Lawyers in the Legislature

What Can’t They Do?
Limitations on the Power of Local Zoning Authorities

This is your last issue if you have not renewed your membership.
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Let Your Voice be Heard!
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There is a gospel song, “What Return Can I Make?” What return can I make for all the good things that the Lord has given to me? That is a question many will ponder as we begin this new year but within that question is a related question. What return can I make to my profession?

No profession is as rooted in our history and our government as the legal profession. When our government was formed, it was lawyers such as Jefferson and Adams who were at the center of the debate and the work that became our unique form of Republic.

A democratically-elected government broken into three branches, executive, legislative, and judicial.

This judicial branch has been beaten and battered but has stood the test of time. At the center of the judicial branch are the lawyers who represent the clients and argue the great causes and who, if they are good enough, become the judges that decide the great questions of our day.

The judicial branch cannot mint money, fire a single bullet, or drop even one bomb. But, by consent, it checks the power of the executive and legislative branches.

This unique idea of an independent judiciary is what distinguishes us from almost every other government.

It is no accident that throughout our history, lawyers have taken a prominent role.

When Abraham Lincoln reached for a handhold to pull himself up from poverty, he grabbed a law book. He knew that if he became a lawyer, he could stand on the strength of his arguments and, if he were good enough, he could make the living that would allow him to run for public office.

The legal profession has been assailed, but I would argue that it is as important to our society as ever. It is no accident that the civil rights movement was decided as much in the courts as it was on the streets or in the halls of Congress. The great speeches were followed by the great judicial decisions.

Our nation is at war and that war is a cross roads. When a review of our policy in Iraq was necessary, this country turned to a group of seasoned public servants. The Iraq Study Group is composed of 10 members, of whom eight are lawyers. This is no accident. Lawyers continue to play a vital role in our society.


This is indeed a noble profession. I am proud to be a lawyer and proud to stand with you. What return can I make to this profession that has provided me a living, fed my family, and given my life meaning? It is unlikely that I will ever be president of the United States or governor of Kansas or even mayor of Dodge City, but I can make a contribution to this noble profession of ours.

My New Year’s resolution is to protect and defend this profession. This can be done in very simple ways.

Last year I wrote a letter to the editor of the Dodge City Daily Globe (see the next page). I simply pointed out some of the good things that lawyers in our community have done. To my surprise, the letter was printed. An old friend, a veterinarian of more than 50 years in practice, approached me after this letter appeared in the paper. He told me that he appreciated my point and that he wished someone would do something similar for veterinarians. He smiled and, as he parted, he taught me the secret veterinary handshake. If you see me, I will be happy to demonstrate it to you (in total confidence, of course).

I reprint this letter as a demonstration of how easy it is to shine a light on the good things that lawyers are doing.

There are few charitable boards that don’t include a lawyer member. There is not an army that goes to war, including the war in Iraq, where lawyers do not serve. There are very few church fund drives or charity raffles or soup kitchens that don’t have lawyer volunteers. In short, people turn to lawyers in times of need and crisis and that is how it should be, that is how it has been and that is how it will be.

I wish all of you a prosperous New Year! ■

David J. Rebein can be reached at drebein@rebeinbangerter.com or by phone at (620) 227-8126. Visit President Rebein on the Web at www.rebeinbangerter.com.
Lawyers making a difference in Dodge City

Dodge City Daily Globe, Aug. 18, 2006

It is my honor to serve as president of the Kansas Bar Association and more than 6,500 lawyer members. As president, my job is to protect and defend the legal profession. I believe that the best defense is a good offense. Rather than respond to criticism of lawyers, I choose to simply point out the good that lawyers do, right here, and in plain sight.

Here are 10 Dodge City heroes:
1. David Snapp serves on the Board of Arrowhead West and has devoted more than 20 years of service to the Boy Scouts.
2. Daniel Love is current president of the Kansas District Judges Association and is a past chairman of United Way and has been extremely involved in the Dodge City community.
3. Larry Daniels has served for more than a decade on the criminal appointment list accepting criminal appointees by the court as a reduced fee. Larry recently returned from cancer chemotherapy to defend an indigent defendant in a case before a jury.
4. Ken Strobel has served for more than two decades on the Development Corporation and the Chamber of Commerce. In that time, he has assisted in bringing new business to Dodge City and in the expansion of existing businesses.
5. Glenn Kerbs serves not only as County Counselor and as the attorney for the Dodge City Community College but also has been instrumental in promoting baseball in Dodge City.
6. Aaron Kite serves on the Board of Directors of New Chance Inc.
7. Terry Malone serves as trustee on the Dodge City Community College Board.
8. Tamara Davis is past president of the Dodge City Depot board of directors and was instrumental in obtaining financing and in the fundraising for the completion of the depot project.
9. Jack Dalton, Dean of Dodge City lawyers and past president of the Kansas Bar Association, has also been active in the Chamber of Commerce. Jack and his wife, Jane, formed a group to help cancer victims deal with their disease and to move on with their lives.
10. Jae Lee has been a tireless advocate for children and has represented literally hundreds of children in need of care cases.

I could easily name more lawyers and the good work that they do. You could too. If you see these lawyers out and about, tell them thanks for all they do for the good of Dodge City and the state of Kansas.

David J. Rebein
President, Kansas Bar Association

Casemaker Online Legal Research

Casemaker is a comprehensive online legal research library and search engine that offers timely and accurate results. This powerful research tool provides KBA members with free and unlimited access to a wealth of legal research materials, including both state and federal case law, statutes, regulations and much more. There are no monthly or hourly fees, and access is available 24 hours a day!

Whether you are a solo practitioner or member of a large firm, Casemaker provides KBA members a unique opportunity to save time and money by allowing them to do a significant amount of legal research for free!

We are certain that you will find Casemaker to be an invaluable research tool as well as the most exciting member benefit the KBA has ever introduced! For more information or to login to Casemaker, visit the KBA Web site at www.ksbar.org. Enter the e-mail address you have on file with the KBA as your User Name and your KBA membership number as your Password. If you have questions, please contact Bar Headquarters at (785) 234-5696 or at casemaker@ksbar.org.
Young Lawyers Encourage High School Students to Choose a Legal Career

By Paul T. Davis, KBA Young Lawyers Section president

Do you remember career day when you were in high school? Perhaps it was a police officer or a doctor that came to visit your class and told you about their profession. Or perhaps it was a lawyer who inspired you to seek a career in the law.

During the next several months, members of the KBA Young Lawyers Section (YLS) will be traveling to many Kansas high schools to talk with students about what it is like to be a lawyer and to encourage them to think about the law as their future profession. This is all part of a public service project that the YLS is implementing this year. The project, which is called “Choose Law,” is the special service project of the American Bar Association Young Lawyers Division (YLD) for 2006-2007.

The Choose Law project is targeted at high school students with an emphasis on reaching out to minority students. This is because minorities continue to be under represented in the legal profession and the YLD believes young lawyers should play a major role in recruiting minorities to the profession. A survey conducted a few years ago by the U.S. Census Bureau showed that attorneys of color made up less than 15 percent of the profession while individuals of color made up approximately 30 percent of the U.S. population.

The project begins with a description of the role of lawyers in our society. It challenges students to imagine a world without rules and demonstrates to them the importance of keeping order in society and ensuring that each of them have certain rights with which they can conduct their lives. Students are told that rules mean nothing if they are not protected and enforced. This is where lawyers play a critical role.

Students are told about the importance of the Constitution and that beneath it is a very complicated set of rules that often have to be applied to many different situations. Judges are the ones that decide how rules are interpreted and applied. And in the cases where interpreting these rules is difficult, individual citizens often have to seek an advocate who will represent him or her. The students are also given examples of when the government, a business, or another individual infringes upon their constitutional rights. It is the job of a lawyer to aid that individual in making sure that the wrong is remedied and that it doesn’t happen again.

A description of the different areas of law is given to students. So no matter what their interest is, whether it be sports or the environment or computers, there is an area of law that will suit them. Students are also told about how lawyers help shape the law with examples like how Thurgood Marshall took Brown v. Board of Education to the U.S. Supreme Court and helped change how our public schools operate.

Students are shown the path to how they can become a lawyer. The first step being college. Students are encouraged to choose courses that they enjoy in college and make grades a priority. We tell them that if they excel in the classroom, they will have an opportunity to be accepted to a law school. Students are also encouraged to seek a part-time job at a law office or government agency. Minority students are told that law schools and law firms are seeking persons of color and that there are opportunities for them. We also try to emphasize that a career in the law can help them aid other minorities.

The YLS is tremendously excited about this project. Many of us were inspired to pursue a career in the law by an attorney who spoke to us when we were in junior high or high school. I vividly remember taking a class at Lawrence High School called “Law in Society.” My teacher brought in a number of attorneys and a couple of judges to speak to the class. I was already interested in the law at that point, but this exposure to persons in the legal profession definitely sealed my desire to become a lawyer. Hopefully, we can provide the same inspiration to Kansas high school students from across the state.

If you or someone from your law firm is interested in speaking to a high school class about the Choose Law project, please contact me. Additionally, more information about the project is available at www.abayld.org/chooselaw.

About the Author

Paul T. Davis is a partner with the firm of Skepnek Fagan Meyer & Davis P.A., Lawrence. He may be reached by phone at (785) 331-0300 or by e-mail at pauldavis@sunflower.com.
What is IOLTA?

IOLTA is the acronym for the Interest on Lawyers’ Trust Account program, which was established by Kansas Supreme Court in 1984. Under the IOLTA program, a lawyer is permitted and encouraged to make the lawyer trust account productive for the profession. IOLTA is designed for short-term and nominal deposits of client funds that would ordinarily be pooled in a noninterest bearing account. When interest from multiple accounts is pooled, they produce significant amounts of revenue for law-related charitable public service projects. The Kansas Bar Foundation administers the IOLTA program and collects the interest on these accounts statewide. The revenue is then used to fund civil legal services for the poor and legal programs to improve the administration of justice.

The program also assumes bank service charges and fees on the account that result from the establishment of an account. Participation in the program is voluntary for both the financial institutions and Kansas lawyers. At this time, approximately 3,200 lawyers and 130 financial institutions participate in the Kansas program.

Programs funded by IOLTA

Since its creation, the Kansas IOLTA program has generated more than $2.5 million in grant funds used primarily for funding civil legal services for the poor, law-related education projects, and administration of justice. In the past, grants to civil legal service programs have focused on assisting victims of domestic violence, children, and the elderly, assisting with local and state bar pro bono and reduced fee programs, and providing technical support for legal service staff.

Past law-related education projects funded include rights and responsibilities booklets for young people, peer mediation projects in schools, a statewide mock trial competition, and a free newsletter for teachers that contains legal topics and lesson plans.

Help make a difference!

The IOLTA program grew in 2006, which allows the KBF Board of Trustees to help more organizations in 2007. We want to continue to grow.

Being a part of the program is easy. All you have to do is fill out an application and set-up the account at an approved bank. The KBF and your bank do the rest. A list of approved financial institutions can be found on the Kansas Disciplinary Administrator’s Web site.

If you have opted out, please consider joining this important program.

If you would like more information about IOLTA, please contact the Kansas Bar Foundation at (785) 234-5696 or visit www.ksbar.org and click on Kansas Bar Foundation.

IOLTA Honor Roll

We are so thankful to the many financial institutions that help make the IOLTA program possible and the attorneys who decide to make a difference. We recognize our honor roll financial institutions based on the net yield of interest rates paid. They are recognized in the KBA Journal, on the KBA Web site, and when an attorney inquires wanting to participate. We have seen attorneys change financial institutions based on whether an institution participates in IOLTA program or not. If your bank/credit union does not participate, please express your interest.

- **Gold** includes financial institutions paying a net yield of 2.5 percent or higher on all IOLTA accounts,
- **Silver** includes financial institutions paying a net yield of 2 to 2.49 percent, and
- **Bronze** includes financial institutions paying a net yield of 1.5 to 1.99 percent.

### Honor Roll of IOLTA Banks

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<th>Gold</th>
<th>Silver</th>
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<tbody>
<tr>
<td>The Bank, Atwood Guaranty State Bank &amp; Trust Co, Beloit State Bank, Hoxie</td>
<td>First Commerce Bank, Marysville First National Bank, Phillipsburg The Farmers State Bank, Oakley</td>
</tr>
</tbody>
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<table>
<thead>
<tr>
<th>Bronze</th>
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<tbody>
<tr>
<td>Girard National Bank, Girard Heritage Bank, Topeka Yates Center Branch Bank The Bank of Denton Western State Bank, Garden City</td>
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Advance Notice: Elections for 2007 KBA Officers and Board of Governors

It’s not too early to start thinking about KBA leadership positions for the 2007-2008 leadership year.

- **KBA President-elect** (Current – Linda S. Parks, Wichita)
- **KBA Vice President** (Current – Ernest C. Ballweg, Overland Park)
- **KBA Secretary-Treasurer** (Current – Thomas E. Wright, Topeka)

The KBA Nominating Committee, chaired by Rich Hayse, Topeka, is seeking information about individuals who are interested in serving in the positions of president-elect, vice president, and secretary-treasurer of the Kansas Bar Association. If you are interested, or know someone who should be considered, please send detailed information to Jeffrey Alderman, KBA Executive Director, P.O. Box 1037, Topeka, KS 66601-1037, by Jan. 12, 2007. This information will be distributed to the Nominating Committee prior to its meeting on Jan. 26, 2007.

**Board of Governors**

There will be five positions on the KBA Board of Governors up for election in 2007. Candidates seeking a position on the Board of Governors must file a nominating petition — signed by at least 25 KBA members from that district — with Jeffrey Alderman by March 9, 2007. If no one files a petition by March 9, the Nominating Committee will reconvene and nominate one or more candidates for open positions on the Board of Governors. KBA districts with seats on the Board of Governors up for election in 2007 are:

- **District 1:** Incumbent Kip A. Kubin is eligible for re-election. Johnson County
- **District 2:** Incumbent Jeffrey S. Southard is not eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties
- **District 7:** Incumbent Laura L. Ice is eligible for re-election. Sedgwick County
- **District 9:** Incumbent Hon. Kim R. Schroeder is eligible for re-election. Clark, Comanche, Edwards, Finney, Ford, Grant, Gray, Greeley, Hamilton, Haskell, Hodgeman, Kearney, Kiowa, Lane, Meade, Morton, Ness, Pawnee, Rush, Scott, Seward, Stanton, Stevens and Wichita counties
- **District 11:** Incumbent Melissa A. Taylor Standridge is eligible for re-election. Wyandotte County

**KBA Delegate to ABA House of Delegates:** Sara S. Beezley is eligible for re-election.

For more information:

Petitions for the Board of Governors can be obtained by contacting Becky Hendricks at the KBA office at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.

If you have any questions about the KBA nominating or election process or serving as an officer or member of the Board of Governors, please contact Rich Hayse at (785) 232-2662 or via e-mail at rhayse@morrislaing.com or Jeffrey Alderman at (785) 234-5696 or via e-mail at jalderman@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2007 KBA Awards. These awards will be presented at the KBA Annual Meeting in Wichita, June 7-9. Below is an explanation of each award, and a nomination form can be found on Page 10. The Awards Committee, chaired by Anne Burke Miller, Manhattan, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee's attention!

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

- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

Distinguished Service Award: This award recognizes an individual for continuous longstanding service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

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

Outstanding Young Lawyer: This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Outstanding Service Awards: These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize:
- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

Pro Bono Award: This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

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

Distinguished Government Service Award: This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award: The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council's request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

Note: Nomination form on Page 10.
KBA Awards Nomination Form

Nominee's Name ________________________________

- Phil Lewis Medal of Distinction
- Outstanding Service Award
- Outstanding Young Lawyer Award
- Distinguished Government Service Award
- Distinguished Service Award
- Professionalism Award
- Pro Bono Award/Certificates
- Courageous Attorney Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

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Travel Mysteries: Can Someone Please Solve?

By Matthew Keenan, Shook, Hardy & Bacon, Kansas City, Mo.

I have questions that need answering. Someone please take the challenge and send me an e-mail. Here are my top Travel Mysteries. I was hoping to limit it to 10, but the number kept growing. So, 11 it will be.

1. Airport shopping. Why do companies rent shops in terminals to sell things other than magazines and books? For example, who is the brain surgeon who thinks people will buy Brooks Brothers shirts before they catch their plane? Who are the poor saps who have to sell golf shoes there? Or Johnston and Murphy shoes after they passed through security?

2. Airport security. This nugget is full of mysteries. Like where did they hire them? McDonalds? Walmart? Mars? What was their training? If it’s X-ray vision, why do you have to take the laptop out? Why do I need to show my boarding pass three times at the airport at Minneapolis but only once in Kansas City? Are there more terrorists in Minnesota? Why is toothpaste a security risk? Maybe the Transportation Security Administration people could use the toothpaste they have confiscated from me. What is special about “special screening?” Does the man who checks my boarding pass actually read my driver’s license? I’ve wondered what he would do if my name read “O. Bin Laden.” Would he still smile at me and say, “Have a safe flight?”

3. Airline mumbo jumbo. Why do they say it’s a “no smoking” flight? No one has lit a cig on a plane for 30 years. It would make more sense to say, “This is a no hijacking flight.” Why don’t they say that? It is more probable than someone firing up a Marlboro Light.

4. Luggage. Who checks luggage these days? And why? Anyone who checks luggage has never watched them load it on the plane. Who would bring a dog on a plane? When it starts to bark, how do they sedate them?

5. KCI mysteries. Our airport has a million mysteries. I know, since I have celebrated birthdays out there. Let’s start with location. Who was the Nobel Prize winner who decided to build KCI in southern Nebraska. Who did the bathroom planning? What rocket scientist operates the parking buses that take you from one terminal to the next? How long are their breaks? How many jobs did they get fired from to qualify for this job? I read the other day where Kansas City wants more conventions. Kansas City politicians sit around discussing how to get more conventions here. I have a suggestion – offer airplane shuttle service from KCI to the downtown airport. That might help bring in the Wal-Mart regional sales force. Maybe Popular Bluff, Mo., is offering them some huge inducements, but that’s too close to call.

6. Open seating. What makes the seat next to me attractive to the largest person on board? Why do the teenagers who got dropped off by divorced parent No. 1 en route to parent No. 2 sit behind me and push my seat the entire way to Baltimore?

7. Sky Mall magazine. Who would ever order anything from the catalog they stick in the seat in front of you? Some of the wonderful items offered there include the advanced large capacity feline drinking fountain, the pet Murphy bed, the high performance inflatable kayak, the realistic boulder you place over what they call “yard problems,” and the pet staircase. It says, “not offered in stores.” Call me shocked.


9. Airplane bathrooms. Why are airplane bathrooms designed for passengers who are 4 feet tall? Are their really marshals on flights? What poor marshal flies the connection between KCI and Tulsa?

10. Bottled water in the room. Who opens the bottled water that’s been sitting in the hotel room? That same bottle that’s been warmed to 80 degrees, and for the privilege you pay $5 a pop. A used toothbrush would be more attractive.

11. Mini-bars. This raises a ton of mysteries. Like how did they get their name? Some focus group of little people? And who uses them? Who pays $9 for a pack of peanuts? And how long have they sat in that bar? Ten years? Who likes to fix a drink with a 2-inch bottle of Jack Daniels?

I have more mysteries but I have to catch a flight at KCI, and I need to allow four hours to get there.

About the Author

Matthew Keenan grew up in Great Bend and attended the University of Kansas, where he received his B.A. in 1981 and his J.D. in 1984. For the last 21 years, Keenan has practiced with Shook, Hardy & Bacon. He may be reached at mkeenan@shb.com.
Haney Takes Experience into the Realm of Fiction

By Susan McKaskle, managing editor

Topeka attorney Tom Haney has tried more than 135 criminal and civil jury cases in his 35 years of trial work. He drew on that experience to write his first novel, “Accused by the State.”

“I have written mostly non-fiction work before,” Haney said. “Although I’ve been accused by opposing counsel of delving into the realm of fiction.”

Haney said the premise for the book came from a time when he heard a lawyer say, “Defending the guilty is challenging and difficult, defending the innocent is terrifying.”

“I’ve come to realize that is true,” he said.

He has always enjoyed writing and thought of writing a novel as a challenge.

“I didn’t plan to give up my day job, but enjoyed the journey,” Haney said. “And, the book is an ice breaker for new clients and attorneys.”

“Accused by the State” took about a year and half of on and off writing to complete.

“Luckily, I never had writer’s block and once the book started, the characters just started to speak for themselves,” he said. “At the end of some writing sessions, I was amazed at what I had written. Sometimes it was pretty good and sometimes it went in file 13. The characters just had a mind of their own.”

In reading Haney’s novel you will meet the central character, the attorney defending the accused. You may notice the similarity of his name, Tom Holly, to that of the author. The name choice was no accident.

“Since it’s my book I could name the central character anything I want to,” Haney said. “Also, using familiar names helped keep the characters straight.”

Haney explained that his wife’s, Barb, personality came out in one of the central characters. Although all of the characters are entirely fictional there is a lot of his wife of 37 years in Barbara Holly, an appellate court judge. Again, he used a familiar name for a character.

Reviews from Haney’s friends and acquaintances, who have read his book, have been positive.

“I’ve even had several judges compliment me,” he said. “Of course several of these jurists have commented in the past that my legal briefs were thought provoking, innovative, and creative. That’s kind of like saying the law is against you, but good try.”

Haney went on to say, “It is a real pleasure to have a contemporary or client say he or she enjoyed the book or to ask questions about the plot or settings. I don’t plan to change careers, but I’m pleased it’s been well received.”

Haney is of counsel with the Topeka firm of Wright, Henson, Clark, Hutton, Mudrick & Gragson LLP. His practice is 50 percent civil and 50 percent criminal.

He is a 1970 graduate of Kansas State University and is currently the international legal advisor for his fraternity, Delta Chi. He received his juris doctorate from Washburn University School of Law in 1973 and is admitted to practice in Kansas and before the U.S. Supreme Court.

Haney has served as an assistant Shawnee County district attorney, Chief of Criminal Division for the Kansas Attorney General’s Office, and assistant U.S. attorney in charge of the Topeka office.

He is a member of the American and Kansas Bar associations. He has written for the KBA journal and the “Criminal Defense Strategy” chapter for the KBA Kansas Criminal Law and Procedure Handbook.

Haney has one completed unpublished novel and is working on a third. He explained that the unpublished work has too much resemblance to a case he handled several years ago and will either need a substantial rewrite or releases from the clients. The third manuscript is entirely fictional and set in Kansas City, Mo.

“Accused by the State” — A Short Review

If you are familiar with small farm communities in Southeast Kansas you might recognize the setting for “Accused by the State.”

It is a fast pace read from start to finish and will keep you wondering what can possibly happen next. Although Howard Eckels and his son-in-law are the accused; they, their family, and the situation will have you rooting for them.

Attorney Tom Holly knows criminal law like the back of his hand and is ready for whatever the Attorney General’s Office throws his way.

When you near the end of the book, you will be saddened by the toll the case has taken on the Eckels family. But, more than that the ending is totally unexpected. It will startle you and cause some deep thought about the premise of the tale.

I have read “Accused by the State” twice and as an avid reader, highly recommend it.
The Law Firm of Goodell, Stratton, Edmonds & Palmer LLP, Topeka, celebrated its 125th year during 2006. Bennett R. Wheeler, started the firm after graduating from Boston University and heading west to Kansas. Through the years, the firm has grown by focusing on specific practice areas including health care, real estate, environmental law, taxation, corporate law, commercial litigation, personal injury law, employment law, and insurance defense.

“Our success is based upon providing the best legal services for the best possible price. In addition, we cultivate an organizational culture that serves generation after generation of companies and families. Clients tend to stay with us for a long time,” said H. Philip Elwood, managing partner, a practicing member of the firm for more than 35 years. "For example, we started focusing on the area of health law in the 1930s, long before it was either popular or profitable."

The scrapbooks of the firm’s history tell an interesting tale. Throughout the history of the city and state, lawyers associated with Goodell, Stratton, Edmonds & Palmer have influenced the news of the day.

Sardius M. Brewster, who served as Kansas Attorney General (1915-19) and a U.S. district attorney (1930-34) was a partner and was called upon by Kansas Gov. Alf Landon as special prosecutor to lead the prosecution of the principal defendant in the famous Finney Bond Scandal of 1933-34. As the story of the statewide scandal grew, Lester Goodell, then serving as Shawnee County attorney, joined in the prosecution. Some years later, Goodell would gain national attention as the lead trial attorney for the Topeka school board in Brown v. Board of Education.

In the 1920s, the partners financed the education of one of their legal secretaries, Margaret McGurnaghan, who attended Washburn University School of Law. She graduated in 1927 at 51 years of age. In addition to becoming the first female partner in a major Kansas law firm, she became one of the first women to join the Kansas Bar Association. She practiced law in the firm for 33 years and wrote the Kansas Title Standards.

Other recognizable attorneys who have been associated with the firm include: John L. Hunt, an assistant U.S. district attorney; and Marla Luckert, a district judge in Shawnee County, a chief judge of the 3rd Judicial District, and the second woman to be appointed to the Kansas Supreme Court. In addition, former Kansas Secretary of Agriculture and U.S. Sen. Sam Brownback was associated with the firm in the early 1990s.

Goodell, Stratton, Edmonds & Palmer has taken seriously its support of the Topeka and Kansas Bar associations. Gerald L. Goodell, Wayne T. Stratton, Patrick M. Salsbury, and Arthur E. Palmer have served as president of the Topeka Bar Association; and Goodell also served as president of the Kansas Bar Association.

The firm’s commitment to Topeka has been steadfast. Today their offices are located at 515 S. Kansas, just a few steps away from 525 Kansas, where the firm had their original offices in 1881 and the Columbian Building at 112 S.W. Sixth Ave. where the firm office from the 1920s to 1970.

The firm remains dedicated to the legal profession and its positive influence on the community and state. Scholarships and awards at Washburn University and the University of Kansas law schools carry the names of past partners. The Lester Goodell Award at Washburn Law School, established in 1969, is made annually for participation in moot court. The John Ensley Memorial Award was established by Elizabeth Ensley in 1999 for a Washburn Law School student who demonstrates outstanding legal writing. The Robert Edmonds Endowed Award at the University of Kansas School of Law was started in 2002 with a gift from the firm, and will be permanently endowed through the estate of Robert (Bob) Edmond’s widow, Oreen.

Today, the firm is the largest in Topeka and serves clients across Kansas and the Midwest. It is a law firm steeped in Topeka and Kansas history, and a rich tradition in the legal profession.
Community. How important is your community to you? I am a Modern Orthodox Jew, and in the Orthodox Jewish world, one's community is everything. In Ethics of our Fathers, Chapter 2, Verse 5, Rabbi Hillel is quoted as saying, “Do not separate from the community, do not trust yourself till the day you die ....” Hillel says this because one's community is the group of people that helps one to remain observant in one's faith. The people one spends every Sabbath with, invite to joyous occasions, and help remind one that even in this predominantly Christian society, one can survive and be proud to be Jewish. In the Jewish world, one's community is one's identity.

In August 2005, I became a student at Washburn University School of Law. As one might imagine, there is almost no Jewish community at Washburn. Most people advised me that going to Washburn would be a bad idea if I wanted to maintain my connection to Judaism. How would I meet a husband, keep Kosher, or grow spiritually? Most importantly, how would I remain observant without my community directly there, keeping me connected? Being completely separated from my identity could mean I would lose it altogether. My family had a hard time understanding why I would want to make my life as an observant Jew more difficult than it already was. I was in essence isolating myself from everything I had ever known. How would I survive?

It's amazing how strong people will hold to their convictions when faced with a difficult decision. For a Jew, the dilemma is obvious. Assimilate and be accepted, or diverge and be misunderstood. Having been raised in a strong community, I had always deeply identified with my Jewish heritage. My grandparents are Holocaust survivors, and my parents are staunch Zionists. Judaism is not only a belief system — it is who I am. Because I grew up in such a strong Jewish community, I never had to explain to people that I am Jewish. Certainly, coming to Washburn, it would have been easier to assimilate. There are parties on Friday nights, pizza at school meetings, and secret Santa gift exchanges. I figured that if I wanted to fit in, I had to assimilate. However, Washburn taught me that I was wrong.

I had been to one “welcome new students” event prior to the beginning of school, and although everyone was very friendly, I was still a bit apprehensive about leaving my community behind. I had heard from several lawyers who attended Washburn that what they liked best about the school was the feeling of a family and a community, but I still was not sure if Washburn was going to work for me as an observant Jew. However, when school started, I had no problem making friends. My peers were as anxious as I was about the study of law, and we were never at a loss for topics between the reading assignments and our much-anticipated legal memo.

As I learned more about people, I discovered that most of the students were from west of Kansas City. I had known only Kansas City, if that, and must admit that I had preconceived notions about farm life. How were these people from small, isolated towns going to react to the fact that I am Jewish?

I learned at a very young age that people are not innately prejudiced; people are simply afraid of the unknown. As little as I knew about Kansas, fellow students from Kansas equally did not know about Judaism. I decided the best way to let people know I was Jewish was to just tell them; and that is exactly what I did.

I expected people to be tolerant, but much to my surprise, everyone was overwhelmingly accepting of me and my faith. The fact that I am Jewish didn’t even faze them. It became a hot topic of discussion, with students and professors equally curious about my religion. I discovered that I had not lost a connection to my community; I had gained a new community. When the time came and I had to miss school for Jewish holidays, my peers shared their class notes with me, and professors even recorded classes so I would not fall behind. I was not all alone like I had thought, but I was part of a new community, the Washburn community. I am proof that an Orthodox Jew or anyone can make it anywhere by just taking a leap of faith.

About the Author

Shira Megerman is a second-year law student at Washburn University. She was born and raised in Kansas City, Mo., but presently resides in Overland Park. She went to the University of Texas at Austin for her undergraduate degree, and has a B.A. in Middle Eastern archaeology. When she graduates, she hopes to work in family law, with her focus on child protection.

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Kansas Legal Services Names New Executive Director

Kansas Legal Services (KLS), a widespread nonprofit agency providing legal, mediation, and employment training services to low-income Kansans, has named Marilyn Harp as its new executive director.

The organization was led by Roger McCollister for its entire 29-year history. Following McCollister’s retirement, Harp was appointed to lead KLS, which serves approximately 30,000 low-income clients each year.

“We want to continue making services available to low-income and other people with barriers in accessing the legal system,” said Harp, who, since 1979, has served KLS as a staff attorney, managing attorney in Wichita, and regional director. In that time, she has championed accessibility of legal services by founding and directing the Elder Law Hotline, Lawyer Advice Line, and Central Intake Line. She was also instrumental in developing Kansas Support Services for Elders and the Juvenile Detention Program.

Harp holds a juris doctorate from the University of Kansas School of Law and a Bachelor of Social Work degree from the University of Kansas School of Social Welfare. She served as a board member of the Kansas Bar Association, Step Stone (a housing program for domestic violence victims) and Alternative Gifts (a fundraising agency for worldwide relief efforts), for whom she is the current board president. In addition, she served as chairman for Operation Holiday and co-chair for the Women’s Equality Coalition, which named her Woman of the Year in 1990. Her awards also include three Outstanding Service Awards from the Kansas Bar Association, the Liberty Bell Award from Butler County Bar Association, the YWCA Women of Valor Award, the Louise Mattox Attorney of Achievement Award from the Wichita Women Attorneys Association, the Elizabeth Ferguson Excellence Award from KLS, and the Wichita Bar Association President’s Award.

Harp has also taught a course on women and the law as adjunct faculty at Wichita State University, Wichita.

As KLS approaches its 30-year anniversary, Harp’s leadership priorities include improving technology within KLS’ 14 offices across the state and engaging more private attorneys in the organization’s mission.

“We need to get more lawyers involved in helping meet the great need for legal services,” Harp said. “I’m excited for the future of Kansas Legal Services.”

Marilyn Harp

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2006 Outstanding Speakers Recognition

The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our continuing legal education seminars for September through December 2006. Your commitment and invaluable contribution is truly appreciated.

Tony L. Atterbury, Depew Gillen Rathburn & McInteer L.C., Wichita
Thomas J. “Tom” Bath Jr., Bath & Edmonds P.A., Overland Park
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Rudolf H. Beese, Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.
David J. Brown, The Law Offices of David J. Brown L.C., Lawrence
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(continued on next page)
Recognition of 2006 Journal Authors

The Kansas Bar Association and its Journal Board of Editors would like to extend a special thank you to the following authors who gave their time and expertise in writing substantive legal articles for the Journal of the Kansas Bar Association. Your commitment and contribution is greatly appreciated.

Joan K. Archer, Stinson Morison Hecker LLP, Kansas City, Mo., “Joint Defense/ Common Interest Privilege in Kansas” (February)

J. Nick Badgerow, Spencer Fane Britt & Browne LLP, Overland Park, “From Solo to Megafirm: You Need a ‘General Counsel’” (January)

Christopher E. Burger, Stevens & Brand LLP, Lawrence, “The Fairness in Private Construction Contract Act: Legislative Fairness or Oxymoron?” (May)

Ron Campbell, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, “Comparison of Federal and State Court Practice” (April)

Jeffrey A. Deines, Lentz & Clark P.A., Overland Park, “A Hitchhiker’s guide to Consumer Bankruptcy Reform” (November/December)

Martin Dickinson, Robert Schroeder Professor of Law, University of Kansas, Lawrence, “The New Kansas Estate Tax” (September)

Stephanie J. Haggard, Clarke & Haggard LLC, Lawrence, “Protecting Medicare’s Interests in Kansas Workers’ Compensation Settlements — Simplifying the Maze” (January)

Cynthia L. Kelly, Kansas Association of School Boards, Topeka, “Individuals with Disabilities Education Act — The ‘IDEA for all Childrens Education” (March)

Suzanne Carey McAllister, University of Kansas School of Law, Lawrence, “What’s Become of Grandma, Grandpa, and the Troxels? An Update on Grandparent Visitation Rights in Kansas” (July/August)

Charles E. Millsap, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, “Comparison of Federal and State Court Practice” (April)

Ryan M. Peck, Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita, “Title VII is Color Blind: The Law of Reverse Discrimination” (June)


Nancy Schmidt Roush, Shook, Hardy & Bacon LLP, Kansas City, Mo., “The New Kansas Estate Tax” (September)

David G. Seely, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, “Comparison of Federal and State Court Practice” (April)


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(Continued from Page 16)

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Marty M. Snyder, Kansas Attorney General’s Office, Topeka
Charles C. “Chris” Steincamp, Depew Gillen Rathbun & McIntee L.C., Wichita
William P. “Bill” Tretbar, Fleeson, Gooing, Coulson & Kitch LLC, Wichita

Hon. Linda S. Trigg, District Magistrate Judge, Johnson County District Court, Olathe
Brian M. Vazquez, Estate Recovery Program, Topeka
Lyndon W. Vix, Fleeson, Gooing, Coulson & Kitch LLC, Wichita
Diane L. Waters, Bennett Bodine & Waters P.A., Shawnee
Bruce B. Waugh, Gilliland and Hayes, Kansas City, Mo.
Lisa A. Weixelman, Polsinelli Shalton Welte Suelthaus P.C., Kansas City, Mo.
James J. “Jim” Welch, Kansas Insurance Department, Topeka
Molly M. Wood, Stevens & Brand LLP, Lawrence
Lori E. Worley, Polsinelli Shalton Welte Suelthaus P.C., Kansas City, Mo.
Thomas E. Wright, Wright, Henson, Clark, Hutton, Mudrick & Gragson LLP, Topeka
Members in the News

CHANGING POSITIONS

Laura J. Bach has joined Parmele Law Firm, Wichita.
LeAnn M. Berry has joined the Kansas Department of Social and Rehabilitation Services, Topeka.
Patrice M. Brown has joined Hill's Pet Nutrition, Topeka.
Lisa A. Brunner and Amber F. Van Hauen have joined Husch & Eppenberger LLP, St. Louis. Patrick T. Smith has joined the firm's Kansas City, Mo., office as of counsel.
Sandra J. Clark has joined Brooke Corp., Phillipsburg.
Jeffrey W. Deane has joined Swiss Re, Shawnee.
William J. Denton has joined Shook, Hardy & Bacon LLP, Kansas City, Mo.
Nathaniel C. Foreman has joined Yoxall, Antrim, Fitzgerald & McCaffrey LLP, Liberal.
Gavin Fritton has joined Lockton Companies, Kansas City, Mo.
Matthew P. Gaus has joined Thompson, Ransdell & Qualseth P.A., Lawrence.
Kelly N. Goodwin has joined 10th Judicial District Public Defender's Office, Olathe.
Travis B. Harrod has joined the Ford County Attorney's Office, Dodge City.
James C. Holland has joined Associated Wholesale Grocers Inc., Kansas City, Kan.
Kimberly J. Ireland has joined the Law Office of Aaron C. McKeever LLC, Lenexa.
Derek G. Johannsen, Schalie A. Johnson, and Alex B. Judd have joined Wallace, Saunders, Austin, Brown & Enochs Ch., Overland Park. Ryan D. Weltz has joined the firm's Wichita office.
Robert E. Johnson II has joined Apt Law Offices, Iola.
Andrew M. Jones has joined AT&T Communications, Austin, Texas.
Kimberly B. King has joined the County Attorney's Office for Chautauqua County, Sedan.
Kevin D. Mason and Robert M. Swiss have joined Martin, Leigh, Laws & Fritzlen P.C., Kansas City, Mo.
Lance A. Miller and Peter L. Summers have joined Westar Energy, Topeka.
Michelle Kristine Moe has joined Joseph & Hollander, P.A., Wichita.
Jason A. Orr has joined Roe Epstein Law Firm, Kansas City, Mo.
Adam T. Pankratz and Marcia A. Wood have joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.
Carol M. Park has joined Glassman Bird Braun & Schwartz LLP, Hays.
Brett C. Randol has joined Polsinelli, Shalton, Welte, Suelthaus P.C., Overland Park.
Brooke R. Rank has joined Doerling & Associates P.C., Kansas City, Mo.
Teresa L. Rhodd has joined the office of Jan Hamilton, Chapter 13 Trustee, Topeka.
Hillary J. Spellman has joined Findley Miller Cashman Schmidt & Hill, Hiawatha.
Kevin K. Stephenson has joined the Nebraska Attorney General's Office, Lincoln.
Sheila M. Thiele has joined the Murphy Law Firm P.A., Overland Park.
Jason J. Tupman has joined the Salina Public Defender's Office.
Christina Marie Waugh has joined the Kansas Appellate Defender's Office, Topeka.
Christy Lynn West has joined Martin, Dell, Swearer & Shaftner LLP, Hutchinson.
Geoffrey E. Willmoth has joined the staff of the Missouri Court of Appeals, Kansas City, Mo.

CHANGING PLACES

Jessica A. DeVader has started the DeVader Law Office, 105 S. Broadway, Ste. 705, Broadway Plaza Building, Wichita, KS 67202.
Eschmann & Pringle P.A. has moved its office to 310 S.W. 33rd St., Topeka, KS 66611.
Leslie A. Hess has started the Law Office of Leslie A. Hess, 1200 Main St., Ste. 102, Hays, KS 66760.
John D. Michaels Chtd. has a new business address, P.O. Box 7507, Overland Park, KS 66207.

John C. Johnson and his daughter, Joni C. Johnson, have started the Law Office of Johnson & Johnson LLC, 3120 Mesa Way, Ste. C, Lawrence, KS 66049.
Law Office of Maryteresa Doyle LLC has moved to 4745 W. 136th St., Ste. 29, Leawood, KS 66224.
David W. Norburg has started his own practice, located at 17621 W. 84th St., Lenexa, KS 66219.
Jared A. Saunders has started his own firm, located at 9346 Kingman Dr., West Des Moines, Iowa, 50266.
Martin, Leigh, Laws & Fritzlen P.C. has moved its office to 10977 Granada, Ste. 103, Overland Park, KS 66211.
Clyde W. Toland now has his own practice, P.O. Box 404, Iola, KS, 66749.
Dan A. Williams has started his own firm, Williams Law Group LLC, 135 S. Mahaffie St., Olathe, KS 66061.
Charles F. Zarter has started Zarter Law Firm LLC, 10561 Barkely Place, Ste. 510, Overland Park, KS 66212.

MISCELLANEOUS

Jeffrey J. Alderman, Kansas Bar Association executive director, Topeka, has been elected president of Lawrence Habitat for Humanity.
Doering, Grisell & McFarland P.A. is now Doering & Grisell P.A., Garden City.

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

Dan’s Cartoon by Dan Rosandich

“You Didn’t Do It? Oh, I’m Sorry ... I Specialize in People Who Did It.”
Donald H. Corson Jr.

Donald H. Corson Jr., 80, died Oct. 6 in Billings, Mont. Corson was born Jan. 31, 1926, in Kansas City, Kan., to Donald H. Corson Sr. and Norma Evans Corson. He lived in Kansas City until 1996, when he and his wife, Margaret, retired to Billings.

He graduated from the U.S. Naval Academy in 1948 and served in the Navy until 1954. In 1957, he graduated from the University of Missouri-Kansas City School of Law. Corson practiced law in Kansas City from 1957 to 1996, many of those years in association with his father. In his career, he represented the city of Bonner Springs, the International Brotherhood of Boilermakers, and the Brotherhood State Bank. He served 23 years on the Kansas State Board of Law Examiners and retired from the Kansas City, Kan., law firm of Holbrook, Heaven & Fay.

His wife; children, Scott Corson, Walker, Minn., and JoAnn Bacheller, Billings, Mont.; three granddaughters; and sister, Sue Davis, Iowa City, Iowa, survive.

Charles White Hess

Charles White Hess, 64, of Mission Hills died Oct. 11, in Kansas City, Mo.

He earned his B.A. from the University of Kansas and was a third generation Jayhawk. He received his LL.B. from the University of Virginia in 1965. His law career spanned 41 years, during which he was a law clerk for the U.S. Department of Justice and served as a JAG officer in the U.S. Army Reserve. Hess was an attorney with Bryan Cave LLP, Leawood, and a member of both the Kansas and Missouri Bar associations. He served as a trustee of the Johnson County Bar Foundation.

Hess also served on the city council of Mission Hills and as its president. He was most recently on the Mission Hills Planning Commission and Architectural Review Board. He was past president of the Carriage Club, a member of the University Club and Farmington County Club of Charlottesville, Va. He was a trustee of the Phi Delta Theta Education Foundation and recognized as Phi of the Year by the Kansas City Alumni Chapter in 2004.

Survivors include his wife, Jane Walker Hess; son, C. Walker Hess, Grand Cayman; daughter, Sara Langston, Springfield, Mo.; mother, Mary Anne Hess, Overland Park; brother, William L. Hess; two grandsons; and seven nieces and nephews.

His father, Charles W. Hess, and infant daughter, Anne Lawrence Hess, preceded him in death.

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Save the date:

2ND ANNUAL
GRAND SLAM:
A KBA ROYAL AFFAIR
Friday, July 27 at “The K”

Event to include:

• Continuing Legal Education Program, Stadium meeting room
• Tour of Kauffman Stadium
• Dinner at Brancato’s Bullpen (complete with cash bar)
• Chance to win one of many great door prizes
• Meet and greet Royal’s Alumni Players (New for 2007)
• Kansas City Royals vs. Texas Rangers baseball game

Look for more information to come, Spring 2007!

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Is someone on your case?

If you’re trying to balance work and family, KALAP can help. We understand the competition, constant stress and high expectations you face as a lawyer. Dealing with these demands and other issues can be overwhelming. KALAP offers free, confidential support because sometimes the most difficult trials lie outside the court.

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Most clients value the relationship they have with their lawyers. Lawyers serve as guides, spokesperson, counselors, protectors, and friends through difficult times. At least equally, lawyers value their relationships with clients, who serve as a source of pride, interesting work – and income. Therefore, the relationship between lawyer and client should not lightly be interfered with.

One protection enjoyed by the attorney-client relationship is found in the Model Rules of Professional Conduct (MRPC).¹ Rule 4.2 (Rule) states:

In representing a client, a lawyer shall not communicate about the subject of the representation with a party the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.[2]

Much of the debate over Rule 4.2 has related to whether the contact with the represented party is “about the subject of the representation,”³ whether an employee of a represented corporate employer is a “client,”⁴ or whether the communication is otherwise “authorized by law,” despite the fact that the person is represented by counsel.⁵

However, on its face, the Rule would appear to prohibit communications between a lawyer and a person represented by other counsel, where the person seeks a “second opinion,” that is, seeks advice about the advice, strategy, or actions of the person’s lawyer. May a lawyer talk to another lawyer’s client, when that client seeks a second opinion? Or would such communications be ethically prohibited by Rule 4.2? Must the second lawyer have permission from the lawyer representing the client, before speaking with them?

The answer to these questions lies in an analysis of Rule 4.2, and leads to the conclusion that such contacts are not unethical or inappropriate.

1. Rule 4.2 prohibits contacts with represented parties by other lawyers in the course of their “representing a client.” The lawyer who has been requested to give a “second opinion” is not representing a client, and so the Rule should not be implicated.⁶ A lawyer does not violate either the letter or purposes of Rule 4.2 by rendering a second opinion to a represented party, when the lawyer is not “representing a client” in the same matter.⁷

2. Clients possess an “inherent right to seek advice or representation for counsel of the client’s choosing,”⁸ and thus must be free to seek out opinions from other lawyers about their own matters.

3. At the time of the contact, the second lawyer is not “adverse” to the client or to the other lawyer.⁹ It is adversity, which would give rise to a risk of admissions that might be used against the client.

By J. Nick Badgerow, Spencer Fane Britt & Browne LLP, Overland Park

Acceptable Interference: The Ethics of Giving a Second Opinion

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THE JOURNAL OF THE KANSAS BAR ASSOCIATION
The Kansas Bar Association’s Professional Ethics Advisory Opinion service is available to members of the Kansas Bar Association. Opinions are issued by the KBA Professional Ethics Advisory Committee and are not binding in any judicial or disciplinary proceeding. The Office of the Disciplinary Administrator receives a copy of opinions, but does not comment on them.

Limitations: Ethics opinions are not issued if the matter on which an opinion is being sought is the subject of litigation. Requests must concern a lawyer’s own future conduct, not past conduct. Opinions are not issued with regard to questions of law, such as interpretations of rules, statutes, or cases.

Formal or Informal: The KBA will issue either informal or formal opinions. Informal opinions are spontaneous discussions with the KBA legislative counsel or with members of the KBA Professional Ethics Advisory Committee, to which the caller is referred by the legislative counsel. Little research is spent on informal opinions.

Formal opinions take longer, generally three to six weeks, but are well researched.

FOOTNOTES
2. Rule 4.2, MRPC.
13. Id.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park. He is a member of the Kansas State Board of Discipline for Attorneys and the Kansas Judicial Council. He is chairman of the Judicial Council’s Civil Code Advisory, the Kansas Bar Association Ethics Advisory Opinion, the Johnson County Bar Association Ethics and Grievance committees and the KBA Ethics 2000 Commission.

Requesting an Ethics Opinion

The Kansas Bar Association’s Professional Ethics Advisory Opinion service is available to members of the Kansas Bar Association. Opinions are issued by the KBA Professional Ethics Advisory Committee and are not binding in any judicial or disciplinary proceeding. The Office of the Disciplinary Administrator receives a copy of opinions, but does not comment on them.

Limitations: Ethics opinions are not issued if the matter on which an opinion is being sought is the subject of litigation. Requests must concern a lawyer’s own future conduct, not past conduct. Opinions are not issued with regard to questions of law, such as interpretations of rules, statutes, or cases.

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Formal opinions take longer, generally three to six weeks, but are well researched.

Once again, both informal and formal opinions are not binding and should not be used as a substitute for advice given by the Office of the Disciplinary Administrator. The Office of the Disciplinary Administrator will frequently discuss ethical situations with attorneys and may be where an attorney should make his or her first inquiry, especially in situations where an expedited response is necessary.

Confidentiality: All opinion requests and opinion releases are kept confidential. Final versions of opinions do not identify the requesting attorney.

Requesting an Opinion: To request an informal opinion, simply call (785) 234-5696 and ask for the legislative counsel. For a formal opinion, write a letter to the address below, stating the facts upon which you want an opinion and self certify that (1) you are a KBA member and are seeking the opinion for yourself and no one else, (2) that it is not for use in litigation or disciplinary matters, and (3) that you want the information for guidance on future conduct.

Jim Clark, legislative counsel
Kansas Bar Association
P.O. Box 1037
Topeka, KS 66601-1037
Lawyers in the Legislature

U.S. Congress

Sam Brownback, R, became Kansas’ 32nd U.S. Senator, as well as the senior senator from Kansas in 1997. He is now serving his second full term, after being first elected to the Senate in 1996 to fill the remainder of Sen. Bob Dole’s term and being re-elected in 1998 to his first full six-year term.

Brownback serves on the Appropriations, Judiciary, and Joint Economic committees. Brownback chairs the Judiciary Constitutional Subcommittee. He is co-chair of the Senate Cancer Coalition and the Congressional Wireless Caucus and a member of the Senate High Tech Task Force.

Before his election to the Senate, Brownback served one term in the U.S. House of Representatives from the 2nd Congressional District of Kansas. He also served as the Kansas Secretary of Agriculture from 1986 to 1990 and was a White House Fellow with the Office of the U.S. Trade Representative. A graduate of Kansas State University in 1979, Brownback received his juris doctorate from the University of Kansas School of Law in 1982 and has practiced law in both Manhattan and Topeka.

Dennis Moore, D, represents the 3rd Congressional District of Kansas. He has been a U.S. Representative since 1998 and is serving his fifth term. He serves on the Budget, Financial Services, and Science committees.

He earned his bachelor’s degree from the University of Kansas in 1967 and his juris doctorate from Washburn University School of Law in 1970. After service in the Army and Army Reserve, Moore served as an assistant attorney general for the state of Kansas. He entered private practice in Johnson County in 1973. In 1976, Moore was elected as district attorney in Johnson County and served three terms until 1989. At the end of his third term, he returned to private practice, where he was a partner in the firm of Erker and Moore LLC.

Moore serves on the board of trustees for Johnson County Community College and is the founding member, president,
and board member of Johnson County Safehome. He is also a board member for the Coalition for the Prevention of Child Abuse, the Kansas Child Abuse Prevention Council, Court Appointed Special Advocate, and the United Community Services. He is a member of the Community Corrections Advisory Board and is past president of the Kansas County and District Attorneys Association. He is a member of the Kansas Bar Association.

Jerry Moran, R, represents the 1st Congressional District of Kansas. He is now serving his sixth term. He serves on the Agriculture, Transportation and Infrastructure, and Veterans' Affairs committees. Moran is a member of the executive committee of the National Republican Congressional Committee.

In 2000, Moran was elected to a four-year term as co-chair of the Steering Committee of the Rural Health Care Coalition. He also serves on the executive committee of the Coronado Area Council of the Boy Scouts of America and as an adjunct professor of political science at Fort Hays State University.

Before his election to Congress, Moran served eight years in the Kansas Senate, the last two as majority leader. While in the Kansas Legislature, he chaired the Senate Judiciary Committee.

Moran, who formerly practiced law in Hays, has his undergraduate and law degrees from the University of Kansas. He is a member of the Kansas Bar Association.

Editor's Note: Committee appointments for the Kansas Senate and House were not available at press time. We will publish them in the February issue of the Journal.

Barbara Allen, R-Overland Park, represents the 8th Senate District in Johnson County. Allen is serving her third term in the Kansas Senate, after serving 13 years in the Kansas House of Representatives.

Allen, who is with the firm of Kent T. Perry & Co. L.C. in Overland Park, received her bachelor's degree from Mount Vernon College in Washington, D.C., and a juris doctorate from the University of Missouri-Kansas City School of Law. She served as an assistant attorney general under Kansas Attorney General Bob Stephan from 1985 to 1987.

She has lived in the Kansas City area all of her life. She is secretary/treasurer of the Skillbuilders Fund and serves on the board of directors of the Powell Family Foundation, TLC for Children and Families, and Wayside Waifs. She is a trustee of the Johnson County Community College Foundation and the Women's Public Service Network and is a past director of the Women's Employment Network and Heart of America Family Services.

Terry Bruce, R-Hutchinson, is representing the 34th Senate District for his second term.

Bruce is with the firm of Forker, Suter and Rose LLC in Hutchinson. He graduated with a bachelor's degree in political science from Fort Hays State University in 1997 and earned his juris doctorate from the University of Kansas School of Law in 2000.

After graduation, he worked as a prosecutor in the Reno County District Attorney's office. In December 2003, Bruce began working for Majority Leader Clay Aurand as communications director. His responsibilities included writing press releases for legislators, producing sound bites from legislators for local radio stations, and compiling the weekly House Republican newsletter.

He was appointed to the City of Hutchinson Human Relations Commission. He also taught law courses part time at Hutchinson Community College. Bruce is currently a member of the City of Hutchinson Sales Tax Advisory Board.

Jay Scott Emler, R-McPherson, represents the 35th Senate District that encompasses Ellsworth, Lincoln, McPherson, and Rice counties and parts of Barton, Dickinson, and Marion counties. He was elected to his first term in 2000.

Emler, who maintains a law practice in McPherson, serves as a member of the Kansas Supreme Court Municipal Judge Testing and Education Committee and the Kansas Judicial Council's Municipal Court Manual Committee, which he chairs. He is a graduate of Bethany College, Lindsborg, and the University of Denver College of Law.

For more than 30 years, Emler has been a resident of Lindsborg and rural McPherson County. Emler has been in private law practice for 13 years, served as municipal judge in Lindsborg for 12 years, and spent 10 years as the chief legal officer of Kansas Cellular. He is a member of the Kansas Bar Association.

Emler has been a volunteer emergency medical technician and served as administrator of the Lindsborg Volunteer Ambulance Corps. He has served on the Lindsborg Community Hospital board of directors, has been a member of the Kansas Emergency Medical Services Council, and has chaired the Lindsborg Chapter of the McPherson County March of Dimes.

David Haley, D-Kansas City, Kan., represents the 4th Senate District in Wyandotte County. He is serving his third term after being first elected in 2000 and serving the prior six years in the Kansas House of Representatives.

(continued on next page)
While in the House, Haley served on the Health and Human Services, Judiciary, and Governmental Organizations and Elections committees, along with the joint committee on Health Care Reform. He previously served as legislative liaison for the Mayor/City Council of Kansas City, Mo.

Haley has served on the boards of Habitat for Humanity, Planned Parenthood of Greater Kansas City, Turner House, the United Way, the Kansas State Historical Society, and the Northeast Action Group. Haley’s father, George Haley, formerly served in the Kansas Senate and is a former U.S. Ambassador to Gambia. Haley is a nephew of “Roots” author, Alex Haley.

Phillip Journey, R-Wichita, represents the 26th Senate District. He was first appointed to the seat in December 2003.

Journey graduated from Washburn University with a bachelor’s degree in business in 1974. He earned his juris doctorate from the Oklahoma City University Law School in 1983. He has been in private practice concentrating on criminal and traffic cases.

He has practiced before all divisions of the district court, including domestic, civil, and probate, along with federal and municipal courts throughout Kansas. He has worked on some 60,000 cases in his more than 20-year career.

Derek Schmidt, R-Independence, represents the 15th District, which consists of all or part of Allen, Anderson, Chautauqua, Coffey, Elk, Franklin, Montgomery, Wilson, and Woodson counties.

Schmidt, in his second term, served as majority leader of the 30-member Republican Caucus in the Senate.

Before being elected to the Senate in November 2000, Schmidt served as special counsel and legislative liaison to Gov. Bill Graves. Prior to that he served as an assistant Kansas attorney general and was assigned to the Consumer Protection Division. He is an attorney in private practice with the firm Scovel, Emer, Heasty and Chubb, Independence, Kan.

For seven years, Schmidt worked in Washington, D.C., as a congressional aide. He served five years as a legislative assistant to Sen. Nancy Kassebaum, R-Kansas, including two years as her chief foreign policy aide. He also served two years as legislative director and general counsel to Sen. Chuck Hagel, R-Nebraska.

He earned his bachelor's degree in journalism from the University of Kansas and his master's degree in international politics from the University of Leicester in the United Kingdom. He earned his law degree from Georgetown University Law Center. During the fall of 2006, he was in residence at the University of Kansas as the first Simons Public Humanities Fellow.

Schmidt is a member of the Kansas Bar Association.

John Vratil, R-Overland Park, represents the 11th Senate District in Johnson County. He has served eight years in the Kansas Senate.

Vratil practices law in Overland Park with Lathrop & Gage L.C. His practice is focused on commercial, business, appellate, real estate, and education law.

Vratil received his undergraduate and law degrees from the University of Kansas, in addition to studying at the University of Southampton, England, on a Rotary Foundation Fellowship. Vratil is a former president of the Kansas Bar Association and received the Outstanding Service Award from the Johnson County Bar Association in 1984. He has been president of the Overland Park Chamber of Commerce and a board member of the Shawnee Mission Medical Center Foundation.

Pat Colloton, R-Leawood, is serving her second term as a Representative in the Kansas House from the 28th District.

Colloton graduated from the University of Wisconsin School of Law and has undergraduate degrees in chemistry and psychology. She worked as a research organic chemist for Eli Lilly before attending law school. She has practiced law in several jurisdictions. She is a member of the New York, Massachusetts, Illinois, Wisconsin, and Kansas Bar associations.

Most recently, Colloton’s law practice has related to school law and charitable foundations. For her first 10 years of law practice, she was a litigator with a large law firm; subsequently, she has been a solo practitioner, representing clients on a wide variety of issues.

Colloton is active in school organizations, several charitable foundations, the Leawood Chamber of Commerce, and the Leawood Rotary. She previously served on the Leawood Planning Commission.

Marti Crow, D-Leavenworth, represents the 41st District in Leavenworth County. She is serving her seventh term after being first elected in 1996.

She is a partner in the law firm of Crow, Clothier and Bates, Leavenworth. Crow received a bachelor’s degree from Baker University and a juris doctorate from Washburn University School of Law.
Prior to serving in the Legislature, Crow was a member of the Leavenworth City Planning Commission, the Board of Zoning Appeals for 17 years, and the USD 453 Board of Education for 13 years. She worked as an attorney for the Kansas Department of Revenue and the Kansas Department of Education for 13 years. She worked as an attorney for the Kansas Department of Revenue and the Kansas Department of Education for 17 years, and the USD 453 Board of Education for 13 years. She worked as an attorney for the Kansas Department of Revenue and the Kansas Department of Education prior to entering private law practice in 1995.

Crow served on the Kansas Continuing Legal Education Commission from 1993 to 1999, appointed by the Kansas Supreme Court. She was chairman of the Commission from 1997 to 1999. She has presented continuing legal education programs about military family law, ethics, and legislation for the Kansas and Leavenworth County bar associations, the Kansas Trial Lawyers Association, and the annual meeting of the Kansas Association of County Counselors. She is the author of the Military Family Law chapter in the KBA Family Law Handbook. She also wrote and published a series of articles in the Kansas Governmental Journal concerning solid waste and landfills.

Paul Davis, D-Lawrence, is serving his third term with the 46th District as a representative.

Davis is a partner with the law firm of Skepnek Fagan Meyer & Davis P.A., Lawrence. Prior to serving with the Kansas Legislature, Davis was the legislative and ethics counsel for the Kansas Bar Association. He also previously served as assistant director for Government Affairs for former Kansas Insurance Commissioner Kathleen Sebelius.

Davis holds a bachelor’s degree in political science from the University of Kansas and a juris doctorate from the Washburn University School of Law. He is active in the Lawrence community, having served on the board of directors of the Health Care Access Clinic and the Arc of Douglas County, and the City of Lawrence Housing Trust Fund Advisory Board.

Davis serves as president of the Kansas Bar Association Young Lawyers Section. He also serves as chair of the American Bar Association (ABA) Young Lawyers Division’s Family Law Committee. Davis previously was a member of the ABA Special Committee on Judicial Funding and has been a member of the ABA Young Lawyers Division Council.

Raj Goyle, D-Wichita, is serving his first term in the Kansas House representing the 87th District.

Goyle is an attorney and lecturer at Wichita State University. A native Wichitan and active member of his community, Goyle has experience as a civil attorney and policy analyst with a specialty in homeland security and election reform. A former reporter for the Wichita Eagle, Goyle’s work has appeared in several publications, including the Sunday New York Times. Goyle is a graduate of Duke University and Harvard Law School.

Jeffrey R. King, R-Independence, is serving his first term in the Kansas House representing the 12th District.

King practices in the areas of business litigation and appellate law with Lathrop & Gage L.C., Overland Park.

He received his juris doctorate from Yale University, 2002, Master of Philosophy (MPhil) in European Studies, 1998, and MPhil in Land Economy, 1997, from Cambridge University, and B.A., magna cum laude, in 1997 from Brown University.

King is admitted to practice law in Kansas and Missouri and before the U.S. District Court for the District of Kansas, the U.S. District Court for the Western District of Missouri, and the U.S. Court of Appeals for the 10th Circuit.

He is a member of the American and Kansas Bar and American Agricultural Law associations, Earl E. O’Connor American Inn of Court and Leadership Kansas, 2003.

Lance Kinzer, R-Olathe, represents the 14th House District. He is serving his second term.

Kinzer received his bachelor’s degree at Wheaton College in Wheaton, Ill., and his juris doctorate at the University of Kansas School of Law. After graduating, he served four years on active duty as a captain with the Army JAG Corps. After leaving the military, Kinzer joined Schlagel, Damore and Gordon LLC, Olathe, where he practices personal injury, labor and employment, civil, contract, and commercial litigation.

Kinzer is the former chairman of the Olathe Republican Party and is a member of the Olathe Noon Rotary. He was admitted to the Kansas bar in 1995 and is a member of the Johnson County and Kansas Bar associations and the Kansas Trial Lawyers Association.

Mike O’Neal, R-Hutchinson, represents the 104th House District in Reno County. He has served in the Kansas House of Representatives since 1984.

O’Neal is a member of the Kansas Judicial Council and the National Conference of Commissioners on Uniform State Laws. He also serves on the Law and Justice Committee of the National Conference of State Legislatures and Council of State Governments. He is a member of the Kansas Bar Association. O’Neal is a shareholder in the firm of Gilliland and Hayes P.A., Hutchinson.

(continued on next page)
Thomas C. “Tim” Owens, R-Overland Park, is serving his third term as representative for the 19th House District. A graduate of Kansas State University, Owens obtained his juris doctorate from Washburn University School of Law in 1974. Upon being admitted to the bar, Owens worked for the Office of the Kansas Attorney General, Employers Reinsurance Corp., and the city of Overland Park before becoming a partner in the firm of McAulay, Owens, Heyl and Kincaid. Owens practiced law for 10 years until he was named general counsel for the Kansas State Department of Social Rehabilitation Services in 1988. He returned to private practice in 1991 and is a solo practitioner in Overland Park. Owens is a member of the Kansas Bar Association.

Joe Patton, R-Topeka, will be serving his first term as representative for the 54th District. A 1977 graduate of Washburn University School of Law, he is founder and senior partner of the firm Patton and Patton Chtd., Topeka. His areas of practice include civil litigation, workers’ compensation and auto insurance claims. Patton is active in the Topeka community. He currently serves on the Advisory Board of Safe Streets organizing neighborhoods for the prevention of violent crime. Patton is a past president of the organization. His is a member of the Kansas Bar Association and a Kansas Elder Law Hotline volunteer. He is also member of National Federation of Independent Business, The Voice of Small Business, Topeka Independent Business Association, and the Mayor’s Crime and Safety Committee.

Janice Pauls, D-Hutchinson, represents the 102nd House District in Reno County. She has served in the Kansas House of Representatives since 1991. Pauls, a former district court judge and prosecutor, is a graduate of the University of Kansas School of Law. She is now in private practice in Hutchinson. Pauls is a member of the Kansas Sentencing Commission and is on the Law and Justice Committee of the National Conference of Legislatures. Pauls also serves on the Kansas Judicial Council Juvenile Offender/Child in Need of Care Advisory Committee.

Michael J. Peterson, D-Kansas City, Kan., will be serving his second term representing the 37th House District in Wyandotte County.

James “Jim” Ward, D-Wichita, will be serving his third term as Representative for the 88th District. He has been in private practice with the firm of Ward and Batt LLC, Wichita, since 1990. He has a general practice that includes probate, real estate, juvenile, and family law. He also does pro bono work with Kansas Legal Services, representing the victims of domestic violence in protection from abuse cases.

Ward received his bachelor’s degree from Creighton University, Omaha, Neb., in 1981 and his juris doctorate from Washburn University School of Law in 1985. He served as an assistant district attorney in the Sedgwick County District Attorney’s Office from 1985 to 1990. Ward also served on the Kansas Judicial Council Civil Law Committee from 1992 to 1994. He is a former member of the Kansas State Senate and the Wichita City Council.

Jeffrey F. “Jeff” Whitham, R-Garden City, is serving his first term representing the 123rd District. He has served as the president of Western State Bank for 23 years. In this position he handles the majority of legal matters for the bank.

Whitham graduated magna cum laude from Kansas State University in 1975 and received his juris doctorate from Washburn University School of Law in 1979. He practiced three years in Garden City before joining Western State Bank.

He is a member of the Kansas Bar Association. He is a board member of the Finney County Economic Development Corp. and the Garden City ethanol plant now under construction. He is a past Garden City commissioner and mayor, and board member and chair Garden City Family YMCA and St. Catherine Hospital.

Kevin Yoder, R-Olathe, is serving his third term as representative for the 20th District. He is a partner with Speer & Holiday LLP, Olathe.

Yoder became a member of the Kansas Bar Association in 2002. He is a member of the Johnson County Bar Association’s board of directors, a board member of the Kansas Sentencing Commission and a member of the Overland Park Rotary Club.

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I. Introduction

If there had been any doubt, the recent Kansas Court of Appeals opinion in *R.H. Gump Revocable Trust v. City of Wichita* removes it: spiritual and aesthetic considerations are enough to justify zoning restrictions. In *R.H. Gump Revocable Trust*, a zoning applicant sought a conditional use to erect a flagpole along U.S. Highway 54, Wichita’s major east-west thoroughfare. The flagpole would have been located in a commercial area near a Veterans Administration hospital, car dealerships, a shopping mall, and one of the busiest intersections in the city. At up to 165 feet tall, the Stars and Stripes flown would have to be large. Old Glory, however, was not welcomed to this neighborhood. The city council denied the zoning request that would have permitted such a public display of civic pride, finding it would be inconsistent with beautification efforts along the freeway and would have a negative visual impact. The district court and the Court of Appeals agreed and found that the decision was a proper use of zoning power to protect the “public welfare.” It found that the public welfare included the “spiritual” and “aesthetic” concerns that had caused the city to reject the flagpole.

There is, as the gut of any lawyer discloses at this point, more to the story. The pole was near not only U.S. Highway 54, commercial development, and a busy intersection but it was also near the city of Eastborough, a city fully enclosed by the city of Wichita, known for its stately homes and tree-lined drives. The pole was not the idea of a patriotic landowner motivated to honor the nation that made such property ownership possible. Instead, its purpose was to house a cellular telephone antenna, and it was the third attempt to place such an antenna on the site. The flagpole was presented as a way to disguise the tall structure jutting up above the trees. It was a literal case of “wrapping yourself in the flag.”

If, as the Court of Appeals confirms, local government authorities can make zoning decisions on such an inherently subjective basis as the visual impact of the American flag flying over a U.S. highway, that raises a question. What limitations are there on local land use regulation? This article addresses that question by examining how the Constitution of the United States, federal statutes, state statutes, and zoning review procedures impact and restrict the power of local zoning authorities to regulate land use.

**FOOTNOTES**
2. Id. at Syl. ¶¶ 3, 4.
II. What power can local authorities exercise through zoning?

While some specific types of land uses are regulated by other laws, zoning regulation is the most comprehensive land use control device. In Kansas, state statutes empower cities and counties to adopt zoning regulations. Those regulations can both control the uses allowed for a particular property and impose substantive limitations, or development controls, on the uses that are allowed, including controls of the height and size of buildings, the size of yards and open spaces, and the appearance of buildings. Zoning accomplishes its use restrictions and development controls by establishing base zoning districts and permitting case-by-case deviations through conditional or special uses, community unit and planned unit development plans, and variances.

III. How far can zoning regulations go?

While land use can be regulated, the power of governmental regulation is not boundless. All governmental land-use regulation is subject to constitutional limitations. State and local land use controls are further restricted by certain specific federal statutes, and local land use controls are restricted by state statutes.

A. What limits does the Constitution impose?

Zoning regulations are constitutionally permissible as a legitimate exercise of police power by the states. Nevertheless, they are restricted as are other exercises of police power by constitutional takings limitations and by due process, equal protection, and freedom of expression guarantees.

1. Constitutional limitations on taking property without compensation, nonconforming uses, and vested rights

Most regulations restricting the use of land or impairing its value do not require compensation under the Fifth and Fourteenth Amendments. Therefore, even though prohibiting a particular type of development, like a landfill, may reduce the value of land, it is not usually a taking if other economically viable uses remain available. However, zoning restrictions constitute a “taking” for which compensation is required when the regulations deny “all economically beneficial or productive use of the land.”

In extraordinary circumstances, even when not all economically viable property uses are prohibited, a land owner might successfully argue that the impact of a zoning restriction on his or her investment-backed expectations, when compared to the government’s interests being pursued by the regulation, is a taking. However, the U.S. Supreme Court has refused to adopt a standard that would require the impact of a zoning restriction to be even roughly proportional to the benefit regulation provides. The Court has also refused to embrace a test that would require regulatory action to “substantially advance” a legitimate governmental goal to avoid being a taking for which compensation is required.

Despite these rather slight limitations on zoning regulations under the Takings Clause, state cases find a constitutional protection against land use regulation with more routine operation when new zoning regulations would require immediate cessation of an existing land use. The Kansas Court of Appeals has said:

“In order to avoid violation of constitutional provisions preventing the taking of private property without compensation, zoning ordinances must permit continuation of nonconforming uses in existence at the time of their enactment.”

Whether this protection truly has a constitutional basis or not is relatively unimportant, because Kansas statutes protect the right to continue a nonconforming use; these statutes provide that zoning regulations do not apply to the “existing” lawful uses of land.

As a matter of public policy, courts strictly construe the right to a nonconforming use. In Kansas, the strong public interest in eliminating nonconforming uses allows zoning authorities to require such uses to be gradually phased out rather than requiring nonconforming uses to be permanently grandfathered.

(continued on next page)
Where the right to a nonconforming use exists and there is no mandatory phase-out of the use, the use may continue until it is abandoned, after which it cannot be reclaimed. While the use cannot undergo a fundamental change in quality and remain a nonconforming use, an increase in the volume and intensity of the use, as for example by processing a greater volume of scrap at a wrecking yard, is not per se impermissible, or is the landowner necessarily prohibited from employing more modern instrumentalities to replace older methods of operation with modern means in conducting the nonconforming land use. For mining and quarrying, under the “diminishing asset doctrine” the Kansas Supreme Court has permitted the expansion of mining and quarrying activities of a nonconforming mine or quarry over the entire land that is an integral part of the operation.

However, the protections offered to nonconforming uses can easily be lost. Zoning authorities can, under penalty of forfeiture, require that nonconforming uses be registered by the landowner. A forfeiture is not a taking by the government because it deprives a landowner of nothing unless the landowner fails to register the use.

Kansas statutes provide for a broader “vesting” of development rights, in limited circumstances, that gives the landowner the right to implement a plan for the land that existed before a zoning change that would prohibit it even though the planned use is not implemented far enough at the time the zoning restriction is imposed to be a nonconforming use. By statute, the recording of a plat allows a five-year window in which to commence construction of a single-family residential development, despite intervening changes in zoning regulations. For other land uses the same statute allows a vesting of development rights when all permits required for the use have been issued, construction has started, and a substantial amount of work has been completed under a validly issued permit.

2. Procedural due process

It is well established in Kansas state courts that procedural due process protections attach to rezoning and conditional use decisions. Thus, those people and entities involved, both landowners and opponents to a zoning change, have procedural rights, including the right to notice, a fair and open hearing, and an impartial decision-maker. A zoning decision that does not comport with due process has been said to be void, but this is probably an overstatement, and a failure to provide due process protections probably would be found to invalidate a zoning decision only if there is a timely challenge.

Under the rubric of due process, the fairness, openness, and impartiality of the rezoning or conditional use process used in a particular case all may be challenged. As discussed in the following paragraphs, challenges of this type to zoning decisions include challenges that a decision resulted from improper ex parte communications, predetermination by a decision-maker, or the participation of a decision-maker with a personal interest in the matter being decided. In general, while communications with zoning decision-makers outside of public hearings are not favored, they are very common and even expected by some decision-makers, and they will be subject to a harmless error analysis. Revealing or repeating ex parte communications in the record tend to make them harmless. However, ex parte communications may raise the level of scrutiny applied to charges of bias or unfairness of the overall process.

The standard for attacking a zoning decision as being a product of predetermination is high. In Tri-County Concerned Citizens v. Board of County Commissioners of Harper County, the chairman of...
the county commission was involved in the process of bringing a sanitary landfill to the county and had engaged legal counsel to assist in negotiations with a landfill developer. Another commissioner had expressed his (incorrect) opinion that he had no choice but to approve a zoning request to allow the landfill. The Kansas Court of Appeals reversed a district court’s conclusion that both commissioners had inappropriately prejudged the zoning application. It is not sufficient that a decision-maker publicly discussed a personal view about a zoning issue before a public hearing. When, for example, there is not necessarily a right to cross-examine witnesses, at least in cases in which written questions of the witnesses are submitted to the decision-maker after the hearing for its consideration. As a practical matter, cross-examination in zoning hearings is unusual. In addition, zoning controls imposed on a zoning district as a whole, and not simply on a particular parcel, are legislative decisions, which do not involve procedural due process requirements.

3. Substantive due process

Substantive due process provides little restriction to land-use regulation. A land use decision violates substantive due process only if its alleged purpose “has no conceivable rational relationship to the exercise of the state’s traditional police power through zoning.” The actual purpose of the zoning regulation is not important, but rather the question is whether a “reasonably conceivable” rational basis exists.

4. Equal protection

Zoning regulations based on illegitimate distinctions are subject to challenge under the Equal Protection Clause. For example, in *City of Cleburne, Tex. v. Cleburne Living Center,* the U.S. Supreme Court struck down a requirement that a group home for the mentally handicapped obtain a special use permit. In the absence of any rational basis in the record for believing that a group home would pose a special threat to the city’s legitimate interests, it appeared to rest on an irrational prejudice against the mentally handicapped. Likewise if a zoning ordinance “segregated one area only for one race, it would immediately be suspect…”

However, equal protection challenges are not usually successful when disparate treatment is not based on membership in a suspect class. “Absent a fundamental right or a suspect class, to demonstrate a viable equal protection claim in the land use context, a plaintiff must...” (continued on next page)
demonstrate governmental action wholly impossible to relate to legitimate governmental objectives.” Even when a suspect class is involved, where the plaintiff cannot show that a zoning decision is motivated in part by racial discrimination, a racially discriminatory result will not invalidate the decision.

5. The First Amendment
The First Amendment can be a restriction on the ability of governments to impose land use controls on expressive land uses, such as signs or adult entertainment. The First Amendment poses a particular barrier to outright prohibitions of such uses. It may also restrict the time within which a zoning body must act. However, zoning regulations that are content neutral, like regulations designed to curb the secondary effects of sexually oriented businesses, may have an impact on expressive conduct without violating the Constitution if the “regulation (1) serves a substantial governmental interest, (2) is narrowly tailored, and (3) does not unreasonably limit alternative avenues of communication.”

B. What limits has Congress imposed?
Under the Supremacy Clause, the federal government by statute has limited the ability of local governments to regulate some land use issues. The question of whether a given federal law pre-empt s local zoning regulations turns on whether (1) Congress has expressed an intention to pre-empt local zoning control, (2) Congress has so occupied the field involved that it is reasonable to assume an intent to displace all local control, or (3) the decision of the zoning authority actually conflicts with some specific requirement of the federal law.

1. Religious Land Use and Institutionalized Persons Act of 2000
The Religious Land Use and Institutionalized Persons Act of 2000 (RLUIPA/Act) marks a substantial foray by the federal government into land use control. The RLUIPA prohibits intentional discrimination and disparate treatment in land-use regulation between religious and nonreligious assemblies. It also prohibits a local government from implementing a land-use regulation in any individual case in a way that imposes a substantial burden on religious exercise of a person or religious institution, unless the burden imposed is the least restrictive means of furthering a compelling government interest. The potential impact of the RLUIPA is dramatic. It can bar local governments from imposing otherwise appropriate zoning restrictions. The “religious exercise” it protects can include not only such practices as prayer meetings, religiously based college instruction, and religious retreats, but also activities with a religious component like day care programs. Whenever a land use has a connection to a religious practice, the impact of the RLUIPA should be considered. If a landowner seeks to run a church camp, for example, the Act might preempt any zoning control that would otherwise bar the same sort of use by a nonreligious organization.

The RLUIPA does not immunize religious institutions from all zoning regulations or regulatory processes. Because the RLUIPA is concerned with the results of land use regulations on religious activity, religious institutions may be required to go through rezoning or variance processes, and the costs of going through those processes are not themselves a substantial burden on religious exercise. Thus, in Civil Liberties for Urban Believers v. City of Chicago, the 7th U.S. Circuit Court of Appeals rejected a claim that zoning regulations and processes that made it difficult and expensive for churches to find locations in Chicago placed an impermissible burden on those churches. In addition, the administrativefacilities of religious institutions may not be covered by the RLUIPA. Intrusions on a religious institution’s aesthetic sensibilities from neighboring land uses will not be sufficient to evoke the protection of the RLUIPA. The statute is relatively new and its full potential impact of the RLUIPA should be considered. If a landowner seeks to run a church camp, for example, the Act might preempt any zoning control that would otherwise bar the same sort of use by a nonreligious organization.

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impact will only be seen as the cases it spawns work their way through the courts.

2. Transmission towers and the like

The federal Telecommunications Act of 1996 (TCA)\(^{63}\) imposes certain restrictions on local zoning decision-making that impact the placement of wireless services facilities, like transmission towers. It applies to controls regarding the placement, construction, and modification of wireless facilities, regardless of whether they take the form of specific zoning regulations, conditional or special use permits, or variances.\(^{54}\)

The TCA essentially imposes two restrictions on local zoning decision-making. First, the state or local decision-makers cannot “unreasonably discriminate among providers of functionally equivalent services.”\(^{65}\) By prohibiting only unreasonable discrimination, the TCA leaves substantial discretion to local decision-makers. The reasonableness test is essentially a comparison of the contribution an antenna would make to the availability of wireless services to the aesthetic, environmental, and safety impacts it will have.\(^{46}\)

The second restriction imposed by the TCA is that the state or local government cannot impose regulations that “prohibit or have the effect of prohibiting the provision of personal wireless services.”\(^{66}\) The focus is not limited to the intention of local governments to prohibit the facilities, but extends to the result of even facially neutral, objectively administered policies.\(^{68}\) This means that zoning regulations that prevent closing gaps in the availability of wireless services are prohibited.\(^{49}\)

In addition, the federal law regulates the procedure local or state regulators must follow when dealing with telecommunications land uses. It requires the governmental entity to take action within a reasonable period of time,\(^{70}\) which has the potential to make moratoria on processing zoning applications or issuing building permits for cell towers unlawful.\(^{71}\) The TCA also requires a decision to be in writing and supported by “substantial evidence contained in a written record.”\(^{72}\)

Significantly, the TCA gives the applicant adversely affected by a state or local action that violates the TCA the right to challenge the decision in federal court.\(^{73}\) However, it does not extend a similar right to those aggrieved by the approval of a telecommunication antenna by a local zoning authority.\(^{74}\)

Other federal statutes and regulations limit the power of state and local governments to control satellite receiver dishes,\(^{75}\) amateur radio facilities,\(^{76}\) nuclear waste facilities, and railroad-related land uses.\(^{77}\) Federal law may also so thoroughly regulate a field, like radio frequency interference, that zoning authorities cannot use the regulated aspects of a land use in making zoning decisions.\(^{79}\) In addition, zoning codes or decisions that discriminate in a way that does not violate the Equal Protection Clause may nevertheless be pre-empted by the Fair Housing Act.\(^{80}\)

C. Limitations imposed on zoning power by Kansas statutes

1. The agricultural use exemption

The use of land for agricultural purposes outside of city limits is exempt from local zoning control. The agricultural use exemption provides that such zoning regulations, other than flood regulations, “shall not apply to the use of land for agricultural purposes, nor for the erection or maintenance of buildings thereon for such purposes so long as such land and buildings are used for agricultural purposes and not otherwise.”\(^{81}\) Kansas statutes governing zoning do not define what is meant by the term “agricultural purposes.” However, cases provide some general rules. The raising of canaries and chickens are agricultural pursuits.\(^{82}\) Raising hogs is in the general realm of agriculture and is, therefore, exempt from zoning regulations by county government.\(^{83}\) The Kansas Supreme Court has held that operation of a livestock feedlot is an agricultural enterprise, although by statute these feedlots are excepted from the agricultural use exemption.\(^{44}\) It has also held that operation of a wildlife hunting preserve, where the owner planted crops specifically for the purpose of providing food for wildlife, was an agricultural use of the land, the court noting

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66. Prime Co. Personal Comm. L.P. v. City of Mequon, 352 F.3d 1147 (7th Cir. 2003) (reversing city decision to deny permit to construct 70-foot antenna disguised as flagpole in church parking lot).
69. See National Tower LLC v. Zoning Bd. of Appeals, 297 F.3d 14 (1st Cir. 2002); Cellular Tel. Co. v. Bd. of Zoning Adjustment of Borough of Ho-Ho-Kus, 197 F.3d 64 (3d Cir. 1999).
72. 47 U.S.C. § 332(c)(7)(B)(iii) (2006). To comply with the statute, a written decision should be separate from the written record, describe the reasons for the decision, and explain those reasons sufficiently for a court to evaluate whether the evidence in the record supports those reasons.
that agriculture involves the “utilization of the resources of the land for production of plants and animals.”85 However, raising racing dogs or race horses is not an agricultural land use because the animals are not used for agricultural pursuits.86

If land is used for agriculture, land uses that would otherwise be regulated by zoning ordinances may be exempt if they further the agricultural operations on that land. Thus the Court has held the following to be exempt from zoning regulations: sale of excavated rock where the landowner was excavating to build an irrigation pond,87 an airstrip used to monitor the growing of turf grass,88 and a farmhouse used to support a family farm.89

The 1986 case of State v. Scherer90 illustrates how the agricultural use exemption has the potential to cover a broad range of land uses and how important it can be for those involved in zoning disputes to explore the connection between an otherwise prohibited land use and agriculture. In Scherer, a landowner was prosecuted for operating a salvage yard in violation of zoning regulations. He had accumulated on his 10-acre property trucks, cars, washing machines, a badly damaged horse trailer, an old swimming pool, and more than 800 pieces of farm equipment, most of which were horse drawn. He admitted that he kept much of the collection to have a stock of repair parts and claimed that he hoped to use horses to plant corn, apparently in Missouri, in the future and had used horses for having a little bit in the past. The district court refused to give the jury an instruction on the agricultural use exemption, and the Court of Appeals determined the failure to give the instruction was an error.

2. Group homes and manufactured homes

The Legislature has also limited the power of local zoning authorities to regulate group homes for 10 or fewer disabled people.91 Group homes must be permitted in any district where single-family dwellings are allowed.92 Likewise, local regulation of manufactured homes is limited by a statute that prohibits zoning regulations that have the effect of excluding manufactured homes from an entire zoning jurisdiction or excluding residential-design manufactured homes from single-family residential districts based solely on the fact they are manufactured homes.93

3. Direct control of siting particular land uses

As a general rule, Kansas statutes do not directly control the siting of land uses but leave the question to local authorities. However, the Kansas Legislature has adopted legislation to control the siting of two specific land uses: nuclear power facilities94 and power transmission lines.95 The Kansas Corporation Commission administers these siting processes.96

D. Restrictions on zoning power imposed by rezoning procedures

The power to zone is an exercise of police power. Cities and counties have the authority to adopt police power regulations apart from the power expressly granted in the zoning statutes. Can a unit of local government enact zoning regulations without following the procedures set out in the zoning statutes or are those procedures restrictions on its police power? If state statutes are the exclusive source of city and county zoning power,97 those statutes serve as a limitation on that power. In many fields, cities and counties have broad home rule powers to decide for themselves how they will operate and what powers they will exercise.98 However, they apparently have no home rule power to change the procedures concerning zoning established by state statute once they have decided to exercise zoning power under the statute.99

The zoning statutes set out specific procedures for adopting zoning regulations and changing those regulations.100 All changes in zoning regulations or classifications of property under K.S.A. 12-757 require a public hearing of the local planning commission after proper notice.101 At the public hearing, all interested parties are given the opportunity to be heard.102

While the planning commission holds the public hearing, it is not the ultimate decision-maker on rezoning requests or amendments to the zoning code. Its role is to advise the governing body. Planning commissions exist to limit the temptation of elected officials to view their power over land use as a “mere prerequisite” attaching to their offices and to grant or withhold zoning changes “at their grace or caprice.”103

While the vote of the planning commission is a recommendation and not a final decision, it nevertheless carries weight. To override the planning commission’s recommendation without giving it the opportunity to further review the matter, the governing body must act by a two-thirds supermajority.104 A simple majority can reach a result contrary to that recom-

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97. See Johnson County Mem’l Gardens Inc. v. City of Overland Park, 239 Kan. 221, 224, 718 P.2d 1302 (1986) (municipalities lack inherent power to enact zoning laws; authority derives from K.S.A. 12-701 et seq. (2001)).  
mended by the planning commission only if the governing body first returns the planning commission’s recommendation with a statement specifying the basis of the governing body’s failure to approve or disapprove the change and after the planning commission has the opportunity to respond.\textsuperscript{105}

Kansas statutes further limit local zoning power by allowing nearby landowners in some circumstances to file a protest petition, which requires the governing body to have a three-fourths majority to approve a zoning change.\textsuperscript{106}

### E. Limitations on zoning regulations enforced by district court review

K.S.A. 12-760 allows any person aggrieved by a final zoning decision of the county or city governing body to “maintain an action in the district court ... to determine the reasonableness of such final decision.”\textsuperscript{107} Such a challenge is not an appeal, but is an action under K.S.A. Chapter 60, governed by the rules of evidence.\textsuperscript{108} The issues the court can decide are limited to the reasonableness and lawfulness of the final decision.\textsuperscript{109}

#### 1. The reasonableness review

Cities and counties “are entitled to determine how they are to be zoned or rezoned ... No court should substitute its judgment ... merely on the basis of a differing opinion as to what is a better policy in a specific situation.”\textsuperscript{110} The standard of review is an onerous one for the plaintiff:

An administrative action is unreasonable when [1] it is so arbitrary that it can be said it was taken without regard to the benefit or harm involved to the community at large, including all interested parties, and [2] was so wide of the mark that its unreasonableness lies outside the realm of fair debate.\textsuperscript{111}

The zoning decision-maker is entitled to a presumption that its decision was reasonable.\textsuperscript{112} To prove a decision was unreasonable, the person challenging a zoning decision cannot come forth with a completely new case and new evidence that was not before the planning commission at its public hearing. This is because “whether the action is reasonable or not is a question of law, to be determined upon the basis of the facts, which were presented to the zoning authority.”\textsuperscript{113}

and the court is “not to retry the case on the merits of the application.”\textsuperscript{114} Nevertheless, the planning commission hearing may be a relatively informal process, and the introduction of evidence that was not before the planning commission is within the discretion of the court.\textsuperscript{115}

To enable meaningful review of rezoning decisions, the Kansas Supreme Court recommended in *Golden v. City of Overland Park*,\textsuperscript{116} that zoning decision-makers use specific factors in their analysis of a proposed change: the character of the neighborhood, the zoning and uses of nearby property, how suitable the subject property is for the uses to which it is restricted, the effect on nearby property of removing the restrictions, the length of time the property has been vacant as zoned, the public benefit of the restrictions versus their private burden, the recommendations of professional staff, and the conformance of the proposed change with any comprehensive plan. These same factors apply to conditional or special uses as well as rezoning decisions.\textsuperscript{117} The factors recommended by the *Golden* Court have become widely used by planning commissions, cities, counties, and courts, and often zoning decision-makers articulate their decisions in terms of these factors.\textsuperscript{118} However, courts have indicated that zoning decision-makers were only encouraged to use the *Golden* factors, and a failure to do so would be problematic only if the record is not sufficient to conduct a meaningful review.\textsuperscript{119} When the factors are explicitly used, they do not need to be given equal weight and, once balanced by the zoning authority, will not be rebalanced by the courts. Consequently, even if the rezoning were inconsistent with the comprehensive plan, that is only one factor to be weighed and does not make a rezoning decision unreasonable.\textsuperscript{120} In addition, analysis of any given factor will be upheld if the evidence on the factor is mixed.\textsuperscript{121}

While the “reasonableness” standard results in broad deference to local zoning decision-makers, the standard is not so high that the court rubber stamps the result reached by the city or county. Courts have overturned some rezoning decisions as unreasonable, like not allowing a restaurant on a busy street because of the additional traffic it might generate.\textsuperscript{122}

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\textsuperscript{105} K.S.A. 12-257(d) (2001).
\textsuperscript{106} K.S.A. 12-757(f) (2001).
\textsuperscript{107} K.S.A. 12-760 (2001).
\textsuperscript{109} Keeney, supra note 108, 203 Kan. at 392-93.
\textsuperscript{111} Id.
\textsuperscript{112} Bd. of County Comm’rs of Johnson County v. City of Olathe, supra note 110, 263 Kan. at 676.
\textsuperscript{113} Davis v. City of Leavenworth, 247 Kan. 486, 492, 802 P.2d 494 (1990); Landau, supra note 110, 244 Kan. at 263; Bd. of County Comm’rs of Johnson County v. City of Olathe, supra note 112, 263 Kan. at 676.
\textsuperscript{114} Landau, supra note 110, 244 Kan. at 271.
\textsuperscript{116} 224 Kan. 591, 598, 584 P.2d 130 (1978).
\textsuperscript{117} K-S Center Co. v. City of Kansas City, 238 Kan. 482, 495, 712 P.2d 1186 (1986).
\textsuperscript{118} McPherson Landfill Inc. supra, note 6, 49 P.3d at 525 (noting “The Golden factors have become standard considerations throughout Kansas.”).
\textsuperscript{119} E.g., Davis v. City of Leavenworth, supra note 113; Landau, supra note 110; Bd. of County Comm’rs of Johnson County v. City of Olathe, supra note 112.
\textsuperscript{120} Bd. of County Comm’rs of Johnson County v. City of Olathe, supra note 112.
\textsuperscript{121} Bd. of County Comm’rs of Johnson County v. City of Olathe, supra note 112, 263 Kan. at 681.
2. The lawfulness review

The court’s review of the lawfulness of the zoning action consists of determining “whether procedures in conformity with law were employed.”123 The courts will look not only at the provisions of the zoning statutes and zoning ordinances, but also at the bylaws adopted by the planning commission in evaluating whether all legally required procedures were followed.124 Exact conformity with each jot and tittle of the law is not required for those requirements unrelated to the jurisdiction of the zoning authority and substantial compliance is sufficient.125 For jurisdictional matters, however, such as proper notice to the public of a zoning hearing, substantial compliance is not enough, and a decision can be reversed even when there is no evidence that there was anyone interested in the matter who did not participate because of a defect in notice.126

IV. Conclusion

While zoning authorities have wide latitude in determining how to regulate the use of property to promote the interests of the public at large, they must act in an appropriate manner to do so. They may determine what is beautiful, as long as they don’t do it in an ugly way. Their decisions must respect the confines placed on the zoning power by the Constitution of the United States, various federal laws, state statutes, and local zoning codes. Their views of beauty must not lie outside the realm of fair debate. The scope of the limitations on zoning power is an area with many open questions that provide all those involved in land use disputes with ammunition for their fight.

About the Author

Patrick B. Hughes is a shareholder at the Adams Jones Law Firm P.A., Wichita. His practice centers around litigation and the resolution of disputes concerning real estate, business, and estates. After graduating from Washburn University School of Law in 1994, he served as a research attorney for Hon. Edward Larson, Kansas Court of Appeals and the Kansas Supreme Court; and as a law clerk for Hon. Mary Beck Briscoe, Federal Court of Appeals for the 10th Circuit before joining Adams Jones in 1997. In the area of land use law, he has represented landowners, developers, neighbors, and zoning authorities in various parts of the state.
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All articles or subject ideas for articles are reviewed by the Board of Editors. You may send a copy of the article or an outline of a proposed article to the Board for review. Mail or e-mail to:

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1200 S.W. Harrison
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Topeka, KS 66601-1037
E-mail: smckasket@ksbar.org
Notice of Consideration of Reappointment of Magistrate Judge
and Invitation for Public Comment

The current term of the office of U.S. Magistrate Judge Donald W. Bostwick at Wichita, Kan., is due to expire on July 21, 2007. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conduct of most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court, and (4) and trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to Ralph L. DeLoach, Clerk, U.S. District Court, 259 Robert J. Dole U.S. Courthouse, 500 State Ave., Kansas City, KS 66101. Comments must be received by 4:30 p.m., Feb. 15, 2007.

Notice of Consideration of Reappointment of Magistrate Judge
and Invitation for Public Comment

The current term of the office of U.S. Magistrate Judge David J. Waxse at Kansas City, Kan., is due to expire on Oct. 3, 2007. The U.S. District Court is required by law to establish a panel of citizens to consider the reappointment of the magistrate judge to a new eight-year term.

The duties of a magistrate judge position include the following: (1) conduct of most preliminary proceedings in criminal cases, (2) trial and disposition of misdemeanor cases, (3) conduct of various pretrial matters and evidentiary proceedings on delegation from the judges of the district court, and (4) and trial and disposition of civil cases upon consent of the litigants.

Comments from members of the bar and the public are invited as to whether the incumbent magistrate judge should be recommended by the panel for reappointment by the court and should be directed to Ralph L. DeLoach, Clerk, U.S. District Court, 259 Robert J. Dole U.S. Courthouse, 500 State Ave., Kansas City, KS 66101. Comments must be received by 4:30 p.m., Feb. 15, 2007.

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IN THE SUPREME COURT OF THE STATE OF KANSAS
RULES RELATING TO ADMISSION OF ATTORNEYS
RULE 706
TEMPORARY LICENSURE OF ATTORNEYS
PERFORMING RESTRICTED LEGAL SERVICES FOR SINGLE EMPLOYERS

Supreme Court Rule 706(a) is hereby amended, effective Jan. 1, 2007:

(a) Any applicant for admission to the Bar of Kansas who was duly admitted to and continuously licensed for the practice of law upon written examination by the highest Court of another state's judicial system or that of the District of Columbia, and who has accepted or intends to accept or continue employment by a person, firm, association, corporation, or accredited law school engaged in business in Kansas other than the practice of law, and whose full time is, or will be, limited to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for the rendering of services, which include legal services, may be granted a special temporary permit to practice law in Kansas and the Courts of this state, without examination, upon showing that the applicant:

(1) has filed a completed application pursuant to subsection (b) of this rule within ninety (90) days of the beginning of employment;
(2) would be fully qualified to take the bar examination in Kansas under the Rules of the Supreme Court;
(3) has satisfied any applicable continuing legal education requirements specified by the rules of the jurisdictions in which applicant has been admitted prior to making application in Kansas;
(4) is now and has been a person of good moral character and in all respects is a proper person to be granted a special temporary permit to practice law in this state; and
(5) has never failed a Kansas bar examination.

Subsequent to filing the completed application and pending issuance of the special temporary permit, an applicant may engage in the business of his or her employer, including legal services, if an attorney actively engaged in the practice of law in Kansas agrees, in writing, to supervise and be responsible for the acts of the applicant during that interim period. A special temporary permit granted under the provisions of this rule shall remain in effect for so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no source other than such employer. Upon the termination of such employment, the right of such person to practice law in Kansas shall terminate unless he or she shall have accepted like employment with another Kansas employer. Persons granted a temporary permit under this rule shall be subject to all of the rules for practice in this state, including the requirements for continuing legal education.

By order of the Court, this 31st day of October, 2006.
FOR THE COURT
Kay McFarland, Chief Justice

Rule 706 Amendment Warrants Timely Attention by In-House Counsel

By Jeff Morris, Bekowitz Oliver Williams Shaw & Eisenbrandt LLP, Overland Park

On Oct. 31, 2006, the Kansas Supreme Court announced an amendment to Kansas Supreme Court Rule 706 that inserts a timeliness element into the process whereby unlicensed in-house corporate counsel working in Kansas obtain temporary permits to practice. Enforcement of Rule 706 has been a recent focus of the Kansas Board of Law Examiners, as previously reported in the KBA Journal. Kansas companies employing in-house counsel have been sent reminders and notices to encourage compliance with Rule 706. The Board of Law Examiners (Board) has been dealing with an increased number of applications under Rule 706, many from in-house counsel who have worked in Kansas for an extended period of time while only being licensed in another state.

An uninformed opinion has been that in-house counsel engaged solely in the employment activities of the employer company need not be additionally licensed in Kansas despite working and making a living in the state. This misperception parallels a general view concerning in-house practice. The Kansas Supreme Court rules, however, make clear that in-house counsel must be properly licensed in Kansas or obtain a special temporary permit.

First and foremost, Model Rule 5.5 prohibits the unauthorized practice of law:

A lawyer shall not:

(continued on next page)
Rule 706, as amended in 2005, states:

(a) Any applicant for admission to the Bar of Kansas who was duly admitted to and continuously licensed for the practice of law upon written examination by the highest Court of another state's judicial system or that of the District of Columbia, and who has accepted or intends to accept or continue employment by a person, firm, association, corporation, or accredited law school engaged in business in Kansas other than the practice of law, and whose full time is, or will be, limited to the business of such employer, and who receives, or will receive, his or her entire compensation from such employer for the rendering of services, which include legal services, may be granted a special temporary permit to practice law in Kansas and the Courts of this state, without examination, upon showing that the applicant:

(1) would be fully qualified to take the bar examination in Kansas under the Rule of the Supreme Court;

(2) has satisfied any applicable continuing legal education requirements specified by the rules of the jurisdictions in which applicant has been admitted prior to making application in Kansas;

(3) is now and has been a person of good moral character and in all respects is a proper person to be granted a special temporary permit to practice law in this state; and

(4) has never failed a Kansas bar examination.

A special temporary permit granted under the provisions of this rule shall remain in effect for so long as such person remains in the employ of, and devotes his or her full time to the business of, and receives compensation for legal services from no source other than such employer. Upon the termination of such employment, the right of such person to practice law in Kansas shall terminate unless he or she shall have accepted like employment with another Kansas employer. Persons granted a temporary permit under this rule shall be subject to all of the rules for practice in this state, including the requirements for continuing legal education.

(b) Each applicant for a special temporary permit under this rule shall file in duplicate on forms approved by the Court and procured from the Clerk of the Appellate Courts:

(1) a verified petition to the Supreme Court;

(2) a written certificate from the authority charged with the administration of discipline in each jurisdiction in which the applicant holds a license to practice law, certifying that the applicant is in good standing, has not been disciplined by such jurisdiction for violations of the Code of Professional Responsibility, Kansas Rules of Professional Conduct, or any other ethical standards therein applicable, and that there are no complaints of such violations then pending against the applicant;

(3) where required by the rules of such jurisdictions, a written certificate from the authority charged with the administration of continuing legal education in the jurisdictions in which the applicant has been admitted to practice, certifying that the applicant has satisfied the continuing legal education requirements of such jurisdictions for any required years prior to making application in Kansas;

(4) a written certificate from the employer of such applicant evidencing the applicant's employment by such employer and that his or her full-time employment will be by such employer in Kansas; and

(5) such other and further information as the Board may require in the consideration of his or her application.

(c) The Board shall review each application for a special temporary permit under this rule and, if deemed necessary, shall interview each applicant for a special temporary permit under this rule, and will report its findings and recommendations in writing to the Supreme Court. If the Board shall recommend granting of the application, the Supreme Court may grant the applicant a special temporary permit to practice law in Kansas and in the courts of this state. The special temporary permit shall recite that it is issued under this rule, and shall limit the licensee to perform only (a) legal services for the employer's business or (b) matters for which a court makes a specific appointment. Such special temporary permit shall expire upon (i) termination of the applicant's employment by his full-time employer, or (ii) admission of the applicant to practice in Kansas under the terms of Rule 703 or 704, or, if the applicant shall fail the bar examination, at the date the results of the examination are announced.

(d) When an application under this rule is granted by the Supreme Court, the applicant shall take the oath, sign a roll of attorneys granted special temporary permits to practice law in this state and the Clerk shall issue to the applicant the permit as provided in subparagraph (c) above.

(e) If the Board shall recommend denial of an application made under this rule, it shall file its report with the Clerk of the Appellate Courts, who shall thereupon mail or otherwise furnish a copy to the applicant. The applicant may, within twenty days from the date the report was filed with the Clerk, or such other period as the Supreme Court may prescribe, file with the Clerk exceptions to the Board's report. A copy of such exceptions, if any, shall be forwarded by the Clerk to the secretary of the Board. Within twenty days of the filing of the exceptions of the applicant, the Board may file with the Clerk such additional
information or material as it deems appropriate, where-
upon the matter shall stand submitted and the Supreme
Court shall proceed to consider the same.

(f) Time in practice under a special temporary permit
issued pursuant to this rule may not be used to satisfy
requirements of any statute or regulation of the State of
Kansas.

(g) Any applicant for admission under Rule 706 who
withdraws or fails to pursue his or her application within
one year of the date of filing thereof, shall thereafter be
required to file a new application and pay the same fee re-
quired for the initial application. However, if the failure
of an applicant to pursue said application during such
period is the result of delay attendant to investigation of
applicant’s fitness and/or character, the need for a hearing
thereon, or actions of the Disciplinary Administrator, the
Board of Law Examiners, or the Supreme Court, such pe-
riod shall be extended for such additional time as shall be
determined by the Board.

The 2006 amendment, which goes in to effect on Jan. 1,
2007, states in relevant part that an applicant under Rule 706
must now demonstrate that the applicant:

(1) has filed a completed application pursuant to sub-
section (b) of this rule within ninety (90) days of the
beginning of employment;

Subsequent to filing the completed application and
pending issuance of the special temporary permit, an
applicant may engage in the business of his or her em-
ployer, including legal services, if an attorney actively
engaged in the practice of law in Kansas agrees, in writ-
ing, to supervise and be responsible for the acts of the
applicant during that interim period.

Accordingly, beginning January 2007, individuals who have
served as in-house Kansas counsel for an extended period of
time without properly seeking a permit under Rule 706, will
no longer be able to make application for a special permit
because the 90-day window for application will have been vio-
lated. Further, new in-house counsel will be required to make
timely application for a Rule 706 permit or forfeit the abil-
ity to seek a temporary permit. Absent an outright license to
practice in Kansas, or a Rule 706 permit, in-house counsel are
subject to the rule against the unauthorized practice of law.

For information regarding attorney admissions in Kansas, call
Francine Acree, attorney admissions administrator, or Carol
G. Green, clerk of the Supreme Court at (785) 296-3229.
Attorney Discipline

IN RE MICHAEL F. BRUNTON
ORIGINAL PROCEEDING IN DISCIPLINE
SUSPENSION OF SANCTION WITH CONDITIONS
NO. 96,581 – OCTOBER 27, 2006

FACTS: Respondent, a private practitioner from Topeka, stipulated to the facts and violations alleged in the formal complaint before a disciplinary hearing panel. The panel concluded that respondent failed to handle a bankruptcy appropriately when he attempted to include a nondischargeable criminal restitution order. He further caused unnecessary litigation when he failed to cooperate with the attorney for the victim and was assessed monetary sanctions of $1,000 by the bankruptcy court. Respondent was also convicted in federal court for his failure to file income tax returns for 1998, 1999, and 2000.

The panel found clear and convincing evidence of violations of Kansas Rules of Professional Conduct 3.1 (meritorious claims and contentions), 8.4 (b) (misconduct involving a criminal act that reflects adversely on honesty), and 8.4 (d) (misconduct involving conduct that is prejudicial to the administration of justice). After considering four mitigating and four aggravating factors, the panel unanimously recommended published censure so long as six express conditions were met.

HELD: Respondent did not contest the panel’s final report, and the Court adopted its findings of fact and conclusions of rules violations. A majority of the Court found that immediate imposition of a disciplinary sanction in addition to the conditions recommended by the panel was not necessary due to respondent’s positive response to the conditions to date. The Court suspended imposition of sanction for two years, provided respondent continues to comply fully with the conditions. A minority would impose a six-month definite suspension as recommended by the Disciplinary Administrator’s Office.

IN RE LINDA L. ECKELMAN
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 96,580 – OCTOBER 27, 2006

FACTS: Respondent, a private practitioner from Dodge City, appeared before a disciplinary panel on a complaint from a trial judge regarding her behavior during a criminal trial. Respondent stipulated to the allegations stated in the formal complaint with the exception of one sentence. The panel found that respondent violated Kansas Rule of Professional Conduct 3.5(c) when she discussed the merits of declaring a mistrial in the judge’s chambers without the prosecutor present and that she violated Rule 3.5 (d) when she used profanity and engaged in undignified and discourteous conduct that was degrading to the tribunal.

The hearing panel also found a violation of Rule 8.2 (a) for respondent’s false statement that concerned the integrity of the judge and accused him of improper discussions with jurors. The panel found one aggravating factor and six mitigating factors and recommended published censure.

HELD: No exceptions were filed to the panel’s report. The Court unanimously adopted the panel’s findings of fact and conclusions of rules violations as well as the recommended disciplinary sanction.

IN RE STEVEN R. SMITH
ORIGINAL PROCEEDING IN DISCIPLINE
REINSTATEMENT FROM DISBARMENT
NO. 66,330 – NOVEMBER 16, 2006

FACTS: Petitioner, formerly an attorney in private practice in Wichita, was disbarred by the Kansas Supreme Court in 1991 (In re Smith, 249 Kan. 227 (1991)). Following a period of dedicated rehabilitation, Smith filed a petition with the Court in 1996 for reinstatement. A hearing panel unanimously recommended that he be reinstated, however, a majority of the Court found that rehabilitation efforts did not outweigh the gravity of the misconduct. Citing factors in State v. Russo, 230 Kan. 5 (1981), the Court denied reinstatement.

In 2003, Smith filed a second petition for reinstatement. A hearing panel composed of three different attorneys reviewed the matter and also “unanimously and without hesitation strongly urge[d] the Court to grant the Petitioner’s petition for reinstatement.”

HELD: A majority of the Court found that the panel’s recommendation could no longer be ignored. The Court noted that SCR 219 contemplates reinstatement when a petitioner is completely rehabilitated and is fit to practice law. Upon earning 12 hours of continuing legal education credit and paying the annual registration fees, Smith will be reinstated to the practice of law. [Note: This is the first instance of a disbarred attorney being reinstated to practice in Kansas in more than 50 years.]
FACTS: Respondent, a private practitioner from Wichita, represented a client in a patent application. From September 1997 until February 2004, respondent was unable to get the documentation filed properly and the client finally filed a disciplinary complaint. Following a contested hearing, the hearing panel concluded respondent violated Kansas Rules of Professional Conduct 1.1 (competence), 1.2 (a) (scope of representation), 1.3 (diligence), 1.4 (a) (communication), and 8.4 (c) (misconduct involving deception).

After considering mitigating and aggravating factors, the panel recommended a 90-day suspension plus restitution of fees amounting to $5,800.

HELD: In addition to filing exceptions to the panel’s report, on the day of oral argument respondent filed additional factual information due to his confusion and erroneous testimony before the panel. The Court noted the unusual circumstances, considered additional factual information and adopted the factual findings and rules violations found by the panel. A majority of the Court believed respondent acted negligently in causing potential loss to his client and imposed published censure plus restitution of attorney’s fees. A minority of the Court believed respondent acted knowingly and would have imposed a more severe sanction.

 ASSIGNMENT OF REAL ESTATE COMMISSIONS
DECISION POINT INC. V. REECE & NICHOLS REALTORS INC.
JOHNSON DISTRICT COURT – AFFIRMED NO. 95,543 – OCTOBER 27, 2006

FACTS: Decision Point Inc. advanced money to two real estate agents who worked for Reece & Nichols Realtors Inc. in return for the assignment of their commissions. Reece & Nichols paid the real estate agents rather than directly paying Decision Point. When the real estate agents defaulted on the agreement with Decision Point by failing to tender payment, Decision Point sued Reece & Nichols for payment of the commission. The district court granted summary judgment to Reece & Nichols finding the Uniform Consumer Credit Code (UCCC) precluded the assignment of real estate agents’ earnings.

ISSUE: Assignment of real estate commission

HELD: Court held that advancing cash to a real estate agent for personal, family, or household purposes in return for the assignment of an anticipated commission and a percentage of the anticipated commission is a consumer loan subject to the UCCC. Court held the real estate agents assigned their earnings in violation of the UCCC and as a result, Decision Point could not enforce the assignment against Reece & Nichols.

STATUTES: K.S.A. 16a-1-101 et seq.; K.S.A. 2005 Supp. 16a-1-107, -1-201, -1-301(13), (15), (17), (21), (27), -3-305; K.S.A. 20-3017; and K.S.A. 84-9-102, -9-406

BREACH OF CONTRACT AND “SHRINKWRAP” AGREEMENT
WACHTER MGMT. CO. V. DEXTER & CHANEY INC.
JOHNSON DISTRICT COURT
AFFIRMED AND REMANDED NO. 95,102 – OCTOBER 27, 2006

FACTS: Wachter is a construction management company. Dexter and Chaney Inc. (DCI) is a software services company that develops, markets, and supports construction software. After negotiations, DCI issued a written proposal to Wachter for the purchase of an accounting and project management software system. Wachter signed the proposal. DCI shipped the software and assisted Wachter in installing it. Enclosed with the software, DCI included a software licensing agreement, also known as a “shrinkwrap” agreement, and provided a choice of law provision for Washington state. After encountering problems with the software, Wächter sued DCI in Kansas for breach of contract. The district court denied DCI motion to dismiss finding that the parties entered into a contract when Wächter signed the proposal and that the software license agreement contained additional terms that Wächter had not bargained for or accepted. The district court certified its ruling for interlocutory appeal.

ISSUES: (1) Breach of contract and (2) “shrinkwrap” agreement

HELD: Court held that DCI and Wächter negotiated prior to entering into a contract for the sale of software. DCI’s written proposal following the parties’ negotiations constituted an offer to sell. Wächtter accepted that offer when it signed the proposal, requesting shipment of the software. The contract was formed under the Uniform Commercial Code when Wächter accepted DCI’s proposal. Because the contract was formed before DCI shipped the software with the enclosed license agreement, the Software Licensing Agreement must be treated as a proposal to modify the terms of the contract. There was no evidence that Wachtter expressly agreed to the modified terms, and Wachtter’s actions in continuing the pre-existing contract do not constitute express assent to the terms in the software licensing agreement. Court held the forum selection clause in the software licensing agreement was not enforceable against Wächter.

STATUTES: K.S.A. 20-3018(c); K.S.A. 60-2102(b); and K.S.A. 84-1-103, -2-204, -2-206, -2-202, -2-209, -2-102, -2-105

DISSENT: J. Luckert dissented holding that the choice of venue provision in the software licensing agreement was enforceable against Wächtter.

CLASS ACTION
DRAGON ET AL. V. VANGUARD INDUSTRIES INC. ET AL.
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED WITH DIRECTIONS NO. 94,877 – OCTOBER 27, 2006

FACTS: In 2001, Dragon and two Georgia residents filed suit on behalf of themselves and a nationwide class of property owners whose property contains polybutylene pipe manufactured from Mitsui resin and was designed, manufactured, advertised or sold by Vanguard. In Dragon I, the Kansas Supreme Court reversed the class certification order and remanded for further findings because the trial court had failed to fully determine factual issues relating to the prerequisites for class certification and to rigorously analyze the requirements of commonality, typicality, predominance, and superiority. On remand, plaintiffs filed a second amended class petition, which reduced the number of causes of action to three and narrowed the class to members in Kansas, Oklahoma, Georgia, and South Carolina. The district court denied the plaintiff’s motion to certify a class action.

ISSUE: Class action

HELD: Court held that while plaintiffs failed to request further findings of fact and conclusions of law and the Court may assume that the trial court made the necessary findings and conclusions to support its decision, ultimately, the decision to be rendered on appeal is an appellate decision. If the appellate court concludes that the trial court did not engage in a rigorous analysis of the factors set forth in K.S.A. 60-223, as required by both the U.S. Supreme Court and this Court in Dragon I, so as to permit meaningful appellate review, the appellate Court in its discretion may still remand for such a rigorous analysis prior to further review. Court remanded for a rigorous analysis under K.S.A. 60-223.

STATUTE: K.S.A. 60-223, -252, -258, -2102(b), -3018(c)
HABEAS
HADDOCK V. STATE
JOHNSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 93,500 – NOVEMBER 9, 2006
FACTS: Haddock convicted of first-degree murder of wife. Conviction affirmed on direct appeal. Court rejected Phillips’ claims that his counsel was ineffective for: (1) failing to call a witness that Phillips claimed was necessary to support his claim of imminent threat; (2) failing to call witnesses that Phillips claimed would establish that before shooting Wilson, Phillips tried to defuse the hostile situation by calling police and leaving the party; and (3) failing to object to evidence that Phillips was on parole at the time of the shooting. Court stated it was legally and strategically sound for trial counsel, as long as the ultimate decision was made by the defendant, to suggest that his client would be better off not testifying than risking the introduction of his criminal record. Court agreed with the Court of Appeals decision to not address Phillips’ claims that his trial counsel was generally ineffective for various reasons that were incidentally raised by Phillips. Court rejected Phillips’ claims that the trial court failed to make appropriate findings of facts and conclusion of law.

ISSUES: (1) Post-conviction DNA testing, (2) prosecutorial misconduct, and (3) ineffective assistance of counsel

HELD: Issues of first impression. Provisions of K.S.A. 2005 Supp. 21-2512 are interpreted and applied, with comment on possible or probable available dispositions. Haddock’s requests for DNA testing are examined in detail. In first motion, district court erred in finding DNA test results of hair, fingernail, and eyeglass testing were inconclusive because evidence not conclusively exonerating. Trial court’s application of K.S.A. 2005 Supp. 21-2512(f)(3), rather than K.S.A. 2005 Supp. 21-2512(f)(2) applicable to DNA evidence that is favorable in part, is reversed and remanded for required hearing under 21-2512(f)(2). In second motion, district court erred in finding no substantive issues regarding DNA testing of shoes, shirt, and slacks remained after Haddock refused to submit to further testing. This resolution is reversed and remanded for district court to make findings of facts and conclusions of law regarding DNA results depending upon Haddock’s decision whether to go forward with further DNA testing of this evidence.

Haddock’s due process claims of prosecutor’s use of false evidence and nondisclosure of evidence concerning DNA testing of shoes, shirt, and slacks are not properly before the appellate court. Similar claims concerning DNA testing of hair and fingernail scrapings are considered and rejected. This evidence was neither false under Napue v. Illinois, 360 U.S. 264 (1959), nor suppressed under Brady v. Maryland, 373 U.S. 83 (1963).

Under facts, counsel not constitutionally ineffective in failing to investigate Dr. Gile’s DNA findings and in failing to employ or consult with independent DNA expert. Nor was counsel ineffective in failing to obtain shoe-print expert, failing to investigate and obtain further DNA testing on glasses, or in failing to have independent DNA testing of fingernail evidence. Counsel’s failure to object to prosecutor’s improper repeated characterization of Haddock as lying was deficient but not prejudicial in light of overwhelming circumstantial evidence of Haddock’s guilt. Claim that counsel failed to impeach testimony of witness with contradictory statement in police report is not properly before the court because police report attached to appellate reply brief was not presented to trial court. Also, cited inconsistency not so significant that failure to impeach denied Haddock a fair trial.

STATUTES: K.S.A. 2005 Supp. 21-2512, -2512(b)(1), -2512(c), -2512(f), -2512(f)(1)(A) and (B), -2512(f)(2), -2512(f)(2)(B) subsections (i), (ii), (iii) and (iv), -2512(f)(3), -22-3602(a) and (b) and K.S.A. 20-3018(c), 22-3501, -3501(1), 60-252(b), -254, -261, 60-1507

INEFFECTIVE ASSISTANCE OF COUNSEL
PHILLIPS V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,233 – OCTOBER 27, 2006
FACTS: Phillips fatally shot Charles Wilson. On the night of the shooting, Wilson had assaulted at least five people, including Phillips, over a two-hour period where teenagers had gathered at Ralph and Vickie Martin’s residence to socialize and consume alcohol. Phillips presented the jury with a theory of self-defense or defense of another person. The jury convicted Phillips of first-degree murder. Phillips filed a 60-1507 motion claiming he was denied effective assistance of counsel. The trial court denied the motion after an evidentiary hearing. The Court of Appeals affirmed the trial court.

ISSUE: Ineffective assistance of counsel

HELD: Court rejected Phillips’ claims that his counsel was ineffective for: (1) failing to call a witness that Phillips claimed was necessary to support his claim of imminent threat; (2) failing to call witnesses that Phillips claimed would establish that before shooting Wilson, Phillips tried to defuse the hostile situation by calling police and leaving the party; and (3) failing to object to evidence that Phillips was on parole at the time of the shooting. Court stated it was legally and strategically sound for trial counsel, as long as the ultimate decision was made by the defendant, to suggest that his client would be better off not testifying than risking the introduction of his criminal record. Court agreed with the Court of Appeals decision to not address Phillips’ claims that his trial counsel was generally ineffective for various reasons that were incidentally raised by Phillips. Court rejected Phillips’ claims that the trial court failed to make appropriate findings of facts and conclusion of law.

STATUTE: K.S.A. 60-421, -460(g), -1507

DISSENT: J. Davis dissented from the majority and concluded that Phillips was entitled to a new trial based on trial counsel’s failure to call the witness that was necessary to support his claim of imminent threat.

JURISDICTION OVER FOREIGN CORPORATIONS
MERRIMAN V. CROMPTON CORPORATION ET AL.
PRATT DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 91,702 – NOVEMBER 9, 2006
FACTS: Merriman alleged that he, and others similarly situated, paid an inflated price for tires purchased in Kansas because of an out-of-state price fixing agreement entered into by foreign corporations, which allegedly conspired to fix the price of chemicals used in the out-of-state manufacturing of two tires, which Merriman purchased from a Kansas retailer. The trial court and the Court of Appeals determined that Kansas courts could not exercise personal jurisdiction over the foreign corporations.

ISSUES: (1) General jurisdiction; (2) K.S.A. 2005 Supp. 17-7307(c); (3) Long Arm Statute, K.S.A. 60-308(b); and (4) K.S.A. 60-308(b)(2)

HELD: Court held that K.S.A. 17-7307(c) authorizes general jurisdiction over foreign corporations still doing business in Kansas and a basis for jurisdiction in this case. Court held that due process does not allow the exercise of general jurisdiction under K.S.A. 17-7307(c) as to any defendant except Bayer Corp. because of Bayer’s continuous and systematic contacts with Kansas. Court found the other defendants were subject to personal jurisdiction in Kansas pursuant to the long arm statutes. Court held that in considering the allegations of the plaintiff’s petition and in balancing the general equities of the situation, Court concluded that the exercise of specific jurisdiction against price fixing co-conspirators under the facts alleged would not violate due process.

STATUTES: K.S.A. 2005 Supp. 17-6202, -7301(b)(7), -7303, -7306, -7307(c); K.S.A. 40-218; K.S.A. 50-101 et seq.; and K.S.A. 60-308(b)
UNDERINSURED MOTORIST COVERAGE AND EXCLUSIVITY
STEMPLE v. MARYLAND CASUALTY CO.
CERTIFICATION OF QUESTION OF LAW FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS
NO. 96,173 – OCTOBER 27, 2006

FACTS: Stemple received workers’ compensation benefits from his employer, F&S Supply, for injuries caused by a nonemployee. After also receiving remuneration from the tortfeasor’s liability insurance carrier, Stemple then sued his employer’s underinsurance motorist (UIM) carrier for benefits based upon his use of a company car at the time of the accident. The UIM carrier, Maryland Casualty, argued that recovery of the UIM benefits was barred by the exclusivity provision of the workers’ compensation statute, K.S.A. 44-501(b). The U.S. District Court certified a question to the Kansas Supreme Court.

ISSUES: (1) Underinsured motorist coverage and (2) exclusivity

HELD: Court held the exclusivity provision is not a bar to Stemple’s recovery. Court stated K.S.A. 44-501(b) does not bar an injured worker’s recovery against the employer’s insurance company for underinsurance coverage when he or she has already received workers’ compensation benefits from the employer.

STATUTES: K.S.A. 44-284, -501(b), -504(b); and K.S.A. 60-3201

WORKERS’ COMPENSATION AND STANDARD OF REVIEW
SUMNER v. MEIER’S READY MIX INC. ET AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 93,546 – OCTOBER 27, 2006

FACTS: Sumner drove a semitrailer for Meiers. Sumner died as a result of a one-vehicle accident while he was driving a company truck, but running a personal errand. The administrative law judge (ALJ) awarded benefits finding that because Sumner’s traveling was made in a company vehicle, his death arose out of and in the course of his employment. The board reversed the ALJ and denied benefits because of the dual-purpose rule and the fact that Sumner’s trip was purely personal. The Court of Appeals found that Sumner’s trip home for a personal emergency fell within the traveling exception to the “going and coming” rule and therefore, Sumner, by and through his surviving wife, was entitled to workers’ compensation benefits.宁静

ISSUES: (1) Workers’ compensation and (2) standard of review

HELD: Court held that the Court of Appeals was correct that there was circumstantial evidence that Sumner might have stayed in Council Grove for the night and continued the business trip the next day, there was also substantial competent evidence that the side trip to Council Grove was purely personal and did not serve the interest of the employer. Thus, the issue was contested and evidence supported both positions. The board weighed the evidence and found Sumner had failed to establish by a preponderance of the evidence that the side trip furthered Meier’s interest. Court held that substantial competent evidence supported the board’s findings and the board’s decision should have been upheld. Court found the

Appellate Practice Reminders . . .
From the Appellate Court Clerk’s Office

Footnotes in Briefs

Footnotes are not favored and they should be avoided in briefs. See Rule 6.07(a). Substantive information should be placed in the body of the brief. Standards of review, facts keyed to the record prepared by the district court, and citations to case law are examples of information that should be placed in the body of the brief. See Rules 6.02 and 6.03.

If a footnote is absolutely necessary, it shall commence on the same page as the text to which it relates. See Rule 6.07(a). A footnote detailing how the party is citing to the record on appeal or that an item has been requested to be added to the record are examples of acceptable material for a footnote.

Consolidations

When moving to consolidate two or more cases, file a motion to consolidate, with the appropriate number of copies, in each case to be considered for consolidation. The motions should list all captions and appeal numbers for the matters to be considered for consolidation. Highlighting the number of the case in which each pleading is to be filed will help ensure the motion is filed in the appropriate appeal.

If an appellate court has issued a show cause order concerning consolidation, remember to file a response in each case. An original, along with the appropriate number of copies of the response, is needed for each case under consideration for consolidation. See Rule 5.01 for the required number of pleading copies.

If you have any questions about these or other appellate court rules and practices, call the Clerk’s Office and ask to speak with Jason Oldham, chief deputy clerk, (785) 368-7170.
Criminal

STATE V. ALGER
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 93, 587 – OCTOBER 27, 2006

FACTS: Two-year-old Alexis was under Alger’s care while her mother, Alger’s girlfriend, was at work. EMT and police were called to the girlfriend’s home where they found Alexis unconscious. Alexis died two days later. Alger testified he had found Alexis face down and attempted CPR, he called 911, and then told paramedics that Alexis tripped because he thought that might have happened. Alger’s interrogations were videotaped. Alger gave various reasons for several bruises on Alexis’ body. Alger eventually admitted that he had lost control with Alexis and that he had shaken her on at least two previous occasions. He denied shaking Alexis on the day she was found unconscious.

ISSUES: (1) Admission of evidence (2) confession, (3) prosecutorial misconduct, and (4) cumulative error

HELD: Court stated that the defendant argued that the state’s admission of an unredacted videotape of his interrogation was error, but he had not objected to the admission of the video at trial. Court held that it will not address the merits of the issue on appeal because a contemporaneous and appropriate objection at trial is indispensable. Court stated there was no motion to suppress filed in the district court and no objection lodged to the admission of statements at trial. Court held that the claim was not preserved for appeal. Court held that although the prosecutor danced on the line between mere recitation of the expected evidence and forbidden argument, he did not step over it in his opening statement. Court held the prosecutor’s rhetorical devise that Alexis will forever be two years old and her last memory will forever be that of Alger violently shaking the life out of her was colorful, but it was not error. Court stated there were no errors and thus no possibility of cumulative error.

STATUTE: K.S.A. 60-261

STATE V. ANTHONY
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 92, 362 – OCTOBER 27, 2006

FACTS: Anthony was convicted of first-degree premeditated murder of David Carrington after three trials. Carrington was Anthony’s off-and-on landlord and employer. The first two trials resulted in hung juries on the murder charge, but in the second trial, Anthony was acquitted on charges of aggravated burglary and theft. Carrington’s wife found him on the ground in front of their house. Carrington’s wife alleged that she was missing $60-$80 from her purse. Paramedics initially believed Carrington suffered a heart attack and had fallen, but the coroner determined Carrington died from extensive damage to his skull and brain from multiple blows to his head and neck. Carrington’s wife told authorities that Anthony, among others, was one of several people that had a “beef” with her. After a lengthy interrogation, Anthony confessed, but then before recounting the story, he asked for an attorney.

ISSUES: (1) Post-arrest silence, (2) prosecutorial misconduct, (3) redacting videotaped interview, (4) admission of evidence, (5) Allen instruction, and (6) cumulative error

HELD: Court held that Anthony failed to preserve the issue of his post-arrest silence. Nevertheless, the Court held that Anthony was not silent. When interrogated, he confessed. He never invoked his right to silence and he invoked his right to counsel only after the cat was out of the bag. Court rejected Anthony’s arguments of prosecutor misconduct that the prosecutor: (1) implied that Carrington’s wife only gave authorities Anthony’s name, (2) misstated the law of premeditation during closing argument, and (3) improperly asked the jury to consider why Anthony would give three different stories concerning his whereabouts or actions on the morning Carrington was killed. Court held that Anthony failed to preserve the issue of redacting the videotape to remove repeated comments by the detective regarding Anthony’s lack of credibility or veracity. Court held the eviction or the restraining order did not qualify as evidence of other crimes or civil wrongs evidence and that the threat against Carrington evidence was invited error because defense counsel pressed the point during cross-examination. Court found the Allen instruction along with all the other instructions were proper statements of law and a jury could not reasonably have been misled by them. Court found the only potential error was the prosecutor’s remark in opening statement and that one error cannot support reversal under the cumulative effect rule.

STATUTES: K.S.A. 2005 Supp. 44-501(a), -508(f), -555c(a), (k) and K.S.A. 77-601
STATE V. GARCIA  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 93,412 – OCTOBER 27, 2006

FACTS: Garcia was convicted of two counts of first-degree murder and one count of intentional second-degree murder for three killings that took place at a club in Wichita, where drugs were regularly sold, that was jointly owned by Garcia and Luis Hernandez. Garcia shot the victims and then dismembered and burned them in barrels in a field in Cowley County. Forensic anthropologists identified the victims.

ISSUES: (1) Speedy trial, (2) admission of evidence, and (3) sentencing

HELD: Court found that Garcia was arraigned on Oct. 4, 2003, and his trial began 217 days after that on May 17, 2004. The Court found no speedy trial violation because of the timing of the availability of the DNA testing results. Court held the district court did not abuse its discretion by admitting statements by one Garcia associate to another that he was now “part of the family” because he witnessed the murder of one of the victims. Court held this statement was not inadmissible hearsay. Court held the trial court did not abuse its discretion by admitting testimony of two witnesses that Garcia had encouraged each of them to kill someone. Court held Garcia improperly raised different objection to this testimony on appeal. Court also held the state's overwhelming evidence of Garcia’s guilt led to his conviction without regard to the admission of the testimony of the two witnesses. Court cited prior Kansas precedent that a jury does not need to determine that aggravating circumstances existed beyond a reasonable doubt in a hard 50 conviction.

STATUTES: K.S.A. 22-3402 and K.S.A. 60-401(b), -460, -447

STATE V. GARY  
SEDGWICK DISTRICT COURT  
REVISED AND REMANDED  
COURT OF APPEALS – AFFIRMED  
NO. 93,089 – OCTOBER 27, 2006

FACTS: On April 21, 2004, Gary entered into a plea agreement to two counts of forgery based on conduct, which occurred in July 2003. The district court accepted his plea, pronounced him guilty, and ordered a presentencing investigation. On May 25, 2004, the district court sentenced Gary to probation. Within a month, the district court revoked Gary's probation finding that he had violated his probation based on the fact that he had been charged on June 15, 2004, with attempted robbery occurring on May 22, 2004. The Court of Appeals reversed finding probation violation warrants cannot be issued for conduct occurring prior to the grant of probation.

ISSUE: Probation revocation

HELD: Court held that Gary’s conduct prior to sentencing did not constitute a violation of the terms of his probation and therefore cannot be the basis for revoking the probation under Kansas law. Court held that a defendant does not have an independent, affirmative obligation to incriminate himself at sentencing by revealing his commission of the crime of attempted robbery three days prior to sentencing. Court found the district court’s revocation of his probation based upon what may be concealment by the defendant provided no basis for the revocation of his probation and amounted to an exercise of power beyond its jurisdiction.


STATE V. GONZALEZ  
SEWARD DISTRICT COURT – AFFIRMED  
NO. 91,469 – OCTOBER 27, 2006

FACTS: Officer Schafer was on routine patrol and noticed a tan Lincoln with its headlights off, either parked or moving very slowly in an alley behind a Motel 9. He was suspicious because of recent burglaries and stopped in a nearby dirt road. Schafer saw a Hispanic male, on foot, approach the Lincoln from behind and fire approximately four shots with a handgun into the Lincoln. The driver died, but the passenger, Heathman, survived his injuries. Heathman testified they had been flashed gang signs by the shooter and they were driving slowly in the alley intending to surprise the shooter and start a fight. Gonzalez was arrested for the shooting, but was released after two months for lack of evidence. Approximately two years later he was arrested in California for robbery and during an interview he gave details of the Kansas murder.

ISSUES: (1) Expert testimony, (2) confession, (3) self-defense instruction, and (4) sentencing

HELD: Court held the trial court did not err in excluding expert opinion based on California medical records that Gonzalez was incompetent to stand trial. Court concluded that Gonzalez’s California medical records were not properly authenticated, were not offered as an exception to the hearsay rule, and remained inadmissible hearsay. Court stated that while it was error to admit the unredacted videotape of Gonzalez’s interview where he described many additional crimes and civil wrongs, Court found the error not prejudicial in light of Gonzalez’s theory of self-defense and the trial court’s limiting instruction. Court examined all the appropriate considerations and agreed with the trial court’s determination that Gonzalez’s confession was freely and voluntarily given. Court found no err by the trial court in not allowing a self-defense instruction. Court stated the evidence indicated that Gonzalez had every opportunity to escape, rather than to continue walking toward and shooting from behind what Gonzalez allegedly believed to be the source of life-threatening danger. Court rejected Gonzalez’s argument that his criminal history must be submitted to jury and proved beyond a reasonable doubt, citing State v. Ivory, 273 Kan. 44. Court rejected Gonzalez’s arguments of cumulative error finding that the evidence against him was overwhelming.


STATE V. GUNBY  
JOHNSON DISTRICT COURT – AFFIRMED  
NO. 91,406 – OCTOBER 27, 2006

FACTS: Kevin Gunby was convicted of the premeditated first-degree murder in the strangulation death of his high school classmate, Amanda Rae Sharp. Gunby and Sharp were in a sometimes violent and sexual relationship. Gunby lived with the Jaynes family and their son, Brad Jaynes. Jaynes testified that he saw Sharp lying down in a downstairs bedroom with blood coming from her nose. Jaynes helped load Sharp's body into the trunk of Gunby's car where the body was eventually discovered after Jaynes reported the crime.

ISSUES: (1) Admission of other crimes evidence, (2) prosecutorial misconduct, (3) jury instructions, and (4) cumulative error

HELD: The Court expounded a lengthy discussion of Kansas jurisprudence on admission of evidence of other crimes and civil wrongs and held that Kansas cases allowing admission of such evidence independent of K.S.A. 60-455 are contrary to long-held common law and the text of the statute itself. Court held the list of material facts in K.S.A. 60-455 is exemplary rather than exclusive. Evidence of other crimes or civil wrongs committed by a criminal defendant is
admissible if relevant to prove one of the eight material facts listed in the statute or some other material fact not listed in the statute, if the judge determines (1) the relevance exists, (2) the material fact is in issue, and (3) the probative value of the evidence outweighs its prejudicial effect. In addition, to avoid error, the district judge must give a limiting instruction informing the jury of the specific purpose for admission. Any language to the contrary in previous opinions was disapproved. The Court also held that error in the admission of or instruction upon K.S.A. 60-455 evidence is not automatically reversible. Rather, it is to be evaluated on appeal under either K.S.A. 22-3414 or K.S.A. 60-621. Any language to the contrary in previous opinions was disapproved. Court held that resid estae is no longer an independent basis for admission of evidence in Kansas. That evidence may be part of the resid estae of a crime demonstrates relevance. But that relevance must still be measured against any applicable exclusionary rules. Court held that the testimony about prior violence between Gunby and Sharp would have survived the K.S.A. 60-455 explicit relevance inquiries and particularized weighing of probative value and prejudicial effect. Court stated the district court's failure to give a limiting instruction was not prejudicial in light of the overwhelming evidence against Gunby. Court held admission of the evidence as resid estae was error, but was not reversible error in light of the overwhelming evidence against Gunby. Regarding prosecutorial misconduct, the Court found the prosecutor's limited discussion of premeditation was barely outside the broad latitude permitted in discussing the evidence in the case and was harmless. The Court found no error in the lesser-included jury instructions and that reversal was unnecessary under the cumulative effect rule if the evidence against the defendant is overwhelming, as was the case with Gunby.

STATE V. MOODY
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVISED IN PART, AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED IN PART AND REVISED IN PART
NO. 92,248 – OCTOBER 27, 2006

FACTS: Moody was charged in a complaint with driving under the influence (DUI) after having been previously convicted of DUI two or more times. Moody pled guilty. Just prior to the imposition of sentence, a third prior DUI conviction was added to Moody's criminal history. Moody acknowledged that she had three prior DUI convictions. Accordingly, the district court judge then sentenced Moody as a fourth-time DUI offender. Moody appealed her sentence on the admissibility of prior crimes evidence under K.S.A. 60-455.

STATUTES: K.S.A. 20-3109; K.S.A. 22-3414; K.S.A. 60-261, -401(b), -407(f), -455; and K.S.A. 62-1447

DISSENT: C.J. McFarland dissented with the majority's restriction on the admissibility of prior crimes evidence under K.S.A. 60-455.

STATE V. ROGERS
JOHNSON DISTRICT COURT – AFFIRMED
NO. 92,814 – OCTOBER 27, 2006

FACTS: Rogers and three accomplices broke into an Olath motorcycle dealership and stole motorcycles. They also stole a large truck to use in the burglary. Witnesses saw the large truck backed up to the dealership and after the truck left they saw the window had been broken. Authorities gave chase and the truck eventually traveled against traffic and the chase ended when the truck struck a car, killing both occupants of the car. A jury convicted Rogers of burglary, theft, and two counts of felony murder based upon the theft. The case was remanded for a new trial. The second jury convicted Rogers of two counts of felony murder and one count of theft.

ISSUES: (1) Double jeopardy, (2) law of the case, (3) admission of evidence, and (4) lesser-included jury instructions

HELD: Court held that the first jury's convictions of Rogers for felony murder based upon the improperly-defined theory of theft by exerting unauthorized control did not represent acquittals for the remaining theories of felony murder, e.g., theft by obtaining unauthorized resources of the defendant and the nature of the burden that the payment of fees will impose.

STATUTES: K.S.A. 8-1567(g); K.S.A. 22-3201 and K.S.A. 2005 Supp. 22-3210(a)(2), -4513

DISSENT: J. Luckert indicated she would not reach the due process issue because a sentencing judge assessing fees to reimburse BIDS must consider on the record at the time of assessment the financial resources of the defendant and the nature of the burden that the payment of fees will impose.

STATE V. REED
CHAUTAUQUA DISTRICT COURT – AFFIRMED
NO. 93,430 – OCTOBER 27, 2006

FACTS: Reed shot and killed his wife because she had recently filed for divorce and he was upset because of the breakup and his wife's relationship with another man. During the shooting rampage where he shot his wife 20 times, he wounded his daughter as well. A 911 phone call made by his wife captured almost the entire incident. Reed was convicted of first-degree premeditated murder of his wife, attempted second-degree murder of his daughter, and aggravated burglary.

ISSUES: (1) Motion for change of judge and (2) admission of evidence

HELD: Court held the district court did not err in denying Reed's motion for change of judge based on the judge's acquaintance with Reed's family, church, and children connections. Court held that even if Reed could create reasonable doubt concerning the judge's impartiality, the record did not show that the judge actually exhibited bias or prejudice at Reed's trial. Court also held the district court did not abuse its discretion in admitting the audiotape of the 911 call. Court found the 911 recording corroborated the testimony of the dispatcher, the testimony of the officer to whom Reed offered confessions, and the testimony of Reed's daughter. The audiotape also captured Reed's demeanor at the time of the events, documented events, and the duration of the incident and was highly probative with respect to the essential element of premeditation. Court reiterated the constitutionality of the hard 50 sentencing scheme.

STATUTES: K.S.A. 2005 Supp. 20-311d(a), (b), (c)(5); K.S.A. 2005 Supp. 21-4635(b), (d), (f), -4637; K.S.A. 22-3601(b)(1); and K.S.A. 60-407(f)
control or burglary. An improper conviction of a crime on a single theory does not bar retrial under the remaining alternate theories. Court stated that the same crime was charged and tried in both trials. Court found Rogers’ law of the case argument without merit. Court admitted that the first jury failed to find Rogers and his accomplice guilty of felony murder based upon commission of burglary or, as he pointed out, flight from commission of burglary. However, the jury did find him guilty of felony murder for commission of a crime based upon an improperly defined theft by exertion of unauthorized control theory. This theory incorrectly invited the jury to ignore flight and to find the theft was ongoing from the time he obtained possession of the motorcycles until the time of the deaths. The jury did so. The reversed verdict did not foreclose the second jury from considering, as a basis for felony murder, the same flight from the now properly defined theft. Court found Rogers’ substantial rights were not prejudiced in the use of his transcribed testimony from his first trial. Court held the trial court did not err in failing to give lesser-included instructions for involuntary manslaughter and vehicular homicide because the evidence that Rogers was in flight from the commission of the theft at the time of the accident was not weak.

STATEMENTS: K.S.A. 21-3108(1)(c), (4)(c), -3401(b), -3436; K.S.A. 22-3601(b)(1); and K.S.A. 60-4006(c)

STATE V. SANCHEZ
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,694 – OCTOBER 27, 2006

FACTS: Sanchez was convicted of first-degree felony murder and aggravated battery involving the death her 3-year-old son. Sanchez gave a series of explanations for the multiple abrasions and contusions her son had all over his body.

ISSUES: (1) Right to remain silent, (2) presenting a defense, (3) merger of offenses, (4) sentencing, and (5) cumulative error

HELD: Court held there was no violation of her “right not be in interviewed,” because it was defense counsel that elicited the testimony from the detective. The state did not cross-examine the detective about the statement or use the testimony in closing argument. Court stated that the state did not need nor did it use Sanchez’s silence to support the theory that she had fabricated her story after the arrest. Court held the trial court did not prevent Sanchez from presenting a defense, because the other children’s behavior when they were admitted to the children’s home after the incident did not address whether Sanchez beat her son to death or not and Sanchez was able to present evidence for consideration that her 16-year-old son was actually the perpetrator of the abuse. Court held that because the aggravated battery inflicted upon the child was not so distinct as to not be an ingredient in his homicide, the aggravated battery cannot serve as an inherently dangerous felony for application of the felony-murder rule. However, the Court held that even though the aggravated battery conviction merged, the child abuse conviction did not because the Legislature has determined that child abuse is an appropriate underlying felony for felony murder regardless of whether the act of child abuse is so distinct from the homicide as to not be an ingredient of the homicide. Regarding sentencing, the Court stated that the jury found Sanchez guilty of both child abuse and aggravated battery and because aggravated battery and child abuse are not multiplicitous, Sanchez’s sentence for aggravated battery and felony murder based on child abuse are not multiplicitous and do not violate her right against double jeopardy. Court stated that Sanchez failed to demonstrate any trial errors that prejudiced her right to a fair trial.

STATEMENTS: K.S.A. 2005 Supp. 21-3436(a)(7); K.S.A. 21-3401(b), -3414, -3609; K.S.A. 22-3601(b)(1); and K.S.A. 60-401(b), -407(f)

STATE V. SNOW
JOHNSON DISTRICT COURT – CONVICTIONS
AFFIRMED, SENTENCES VACATED, AND REMANDED
FOR RESENTENCING
NO. 93,749 – OCTOBER 27, 2006

FACTS: Snow, his brother, and Charles Miller broke into several stores in Johnson County and stole various items valued at more than $60,000. The trio also stole a van valued at nearly $5,000 to assist in the thefts. When Miller was arrested, he confessed to these crimes and advised police of the other two as accomplices. Miller was given immunity. A jury convicted Snow of 15 felony counts of nonresidential burglary, theft and criminal damage to property, and four counts of misdemeanor criminal damage to property.

ISSUES: (1) Admission of evidence, (2) prosecutorial misconduct, (3) cumulative error, and (4) sentencing

HELD: Court held the district court did not err in admitting the telephone conversation between Snow and his bondsman. Court rejected Snow’s argument about lack of foundation because the phone monitor was competent to testify regarding the authenticity and correctness of the audio recording. Court held the trial court erred by not redacting references to Snow’s other bad acts from the audio recording, but that the error was harmless. Court found the trial court did not abuse its discretion by allowing the state’s endorsement of a jail house witness on the eve of trial because Snow could not claim any surprise and the witnesses’ testimony was not critical for Snow’s conviction. Court agreed that the prosecutor’s comments on Snow’s right to a jury trial were outside the considerable latitude prosecutors are allowed, but that the comments were brief in the context of the trial and probably had little if any weight in the minds of the jurors when considered in light of the evidence presented. Court found no support for Snow’s claim that cumulative errors denied him a fair trial. Court held that Snow’s sentence violated the maximum sentence statutes and remedied for resentencing. Court briefly addressed the constitutionality of the aggravated factors statute, the nonstatutory aggravating factors, aggravated factors already included in the severity level of Snow’s crime, use of his criminal history, and the consecutive nature of his misdemeanor sentences.

STATEMENTS: K.S.A. 20-3018(c); K.S.A. 2005 Supp. 21-3701, -3715, -3720, 4636(f), -4716, -4719, -4720(b)(4), (c)(3); K.S.A. 2005 Supp. 22-3201(g); and K.S.A. 60-401(b), -455
Court of Appeals

Civil

ADMINISTRATIVE ACTIONS
TWIN VALLEY DEV. SERVICES INC. V.
KANSAS DEPARTMENT OF SRS
WASHINGTON DISTRICT COURT – AFFIRMED
NO. 95,569 – NOVEMBER 17, 2006

FACTS: Twin Valley, a community developmental disability organization (CDDO), employed Hawkins as targeted case manager. Hawkins resigned after Twin Valley suspended her on allegations of falsified records and improper use of company equipment. Twin Valley filed complaint with Social and Rehabilitation Services (SRS) alleging Hawkins had breached rules of conduct of case management. When SRS issued letter finding no violation of SRS rules, Twin Valley appealed. Office of Administrative Hearings dismissed the appeal because Twin Valley had no standing. On Twin Valley's petition for review, State Appeals Committee (SAC) found Hawkins was only party with standing to challenge SRS's decision. Twin Valley filed district court action for judicial review of SAC's order. District court dismissed the case, finding Twin Valley lacked standing to compel SAC to conduct a hearing. Twin Valley appealed, claiming strong interest in outcome of its complaint against Hawkins given her new affiliation with Progressive Enterprises Inc., a CDDO interested in affiliating with Twin Valley.

ISSUE: Standing to appeal administrative agency action

HELD: SRS acted in accordance with all relevant statutes. Twin Valley not a party to the SRS proceedings, and it had no standing to initiate an appeal or petition for review. Even if SRS had chosen to investigate Twin Valley's claims further, no hearing was required. No merit to Twin Valley's claim it was entitled to copy of Hawkins' response to SRS regarding Twin Valley's complaint, and letters between SRS and Hawkins were not "ex parte communication" within Kansas Administrative Procedures Act.

STATUTES: K.S.A. 2005 Supp. 77-259(a)(1); and K.S.A. 77-501 et seq., -502(e), -508, -525, -525(a), -601 et seq.

CHILD PLACEMENT
IN RE M.R. AND J.R.
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 95,671 – NOVEMBER 9, 2006

FACTS: M.R. and J.R. were placed in protective custody of Social and Rehabilitation Services (SRS) and later placed in a foster home. The parental rights to the children were terminated. The uncle and aunt of the children were granted interested party status. SRS decided that both the foster family and the uncle and aunt were great families, but they chose blood over bond and decided to remove the children from the foster home. The district court reversed SRS holding that the foster parents had met their burden of proving that a change in placement was not in the best interests of the children and that the decision of SRS was based on abstraction.

ISSUE: Child placement

HELD: Court held that where an agency's decision to change placement of a child was overly influenced, if not controlled, by an abstract or arbitrary preference for "blood," this will sufficiently support the district court's conclusion that the agency's decision failed to reflect reasonable efforts in finding child placement.

STATUTE: K.S.A. 38-1501 et seq., -1566(a), -1584

HABEAS
ABASOLO V. STATE
SEDGWICK DISTRICT COURT – DISMISSED IN PART, REVERSED IN PART, SENTENCE VACATED AND REMANDED
NO. 93,788 – NOVEMBER 9, 2006

FACTS: Abasolo convicted of drug offenses and placed on probation with underlying controlling 52-month sentence. Trial court later revoked probation and ordered service of 36-month sentence minus good time. Journal entry, however, showed a 52-month sentence. Abasolo filed 60-1507 motion after discovering the discrepancy. At hearing on issue of true length of sentence, trial court acknowledged error at revocation hearing, stated his intention to impose the original 52-month sentence, and denied Abasolo's motion. Abasolo appealed, arguing sentence pronounced at revocation hearing controls. Abasolo also claims plea not knowing and valid because counsel failed to advise of potential sentence, and failed to obtain mental health evaluation to support bipolar diagnosis as mitigation in sentencing.

ISSUES: (1) Disparity in oral and written sentence and (2) ineffective assistance of counsel

HELD: General rule stated that sentence becomes final when pronounced from bench. No merit to state's argument that this rule does not contemplate sentencing at a probation revocation where there is an underlying original sentence. Abasolo's 52-month sentence is vacated. Case remanded for entry of 36-month sentence. Claims of ineffective assistance of counsel not properly preserved for appeal, and are dismissed.

STATUTES: K.S.A. 2005 Supp. 22-3716(b) and K.S.A. 60-1507

HABEAS
MCDERMED V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,960 – NOVEMBER 9, 2006

FACTS: McDermed convicted of aggravated robbery and kidnapping. He filed 60-1507 motion, alleging ineffective assistance of trial counsel, insufficient evidence, equal protection violations, and vindictive prosecution. After appointing counsel and conducting a preliminary hearing, district court summarily denied the 1507 motion. McDermed appealed, claiming 1507 counsel was ineffective, and claiming trial court should have held evidentiary hearing on McDermed's 1507 motion.

ISSUES: (1) Ineffective assistance of counsel in 60-1507 hearing and (2) summary denial of 60-1507 motion

HELD: Kansas law provides statutory right to effective assistance of counsel in a 60-1507 proceeding. No violation of this statutory right in this case. Under facts, McDermed's counsel did not advocate against his client's position, but instead honored duty of candor to the court.

Ineffective assistance of trial counsel claims examined. Files and records of case conclusively show that McDermed not entitled to relief on any claim. Although some of district court's findings were erroneous, correct result was reached. No error to deny McDermed's 1507 motion without an evidentiary hearing.

STATUTES: K.S.A. 2005 Supp. 22-4506(b) and K.S.A. 22-2501, 60-1507, -1507(b)
ISSUES: (1) Coverage under provisions in general liability policy and (2) coverage under workers’ compensation/employer’s liability policy

HELD: District court erroneously determined there was coverage. Under facts, where no evidence was made known to insurer that victim suffered or claimed physical harm, and where insured cites no fact that was reasonably discoverable indicating physical harm was at issue at any time from date of incident until settlement with victim, insurer had no duty to further investigate or defend claim for purely emotional injury under insurance policy agreeing to indemnify only for bodily injury. Also, employment-related practices exclusion in commercial general liability policy of insurance requires no showing of practice or policy as prerequisite to applicability of this exclusion. Language of exclusion clearly references not only employment-related practices and policies but also employment-related acts or omissions. Likewise, coverage under workers’ compensation/employer’s liability not triggered. Liberty Mutual did not breach policy in not defending LDF. District court is reversed and case is remanded with directions to enter judgment against LDF on its claims against Liberty Mutual.

STATUTE: K.S.A. 60-256

SERVICE OF PROCESS AND UNIQUE CIRCUMSTANCES DOCTRINE
FINLEY V. ESTATE OF DE GRAZIO ET AL.
MCPEHERSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 94,698 – NOVEMBER 17, 2006

FACTS: Finley’s purported medical malpractice claims arose in October 2000. She requested a medical malpractice screening panel in October 2002. The district court later dismissed the screening panel on March 25, 2004, and Finley filed her petition against four defendants on April 22, 2004. Summons requests were filed on May 25, 2004. Counsel for the defendant determined that she needed to open an estate for one of the defendants in order to have an administrator appointed to receive service. Because counsel determined she could not obtain service within 90 days, counsel faxed an order for extension of time for service on July 7, 2004, to extend service time to Aug. 20, 2004. The court granted the order on July 8, 2004, and all defendants were properly served within the extended period. The defendants challenged the extension of service. The original judge recused himself and another district court judge ruled that Finley did not have “good cause” for the extension, that counsel was not entitled to rely on the order because she knew or should have known that it was procured without the required showing, and that the doctrine of unique circumstances was not applicable to save service or the suit. The district court concluded Finley’s lawsuit was time barred and a dismissal was granted.

ISSUES: (1) Service of process and (2) unique circumstances doctrine

HELD: Court held that under the facts of this case, the doctrine of unique circumstances applied because: (1) past practice of counsel in seeking a 60-203(a) extension supported a reasonable belief that her extension order was valid; (2) counsel’s conduct was found to be “reckless” but not an outright misrepresentation or fraud on the court; (3) there was no real prejudice to defendants; (4) the good cause requirement of K.S.A. 60-203(a)(1) must be liberally construed; (5) dismissal of plaintiff’s action constituted significant prejudice and was contrary to the policy to provide litigants their day in court; and (6) purported post hoc reconsideration by a second district judge was in fact quasi-appellate review. Court reversed and remanded with directions for the lawsuit to proceed as if service had been timely effected.

STATUTES: K.S.A. 60-203(a) and -1501; and K.S.A. 65-4908

WORKERS’ COMPENSATION
JOHNSON V. JOHNSON COUNTY
WORKERS’ COMPENSATION BOARD – REVERSED
NO. 93,466 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED MARCH 10, 2006

FACTS: Johnson works for Johnson County as a child care licensing specialist. She inspects childcare facilities and spends 5 to 10 percent of her time in the office doing paperwork. In August 2002, Johnson injured her left knee when she simultaneously turned in her chair and attempted to stand while reaching for a file that was overhead. Johnson immediately experienced severe pain in her left knee, which would not straighten. A medical examination revealed a bucket handle meniscal tear to the knee. The injury was surgically repaired and Johnson was released without restrictions. The administrative law judge found Johnson’s injuries arose out of her employment and that although the injury could have happened away for work, it in fact happened at work. The board affirmed and, in doing so, rejected Johnson County’s argument that this was normal activity of day-to-day living.

ISSUES: (1) Substantial competent evidence, (2) K.S.A. 44-501(a), and (3) normal activities of day-to-day living under K.S.A. 2002 Supp. 44-508(c)?

HELD: Court held that under the facts of this case, substantial competent evidence did not support the board’s finding that Johnson’s act of standing up from a chair to reach for something was not a normal activity of day-to-day living. Court stated that other jurisdictions, which have considered similar factual scenarios, have reached the similar conclusion that ordinary activities of daily living, which result in on-the-job injuries, are not compensable under workers’ compensation law.

(continued on next page)
Criminal

STATE V. 1990 LINCOLN TOWN CAR ET AL.
DICKINSON DISTRICT COURT – AFFIRMED
NO. 95,108 – NOVEMBER 9, 2006

FACTS: Highway patrolman stopped Smith’s 1990 Lincoln Town Car for an expired license tag. Smith received a warning and then agreed to answer a few more questions. After a drug dog alerted on the vehicle, officer’s searched Smith’s car and discovered a marijuana pipe, a jar containing approximately 5,209 marijuana seeds, two firearms, and then officers found $3,497.68 in Smith’s pocket and a bag of marijuana in his boot. The criminal charges against Smith were dropped after the district court granted Smith’s motion to suppress the evidence from the stop because the detention after the traffic stop was improper. The state filed a forfeiture action for the car and the cash. Smith argued collateral estoppel applied and the suppression order in the criminal case applied to the forfeiture action. The district court disagreed and found collateral estoppel was not applicable.

ISSUES: (1) Collateral estoppel and (2) forfeiture

HELD: Court held that Smith failed to establish that the suppression order in the criminal case was a final judgment. As such, it was irrelevant whether an exception to collateral estoppel was applicable. Court held the district court did not err in finding the car facilitated a violation of the drug act and Smith presented no evidence to the contrary. Court also held that money found in close proximity to contraband gives rise to a rebuttable presumption that it is the proceeds of conduct giving rise to forfeiture or was used or intended to be used to facilitate the conduct.

STATUTES: K.S.A. 22-3603 and K.S.A. 60-4101 et seq., -4105(d), -4112(j), -4113(g)

CONCURRENCE: J. Greene concurred in the opinion, but stated the full panoply of protections against unreasonable searches and seizures should be available in a forfeiture action.

STATE V. BECKER
ELLIS DISTRICT COURT – AFFIRMED
NO. 95,245 – NOVEMBER 9, 2006

FACTS: Becker filed motion to suppress results of failed breath test, claiming the implied consent read to him failed to inform him that his commercial driver’s license would be suspended for one year if he failed the test. Trial court denied the motion to suppress and found Becker guilty of driving while under the influence. Becker appealed, arguing warning should include all consequences so that a driver is not misled regarding consequences of refusal on his commercial driver’s license.

ISSUES: (1) Implied consent and (2) commercial driver’s license


STATUTES: K.S.A. 2005 Supp. 8-1001, -1001(a), -1001(f) subsections (D), (E) and (I), -1001(g), -2142(k) and K.S.A. 8-1001 et seq., -1001(f), -1001(f)(1)(E), -1567(a)(2), -2142, -2145, -2145(a)

STATE V. CLEMENCE
DICKINSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 92,114 – NOVEMBER 9, 2006

FACTS: Clemence was charged with multiple crimes. He was arrested in November 2001, arraigned on Sept. 4, 2002, and his jury trial occurred in mid-December 2003. Within that time period was a host of delays, most notably the state’s dismissal and refiling of charges found by the district court to not be of necessity.

ISSUE: Speedy trial

HELD: Court agreed that Clemence’s right to a speedy trial was violated and reversed his conviction and ordered his discharge. The court chronologized the time periods in this case and charged 205 days to the state, thus violating the statutory maximum of 180 days from arraignment. The court found a violation of Clemence’s constitutional speedy trial rights as well. Court also held Clemence’s due process rights to a reasonably timely criminal prosecution were denied where the state’s dismissal and refiling was to gain advantage over the defendant.

STATUTES: K.S.A. 22-3402 and K.S.A. 60-455

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