right. And a few miles away on the volleyball and basketball court of Joplin High School, I learned that success isn’t necessarily measured in the number of wins at the end of the season, but in the way the game is played.

Years down the line, after I used those skills to persevere through the struggle that is law school, I watched my town begin to struggle its way through the biggest battle that it would ever face. Because on the night of my commencement from law school, all that was left of my church was that tower given, just like that cross standing tall to greet us every Sunday. Impossibility meant nothing to me, and not a single real worry wandered my way. Life was a given, just like that cross standing tall to greet us every Sunday morning, or my brother walking home from Irving Elementary with me every Monday afternoon, or a stadium of fans cheering on the Eagles at home football games on Friday nights. But even as a young girl, that town began to build skills in me that I would need somewhere down the line, slowly teaching me lessons about respecting others, facing challenges head on, and never giving up. Because two blocks away from that church, at a small two-story brick elementary school, I learned that sometimes just being nice to others can change their whole day when a classmate helped dust off my jeans after a spill on the playground. A few more blocks down the road at South Middle School, I learned that perseverance pays off after spending hours and hours squeaking notes out of my clarinet before I could play the song just right. And a few miles away on the volleyball and basketball court of Joplin High School, I learned that success isn’t necessarily measured in the number of wins at the end of the season, but in the way the game is played.

Lesson 1: When it looks impossible at first, just start working and worry about the impossibility later.

More than a few times, I have looked at a research assignment, an insane editing schedule, or just the unknown future and thought, “There is no way I can handle this.” When my brain starts to panic, I have to remind myself to just take it one step at a time and trudge through what I can at that moment.

I had to remind myself to focus on the small steps when I went home the week after the storm. To walk into a place that is so familiar, with images etched into your every fiber, and not recognize anything or even know where you are standing is more than unnerving. For the people who stood in front of their own homes and saw nothing left, that feeling multiplied into incredulity. But brick by brick, tree limb by tree limb, and board by board people literally just started picking up the pieces, not focusing on the impossibility of it all. Soon, truck after truck hauled the shattered pieces of the town away, leaving a barren scar across its face. And slowly but steadily, new nails, boards, and bricks have begun to soften the jagged edge of that scar, making the new beginning, which seemed impossible a few months ago, a closer reality.

And so, Joplin has again reminded me of a valuable lesson: when it seems impossible, just start moving, and with a little work, the finish line will soon seem much closer than first thought.

Lesson 2: You can’t always do it by yourself — you have to rely on others; they can’t always do it by themselves — you have to help.

When working through something challenging, it becomes easy to get caught up in personal battles and forget the people around you. In law school, I constantly had to remind myself to step back and see the people who could help me and the people who I could help — it’s too easy to forget that you don’t have to face all challenges by yourself.

The people of Joplin haven’t had to travel this journey by themselves either. In fact, in a place that has seen so much heartache, I’ve never seen so much generosity and love. For example, as a friend started the task of tearing rain soaked walls and ceilings out of his house, a crew of strangers showed up at his door. In a few hours, their saws and muscles had taken out every wall and ceiling in that house. When they were done, they moved down the road to the next person in need. This group was just one of hundreds. The various efforts have been organized at rebuildjoplin.org, allowing anyone to use when facing their own personal challenges.

*The Journal of the Kansas Bar Association | November/December 2011*
find a way to help. Many attorneys have assisted and continue to assist in Joplin, including the Missouri Association of Trial Attorneys (www.matanet.org) and Legal Aid of Western Missouri (www.lawmo.org). All of these people and groups recognized a need and gave what they could. The outpouring of help is overwhelmingly wonderful.

Maybe the outpouring of help has been so great because the hurt is so raw and easy to identify. But a helping hand has the same impact in less drastic situations. You don’t need to wait until a tragedy strikes to offer assistance and strike a chord in someone’s heart. Every small gesture of kindness can have a huge return. And any small gesture is a blessing in the competitive environment of law school, where students can get so focused on the individual battle.

So, take a step back and look at the people around you — you can probably do something to make their life easier. And if you let them, they can probably do the same for you.

Lesson 3: No one knows exactly what they’re doing; don’t make that your excuse.

I’ve heard it from fellow law students, I’ve heard it from friends, and my own thoughts have screamed it at me: “Everyone else knows what they’re doing, but I just feel like I’m stumbling along.”

You probably are stumbling along, but everyone else is probably in the same situation. The people who look like they have it all together and who end up being the most successful are most likely just putting their insecurities aside, focusing on the skills they can use, and using their resources to make up in the areas they lack. Sometimes, you just have to ignore the stumbling when work needs to be done.

Nowhere has this been more evident than in the Joplin schools. How can any school district know how to get back to teaching kids when 10 of its schools suffered damage and hundreds of teachers lost their classrooms and supplies all in one day? No one knows. But in the spring, the district promised to start the school year on time. While I’m sure the path wasn’t exactly smooth, on August 17, those schools opened their doors to welcome students back. And to the outside world, the school district looked like it implemented a plan that had been in place all along. Why? Because even though it might not have known exactly how to get those kids back into a school, it got to work, using the resources it had and reaching out to find the help it needed — something we can all do when faced with a new challenge.

So move forward one step at a time, help where you can, accept help when you need it, and act like your stumbling is all part of your plan. The people of Joplin have, and so far they are pushing through this tragedy.

On my last trip home, I walked around that now lonely metal cross one more time and brushed my fingers across the metal face. This time the feel of that cool metal on my hand sent an echo through me, rumbling memories to my core. This town may never look the same, and those places that have always stored my memories may never be replaced. But the values and principles that they stood for will live on in me and all the other people that this town helped to build.

About the Author

Melissa Plunkett was extremely blessed that her family suffered no damage to their home from the storm, she will forever be a Joplin Eagle, and she listened to Miranda Lambert’s “The House That Built Me” too many times while writing this article. She is a recent graduate of University of Kansas School of Law, where she served as editor-in-chief of the Kansas Law Review and as a member of the Moot Court Council. Plunkett is currently clerking for the Hon. Julie Robinson in Topeka.

These Young Lawyers are Serving ...

While this list may be incomplete, I wanted to recognize the other KBA YLS members I heard from who are serving in the military: Jessica Switzer, Air Force; D. Matt Keane, Kansas National Guard; Josh Goetting, Army; Jared Reeves, Air Force; Brian Carr, Army; and Reese Hays, Kansas Air National Guard. Please join me in thanking these fine individuals for their service and thanking those who are not included on this list. I am inspired by their commitment to the legal profession and their military service to our country.

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.
Beating the High Cost of College Tuition

It was apparent coincidence that I stumbled into a variety of free college courses just as my daughter’s college application deadlines arrived. Having reviewed her financial aid options and now looking over the general state of the economy, I now suspect these free courses are not coincidence — they’re destiny!

OK, maybe I still have enough faith in our system that I would not advocate my kids (or yours) opt out of college in favor of online courses and a digital diploma. Nevertheless, the wealth of information available via the Internet is still stunning and humbling as you drift away from the main thoroughfares of Facebook, YouTube, and Twitter. Top-tier universities and colleges have thrown open their doors hundreds of courses available to those of us without a full-ride scholarship.

Some of the most compelling:

Stanford University, Introduction to Artificial Intelligence (www.ai-class.com)

The world of electronic discovery is primed for invasion by Artificial Intelligence (AI) software; “… software that reasons about the world around it.” There are even companies mining dockets and decisions to build statistical models predictive of outcome and aimed at computing litigation strategies. Though seemingly far afield of the practice of law, AI research is already on attorneys’ doorsteps so why not sign up for a two month class to investigate the field and even create AI software? One warning — there is a final exam!

Massachusetts Institute of Technology, MIT OpenCourseware (ocw.mit.edu)

Maybe you missed the enrollment cut-off for the artificial intelligence course and want something a bit more grounded in your legal experience. MIT began making portions of its courses available online (for free) as early as 2001 with (as expected) emphasis on their science and technology curriculum. The project has steadily grown now, and even entire undergraduate and graduate slate of courses on economics and even business classes from the Sloan School of Management are available. The MIT project is more self-driven usually providing only lecture notes, assignments (with solutions), and exams. Interactive lectures and conferencing are not typically available.

University of California, Berkeley, Cognitive Science (itunes.apple.com/us/institution/uc-berkeley/)

Wonder what it is about the human brain that makes people do dumb things requiring a lawyer? UC Berkeley has joined a number of universities in filling iTunes-U with full semesters’ worth of lectures. The highly-rated Cognitive Science course includes 19 videos “include[ing] the study of brain-injured patients, neurophysiological research in animals, and the study of normal cognitive processes in humans …” Other distinguished universities including Yale, Harvard, and UCLA also post full courses online in an iPod ready format.

Khan Academy (www.khanacademy.org)

Not every online course has an Ivy League pedigree or will take 20 weeks to complete. Some sources like Khan Academy have a more modest aim of laying out the basics of a topic in video instructional form to be digested in small bites. Khan offers more than 2,600 such videos covering just about everything. A 10-minute session can walk you through the basics of how a FICA tax is calculated, a discussion of inflation and the CPI, inductive logic, or even help for helping with kids’ algebra homework.

Open Culture (www.openculture.com/freeonlinecourses)

The sheer volume and variability of educational courses available online have not all yet been completely catalogued. A start toward that aim is the syllabus at Open Culture linking out to more than 400 courses from Aims and Limits of the Criminal Law (Tamara Lave, UC Berkeley) to Environmental Politics and Law (John P. Wargo, Yale).

Online CLE

None of the courses cited will qualify for the Kansas CLE Commission’s new rules allowing more non-traditional course delivery options but the guidelines (www.kscle.org/clecommission.asp) do allow online classes as an option. One entire section of Open Culture includes podcasts and videos from nine different law schools of potential value for CLE purposes and LexisNexis has been in the game for some time now with a broad selection of legal podcasts for virtually all practice areas. The Irreverent Lawyer helps watch for free CLE options (http://lawmrh.wordpress.com/) while the American Bar Association is an immediate resource for fee-based online courses (www.americanbar.org).

Personally, I get the most enjoyment from live CLE rubbing shoulders with colleagues so, for now, I spend my online time on guitar lessons (http://justinguitar.com/) and stargazing in a Penn State University Astronomy lecture series (http://www.youtube.com/astronomy001).

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.
Obituaries

Marion Paul Mathews

Marion Paul Mathews, 91, of Winfield, died October 13 at William Newman Memorial Hospital. He was born May 25, 1920, in Winfield, the son of William A. and Ethel P. (Jameson) Mathews, and grew up on a farm north of Cambridge.

After graduating from Cambridge High School and Pittsburg State Teachers College, he volunteered for service in the Army Air Force. After completing pilot training, he was commissioned as second lieutenant. As a B-24 four-engine bomber pilot, he joined the 431st Squadron of the Seventh Air Force. The airplane assigned to him was equipped with both regular and radar bomb sights, one of only a handful of radar-equipped planes in World War II. Mathews flew combat missions out of Guam, Saipan, and Okinawa with later missions over Japan and the China coast.

Upon being discharged as a first lieutenant, he entered law school and received his law degree from the University of Kansas School of Law. Mathews practiced law in Winfield for 45 years, and at the time of his retirement, he was senior partner in the law firm of Mathews, Taylor, and Krusor. He was elected to four terms in the Kansas House of Representatives and while there, served as chair of the Assessment and Taxation Committee. He later served as chair of the State Chamber of Commerce Taxation Committee. Mathews was city attorney of Udall from 1955-80 and served as president of the Winfield Chamber of Commerce from 1981-82.

Mathews is survived by his wife, Florence, of the home; children, Cheryl Gentry, of Independence; grandsons, Todd and Brian Gentry, both of Winfield; great-grandchildren, Anna and Paul Gentry, both of Winfield; and numerous nieces and nephews. He was preceded in death by his parents; sisters, Neva Tripllett, Lola Jones, and Phyllis Mathews; half-sisters, Flossie Taylor and May Mielson; and half-brother, Ray Mathews.

George A. Lowe

George A. Lowe, 86, of Olathe, died October 26 in Lenexa. He was born December 26, 1924, and was a graduate of Olathe High School, Oberlin College & Conservatory, and the University of Kansas. In 1950, Lowe graduated from the University of Kansas School of Law with his juris doctorate.

Lowe was in the U.S. Navy as a quartermaster and served aboard the USS Springfield. He was a Kansas senator, a member of the board of directors for Olathe Medical Center and First National Bank of Olathe, KU Law School board of governors, Johnson County Bar Association (JCBA) president, and was member of the American College of Trial Lawyers.

He is a recipient of the KBA’s Outstanding Service Award and the JCBA’s Justinian Award.

He is survived by his wife, Rosemary, of the home; children, Serena Shaffer, of Tallahassee, Fla., Zach Lowe, of Hamilton, Ohio, Dan Lowe, of Prairie Village, and John Lowe, of Colorado City, Colo.; 13 grandchildren; seven great-grandchildren; and his sister, Margaret DeVault. He was preceded in death by his son, Alex Lowe, and his brother, Roy Lowe.

Saleem W. Raza

Saleem W. Raza, 41, of Wichita, died September 5. He was chief legal counsel at The Coleman Co.

He is survived by his wife, Pam Raza, of the home; children, Ayden and Ava Raza; sisters, Samina Christopher and Sara Cherry; mother, Susan Phillips; and nieces and nephews. He was preceded in death by his father, Sammi Raza.
Advance Notice
Elections for 2012
KBA Officers
and
Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2012-2013 leadership year.

OFFICERS

KBA President-elect: (Current – Lee M. Smithyman, Overland Park)
KBA Vice President: (Current – Dennis D. Depew, Neodesha)
KBA Secretary-Treasurer: (Current – Gerald L. Green, Hutchinson)
KBA Delegate to ABA House of Delegates: Linda S. Parks, Wichita, is eligible for re-election

The KBA Nominating Committee, chaired by Glenn R. Braun, Hays, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Friday, January 6, 2012. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 20, 2012. In accordance with Article V – Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be seven positions on the KBA Board of Governors up for election in 2012. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Jeffrey Alderman by Friday, February 10, 2012. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2012 are:

• District 1: Incumbent Eric G. Kraft is not eligible for re-election. Johnson County.
• District 2: Incumbent Charles E. Branson is eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
• District 4: Incumbent William E. Muret is not eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
• District 5: Incumbent Natalie G. Haag is eligible for re-election. Shawnee County.
• District 6: Incumbent Bruce W. Kent is eligible for re-election. Clay, Cloud, Dickinson, Ellsworth, Geary, Lincoln, Marion, Marshall, McPherson, Morris, Ottawa, Republic, Riley, Saline, and Washington counties.
• District 7: Incumbent Calvin D. Rider is eligible for re-election. Sedgwick County.

For more information

To obtain a petition for the Board of Governors, please contact Christa Ingenthron at the KBA office at (785) 234-5696 or via email at cingenthron@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Glenn R. Braun at (785) 625-6919 or via email at gbraun@haysamerica.com or Jeffrey Alderman at (785) 234-5696 or via email at jalderman@ksbar.org.
The Greatest Generation: An Update

By Matthew D. Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

I’ve been writing a monthly column for this journal since April 2005. Ranging from the frivolous to the serious, the topics have, at times, shown little relevance to the legal practice. Yet when I stumbled on the idea of an issue dedicated to WWII veterans, and received a tremendous outpouring of support from those who served, it was the literary equivalent of a defense verdict on primetime Court TV.

But each of the 31 veterans has a story more amazing than the next, and with each narrative, there is much minutia you must correctly record. It’s important, for instance, to nail whether they enlisted, were drafted, their rank, and where they served. Other details are critical, say, for instance, if they saw combat, received injuries, or in some cases, were captured and held as a prisoner of war. Combine these facts with the rush of a deadline, and then throw into the mix legal work for our clients, and guess what? Stuff happens. Bad stuff. It certainly did with the last issue.

The profile of one veteran was botched horribly. The story of J. Francis Hesse contained some significant inaccuracies. Hesse was captured by the Germans during the Battle of the Bulge and subsequently escaped and made his way home via Poland. Yet my profile of Mr. Hesse included a confusing description of Hesse’s military service that was actually the service of another veteran profiled in the March issue — Edwin Wheeler.

Fortunately, with the benefit of another issue, we were able to correct the service history and contribution of J. Francis Hesse. So, with apologies to Mr. Hesse, his son, Matthew, and the rest of his family, what follows is a corrected account of his service to our country.

And, as an added bonus, we located another veteran, who is profiled in this issue — Jerry Griffith, of Hoisington. Enjoy.

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

Condensed article excerpts from the Bar-O-Meter (November 1990 by Martin R. Ufford); reprinted with permission by the author.

Christmas Eve, 1944. A twenty-two year old Second Lieutenant from Wichita captured during the Battle of the Bulge, sits cramped in a railroad box car at the rail yard in Limberg, Germany, along with approximately 40 other American prisoners. Overhead, American fighter and bomber planes begin their attack on the railroad yard. The cold and hungry prisoners of war feel great anguish as the bullets from the strafing fighter planes streak through the sides and tops of the rail cars. The men are deafened by the sound of bombs exploding all around them. American bombs.

Less than three weeks earlier, J. Francis Hesse’s Heavy Weapons Company, including two platoons of 30-caliber water-cooled heavy machine guns and one platoon of 81 millimeter mortars, had assumed their defensive positions along a “quiet sector” of the Siegfried Line in the Ardennes forest near the border between Germany and Belgium. Company D of the 423rd infantry regiment had just arrived on the continent from England. This inexperienced combat unit considered themselves fortunate to be stationed at a location where seasoned combat units were typically assigned when they needed a “rest.” Things didn’t stay quiet for long.

Germany’s last great counter-offensive of World War II began with a surprise armored offensive crashing through the Ardennes forest. It took two days for word of a “major German offensive” to reach Hesse’s position. On December 18, 1944, Capt. James L. Clarkson transmitted the orders for Company D to withdraw. Lt. Hesse was informed his platoon’s four machine guns would be among the last to withdraw, thus providing protection for the rifle company. By the time Lt. Hesse’s platoon began to withdraw, the Germans had encircled from 75,000 to 125,000 American troops.

Upon relinquishing his position, Lt. Hesse saw nothing but mass confusion along the roads. Soldiers were in disarray. Combat units were separated and disunited from their leaders and support groups. Junior grade officers and lower units did not know where they were or where they were going.

That night, Lt. Hesse and Capt. Clarkson shared a slit trench 18 inches deep they had dug in the frozen ground somewhere in the Ardennes forest. Shortly after dawn, Germans began shelling their position with artillery and mortars. Soon after, German Tiger tanks appeared with heavy machine gun fire. Hesse began running toward the woods where his machine guns had been strategically placed. After running about 50 feet, a shell landed at the edge of the trench he and Clarkson had shared the night before. Clarkson died from this shell burst.

The Germans had wiped out every other pocket of American resistance for many miles surrounding this area. The German mandate was to either capitulate by 10:00 o’clock a.m. or they would wipe out this unit to the last man. Having no food, little ammunition, and several injured and wounded, the senior American officer was without an alternative, and notified the men he had accepted the German terms and this stronghold would be handed over the next morning. Upon hearing this, one American, whose brother had been captured and who had enlisted “to get his brother out of Germany,” killed himself.

Thousands of Americans from the entire front, including young Lt. Hesse, were assembled and began the long march into Germany. Along the way, in large cities such as Cologne,
Germany, Germans threw stones and jeered the American soldiers. After several days, Lieutenant Hesse found himself in the boxcar on Christmas Eve, praying that he would live to see Christmas Day.

The next day, the prison train arrived at Stalag 4-B, Muehlberg, Germany — an enlisted men’s prison. Captured officers were transported by train, 20 to a boxcar, further east into Poland. After a three-day journey, they arrived at Oflag 64 near Altburgund, Germany (formerly Szubin, Poland).

The name “Hesse” is of German origin. Americans in Oflag 64 were not fond of Germans. Shortly after his arrival and processing, Lt. Hesse was signaled out and asked to report to a different barracks. Lt. Hesse began to settle into the dreary routine of prison life in Poland (Germany) in January 1945.

Having access to a contraband radio, the prisoners in Oflag 64 were aware that the German thrust into Belgium had been stopped and the German army, in turn, had been surrounded. The prisoners also knew the Russian army was rapidly advancing toward their camp from the east. On January 21, 1945, the prisoners were ordered to depart from Oflag 64 and began a march on foot south into Germany. By this time, Francis’ weight had fallen dramatically. His feet were frozen. His left hand was injured.

About 10 miles south of Oflag 64, the American prisoners were ordered to spend the night in a huge dairy barn. The barn was in the shape of a horseshoe and was approximately one-eighth mile long on two sides and somewhat less at the base of the “U.” Having grown up in south central Kansas, Francis knew how to milk cows — and did. Pulling a tin cup he had tied to his belt loop, Francis sat down and drank the first cup of milk he had had in more than two months. That drink of milk had a profound effect on Lt. Hesse.

Feeling refreshed, Francis sized up his situation. Given his physical condition, he would not realistically survive a forced march in the winter in northern Europe. Under cover of darkness, Hesse sneaked up a 15-foot ladder and reconnoitered the hayloft. Descending to ground level, he quietly considered his options.

The next morning when the Germans roused the Americans out of the barn, lined them up and began marching them toward Germany again, Hesse was not with them. The Russians were coming; the Germans did not do a head count. Hesse was burrowed deep in the hay in the second story of the barn and was being very, very quiet. One hour passed. Two hours passed. Several more hours passed, and late that afternoon, Francis slowly crawled out of the hay, and, seeing no Germans from his second floor vantage point, came down from the loft. He soon discovered four other American officers who had done the same thing.

Lt. Hesse and a handful of other men began to fear the consequences of a German counter-offensive that could possibly retake the farm where they were staying. They proceeded to hop on board a railroad flatcar and headed toward Warsaw, Poland. Upon arriving there, the men could not believe the devastation. After the Polish revolt in late 1944, the Germans had systematically dynamited Warsaw block by block — the entire town.

That afternoon, while Francis was standing in front of a bombed out church, he was befriended by an elderly couple who took Francis to spend the night at their house and share some bread and potato soup. That night there was a knock at the door. Two smartly dressed women appeared and offered to take the American officers to their house. Upon arriving at their home, they were led to a room where the occupants of the house maintained a still. They had spent the war selling homemade vodka to the Germans, reaping a sizeable amount of cash, which enabled them to purchase anything they needed on the black market. The Americans saw no reason not to accept their hospitality.

Francis and his two companions went east of Warsaw to the little town of Rembertov, Poland. There they were detained overnight by the Russians along with many other refugees and displaced persons. They left there the next morning and hopped a flatcar to Lublin, Poland. There the Russians took control of them again and this time, along with about 100 other American officers and enlisted men, proceeded to Odessa, Russia on the Black Sea. Arrangements were soon made for the American POWs to be transported to Egypt on a British passenger liner. More importantly, the names of the prisoners were taken so their families could be notified they were safe. Lt. Hesse’s parents had received a telegram from the War Department the day after Christmas informing them that their son was missing in action. It was now March 1945.

Upon arriving in Egypt, Lt. Hesse was interrogated by American military intelligence. Again, fearful of German spies, Francis was asked about the governor of Kansas, Babe Ruth, and other questions designed to smoke out imposters. The debriefing then went on to ask questions not about the Germans — the intelligence officers could have cared less about the Germans — but about the Russians. Lt. Hesse was asked about the Russian troops, types of equipment, and even how fast the Russians drove their trucks through town.

Francis was eventually shipped to Italy and from there was transported to Boston, arriving back in the United States on April 9, 1945 — the day President Roosevelt died. From Boston, Francis traveled by train to Fort Riley and from there, Francis took a train to Wichita where he was joined by his parents and bride-to-be.

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 (Kansas), 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.

JERRY L. GRIFFITH, AGE: 92
Kansas Lawyer
Admitted: 1948
Captain

My Story: On September 16, 1942, I entered the service as a private and was discharged with the rank of captain on
January 15, 1946, after serving as an intelligence staff officer, combat. I graduated from Kansas University in 1940 and left KU Law School to enlist I was flown overseas with two other officers, serving as advance echelon for the 361st Fighter Group, Eighth Air Force. I served as group intelligence officer for that unit. In England I was stationed at Bottisham Air Base, located between Cambridge and London. I was able to have many off-duty days in those cities for sightseeing and recreation. I recall one visit to the House of Commons in London with interesting events. My host at the House of Commons was Captain the Right Honorable Harry Crookshank. While waiting to enter the House Chamber, a woman asked my host for tickets so her American friends could enter. He replied that he needed them for his friends, and then he introduced me to the woman. It was Lady Astor, first female member of the House of Commons, a very famous and gracious lady. You may remember some of the interchanges of wit she had with Winston Churchill.

A portion of my unit was assigned to the European continent during the Battle of the Bulge and I was included. We were in Belgium and France.

Upon discharge I resumed my legal education at KU School of Law, graduating in 1946. The GI Bill was a great aid in my education. While in Law School, I was employed by the NYA to type a manuscript of a legal book by Dean Moreau on an antique typewriter. My pay was 15 cents per hour.

I commenced practice in Hoisington and continued for approximately 24 years, serving as city attorney for 22 years and assistant county attorney for four years. In all I practiced law for 34 years. I have been retired for approximately 24 years.

**Personal:** After serving as intelligence staff officer in combat, I was awarded six Bronze Battle Participation Stars and European Africa Middle Eastern Service Ribbon. I married my wife, Dorothy Durand, just before going overseas. We had a daughter, Rochelle, and a son, Robert. Dorothy passed away November 4, 1999. ■
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What Every Lawyer Should Know About Crime Victims’ Rights in Kansas

By Suzanne Valdez
I. Introduction

This summer I read “Bringing Adam Home,” a gripping account detailing the police investigation of the 1981 murder of 6-year-old Adam Walsh, who was abducted from a Sears department store in Hollywood, Florida.2 This horrific tragedy spurred Adam’s father, John Walsh, to become a prominent and admired national spokesman for victims’ rights, perhaps most notably as host of the television reality show “America’s Most Wanted.” One of the many inadequacies that plagued the Adam Walsh investigation involved law enforcement’s failure to notify or keep the Walsh family informed about the progress of the investigation. Just as heartbreaking were the various police blunders and incompetence during Adam’s murder investigation.

While Adam’s murder remained unsolved for many years, John Walsh passionately and steadfastly advocated for increased national awareness for crime victims and used television and other social media to help solve crimes for other victims. Sadly, it took nearly 27 years to solve Adam’s murder, and then only because of the efforts of a private investigator hired by the Walsh family. Though the Walshes eventually came to learn the identity of Adam’s murderer, the suspect had died years earlier in prison for unrelated crimes, thus depriving the Walsh family of the opportunity to see Adam’s murderer held accountable in a court of law.

The Adam Walsh case poignantly illustrates the traditional powerlessness of victims and their families in the criminal justice system. In the past, the criminal justice system typically legitimized only the prosecution’s and the defendant’s voices in the process. Ironically, although it was the victim and the victim’s family that suffered physical, emotional and financial trauma as a result of a crime, no legal mechanism existed for these people to have a participatory voice in the criminal justice process.

Today, thanks in large part to the efforts of John Walsh and other victims’ rights advocates, federal law and most states’ laws no longer permit the marginalization of victims or their families, people who have suffered physically, emotionally, and financially because of crime. Over the past 30 years, through the passage of federal and state legislation, progress has been made across the country to recognize and involve victims and their families in the criminal justice process. This article provides a brief description of the national crime victims’ movement. It then examines the Kansas constitutional and statutory rights afforded to victims of crime. Next, it discusses Kansas crime victim compensation, a statutory program that provides monetary benefits to victims of violent crime and their families. Finally, it highlights other areas of Kansas law that further protect crime victims in court proceedings involving the offender.

II. The National Landscape Surrounding Victims’ Rights

In the late 1970s, a national grassroots movement to create and strengthen victims’ rights was started.2 However, it was not until the early 1980s that a more formal governmental forum, President Reagan’s Task Force on Victims of Crime (Task Force), was convened to address what was deemed an imbalance in the criminal justice system.2 The imbalance was a system and culture in which defendants’ rights were paramount, often leading to the exclusion or marginalization of victims’ rights. Among many things, the Task Force was charged with developing ideas and recommendations for federal legislation that could aid and benefit crime victims without diluting the constitutional rights of the accused. At the conclusion of its work, the Task Force made several recommendations for reform including its boldest one, amending the Sixth Amendment of the U.S. Constitution to include specific rights for victims. When concern grew about whether a constitutional amendment was possible, the victims’ rights movement decided to move the reform efforts to the states, where constitutional amendments and legislation were deemed more feasible.

Since the 1980s, more than half the states, including Kansas, have amended their constitutions to vest victims and their families with certain constitutional rights associated with the criminal justice process.2 Further, all 50 states and the District of Columbia have statutes that provide victims with participatory rights and procedural protections associated with the criminal process.4 Such rights include the right to be treated with dignity and compassion, the right to be informed about the status of the offender’s case, the right to notice of hearings involving the offender, and the right of the victim or the victim’s family to be heard at the offender’s criminal proceedings.7

On the federal level, though a constitutional amendment has not been successful,8 Congress has enacted legislation that supports victims’ rights, beginning with the 1982 passage of the Victim and Witness Protection Act, “which gave victims the right to make an impact statement at sentencing and provided expanded restitution”9 in federal criminal proceedings. Thereafter, Congress passed other laws that provide victims with additional rights and protections, such as the Victims of Crime Act of 1984,10 the Victims’ Rights and Restitution

Footnotes

3. Id.
4. Id. at 866.
5. Id.
6. Id.
7. Id. at 867-69. For example, Missouri requires the court to provide a secure waiting area for victims and their families, which is separate from the defendant’s family. John Albrecht, THE RIGHTS AND NEEDS OF VICTIMS OF CRIME: THE JUDGES’ PERSPECTIVE, 34 No. 1 JUDGES’ J., Winter 1995, n.3 (hereinafter Albrecht).
8. A formal, more structured effort was made to pass a constitutional amendment in 1995, but the amendment failed to pass Congress.
Act of 1990,\textsuperscript{11} the Violent Crime Control and Law Enforcement Act of 1994,\textsuperscript{12} the Antiterrorism and Effective Death Penalty Act of 1996,\textsuperscript{13} and the Victim Rights Clarification Act of 1997.\textsuperscript{14} Probably the most comprehensive federal legislation addressing victims’ participatory rights and the enforcement of these rights is the 2004 Crime Victims’ Rights Act (CVRA).\textsuperscript{15} This statute gives every victim in a federal criminal prosecution the right to be notified of court proceedings involving the accused, the right to attend such proceedings, the opportunity to be heard at appropriate times during the criminal process, and the right to be treated with fairness and dignity.\textsuperscript{16} The hallmark of the CVRA is its enforcement mechanism, which confers standing to victims who wish to assert and enforce their statutory rights in federal criminal cases.\textsuperscript{17}

In addition to Congressional action, every year since 1981 the Office for Victims of Crime (OVC), an office within the U.S. Department of Justice, has designated a week in April as National Crime Victims’ Rights Week to promote crime victims’ rights, as well as honor victims and their advocates.\textsuperscript{18} Besides assisting communities nationwide with their annual observances, OVC administers the Crime Victims’ Fund, which provides millions of dollars in grants and funding for victim assistance programs throughout the country.\textsuperscript{19} Each year the Kansas governor’s and attorney general’s offices co-host a statewide crime victims’ conference, which coincides with National Crime Victims’ Rights Week. This conference alternates every year between Wichita and Topeka, bringing together hundreds of victims’ rights advocates, law enforcement officers and officials, and prosecutors.\textsuperscript{20}

### III. The Kansas Constitution and the Victims’ Bill of Rights — A Broad Overview

In 1992, with 84 percent of voter support, the Kansas Constitution was amended to include a victims’ rights provision.\textsuperscript{21} Article 15, section 15 of the constitution provides, in relevant part: “Victims of crime, as defined by law, shall be entitled to certain basic rights, including the right to be informed and to be present at public hearings, as defined by law, of the criminal justice process, and to be heard at sentencing or at any other time deemed appropriate by the court, to the extent that these rights do not interfere with the constitutional or statutory rights of the accused.”\textsuperscript{22}\textsuperscript{23} These constitutional protections, known as the Victims’ Bill of Rights, are codified at K.S.A. 74-7333 et seq. The statutes provide rights and considerations to victims of crime so as to ensure their “fair and compassionate treatment” in the Kansas criminal justice system.\textsuperscript{24} Kansas law requires that the victim or the victim’s family shall be informed of the Victims’ Bill of Rights by the law enforcement agency investigating the crime.\textsuperscript{25}

K.S.A. 74-7333(b) defines “victim” as “any person who suffers direct or threatened physical, emotional or financial harm as the result of the commission or attempted commission of a crime against such person.”\textsuperscript{26} K.S.A. 74-7335 defines “victim’s family” as “the spouse, surviving spouse, children, parents, legal guardian, siblings, stepparents, or grandparents” of the victim.\textsuperscript{27} Notwithstanding the statutory definition of “victim’s family,” the Kansas Supreme Court has given broad scope to the statute in defining who may be considered part of a victim’s family.\textsuperscript{28}

In State v. Parks, the Court addressed whether it was appropriate for the sister-in-law of the deceased victim to submit a written victim impact statement as part of the presentence investigation report and also make an oral statement at the defendant’s sentencing proceeding.\textsuperscript{29} The defendant, Phillip Parks, argued that the sister-in-law was not a member of the victim’s immediate family, as defined by statute, and thus her written and oral statements violated both the Kansas Constitution and the codified Victims’ Bill of Rights.\textsuperscript{30} In rejecting that argument, the Court stated that it was irrelevant whether the sister-in-law did not meet the statutory definition of a family member. Rather, the Court iterated that the purpose of the passage of the victims’ rights laws was not to restrict rights, but to guarantee them.\textsuperscript{31} It stated that “neither the Kansas Constitution Victims’ Rights Amendment, nor the statutory bill of rights for victims of crime restricts the ability of nonvictim and nonfamily members to testify and submit statements during the sentencing phase of criminal proceedings in Kansas.”\textsuperscript{32}

Importantly, K.S.A. 21-6705 provides factors that the sentencing court is to consider in determining a defendant’s sentence. One factor is the extent of harm caused to the victim or the victim’s family by the defendant’s criminal act.\textsuperscript{33} The extent of harm or injury to be considered is the physical, psychological, social, or financial injury suffered by the victim or the victim’s family.\textsuperscript{34} Another factor for the court is its consideration of the defendant’s presentence report, usually prepared by a court services officer, which may contain information about the victim’s or the family’s attitude toward or position regarding the defendant’s sentence.\textsuperscript{35}

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15. Id. at 809-870.
16. Id.
17. Id.
19. Id.
A. Victim’s right to notice of public hearings involving the accused and victim’s right to be present

Many victims and their families want to attend the trial of the accused offender. They may feel a need to see justice in action, hopefully to help heal psychological injury that has been caused by their victimization. Historically, victims were prevented from attending their perpetrator’s trial because of rules that excluded witnesses from hearing or seeing testimony of other witnesses. As part of their victims’ rights laws, many states, like Kansas, have enacted statutes that allow victims and their families to be present at the offender’s trial as well as at any other public proceeding involving the offender, though evidentiary rules may prevent a victim from being present in the courtroom until after he has testified against the defendant.

K.S.A. 74-7335(a) provides that the “victim of a crime or the victim’s family shall be notified of the right to be present at any public hearing or any juvenile offender proceeding concerning the accused or the convicted person or the respondent or the juvenile offender.” Subsection (b) of K.S.A. 74-7335 further states the victim or the victim’s family “shall be notified of the right to be present at any proceeding or hearing at which the defendant has such a right.”

B. Victim impact statements and the right to be heard

Oftentimes a judge must engage in the delicate balance of ensuring that the victims’ rights statutes are followed while also protecting the defendant’s constitutional right to a fair trial. Some states make a distinction between a written victim impact statement, which is typically included in a presentence investigation report and then submitted to the court for consideration prior to sentencing, and an oral victim impact statement in which the victim is allowed to be heard at the sentencing hearing and which usually is made in the presence of the defendant. Typically, it is the oral victim statement allowed by a victim or victim’s family at a sentencing proceeding that a defendant objects to and that causes the most controversy for the courts.

In Kansas, the Victims’ Bill of Rights expressly provides that “the views or concerns of the victim should, when appropriate

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and consistent with criminal law and procedure, be brought to the attention of the court.”43 This mandate is broad, allowing the victim to submit a written statement to the court as part of a presentence investigation or to appear at the offender’s sentencing hearing to allocate a statement before the court or jury imposes a sentence on the defendant. Further, K.S.A. 22-3424(e)(3) provides that before a sentence is imposed on the defendant, the court shall “allow the victim or … the victim’s family as the court deems appropriate to address the court, if the victim or the victim’s family so requests.”44 This statutory mandate seemingly grants the court some discretion in deciding whether and, if so, how to allow the victim or the victim’s family to speak at a defendant’s sentencing proceeding, though the statute does require that the court shall consider the victim’s and victim’s family’s request for the opportunity to be heard.45

Courts’ procedural management of an oral victim impact statement at a defendant’s sentencing hearing, and laws concerning the content of what can be said by the victim during allocution, vary from state to state.46 For instance, some states limit the content of the impact statement by allowing victims to make statements only about the impact of the crime upon their lives, but not permitting statements about the underlying facts of the crime.47 Other states do not allow the victim or the victim’s family to recommend a sentence. At least one state allows the victim the opportunity to be heard only after the court has sentenced the defendant.48

In Kansas, the victim has the right to be heard at sentencing to the extent that exercising this right does not interfere with the constitutional rights of the accused.49 In the 1995 case of State v. Gideon, one of the many issues that the Kansas Supreme Court addressed on appeal was whether the oral victim impact statements made by the deceased victim’s father, mother, and sister during sentencing violated the defendant’s constitutional right to confrontation, as well as his equal protection and due process rights.50 Before the sentencing court pronounced Gideon’s sentence and despite his objections, the family of murder victim Stephanie Schmidt gave lengthy and emotional statements about how Stephanie’s death had affected them and what sentence they believed Gideon should receive.51 The sentencing court imposed the maximum sentence, the “hard 40,” and the defendant argued on appeal that the family’s statements were highly emotional and inflammatory, therefore unfairly and prejudicially influencing the sentencing court.52 Gideon further argued that he was denied his right to cross-examine each of the Schmidts, thus violating his constitutional right to confrontation.53

In analyzing these claims, the Supreme Court assessed whether the decision to impose the mandatory prison term on the defendant was made “under the influence of passion, prejudice, or any other arbitrary factor” under K.S.A. 21-4627(3).54 In Gideon, the Court found no reversible er-
ror with regard to the Schmidts’ victim impact statements, noting that the oral statements were made not to a jury, but to the judge who could determine the proper weight to give the statements. Importantly, however, the Court stated that a sentencing court should “exercise control” when victim impact statements are presented to a jury. The Court suggested that “control can be exercised, for example, by requiring the victims’ statements to be in question and answer form or submitted in writing in advance. The victim’s statements should be directed toward information concerning the victim and the impact the crime has had on the victim and the victim’s family. Allowing the statement to range far afield may result in reversible error.”

Thus, in Kansas after the Gideon case, though the court does not distinguish between written and oral impact statements, there appear to be some limits placed on both types, especially in cases in which the defendant’s sentence is decided by a jury. Moreover, the Gideon case implies that even if an oral impact statement is made to a court, the court must exercise control and disallow any statements that may be so inflammatory and prejudicial that there may be a risk of violating the defendant’s 14th Amendment due process rights.

Also in 1995, the same year that Gideon was decided, defendant Joe Johnson, sought to withdraw his guilty plea on the basis that the State breached his plea agreement when the court considered public letters and oral victim impact statements in the sentencing of his sister, Donice Johnson, a co-defendant in the crimes. Specifically, in State v. Johnson, the defendant argued that prosecutors either caused or did not prevent public letters from being submitted to the court, and the State allowed oral impact statements by the victim’s family to be made during his sister’s sentencing proceeding. In affirming the trial court’s denial of Johnson’s motion to withdraw his plea, the Kansas Supreme Court highlighted the portion of the transcript where the State noted its position with regard to the defendant’s sister. Consistent with the plea agreement, the prosecutor stated on the record that the State took no position with regard to whether Ms. Johnson should serve concurrent or consecutive sentences. The prosecutor also noted at the sentencing hearing, “[T]he family can request what they want.”

Notably, the Supreme Court did not address the appropriateness of the sentencing court’s consideration of the public letters that were submitted as part of Donice Johnson’s presentence investigation. Moreover, in Donice Johnson’s direct appeal of her own case, she made no claim of error concerning the impact of the public letters on her sentence.

Subsequently, in State v. Chesbro, the Kansas Court of Appeals addressed whether the State breached a plea agreement when prosecutors submitted a letter to the court written by a victims’ advocate and later produced the victim’s mother to make a statement at the defendant’s sentencing hearing. The Court of Appeals found that there was no evidence that the State procured the letter written by the victims’ advocate. Regarding the oral victim impact statement allocated by the victim’s mother, the Court determined that the State “cannot control through the plea agreement the right created by statute for the victim or the victim’s family to be heard at sentencing.”

C. Capital cases are treated differently

During sentencing proceedings in capital cases, protecting the constitutional rights of the defendant tends to be of paramount concern for the courts. The U.S. Supreme Court, in particular, has considered and reconsidered the extent to which oral victim impact statements are allowed in capital cases for sentencing purposes. In Booth v. Maryland, the Court ruled that victim impact statements made by the deceased victim’s son and daughter violated the defendant’s Eighth Amendment right to be free from cruel and unusual punishment. But four years later, in Payne v. Tennessee, the Supreme Court expressly overruled Booth.

In Payne, the Court addressed whether a constitutional violation occurred when a sentencing court allowed a victim’s grandmother to speak at the defendant’s sentencing hearing. The grandmother in Payne stated that her three-year-old grandson missed his mother and sister, who were both murdered by the defendant. Payne argued that under Booth, such an impact statement violated his constitutional rights. The Court overruled Booth and instead deferred to Tennessee state law, which allowed an oral victim impact statement, holding that “if the State chooses to permit the admission of victim impact evidence … the Eighth Amendment erects no per se bar. A state may legitimately conclude that evidence about the victim and about the impact of the murder on the victim’s family is relevant to the jury’s decision as to whether or not the death penalty should be imposed.”

55. Id.
56. Id.
57. See id.; see also State v. Scales, 261 Kan. 734, 933 P.2d 737 (1997) (a case in which the Kansas Supreme Court addressed whether the defendant was denied a fair sentencing hearing because of the sentencing court’s ex parte meeting with the deceased victim’s family and because of the court’s ex parte review and consideration of a petition signed by nearly 2000 people seeking the imposition of a harsh sentence for the defendant. The Supreme Court determined that because the sentencing court violated the Code of Judicial Conduct by having such ex parte communications, the defendant was denied a fair sentencing hearing. The court remanded the case for resentencing of the defendant with a different district judge). See generally, Douglas E. Belloof, Constitutional Implications of Crime Victims as Participants, 88 CORNELL L. REV. 282 (Jan. 2003).
59. Id. at 612, 143.
60. Id.
61. After the Kansas Supreme Court’s decision in State v. Parks, supra note 27, presumably it is allowable for judges to consider letters from persons other than the victim or the victim’s family for purposes of sentencing the defendant. See State v. Scales, supra note 57.
62. See State v. Johnson, 258 Kan. 100, 899 P.2d 484 (1995), wherein the Kansas Supreme Court upheld the convictions of Joe Johnson’s sister and co-defendant, Donice Johnson.
64. Quoting id. The victim’s advocate was the manager of the shelter at Domestic Violence Association of Central Kansas (DVACK).
65. Id. at 674, 10.
68. Id.
69. Quoting id.
the Court placed no specific limits on the kind of victim impact statements that can be delivered. Rather, the Court stated that the 14th Amendment provides the appropriate constitutional relief for a defendant if a victim impact statement is so prejudicial that it is fundamentally unfair to the defendant.70

Thus, in Kansas in capital cases, in light of Payne and State v. Gideon, a victim or victim's family presumably has the right to be heard at the defendant's sentencing hearing, but the trial court also has the responsibility to exercise control over both the manner in which the statement is delivered and the content of the statement. Moreover, Gideon suggests that should the jury determine the defendant's sentence, the court may restrict the victim or the victim's family from providing an opinion about the sentence that the defendant should receive.71

D. Victims’ right to information and notice

As previously mentioned, K.S.A. 19-4808(b) requires law enforcement to timely inform a victim or victim's family of the Victims' Bill of Rights under K.S.A. 74-7335 et seq.72 This subsection also requires law enforcement to provide the victim or victim's family with certain information concerning the criminal investigation, including the following: the police report number; if necessary, emergency and medical services information; contact information for the appropriate prosecutorial office in which the criminal case will be handled; and information about crime victims compensation benefits. Law enforcement agencies are also required to advise the victim that information about the crime may become public.73

Under the Victims’ Bill of Rights statute, K.S.A. 74-7335(d) requires the county or district attorney or municipal court clerk to send notification of an offender’s court proceeding to the victim’s or victim’s family’s last known address.74 In addition to providing the victim notice of an offender’s court proceedings, K.S.A. 22-3436 requires a prosecutor to notify the victim or victim’s family, in certain criminal proceedings, of the following: (1) any decision to dismiss or to decline filing of charges against an offender; (2) any proposed plea agreement with an offender; and (3) the right to be present at any hearing where a plea agreement is reviewed and to submit written comments or arguments to the court considering a plea agreement between the state and an offender.75 Further, should an offender charged with a felony be found incompetent to stand trial, the court shall order the offender to be committed for evaluation and treatment at the state security hospital or any other appropriate institution. In the event that this occurs, the victim must be given notice of the commitment by the secretary of corrections.76

While Kansas law affords the victim and the victim’s family the right to have notice of an offender’s criminal proceedings and the right to have information about the criminal case, it also requires victim notification when an offender will be released from the State Department of Corrections for any of the following reasons: (1) the offender has served his sentence; (2) the offender will be released on parole; (3) the offender has been granted a conditional release; or (4) the offender has been granted post-release supervision.77 The victim is to be notified if the offender dies while in custody or if the offender has escaped.78 However, in order for the victim to be given notice of an inmate’s status, the victim services office of the Department of Corrections must have the current address of the victim or the victim’s family.79 Unfortunately, Kansas is one of few states that does not have the SAVIN (state automated victim information and notification) system, which allows victims to inquire and receive free real-time information about the custody status of offenders through such mediums as phone, email, and texts.80 SAVIN provides current offender

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70. See State v. Gideon, supra note 50.
71. But see K.S.A. 21-6703, wherein the victim can inform the court services officer about his recommendation concerning the defendant’s sentence. This recommendation is included in the presentence report that is submitted to the court for review and consideration prior to the defendant’s sentencing.
72. K.S.A. 19-4808(b).
73. Id.
74. K.S.A. 74-7335(d). (1995 Kansas Laws Ch. 243, § 7 amended K.S.A. 74-7335 to expressly include municipalities and municipal courts. The amendment probably was due to an advisory opinion issued by then Attorney General Robert Stephan’s office. The advisory opinion stated that municipalities and municipal courts also were bound by the notice requirement under K.S.A. 74-7335(c), though at that time the language of the statute did not expressly include municipal courts. The attorney general’s opinion reasoned that in giving a “practical interpretation” to the state constitution, municipalities were required to abide by the statute. (Op. No. 93-30).
75. K.S.A. 22-3436.
76. K.S.A. 22-3303 et seq.
80. For information on the SAVIN service, go to http://www.savin.sc.gov (South Carolina) and http://www.in.gov/idoc/2313.htm#services (Indiana).
information for all inmates in state prisons and local jails.\textsuperscript{81} In Kansas, unless local jails have policies concerning victim notification, there is no statewide law that requires victim notification when an offender is released from jail after being taken into custody.

\section*{IV. Crime Victim Compensation}

Victims of violent crime and their families may suffer physically and emotionally from trauma associated with their victimization. Also, often they suffer financially due to medical and therapy expenses and lost income due to disability or death. If the victim dies, families are often burdened financially with burial costs. Crime victim compensation can help victims and their families in their recovery by paying for care and treatment that can help restore victims’ physical and mental well-being, as well as replace lost income.\textsuperscript{82}

Crime victim reparation programs are the oldest kind of organized victim assistance in the United States. In 1965, California was the first state to establish a program to offer financial assistance to victims of violent crimes.\textsuperscript{83} Today all 50 states and the District of Columbia, the Virgin Islands, and Puerto Rico, operate such programs. Although since 1983 there has been a substantial decline nationally in violent crime, claims and compensation awards continue to increase in most states.\textsuperscript{84} According to the National Association of Crime Victim Compensation Boards, a total of approximately $265 million is paid out annually to about 115,000 victims nationwide.\textsuperscript{85} Of this amount, California pays out the most, about $75 million per year. Texas, with the second largest program, awards approximately $30 million annually. Moreover, Canada, Australia, New Zealand, Japan, and some European countries have crime victims’ reparation programs similar to those in the United States.\textsuperscript{86}

\section*{V. The Kansas Crime Victims Compensation Board}

In 1978, the Kansas Legislature established the Crime Victims Compensation Board (hereinafter referred to as “CVCB” or “the board”) pursuant to K.S.A. 74-7301 \textit{et seq.}, which is known as the Crime Victim’s Compensation Act.\textsuperscript{87} Jurisdictionally, the CVCB is found within the victims’ services division of the Kansas attorney general’s office.\textsuperscript{88} The CVCB’s mission is to award just compensation to victims for economic loss arising from violent crime.\textsuperscript{89} Importantly, because statutes for an award of compensation to crime victims are remedial in nature, “they should be construed liberally with a view toward the effective administration of justice, and not in such a way as to defeat or frustrate the intention of the legislature in enacting them.”\textsuperscript{90} The attorney general appoints the three-member board, subject to Kansas Senate confirmation, to serve four-year terms.\textsuperscript{91} The CVCB office handles the day-to-day operations of the board and is comprised of an executive director, investigators, and other support staff who assist in processing applications for compensation.\textsuperscript{92}

\subsection*{A. Who is eligible for crime victims’ compensation benefits}

Under Kansas law, an application for compensation may be filed by: (1) a victim; (2) a dependent of a deceased victim; (3) a third person other than a collateral source; and (4) an authorized person acting on behalf of any of the above.\textsuperscript{93} The filing party, the applicant, is called the “claimant” and in some instances, such as in a homicide case where the victim is deceased or in the case of a child sexual assault, the claimant may be a different person than the victim. “Victim” is awkwardly defined in K.S.A. 74-7301(m) as: “a person who suffers personal injury or death as a result of (1) Criminally injurious conduct; (2) the good faith effort of any person to prevent criminally injurious conduct; or (3) the good faith effort of any person to apprehend a person suspected of engaging in criminally injurious conduct.”\textsuperscript{94}

81. \textit{Id.}
82. See http://www.nacvcb.org/articles/overview.
83. \textit{Id.}
84. \textit{Id.}
85. \textit{Id.}
86. \textit{Id.}
87. \textit{See also} K.A.R. 20-1-1(b) and (c).
88. K.S.A. 74-7303(a). Further, K.S.A. 74-7316 requires for the board to prepare and submit an annual report to the governor and the legislature, which outlines a “statistical summary of claims and awards made and denied.”
91. K.S.A. 74-7303.
92. K.S.A. 74-7304.
94. K.S.A. 2010 Supp. 74-7301(m); \textit{see also} K.A.R. 20-1-1(k).
B. Offenses that are compensable crimes

In order to be eligible for compensation, the crime against the victim must be considered a violent crime that falls into one or more of these broad categories: arson, assault, child physical and sexual abuse, domestic assault, DUI (and some other vehicular offenses), kidnapping, murder/homicide, robbery, sexual assault, and stalking. Injury or harm resulting from property crimes or other non-violent crimes is not compensable under the CVCB legislative mandate; however, K.S.A. 19-4803 authorizes counties to establish local compensation boards to award payments to victims for loss resulting from property crimes. These local compensation boards operate in much the same fashion as the statewide CVCB.

C. Requirements that determine a victim's eligibility to receive benefits

In order to be eligible to receive crime victims' compensation benefits, the crime must result in a substantial threat or personal injury to, or death of, the victim. The claimant must file an application within two years of the incident. The crime must have occurred in Kansas, or against a Kansas resident outside of the United States. The crime must be reported to law enforcement within 72 hours, unless the applicant can show good cause why a report was not timely made. The victim or claimant must be cooperative with law enforcement during the investigation and prosecution of the criminal case against the offender and cannot in any way have been the offender's accomplice. Lastly, apprehension or conviction of the offender is not required for the claimant to receive compensation. However, the board may delay consideration and processing of a claim while a criminal proceeding against the offender is pending, or make a tentative award under K.S.A. 74-7314.

D. Compensable costs and expenses

In Kansas, as in most states, awards of compensation may include out-of-pocket medical and therapy costs, loss of income or support, burial expenses, and other costs associated with the treatment of injuries that a victim sustains as a result of a violent crime. Specifically, compensable expenses allowed by statute include:

- Medical expenses ($25,000 maximum), which include transportation to obtain medical care and treatment.
- Mental health care with maximums of $10,000 for inpatient psychiatric care, $3,500 for outpatient counseling, and $1,000 for grief therapy for family of homicide victims. All individual therapy is subject to a $60 per hour maximum allowance. Group therapy is subject to a $40 per hour maximum allowance.
- Dependent economic loss, wage loss and replacement services (e.g., child care), which are compensable at a maximum of $400.00 per week.
- Funeral and related expenses, with a maximum of $5,000.
- Moving expenses, which is a reasonable allowance compensable at the recommendation of law enforcement.
- Crime scene cleanup, a maximum of $1,000 for items, such as bedding and replacement clothing.
- Attorney's fees at $45 per hour for claim preparation only.

E. Revenue sources

The dollars for the Kansas crime victims’ compensation fund come from many sources, but do not include Kansas taxpayer dollars. Funding sources include offender-based fees, such as docket fees, fines, penalties and forfeitures; an annual U.S. Department of Justice VOCA Grant, which provides $40 in federal funds for every $100 of state funds awarded to victims; restitution and subrogation paid to the local district courts; and inmate wages, administration and supervision fees collected by the Kansas Department of Corrections. If the CVCB makes an award, the state has subrogation rights to any benefits or compensation paid to either the victim or the claimant by a collateral source.

F. Claim review process

Kansas law requires the law enforcement agency investigating the crime to provide the victim with contact inform
tion regarding victim compensation benefits.\textsuperscript{116} It is typically either through this process, through a law enforcement or prosecutorial victim coordinator, through other victims’ advocates, or through medical and counseling professionals that the victim is informed about the state compensation program. Once the board office receives an application for compensation, a board investigator conducts a telephone interview with every applicant and then provides a written summary of the interview for the board file.\textsuperscript{117} All records and information provided to the board to process an application for compensation benefits are confidential.\textsuperscript{118} Eligible expenses for compensation are calculated as well.

The written investigative summary and the applicant’s file are compiled for the board to review at its monthly meeting. If the board is satisfied by a preponderance of the evidence that the claimant’s application meets the requirements for reparation, the claim is approved and the claimant is notified within 30 days.\textsuperscript{119} Approvals for compensation benefits are processed promptly and claimants are allowed to submit expenses for payment until the statutory maximum amounts are reached. Kansas law states that claims for compensation shall be processed in accordance with the Kansas Administrative Procedure Act and the Kansas Open Meetings Act.\textsuperscript{120} A claimant who is initially denied compensation by the board may request a formal hearing with the board.\textsuperscript{121}

Since 1978, when the CVCB was created, through 2009, the board has awarded claims totaling more than $58 million.\textsuperscript{122} In 2009, more than $4.5 million was awarded in compensation. And in 2010, the CVCB paid $3.7 million in compensation.\textsuperscript{123}

G. Diminishment of compensation

While it is often the case that eligible claims are approved for the statutory maximums, the board may diminish or reduce compensation of a claim if: (1) The board finds that the victim or the claimant has not fully cooperated with the appropriate law enforcement agencies; (2) the economic loss suffered by the victim or the claimant is recouped from other sources, including collateral sources (e.g. insurance); or (3) the board deems diminishment reasonable because of (a) contributory misconduct of the victim or the claimant, or (b) the victim was likely engaging in or attempting to engage in unlawful activity at the time of the crime.\textsuperscript{124}

Kansas, like most state programs, reduces compensation when the victim is deemed to have committed contributory misconduct in the incident that has resulted in their victimization.\textsuperscript{125} The determination of contributory misconduct is not always an easy assessment and in many instances the board may wrestle with making such a determination. Contributory misconduct is addressed at K.A.R. 20-2-8, which defines it as: (1) consent, provocation or incitement, including the use of fighting words or obscene gestures; (2) willing presence in a vehicle operated by a person who is known to be under the influence of alcohol or an illegal substance; (3) abuse of alcohol or an illegal substance; (4) failure to retreat or withdraw from a threatening situation when an option to do so is readily available; or (5) failure to act as a prudent person. Contributory misconduct may be excused in claims for domestic violence or sexual assault, and the board typically does not reduce awards for claims involving such crimes.\textsuperscript{126}

In the 2005 case of Fisher v. Crime Victims Compensation Board, the Kansas Supreme Court reviewed whether the board properly denied compensation to parents (the claimants) whose son’s misconduct may have contributed to his death caused by a drunk driver.\textsuperscript{127} In the Fisher case, Donny Taylor, who had a blood alcohol concentration (BAC) of 0.15, almost double the legal limit, was driving a vehicle when he crossed the center line of a two-lane road and collided head-on with the victim, Jeremy Fisher.\textsuperscript{128} Both Donny Taylor and Jeremy Fisher were killed. Importantly, Jeremy, the victim, had consumed alcohol the evening before the early morning collision, but the evidence showed that Jeremy never left his proper traffic lane when his vehicle was struck by Taylor. At the time of the collision, Jeremy was 15 years old and he had a BAC of 0.05, which is above the legal limit of 0.02 for a person under 18 years of age.\textsuperscript{129}

Jeremy’s parents applied for crime victims compensation to cover his funeral costs. The CVCB initially denied the Fishers’ claim determining that Jeremy’s drinking of alcohol prior to the collision contributed to his death.\textsuperscript{130} Thereafter, the Fishers requested a hearing with the board and were represented by counsel. The Fishers’ attorney argued that there was no evidence that Jeremy’s BAC contributed to or caused the collision.\textsuperscript{131} The board issued a summary proceeding order, approving the Fishers’ claim for compensation, but reducing the award by 25 percent because of Jeremy’s contributory misconduct.\textsuperscript{132}

The Fishers then filed a petition for judicial review in Shawnee County District Court, arguing that there had been no evidence that Jeremy’s drinking and BAC were contributing factors in the collision.\textsuperscript{133} The district court affirmed the

\begin{enumerate}
  \item[116.] K.S.A. 19-4808.
  \item[117.] K.A.R. 20-2-1.
  \item[118.] \textsuperscript{12}K.S.A. 74-7308(e); K.A.R. 20-2-1.
  \item[119.] K.S.A. 2010 Supp. 74-7302(a); K.A.R. 20-2-2 and 20-2-5.
  \item[120.] K.S.A. 74-7307 and K.S.A. 75-4317 et seq., respectively.
  \item[121.] K.S.A. 2010 Supp. 74-7315; K.A.R. 20-1-1(f) and 20-3-2.
  \item[123.] See 2010 State of Kansas, Office of the Attorney General, Crime Victims Compensation Board Annual Report.
  \item[124.] K.S.A. 2010 Supp. 74-7305(c)(2).
\end{enumerate}

\textsuperscript{125}Id. 602, 77.
\textsuperscript{126} Id.
\textsuperscript{127} Id.
\textsuperscript{128} Id.
\textsuperscript{129} Id.
\textsuperscript{130} Id.
\textsuperscript{131} Id.
\textsuperscript{132} Id.
\textsuperscript{133} Id.
CVCB summary proceeding order. The Fishers then appealed the district court’s decision, and the case was transferred to the Kansas Supreme Court pursuant to K.S.A. 20-3018(c).

The Supreme Court pointed out that interpretation of “contributory misconduct” was a matter of first impression for the court and that while Jeremy's underage drinking and BAC level constituted misconduct on his part, the question remained whether this misconduct contributed to the incident that caused his unfortunate and untimely death.134 Analyzing the definition of the term “contributory,” the Court stressed that the various dictionary and common definitions of the word, as well as the legislative history of the CVCB statutes and regulations, supported the conclusion that based on the facts of the case, the board erroneously determined that Jeremy's misconduct contributed to his victimization.135 In other words, though Jeremy engaged in underage drinking and his BAC level was beyond that allowed by law, there was no evidence establishing a causal link between that behavior and the collision that killed him. Therefore, any reduction in compensation on the basis of contributory misconduct was not supported by traditional causation principles.136

VI. Other Relevant Victim-Focused Laws in Kansas

In most instances, the state will need the victim’s testimony in court as evidence to convict the offender of the criminal conduct. In addition to victims’ participatory rights as described above, other Kansas statutes protect a crime victim who ultimately will be involved in the criminal justice process in order to assist law enforcement and prosecutors in bringing an offender to justice. Though a full discussion and review of all the Kansas victim-focused statutes and interpretive case law is outside the scope of this article, it is worth briefly highlighting some of these laws because they are intended to shield victims from potential further victimization in criminal proceedings.

A. Evidentiary protections

In Kansas, there are at least two evidentiary protections afforded to victims in criminal prosecution proceedings involving the offender. First, K.S.A. 21-5502, known as the rape shield law, is intended to focus the prosecution of certain sexual assault cases, such as rape, criminal sodomy, and unlawful voluntary sexual relations, on the particular facts of the crime and to avoid exploration of any past sexual conduct of the victim.137 Thus, the victim's sexual history is irrelevant, and generally inadmissible.138 The statute states that “evidence of the complaining witness’ sexual conduct with any person including the defendant shall not be admissible, and no reference shall be made thereto in any proceeding before the court.”139 A “complaining witness” means the victim of the sexual assault with which the defendant has been criminally charged. The statute further outlines the procedure that the defendant must use in order to seek admission of testimony or other evidence concerning the victim’s prior sexual activity, all of which must be pursued typically with the court in advance of trial and outside the presence of a jury.140

The second type of evidentiary protection involves that of a child victim who is less than 13 years old.141 In criminal proceedings, the court may admit the video testimony of a child victim, rather than require the child to testify in open court, in instances where the state can prove by clear and convincing evidence that requiring the child to testify in court in the presence of the defendant will “so traumatize the child as to prevent the child from reasonably communicating to the jury or render the child unable to testify.”142

B. Laws related to domestic violence and stalking

Victims of domestic violence and stalking may be entitled to immediate civil relief in the form of protection orders, which are issued pursuant to K.S.A. 60-3101 et seq. and K.S.A. 60-31a01 et seq., respectively.143 Protection from abuse and protection from stalking orders prevent the perpetrator from having any contact with the victim for a period of up to a year.144 Prior to expiration of the original order, the victim may request for the court to renew the order of protection for up to an additional year.145 In addition to these protection orders, a perpetrator can be charged with crimes associated with domestic violence and stalking.146 Kansas law requires both law enforcement agencies and prosecutors to implement and use written policies regarding the investigation and prosecution of these crimes in order to promote the safety of victims and their children.147

C. Offender's release prior to trial

An offender in custody for his alleged involvement in committing a crime has the right to request a bail hearing in which the court is to consider whether to release the offender from custody (as well as the conditions of release) while the prosecution is pending.148 Some states, like Kansas, have enacted statutes that require the court to consider and protect the victim in setting an offender’s bail.149 In determining whether to grant an offender’s request for bail in Kansas, the court must consider among, many factors, the severity of the crime, the harm or injury to the victim, and whether it is likely that the offender will “threaten, harass, or cause [further] injury to the victim.”150 Should the court release an offender from custody, the bond shall be conditioned on the offender not having contact with the victim for at least 72 hours, unless...

134. Id. at 609, 80-81.
135. Id. at 615-16, 84.
136. Id.
137. K.S.A. 21-5502.
138. Id.
139. Quoting id.
140. Id.
141. K.S.A. 22-3434(b).
142. Id.
143. K.S.A. 60-3101 et seq. and K.S.A. 60-31a01 et seq.
144. Id.
146. See K.S.A. 2010 Supp. 60-3107(b) and K.S.A. 2010 Supp. 60-31a06(a)(2) (which are provisions within the Protection from Abuse and Protection from Stalking statutes that discuss criminal charges that can result from an offender’s failure to abide by the civil protection orders).
148. See Albrecht, supra note 7, at 32.
150. Id.
VII. Conclusion

The nationwide expansion of laws protecting crime victims and their families to vest them with participatory rights in the criminal justice system has begun to fill a vacuum that unfortunately existed in American law. But there is still much work to be done on many different fronts in Kansas, including adding more protections and enforcement provisions in the Victims’ Bill of Rights, educating law enforcement officials to properly detect and characterize crime and victimization, and creating a more collaborative interface between victims’ advocates, governmental social service agencies, and the law enforcement community to promote victim safety.

Notwithstanding the need for further reform, however, it is critical that courts and prosecutors ensure that victims and their families are afforded the rights and protections currently given to them by law. As well, courts may be able to exercise their inherent powers to extend explicit statutory rights or provide protections to victims in criminal proceedings. In instances where the law is silent both as to the rights of the victim and/or to the defendant, the courts should use their inherent powers “to meet the needs of the victims, and at the same time, not violate the defendant’s right to a fair trial.”

About the Author

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151. Id.
152. K.S.A. 2010 Supp. 22-2802(1); see also K.S.A. 12-4301, which pertains to bonds set in municipal court.
153. See Albrecht, supra note 7, at 30-31.
154. Quoting id., at 31.
Supreme Court

ATTORNEY DISCIPLINE

DISBARMENT
IN RE DAVID F. HOLMES
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 105,923 – OCTOBER 21, 2011

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, David F. Holmes, of Hutchinson, an attorney admitted to the practice of law in Kansas in 1985. Allegations against Holmes involved his billing of clients, commingling of earned and unearned attorney fees, representation of probate matters, his appointment in a conservatorship, a dispute of real estate, and his personal bankruptcy situation. Holmes developed a plan of probation prior to his hearing and argued his handling of funds was sloppy and the result of bad judgment and mismanagement, but not dishonesty.

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

HEARING PANEL: A hearing was held on a complaint before a panel of the Kansas Board for Discipline of Attorneys on January 26, 2011, where the respondent was personally present and was represented by counsel. The Hearing Panel determined that respondent violated KRPC 1.3 (2010 Kan. Ct. R. Annot. 422) (diligence); 1.5 (2010 Kan. Ct. R. Annot. 458) (fees); 1.15(a) and (d) (2010 Kan. Ct. R. Annot. 505) (safekeeping property); 3.2 (2010 Kan. Ct. R. Annot. 539) (expediting litigation); and 8.4(c) and (g) (2010 Kan. Ct. R. Annot. 603) (engaging in conduct involving misrepresentation and reflecting on lawyer’s fitness to practice law). Hearing Panel unanimously recommended that the respondent be indefinitely suspended from the practice of law.

HELD: Court agreed with the Hearing Panel’s findings that Terry does not appear to fully appreciate the significance of his misconduct. One of Terry’s clients, Ms. Collins, retained the respondent to perform a service. The respondent accepted the representation and the attorney fee and did not perform the service. The respondent failed to inform her that her case had been dismissed. The respondent could have informed Ms. Collins that the case had been dismissed at a time when she could have retained new counsel to pursue the litigation. Because he did not, Ms. Collins lost not only her $2,000 in attorney fees but also her cause of action. The respondent basically ignored the disciplinary administrator’s office. He failed to provide a written response to the initial complaint, he failed to timely contact the investigator to schedule an interview, he failed to provide a copy of the trust account records when requested to do so, he failed to provide a copy of the trust account records pursuant to the subpoena, and he failed to file a timely Answer to the Formal Complaint. Finally, the respondent has repeatedly failed to comply with the annual registration rules resulting in the repeated suspension of his law license. It does not appear that the respondent ever complied with the suspension orders. Rather, it appears that the respondent continuously practiced law when his license was suspended. Court ordered that Terry be disbarred from the practice of law in the state of Kansas.
ADOPTION AND INCARCERATED PARENT IN RE ADOPTION OF J.M.D. AND K.N.D.
SEDGWICK DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED
NO. 99,687 – SEPTEMBER 16, 2011

FACTS: Mother and Father had two children of their marriage J.M.D. and K.N.D. They were also named managing conservators/guardians of Mother's 5-year-old stepson (H.R.B) and Mother's 3-year-old half-sister (L.H.D.). When Father became the primary caretaker of the children, L.H.D. had to be flown to the hospital as a result of serious physical injuries. L.H.D. ultimately died from these injuries. Father was charged with felony child abuse against L.H.D. Father denied the allegations. Mother was told she would have to divorce the Father in order to regain custody of the children. While still maintaining his innocence, Father pled guilty to the charges and was sentenced to 17 years in prison. Several years later, Mother was remarried and the Stepfather filed a petition for adoption with the Mother's consent. Father participated in the adoption proceedings by telephone. Father's sister testified that Father remained in contact with the children and he would have his sister buy gift cards for the kids. He also sent birthday and Christmas cards and that he directed his veteran's disability check to be used by the sister to purchase gifts and cards for the children. Trial court held the Father failed to assume duties of a parent for two consecutive years prior to the filing of the adoption petition, that the Father was unfit and that adoption by the Stepfather was in the best interests of the children. Trial court granted the adoption. In a split decision, the Court of Appeals reversed, finding insufficient evidence to support the district court's determination that Father had failed to assume his parental duties for the two consecutive years immediately preceding the adoption petition.

ISSUES: (1) Adoption and (2) incarcerated parent

HELD: Court held that a natural parent's consent to a stepparent adoption of his or her children is mandatory unless the district court finds that the natural parent has failed or refused to assume the duties of a parent for two consecutive years next preceding the filing of the petition for adoption or that the natural parent is incapable of giving such consent. Court agreed with the Court of Appeals that after Father's judicially agreed child support was lowered to $5 per month, he paid all of that amount for the last 10 months before the adoption proceedings commenced. However, Court stated Father had an obligation to disclose the existence of his $105 per month veteran's payments when the court was modifying child support and he had a duty to pay as much of his $125 per month income as he was financially able to pay, both before and after the modification of the judicially decreed amount. Father did not pay all that he could, and the evidence supports the district court's finding that child support payments were incidental and insufficient to establish an assumption of parental duty. Court stated that the district court had the opportunity to hear all of the evidence in the light most favorable to granting the adoption, that the evidence was insufficient to establish that Father had failed to assume the parental duty of providing for his children's psychological and emotional health in the two years next preceding the adoption petition. Accordingly, Court affirmed the district court and reversed the Court of Appeals.

STATUTES: K.S.A. 22-4507(c); K.S.A. 38-1122, -1613(b), -2202, -2205(e), -2215(b); and K.S.A. 59-104(d), -2111, -2134(c), -2136

COUNTRY ORDINANCE, APPEAL, AND JURISDICTION
BARNES V. BOARD OF COUNTY COMMISSIONERS
OF COWLEY COUNTY
COWLEY DISTRICT COURT – JUDGMENT OF THE COURT OF APPEALS DISMISSING THE APPEAL IS AFFIRMED IN PART AND REVERSED IN PART, AND THE CASE IS REMANDED WITH DIRECTIONS TO THE COURT OF APPEALS
NO. 99,609 – SEPTEMBER 2, 2011

FACTS: The Barnes own but do not reside on 14 acres of land in Cowley County. The County found the property did not comply with an ordinance adopted to identify and cleanup unsafe structures and unsightly conditions on properties in the County. After the Barnes were unable to finish clean up of the property the County completed the cleanup and billed the Barnes $11,740.75. The Barnes sued the County. The County claimed the Barnes lacked subject matter jurisdiction because the Barnes should have appealed the Board's order within 30 days. The district court dismissed the action finding the Barnes lacked subject matter jurisdiction because there was no appeal within 30 days. But despite this finding, the district court went on to reach the merits of the claims by granting the County's summary judgment motion. The Court of Appeals affirmed the district court's finding of lack of jurisdiction.

ISSUES: (1) County ordinance, (2) appeal, and (3) jurisdiction

HELD: Court held that the Board acted in a quasi-judicial capacity when it investigated and weighed the facts and ultimately determined the property did not comply with its resolution and ordered cleanup. However, the Board's actions shifted to administrative when the Board assessed the special tax. Court held that only some of the Barnes' claims appropriately target the special tax assessment and the Court of Appeals correctly found the statutes bar review of the these claims, but erred in finding all claims were barred. Court held the assessment of a tax by a board of county commissioners is administrative in nature. And that to pursue a claim of an illegal tax under K.S.A. 60-907(a), that claim must be judicial in nature, not administrative, in order to avoid the requirement that litigants exhaust administrative remedies on tax matters. Court held the Barnes satisfied the jurisdictional burdens under K.S.A. 60-907(a) on the following issues: (1) the County exceeded its statutory authority in violation of the County Home Rule Act when the Board enacted the Resolution's self-help and abatement remedy provisions; and (2) Resolution 2005-01 was unconstitutional as applied, and the County engaged in arbitrary and capricious conduct. Court remanded to the Court of Appeals to determine the case on the merits.


DISQUALIFICATION OF REFERRING COUNSEL
VENTERS V. SELLERS
RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 103,395 – SEPTEMBER 2, 2011

FACTS: Barry Venteres was a passenger in a single-car accident in 2001. He was admitted to the Hutchinson emergency room where he was evaluated by Dr. Scott Sellers. Venteres alleged that Sellers was negligent, resulting in Venteres' paralysis. Venteres died in 2010, but his estate was replaced as plaintiff. Mann represented Venteres in the settlement of his claims against the driver of the car. Bretz agreed to assist as co-counsel in the event a lawsuit was filed. Bretz filed Venteres' petition in June 2002. Seller's attorney Bradley Dillon, of Gilliland and Hayes, sent a letter to Bretz demanding that Bretz withdraw as Venteres' counsel because an associate of the Gilliland firm, Mitch Rice, had left there and gone to work for Bretz and was privy to information of this case. Bretz filed a motion to disqualify counsel. The district court granted the motion and disquali-
fied plaintiff’s counsel, Rice, their firm, and any co-counsel. Venters sought an interlocutory appeal, but it was dismissed voluntarily.

More than two years later, in November 2008, Mann entered his appearance for Venters in district court. Sellers moved for disqualification. The district court concluded res judicata applied and Mann was previously disqualified. Venters sought an interlocutory appeal.

ISSUE: Disqualification of referred counsel

HELD: Court held there was not substantial competent evidence before the district court in 2004 supporting extension of imputed disqualification under Kansas Rule of Professional Conduct 1.10 to an attorney merely alleged to be co-counsel to plaintiff’s attorney. The district judge also failed to conduct an appropriate legal analysis under the rule of whether alleged co-counsel was part of an imputedly disqualified firm. The alleged co-counsel’s disqualification was therefore an abuse of the district judge’s discretion. Court also held the district judge’s imputed disqualification of a firm in 2004 exerted no preclusive effect — under res judicata, collateral estoppel, or the doctrine of law of the case — on his 2009 consideration of a motion to disqualify plaintiff’s lawyer. Court held that Venters’ lawyer was not subject to disqualification in 2009 under Kansas Rule of Professional Conduct 3.7, because he was not likely to be a necessary witness on causation in a medical malpractice case.

STATUTE: K.S.A. 60-2102

INSURANCE, KANSAS INSURANCE GUARANTY ASSOCIATION, DUE PROCESS, AND EQUAL PROTECTION

BRENNAN V. KANSAS INSURANCE GUARANTY ASSOC.

RENO DISTRICT COURT – AFFIRMED

NO. 102,308 – OCTOBER 21, 2011

FACTS: John M. Brennan sued his physician for medical malpractice. His physician had a $200,000 professional liability insurance policy. The insurer was declared insolvent after Brennan filed his claim but before he recovered. The Kansas Insurance Guaranty Association (KIGA) is a statutorily created entity that substitutes some coverage for certain claims against insolvent insurers. KIGA denied liability because Brennan received medical reimbursements from his personal health insurance policy that totaled more than the insolvent insurer’s policy limits. The dispositive issue is whether Brennan’s due process rights were violated by a retroactive statutory amendment permitting KIGA to offset Brennan’s personal health insurance benefits against its liability on the insolvent insurer’s policy. The district court declared the statute’s retroactive feature unconstitutional as violating Brennan’s due process and equal protection rights. The district court entered judgment against KIGA for $200,000.

ISSUES: (1) Insurance, (2) KIGA, (3) due process, and (4) equal protection

HELD: Court stated that as originally enacted, the KIGA Act did not require a claimant to first offset amounts paid or payable under a health insurance policy in determining liability to claimants. An amendment made in 2005 changed the original statute to broaden the offset provisions and was not intended to simply clarify them. Court stated that courts considering the constitutionality of a statutory amendment expressly requiring retroactive application must decide whether the amendment’s retroactivity will affect vested rights, thereby violating due process. Court held that under the facts of this case, the retroactivity provision in K.S.A. 2010 Supp. 40-2910(a) adversely impacted a claimant’s vested rights under the KIGA Act by requiring an offset for health care benefits paid on that claimant’s behalf. The retroactivity provision violated that claimant’s due process rights. Court also held that the retroactivity provision in the 2005 amendment is severable and Brennan’s rights are governed by the pre-amended statute.

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Order of Oral Argument in Petitions for Review

On July 21, 2011, the Supreme Court amended Rule 8.03(g)(4), regarding the order of argument in the Supreme Court on petitions for review. Effective with the current term of court, unless otherwise ordered by the Court, the party whose petition for review was granted will argue first and may reserve time for rebuttal. In many cases, the order of argument will remain the same as in the Court of Appeals because it is the appellant’s petition which has been granted. When the order of argument changes, however, it is significant to the attorneys’ preparation for oral argument.

Trouble Shoot Your Fax Filings

It is convenient to file routine motions, pleadings, or correspondence with the appellate clerk’s office by fax under Rule 1.08. Take a moment after sending a fax, though, to check the transaction report and make sure the fax has gone through. Equipment is not infallible on either end of the transaction.

A Few Basic Reminders

The Kansas courts continue to have surcharges in place on filing fees. At the appellate level, the $125 docket fee in Rule 2.04 is supplemented by a $10 surcharge for a total of $135 to docket an appeal.

When a case is on appeal, the request for transcript must clearly state it is “for appeal purposes.” That designation alerts the court reporter to time constraints on transcript preparation imposed by Supreme Court Rules. Remember to serve the parties to the appeal as well as the court reporter with the request for transcript.

Service is often an issue on motions. A motion will not be processed without appropriate service shown. A common mistake made in motions to withdraw as counsel under Rule 1.09 is failure to serve the client.

For questions about these or other appellate procedures and practices, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
FACTS: This appeal is from an August 15, 2007, order granting summary judgment to the Board of Sedgwick County Commissioners (Board) regarding its challenge to the annexation of certain land by Park City. Five days after the district court filed its journal entry, Park City requested an extension of time to file a post-judgment motion under two avenues of relief — K.S.A. 60-259(f) (motion to alter or amend judgment) and K.S.A. 60-260(b) (relief from judgment). The district court granted Park City’s motion and extended the deadline to August 31, 2007. On August 30, 2007, Park City asked the district court for another extension. The court granted the motion and set September 4, 2007, as the new deadline. On that date, Park City returned to the district court and once again requested additional time in which to file its post-judgment motion. The district court permitted Park City to have one additional day for filing. All three motions for extension of time were approved by counsel for both parties. Park City filed its motion for post-judgment relief on September 5, 2007, pursuant only to K.S.A. 60-259(f). The Board argued to the district court that Park City’s K.S.A. 60-259(f) request for relief was untimely filed because, under the version in effect at that time, such a motion had to be filed within 10 days after the entry of judgment, and K.S.A. 60-206(b) prohibited the district court from extending this time period. In reply, Park City argued that the doctrine of unique circumstances should apply in this case and that the deadline extensions should be honored in light of Park City’s “good faith and reasonable reliance” on the district court’s grants of extension. The district court denied Park City’s post-judgment motion finding it untimely because it must be filed within 10 days after entry of judgment and that the unique circumstances doctrine was not applicable. The Court of Appeals dismissed the appeal in part for lack of appellate jurisdiction because it was beyond the 30-day appeal window. However, the Court of Appeals found the unique circumstances doctrine applied and it could consider the merits of the summary judgment order. The Court of Appeals concluded the unique circumstances doctrine did not apply to the facts where a careful reading of K.S.A. 2008 Supp. 60-206(b) would have given Park City notice that the trial court lacked authority to grant an extension of time to file a K.S.A. 60-259(f) motion.

ISSUES: (1) Jurisdiction and (2) Unique Circumstances Doctrine

HELD: Court held that Park City’s argument that an appellate court may exercise jurisdiction over a late appeal if the appellant can show unique circumstances, i.e., that the appellant reasonably relied on some judicial action that purportedly extended the time period for bringing an appeal, is rejected. An appellate court has no authority to create equitable exceptions to jurisdictional requirements and, therefore, the use of the unique circumstances doctrine to save an untimely appeal is illegitimate. Accordingly, Johnson v. American Cyanamid Co., 243 Kan. 291, 758 P.2d 206 (1988), and Schroeder v. Urban, 242 Kan. 710, 750 P.2d 405 (1988), are overruled to the extent they authorize an exception to a jurisdictional rule.

STATUTE: K.S.A. 60-206(b), -259(f), -260(b), -2103(a), -3018(b)
STATUTES: K.S.A. 20-3018; and K.S.A. 60-250, -901, -3320, -3321, -3320, -3323, -3326, -3328

TELEPHONE CONSUMER PROTECTION ACT AND CLASS ACTION
CRITCHFIELD PHYSICAL THERAPY V. THE TARANTO GROUP
JOHNSON DISTRICT COURT – AFFIRMED AND REMANDED WITH DIRECTIONS
NO. 101,949 – SEPTEMBER 30, 2011

FACTS: The Taranto Group is a small business incorporated in Kansas. Taranto distributes and resells aesthetic medical devices such as microdermabrasion equipment and medical lasers to physicians and aesthetic professionals. From March 2005 to March 2008, Taranto contracted with two outside vendors to send out advertising via fax on its behalf. The vendors were AmeraScope Media Inc. and Westfax Inc. Taranto did not own or review the databases or transmission logs used by AmeraScope. Westfax obtained its physician database from Taranto, but Taranto did not possess or review Westfax’s transmission logs. Radha Geismann, a Missouri doctor, brought an action individually and as the representative of similarly situated persons against Aestheticare, a Kansas limited liability company, alleging violations of the Telephone Consumer Protection Act (TCPA). An amended petition named the Taranto Group as an additional defendant. The action sought damages and injunctive relief under the TCPA and tort damages for conversion. Critchfield Physical Therapy subsequently filed a petition seeking to intervene as an additional class representative. Aestheticare was dismissed. The district court issued an order certifying the proposed class, and in an amended order, certified the order for interlocutory appeal.

ISSUES: (1) TCPA and (2) class action

HELD: Court held that Critchfield presented sufficient evidence and reasonable allegations based on the evidence and the statutory scheme to allow the district court to conclude that class certification was appropriate, analyzing each factor in light of the proffered evidence. The district court fulfilled its requirement to engage in a “rigorous analysis” of the factors for certification without conducting a trial within a trial to determine the relationship of each potential class member with the defendant. Court also held that the TCPA does not require that Taranto successfully completed a fax transmission but only that Taranto attempted to complete a fax transmission. It will be unnecessary for plaintiffs to prove that they actually received the transmissions, and this is not an issue that will defeat commonality. Court held the threat of catastrophic judgments should not protect parties that violate the law on a large scale and is not a relevant factor in determining whether a plaintiff class should be certified. Court stated that the plain language of K.S.A. 2010 Supp. 60-223(b)(1)(A) includes standards of conduct for past behavior. This means that a district court, when evaluating class certification, may consider whether the courts might hold the parties to standards that are ultimately incompatible. Court held that the district court properly considered such factors in concluding that a class action would avoid inconsistent adjudications. Court ordered the district court to modify the class definition to clarify which parties constituted the plaintiff class. Court stated the district court did not require the plaintiffs to prove their relationships with Taranto or the time of certification, but the opportunity to present such proof will still be available to Taranto if the case proceeds to trial. Court also held several pleading errors alleged by Taranto were technical and did not undermine the district court’s determination that class certification was appropriate.


TORTS AND COUNTIES
THOMAS V. COUNTY COMMISSIONERS OF SHAWNEE COUNTY
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 98,586 – SEPTEMBER 23, 2011

FACTS: Stapleton committed suicide while in close observation unit at Shawnee jail. Negligence action filed against guard and his immediate supervisor, the warden, and Shawnee County Commissioners. District court granted summary judgment to all defendants, finding plaintiffs failed to allege material facts indicating any defendant knew or should have known Stapleton was subject to an unreasonable risk of physical harm. The Court of Appeals held that the district court erred in granting summary judgment to Tipton, the jail guard. It also reversed the summary judgment in favor of Biltoft, supervisor, on Thomas’ negligence theory, but it affirmed the summary judgment on the negligent supervision claim against him. The panel affirmed the district court’s summary judgment in favor of the County Commissioners. The panel reversed the district court on Kansas Tort Claims Act immunity.

ISSUES: (1) Duty to protect, (2) knowledge of unreasonable risk of physical harm, and (3) claims against county

HELD: Court held that defendants Tipton and Biltoft were not entitled to summary judgment in their favor, and thus Shawnee County, alleged to be vicariously liable for their negligence, also was not entitled to summary judgment. Tipton and Biltoft owed a duty of reasonable care to Stapleton under both K.S.A. 19-1919 and Restatement (Second) of Torts 314A(4). Plaintiffs came forward with evidence to support their allegations that defendants’ duty was triggered by Tipton’s and Biltoft’s actual or constructive knowledge of the risk that Stapleton would kill himself and to support breach of that duty. The discretionary function exception under the Kansas Tort Claims Act, K.S.A. 2010 Supp. 75-6104(e), is not applicable to immunize defendants from liability for negligence in this lawsuit.

STATUTES: K.S.A. 19-1919; K.S.A. 75-6102, -6103(a), -6104; and K.S.A. 75-6101 et seq.

ZONING, WIND FARMS, TAKINGS CLAUSE, AND COMMERCE CLAUSE
ZIMMERMAN ET AL. V. BOARD OF COUNTY COMMISSIONERS OF WABAUNSEE COUNTY
WABAUNSEE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 98,487 – OCTOBER 21, 2011

FACTS: The Board of County Commissioners of Wabaunsee County (Board) amended its zoning regulations to permit Small Wind Energy Conversion Systems (SWECS) but prohibited the placement of Commercial Wind Energy Conversion Systems (CWECs, i.e., commercial wind farms) in the county. Plaintiffs are owners of land in the county. They were later joined by plaintiff intervenors (Intervenors), who are not landowners but owners of purported wind rights in the county. The district court granted the Board’s various dispositive motions. Plaintiffs and Intervenors appealed, and the Board cross-appealed. In Zimmerman v. Board of Wabaunsee County Commrs, 289 Kan. 926, 218 P.3d 400 (2009) (Zimmerman I), the Court affirmed the district court’s decision on several issues. It specifically held that the district court did not err (1) in determining that the Board’s decision to amend the zoning regulations was lawful; (2) in determining the Board’s decision to amend was reasonable; (3) in precluding Plaintiffs and Intervenors from conducting further discovery on the issue of reasonableness; (4) in dismissing the claim that the Board’s decision violated the Contracts Clause of the U.S. Constitution; (5) in dismissing the
claims that the zoning regulation amendments were preempted by state and federal law; and (6) in determining that Intervenors’ action was commenced in a timely manner. Concurrent with the release of Zimmerman I, the Court ordered the parties to submit supplemental briefs on certain questions raised in the issues originally presented on appeal by both Plaintiffs and Intervenors focusing on whether the district court erred in deciding as a matter of law that the Board did not violate the Takings Clause or the Commerce Clause of the United States Constitution.

ISSUES: (1) Zoning, (2) wind farms, (3) Takings Clause, and (4) Commerce Clause

HELD: Court found the district court did not err by disposing of the Takings Clause claim as a matter of law. Court stated that because there was no taking, the district court did not err in also disposing of Intervenors’ related takings-based claim under 42 U.S.C. § 1983 and their claim for inverse condemnation. Court also held that although there was no discrimination against interstate commerce, the claim alleging the Board’s decision placed incidental burdens on interstate commerce that outweighed the benefits was remanded to the district court for analysis under Pike v. Bruce Church Inc., 397 U.S. 137. Court also remanded the Interenver's claim under the Commerce Clause in their 42 U.S.C. § 1983 contention.

STATUTES: K.S.A. 12-755, -757, -760; K.S.A. 20-3017; K.S.A. 60-212; and K.S.A. 74-8813

CRIMINAL

STATE V. BARNES
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 100,719 – SEPTEMBER 23, 2011

FACTS: Barnes convicted of first-degree premeditated murder and aggravated assault. On appeal he claimed: (1) district judge erred by failing to investigate Barnes’ competency to stand trial rather than accepting his waiver of jury trial; (2) Barnes’ waiver of right to jury trial was not knowing and voluntary; (3) insufficient evidence supported Barnes’ possession of requisite mental state for the offenses; and (4) district judge erred by relying on Barnes’ criminal history score to impose sentence when criminal record had not been proved to a jury, and in sentencing to high number in presumptive grid box for the aggravated offense.

ISSUES: (1) Competency to waive jury trial, (2) waiver of jury trial, (3) sufficiency of evidence supporting requisite mental state, and (4) sentencing

HELD: District court’s acceptance of Barnes’ jury trial waiver on third day of jury trial and continuance of trial to the bench was not an abuse of discretion, despite Barnes’ history of mental illness. Record includes an extensive conversation — between Barnes and his lawyer, and among Barnes, defense counsel, prosecutor, and district court judge — that viewed holistically demonstrates Barnes’ understanding of his right to jury trial and consequences of waiving it. District judge not obligated to stay the trial and order a new competency evaluation sua sponte.

Under facts of case, Barnes’ waiver of right to jury trial was knowing and voluntary.

Sufficient evidence of Barnes’ mental state was presented to support district judge’s verdict of guilty on the conviction offenses. No authority supported Barnes’ argument that factfinder must inevitably give more weight to after-the-fact psychological expert opinion on a defendant’s mental state than to lay eyewitness testimony about the defendant’s behavior at time of crime.

Controlling decisions that defeat Barnes’ sentencing claims are not reconsidered or overruled.

STATUTE: K.S.A. 22-3219, -3220, -3302(1)
STATE V. CASH
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART
AND VACATED IN PART
NO. 104,180 – OCTOBER 14, 2011

FACTS: Cash convicted on guilty pleas to three counts of aggra-
vated indecent liberties with a child, and sentenced to three concur-
rent hard life sentences with a mandatory 25 year prison term. On
appeal, Cash claimed his parole eligibility fits within two statutory
provisions, thus rule of lenity dictates the shorter mandatory mini-
mum of 20 years for parole eligibility. He also claimed the district
court erred in imposing lifetime post-release supervision for Cash’s
off-grid convictions.

ISSUES: (1) Parole eligibility and (2) lifetime post-release super-
vision

HELD: Same parole eligibility claim examined and rejected in
K.S.A. 2008 Supp. 22-3717(b)(2) and (b)(5), an inmate sentenced
to an off-grid, indeterminate hard 25 life sentence pursuant to
K.S.A. 21-4643 shall not be eligible for parole until that inmate has
served the mandatory 25 years in prison. Cash’s hard 25 life sentence
is affirmed.

State concedes the sentencing court had no authority to order
a term of post-release supervision in conjunction with an off-grid
indeterminate life sentence. Differences between parole and post-
release supervision explained in State v. Ballard, 289 Kan. 1000
(2009). Cash is subject to lifetime parole rather than post-release
supervision, and will leave prison only if successor to parole board
grants him parole.

STATUTES: K.S.A. 2008 Supp. 22-3717, -3717(b)(1), -3717(b)
(2), -3717(b)(4), 3717(b)(5), -3717(u); K.S.A. 21-3504(a)(3),
-4643, -4643(a)(1)(C); and K.S.A. 22-3504(1), -3601(b)(1)

STATE V. CHANTHASENG
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,346 – SEPTEMBER 9, 2011

FACTS: Chanthaseng convicted of aggravated indecent liberties
with a child. On appeal he claimed: (1) testimony regarding state-
ments made by fellow inmate at jail should have been admitted;
(2) prosecutor committed reversible misconduct by arguing facts
not in evidence and commenting on credibility of the victim; and
(3) district court erred in sentencing without requiring jury to find
Chanthaseng was 18 years or older when crime committed.

ISSUES: (1) Testimony about statements, (2) prosecutorial mis-
conduct, and (3) jury instruction

HELD: Chanthaseng failed to preserve arguments that state-
ments were nonhearsay or admissible under exception for admis-
sions against interest. No exception to preservation requirement
applies in this case.

Prosecutor committed misconduct by discussing delayed and
piecemeal “process of disclosure” of victim of child sexual abuse
and by using personal experiences of venire panel members as
substitute for evidence of disclosure pattern relevant to reliabil-
ity. Prosecutor did not commit misconduct by referencing abuse
victim’s credibility because prosecutor’s comments, viewed in con-
text, were accompanied by discussion of evidence presented at trial
and merely asked jury to draw permissible inferences from that
evidence. “Process of disclosure” misconduct not plain error re-
quiring reversal.

Where Chanthaseng gave uncontested trial testimony about his
age, no reversible error in district court’s failure to include Chan-
thiseng’s age of 18 years old or older at time of indecent liberties
was committed.

STATUTES: K.S.A. 21-4643, -4643(a)(1)(c); and K.S.A. 60-
261, -460(j), -2105

STATE V. COSBY
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 100,839 – SEPTEMBER 9, 2011

FACTS: Cosby convicted of first-degree premeditated murder af-
after second trial. On appeal he claimed: (1) district judge improperly
excluded as inadmissible hearsay the question Cosby asked police
detective about the investigation; (2) district court erred in denying
lesser included offense instruction on voluntary manslaughter that
permitted use of deadly force if necessary to prevent imminent death
or great bodily harm to a third person; (3) insufficient evidence of
premeditation supported the conviction; and (4) prosecutorial mis-
conduct during closing argument.

ISSUES: (1) Hearsay statement - state of mind, (2) jury instruc-
tion, and (3) prosecutorial misconduct

FACTS: Cosby did not testify. His question to police detective
— “Did you find the gun on him?” — was inadmissible hearsay.
District judge did not err in excluding it when Cosby sought to
admit it to show inadequacy of police investigation and his state of
mind when he shot victim. Due process did not demand admission,
when state introduced no competing inculpatory statements from
Cosby’s conversation with the detective. Statutory hearsay exception
for expression of a declarant’s state of mind did not apply because
Cosby's question did not address his existing state of mind, only his
state of mind two days before question was asked.

District judge’s decision to omit instruction on type of voluntary
manslaughter known as imperfect defense of another was not error,
where evidence before the jury would not have supported finding
Cosby harbored an honest belief his victim was an aggressor threat-
ening imminent use of unlawful force.

State presented strong evidence of premeditation where eyewitness-
esties testified that victim did not provoke Cosby; Cosby left the
room and returned with a handgun; Cosby fired three shots into
victim’s chest with pause between second and third shots; first shot
was fired from farther away than second and third shots; Cosby said
“motherfucker” between shots; and Cosby stood over victim and
prayed or talked about Jesus after the shooting.

Prosecutor’s remark in closing argument — “But ask yourself this:
Have you heard any evidence that suggests that [the defendant] did
not walk up to [the victim] with some purpose in mind and execute
that purpose?” — was not error when considered in context of entire
argument and judge’s burden of proof instructions.

DISSENT (Johnson, J., joined by Luckert, J.): Would grant a
new trial because detective should have been permitted to testify
that Cosby asked officer if gun had been found on victim. Exclu-
sion of this question significantly hindered Cosby’s ability to present
self-defense claim and to obtain lesser included offense instruction
discussed by majority.

STATUTES: K.S.A. 21-3211(a), -3211(b), -3403(b); and K.S.A.
60-460, -460(1)

STATE V. HULETT
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 102,895 – SEPTEMBER 30, 2011

FACTS: Hulett was charged with first-degree premeditated mur-
der and four counts of aggravated assault. Lamb was appointed to
represent Hulett. Before trial Hulett filed a motion for substitute
counsel, but it was denied by the judge who found no conflict of
interest, no irreconcilable conflict, no complete breakdown in com-
munication and that most, if not all, of Hulett’s complaints had to
do with unreasonable expectations of appointed counsel. During
trial, Hulett decided to accept the state’s offer of a pled to felony
murder. The district court found Hulett’s plea to be voluntary. Be-
fore sentencing, Hulett filed a motion to set aside his plea claiming
it was a mistake; there was no evidence to support felony murder.
The district court denied Hulett’s motion, finding there was no good
cause for withdrawing the plea. The district court sentenced Hulett to life imprisonment without the possibility of parole for 20 years.

ISSUE: Pre-sentencing motion to withdraw plea

HELD: Court held there was no error in the district court’s failure to address a nonexistent, possible conflict of interest between Hulett and Lamb at the time of the hearing on the motion to withdraw plea and Hulett’s earlier allegations of conflict of interest were resolved appropriately by the district judge. Court stated that it would have liked to see a more enthusiastic and expansive performance by counsel, but that Lamb’s performance was not so infirm that it was an abuse of discretion for the district court not to have sua sponte inquired about a current conflict of interest. Court stated that lackluster advocacy does not equate to an obvious conflict that must receive immediate, on-the-record attention from the district court.

DISSENT: Justice Luckert dissented from the majority’s conclusion that the district court did not have an obligation to inquire about appointed counsel’s potential conflict of interest at the hearing on the motion to withdraw plea.

STATUTES: No statutes cited.

STATE V. INKELAAR
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 101,987 – OCTOBER 21, 2011

FACTS: Inkelaar convicted of rape, aggravated indecent liberties with a child, attempted aggravated indecent liberties with a child, and aggravated criminal sodomy. On appeal he claimed: (1) trial court erred in allowing state to introduce evidence of Inkelaar’s alleged prior sexual abuse of other children; (2) prosecutor committed misconduct during cross-examination of Inkelaar’s brother, implying statute of limitations barred prosecution of prior sexual conduct by Inkelaar and brother; (3) trial court lacked jurisdiction to sentence Inkelaar under Jessica’s Law because Inkelaar’s age was omitted from the complaint and jury instructions; and (4) trial court abused its discretion by excluding evidence of third-party guilt, namely prior sexual abuse allegations against victims’ father.

ISSUES: (1) Admission of K.S.A. 60-455 evidence, (2) prosecutorial misconduct, (3) jurisdiction to sentence under Jessica’s Law, and (4) evidence of third-party guilt

HELD: Under circumstances of case, Inkelaar preserved appellate review of his 60-455 issue by filing motion in limine, objecting during state’s proffer of the evidence, and asking trial court for a continuing objection to admission of the evidence, even though Inkelaar did not object after specific questions at issue. Inkelaar admits evidence was admissible to prove plan, and no abuse of trial court’s discretion in determining evidence of alleged prior crimes was not unduly prejudicial. Any error by inclusion of other 60-455 grounds in limiting jury instruction was harmless error.

Again, Inkelaar preserved his prosecutorial misconduct issue for appeal. Prosecutor’s statute of limitations questions were not predicated on an accurate statement of law and were improper. Standard of review is stated and applied, finding error was harmless. No reasonable probability the questions regarding statute of limitations affected the verdict in this case.

Showing required to challenge the charging document for first time on appeal is stated, finding Inkelaar failed to make necessary showing that trial court had no jurisdiction to sentence Inkelaar for the off-grid offenses. Also, stating and applying standard of review, finding it proper to instruct jury regarding Inkelaar’s age was not prejudicial at trial. There is no abuse of discretion to deny counsel’s claim that the omission was not contested and supported by overwhelming evidence. Inkelaar’s off-grid sentences under Jessica’s Law are affirmed.

No abuse of trial court’s discretion in denying admission of third-party evidence when totality of fact and circumstances in case did not connect victims’ father to the crime charged.

CONCURRING IN PART, DISSENTING IN PART (Johnson, J.): Agrees with majority’s ultimate decision to review the K.S.A. 60-455 evidentiary issue, but has different reading of K.S.A. 60-404. Also, still firmly convinced that sentencing a person for a crime for which the person was never charged nor convicted by the jury is constitutionally, statutorily, jurisdictionally, and morally wrong. Would have found district court lacked subject matter jurisdiction to convict Inkelaar of Jessica’s Law off-grid version of the crime, thus no appellate jurisdiction to engage in fact-finding and determine Inkelaar guilty of uncharged crime.


STATE V. JACOBS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,114 – OCTOBER 21, 2011

FACTS: In appeal on summary calendar, Jacobs claimed his sentence under Jessica’s Law violated federal and state constitutions, and claimed sentencing judge erred by making sentences consecutive rather than concurrent.

ISSUES: (1) Constitutional challenges to Jessica’s Law and (2) consecutive sentences

HELD: Constitutional challenge to Jessica’s Law was not made in district court, and will not be considered for first time on appeal. Also, Jacobs cannot challenge constitutional infirmity in Jessica’s Law because he received a departure to grid sentence rather than K.S.A. 21-4643’s life sentence with mandatory minimum.

No jurisdiction to address appellate argument that sentencing judge erred in making three presumptive sentences consecutive rather than concurrent.

STATUTE: K.S.A. 21-4643, -4721(c)(1)

STATE V. JOHNSON
WYANDOTTE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 98,812 – SEPTEMBER 2, 2011

FACTS: State and federal officers were looking for Shane Thompson. They had a description of Thompson and they acted on a tip that he was staying in a particular house. They approached the house and the occupants stated that Thompson was not home. Approximately five blocks away from the house, Johnson and Brown were walking on the sidewalk. Johnson’s features were somewhat similar to those of Shane Thompson. Officers activated lights, drew weapons and requested identification from Johnson and Brown. Officers discovered marijuana and crack cocaine during a search of Johnson. Johnson filed a motion to suppress based on a lack of reasonable suspicion to detain him. Officers said they stopped Johnson and Brown because of similar features and the proximity to Thompson’s house. They admitted there was nothing suspicious about Johnson’s and Brown’s actions. The trial court denied the motion to suppress. The jury convicted Johnson of multiple drug crimes. The Court of Appeals affirmed the convictions.

ISSUES: (1) Reasonable suspicion and (2) motion to suppress

HELD: Court found the officers lacked reasonable suspicion. There was no relationship between Johnson’s location and criminal activity. Officers lacked reliable information or chose to ignore the available information, specifically that Johnson was 9 inches taller than Thompson. Court stated that the drug task force indicated that Johnson was detained because he shared common features with Thompson, mainly he was a black male with facial hair, and that such a description is non specific or generic in nature to defy reasonable suspicion of criminal activity. Court concluded that under the totality of the circumstances the task-force officers lacked reasonable suspicion as a matter of law and Johnson’s convictions were reversed.
STATE V. MILLER
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED NO. 100,247 – SEPTEMBER 2, 2011
FACTS: Miller was charged with premeditated first-degree murder. The court gave the jury the lesser-included instructions of second-degree murder and voluntary manslaughter. The jury convicted Miller of second-degree murder. Miller argued the jury may not have considered whether he was guilty of voluntary manslaughter. The Court of Appeals affirmed in part and reversed in part.
ISSUES: (1) Lesser-included instructions and (2) first-degree murder
HELD: Court held the district court erred when it properly instructed the jury pursuant to PIK Crim. 3d 56.05, Alternative B to simultaneously consider the lesser-included offenses of second-degree murder and voluntary manslaughter, but then also erroneously instructed the jury to sequentially consider the lesser offenses of second-degree murder and voluntary manslaughter, using a modified form of PIK Crim. 3d 56.05, Alternative A. Court held that under the facts of this case, when the jury was given contradictory instructions to consider the lesser-included offenses of second-degree murder and voluntary manslaughter sequentially under a modified form of PIK Crim. 3d 56.05, Alternative A, and simultaneously under PIK Crim. 3d 56.05, Alternative B, and the remaining instructions, closing argument, and verdict form also led the jury to consider the lesser included offenses sequentially rather than simultaneously, a real possibility exists that the jury would have rendered a different verdict had it been properly instructed. Court reversed for new trial.
STATUTES: K.S.A. 21-3403; and K.S.A. 22-3414(3)

STATE V. NAPUTI
SEGDICK DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND CASE REMANDED NO. 101,354 – SEPTEMBER 2, 2011
FACTS: Naputi convicted on seven counts of indecent liberties with a child in two cases consolidated for trial. District court granted Naputi's departure motion and imposed sentence that included incarceration, lifetime electronic monitoring, and lifetime post-release supervision. Naputi appealed claiming prosecutorial misconduct in closing argument by misleading jury on definition of specific intent, by improperly shifting burden of proof in commenting on defense failures to call therapist as witness, and by making improper propensity argument by encouraging jury to find one victim's allegations corroborated allegations of five other victims. Naputi also claimed district court erred in denying defense request to modify jury instruction to reflect jury's power of nullification, and in imposing lifetime electronic monitoring. Naputi further claimed that his departure motion and imposed sentence that included incarceration, lifetime electronic monitoring, and lifetime post-release supervision is cruel and unusual punishment prohibited under federal and state constitutions.
ISSUES: (1) Prosecutorial misconduct, (2) jury instruction, (3) lifetime electronic monitoring, and (4) cruel and unusual punishment
HELD: Prosecutor's singular and isolated misstatement of law with a comment that effectively combined lewd touching or fondling element with requisite specific sexual intent element was not reversible error where prosecutor repeatedly referenced correct standard, jury was properly instructed, and under circumstances this misconduct made no difference in outcome of trial. Under facts of case, prosecutor refusing purported inference by defense regarding therapist witness was not an impermissible shifting of burden of proof. No reversible error in prosecutor's misuse of “corroborate” where jury was instructed to look at each count separately, uninfluenced by other charges.
Naputi's attempt to distinguish State v. McClanahan, 212 Kan. 208 (1973), is rejected. A defendant is not entitled to have jury instructed on power of nullification. Instruction given in this case was a correct statement of law.
Parties acknowledge that lifetime electronic monitoring portion of sentence should be vacated. As recognized in State v. Jolly, 291 Kan. 842 (2011), parole board has sole authority to impose electronic monitoring.
Constitutional challenge to lifetime post-release supervision as cruel and unusual punishment was not preserved for appeal.
STATUTES: K.S.A. 21-3504; K.S.A. 22-36011(b)(1), -3717(u); and K.S.A. 60-261, -455

STATE V. RACE
RENO DISTRICT COURT – AFFIRMED NO. 101,545 – SEPTEMBER 2, 2011
FACTS: Race convicted of multiple counts of rape, aggravated criminal sodomy, and aggravated indecent liberties with a child. On appeal he claimed: (1) district court erred by admitting hearsay testimony about one child victim's allegations; (2) district court erred by admitting photographs and computer images of child pornography; (3) insufficient evidence supported Race's conviction on second count of rape of one victim; (4) district court erred by denying motion for mistrial after juror saw Race in courtroom hallway while Race was in handcuffs, and that juror was not present during deliberations for a few minutes while court inquired about juror's observation of Race; and (5) district court erred by failing to instruct jury that it must find Race was 18 years old or older at time offenses were committed.
ISSUES: (1) Hearsay testimony, (2) child pornography evidence, (3) sufficiency of evidence, (4) mistrial, and (5) jury instruction
HELD: No error in overruling Race's hearsay objection to testimony about victim's allegations. District judge admonished jury about limited purposes of the testimony, and jury had plenty of eyewitness testimony to support aggravated indecent liberties count involving this victim.
Objections to admission of child pornography photographs and computer images not preserved for appeal where Race failed to make contemporaneous objection on proper grounds.
Under facts of case, sufficient evidence supports Race's conviction of second count of rape of one victim.
Cases discussing potential for prejudice to defendants who appear before the jury in shackles are examined and compared, finding no abuse of discretion in denying Race's motion for mistrial. District judge's findings of no "fundamental failure" in the proceedings under facts of case are affirmed, thus no reason to reach second question of whether any prejudice was curable or injustice could otherwise be avoided without mistrial declaration.
Failure to instruct on age element of the offense was harmless where Race provided jury with unrebuted testimony that he was well over age of 18 at time of charged offenses.
STATUTES: K.S.A. 21-3501(1), -3502, -3502(a)(1), -3502(a)(2), -3502(c), -3504, -3504(c), -3506, -3506(c), -4643; K.S.A. 22-3414(3), -3423(1)(c); and K.S.A. 60-404, -455, -460

STATE V. ROBERTS
RENO DISTRICT COURT – AFFIRMED COURT OF APPEAL – AFFIRMED ON ISSUE SUBJECT TO REVIEW NO. 100,233 – SEPTEMBER 2, 2011
FACTS: Roberts arrested and charged with felony possession of hydrocodone in violation of K.S.A. 2007 Supp. 65-4160(a). Rob-
erts filed motion to dismiss, arguing hydrocodone was a schedule III controlled substance not included in schedule II controlled substances criminalized under 65-4160(a). District court granted motion. State appealed, challenging district court’s interpretation of 65-4160. Roberts argued the dismissal was equivalent to an acquittal, thus appeal barred by K.S.A. 21-3180(1)(b) and Double Jeopardy Clause. In unpublished opinion, Court of Appeals found Fifth Amendment did not prevent further prosecution because jeopardy had not attached, and affirmed district court’s dismissal of the complaint. Review granted on sole issue of whether state was barred from appealing district court’s order of dismissal.

ISSUE: Order of dismissal or judgment of acquittal

HELD: K.S.A. 22-4602(b)(1) allows state to appeal order dismissing complaint, information, or indictment, and K.S.A. 21-3108(1)(b) does not preclude state from appealing order of dismissal if appeal is not otherwise barred. State has no right to appeal a judgment of acquittal because appellate review would constitute double jeopardy. Acquittal that cannot be appealed by the state is defined as judgment that resolves some or all of the factual elements of the offense charged after jeopardy has attached. Under facts of this case, where order of dismissal was entered before trial, meaning double jeopardy had not yet attached, district court’s order was not a judgment of acquittal and state’s appeal not barred by Double Jeopardy Clause. Judgments of Court of Appeals and district court on issue subject to review are affirmed.

No review in this appeal of whether K.S.A. 2007 Supp. 65-4160(a) criminalizes possession of generic Lortab, but court notes that issue is being reviewed in pending appeal in State v. Collins, No. 1012101.

STATUTES: K.S.A. 2007 Supp. 65-4160, -4160(a); K.S.A. 20-3018(b); K.S.A. 21-3108(1)(a), -3108(1)(b); and K.S.A. 22-3419, -3602, -3602(b)(1), -3602(e)

STATE V. TAHAH
FORD DISTRICT COURT – REVERSED AND REMANDED
NO. 100,768 – SEPTEMBER 30, 2011

FACTS: A jury convicted Tahah of felony murder and the underlying felony: discharge of a firearm at an occupied dwelling resulting in great bodily harm. The court sentenced him to prison without the possibility of parole for 20 years for the felony-murder conviction and 102 months for the underlying felony, with the sentences to run consecutively. On appeal, Tahah challenged the district court’s refusal to give a lesser-included offense instruction on second-degree unintentional murder and involuntary manslaughter, exclusion of third-party evidence, prosecutorial misconduct during closing argument, admission of prior crimes evidence, and the voluntariness of his confession.

ISSUES: (1) Lesser-included instructions, (2) third-party evidence, (3) prosecutorial misconduct, (4) prior crimes evidence, and (5) confession

HELD: Court found that Tahah’s confession included a statement that he admitted to aiming the rifle at the window, but as he lowered the rifle a round went off and that he did not want to kill the victim. Court held this evidence in particular could reasonably support a conviction for both lesser-included offenses and the felony-murder conviction was reversed for a new trial. Court held under the totality of the evidence, the third-party evidence of text messages between the victim and another man neither indicated the other man’s motive to commit the crimes nor otherwise connected him to the murder. Court found no abuse of discretion where the district court reviewed the messages and stated that they were indicative of two people trying to feel their way into a new relationship. Court found that the prosecutor did not argue facts that were not admitted into evidence when he stated in closing argument that the bullet traveled through the glass window before striking the victim. However, the Court found the prosecutor did misstate the facts when he argued to the jury that Dr. Thomas, “the expert” himself opined that the murder weapon was a high-powered rifle. Court stated this fact was attributable to a KNI agent instead. Court did not address Tahah’s prior crimes evidence because he failed to enter a contemporaneous objection to the evidence when it was introduced at trial. Court did not address the voluntariness of Tahah’s confession because he failed to challenge the confession in a pretrial motion and failed to object to introduction of the confession at trial.

DISSENT: Justice Rosen dissented from the majority based on his belief that a jury could not reasonably have convicted Tahah of second-degree reckless murder or involuntary manslaughter and there was no error in the district court refusal to give these instructions.

STATUTES: K.S.A. 22-3402, -3404, -3414(3), -3601(b)(1); and K.S.A. 60-455

STATE V. TULLY
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 92,764 – SEPTEMBER 23, 2011

FACTS: Tully convicted of rape by engaging in sexual intercourse without consent under circumstances when victim was overcome by force or fear. On appeal he claimed: (1) state improperly cross-examined Tully on his post-arrest silence; (2) district court improperly instructed jury on element of force necessary to prove rape; (3) state’s emergency doctor’s expert testimony on lack of physical trauma offered an opinion beyond her qualifications which invaded province of jury; and (4) cumulative error denied Tully a fair trial. Court of Appeals affirmed in unpublished opinion with a dissent finding reversible error on first three claims. Review granted on all claims.

ISSUES: (1) Comment on post-arrest silence, (2) jury instruction, (3) expert testimony, and (4) cumulative error

HELD: Under circumstances of case which included determination of whether defense counsel opened door by implying Tully was cooperative with police during the investigation, Tully’s rights protected by Miranda and Doyle were violated by state’s questions, and error was not harmless. Non-PIK instruction given was clear error due to omission of key language on element of force and confusing terminology used which could have caused jury to overlook requirement that victim must have been overcome by force or fear. Similar instruction should not be used on retrial.

District court abused its discretion in finding evidence in this case established emergency room doctor’s qualifications to opine as to whether physical finding of lack of traumatic injury did or did not mean victim had been raped. On retrial, foundation for this evidence must be laid or evidence should not be admitted. Error by itself would not be reversible.

Reversal required by cumulative error, even if first two issues were not each viewed as basis for reversal.

STATUTES: K.S.A. 20-3015(b); K.S.A. 21-3502(a)(1)(A); K.S.A. 22-3414(3), -3602(e); and K.S.A. 60-261, -456, -456(b), -456(b)(2), -456(c), -456(d), -2105
FACIALS: Irvin and Carolyn Crone, husband and wife, purchased approximately 60 acres of land in the fall of 1988. Their land is adjacent to 48.5 acres of land (disputed land) which has been owned by Nuss since he received the deed from his grandfather in 1968, although it is currently owned equally by both Nuss and the Hott Trust (hereinafter referred to jointly as Appellees). The Crones do not contest that they knew they did not own the disputed land. The Crones commenced an action to quiet title to the 48.5 acres to which Appellees hold the deed. The Crones claim ownership by adverse possession. Following trial, the trial court denied the Crones’ quiet title claim. The trial court found: (1) the Crones started doing some type of work in 1988 on land they knowingly did not own, and this initial period of cutting the Johnson grass did not amount to possession, only trespass; (2) the Crones seemed intent to take continuous possession of the disputed land when they began disking the land in either 1991 or 1993; (3) Nuss, the legal titled owner, clearly became aware that someone was cultivating the disputed land in 2003, and he notified the Crones that they did not own it and to stop trespassing; (4) the Crones continued to claim ownership and cultivate the disputed land despite knowing that there was a challenge to their adverse claim; (5) the period of continuous adverse possession from 1991 through 2003 was only 12 years, not the statutorily required 15 years; and (6) the Crones did not exclusively possess the disputed land because both parties were jointly using it, and Nuss paid the yearly taxes and had signed-up or had it listed for a farm program.

ISSUE: Adverse possession

HELD: Court found substantial evidence supported the trial court’s finding that the Crones’ act of disking in 1991 or 1993 in an attempt to cultivate the land provided sufficient unequivocal notice of an open claim to the ownership of the property. Court found there is substantial evidence in the record to support the trial court’s finding that the Crones’ possession was not exclusive based on Nuss’ payment of taxes, enrollment of the disputed land for farm programs, hunting on the property, and allowing friends to hunt on the property, and there was no indication that Crones’ possession amounted to an ouster of Nuss or excluded Nuss. Court found that in order to establish a claim of adverse possession under K.S.A. 60-503, the claimant’s possession must be open, exclusive, and continuous for 15 years. The findings by the trial court that none of these requirements were met by the Crones by even a preponderance of the evidence are supported in the record. Last, court held the trial court did not abuse its discretion in denying Crones’ motion for reconsideration and refused to consider new evidence finding the Crones had more than three years to search the public records and locate any evidence relevant to their adverse possession claim, but failed to do so.

STATUTE: K.S.A. 60-259(a) Fifth, -503, -601, -1001, -1002

ANNEXATION

BAGGETT V. BOARD OF COUNTY COMMISSIONERS OF DOUGLAS COUNTY DOUGLAS DISTRICT COURT – REVERSED AND REMANDED

NO. 104,441 – SEPTEMBER 30, 2011

FACTS: The business owners (the applicants) of approximately 155 acres of land in Douglas County petitioned the City for the voluntary annexation of the property, which lies northwest of the Lawrence city limits, later seeking rezoning for industrial development. The property does not adjoin the contiguous boundaries of the City, and therefore the proposed annexation constitutes an island annexation pursuant to K.S.A. 12-520c. Before the annexation request, the property was undeveloped agricultural property used as pastureland and was zoned County A (Agricultural). The Baggett Group consists of individual homeowners adjacent to or located within 1/2 mile of the property. Their property is zoned County A, with rural residential homes located along the existing county roads. Mastercraft Corporation, which successfully intervened in the proceeding in district court, is the developer of the property and has pursued the annexation and zoning in question on behalf of the applicants. The City Planning Commission voted to recommend the annexation and the City adopted a resolution requesting the Board find and determine that the annexation of the property into the City would not hinder or prevent the proper growth and development of the area or that any other incorporated city located within the County. The Board concluded that the proposed annexation would not hinder or prevent proper growth and development in the area and that the annexation would help create available industrial space, there was anticipated warehouse distribution business, that potential uses may include all uses permitted within the industrial zoning classification and the Development Code of the City, and the industrial park did not conflict with any other established development plan for the area. The district court affirmed the Board’s annexation decision.

ISSUE: Annexation

HELD: Court held that for the Board to approve the annexation by a mere conclusory finding without a more careful and deliberative consideration of the extent that any of the proposed uses might hinder proper development of the area under consideration is both unsupported by the record and inherently arbitrary and capricious. The district court stated that it did not substitute its judgment for the Board, but rather concluded that the Board failed to perform its function under the law. Where the developer of land in an island annexation cannot specify the intended uses of the land but provides only a category of potential uses, the Board must examine those potential uses — or at least the most potentially deleterious uses — and determine whether those potentially deleterious uses would “hinder or prevent the proper growth and development of the area.” Failing in that examination, the annexation cannot survive judicial scrutiny under K.S.A. 12-520c. Court held it was compelled to reverse the district court’s order affirming the annexation of the Board and to remand for further proceedings.

STATUTES: K.S.A. 12-520c, -521; and K.S.A. 77-621

AUTOMOBILES - LICENSES - CONSTITUTIONAL LAW

CRAWFORD V. KANSAS DEPARTMENT OF REVENUE ELLIS DISTRICT COURT – AFFIRMED

NO. 104,837 – SEPTEMBER 9, 2011

FACTS: Crawford requested “in person” administrative hearing to challenge suspension of driving privileges after failed Intoxilyzer breath test. Hearing scheduled then postponed when in-person hearings outside Topeka area were suspended three months due to budgetary constraints. Crawford sought dismissal based on Kansas Department of Revenue (KDR) failure to “forthwith set” hearing as required by K.S.A. 2008 Supp. 8-1020(d), and claimed equal protection violation. District court denied the motion and affirmed suspension of Crawford’s license. Crawford appealed.
ISSUES: (1) K.S.A. 2008 Supp. 8-1020(d) and (2) equal protection

HELD: Under facts of case, delay in scheduling Crawford’s in-person administrative hearing was necessary and did not result from lack of due diligence or reasonable exertion by KDR. Also, no evidence that Crawford was prejudiced by the delay.

Rational basis analysis applied to constitutional claim. KDR’s decision to temporarily delay all in-person driver’s license suspension hearings between April and July 2009 in geographic areas outside 100-mile radius of Topeka did not violate licensee’s constitutional right to equal protection.

STATUTE: K.S.A. 2008 Supp. 8-1020(d)

BREACH OF LIMITED LIABILITY AGREEMENT CANYON CREEK DEVELOPMENT V. FOX JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 103,190 – SEPTEMBER 2, 2011

FACTS: Mike A. Fox, Don and Linda Julian, and Jeff Horn formed Canyon Creek Development LLC and American Land Investments LLC in 2004 for the purpose of developing residential real estate in Johnson County. Fox held a 50 percent position in both LLCs. The remaining half interest in Canyon Creek was shared equally by Don Julian and Jeff Horn. The remaining half interest in American Land Development was similarly shared, but with the Julian 25 percent interest split between Don and Linda. When the housing market downturned in 2008, Don Julian wrote letters on behalf of the LLCs to Fox demanding that he contribute additional capital to the ventures to pay outstanding obligations on loans for the projects. Fox failed to meet these capital calls.

Julian and Horn covered by making minimal additional capital contributions to the firms and by making loans to the firms to cover their current debt-service obligations. These additional capital contributions gave Julian and Horn a majority position in each firm. They exercised their new majority by removing Fox from any management of the firms and electing themselves in his stead.

Additional demands were made upon Fox for capital calls. When Fox failed to satisfy these demands, the LLCs filed this action for breach of the operating agreements, breach of fiduciary duties, and unjust enrichment. The district court granted summary judgment in favor of the LLCs of $255,426.42 for Canyon Creek and $166,254.76 for American Land, prejudgment interest, and attorney fees of $3,979.

ISSUE: Breach of limited liability agreement

HELD: Court held the management of two limited liability companies was entitled under the provisions of the LLCs’ operating agreements to demand that the members of the LLCs contribute additional capital in order to service the LLCs’ debts and to pay taxes or insurance on real estate owned by the LLCs. A member of the LLCs who failed to respond with additional capital contributions for these purposes was in breach of the operating agreements.

Court also held that a member of two LLCs who failed to contribute additional capital for their ongoing operation could have his ownership interests in the LLCs reduced in accordance with the operating agreements and K.S.A. 17-76,100(c), but he could not be held personally liable for his failure to contribute additional capital. In the absence of clear statutory authority for imposing personal liability on an LLC member who fails to meet a capital call for the ongoing venture, when the LLC’s operating agreement specifies a reduction in the defaulting member’s capital share as the sole consequence, the LLC is not entitled to seek a personal judgment for damages against the defaulting member.

STATUTES: K.S.A. 17-7631, -7663, -7672, -7688, -7691, -7699, -76,100, -76,130, -76,135; and K.S.A. 60-256, -259

CLASS ACTION, ATTORNEY FEES, AND INCENTIVE AWARD FREEBIRD INC. V. CIMAREX ENERGY CO. FINNEY DISTRICT COURT – AFFIRMED NO. 104,748 – OCTOBER 7, 2011

FACTS: This was a class action lawsuit brought by Freebird Inc. against Cimarex Energy Co. for the underpayment of gas royalties. Cimarex and Freebird were able to reach a settlement agreement for $3.45 million. Class counsel requested a one-third contingent fee and the class representative requested a 1 percent incentive award, each to be distributed from the fund prior to the distribution to the remaining class members. Chesapeake Energy Corporation, an affected royalty owner and class action participant, objected to the settlement agreement, requesting that a special master be appointed to review the request for attorney fees, litigation expenses, and the incentive award. Chesapeake was the only class member to object. Its recovery under the settlement was estimated to be about $500.

The district court denied Chesapeake's objection, and then certified the class, approved the settlement agreement, the attorney fees, the litigation expenses, and the incentive award.

ISSUES: (1) Class action, (2) attorney fees, and (3) incentive award

HELD: Court held that the district court did not abuse its discretion in granting either the attorney fee award or the incentive award. Court rejected Chesapeake's argument that it was denied the opportunity to be heard because the process was tainted by its inability to view the detailed billing records submitted by class counsel at the fairness hearing. Court found the detailed billing statements were not critical to the analysis, and the failure to provide the information to Chesapeake did not deny it procedural due process. Court held the district court properly examined the factors set forth in the Kansas Rules of Professional Conduct and relied on substantial competent evidence in determining the reasonableness of attorney fees in a class action lawsuit. As for the incentive award, court stated that it could find no reason to automatically deny incentive awards that are based upon a percentage of the common fund. Court stated that even if it were to use a lodestar analysis as an additional cross-check as to the reasonableness of the award, the award did not represent an unreasonable amount. The district court awarded 1 percent of the common fund to the class representative, which amounts to approximately $34,500. Based upon the 700 hours the class representative spent working on the lawsuit, the incentive award results in a reimbursement rate of approximately $50 per hour. This does not appear to be unreasonable given the importance of the class representative’s contribution in this case.

STATUTE: K.S.A. 60-223(e), -226, -426


FACTS: Inmate Chelf seriously injured in prison work accident June 18, 2007. Property claim for damages he filed with Department of Corrections (DOC) February 14, 2008, was returned with instruction to file claim over $500 with Joint Committee on Special Claims against state. Joint Committee claim filed February 26, 2008, was denied without prejudice August 27, 2008. Chelf, thereafter, filed district court petition sounding in tort. District court granted state’s motion to dismiss for lack of subject matter jurisdiction because Chelf filed his DOC administrative claim out of time and thus failed to timely exhaust his administrative remedies.

ISSUE: Inmate exhaustion of administrative remedies

HELD: Kansas Tort Claims Act claim was timely filed within two years of accident. History of DOC administrative regulation governing inmate claims for personal injury, K.A.R. 44-16-104,
is discussed. Effective June 1, 2007, K.A.R. 44-16-104a imposed more demanding requirements giving inmates 10 days to file claim for person injury. Inconsistency in court rulings regarding subject matter jurisdiction is noted. Applying fundamental principles of subject matter jurisdiction in manner consistent with U.S. Supreme Court cases, inmate exhaustion requirement in K.S.A. 75-52,138 is a mandatory but nonjurisdictional, prerequisite to filing suit, and thus subject to equitable defenses. Although district court erred in summarily dismissing Chelf’s claim for lack of subject matter jurisdiction, dismissal is affirmed because undisputed facts do not support equitable defenses of waiver, estoppel, and futility in this case, or the denial of procedural due process.


**CONTRACT AND PENSION**

**DAGGETT V. BOARD OF PUBLIC UTILITIES OF THE UNIFIED GOVERNMENT OF WYANDOTTE COUNTY WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 104,835 – SEPTEMBER 16, 2011**

FACTS: Daggett was the general manager of the BPU for 10 years. Daggett was terminated from his employment on December 21, 2005. On March 22, 2006, the BPU drafted a settlement and release agreement that would pay Daggett’s salary, deferred compensation, and pension contributions through June 30, 2008. On July 1, 2008, when Daggett attempted to receive his pension benefits, he discovered that the pension contributions paid by the BPU were not in his account. The pension contributions made by Daggett had been deducted from his paychecks, and the BPU also made its contributions to the pension fund; however, those contributions were not accepted by the pension fund. The record does not indicate why the contributions were not accepted or what happened to the contributions after they were rejected. At oral argument, the BPU admitted that the contributions it made to the pension plan on behalf of Daggett were returned to the BPU and that Daggett’s contributions were returned to him. As a result, Daggett receives approximately $1,000 less a month than he would have received if the contributions had been accepted. Daggett sued the BPU, claiming, among other things, breach of contract. Daggett moved for summary judgment, which the trial court denied. The trial court found that the BPU made the required contributions to the pension fund, and, therefore, it did not breach the settlement agreement between Daggett and the BPU.

ISSUES: (1) Contract and (2) pension

HELD: Court held that it had jurisdiction to hear the appeal because Daggett’s judgment was not final until the ruling on the motion for attorney fees had been filed. Court held it was discretionary for the BPU to argue that it did what it was required to do, and, therefore, it is not liable for breach of contract. It would not be a reasonable interpretation of the settlement agreement to find that the intent of the parties was simply for the BPU to make the contributions without any concern with whether those contributions were accepted. This interpretation completely ignores the words “for the benefit of Mr. Daggett.” As the case law requires, a contract should not be interpreted merely by isolating one particular sentence or provision. Reading this contract as a whole, it is clear that the contributions had a specific purpose, and that purpose was to benefit Daggett. Thus, it was reasonable for Daggett to expect that the monthly pension contributions would continue to go into the pension fund to increase his eventual payout so long as he did not exercise his option, under section 3 of the settlement agreement, to request the payment of the remaining value of his annual compensation in a single lump sum payment. And he did not exercise this option. Court held that because BPU failed to ensure that the contributions made benefit Daggett, it breached the settlement agreement. Court remanded for summary judgment to be entered in favor of Daggett and because there is insufficient evidence in the record to calculate damages, court remanded for calculation of damages.

CONCURRENCE: Judge Bruns concurred in the decision and would rely on the plain and unambiguous language of the contract that because BPU’s payments to the pension plan were not accepted and BPU kept the money that was returned by the pension plan, Daggett did not receive the advantage or benefit of the bargain.

STATUTES: No statutes cited.

**CORPORATIONS, SELF-DEALING, STATUTES OF REPOSE, AND STATUTES OF LIMITATION**

**LIGHTNER V. LIGHTNER**

**FINNEY DISTRICT COURT – VACATED AND REMANDED WITH DIRECTIONS**

**NO. 104,000 – SEPTEMBER 23, 2011**

FACTS: Irma Lightner filed her petition against the defendants, as well as the D. Lightner Farms Inc. (Corporation) and “R.F. Let it Ride LLC” (the LLC), alleging that the defendants were “actively involved in the management and operations” of the Corporation as “executives and directors” and that during the period since 1991 they “participated in the acts of mismanagement and self-dealing” in a manner that resulted in the “dilution of the shareholders’ interests” in the Corporation. The only claim for relief was titled “breach of fiduciary duty” and contained allegations (a) that the defendants “engaged in a series of self-dealing lease transactions” and “have inappropriately benefitted themselves while resulting in underpayment” to the Corporation “for equipment rental and cash rent for land” and (b) that the defendants “arranged for and been paid compensation well in excess of that which is reasonable.” After a bench trial, the district court granted judgment against Gerald and Kyle Lightner and in favor of their sister and plaintiff, Irma Lightner, for $264,951 as well as their brothers and interveners, Robert and Lloyd Lightner for a combined total of $895,786, as well as costs, in favor of Irma’s claims that Gerald and Kyle engaged in a breach of fiduciary duty and self-dealing in their respective capacities as officers and directors of the Corporation.

ISSUES: (1) Corporations, (2) self-dealing, (3) statutes of limitation, and (4) statutes of repose

HELD: Court held that a direct action by a single shareholder against the corporation and two officers and directors holding only 23.5 percent of the outstanding shares, for claims conceded to be derivative in nature, was a mangled misalignment of parties, demonstrating that the statutory safeguards of a derivative action may not be ignored. Because the single shareholder had no standing to file and pursue these claims as a direct action, the district court was without subject matter jurisdiction. Court held that Irma had no standing to bring her action.

STATUTES: K.S.A. 17-7202; and K.S.A. 60-223a

**HABEAS CORPUS - MOTION FOR NEW TRIAL**

**BELLS V. STATE**

**SEDGWICK DISTRICT COURT – REVERSED AND REMANDED**

**NO. 104,429 – SEPTEMBER 16, 2011**

FACTS: Member of jury that convicted Bell of rape had a rape charge pending against him when he was selected to serve on Bell’s jury — a fact that the juror intentionally concealed during voir dire. Bell filed K.S.A. 60-1507 motion for a new trial. District court denied relief finding Bell had not shown that this juror acted differently because of the pending rape charge against him. Bell appealed.

ISSUE: Motion for new trial - juror misconduct
HELD: A new trial is required where a juror deliberately fails to provide an honest answer to a material question during jury selection and a truthful response would have provided a valid basis to challenge the juror for cause. In such cases, no showing of actual bias of the juror is required. That standard is satisfied under facts of this case. District court abused its discretion when it denied defendant's motion for new trial. District court's judgment is reversed. Case is remanded for new trial.

STATUTE: K.S.A. 60-1507

JURISDICTION, NOTICE OF APPEAL, CONTRIBUTORY NEGLIGENCE, AND JURY INSTRUCTIONS

VALLEJO V. BNSF RAILWAY CO.

WYANDOTTE DISTRICT COURT — REVERSED AND REMANDED

NO. 104,553 — SEPTEMBER 16, 2011

FACTS: Vallejo works as a carman for Burlington Northern Santa Fe Railway Co. (BNSF). Vallejo often works overtime at other locations. On August 4, 2006, Vallejo worked overtime and was assigned to fabricate a sill step. Vallejo had fabricated a sill step many times before. Vallejo did not have the proper tools, but he completed the job with the tools he had. Vallejo did not feel any pain when he was welding the metal for the sill step. Because Vallejo did not have adequate tools, Vallejo had to exert more force than normal to bend the metal. It was not until Vallejo knelt down to pick up some pieces of metal that he felt the sharp pain in his back. In his injury report, Vallejo did not report any problems with the tools or equipment. In fact, Vallejo left the tools in his truck for the next carman to use. Vallejo returned to work the day after his injury but only performed light duties. Vallejo endured conservative treatments and surgeries for his back pain. On August 28, 2008, almost two years after the injury occurred, Vallejo filed a FELA action against BNSF. In his petition, Vallejo contends that the equipment caused his injury and that BNSF was negligent for failing to provide proper equipment. Before trial, the trial court granted Vallejo's motion for partial summary judgment on the affirmative defense of contributory negligence. At the instruction conference, BNSF requested an instruction on contributory negligence which the trial judge denied. The jury returned a verdict in favor of Vallejo and awarded him $1,121,909 in damages.

ISSUES: (1) Jurisdiction, (2) notice of appeal, (3) contributory negligence, and (4) jury instructions

HELD: Court held that in broadly construing BNSF's notice of appeal in accordance with Kansas jurisprudence, the notice of appeal was adequate to provide the court with jurisdiction to review the contributory negligence issue. Court rejected Vallejo's argument that BNSF's failure to appeal the partial summary judgment and that it has now merged into the final judgment. Court held that it does not matter if BNSF challenged the partial summary judgment on contributory negligence as long as it raised the issue of contributory negligence in its dispositive motion, which it did. Court found that Vallejo conceded there is sufficient evidence in the record of contributory negligence. Evidence that Vallejo failed to appropriately utilize the safest means to fabricate the sill step clearly constitutes evidence of contributory negligence, as it does not pertain to risks inherent in Vallejo's job. Instead, this evidence went to a careless act or omission on Vallejo's part that added new risks to those already inherent in his task. Court held that based on the evidence presented at trial, it is readily apparent that sufficient evidence existed to submit the issue of contributory negligence to the jury. Court also held that the trial court incorrectly required BNSF to submit evidence of a safety rule violation before the court would instruct on contributory negligence.

STATUTE: K.S.A. 60-250, -254, -256, -259, -2103

OFFICERS AND PUBLIC EMPLOYEES

DENNING V. JOHNSON COUNTY SHERIFF'S CIVIL SERVICE BOARD

JOHNSON COUNTY – AFFIRMED

NO. 104,318 – OCTOBER 21, 2011

FACTS: Sheriff terminated deputy Maurer's employment for violating department's truthfulness policy by not fully reporting that he caused crack in police car's windshield. Maurer appealed to Johnson County Civil Service Board (CSB), which held informal hearing with no rules or procedures and handed down decision for reinstatement. District court reversed finding CSB's decision was arbitrary and capricious, and remanded to CSB for further consideration under appropriate legal standards, rules, and procedures. Court of Appeals dismissed Maurer's appeal because there was no final order on all issues. Prior to CSB rehearing case, County enacted Charter Resolution to adopt rules and procedures for the CSB. Under those rules and procedures, CSB affirmed Maurer's dismissal. District court affirmed. Maurer appealed, claiming the first CSB decision should have been affirmed, and claiming district court erred in reversing the first CSB's decision. Maurer also claimed district court erred in finding the failure to establish operating standards rendered the parties unaware of the procedural and substantive rules operating in the first CSB, and claimed rules and procedures adopted in Charter Resolution should not apply to second CSB hearing.

ISSUES: (1) Review of first CSB decision, (2) district court's review of first CSB decision, (3) adoption of rules and procedures, (4) application of new civil service rules on remand, and (5) second CSB decision

HELD: When county CSB holds hearing with no operating rules and procedures, its review is limited to determining if substantial evidence supported the termination. Here, substantial evidence supported Maurer's termination. First CSB erred in reversing that decision.

Appeal from county CSB, a political subdivision of the state, is governed by K.S.A. 60-2101(d). District court's review is limited to whether board acted within scope of its authority, whether its decision was substantially supported by the evidence, and whether it acted fraudulently or arbitrarily and capriciously. Because CSB's first decision was not supported by substantial competent evidence, no error in district court's reversal of that decision.

Constitutional concern in CSB not providing rules and procedures for its hearing and decision is addressed for first time on appeal, finding denial of due process. Maurer had no vested right in the procedure used in this case. Charter Resolution established procedural rules and could be applied to cases pending as of effective date.

Second CSB decision finding Maurer violated the Sheriff's truthfulness policy was supported by substantial evidence.

DISSENT (Leben, J.): Believes district court wrongly vacated the first CSB order. K.S.A. 19-4327(b) limits CSB's review to reasonableness of the sheriff's personnel decision. Even though first CSB's finding of no violation of sheriff's truthfulness rule is open to question, the CSB was to decide whether Sheriff's decision to terminate Maurer's employment was reasonable. CSB clearly did not think so under circumstances of this case, and judicial review is limited to facts supporting that decision. CSB's conclusion was within the realm of fair debate and should have been upheld. CSB acted within its authority, and objection to CSB not having written procedures is not properly raised because that objection was not raised to CSB.

STATUTES: K.S.A. 19-101a(14), -805(a), -805(d), -4303 et seq., -4311(h), -4327(a), -4327(b), -4327(c), -4327(d), -4327(e); K.S.A. 60-2101(d); and K.S.A. 77-501 et seq., -526, -601 et seq., -602(a), -603(a)
FACTS: In 2006, the Bank loaned Johnny and Kellie Parish $40,000 to purchase a 2006 GMC Yukon. As security for the loan, Johnny and Kellie granted the Bank a security interest in the Yukon. The Bank properly filed its notice of this security interest with the Kansas Department of Revenue (KDR) and, thereafter, the lien was on record in KDR's electronic lien filing system known as E- lien and recorded on the truck’s paper title and registration receipt. In a lawsuit unrelated to either the Yukon or the Bank, the district court in Johnson County, Kansas, granted default judgment against Johnny Parish in favor of Robert Bazin and Bazin Excavating. Following judgment, Bazin Excavating levied on the Yukon and proceeded to have it sold at public auction. In March 2008, the Bank filed suit against Bazin Excavating in conjunction with the levy and sale of the Yukon. Both parties filed motions for summary judgment. After considering the motions and arguments of counsel, the district court granted summary judgment in favor of the Bank. The court found that the Bank held a perfected security interest in the Yukon. The court ultimately awarded damages to the Bank in an amount equal to the monetary value of the Yukon at the time of the sale.

ISSUE: Security interest

HELD: Court affirmed the district court’s summary judgment in favor of the Bank on Count I, wherein the Bank sought a declaratory judgment that the Bank has a security interest in the Yukon that is superior to all other prior and existing interests and Count IV, wherein the Bank asserted a claim of conversion against Bazin Excavating for exercising unlawful dominion and control over the proceeds from the sale of the Yukon at the September 21, 2007, auction. Court also affirmed the district court’s summary judgment ruling on Count V against Robert Bazin that he exercised unlawful dominion and control over the Yukon. However, Court reversed and remanded with directions to vacate judgment pursuant to Count II wherein the Bank sought a declaratory judgment that Bazin Excavating conducted a sale of the Yukon without meeting and satisfying the statutory requirements as set forth in K.S.A. 60-2406 and 60-2409. Court also reversed on Count V with respect to Bazin Excavating on the claim they exercised unlawful dominion and control over the Yukon. Court left to the district court whether any actual controversy continues to exist given the district court’s declaration, which we have affirmed, that the Bank holds a perfected purchase money security interest superior to any other right and the district court’s decision to grant the Bank’s conversion claims, which we also have affirmed, the result of which provides the Bank with a legal right to retrieve the Yukon and/or the proceeds from its sale.


SERVICE OF PROCESS


FACTS: J.A. Tobin Construction Co., a Missouri corporation, asked the district court to set aside the tax sale of a vacant lot that it owned in Kansas because the company was improperly served notice of the sale. The county had tried to personally serve the corporation that Tobin Construction had merged with, Rosedale Development Co., but when that proved unsuccessful, the county resorted to serving court papers directly rather than putting a legal notice in the newspaper that the owner isn’t really all that likely to see. The undisputed evidence showed that the county knew from the Kansas Secretary of State’s website that Rosedale Development was a Missouri corporation and that the company had forfeited its corporate status in Kansas. Searching for Rosedale Development on the Missouri Secretary of State’s website, which takes only a few minutes, would have revealed the merger and Tobin Construction’s new address. Because Tobin Construction’s name and address for personal service could reasonably be found, service by publication violated due process and the sale is void.

STATUTES: K.S.A. 60-260; and K.S.A. 79-2801(a), -2804b

WORKERS’ COMPENSATION AND CHEMICAL EXPOSURE


FACTS: Chriestenson, who is now 57 years old, worked at Russell Stover in Iola from April 1997 to December 1998. Chriestenson was first diagnosed with multiple chemical sensitivity approximately 11 years before she went to work at Russell Stover. Chriestenson smoked cigarettes before, during, and after her employment at Russell Stover. According to her physician, Chriestenson was a fairly heavy smoker. She also suffered from memory loss and was tested for multiple sclerosis prior to going to work for Russell Stover. Chriestenson worked as a plant nurse, safety coordinator, and workers’ compensation benefits coordinator at Russell Stover. Her office was located across the hall from a laundry facility. Chriestenson claims that her final chemical exposure at Russell Stover occurred on December 8, 1998, when the floor to her office was stripped and re waxed. Russell Stover allowed Chriestenson to move from the office. However, Chriestenson contends she was in the room for approximately 15 minutes while she collected her things. Following this incident, Chriestenson saw a doctor retained by Russell Stover, as well as her family practitioner. On December 18, 1998, Chriestenson’s employment at Russell Stover was terminated. Ten days later, she signed an initial application for workers’ compensation benefits. In the application, Chriestenson expressly listed the date of the accident as December 8, 1998. Chriestenson did not list any other exposures to chemicals in her application. An administrative law judge ultimately found that Chriestenson had experienced temporary symptoms as the result of chemical exposure while working at Russell Stover. In addition, he found that the medical treatment Chriestenson received prior to June 17, 2002, was adequate to relieve her temporary symptoms. Finally, the administrative law judge found that Chriestenson did not sustain any permanent impairment from her exposure to chemicals at Russell Stover and that there was no need for ongoing or future medical treatment. However, a majority of the Board found that Chriestenson’s “exposure to chemicals and fumes while working for [Russell Stover] through December 18, 1998, caused her personal injury by accident arising out of and in the course of her employment with [Russell Stover].” The majority relied on the causation evidence presented by Dr. Ziem and granted Chriestenson benefits. Two members of the Board vigorously dissented and would deny benefits.

ISSUES: Workers’ compensation and (2) chemical exposure
HELD: Court held that before the cause of chemical sensitivity can be established, the actual quantity or type of contamination to which a person has been exposed must be demonstrated. The ability to diagnose a medical condition is not the same as the ability to deduce, delineate, and describe, in a scientifically reliable manner, the causes of such a medical condition. Court found that when Dr. Ziem was asked in her deposition about the level of exposure to chemicals at Russell Stover, she stated that the concentrations were high enough to cause symptoms. Court held that such reasoning is a classic example of post hoc, ergo propter hoc logic and is not helpful in establishing a causal connection between the alleged permanent disability and Christenson's employment at Russell Stover. Court stated that although it did not question Dr. Ziem's ability to render opinions regarding Christenson's symptoms and diagnosis, it found that her causation opinion was not based on substantial evidence.

STATUTES: K.S.A. 44-501, -510c, -556(a), -5a01(b); and K.S.A. 77-601, -621

CRIMINAL

STATE V. BENAVIDES

OSAGE DISTRICT COURT – REVERSED AND REMANDED

NO. 104,654 – SEPTEMBER 23, 2011

FACTS: In 1994, Benavides pled guilty to attempted sale of marijuana. He was sentenced to, and successfully completed, 24 months’ probation. On January 28, 2010, Benavides filed a pro se pleading entitled “Petition for Writ of Error Coram Nobis and Motion to Vacate Judgments and Withdraw Pleas.” In the petition, Benavides claimed he was being detained by the Department of Homeland Security and faced deportation based on his 1994 conviction. Benavides sought to withdraw his guilty plea and vacate the 1994 judgment because he claimed his trial counsel had not advised him of any risk of deportation stemming from his plea agreement. After hearing arguments of counsel, the district court denied Benavides’ motion to withdraw his guilty plea on the sole ground that the motion was filed more than one year after his conviction became final and, thus, the motion was untimely under K.S.A. 2010 Supp. 22-3210(e)(1).

ISSUES: (1) Habeas corpus and (2) statute of limitations

HELD: Court held the one-year statute of limitations at K.S.A. 2010 Supp. 22-3210(e)(1) begins to run for preexisting claims on the date the amended statute became effective, April 16, 2009. Because Benavides filed his motion on January 28, 2010, the district court erred in denying the motion based upon the statute of limitations.

STATUTE: K.S.A. 2010 Supp. 22-3210(d), (e)(1); and K.S.A. 60-1501, -1507(f)

STATE V. BROOKS

SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART

NO. 102,452 – OCTOBER 7, 2011

FACTS: Brooks convicted of rape, blackmail, and breach of privacy. Convictions based on Brooks accessing and copying ex-wife’s e-mails, and then demanding sexual intercourse with ex-wife or he would publicize her affair with married coworker. State argued the victim was “overcome by force or fear” in yielding to unwanted sex. Brooks appealed his convictions for rape and breach of privacy.

ISSUES: (1) Rape conviction and (2) breach of privacy

HELD: Evidence plainly supports blackmail, and that conviction is affirmed. But facts fail to satisfy statutory elements of rape as defined by Kansas Criminal Code and controlling Kansas precedent. With considerable reluctance, Brooks’ rape conviction is reversed and judgment of acquittal is entered. “Force or fear” is examined and treated as singular rather than alternative means of committing rape, pursuant to State v. Wright, 290 Kan. 194 (2010). The types of force and concomitant fear sufficient to overcome a victim under the rape statute are discussed. Under the Kansas Criminal Code, threatening to invade a person’s privacy or to expose him or her to public ignominy as a means of extracting sexual relations does not constitute rape. Court notes that the same result would be reached under Kansas criminal codification effective July 2011, and that the Model Penal Code and a number of other states have codified and criminalized this sort of extortion as felony sex offenses.

E-mail correspondence sent by the victim was private communication within meaning of the criminal breach of privacy statute, but under facts of case, Brooks did not violate that statute. No Kansas appellate decision construes “intercept” or “intercepting” as used in K.S.A. 21-4002 or the Kansas Criminal Code. Surrupitously obtaining email correspondence from the sender's account or computer file months after the communication has been transmitted does not constitute intercepting within the meaning of the breach of privacy statute. Breach of privacy conviction is reversed, judgment of acquittal is entered.

DISSENT (Hill, J.): Agrees that Brooks cannot be convicted of breach of privacy under limitations set out in K.S.A. 21-4002, but would rely on jury’s assessment of witness testimony and its finding that the victim was overcome by force and fear under the circumstances to affirm the rape conviction.


STATE V. BROWN

DOUGLAS DISTRICT COURT – AFFIRMED

NO. 104,081 – SEPTEMBER 23, 2011

FACTS: Pursuant to plea agreement, Brown entered no contest plea to two counts with dismissal of remaining counts and other cases. Prior to sentencing he filed motion to withdraw plea. District court denied the motion, finding that no good cause to withdraw the pleas had been demonstrated. Brown appealed, claiming district court erred in finding there was no showing of good cause, and alternatively, that even without such a showing the district court had discretion to allow withdrawal of pleas before sentencing.

ISSUE: Withdrawal of plea

HELD: No error by district court in failing to find Brown showed good cause to withdraw pleas, and in denying Brown’s motion to withdraw pleas. Evidence supports the district court’s findings and ultimate decision. K.S.A. 2010 Supp. 22-3210(d)(1) is interpreted to mean that a defendant must show good cause for a plea withdrawal before sentencing. If a defendant fails to show good cause, the court has no choice but to deny the defendant’s request to withdraw the plea.

STATUTE: K.S.A. 2010 Supp. 22-3210(d)(1)

STATE V. CRAWFORD

BARTON DISTRICT COURT – AFFIRMED

NO. 103,881 – SEPTEMBER 9, 2011

FACTS: Crawford convicted of aggravated kidnapping, aggravated indecent liberties with a child, and criminal threat. Continuances in case included death of Crawford’s counsel two days prior to scheduled trial date. Crawford appealed, claiming he was denied statutory right to speedy trial. Crawford also claimed prosecutorial immunity by intimidating jury during voir dire by referring to post-trial questioning of jurors if they did not convict Crawford, by misrepresenting definition of reasonable doubt and minimizing standard of proof.
during voir dire and closing argument by analogy to jigsaw puzzle, and by arguing matters outside evidence during closing argument about deputy finding oil spots at crime scene left by Crawford’s truck. Crawford also claimed district court’s comments regarding need to read jury instructions was misconduct, and claimed cumulative error denied him a fair trial. Finally, Crawford claimed error in sentencing by district judge improperly aggregating unproven and uncounseled misdemeanors to count as prior person felony, and in considering convictions not proven to jury in calculating criminal history.

ISSUES: (1) Speedy trial, (2) prosecutorial misconduct - reference to post-trial questioning of jurors, (3) prosecutorial misconduct - jigsaw puzzle analogy, (4) prosecutorial misconduct - arguing outside the evidence, (5) judicial misconduct, (6) cumulative error, and (7) sentencing

HELD: Under procedural history of case, consideration of Crawford’s speedy trial claim for first time on appeal was not necessary to serve ends of justice or prevent denial of fundamental rights. Considered in context, prosecutor’s comments during voir dire were benign and nonthreatening, and cannot be fairly characterized as a “demand” that jurors defend an acquittal.

Kansas courts have not addressed propriety of analogizing reasonable doubt to a “jigsaw puzzle.” Decisions by other courts examined. Under facts in this case, prosecutor’s comments about jigsaw puzzle were improper, but not gross and flagrant. No showing of ill will by prosecutor, district court properly instructed jury on burden of proof, and overwhelming direct evidence of Crawford’s guilt. Although Crawford not denied a fair trial in this case, this practice by prosecutors is highly discouraged.

Prosecutor’s comments accurately reflected trial testimony, and were clearly within latitude allowed prosecutors.

District court’s comment was ill-advised, but was not commentary on jury instructions substantively. District judge did not fail to read jury instructions aloud, and Crawford established no prejudice by district judge’s comment.

Single error by prosecutor in jigsaw analogy does not support cumulative error claim.

Under facts, no error in district court’s aggregation of misdemeanors or convictions. Misdemeanor conviction in which sentence imposed included no term of imprisonment did not implicite right to counsel. Apprendi claim defeated by controlling Kansas Supreme Court precedent.

STATUTE: K.S.A. 22-3402, -3402(2)

STATE V. HAMON
JOHNSON DISTRICT COURT – AFFIRMED NO. 101,954 ~ SEPTEMBER 2, 2011

FACTS: Hamon convicted of attempted second-degree murder, aggravated robbery, and felony theft. On appeal he claimed district court erred in: (1) denying motion to suppress evidence where affidavit in support of search warrant did not disclose affiant’s crimes of dishonesty; (2) denying requests for jury instructions on attempted voluntary manslaughter and self-defense; (3) giving eyewitness identification instruction; (4) denying request for new attorney in post-trial motion to dismiss; and (5) in using criminal history not proven to jury in sentencing.

ISSUES: (1) Search warrant, (2) attempted voluntary manslaughter and self-defense jury instructions, (3) eyewitness identification jury instruction, (4) right to counsel, and (5) criminal history in sentencing

HELD: District court properly denied motion to suppress. Search warrant issued for Hamon’s motel room was based on sufficient probable cause, even if material omitted about affiant’s prior crimes of dishonesty had been included in the affidavit. Hamon not entitled to jury instructions on attempted voluntary manslaughter or self-defense because no evidence of provocation to justify use of deadly force where he shot an unarmed man on the ground several feet away.

No clear error in eyewitness identification instruction PIK Crim. 3d 52.20 used at trial. No explicit rejection by Kansas Supreme Court of factors in Neil v. Biggers, 409 U.S. 188 (1972), is noted. Even if error to include degree of certainty factor, Hamon invited the error.

Hamon not entitled to a substitute attorney at hearing on hearing at Hamon’s post-trial motion to dismiss. Under facts, district court appropriately protected Hamon’s constitutional rights, and no reason to believe outcome of Hamon’s motion to dismiss his attorney would have been different if Hamon had been represented by another attorney.

No error in using Hamon’s criminal history score to calculate his sentence.

STATUTES: K.S.A. 21-3211(b), -3213, -3214(e)(1), -3402, -3403; K.S.A. 22-3414(3); and K.S.A. 60-1507

STATE V. JOHNSON
RENO DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED NO. 103,786 – SEPTEMBER 2, 2011

FACTS: Officer stopped Johnson after observing him driving in parking lot with child on lap. Johnson told officers that driver’s license was suspended, and could not provide proof of insurance. Johnson also passed field sobriety tests. Johnson arrested and cuffed for driving on suspended license and no proof of insurance. Officer then asked if he had any weapons, sharp objects, or anything else she should be aware of, and Johnson admitted to drugs in pocket. In trial to court on stipulated facts, Johnson convicted of drug offenses.

On appeal, Johnson claimed: (1) district court erred in denying motion to suppress evidence because officers extended a traffic stop without reasonable suspicion and arrested Johnson without probable cause; (2) district court erred in denying motion to suppress evidence obtained as a result of a Miranda violation by officer questioning Johnson prior to pat-down search; (4) no evidence that district court advised him of right to a jury trial; and (4) district court violated Johnson’s right to be present at all stages of his criminal proceeding.

ISSUES: (1) Probable cause to arrest, (2) custodial interrogation, (3) motion to suppress for Miranda violation, and (4) waiver of jury trial

HELD: District court did not err in denying motion to suppress evidence on ground that Johnson was illegally arrested. Safety stop was permissible. Once stopped, officer’s detection of odor of alcohol on Johnson’s breath provided sufficient grounds to extend scope and duration of stop. Arrest for driving with suspended license invalid because he was not operating vehicle on highway, but Johnson was lawfully arrested for driving on suspended license.

Officer’s question regarding sharp objects prior to pat-down search fit within public safety exception in New York v. Quares, 467 U.S. 649 (1984). Question whether “he had anything on his person that she should know about” required Miranda warnings because that question was not narrowly tailored to fit public safety exception. However, prosecution established by preponderance of evidence that drug evidence inevitably would have been discovered by law enforcement, thus no error in denying motion to suppress.

Under facts of case, Johnson failed to effectively waive right to a jury trial. Although parties stipulated that attorney advised Johnson of right to jury trial, record does not reflect that the district court personally did so as required by State v. Irving, 216 Kan. 588 (1975), which is reversible error. Case remanded to district court for further proceedings where Johnson may either exercise or properly waive right to jury trial.

Issue of whether district court violated Johnson’s right to be present at all stages of criminal proceedings is not reached.
STATE V. OTTINGER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,364 – OCTOBER 14, 2011

FACTS: Ottinger was convicted of two counts of forgery and two counts of identity fraud and received probation. Ottinger appealed the district court’s revocation of his probation, the grant of the state’s motion in limine, and his conviction and sentence for aggravated escape.

ISSUES: (1) Aggravated escape, (2) compulsion defense, (3) probation revocation, and (4) sentencing

HELD: Court held Ottinger failed to establish facts to support his compulsion defense. Neither his wife’s testimony at the limine hearing, nor his proffered testimony before the bench trial, was sufficient to support a reasonable belief that his wife was in imminent danger. His wife never communicated to him that she was actively contemplating suicide. There is no evidence, other than Ottinger’s statement, that his wife was intending to take her life at the time that he escaped. Court held the district court did not err in granting the state’s motion in limine. Court stated that Ottinger violated the conditions of his probation in four different ways: (1) he tested positive for amphetamines; (2) he failed to complete the Center’s program; (3) he admitted to having contact with his wife; and (4) he committed a felony while on probation. Court held the district court’s decision to revoke Ottinger’s probation was not arbitrary, fanciful, or unreasonable. Court stated it was duty bound to follow the Supreme Court’s decision that his criminal history does not need to be proven to a jury beyond a reasonable doubt.

STATE: K.S.A. 21-3209

STATE V. STEVENSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,115 – SEPTEMBER 16, 2011

FACTS: When officers stopped Stevenson for failing to signal turn, they detected strong odor of alcohol coming from vehicle. After Stevenson was out of vehicle and officers determined he was not under influence of alcohol, they searched vehicle for open container and discovered drugs. Stevenson arrested on drug charges. District court denied Stevenson’s motion to suppress drug evidence, finding stop was legal and odor of alcohol coming from vehicle provided probable cause to search for open container violation. Stevenson appealed.

ISSUE: Probable cause for warrantless search of vehicle

HELD: Under facts of case, following a traffic stop, the very strong odor of alcohol emanating from inside the vehicle, when sole occupant of vehicle has been excluded as source of the odor, constituted probable cause to search the vehicle for open containers of alcohol. State v. Ibarra, 282 Kan. 530 (2006), and State v. Bickerstaff, 26 Kan. App. 2d 423 (1999), are discussed. Idaho case (Wigginton), 556 U.S. 322 (2009), is distinguished.

DISSENT (Buser, J.): Based on his reading of Ibarra and Bickerstaff, would find the very strong odor of alcohol emanating from Stevenson’s vehicle, without any incriminating facts or circumstances, did not justify warrantless search of the vehicle to search for open containers. Also questions whether facts and law of Wigginton supports majority’s holding. Would reverse and remand with directions to grant motion to suppress.

STATE: K.S.A. 2008 Supp. 8-1567, -1599, -1599(b)

STATE V. WALDRUP
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 103,936 – OCTOBER 21, 2011

FACTS: Waldrup convicted of two counts of sale of cocaine. Circumstances of case included confidential informant, Waldrup’s extradition to Missouri for conviction on pending charges, mistrial after his return to Kansas, and conviction on retrial. On appeal he claimed sale of cocaine is alternative means crime based on definition of sale given to jury, and there was insufficient evidence to find him guilty of each alternative means. He also claimed he was denied right to speedy trial under constitution and under Articles III and IV of Agreement on Detainers. He also claimed district court erred in refusing to caution jury about testimony of confidential informant, in limiting cross-examination of confidential informant about specific medications, and in failing to give unanimity instruction in a multiple acts case.

ISSUES: (1) Alternative means to commit sale of cocaine, (2) right to speedy trial under agreement on detainers, (3) constitutional right to speedy trial, (4) jury instruction on confidential informant, (5) limiting cross-examination of confidential informant, (6) unanimity instruction on multiple acts, and (7) cumulative error

HELD: Issue of first impression in Kansas as to whether a jury instruction more broadly defining “sale” can create alternative means of committing a crime. Reasoning in Washington Supreme Court case is found persuasive. District court’s definitional jury instruction of term “sale” did not create alternative means of committing crime of sale of cocaine. Jury unanimity thus not at issue and Waldrup’s convictions were supported by sufficient evidence. Uniform Mandatory Disposition of Detainers Act is distinguished from Agreement on Detainers. Facts detailed, finding no violation of Waldrup’s right to speedy trial under Articles III or IV of Agreement on Detainers.

Compliance with speedy trial dictates of Agreement on Detainers does not preclude analysis of constitutional claim. Under facts of case, 23 months was a presumptively prejudicial length of time, but applying other factors in Barker v. Wingo, 407 U.S. 514 (1972), no error by district court in finding no violation of Waldrup’s constitutional right to speedy trial.

Jury instructions as a whole fairly and properly stated the applicable law, and testimony of confidential informant was neither uncorroborated nor the sole basis for Waldrup’s conviction.

District court allowed Waldrup to cross-examine witness on whether she was taking medications, the general kinds of medications being taken, and whether those medications affected her ability to remember past events. No error in limiting Waldrup’s cross-examination as to specific names of those medications.

Under facts of case, the offers to sell and the actual sales did not constitute multiple acts.

No error supports cumulative error claim.

STATUTES: K.S.A. 2010 21-36a01, -36a17, -36a01(d); K.S.A. 2006 Supp. 65-4161, -4161(a); K.S.A. 22-3402, -4301 et seq., -4401 et seq.; K.S.A. 60-401(b), -407(f), -4101 et seq., -4107(d) (1), -4107(d)(3), -4107(f)(1); and K.S.A. 2-1431, -1432, -2901 (Cottick)

STATE V. WHITT
JOHNSON DISTRICT COURT – REVERSED
AND REMANDED
NO. 105,689 – SEPTEMBER 23, 2011

FACTS: Ten-year-old K.T. was interviewed at the Sunflower House after claiming that Whitt, her great-uncle, had touched her “front” and “bottom.” During her interview, K.T. said Whitt had “put his hand inside of her underpants” and “rubbed” her vaginal area and buttocks. K.T. described at least two distinct incidents of touching, Detective Matt Campbell interviewed Whitt at the police station. Whitt and Campbell talked in an interview room for almost two hours. Whitt eventually admitted to rubbing the girl’s sides, back, and “bottom.” Whitt went on to say he had a soothing, nurturing intent when he put his hands inside the child’s underwear. He said there were times when his touching probably became inap-
appropriately, but blamed it on the “massive hurts” he was facing from the deaths of his wife and mother. After Whitt admitted touching the girl inappropriately, Campbell thanked Whitt for talking about it and left the room again. Whitt was not arrested at the end of the interview. Throughout the interview, Whitt was never restrained and never verbally or physically threatened. The two men remained civil and polite throughout the discussion. Whitt moved to suppress his statements to Campbell, claiming they were made involuntarily and in violation of his constitutional rights. The district court held a hearing and watched approximately 20 minutes of the 113 minute interview tape. The district court granted Whitt’s suppression motion. The court found that Whitt had been in custody during his interview with Campbell and should have been read his Miranda rights. The court also found that Whitt’s statements were involuntary, mostly due to Campbell’s use of questions that gave Whitt only two options — he was a child molester or a man who had made a mistake. The state timely filed this interlocutory appeal.

ISSUES: (1) Motion to suppress and (2) child-abuse confession

HELD: Court stated that Whitt was not restrained, threatened, or yelled at; the interview lasted less than two hours; only one officer was present; Whitt drove himself to and from the interview; and Whitt was told he was free to leave. Court held that in situations very similar to Whitt’s, Kansas courts have found that the interviewee was not in custody and therefore the district court’s ultimate legal conclusion does not survive a de novo review because Whitt was not in custody. As for the voluntariness of the statements, Court held the setting was not so overpowering to render the confession involuntary, the officer never claimed to have evidence that he did not have, and the officer’s tactic of only giving the defendant two options — to admit to being a sexual predator or admit that he had made a mistake — was not enough to render the confession involuntary.

STATUTE: No statutes cited.
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#### Course Schedule

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<tr>
<td>8:30 a.m.</td>
<td>Registration &amp; Continental Breakfast</td>
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<tr>
<td>9 a.m.</td>
<td>Professionally Responsible Operation of Professional Business Entities in Kansas</td>
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<td>William Quick, Polsinelli Shughart P.C., Kansas City, Mo.</td>
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<td>Kelli J. Stevens, General Counsel, Kansas Board of Healing Arts, Topeka</td>
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<td>Who is Afraid of Work Visas? Employment-Based Visas Basics for Employers of Foreign Professionals, Executives, and Athletics</td>
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<td>Pat Mack, Corporate Immigration Compliance Institute, Overland Park</td>
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<td>Kathleen A. Harvey, Kathleen A. Harvey P.A., Overland Park</td>
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<td>Kyle Vena, Baseball Operations Assistance, Kansas City Royals, Kansas City, Mo.</td>
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<td>Burton W. Warrington, President/CEO, Prairie Band LLC, Mayetta</td>
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<td>11:45 a.m.</td>
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<td>Hugh W. Gill IV, Hinkle Law Firm LLC, Wichita</td>
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<td>Nancy Schmidt Roush, Lathrop &amp; Gage LLP, Kansas City, Mo.</td>
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<td>Timothy P. O’Sullivan, Foulston Siefkin LLP, Wichita</td>
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<td>Kent A. Meyerhoff, Fleeson, Gooing, Coulson &amp; Kitch LLC, Wichita</td>
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