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ITEMS OF INTEREST

5 The First Duty of Society is Justice

6 Hon. Lee A. Johnson
Appointed to Kansas Supreme Court

7 KBF-Funded Law-Related Education Projects

9 KBA YLS Mock Trial Competition Presented by Shook, Hardy & Bacon LLP — Volunteers Needed

14 2007 Kansas Bar Association Awards

19 Buyer Beware!

20 Lawyers in the Legislature Committee Assignments 2007

26 Raising the Bar — This is Our Time

REGULAR FEATURES

4 President’s Message

12 Law Students’ Corner

16 A Nostalgic Touch of Humor

17 Members in the News

17 “Jest Is For All”

18 Obituaries

40 Appellate Decisions

45 Appellate Practice Reminders

50 Classifieds

51 CLE Docket

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The Wall Street Journal recently featured an article by Alan Murray titled “When Firms Turn to Lawyers.” Some of the largest companies in the United States are turning to lawyers to serve as chief executive officers. Two high profile examples are Home Depot and Pfizer. Both companies had a horrendous year and ended up firing their chief executive. Each paid their failed CEO approximately $200 million in severance pay and then turned to lawyers to “clean up the mess.” This has obviously caused some attention.

In Murray’s Wall Street Journal article, he notes that lawyers now have the top job at Marsh and McLennan, Time Warner, and Citigroup. Murray adds, “There’s clearly some sense to this. Lawyers are trained to foresee risk, making them well suited for times of trouble. Perhaps more important, they understand what it means to be a fiduciary …”

I would go a step further. Lawyers are not only effective in cleaning up a mess, but they also know how to build a business as well. It is well-known that a law degree is the ticket to a successful law practice but has also been the first step in a fabulous business career or a career in politics.

In fact, of recent law graduates, 15 percent end up in the business world. Law training makes not only for good lawyers but also for good business leaders.

Why is the business community surprised when, in a time of crisis, a company turns to a lawyer for assistance? This has always been the case, not only in business but also in our country as well. After all, lawyers are the ones who drafted the Declaration of Independence and the Constitution of the United States of America.

Lawyers make for good leaders. Last December, Atlantic Magazine listed the 100 most influential Americans of all times. Abraham Lincoln was listed as number one. In the words of the Atlantic, “He saved the Union, freed the slaves, and presided over America’s second founding.” Number three on the list is Thomas Jefferson, the author of the five most important words in American history: “All men are created equal.” Number four is Franklin Delano Roosevelt. Number seven is John Marshall, the defining Chief Justice of the U.S. Supreme Court, who helped establish that Court is the equal of the other two federal branches. Number 10 is Woodrow Wilson. Five of the top 10 most influential Americans in our history were lawyers and 25 out of 43 American presidents have been lawyers. Not bad! That a lawyer is influential is not really surprising. It has always been so and continues to be so.

At the heart of our country has been the greatest law, the Constitution, and it makes sense that some of the most influential people in politics and business have been the men and women who by training come to shape, influence, and love the law.

Therefore, stick out your chest (suck in your gut) and hold your head high. You are indeed a member of a proud profession.

David J. Rebein can be reached by e-mail at drebein@rebeinbangerter.com or by phone at (620) 227-8126.

From the President
David J. Rebein

Lawyers Rule the Business World Too!
The First Duty of Society is Justice

By Jeffrey Alderman, KBA executive director

Members often ask me what do I do as executive director of the Bar Association. I am quite sure that my staff ponders that eternal question as well. In fact, those of us in the industry often wonder if we can even call our careers a profession since the skills necessary to being a successful director can be acquired numerous ways.

Well, my responsibilities take a piece from many occupations, which is why I enjoy what I do, since it is never the same day twice. Many of my daily tasks involve meeting planning, volunteer management, building maintenance, personnel administration, and the like. I also lobby whenever needed and spend quite a bit of time writing, whether a monthly column for the Journal or copy for a marketing brochure.

Kansas Bar Foundation

Another one of the other more enjoyable aspects of my job is community service as my position involves the dual role of serving as executive director of the Kansas Bar Foundation. As you might suppose, the Bar Foundation is the philanthropic arm of the KBA, whose mission is “serving the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving the accessibility, equality, and uniformity and enhancing the public opinion of the role of lawyers in our society.”

Wow, that’s a mouthful. Another way of describing the Foundation would be to say that we sponsor a lot of community programs, including legal services for disadvantaged families as well as a number of notable law and citizenship education programs throughout Kansas schools.

We share a responsibility to ensure that future generations of Kansans enjoy the freedoms that we have cherished. The Kansas Bar’s continuing commitment to justice and the legal profession guarantees that future.

Celebrating 50 years

By the way, the KBF was founded in 1957. Attorney L.J. Bond of El Dorado served as our first president and was our first contributor. Our current president is Sally Pokorny, formerly of Independence, now practicing in Lawrence. I note this because, if you do the math, you will see that we are about to celebrate our 50th anniversary this year!

Law student scholarships established

As part of that celebration, we will be periodically announcing the establishment of various new law student scholarship awards that have been endowed through the generosity of notable law firms in the state in response to our Raising the Bar campaign. Returns from a stronger endowment will fund these scholarships in perpetuity, leaving a lasting legacy for years to come.

The first of these awards will be the Case, Moses, Zimmer & Wilson P.A. Scholarship Award. This annual scholarship of $1,000 will be given to a second year student attending either the University of Kansas, Washburn University, or Creighton University schools of law. Applicants should demonstrate a bona fide intention to practice law in Kansas and the award will be based upon the student’s participation in school and community activities, financial need, and academic achievement. Applicants should also exhibit professionalism and high character in their personal lives. Students of culturally diverse backgrounds are encouraged to apply.

Our special thanks to our friends at the Case, Moses law firm, Wichita, for being at the forefront of our fundraising efforts to create this wonderful honor.

In addition, we are putting the finishing touches on several other scholarships generously endowed by Lathrop & Gage L.C., the Hinkle Elkouri Law Firm L.L.C., and a few other law firms. I will be happy to formally announce these scholarships and their criteria in the near future.

You can help

This is just a glimpse into the future of your Bar Foundation. I encourage each one of our members to consider financial support of our efforts whether through the Fellows program, the Raising the Bar campaign, or any number of other opportunities to give back to the profession. Lawyers support the Foundation and its mission not because it’s required, but because it’s the right thing to do.

Perhaps Alexander Hamilton may have indeed said it best when he remarked “the first duty of society is justice.” Best wishes for a healthy and prosperous 2007!
Hon. Lee A. Johnson Appointed to Kansas Supreme Court

By Susan McKaskle, managing editor

Hon. Lee A. Johnson was appointed to the Kansas Supreme Court on Jan. 5 by Gov. Kathleen Sebelius. He brings 26 years of legal experience to his new position: six years on the Court of Appeals and 20 years in private practice.

His first thoughts of becoming an attorney came while in high school in his home town of Caldwell. These thoughts were influenced by the words of veteran Caldwell attorney Don Stallings when he spoke to one of Johnson's classes. Johnson's ambition to become an attorney was reinforced by his participation in a mock trial; he then researched the profession as a class assignment.

Johnson received his B.S. in business administration from the University of Kansas (KU) in 1969 and then fulfilled his military obligation. He served two years' active duty and four years' inactive reserve with the U.S. Army Corp of Engineers as a combat engineer. While still on active duty, he applied to and was accepted by both KU and Washburn University to enter law school in 1972.

However, upon his separation from the military, his plans changed when he took on the responsibility of managing the family insurance agency. His father, Glenn, had managed the agency; but due to Johnson's grandfather Elmer's death, Glenn had assumed the oversight of the third generation family farming and Black Angus cattle operation.

While serving as mayor of Caldwell, 1976-1977, Johnson had frequent contact with the city attorney, Don Stallings. Stallings proposed that if Johnson were to get his law degree, Stallings would take him in as a partner.

"That offer reinforced my continuing desire to be an attorney and prompted my return to school at the age of 30," Johnson said.

Johnson completed his juris doctorate, summa cum laude, from Washburn University School of Law in December 1979. He practiced as general partner in Stallings and Johnson, from March 1980 until May 1987. At that time his partner retired and Johnson became a sole practitioner and Caldwell city attorney until his appointment to the Kansas Court of Appeals in 2001.

As a practicing attorney, Johnson considers the court-appointed defense of a person charged with six counts of aggravated vehicular homicide in a week-long jury trial as his most significant litigation.

"It was the first trial in Sumner County at which cameras were allowed in the courtroom and the media coverage was extensive," Johnson said.

Johnson's aspiration to make the law his life's career did not come from family tradition, but from the influence of a veteran attorney who took the time to educate young people about the importance of our law in every citizen's life.

Johnson's decision to apply for a position on the bench took many years to come to fruition.

"I first became intrigued with the appellate process while in law school," Johnson said.

In 1992 he applied for a district court judge position in Sumner County, but he was not selected. His next step toward the bench was applying for a position on the Court of Appeals in 1999. He was surprised to be one of the final three candidates, but again he was not selected. The following year, he again applied for a position on the Court of Appeals, received the appointment, and was sworn in on April 6, 2001.

As an appellate judge, exclusive of utility rate cases and special settings, Johnson participated in 56 dockets, involving 1,485 cases, of which 655 were granted in-court oral arguments. He had the writing assignment on 508 cases.

In 2006 Johnson decided it was time for the next step in his career.

"I was raised to aspire to the next level in whatever I might be involved," he said. "As my father was fond of saying, 'If you are not moving forward, you are falling behind.' I began to seriously consider applying for the Supreme Court after the death of my good friend, Justice Bob Gernon. However, until now, I did not feel the time was right for me, either professionally or personally."

"I only hope to provide meaningful input into the collaborative effort of the seven-member court," Johnson said, summarizing his role on the Supreme Court.

He is a member of the Kansas and Sumner County bar associations and a past member of the American Bar Association. He has also served as the Court of Appeals liaison to the executive committee of the Kansas District Judges Association.

Johnson's wife, Donna, is a judicial assistant to U.S. Bankruptcy Judge Dale Somers. Their daughter, Jennifer, is currently taking graduate courses at Emporia State University and their son, Jordan, is a police officer.

His sister, Nancy "Nan" Yokum, Iola, is a retired school teacher and his brother, Stuart, is a veterinary surgeon in Houston.

Johnson's aspiration to make the law his life's career did not come from family tradition, but from the influence of a veteran attorney who took the time to educate young people about the importance of our law in every citizen's life.

Justice Johnson has now reached the pinnacle of his chosen profession, as the newest justice on the Kansas Supreme Court.
KBF-Funded Law-Related Education Projects
Working With Educators to Reach Our Youth

The Kansas Bar Foundation believes that young people who comprehend our legal system are more likely to believe in it and use it in their everyday lives. Law-related education not only reduces delinquency, but it also fosters positive attitudes toward the law and develops behaviors that reflect a respect for both rights and responsibilities.

Judge G. Joseph Pierron chairs the KBF Law-Related Education Committee for 2006-2007 and is focused on getting the legal system recognized in Kansas schools. With programs like Pierron’s “You be the Judge,” he goes into schools and instead of lecturing, presents an interactive role-playing exercise. Youth get involved in the process and have a better understanding of our legal system.

The success of law-related education depends on the involvement of people outside the school – lawyers, law students, judges, law enforcement officers, and a variety of others both within and outside the legal community.

The KBF continues to work to strengthen this partnership between the legal and educational communities by funding several law-related education projects. Some of the projects that have been funded over the years or continue to be funded are:

- **Law Wise**: A law-related education newsletter distributed free (upon request) to Kansas teachers six times per year. Law Wise includes legal topics and lesson plans that vary between lower and upper grade levels. The KBA publishes Law Wise in cooperation with the Kansas Supreme Court. The newsletter is distributed to more than 1,500 teachers.

- **Law-Related Education Clearinghouse**: A partnership between the KBF, KBA, and Emporia State University to operate a law-related education clearinghouse for teachers. A KBF grant allows the clearinghouse to acquire law-related education materials in several formats: videos, posters, pamphlets, mock trial simulations, lesson plans, and books. Materials are distributed free of charge to educational providers. The KBA also produces a catalog that lists all contents of the clearinghouse.

- **Rights and Responsibilities Booklets**: “On Your Own” explains legal issues that young people should be aware of as they prepare to leave school and enter the workforce. “For the Record” is similar to the popular “On Your Own,” but is directed at middle school students. Both booklets are available in Spanish. Copies of the booklets are distributed free of charge upon request.

- **Law-Related Videos**: “Practicing Law in Kansas,” “Brown v. Board of Education of Topeka: The Case of the Century,” “New York Times v. Sullivan” and “Miranda v. Arizona.” These videos discuss the landmark cases that have changed the face of the law. Written materials are included with each video. Copies of the videos are distributed free of charge upon request.

- **Mock Trial Program**: Statewide mock trial programs are periodically funded by KBF grants to the KBAs Young Lawyers Section. Mock trials have proven to be an effective and popular part of a comprehensive, law-focused program designed to provide young people with an operational understanding of the law, legal issues, and the judicial process.

If you would like to learn more about the many KBF-funded projects or wish to join the KBF, please contact Bar Headquarters at (785) 234-5696. With continued support from its members, the Foundation will continue to make a difference in the education of young people!
We’re Now Working from Offices Just Across the State Line in Missouri,

but the lawyers of Shook, Hardy & Bacon remain committed to serving our Kansas clients and supporting the Kansas Bar Association’s invaluable contributions to the legal community.

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KBA YLS Mock Trial Competition Presented by Shook, Hardy & Bacon LLP – Volunteers Needed

By Chelsey Langland, KBA Young Lawyers Section mock trial coordinator

This month, KBA YLS President Paul Davis is a bit swamped with work; he mentioned something about the Legislature. So I told him I would step in and write his president’s column for this month. It was actually good timing, as it gives me a chance to publicize a very important program and hopefully solicit some assistance from KBA membership.

The Kansas Bar Association Young Lawyers Section Mock Trial competition presented by Shook, Hardy & Bacon LLP is fast approaching. Mock trial allows all KBA members to interact with high school students statewide by serving as a judge at either our regional or state tournaments. This year, regionals will be held in both Olathe and Wichita on Saturday, Feb. 24, and state will be held in Wichita on Saturday, March 31. There are rounds at 8 and 10:15 a.m., as well as 1 and 3:15 p.m.

The high school mock trial program allows students to take on the roles of attorney and witness as they work through a predetermined problem. This year, the problem is civil in nature. It deals with a student who makes disparaging comments about a teacher on a school-wide Internet Listserv, and the subsequent defamation action that is filed by the teacher. The students prepare to present each side of the case, both by acting as the witnesses and by serving as counsel. During the trial, there are prepared opening and closing statements. More interestingly, the students use the facts they are given to act as the persons in the lawsuit and present witness testimony. The witnesses are then opened up for cross-examination. Throughout the balance of the witnesses’ performances, there are opportunities for the students to object and demonstrate their knowledge of the rules of evidence.

The hard work that is put into mock trial is realized each spring when one team from Kansas attends the National Mock Trial Tournament. This past year, a team from Shawnee Mission East High School attended the national tournament in Oklahoma City. Aishlinn O’Connor was a member of the winning team. She described Nationals as “a blast,” and said the trip really helped the team bond. She also appreciated the opportunity to compete against better teams, especially the Hawaiian team, which was returning after a second place finish in 2005. O’Connor said the Hawaiians fielded a very tough team, and she was pleased that the final outcome of the round was close. She said even though Shawnee Mission East ultimately lost the round, they learned more about “confidence, selective argumentation, and presentation” in that round than in all of the others combined. The 2007 national tournament will be held in Dallas.

The Young Lawyers Section of the KBA provides a grant to the Kansas winning team so they are able to travel to and participate in the national mock trial competition. This project has been operated successfully for the last eight years, and it has been funded through entrance fees paid by the school; an IOLTA grant from the Kansas Bar Foundation; Shook, Hardy & Bacon LLP; and donations from local bars and other companies.

The Kansas Bar Association’s former Public Information Committee in cooperation with the Supreme Court formed the Law and Citizenship Project, which was the primary sponsor for the first two Kansas mock trial competitions in 1996 and 1997. This committee wanted to encourage the development of the program and sought and received the assistance of the KBA YLS. The YLS was originally responsible for the three regional competitions and helping select the case used in the competition.

In 2006, the firm of Shook, Hardy & Bacon LLP pledged their help in funding the Mock Trial program in years to come. Not only is their contribution financial, but also in volunteer time as well. The KBA and YLS are thrilled to have the support of Shook, Hardy & Bacon LLP. The Kansas District Judges Association has also provided financial support in past years to underwrite travel expenses for the Kansas team’s trip to the national competition.

Mock trials have proven to be an effective and popular part of the comprehensive, law-focused program designed to provide young people with an operational understanding of the law, legal issues, and the judicial process. The essence of the appeal of a mock trial is the fun involved in preparing for, and participating in, a simulated trial. Mock trials are exciting and, more importantly, they provide invaluable learning experiences.

The students put a great deal of work into preparing for the mock trial tournaments; therefore, it is important that the KBA membership step up to support this program by offering judges for each round. I hope you will consider agreeing to serve as a judge for the regional or state tournaments this year. It is a small time commitment of less than two hours, but it offers so much to the students, who get to interact with licensed attorneys and demonstrate their mastery of the material.

More information and the 2007 problem can be found at www.ksbar.org. If you are interested in judging, please contact me at (785) 291-3916 or at langlandc@kscourts.org.

Chelsey Langland is a graduate of Grinnell College, Grinnell, Iowa, and Washburn University School of Law. She has served as research attorney for the Hon. Christel Marquardt since 1999. Langland is currently serving as mock trial coordinator for the KBA YLS and also serves on the board of directors of the Topeka Bar Association.

Chelsey Langland

FEBRUARY 2007 – 9
The month of July 2006 was life-changing for Gail Agrawal. She joined the University of Kansas School of Law (KU Law) as its dean, and her childhood home in New Orleans was demolished.

Agrawal survived Hurricane Betsy in 1965, when her home flooded with nearly 6 feet of water. Hurricane Katrina's wrath was much more severe – the same home was submerged in a murky sea somewhere between 15 and 20 feet deep.

When Hurricane Katrina hit, Agrawal lived in Chapel Hill, N.C., where she was the interim dean for the University of North Carolina Law School (UNC). Before moving north, she had lived in New Orleans for more than 40 years, and she immediately felt called to action. She provided food, shelter, supplies, and financial assistance to affected friends and family members.

“Every flat surface in my home had someone sleeping on it,” she said. Her contribution extended beyond her friends and family; she asked other law school deans to help by admitting displaced students from Loyola University College of Law and Tulane University Law School, both located in New Orleans.

“Nearly every public law school in the nation agreed to accept these students – it was a shining moment,” she said.

Her initiative and dedication to community service, combined with her exceptional educational and professional background, set her apart from other candidates for the KU Law dean position.

“Gail Agrawal emerged from a field of very strong candidates as the individual best qualified to take the KU School of Law to new heights,” said David Shulenburger, KU provost and executive vice chancellor.

When Agrawal was offered the position, Justice O'Connor asked whether she was prepared to give up a year of her life to the law. Agrawal responded, “I’m prepared to give up more than that.”

The clerkship accelerated Agrawal’s learning curve of the law, allowing her to research and write on the most significant legal cases and issues of the time. She was thrilled and honored to experience the discussion of legal issues at the highest level of the judiciary.

After her clerkships, Agrawal pursued her passion for health care law by joining the New Orleans law firm of Monroe & Lemann as an associate. She became a partner within three years and was later recruited by Aetna Inc. to be the head of Medical Management in Law and Regulatory Affairs.

She had been in private practice for 11 years when a former fellow U.S. Supreme Court clerk invited her to be a visiting professor at the University of Michigan Law School.

“I always intended to be a law professor,” she said, “but I just got caught up in private practice.”

She accepted the position at Michigan; a year later she moved to UNC as a permanent faculty member, teaching health law, legal ethics, and various first-year courses. During her tenure at UNC, she served as the associate dean for academic affairs; as senior associate dean; and, during the 2005-2006 academic year, as interim dean.

Jacqulene Nance, director of admissions for KU Law, was a student at UNC when Agrawal served as interim dean. Nance was impressed that Agrawal “liked to be apprised of all issues concerning the law school, [with] no person being too small to notice.”

“The faculty members are fine scholars and great teachers who have devoted their professional lives to educating the next generation of lawyers,” Agrawal said. “They sincerely and deeply care about the students and the quality of their legal education.”

She is equally proud of the law students who excel academically and “give back quietly and with great success.” She cited the example of the Black Law Students Association, which provided Thanksgiving dinners to needy Lawrence families by collecting more than 4,000 food items and the money to purchase approximately 200 turkeys.
“The law students have an understanding that part of a lawyer’s role in society is to provide community service,” she said.

Agrawal has forged strong relationships with faculty, students, and other administrators, who are her colleagues in achieving her dual goals of strengthening KU Law’s curriculum and fostering interdisciplinary collaborations. She is currently reviewing the first-year curriculum, examining the balance between doctrinal and skill-building courses.

Agrawal said that KU Law alumni and other Kansas attorneys also play a vital role in the school’s continued success.

“The mission of a public law school is to provide an affordable and accessible superior legal education to the daughters and sons of the state,” she said. “Private support from alumni and other attorneys is essential to keep tuition at a manageable level.”

Without the private financial support, law school tuition will increase substantially. She fears that “sticker shock” will prevent some students from pursuing a legal education. This year, more than two-thirds of the entering class qualified for need-based financial aid.

“We have an obligation to ensure that talented and qualified individuals can attend law school and become members of the Bar regardless of their ethnicity or financial backgrounds,” Agrawal said.

Nance added that Agrawal is committed to “increasing scholarship monies, increasing diversity, and meeting the needs of the state while increasing KU Law’s visibility nationally.”

Despite her busy schedule as the law school’s top administrator, Agrawal continues to pursue her “intellectual passion” of health care law by writing for academic publications and teaching law school courses, beginning with bioethics in the spring semester.

Her transition to life in Kansas has been as smooth as her transition to her role as the 14th dean of KU Law. She was pleased to discover the jazz scene in nearby Kansas City, and she has been warmly welcomed by friendly neighbors and colleagues.

Agrawal is fascinated by the prairie landscape, and she is planting roots in what she describes as “a very beautiful state.” She may know Kansas as well as some natives, due to her participation in the Wheat State Whirlwind Tour, a KU program in which faculty members tour the state to develop a deeper relationship with Kansas and its citizens. As part of the 2006 tour, Agrawal traveled approximately 1,500 miles in six days, stopping in various cities such as Nicodemus, Colby, Dodge City, and Cottonwood Falls.

She thoroughly enjoyed meeting Kansans throughout the state, and she is dedicated to attracting students from smaller towns to attend KU Law.

“My hope is that after graduation they will return to their hometowns to practice law and serve their communities,” she said.

Agrawal is also eager to become better acquainted with the members of the Kansas legal profession, offering to travel to meet lawyers and potential law students.

“If you invite me, I will come,” she promised.

About the Author
Katharine J. Jackson is an associate with the law firm of Morrison, Frost, Olsen & Irvine LLP, Manhattan, and also serves as the assistant city attorney for Manhattan. She earned her B.A. from Kansas State University and her J.D. from the University of Colorado School of Law. She may be reached at Jackson@mfoilaw.com.

Editor’s Note: The public announcement of the new dean at Washburn University School of Law was made on Jan. 26. The Journal will publish a feature article on the person selected in an upcoming issue.

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A Few Lessons in Southern Gentility I Learned in the South

By John P. Smolen, University of Kansas School of Law

Throughout a series of happy accidents, I found myself clerking part of this past summer for a civil practice in Greensboro, N.C. I hope to relate just a small taste of a way to practice law that I hope to emulate. I suspected that the Greensboro bar might bristle at a non-Southerner suggesting that there is a way to practice law peculiar to the South. A Navy buddy (and native of North Carolina) suggested that simply in asking, I was already appreciating one aspect of the broader notion of “Southern Gentility.”

Southern Gentility is alive and well in the practice of law in the South.

Thoughtful and courteous formality, in my brief legal experiences, is not form, it’s substance. For example, while attending a motions hearing at an old courthouse, I noticed three things, which prompted the idea for this article. First, all of the lawyers greeted one another and shook hands in advance of their hearing; none discussed their cases, and all discussed their families. Second, when the superior court judge called the docket, I heard not “here” or “here, your Honor,” but instead — from each litigant — “May it please the court. Your Honor, my name is X, and I represent the plaintiff in this action, Mrs. Y.” Third, opposing counsel referred to one another as “Mr.” or “Miss,” but, more stunningly, punctuated other references to one another with words like “sir” and “ma’am.” The most striking feature of this experience was the formality in the adversarial process that didn’t deride the opposing counsel but instead argued politely against their position (“Where I’m sure Miss Z has reviewed the case law, I’m afraid there is another case more on point…”).

In my routine drafting duties, I took special note of the closings offered in legal correspondence by all lawyers in the bar. Instead of simply closing with the traditional “Very truly yours,” the preceding words, often left out in other areas of the country, fleshed out what was supposed to be a sentence, “I look forward to your attention in this matter, and I remain …” With the full thought, I saw the point of the exit, courtesy.

Southern Gentility describes a way to practice, not a place to practice.

I have found that much of my law school education, complemented with necessary field education, comprises my total legal education. I was given the opportunity to draft a straightforward breach of contract complaint. After a first whack, the assigning partner and I — over a beer — went over my draft line-by-line. He indicated that part of the art of pleading in the South was not only to frame the issues but also to indicate the nature of the “spar” one intended with opposing counsel. Another partner called this demonstrating an intention to “play by the Marquis of Queensberry Rules,” furthering the boxing metaphor. He offered the example of not contacting opposing counsel the day after her response was due (which had not been filed) but instead calling on the due date to ask if you had missed it in the mail. There seems to be a fine line between zealous and over-zealous advocacy, between win-no-matter-what and gentleman strategies for justice, but the walk is possible. I saw it, and revised my pleading (and litigation plan) accordingly.

Southern Gentility can work against you, and there is a temptation to use it as a tool.

The Marquis’ Rules do, however, contemplate boxing, and litigation remains a spar, just within certain bounds. In other words, gentility doesn’t displace the adversarial process so much as define its tone. In one of the firm’s civil cases, opposing counsel moved to delay providing the already-late mandatory pretrial disclosures — and the trial itself, a mere two weeks away. In researching the procedural issues, I discovered that the rules were very clear that the judge must exclude any evidence that opposing counsel had not provided. After reporting this finding, the litigating partner indicated that despite the mandatory language, the judge would invariably continue the case. He was right and the judge did. All parties expected this genteel course of action, notwithstanding the rules. The opposing counsel had “won a round,” through manipulation of the genteel tendencies of the judge; that decision cut against our firm’s client.

In another case, however, gentility cut in our favor. Opposing counsel appeared to have failed to identify the crucial issues in the case — and provided more than 50 pages of would-be privileged information in discovery. The firm’s supervising attorney was charming and professional on the phone, and advocated for a beneficial settlement, but nonetheless did not alert this other lawyer to her cluelessness. There was no “scrap” in his tone, seeking to leverage the opponent’s lawyering mistakes against her. Instead, he simply let them evince themselves. We didn’t read and simply returned the privileged material but indicated in the cover letter that we caught it because we were thorough. The message was clear, we were prepared (more than she was) and we knew not only our case but also hers (better than she); the message was also nicely conveyed. I learned even though a case ought never to be about the lawyers, it can be — and often is — about the lawyering.

Gentility describes refinement in taste and manners, the condition of being polite, all invoking notions of “fineness” and “elegance.” I find this “flavor” of practice infinitely attractive, but also useful and effective. Even the most heated controversy between clients can afford room for genuine pleasantries between their attorneys. I’ve carried forward precisely this sense, which forms my intended manner of practice. I consider these lessons learned in gentility as a vital part of my legal education. (As a part of my broader education, I fear I also learned to appreciate sweet tea, hushpuppies, and (gasp!) pork barbecue!)

About the Author

John P. Smolen is a third-year at the University of Kansas School of Law, where he is serving as the editor in chief of the Kansas Journal of Law & Public Policy. He was appointed to the U.S. Naval Academy in 1991 and, in the course of his military service, also earned an M.A. from Virginia Tech. Smolen plans to be an apprentice litigator upon graduation in May 2007. He and his wife are the proud parents of two children, Felix and Aurelia (pictured with him).
A Reminder! KBA Officer and Board of Governors Elections in 2007; Petitions due by March 9

The KBA Nominating Committee, chaired by immediate past president Rich Hayse, Topeka, met on Jan. 26, 2007, to consider nominations for KBA officers. Those nominations were not available at press time, but can be obtained by calling KBA Executive Director Jeffrey Alderman at (785) 234-5696. In addition to being nominated by the Nominating Committee, individuals can submit a petition, signed by 50 KBA members, to run for a KBA officer position. Petitions are due by March 9, 2007, and can be obtained from Becky Hendricks at (785) 234-5696 or via e-mail at bhendricks@ksbar.org.

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 15. 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! Deadline for nominations is March 2.

**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 15; deadline is March 2.
KBA Awards Nomination Form

Nominee's Name __________________________________________

☐ Phil Lewis Medal of Distinction  ☐ Distinguished Service Award

☐ Outstanding Service Award  ☐ Professionalism Award

☐ Outstanding Young Lawyer Award  ☐ Pro Bono Award/Certificates

☐ Distinguished Government Service Award  ☐ 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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Nominator’s Name ________________________________
Address _________________________________________
________________________________________________________________________
________________________________________________________________________
Phone ___________________________ E-mail ____________

Return Nomination Form by Friday, March 2, 2007, to:
KBA Awards Committee
P.O. Box 1037
Topeka, KS 66601-1037
Attorneys know well that, from time to time, they need to appeal to the judge for more time. If the matter is a trial or a hearing, the terms vary — some call it a “continuance” others call it an “adjournment.” No matter the name, the message is the same — the existing date needs to be moved. The reasons can be quite varied, and most judges want an explanation. And in some places, like Arkansas, the reasons can be quite, well, unusual.

It seems that last fall, the defense attorney for one Bobby Junior Cox argued in a motion that the criminal trial of his client should be continued because it conflicts with the opening of deer season. Counsel argued it would be impossible to get a jury to reflect a fair cross-section of the community on that date. He had his evidence. Using the Arkansas Game and Fish Commission records and the 2000 census, he calculated that approximately “[10] percent of the population of [Arkansas] will be deer hunting when this trial is going on.” The motion acknowledges that “deer season” is not a statutorily recognized exemption from jury duty, but argues nonetheless that many deer hunters will make excuses or “just refuse to show up” because they “would rather be hunting than stuck in a courtroom in Cabot [Arkansas].”

On this point, no local judge would dare take issue. Any jury pool, counsel contended, would not reflect a “fair cross-section of the community,” as the Sixth Amendment requires. This legal eloquence, impressive as it is, would not be worthy of a column, however. But then I learned of a similar motion that makes Bobby Junior’s counsel seem unoriginal.

Thanks to a tip from Kevin Underhill, an attorney who works with me, I learned of the innovation of counsel in Danos v. Avondale Industries. Underhill has a Web site, www.loweringthebar.net, dedicated to the “unusual” aspects of our fine profession. It seems defense counsel in this case, which is pending in Orleans Parish, La., moved earlier this month to continue trial from its current starting date of Monday, Jan. 22, 2007, to Wednesday, Jan. 24, on grounds of a football-related crisis. To quote the pleading, “As this Court knows, it was determined just last weekend that the New Orleans Saints will play in the National Football Conference Champion-

ship game — the first such game [as the court very likely also knows] in the franchise’s forty-year history — against the Chicago Bears in Chicago, Ill., on Jan. 21, 2007, at 2:30 p.m. In order to accommodate all fans, including the great majority of the jury pool, the parties involved in this case, and [last but not least] the counsel involved in this case, and in order to ensure that a full jury pool appears on the first day of trial, Defendants request that the beginning of trial be pushed back two days to Jan. 24, 2007.”

As Underhill’s Web site notes, “The motion does slightly downplay the fact that the game is on Sunday and trial is set to begin on Monday, it being unnecessary to make the point that nobody in Louisiana, let alone the jury pool in Orleans Parish, is likely to show up bright and early Monday morning to start a jury trial on the day after the Saints play for the right to go to the Super Bowl, win or lose. Also downplayed was the fact that one of the defense firms is based in New York and the other in Florida, but of course that doesn’t mean they aren’t Saints fans, because aren’t we all Saints fans to some extent as a result of this miracle season that means so much to a hurricane-ravaged community struggling to find some bright spark of hope to help light its way to recovery?”

Presiding Judge Ernest L. Jones of Orleans Parish quickly sustained the motion. The press reports indicated the motion was granted on Wednesday, the same day it was filed.

So in the event you are set for trial this spring and need “an adjournment,” I suspect you probably don’t have the buffet of options available to trial counsel in Arkansas and Louisiana. You may be stuck with the plain truth — “I’m not ready.”

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.
CHANGING POSITIONS

Brandon H. Bauer has joined Crow, Clothier & Associates, Leavenworth.

Jason E. Brinegar was chosen Washington County attorney by the Washington County Republican Central Committee.

Jay B. Brown has joined Employers ReInsurance Corp., Overland Park.

Alice Rutledge Burns has joined Gilliland & Hayes P.A., Wichita.

Melissa L. Castillo has joined the Orlando Immigration Court, Orlando, Fla.

Heather R. Cessna has joined ABS Legal Services LLC, Lawrence.

Tiffany M. Cornejo has joined Shapiro & Mock LLP, Overland Park.

Matthew A. Culp has joined Rasmussen, Willis, Dickey & Moore LLC, Kansas City, Mo.

Cathryn J. Dinges has joined Westar Energy Inc., Topeka.

Robert J. Drumm and James D. Lawrence have joined Bryan Cave LLP, Kansas City, Mo., and Michael P. Lewis has joined the firm’s office in Washington, D.C.

Kyle M. Fleming has joined CDL Electric Co., Inc., Pirtsburg.

Christopher P. Getty has joined the Riley County Attorney's Office, Manhattan.

Larry D. Hendricks has been appointed as a judge for the 3rd Judicial District by Gov. Kathleen Sebelius.

Denise M. Howard has joined H&R Block, Kansas City, Mo.

Brandon G. Kinney has joined Foreclosure Management Co., Overland Park.

Jeffrey J. Larson has been appointed as a judge for the 1st Judicial District by Gov. Kathleen Sebelius.

Dixie F. Madden has joined Friends University, Wichita.

Kelly Elliott Mahoney has joined Mahoney Law Firm P.C., Boone, Iowa.

Chris Oakley has joined the U.S. Attorney's Office, Wichita.

Joel Rook has joined the Salina Public Defender's Office, Salina.

Michael Schaefer has joined Schlee, Huber, McMullen & Krause P.C., Kansas City, Mo.

Margaret E. Shafer has joined the Children's Mercy Hospital, Kansas City, Mo.

Diana C. Toman has joined Gardner Denver Inc., Quincy, Ill.

Mark Alan Ward has been appointed as a judge for the 6th Judicial District by Gov. Kathleen Sebelius.

Angel R. Zimmerman has become managing attorney with Valentine & Zimmerman P.A., Topeka.

CHANGING PLACES


James Jason Armbrust has started the Armbrust Law Office, 1206 S.W. 10th, Topeka, KS 66604.

Robert J. Bjerg has started the Law Offices of Robert J. Bjerg, 11551 Granada, Ste. 100, Leawood, KS 66211.

Carol Ruth Bonebrake has started her own firm, Law Office of Carol Ruth Bonebrake, Attorney & Counselor of Law, 1001 S.E. Quincy, 2nd Fl, Topeka, KS 66612.

Charles T. Engel and Jason E. Geier have formed the firm of Engel & Geier P.A., 800 S.W. Jackson, Ste. 100, Topeka, KS 66612.

Law Office of Leah M. Gagne has moved to 225 N. Market, Ste. 100, Wichita, KS 67202.

E. Elaine Halley has moved to 903 Osage St., Leavenworth, KS 66048.

Parker & Hay LLP has moved to 400 S. Kansas Ave., Ste. 200, Topeka, KS 66603.

The Reno County Public Defender's Office has moved to 129 W. 2nd St., Ste. D, Hutchinson, KS 67501.

Shoko Sevart has moved the firm of Sevart and Sevart to 559 N. Longford Lane, Wichita, KS 67206.

Utz, Miller & Kuhn LLC has moved to 7285 W. 132nd St., Ste. 320, Overland Park, KS 66213.

MISCELLANEOUS

Molly A. Bircher received the 2006 Outstanding Young Lawyer Award from the Tulsa County Bar Association, Tulsa, Okla.

ALFA International has added Hinkle Elkouri Law Firm, Wichita, to its membership.

Shapiro Reid is now Shapiro & Mock LLP, Overland Park.

Shook, Hardy & Bacon LLP has closed its Overland Park office as of Dec. 1, 2006.

Thomas A. Valentine and Larry N. Zimmerman have formed the firm Valentine & Zimmerman P.A., Topeka.

Correction: Lisa A. Brunner and Amber F. Van Hauen have been named members of the firm in Husch & Eppenberger LLC's Kansas City, Mo., office.

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.

“Jest Is For All” by Arnie Glick

“Here in the city you may be considered a nuisance, Stephanie, but in my eyes you are an attractive nuisance.”
Barton Pollock Cohen

Barton Pollock Cohen, 76, died Dec. 11, 2006. He was born Dec. 11, 1930, the son of Joseph and Mary Cohen and raised in Kansas City, Kan. He graduated Yale College and Harvard Law School. Following Harvard, he joined the U.S. Army and served in the 3rd Armored Division in Gelnhausen, Germany.

Cohen joined his father in the practice of law at Cohen and Cohen Law Firm in Kansas City, Kan., but later moved his practice to Johnson County. At the time of his death, he was of counsel with Blackwell Sanders Peper Martin LLP.

He was first on the Fellows list of the Johnson County Bar Foundation; guided the establishment of the University of Missouri Law Foundation; and was a member of the Kansas Bar Association, where he became a lifetime member in 2005.

Cohen was president of the Kansas City, Kan., Jaycees and the Wyandotte County Mental Health Association. He helped establish and served as secretary and as a member of the executive committee of the Human Relations Council of Kansas City, Kan. He also formed a Johnson County Mental Association and Johnson County Human Relations Council. He served two terms on the Prairie Village City Council and a term as president of the Overland Park Chamber of Commerce. He served as either a board member or member of the Johnson County Heritage Trust Grant Review Board, the State Historical Society, the Bleeding Kansas Historical Site Committee, the Johnson County Community College Foundation, and the Wyandotte County Historical Society and Museum.

He is survived by his wife, Dr. Mary Davidson Cohen, of the home; a son, Thomas, Overland Park; a daughter, Margo Beames McKinner, Burlingame, Calif; a stepson, John Davidson, Pasadena, Calif; four grandchildren; a brother, Miles Cohen, Ft. Lauderdale, Fla.; and a sister, Hildred, Leawood.

Nicholas Daily

Nicholas Daily, 57, a partner with Depew, Gillen, Rathbun & McInteer, Wichita, died Dec. 11, 2006. Daily attended Duke University and earned his B.A. in history from the University of Kansas in 1976. He received his J.D. from the University of Kansas School of Law in 1978. After graduation, Daily joined Foulston Siefkin LLP, Wichita, where he worked for 13 years as a trial attorney. In 1991 he joined Depew Gillen, where he also worked as a trial attorney.

Daily was a member of the American and Kansas bar associations. He was a Fellow of the Kansas Bar Foundation and served on the KBA’s Bench-Bar and Ethics Grievance committees. He was a member and served as president and secretary-treasurer of the board of directors of the Kansas Association of Defense Counsel. He was a member of the Aviation Museum Board.

Survivors include his children, Jeff, Bay St. Louis, Miss.; Cameron, Tempe, Ariz.; and Laiken, Haleigh, and Grant, all of Wichita.

James R. James

James R. James, 80, Topeka, died Nov. 14, 2006. James was born July 2, 1926, in Fort Scott, to Milton and Christina James. He graduated with his A.B. from Washburn University in 1951 and his J.D. from Washburn School of Law in 1953.

James’ law career began as an assistant reporter at the Kansas Supreme Court. After two years, he moved to the Supreme Court Clerk’s office, where he served as deputy clerk. In 1961 he became clerk of the Supreme Court, after leaving the Court briefly to serve as an attorney for the League of Kansas Municipalities. From 1965 to 1979, James served Kansas as the first judicial administrator.

He served as director of the Southeast Regional Office of the National Center of State Courts, was named vice president of the Midwestern Regional Office of the national center in 1989, and returned to Kansas in 1992 when he became senior adviser to the national center. In 1994 he received the Justice Award from the Kansas Supreme Court; he also received the Warren E. Burger Award from the National Center for State Courts.

James was a lifetime member of the Kansas Bar Association and was a member of the Masonic Lodge, Lincoln Club of Topeka, Iris Club of Greater Kansas City, and the Prairie Land Depression Era Glass Club.

His wife, Roberta; son, Jay R., Auburn; daughter, Amy Clayton, Kearney, Mo.; four grandchildren; and four great-grandchildren survive him.

Robert Miles

Robert Miles, 53, Liberal, died Nov. 30, 2006. He was born Sept. 4, 1953, in Beaver, Okla., the son of Robert Lee and Doralee Holman Miles.

He received his B.A. from Northwestern Oklahoma State University in 1975 and graduated from the University of Oklahoma School of Law in 1977. He served as the assistant district attorney in Marietta, Okla., until 1978 when he moved to Liberal and practiced with Grover Bryan. He was a part-time county attorney from 1980 to 1984. In 1984 he joined Tom Smith as partner until Smith was elected as a judge. Miles had a private practice from 1992 until his death. He was a former municipal judge in Hooker, Okla., and Sattana, Kan.

Miles is a past member of the Liberal Jaycees, past chairman of the Pancake Day Board, past president of the Liberal Noon Lions Club and Liberal Bee Jays Baseball Board, past Liberal city commissioner, and a member of the Economic Development Committee for Seward County and the Rape Crisis Center Board. He was a member and past president of the Seward-Haskell County Bar Association; a member of the Kansas, Oklahoma, and American bar associations; and Kansas Trial Lawyers Association. He was also the assistant city prosecutor and court trustee for the 26th Judicial District.

He is survived by his wife, Donna; son, Rob, Liberal; three daughters, Brandy Griffin, Dallas; Jennifer Abbott, Kansas City, Mo.; and Lauren Miles, Liberal; two brothers; two sisters; and two grandchildren. His parents preceded him in death.
Buyer Beware!
By Christopher F. Burger

The home inspection that was thought to give assurance to a buyer is now the trigger returning us to “buyer beware.” Form residential real estate contracts contain common language advising a buyer that the failure to inspect the home results in the purchase of the home “as is” and a repudiation of any reliance on a seller’s disclosure. Alires v. McGehee, 277 Kan. 398 (2004), sets forth the proposition that choosing to rely on your own professional inspector in the purchase of a home is an expression of not relying on any statement made by the seller regarding the condition of the home. A buyer, therefore, is in a precarious position, even if fraud, duress, or mutual mistake are present.

If the courts are willing to allow this conundrum to be enforced in the residential setting, we should expect the same in commercial settings. Sophisticated businesses, therefore, are able to shift their burdens by contract (absent a violation of a substantive or procedural right under the Fairness in Private Construction Contracting Act), and steps by one side to give assurance could actually result in a waiver. Preventing such waivers has traditionally been addressed in the context of contemporaneous construction inspections and performance specifications, but is often left unaddressed in other contexts, such as general administration and pay application processing. Perhaps more should be done.

About the author
Christopher F. Burger is a partner with Stevens & Brand LLP, Lawrence. Specializing in construction law, Burger provides legal counsel to designers, contractors, and owners in matters of dispute prevention and resolution; drafts and negotiates contracts; and teaches the construction law and litigation class at the University of Kansas School of Law. He is a graduate of the University of Kansas, where he received both his bachelor’s degree, 1991, and juris doctorate, 1993.

Editor’s note: “Buyer Beware” was first published in the Fall 2006 edition of the Nuts and Bolts newsletter, which is published by the KBA Construction Law Section.

The Construction Law Section plans and promotes education programs; supports and recommends legislation; distributes information through newsletters, bulletin boards, or other means of communication; and provides networking opportunities for practitioners with attorneys or law firms that specialize in construction law.

If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or by calling the KBA at (785) 234-5696.
## Kansas Senate

### Senate Standing Committee Appointments

**Sen. Barbara Allen, R-Overland Park:**
Assessment and Taxation (chair), Education, and Judiciary

**Sen. Terry Bruce, R-Hutchinson:**
Agriculture, Assessment and Taxation, Judiciary (vice chair), and Natural Resources

**Sen. Jay Scott Emmer, R-Lindsborg:**
Commerce, Utilities (chair), and Ways and Means (vice chair)

**Sen. David Haley, D-Kansas City:**
Health Care Strategies (ranking minority), Judiciary, and Public Health and Welfare (ranking minority)

**Sen. Phil Journey, R-Haysville:**
Health Care Strategies, Judiciary, Public Health and Welfare, and Transportation

**Sen. Derek Schmidt, R-Independence:**
Agriculture; Assessment and Taxation (vice chair); Confirmation Oversight (chair); Interstate Cooperation; Judiciary; and Organization, Calendar, and Rules (vice chair)

**Sen. John Vratil, R-Leawood:**
Education (vice chair), Federal and State Affairs, Interstate Cooperation; Judiciary (chair); and Organization, Calendar, and Rules

### Kansas House of Representatives

#### House Standing Committee Appointments

**Rep. Pat Colloton, R-Leawood:**
Education; Judiciary; and Veterans, Military, and Homeland Security

**Rep. Marti Crow, D-Leavenworth:**
Education; Interstate Cooperation; Judiciary; and Veterans, Military, and Homeland Security

**Rep. Paul Davis, D-Lawrence:**
Judiciary and Taxation

**Rep. Raj Goyle, D-Wichita:**
Judiciary; Taxation; and Veterans, Military, and Homeland Security

**Rep. Jeffrey R. King, R-Independence:**
Government Efficiency and Technology, Taxation, and Transportation

**Rep. Lance Kinzer, R-Olathe:**
Federal and State Affairs, Judiciary (vice chair), Rules and Journal, and Taxation

**Rep. Mike O’Neal, R-Hutchinson:**
Judiciary (chair), Education Budget, and Rules and Journal

**Rep. Thomas “Tim” Owens, R-Overland Park:**
Judiciary, Taxation, and Transportation and Public Safety Budget

**Rep. Joe Patton, R-Topeka:**
Health and Human Services and Judiciary

**Rep. Janice Pauls, D-Hutchinson:**
Commerce and Labor, Judiciary, and Rules and Journal

**Rep. Mike Peterson, D-Kansas City:**
Elections and Governmental Organization, and Federal and State Affairs

**Rep. Jim Ward, D-Wichita:**
Calendar and Printing, Health and Human Services, Judiciary, and Legislative Budget

**Rep. Jeffrey “Jeff” F. Whitham, R-Garden City:**
Judiciary, Taxation, and Transportation and Public Safety Budget

**Rep. Kevin Yoder, R-Overland Park:**
Appropriations, General Government Budget (chair), and Judiciary

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Get your 2007 Legislative Update at the

**125th Annual Meeting**

of the Kansas Bar Association

**June 7 – 9 • Wichita, KS**
I. Introduction

More than 20 years ago, the Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA or Act) established uniform procedures for challenging state agency decisions in Kansas. The KJRA provides the exclusive means to obtain judicial review of state agency action. Both the KJRA and the Kansas Administrative Procedure Act (KAPA) were enacted by the Kansas Legislature in 1984. Prior articles appearing in this Journal have discussed these Acts. This article will focus on issues that Kansas appellate courts have recently addressed involving the KJRA. The article will review the courts’ interpretation of KJRA procedures for obtaining judicial review of agency action and discuss the scope of issues reviewed under the KJRA. A subsequent article will discuss standards of review that courts apply in evaluating agency action.

II. What is the Scope of Agency Action Reviewed Under the KJRA?

The Kansas Judicial Council urged the Kansas Legislature to adopt the KJRA as a comprehensive statewide judicial review act for all state and local agencies. The Legislature enacted more limited provisions. The KJRA specifies which agency action is subject to review under its provisions. Before filing a petition pursuant to the KJRA, a litigant should consider whether the particular agency action being challenged is covered by the KJRA. For example, certain agency action is specifically excluded from statutory review under the KJRA. Also, the KJRA does not apply if a party is filing a civil tort action or a civil rights claim against an agency. However, if the action taken by the agency comes within the conduct covered by the KJRA, then the KJRA states that it is the exclusive means for a party to obtain judicial review of agency action. A litigant should keep in mind that if the KJRA applies but a party fails to follow its requirements, the court may find waiver of jurisdiction under the KJRA and dismiss the petition.

FOOTNOTES
1. K.S.A. 77-601 et seq.
2. K.S.A. 77-501 et seq.
4. Ryan, supra note 3 at 63-64.
5. Little Balkans Found. Inc. v. Kansas Racing Comm’n, 247 Kan. 180, 183-89, 795 P2d 368 (1990). Under the Kansas Parimutuel Racing Act, the Kansas Supreme Court has original jurisdiction over a decision on an original organization license; all other Kansas Racing Commission orders are subject to the broad grant of the right to appeal under the KJRA. 247 Kan. at 188-89.
7. K.S.A. 77-606.
Legal Article: Procedures Under the KJRA...

Statutory provisions define the scope of agency action that is subject to review under the KJRA. The KJRA is the exclusive remedy for review and enforcement of action taken by a state agency unless decisions by that agency are specifically exempted from the KJRA’s coverage.9 The Act defines its limited application. The KJRA applies to action taken by an agency.10 An agency is defined as a “state agency.”11 The Act defines state agency as an “officer, department, bureau, division, board, authority, agency, commission, or institution” of the state that is “authorized by law to administer, enforce, or interpret any law of this state”; the definition excludes “any political or taxing subdivision of the state” as well as the judicial and legislative branches of state government.12

The Legislature rejected the Judicial Council’s recommendation that the KJRA apply to local, as well as state, agencies.13 As a result, decisions by political subdivisions of the state are not subject to review under the Act.14 Unified school districts are not state agencies under this definition; therefore, the KJRA does not apply to an appeal from a decision by a school district sitting as a quasi-judicial body.15 Because the definition of state agency specifically excludes political or taxing subdivisions of the state or the judicial or legislative branches of state government,16 the KJRA does not apply to an appeal challenging municipal and county zoning actions.17

Agency action is defined as (1) the whole or part of a rule and regulation or an order issued by an agency, (2) the failure of an agency to issue a rule and regulation or an order, or (3) an agency’s performance of or failure to perform a duty, function, or activity.18 A rule and regulation is defined as “a standard, statement of policy or general order” that applies generally and has the effect of law, which is issued or adopted to implement or interpret legislation the agency enforces or administers or to govern the organization of the agency’s procedures.19

“Order” is defined as “an order that determined the legal rights, duties, privileges, immunities or other legal interests of one or more specific persons.”20 Citing this definition of order, as well as the one contained in KAPA,21 the Kansas Court of Appeals concluded that an award of workers’ compensation by an administrative law judge constituted an order that determined the rights of the parties under the Kansas Workers’ Compensation Act.22

While the definition of “agency action” appears straightforward, the scope of conduct covered is not always clear and may create problems for a practitioner. If an agency takes affirmative action — to issue a rule and regulation; to issue an order; or to perform a duty, function, or activity — a party and counsel should receive notice that agency action has occurred and know what deadlines need to be met. But if an agency does not take action — for example, if an agency fails to issue a rule and regulation; fails to issue an order; or fails to perform a duty, function, or activity when it had an obligation or the discretion to do so — a practitioner may have problems determining how and when the provisions of the KJRA are triggered.23

As discussed later in this article, the KJRA specifically requires an agency to serve parties with notice of agency action, parties to exhaust administrative remedies, and parties to serve an agency with notice of the filing of a petition for judicial review. The Kansas appellate courts have strictly construed these provisions of the KJRA. If an agency takes affirmative steps to make a decision, the deadlines are triggered and the KJRA works well. But if the agency fails to act when it should or could, the goal of the KJRA falters.24 What was intended to provide a uniform procedure for challenging decisions by state agencies may become a technical trap for the unwary. When this happens, the requirements of the KJRA may remind practitioners of a time before revision of the rules of civil procedure in Kansas, when procedural technicalities were used to avoid judicial review of claims on the merits.25

The KJRA specifies that certain actions taken by state agencies are excluded from review under the statute. These provisions include (1) actions taken by the Kansas Parole Board concerning inmates or persons under parole or conditional release supervision; (2) custody decisions by the secretary of corrections; and (3) pardon, commutation of sentence, clemency, and extradition decisions.26 The Act also excludes from its coverage decisions involving election laws and actions concerning military or

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11. K.S.A. 77-602(a).
12. K.S.A. 77-602(k).
13. Ryan, supra 3, 63.
16. K.S.A. 77-602(k).
18. K.S.A. 77-602(b)(1) – (3).
19. K.S.A. 77-602(h).
20. K.S.A. 77-602(e).
23. K.S.A. 77-613.
Agency decisions regarding the Kansas Open Records Act (KORA) and the Kansas Open Meetings Act are also specifically excluded from the KJRA. Because the KJRA does not apply to the KORA, an agency’s interpretation of the KORA is not entitled to deference by a district court. Instead of giving deference to the agency’s decision, the trial court must apply a de novo review standard when considering a KORA request.

A practitioner should check statutory provisions that are the basis of the claim being pursued to determine whether alternative procedures might be available to a claimant. For example, the Kansas Court of Appeals has held that a claim for back wages brought pursuant to the Kansas Wage Payment Act may be initiated either with the secretary of human resources or in a court of competent jurisdiction. Workers’ compensation proceedings are intended to determine an employee’s right to compensation and who is liable; therefore, workers’ compensation insurance carriers may proceed in district court to litigate among themselves their relative liability for a workers’ compensation award.

If action by an agency falls outside the scope of the KJRA, the practitioner may look to alternative remedies. Before adoption of the KJRA, the Kansas Supreme Court noted that if no statutory basis exists for appeal of an agency or board decision, then equitable remedies, such as quo warranto, mandamus, or injunction, may be available for a party to challenge an agency’s action invalid. For example, in Reifschneider v. Kansas State Lottery, the Kansas Supreme Court held that any challenge to an oral ruling by an agency became moot when the agency incorporated its oral decision in a written order that was subject to review under statutory provisions. In light of a recent Kansas Supreme Court decision, counsel should remember that an agency’s failure to take action does not mean the KJRA is not applicable.

III. What Procedures are Required to Initiate a Proceeding Under the KJRA?

One purpose of the KJRA was to establish uniform procedures for litigants to use when challenging decisions by a state agency. The KJRA states that it creates only procedural rights and imposes only procedural duties that supplement those created and imposed by other statutes. The Act sets forth procedures that litigants and agencies must follow to secure judicial review of an agency decision.

Kansas appellate courts have strictly construed procedural requirements that are specifically set forth in the KJRA. If an agency does not comply with the KJRA’s specific procedural requirements, the courts have found the agency’s action invalid. For example, in Southwestern Bell Tel. Co. v. Kansas Corp. Comm’n, the Kansas Supreme Court held the 30-day deadline for filing a petition for judicial review did not run because the agency served the attorney but not the party with the final order as required by K.S.A. 77-631(e). The Court rejected the agency’s claim that the petition was time barred because it was filed more than 30 days after the final order was issued. Instead, the Court found the timeline under K.S.A. 77-613(b) was never triggered because the agency did not serve the party with the final order, as K.S.A. 77-613(e) requires. The Court held that, because the 30-day deadline never began, the petition for judicial review was not out of time.

Although the Kansas appellate courts strictly construed notice provisions in the KJRA that specify how parties and agencies shall be served, the courts have applied a different analysis when reviewing procedural questions not specifically covered by KJRA procedures. On occasion, when provisions of the KJRA do not address a specific procedural issue, the Kansas appellate courts have relied upon principles of interpretation that were adopted in the Kansas Code of Civil Procedure (KCCP), K.S.A.

Legal References:

27. K.S.A. 2005 Supp. 77-603(c)(3) & (5).
35. 6 Kan. App. 2d at 451.
39. 266 Kan. at 342-43.
LEGAL ARTICLE: PROCEDURES UNDER THE KJRA ...

60-101 et seq. These principles include the requirement that provisions of the KCCP are to be “liberally construed to secure the just, speedy, and inexpensive determination of every action or proceeding.” In these cases, the courts have allowed judicial proceedings under the KJRA to continue if the party substantially complied with requirements of the rules of civil procedure even though the KJRA did not contain similar procedures. The following discussion examines those situations in which the appellate courts have considered whether to apply strict construction principles in interpreting the KJRA versus relying upon liberal construction principles applied in the rules of civil procedure contained in the KCCP.

A. What is appealable agency action under the KJRA?

Ordinarily a litigant may not seek relief in court from an agency’s action until after the agency has been given an opportunity to review and decide the litigant’s complaints. This requirement encompasses two overlapping policies. First, in most cases, the litigant can only seek judicial review of a final decision by the agency. Thus, the agency’s decision must arrive at a definitive position on an issue that will inflict an actual, concrete result that will impact the litigant. Second, before seeking judicial review, petitioner must exhaust available administrative remedies. Procedures set forth in the KJRA describe how a litigant obtains an agency decision that is appropriate for judicial review and for which administrative remedies have been exhausted.

In most cases, a petition for judicial review of an agency action under the KJRA can proceed only after the agency has taken final action on an issue that the party wants to raise before the court. Before filing a petition for judicial review, counsel should evaluate whether an agency’s decision is “final agency action” or whether the agency’s decision comes within one of the exceptions that allow review of “nonfinal agency action.” In light of the recent decision in Jones v. State, a practitioner also must consider whether a party’s failure to act constitutes “no agency action” triggering the KJRA deadlines.

1. Final agency action is usually required

The KJRA provides that a party is entitled to seek judicial review of an agency action after the agency has taken final agency action. The KJRA defines “final agency action” to mean “the whole or part of any agency action other than nonfinal agency action.” Thus, to determine if agency action is final, one must understand what is meant by nonfinal agency action. The phrase “nonfinal agency action” is defined as an agency determination, proceeding, or other process that "the agency intends or is reasonably believed to intend to be preliminary, preparatory, procedural, or intermediate ..." Review of nonfinal agency action is only allowed under exceptional circumstances, which will be discussed more below.

The mere fact that an agency has instituted an investigation does not establish “final agency action” that would allow judicial review under K.S.A. 77-607. The Court of Appeals has noted that, by initiating an investigation, an agency does not take evidence and does not enter a definitive holding that is binding on the parties. Affirming the district court, the court found the case before it was not ripe for interlocutory appeal as nonfinal agency action under K.S.A. 77-608 because appellant had not shown that it would suffer an immediate harm disproportionate to the public benefit derived from postponement.

In a prior Court of Appeals decision, the court held that when an agency’s denial of a litigant’s request occurred by operation of law, the agency decision constituted an order that was subject to judicial review under the KJRA. When an agency failed to rule on a party’s request for agency approval of contracts within the deadline set by statute, the contracts were “deemed approved” due to expiration of time for the agency to act. The court concluded that the agency’s failure to act resulted in a decision that had a direct impact on a party and presented a legal question for the court’s review; in addition, the court held its ruling on the issue would not disrupt the orderly process of adjudication in the administrative proceeding. Thus, agency action that occurred through operation of law constituted a decision appropriate for judicial review.

In a more recent opinion, the Court of Appeals found a letter from the head of a state university to a tenured faculty member constituted “final agency action” because it finally and completely resolved the claim. The court further held that the letter, which denied the faculty member’s appeal of a faculty grievance board’s recommendation to terminate his employment at the end of the academic year, was a “final order” and not "agency action other than a rule and regulation or final order.” Because the letter constituted a final order, the court held the petition for judicial review was timely filed because petitioner had 30 days from the date of service plus three additional days for service by mail to file a petition for review.

2. Nonfinal agency action is reviewable in certain cases

Although final agency action is usually required before seeking review under the KJRA, in some instances a party may seek

(continued on Page 29)
To the Lawyers of Kansas:

Lawyers form the backbone of the legal system, which affects nearly every aspect of society, and is bolstered by an effective, organized bar. Your state bar association, the Kansas Bar Association, and its bar foundation, the Kansas Bar Foundation, are among the very best in the country. However, they can be better.

In our professional lives, each of us has had many helping hands. From law school days to life as a young lawyer and beyond, individuals and organizations have been there to guide us and invest in our professional successes. This effort to Raise the Bar is an opportunity to lend our helping hands back to the profession that has enriched our lives.

Please give careful consideration and thought concerning your participation in Raise the Bar. Throughout our history, committed lawyers have stepped up to meet the needs of our profession. This is our time to lead.

As we embarked on this historic endeavor, we sought your feedback. We listened and, as a result, crafted some modest, yet realistic, goals based on demonstrated needs. The following pages articulate those needs.

With your support, Bar staff will be able to better serve your day-to-day needs as a practicing attorney. With your support, our foundation can ensure access to justice for less fortunate Kansans and children of all ages will be enriched by learning the role of law in society. Bar programs and services impact the profession and community, and together we can leave a lasting legacy to our profession that will pay dividends for generations to come. It is important we all pitch in.

Please be a part of this exciting effort as we Raise the Bar!

Sincerely,

Frank C. Norton
Campaign Chairman
Our Goals

Build the endowment to make justice accessible to all Kansans and promote a better understanding of the law

Minimum Goal: $500,000 (endowment)

- The Campaign seeks to strengthen the Kansas Bar Foundation’s ability to fund projects fostering the welfare, honor, and integrity of the legal system.
- Increase funding for civil legal aid to the poor and improve the accessibility, equality, and uniformity of the legal system.
- Launch efforts aimed at educating the public about the role of lawyers in society.

Expand and improve facilities to enhance member services and promote legal professionalism

Minimum Goal: $600,000 (program and capital support)

- Significantly increase the size of the Kansas Law Center through renovation and expansion.
- Enhance member benefits in continuing legal education, legislative advocacy, publications, lawyer referral services, public and media relations, and law-related education for the public.
- Establish the Kansas Law Center as a “home away from home,” with additional deposition and meeting room capabilities for visiting member attorneys, as well as enhanced conferencing flexibility.

Promote areas of excellence

Minimum Goal: $100,000 (program and technology enhancements)

- Technology Enhancements and Modernization — enhance member services through technology-oriented forums such as the Internet and e-mail.
- Continuing Legal Education — develop and evaluate new technologies that increase service delivery areas and program quality.
Our Environment

Expanding Today, Enhancing Services Tomorrow

When groundbreaking ceremonies were held on a cold, dreary spring day during the 1980 annual meeting in Topeka, the face of the Kansas legal profession was markedly different. There were 5,500 licensed attorneys practicing in Kansas. Membership in the Kansas Bar was just over 3,800. Continuing legal education was voluntary. Kansas Bar members were limited to eight practice-area sections. The KBA was governed by a 10-member board. Kansas lawyers practiced law without the benefit of computers, fax machines, the Internet, or e-mail.

Unquestionably, times have changed.

Today:

• The number of practicing licensed attorneys has grown to more than 11,000 and KBA membership has increased to more than 6,800,

• The KBA will provide Kansas attorneys with nearly 200 CLE opportunities and 18,500 hours of CLE programming at more than 26 statewide locations and in Washington, D.C.,

• KBA members will serve on 19 committees and task forces,

• Governance structures have been enhanced to ensure statewide participation and representation on important issues confronting the Bar, and

• The number of legislative bills affecting the judicial system has increased significantly.

The Kansas Law Center symbolizes the Kansas Bar’s efforts during its decades of service to the bench, the bar, and the public. In 1980, it was the answer. Today, we’ve grown beyond the Center envisioned 25 years ago. To Raise the Bar, the time is now to equip the Kansas Law Center with the space, technology, and flexibility to meet the needs of our growing profession. By expanding and improving the Kansas Law Center today, we lay the foundation for enhanced member services tomorrow.

Conceptual drawing of the future Kansas Law Center.
Raising the Bar
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28 – FEBRUARY 2007

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
The definition of “nonfinal agency action” suggests agency action that is intended to be preliminary and subject to change if a proper showing is made. Preliminary rulings, such as those addressing discovery issues or setting procedural schedules, are subject to modification upon further showing and constitute nonfinal agency action not subject to judicial review. Yet it is not always clear what nonfinal agency action would be appropriate for immediate judicial review.

3. No agency action may trigger the KJRA

Recently the Kansas Supreme Court, in Jones v. State, found it “irrelevant” whether agency action was final, as defined by K.S.A. 77-607(b)(1), to trigger the 30-day deadline for filing a petition for judicial review pursuant to K.S.A. 77-613(d). In Jones, foster parents were unaware that the Kansas Department of Social and Rehabilitation Services (SRS) failed to obtain insurance for them. They learned that SRS had not fulfilled its agreement to insure them during a lawsuit for sexual assault perpetrated by their son against a foster child. After becoming aware of SRS’ failure to insure them, and without exhausting administrative remedies, the parents settled with plaintiff and assigned any action they would have against the state of Kansas. Plaintiff pursued a declaratory judgment action for $100,000 against the state for insurance coverage based upon the failure of SRS to list the names of these foster parents in the insurance policy.

The trial court granted the state’s motion to dismiss. After the Court of Appeals affirmed this decision, the Supreme Court granted review. The Court held that the 30-day deadline under K.S.A. 77-613(d) was triggered the day the parents learned SRS failed to insure them. This provision, which does not apply to a challenge of a rule, regulation or final order, extends the 30-day deadline for filing a petition for judicial review (1) while petitioner is exhausting administrative remedies, and (2) “during any period that the petitioner did not know and was under no duty to discover ... that the agency had taken the action or that the agency action had a sufficient effect to confer standing upon the petitioner to obtain judicial review under this act.” The Court rejected both (1) plaintiff’s characterization of her remediation as retroactive insurance coverage and (2) her request that, if the KJRA applied to her claim, the Court direct SRS to issue an official notice of denial of insurance coverage, which would trigger running of deadlines under the KJRA.

Instead, the Court characterized plaintiff’s filing as a breach of contract action against a state agency that was covered by the KJRA. Furthermore, the Court stated that K.S.A. 77-612 permits a person to file a petition for judicial review regarding a breach of contract claim against a state agency only after the person has exhausted all administrative remedies available within the agency whose action is being challenged or within

56. K.S.A. 77-607(b)(1).
57. K.S.A. 77-608.
60. Compare K.S.A. 77-607(b)(1) with (b)(2).
63. K.S.A. 77-613(d)(1)-(2).
64. 279 Kan. at 366-67.
any other agency authorized to exercise administrative review. Because plaintiff failed to exhaust administrative remedies before SRS, the Court found the claim barred under K.S.A. 77-613(d)(2). The Court did not explain how the conduct in Jones met the requirements of K.S.A. 77-613(d)(2). SRS did not "take action" and did not notify the parents of its failure to insure them. Although plaintiff stressed that SRS' failure to take action was an oversight, not deliberate agency action, the Court found SRS' inaction had sufficient effect "to confer standing upon the petitioner," i.e. the parents.

The harshness of the decision in Jones is highlighted when compared to other appellate court decisions interpreting the KJRA. For example, in Reifschneider v. Kansas State Lottery, the Supreme Court reversed the district court's decision to dismiss the action on grounds it was a breach of contract action under K.S.A. 77-613(b) would begin to run only after service on behalf of the agency as required by K.S.A. 77-613(e). The party and did not list the agency officer to receive service did not list the agency officer to receive service. The time for filing a petition for judicial review did not begin standing upon the petitioner, "i.e. the parents.

B. Have administrative remedies been exhausted?

Kansas appellate courts have consistently held that statutory remedies before an administrative agency, which are provided for by law, must be exhausted before courts have authority to review an administrative decision. Before adoption of KAPA and the KJRA, the Kansas Supreme Court explained why exhaustion of administrative remedies is required, as follows:

The doctrine of exhaustion of administrative remedies is well established in the jurisprudence of administrative law. A primary purpose of the doctrine is the avoidance of premature interruption of the administrative process. It is normally desirable to let the administrative agency develop the necessary factual background upon which its decisions are based. Since agency decisions are frequently of a discretionary nature, or frequently require expertise, the agency should be given the first chance to exercise that discretion or to apply that expertise. It is more efficient for the administrative process to go forward without interruption than it is to permit the parties to seek aid from the courts at various intermediate stages.

Before seeking judicial review under the KJRA, a litigant must exhaust all administrative remedies available within the agency whose action is being challenged and within any other agency authorized to exercise administrative review over the issue being raised.

A few exceptions exist. For example, if a petitioner seeks judicial review of a rule or regulation, it is not necessary for the petitioner to have participated in the rulemaking proceeding or to have sought to amend or repeal the rule or regulation at the time it was adopted. Also, a person is not required to exhaust administrative remedies if the KJRA or any other statute does not require exhaustion of the issue before filing a petition for judicial review. Finally, a petitioner does not need to seek reconsideration of an agency's decision before filing under the KJRA unless a statute makes the filing of a petition for reconsideration a prerequisite for seeking judicial review of the agency's action.

To determine whether filing of a petition for reconsideration with an agency is a prerequisite to filing a petition under the KJRA, petitioner should consider provisions of KAPA as well as the KJRA. KAPA allows a party to seek reconsideration of agency action by filing a petition for reconsideration. However, KAPA mandates that a petition for reconsideration be filed before seeking judicial review of action taken by three state agencies: the Board of Tax Appeals (BOTA), the Kansas Human Rights Commission, and the KCC. If a petitioner does not seek reconsideration when required to do so under KAPA, the petition for judicial review under the KJRA will

65. 279 Kan. at 367.
66. 279 Kan. at 366-68.
68. 266 Kan. at 342-43.
69. K.S.A. 77-622(c).
72. K.S.A. 77-612. See Dean v. State, 250 Kan. 417, 421, 826 P2d 1372 (1992) (Tax issues relating to assessment, exemption, equalization, and valuation are within the realm of the administrative agency's expertise and must be exhausted.).
73. K.S.A. 77-612(a).
74. K.S.A. 77-612(b).
75. K.S.A. 77-612(c).
77. K.S.A. 74-2426.
78. K.S.A. 44-1101 and 44-1115.
79. K.S.A. 55-606 (crude oil and petroleum production) and K.S.A. 66-118b (general powers of state corporation commission).
be dismissed for lack of jurisdiction. 80 If a party files a petition for reconsideration under KAPA, the agency head must rule on the petition within 20 days after the filing of the petition with one exception; the KCC is allowed 30 days to rule on a pending petition for reconsideration before it is deemed denied. 81

In filing a petition for reconsideration, a litigant should remember that failure to include an issue generally precludes raising that issue in a petition for judicial review. 82 However, raising an issue in a petition for reconsideration will not assure the issue will be considered on judicial review. Like any argument, an issue must be set forth in the petition and addressed in the party’s brief to assure the court will consider it on review. An issue presented in a petition for reconsideration but not briefed before the court is deemed abandoned. 83

Even though not mandated by statute, a petitioner may decide to file a petition for reconsideration of agency action to be sure the issue to be raised in the petition for judicial review has been presented to the agency. The courts have explained that a party is required to raise issues in a petition for reconsideration to inform the agency and other parties that mistakes of law and fact were made in an order 84 and to give the agency an opportunity to correct those errors that are called to its attention. 85

In Jones 86 the Kansas Supreme Court found failure to exhaust administrative remedies barred recovery on plaintiff’s claim that a state agency breached its agreement to provide insurance even though the agency never took action to provide notice that the administrative review process had been triggered. SRS failed to add the names of foster parents to a list of those covered under a contract with an insurance provider. The parents were not informed of the failure of SRS to list their names. The Supreme Court held that the parents, or their assignee, failed to seek administrative remedies through SRS after they became aware in a lawsuit of the action, or lack of action, by SRS. The Court relied upon its ruling that failure to exhaust administrative remedies barred recovery. The Court held the KJRA did not allow for a chance to direct SRS to specifically deny the parents insurance coverage, which could trigger the provisions for exhausting administrative remedies. 87

In denying plaintiff’s request, the Court did not discuss the KJRA provision permitting a court to grant “other appropriate relief” that includes setting aside or modifying agency action, remanding a matter for further proceedings, or even rendering a declaratory judgment. 88 Litigants may question whether the result in Jones furthers reasons traditionally recognized for exhaustion of administrative remedies, such as those discussed in the above quote.

C. Has the agency had an opportunity to review the issue?

In nearly all circumstances, an administrative agency must have an opportunity to decide an issue before judicial review can be sought. 89 Usually exhausting administrative remedies will assure that an agency has had the opportunity to consider the issue being raised on judicial review. If a petitioner follows procedures set out in the KJRA, the agency will have had an opportunity to consider the issue as well as review action taken by the agency and correct any errors. The agency must have had an opportunity to rule on the same issue being raised on judicial review because a party is not allowed to raise a new legal theory for the first time on appeal. 90

The KJRA contains a few exceptions to this rule. If an agency does not have jurisdiction to grant an adequate remedy in deciding the issue presented, then a petitioner may seek judicial review without raising the issue before the agency. 91 This includes a challenge to the constitutionality of a statute, although an agency’s ability to decide an issue of constitutionality of a statute is limited due to the nature of administrative agencies. The Legislature can delegate its power and authority to implement legislative enactments to an administrative agency without violating the separation of powers principle. 92 In doing so, the Legislature delegates its legislative or quasi-legislative functions to an administrative body. Thus, the agency can ascertain facts for enforcement or enactment of a statute or may acquire expertise that allows it to adapt legislation to complex conditions involving numerous details, which the Legislature would be unable to deal with directly. 93 If a challenge is made to an agency’s implementation of a statute, petitioner must exhaust administrative procedures and raise the statutory construction issue at the administrative level before seeking judicial review, even though the court may review the agency’s interpretation of the statute as a question of law. 94 But an administrative agency cannot acquire judicial powers and, therefore, does not have authority to determine whether a statute is unconstitutional. As the Kansas Supreme Court has noted, “Since administrative boards and agencies ... may not rule on constitutional questions, the issue of constitutionality [of a regulation] must be raised when the case is on appeal before a court of law.” 95

One must be careful in deciding NOT to raise a constitutional challenge before an agency and

83. 29 Kan. App. 2d at 1042.
87. 279 Kan. at 370.
88. K.S.A. 77-622(b).
89. K.S.A. 77-617.
91. K.S.A. 77-617(a).
instead raising the issue for the first time on judicial review. Many cases addressing this dilemma involve challenges by taxpayers. In Zarda v. State,96 the Kansas Supreme Court noted that the “single underlying issue” was whether a motor vehicle registration and taxation statute unconstitutionally discriminated against certain people. The sole issue on appeal was whether the district court had subject matter jurisdiction because plaintiffs had not exhausted administrative remedies by presenting the issue to the administrative agency charged with implementing the statute. Although the Court agreed with petitioners that no purpose would be served by requiring an agency decision if the issue was not appropriate for administrative determination,97 the Court concluded the issue raised involved more than resolution of a constitutional attack upon the statute in question because petitioners were challenging the agency’s regulations adopted to implement the statute.98 The Court found petitioners did not demonstrate how the statutory administrative remedies were unclear, uncertain, incomplete, or inadequate. Furthermore, petitioners could have exhausted their administrative remedies and still pursued their constitutional claims. The Court held petitioners should have exhausted administrative remedies available under the BOTA’s statutory framework, which provided “a clear and certain remedy for full, adequate, and complete relief.”99

If a party decides to raise a constitutional claim for the first time in court, the issue must be presented in the first court where the party petitions for judicial review. If constitutional grounds for reversal are asserted for the first time in the appeal of a judicial decision, the issue is not properly before the appellate court and will be dismissed.100

The KJRA lists three other situations in which a new issue not raised before the agency may be presented in a petition for judicial review. Prior agency review is not required to seek judicial review of a challenge to an agency rule and regulation if the party was not involved in an adjudicative proceeding that provided an adequate opportunity to raise the issue.101 Also, a litigant may obtain judicial review without presenting the issue to the agency if the agency action subject to judicial review is an order and petitioner was not notified of the adjudicative proceeding.102 Finally, the court can consider an issue not presented to the agency if the interests of justice would be served by judicial resolution of an issue arising from (1) a change in controlling law that occurred after the agency action, or (2) agency action that occurred after the person exhausted the last feasible opportunity for seeking relief from the agency.103

D. Has the agency properly served the party with the order or notice?

A petitioner has 30 days from service of an agency action to file a petition for judicial review. To trigger this 30-day deadline, K.S.A. 77-613(e) requires that service of the agency’s order, pleading, or other matter “shall be made on the parties to the agency proceeding and their attorneys of record, if any, by delivering a copy of it to them or by mailing a copy of it to them at their last known addresses.”104 This language is nearly identical to the service requirement in KAPA, which states that service of an order or notice “shall be made upon the party and the party’s attorney of record, if any, by delivering a copy of the order or notice to the person to be served or by mailing a copy of the order or notice to the person at the person’s last known address.”105

The Kansas Supreme Court has held that the language of K.S.A. 77-613(e) requires an agency to serve any final agency action on a party directly, not just through counsel. In Reischneider, the Court concluded that the Legislature anticipated that a state agency’s final action might impact unrepresented parties and, for this reason, mandated an agency to serve final orders or notices on parties as well as counsel, if one has appeared on behalf of a party.106 The Court held that the 30-day deadline for filing a petition for judicial review under K.S.A. 77-613(b) did not begin to run until the agency served the order or notice on the party and counsel, as required by K.S.A. 77-613(e).107

The Kansas Supreme Court has held that under K.S.A. 77-613(e) an agency issuing a final order must state the name of the agency officer that is designated to receive service of a petition for judicial review on behalf of the agency. The Court has concluded that the time for filing a petition for judicial review does not begin to run until “after service of the order” in compliance with the notice requirements of K.S.A. 77-613(e),
IV. How does a party file a petition for judicial review under the KJRA?

On the one hand, preparing a petition for judicial review is similar to drafting a pleading like any other civil proceeding, only it has elements of writing an appeal. On the other hand, drafting a petition for judicial review is similar to preparing documents, such as the notice of appeal and docketing statement for an appeal, except that it is really initiating a civil proceeding. The KJRA contains certain requirements that should be followed in filing a petition for judicial review to prevent dismissal at the pleading stage.

A. What is the deadline for filing a petition for judicial review?

As with any appeal, petitioner should be sure to calculate when its petition for judicial review must be filed. The KJRA sets out timelines for filing a petition for judicial review in K.S.A. 77-613. This deadline is considered jurisdictional.

No deadline is imposed for filing of a petition for judicial review that challenges a rule and regulation; instead, the petition may be filed at any time without exhausting administrative remedies. When a petition for judicial review challenges a rule and regulation, petitioner does not need to have participated in the rulemaking proceeding resulting in the rule and regulation or have petitioned for its amendment or repeal.

If filing of a petition for reconsideration is not a prerequisite for filing of a petition for judicial review, then a petition for judicial review must be filed within 30 days of the filing of a final order. If a petition for reconsideration is requested or is a prerequisite for seeking judicial review, then the KJRA states that a petition for judicial review of a final order must be filed (1) within 30 days after service of the order on reconsideration, unless a party must seek further reconsideration under K.S.A. 66-118b, (2) within 30 days after service of the order denying reconsideration, or (3) in proceedings before the KCC, within 30 days after the request for reconsideration has been deemed denied.

After enactment of the KJRA, a conflict arose in interpreting the requirement of K.S.A. 77-612 that a party exhaust administrative remedies, including filing a petition for reconsideration, and the 30-day deadline for filing a petition for judicial review of K.S.A. 77-613. In United Steelworkers of America v. Kansas Commission on Civil Rights, the Kansas Supreme Court resolved the conflict about when the time for filing a petition for reconsideration with the agency was required to
exhaust administrative remedies. The Court concluded that the statute applicable to a specific agency controlled over a general statute. Therefore, language in K.S.A. 44-1010, which required the filing of a petition for reconsideration to exhaust administrative remedies before the Kansas Human Rights Commission, had to be met before the 30-day deadline for filing a petition for judicial review under K.S.A. 77-613 began to run. However, this decision did not resolve the issue when a statute did not mandate filing of a petition for reconsideration but instead allowed for the discretionary filing of a petition for reconsideration before filing a petition for judicial review.

In *Jones v. Continental Can Co.*, the Kansas Supreme Court found that a specific provision of the Kansas Workers Compensation Act set a 30-day deadline for filing a notice of appeal and no three-day extension for service by mail was permitted. The Court held the statute providing for a specific appeal controlled over broader statutes concerning the general right to appeal. The Court concluded the Legislature intended the specific 30-day deadline in the Workers Compensation Act to substitute for any period provided for in the KJRA, rendering provisions in the KJRA inapplicable.

The Supreme Court, in *Keithley v. Kansas Employment Security Board of Review*, held that the three-day mail rule did not apply in an unemployment case to extend the time for appealing a referee’s decision to the board. The Court held that the applicable subsection of the statute specifically provided the method for computing the appeal time and a three-day extension did not apply to administrative review before the board. However, in *Transam Trucking Inc. v. Kansas Department of Human Resources*, also an unemployment benefits case, the Kansas Supreme Court distinguished the appeal in *Keithley* of a referee’s decision to the board from this appeal challenging a board decision on judicial review to the district court. The Court also distinguished the decision in *Jones* because it was based on the Workers’ Compensation Act. The Court concluded that amendments to the statute in *Transam Trucking* referenced the KJRA, which altered the tone of the language setting the deadline for appeal of the board’s decision. The Court held the three-day mail rule in the KJRA applied when calculating the deadline for appealing an unemployment decision by the board to district court. The Court noted that references to the KJRA in another act meant that consistent passages are grafted onto other statutes and stated, “Litigants may thus rely upon [such references] and must be protected when they conform their conduct to them.”

**B. Does the litigant have standing?**

A litigant qualifies to file a petition for judicial review of final or nonfinal agency action if that person has standing under the KJRA. The statute makes clear that a person has standing to obtain judicial review of final or nonfinal agency action if that person is one to whom the agency action is specifically directed or is a person who was a party to the agency proceedings that led to the agency action. The KJRA also states that a person subject to a rule and regulation has standing to challenge agency action pursuant to that rule and regulation. Finally, the KJRA provides that a person has standing to obtain judicial review of final or nonfinal agency action if that person is “eligible for standing under another provision of law.”

The KJRA does not provide for intervention. Arguably a party must comply with the standing requirements of K.S.A. 77-611 to participate in a judicial proceeding to review agency action. The Kansas Supreme Court followed the provisions of K.S.A. 77-611 when it held that a party, which was a significant consumer of natural gas and an industrial customer of a Kansas public utility, did not have standing to challenge agency action regarding a franchise tax agreement between the utility providing natural gas and the city of Pittsburg.

The Court ruled that the industrial customer was not a person to whom the agency action was specifically directed, did not intervene before the agency, and gave no indication it had standing under any other provision of law.

When considering a standing issue involving an association or corporation, a practitioner should be aware of the Kansas Supreme Court’s decision in *NEA-Coffeyville v. U.S.D. No. 445*, even though this proceeding was not pursuant to the KJRA. The Court held that an association has standing to sue on behalf of its members when (1) the members have standing to sue individually, (2) the interests that the association seeks to protect are germane to the organization’s purpose, and (3) neither the claim asserted nor the relief requested require participation of individual members.

Relying upon its holding in *NEA-Coffeyville*, the Kansas Supreme Court found a nonprofit corporation had standing to file a petition for ju...
dicial review under the KJRA to challenge a permit issued by the Kansas Department of Health and Environment (KDHE), which authorized construction of a hog farm.\textsuperscript{138} Recognizing that teachers in \textit{NEA-Coffeyville} were an unincorporated association while the Families Against Corporate Takeover (FACT) was a corporation, the Court found no reason for a standing issue to turn on whether members have gathered in a nonprofit corporation rather than an unincorporated association.\textsuperscript{139} The Court found that FACT participated in the agency proceedings by requesting a public meeting and submitting comments on the pending permit. After reviewing the three-part test set forth in \textit{NEA-Coffeyville}, the Court concluded FACT had standing as an association to seek judicial review of KDHE’s action. The Court found KDHE’s administrative regulations supported a finding that FACT had standing as an interested party not only to comment on the proposed permit but also to seek judicial review of the agency’s decision granting a permit.\textsuperscript{140}

C. What pleading requirements are set forth in the KJRA?

To initiate an action under the KJRA, a party files a petition for judicial review in the appropriate court and pays the docketing fee.\textsuperscript{141} Generally the petition is filed in the district court, unless a statute specifically provides for review of an agency action by appeal directly to the court of appeals\textsuperscript{142} or as otherwise provided by law.\textsuperscript{143} Venue is proper in the district court of a county in which the agency’s order was entered, in which the agency’s action was effective, or in which the agency’s rule and regulation was promulgated, unless the specific agency action is excepted.\textsuperscript{144}

Exceptions listed in K.S.A. 77-609(b) describe specific agency action that is otherwise provided for by statute. For example, a party seeking review of an order of suspension of a driver’s license under K.S.A. 8-1001 et seq., or an order of disqualification of a driver’s license under K.S.A. 8-2,142(a)(4), must file a petition for review within 10 days of issuance of the agency’s order; venue is proper in the county where the administrative proceeding was held or where the person was arrested.\textsuperscript{145} If the state fire marshal enters an order to correct a condition in a school building or facility, and the board of education concludes the school district cannot afford to correct the condition, the board of education may file a petition for review of the fire marshal’s order in the district court of the home county of the school district.\textsuperscript{146} To seek review of action by the secretary of human resources regarding supplemental contracts of employment, venue is proper in the judicial district where the principal offices of the pertinent board of education are located.\textsuperscript{147} Other exceptions relate to review of orders entered under the Workers’ Compensation Act\textsuperscript{148} and the board of tax appeals.\textsuperscript{149}

A petition for judicial review must provide the name and address of petitioner and the agency whose action is at issue,\textsuperscript{150} identify the agency action that is being challenged,\textsuperscript{151} identify the parties to the administrative proceeding,\textsuperscript{152} set forth facts to demonstrate petitioner is entitled to obtain judicial review,\textsuperscript{153} state petitioner’s reasons for believing that relief should be granted,\textsuperscript{154} and specify the type and extent of relief requested.\textsuperscript{155} Although provisions of K.S.A. 77-614(b) may appear straightforward, their interpretation has been the subject of several Kansas appellate decisions.\textsuperscript{156}

In \textit{University of Kansas v. Department of Human Resources},\textsuperscript{157} claimant appealed a district court decision that reduced his workers’ compensation award. Claimant argued the district court lacked jurisdiction because the petition for judicial review filed by his employer did not specify reasons why relief should be granted or the type and extent of relief requested as required by K.S.A. 77-614(b)(6) and (7). Claimant had not raised the specificity issue in district court but argued that this question challenged the court’s jurisdiction and could be raised at any time.\textsuperscript{158} Finding no Kansas cases directly on point, the Court of Appeals found similar pleading requirements under the rules of civil procedure instructive. Although the KJRA does not provide for notice pleading when filing a petition for judicial review, the court declined to treat the failure to plead with specificity under the K.S.A. 77-614(b) as a jurisdictional defect. Instead, the court held a party can use a procedure for obtaining a more definite statement in an action under the KJRA. If a respondent does not challenge the allegations under K.S.A. 77-614(b) and request a more definite statement, the court concluded a respondent will waive a petitioner’s failure to plead with specificity.\textsuperscript{159}

Following its decisions in \textit{University of Kansas}, the next year the Court of Appeals applied the principle of notice pleading from the Kansas Code of Civil Procedure to a petition for judicial review under the KJRA.\textsuperscript{160} In \textit{Karns v. Kansas Board of Agriculture}, petitioner sought judicial review of rulings by a hearing officer for the Kansas State Board of Agriculture (KSBA), which found petitioner, a crop duster, had violated the Kansas Pesticide Law.\textsuperscript{161} At a hearing before the district court, the KSBA orally moved to dismiss the pet-
tions for failure to comply with K.S.A. 77-614(b)(5) and (6) or, in the alternative, to compel petitioner to file a more specific petition, but the district court denied KSBA’s motion.\(^{162}\) In its analysis, the Court of Appeals recognized that the petition for judicial review filed in district court did not present facts demonstrating petitioner was entitled to judicial review and did not challenge the sufficiency of the findings of fact or conclusions of law of the hearing officer, as required by K.S.A. 77-614(b)(5) and (6).\(^{163}\) A majority of the Court of Appeals panel, however, concluded the defects did not deprive the district court of jurisdiction, citing *University of Kansas* and noting the KSBA did not claim surprise.\(^{164}\) The Court proceeded to rule on the merits and found the district court erred in reversing and modifying civil penalties imposed by the hearing office.\(^{165}\)

Although joining in the ultimate disposition on the merits in *Karns*, then Chief Judge J. Patrick Brazil disagreed with the majority’s decision to apply the standard for notice pleadings under the general civil code to review of agency decisions under the KJRA. In a concurring opinion, Brazil asserted that notice pleading was not the appropriate standard for proceedings under the KJRA because the Legislature adopted provisions in the KJRA that require a petitioner to state detailed allegations in a petition for judicial review.\(^{166}\) Brazil further criticized the decision in *University of Kansas* to apply notice pleading standards from the general civil code to proceedings under the KJRA, reasoning that the specificity pleading requirements in the KJRA focus on alleged agency error and provide the reviewing court a proper understanding of the type of relief sought.\(^{167}\)

The Court of Appeals again turned to the Kansas Code of Civil Procedure when it addressed a petitioner’s failure to identify the agency whose action was challenged in a petition for judicial review under the KJRA. In *Pittsburg State University v. Kansas Board of Regents*,\(^{168}\) Pittsburg State University/Kansas National Education Association (PSU/KNEA) filed a complaint with the Public Employee Relations Board (PERB) against the Kansas Board of Regents/Pittsburg State University (KBR/PSU) for refusing to collectively bargain and negotiate with respect to intellectual property rights. PERB denied PSU/KNEA’s claim and, in its final order, listed its designated agent for service of a petition for judicial review. This agent was Chief Counsel of the Kansas Department of Human Resources (KDHR) Legal Services. When PSU/KNEA filed its petition for judicial review, it named KBR/PSU and KDHR as parties, but it failed to name PERB in the case caption of the petition. The district judge dismissed the petition, finding that petitioner did not strictly comply with K.S.A. 77-613(b) because it did not file the petition for judicial review against the proper agency within 30 days after service of the amended final order.\(^{169}\)

The Court of Appeals reversed the district court’s decision. Although it recognized that the KJRA did not specifically require a case caption, the court pointed to the requirement in K.S.A. 60-210(a) that every petition include a case caption. The court found a case caption “is a logical necessity” and held the requirement of K.S.A. 60-210(a) supplements the KJRA and provides the rule for a case caption in a petition for judicial review of an agency action.\(^{170}\) The court concluded a petition for judicial review under the KJRA must contain a case caption naming all parties. The court further concluded that, pursuant to K.S.A. 2000 Supp. 60-215(a), the trial court had authority to grant leave to amend the case caption of a petition for judicial review of agency action if the amendment was in the interest of justice. Rather than remand this proceeding to the district court to exercise discretion in deciding whether to allow amendment of the case caption, the Court of Appeals held that “PSU/KNEA should be allowed to amend the case caption because PERB’s notice of right to seek judicial review misleadingly specified a KDHR attorney as its designated agent.”\(^{171}\)

In *Pittsburg State University*, the Court of Appeals recognized that it had narrowly applied specific rules of civil procedure to agency appeals but stated that its decision was not intended to suggest that the KJRA should always be supplemented by Chapter 60 rules of civil procedure. In fact, the court stated that it rejected the decision in *University of Kansas* and concluded that failure to comply with pleading requirements set forth in K.S.A. 77-614(b) should be treated as jurisdictional and should preclude a litigant’s statutorily granted right of appeal.\(^{172}\) The court pointed out that the petition in *Pittsburg State University* clearly identified PERB as the agency whose action was at issue and specifically requested review of PERB’s decision. Also, the petition strictly complied with the requirements of K.S.A. 77-614(b). The court made clear it would not allow PERB to benefit from its misleading notice in naming an agent in a different agency to receive notice of filing of a petition for judicial review.\(^{173}\)

### D. How does a petitioner properly serve a petition for judicial review?

When an agency serves a final order, it “shall state the agency officer to receive service of a petition for judicial review on behalf of the agency.”\(^{174}\) The Kansas Supreme Court has held that an agency must comply with K.S.A. 77-613(e) before the 30-day period for filing a petition for judicial review begins to run.\(^{175}\) Presumably an agency is required to identify the agency officer to receive service of a petition for judicial review in its final order to be sure petitioner will know to serve the peti-

\(^{162}\) 22 Kan. App. 2d at 743.  
\(^{163}\) 22 Kan. App. 2d at 745.  
\(^{164}\) 22 Kan. App. 2d at 744-46.  
\(^{165}\) 22 Kan. App. 2d at 746-49.  
\(^{166}\) *Karns*, 22 Kan. App. 2d at 749. Judge Brazil authored the majority opinion as well as his concurrence.  
\(^{167}\) 22 Kan. App. 2d at 750-51, citing Ryan, supra note 3, at 67.  
\(^{170}\) 30 Kan. App. 2d at 40.  
\(^{171}\) 30 Kan. App. 2d at 41.  
\(^{172}\) 30 Kan. App. 2d at 45 (“S[pecificity in pleading under the KJRA is necessary to give focus to the asserted agency error and to give the reviewing court a proper understanding of the type of relief sought.”)  
\(^{173}\) 30 Kan. App. 2d at 46.  
\(^{174}\) K.S.A. 77-613(e) (last sentence).  
tion upon that agent. However, the KJRA is not that limited. K.S.A. 77-615(a) provides that a petitioner must serve a copy of the petition in the manner described in K.S.A. 77-613(e) “upon the agency head, on any other person or persons designated by the agency head to receive service, on any agency officer designated to receive service in an order or on the agency officer who signs an order.” At first glance it might appear that this refers to several different people. To be sure the petition is properly served, petitioner should serve the agency officer designated in an order to receive service. Otherwise, petitioner should serve the agency head.

The Kansas Court of Appeals has strictly construed provisions of the KJRA that require a party to serve a petition for judicial review on an agency. When the petitioner in Claus v. Kansas Department of Revenue did not comply with specific procedural requirements of the KJRA in serving process on the agency, the court found the district court, and therefore, the Court of Appeals, had no jurisdiction to consider the party’s claims and dismissed the petition for judicial review. Petitioner sought judicial review of a decision suspending his driver’s license for failing a breathalyzer test. The top portion of the administrative order notifying Claus of his driver’s license suspension stated that it was issued by the Kansas Department of Revenue (KDR), Division of Vehicles-Driver Control Bureau, which is a subdivision of the KDR. Claus served the petition for judicial review on that department at the address listed in the administrative order, but K.S.A. 77-614(a) requires the petition to be served on the agency head or on the person designated by the agency head to receive service. KDR argued that service was improper because petitioner only served the Driver Control Bureau and did not serve the “agency head,” who was the secretary of revenue. The Court of Appeals agreed with KDR that the language of the statute was clear and unambiguous and that service was improper. The court dismissed the appeal, with directions to the district court to dismiss the petition for judicial review.

In Pittsburg State University, the petition for judicial review was served on the agent designated in the agency’s order to receive service of a petition for judicial review, but the caption listed the agency that employed the designated agent instead of the agency taking the action challenged in the petition. Even though the appropriate agency was not named in the case caption, the proper agency was named throughout the petition and the petition was served on the designated agent. The court concluded that, once the petition was served on the designated agent, the agency issuing the decision should have known that its action was being challenged in the petition for judicial review. The court would not allow the agency to benefit from a misleading notice, which designated an attorney employed by a different agency as its designated agent for service of a petition for judicial review. In addition, the court held that an amendment to the case caption of a petition for judicial review could relate back to the date of filing of the original pleading. The court did not remand the proceeding for the district court decide whether to allow PSU/KNEA’s amendment to the petition’s caption to relate back to the original filing, finding instead that the statutory requirements were satisfied.

V. What must an agency do after a petition for judicial review is filed?

A. Agency response to a petition is not required, but an agency must raise any affirmative defenses.

The agency and other parties to the administrative proceeding have 30 days to file an answer or other responsive pleading to the petition. The filing of an answer is discretionary; however, if a respondent has an affirmative defense, it should be filed within the 30-day period. If the petition for judicial review fails to plead with specific detail either facts demonstrating petitioner is entitled to relief or reasons for granting relief, as required by K.S.A. 77-614(b), the Court of Appeals has held that procedures for obtaining a more definite statement can be used in an action under the KJRA. However, if respondent does not allege that the petition lacked specificity in the district court, the appellate court will not consider this issue on appeal.

Both petitioner and respondent should be aware that the Court of Appeals had no hesitation in finding that a motion for summary judgment filed pursuant to K.S.A. 60-256 of the Rules of Civil Procedure was appropriate in a proceeding under the KJRA. The court found that a KJRA proceeding is a civil matter and, therefore, summary judgment is appropriate if no genuine issues of material fact exist and the party is entitled to judgment as a matter of law.

B. The agency must provide the agency record to the court.

Within 30 days after the agency is served with a petition for judicial review, the agency is required to transmit to the court the original or a certified copy of the agency record; additional time may be allowed by the court or by other provision of law. The record to be transmitted consists of any agency documents expressing agency action, other documents identified by the agency as having been considered by it before its action and used as a basis for its action, and any other material required by law as the agency record for the type of agency action at issue. A state agency that has conducted a formal hearing subject to KAPA should have retained these documents in its official record.

The agency shall prepare transcripts, if it has not already done so in complying with KAPA, to include in the record transmitted to the court, except for portions that the par-
ties stipulate can be omitted. The KJRA provides that the cost of preparing the transcript “shall be paid by the appellant” but allows the court to order otherwise. The Court of Appeals clarified that, under this provision of the KJRA, a court may choose to relieve a petitioner from paying the cost for a transcript and order an agency to pay the transcript costs; however, a court is not mandated to provide such relief to satisfy due process requirements. However, a court is not mandated to provide such relief to satisfy due process requirements.

Generally judicial review of disputed facts is confined to the agency record, unless petitioner is seeking review of one of the orders listed in K.S.A. 77-618. These exceptions include review of (a) orders of the director of workers’ compensation, (b) orders of the Kansas Human Rights Commission under the Kansas Act Against Discrimination or the Kansas Age Discrimination in Employment Act, (c) orders of the Division of Vehicles, (d) orders of the Secretary of Human Resources made under K.S.A. 72-5413 through 72-5431, and (e) orders of the state fire marshal shall be under K.S.A. 31-144.

If deficiencies in the record occur because a party sought and received special procedures from an agency, such as meeting directly with the head of the agency rather than following the usual agency review process, the party will not be allowed to gain an advantage due to procedural problems with the record that it created. The Kansas Supreme Court applied the invited error rule to procedural problems that were created at the agency level to gain advantage on judicial review pursuant to the KJRA.

A court may receive evidence, in addition to that contained in the agency record transmitted for judicial review, only if it relates to the validity of agency action at the time it was taken and is needed to decide disputed issues regarding (1) constitution of the agency as a decision-making body if it is alleged the agency was improperly constituted or the agency relied upon an improper motive or grounds for disqualification, or (b) the proceedings or decision-making process is alleged to have been unlawful. In most KJRA proceedings, the court relies upon the agency record and directs parties to brief issues presented for judicial review, with citation to the agency record.

A court has authority to remand a matter back to an agency for additional fact-finding or further action before final disposition of a petition for judicial review in some cases. A court may remand a proceeding if an agency failed to prepare or preserve an adequate record that is suitable for judicial review. Also, the court may remand a case for further fact finding or other proceedings if (a) new evidence has become available that relates to the validity of the agency action when it was taken and one or more of the parties did not know and was not under a duty to discover or could not reasonably have discovered the evidence until after the agency action, and (b) the interests of justice would be served by remand to the agency. The court may also remand a matter if the agency improperly excluded or omitted evidence from the record or if a relevant provision of law changed after the agency action and the court determines the new provision may control the outcome.

VI. Conclusion

Twenty years after its enactment, application of the KJRA continues to evolve as the Kansas appellate courts interpret its provisions. New issues arise daily. What initially appears to be innocuous agency action may lead to a judicial decision that impacts agencies and litigants far beyond those involved in the immediate proceeding. While this article has reviewed many Kansas appellate court decisions interpreting the KJRA, numerous questions remain unresolved. The author is aware that the Judicial Council’s Administrative Procedure Advisory Committee has begun a substantive review of KAPA and the KJRA. This committee may address many of these questions through legislative proposals and recommendations. Meanwhile, litigants appearing before administrative agencies and the courts throughout Kansas will continue to define the provisions of the KJRA.

About the Author

Martha J. Coffman is currently advisory counsel for the Kansas Corporation Commission. Previously she was director of Central Research Staff for the Kansas Court of Appeals. Coffman has been a member of the Kansas Bar Association since graduating from the University of Kansas School of Law in 1979. She has served on the Board of Editors for the Journal of the Kansas Bar Association since 1990 and is currently on the KBA Board of Governors, representing District 5. Coffman dedicates this article to her father, the Hon. Floyd H. Coffman, who was a KBA member for more than 60 years.
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IN RE DOUGLAS J. ALLEN
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 21,145 – DECEMBER 13, 2006

FACTS: Respondent was convicted of felony theft in October 2006 in Johnson County District Court. He also was facing a disciplinary hearing on a formal complaint alleging violations of KRPCs 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 8.4(c) (misconduct involving theft and forgery), and SCR 207 (failure to cooperate in the disciplinary process). He sent a letter to the clerk of the appellate courts surrendering his license to practice law pursuant to SCR 217.

HELD: The Court examined the files of the Disciplinary Administrator’s Office and found that the surrender should be accepted and respondent disbarred.

IN RE KENT O. DOCKING
ORIGINAL PROCEEDING IN DISCIPLINE
90-DAY SUSPENSION
NO. 96,888 – DECEMBER 8, 2006

FACTS: Respondent, a private practitioner from Kansas City, Kan., faced a disciplinary hearing on a complaint based on his failure to handle a voluntary conservatorship competently. Despite receiving all the information and being paid in full in October 2003, respondent failed to file correct documents with the probate court and failed to advise his client regarding the delay. He failed to return numerous messages from the client’s representative until February 2005, after she filed a disciplinary complaint.

At the hearing, respondent stipulated to violations of KRPCs 1.3 (diligence), 1.4 (communication), 1.15(a) (safekeeping property), and 1.16(d) (terminating representation). The day before the hearing, he returned $1,500 in unearned fees. The panel found the violations to be supported by clear and convincing evidence and found the presence of four aggravating factors, including prior discipline, and five mitigating factors. The panel recommended a 90-day suspension from the practice of law and repayment of the filing fee plus interest on the full amount of fees.

HELD: The Court adopted the panel’s uncontested report, and a majority agreed with the recommended sanction while a minority would impose more severe discipline.

IN RE VINCENT J. GARCIA
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 96,889 – DECEMBER 8, 2006

FACTS: A hearing panel was convened on a formal complaint charging respondent with violations of KRPCs 4.2 (communication with person represented by counsel) and 8.4(g) (conduct adversely reflecting on fitness to practice).

In a divorce matter, temporary orders gave primary residential custody to respondent’s client’s husband with parenting time every other weekend for respondent’s client. However, the orders failed to state a beginning date. Respondent attempted to arrange for weekend custody for his client but opposing counsel left town for the weekend prior to getting back to him on the arrangement. When he was unable to contact counsel, respondent called the adverse party directly and threatened him with contempt of court if he failed to allow weekend custody with the mother. When the transfer did not occur, respondent filed for a contempt of court hearing. Adverse counsel confronted respondent regarding the contact with his client, and respondent said counsel he and his client could “kiss my ass.” The court later found the father was not in contempt.

The hearing panel found clear and convincing evidence of the Rule 4.2 violation and dismissed the 8.4 allegation. The panel found one aggravating factor present. In 2003 respondent successfully completed a disciplinary diversion plan for improper solicitation of a client. Ordinarily, a diversion is confidential but may be cited as an aggravating factor in any future disciplinary proceeding. The panel further found two mitigating factors to be present and recommended published censure.

HELD: The Court adopted the panel’s uncontested report, and a majority agreed with the recommended sanction while a minority would impose more severe discipline.

IN RE DANIEL H. LAMPSON
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 96,884 – DECEMBER 8, 2006

FACTS: The Disciplinary Administrator’s Office filed a formal complaint against respondent, a private practitioner from Wichita, based on five separate client complaints alleging lack of competence, diligence and communication as well as conversion of more than $16,000 in client funds. The hearing panel found clear and convincing evidence of violations of Rules 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 4.1 (truthfulness), 8.4(c) (misrepresentation), and SCR 207 for failure to cooperate in the investigations.
The panel found that four aggravating factors and two mitigating factors were present. The evidence revealed that respondent had developed an addiction to cocaine and that his parents reimbursed the funds belonging to his client. Noting that such serious violations ordinarily result in disbarment, the panel commended respondent for his year-long struggle to recover and recommended indefinite suspension.

HELD: No exceptions were filed. The Court adopted the factual findings and rules violations as found by the hearing panel. A minority of the Court would impose disbarment, but the majority was persuaded by the panel's recommendation.

IN RE JOSEPH M. LASKOWSKI
ORIGIINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 96,886 – DECEMBER 8, 2006

FACTS: Respondent, a practitioner from Kansas City, Kan., faced a hearing regarding his felony conviction of driving under the influence and subsequent probation violations. Based on the Class D felony plea in December 2003, Respondent was temporarily suspended by the Supreme Court in July 2005, pursuant to SCR 203. The panel found clear and convincing evidence that respondent was incarcerated for a felony conviction and later violated his probation terms by consuming alcohol on at least one occasion and by living in Kansas when he was required to remain in Missouri. Based on this evidence, the panel found violations of KRPCs 8.4(b) (criminal act) and 8.4(g) (conduct adversely reflecting on the practice of law). The panel further found that two aggravating factors and six mitigating factors were present. Based on the strong factors in mitigation, the panel recommended suspension until the Missouri Department of Corrections releases respondent in August 2007.

HELD: No exceptions to the final hearing report were filed. The disciplinary administrator recommended indefinite suspension imposed retroactively to the date of temporary suspension in July 2005. While disbarment is ordinarily imposed for a felony conviction, the Court did not find respondent's conduct so egregious as to merit disbarment and adopted the disciplinary administrator's recommendation.

IN RE CHRISTOPHER R. P. MILLER
ORIGINAL PROCEEDING IN DISCIPLINE
TWO-YEAR DEFINITE SUSPENSION
NO. 96,578 – DECEMBER 8, 2006

FACTS: Respondent, a private practitioner in Lawrence, worked for the Kansas Department of Insurance (KDI) for two years following law school supervising the Kansas Workers' Compensation Fund (Fund) and the attorneys who represented the Fund across the state. When he left the KDI, he trained his successor in the procedures for auditing fee reimbursement claims of the Fund's attorneys. He then entered private practice accepting assigned cases from the Fund. For approximately 10 years, respondent handled cases for the Fund and billed for his fees. When Kathleen Sebelius became Insurance Commissioner in 1995, respondent was told he would no longer be referred this caseload. He sent in a final bill for $375,900 in attorneys fees and expenses. When payment was not forthcoming, he sued to recover this amount and further claimed breach of implied contract to continue his representation for the Fund, requesting an additional $375,900 for future lost fees. After auditing the bills, the Fund counter-claimed for $426,000 in prior overpayments. Subsequently, the parties resolved these claims by mutual dismissal.

At the disciplinary hearing, respondent stipulated that he charged unreasonable fees in violation of KRPC 1.5(a) and asserted a frivolous claim in violation of KRPC 3.1 (meritorious claims and contentions). The evidence revealed that respondent had billed for clerical duties and overhead expenses in violation of the depart-

ment's written policies and billed $44,000 for the same work twice. He further stipulated that he engaged in misconduct involving misrepresentation in violation of KRPC 8.4(c).

The panel found clear and convincing evidence of these three violations and found three aggravating factors and six mitigating factors to be present, including the length of time between the misconduct and the hearing. A concurring opinion was more critical of the misconduct, citing “astonishing greed,” “lack of judgment,” and “lack of maturity,” but concurred in the recommended discipline of two-year conditional supervised probation based on the length of time since the misconduct began 20 years ago and the absence of any new complaints.

HELD: No exceptions were filed to the final hearing report or concurring opinion. The Court found the facts to be established by clear and convincing evidence and that they supported the violations found by the panel. However, the Court found respondent “clearly used his extensive inside knowledge of the Fund’s handling of attorney fee billing to develop and implement a plan for the systematic fleecing of the Fund for unearned and unreasonable attorney fees.” The Court further found that respondent's filing of a lawsuit and the resulting delay in disciplinary proceedings should not be considered a factor in mitigation. The Court imposed a two-year definite suspension from the practice of law, noting that the imposition of a more severe discipline could be justified.

IN RE KATHRYN S. POLSLEY
ORIGINAL PROCEEDING IN DISCIPLINE
REINSTATEMENT
NO. 91,296 – DECEMBER 13, 2006

FACTS: On March 19, 2004, the Supreme Court suspended the respondent, Kathryn S. Polsley, from the practice of law in Kansas for a period of two years. See In re Polsley, 277 Kan. 565, 86 P.3d 531 (2004). Before reinstatement, the respondent was required to pay the costs of the disciplinary action, to comply with Supreme Court Rule 218 (2006 Kan. Ct. R. Annot. 314), and to resolve any Continuing Legal Education or attorney license fee problems.

HELD: The Court examined the files of the Disciplinary Administrator's Office and found that the respondent should be reinstated to the practice of law in the state of Kansas.

(continued on next page)
Civil

MEDICAL NEGLIGENCE, SCREENING PANEL, AND STATUTE OF LIMITATIONS
SMITH V. GRAHAM
LABETTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 94,120 – DECEMBER 8, 2006

FACTS: On May 11, 1999, Dr. Graham performed a pelvic laparoscopy and in the process lacerated Smith's sigmoid colon. On April 24, 2001, Smith filed in the district court for a malpractice screening panel. On April 8, 2002, the district court dismissed the screening panel for “good cause shown” so Smith could file a medical negligence action. That same day, Smith filed a petition for Graham’s negligent treatment claiming damages in excess of $75,000. On July 19, 2002, while the first petition was pending, Smith filed a second medical negligence petition identical to the first except that it stated that Smith filed a motion to dismiss the medical malpractice screening panel so she could file her medical negligence action. On Jan. 16, 2003, the district court dismissed Smith’s first action for lack of prosecution. On March 9, 2004, the court dismissed the second petition for lack of prosecution. On Sept. 3, 2004, Smith filed a third medical malpractice action claiming the action was permitted because the second petition was dismissed for reason other than upon the merits, otherwise it was identical to the second petition. The district court granted Graham’s motion to dismiss finding that one may not toll the statute of limitations by simply running into court and requesting a screening panel and taking no further action. The court held that Smith failed to toll the statute of limitations. The Court of Appeals agreed that the statute of limitations was not tolled and that the first petition was filed outside the applicable statute of limitations and the six-month saving statute would not save the third petition.

ISSUE: Statute of limitations

HELD: Court held that Smith’s first petition was not in fact barred by the statute of limitations and the district court and Court of Appeals erred in so holding. Court stated that Smith’s petition was filed within the statute of limitations. However, Smith failed to prosecute the first petition and it was dismissed by the district court. Her second petition was filed well beyond the 30 days tolled by K.S.A. 65-4908 and well past the two-year statute of limitations. Her second petition was untimely. Therefore, her third petition could not be saved by the savings statute, and the district court did not err in granting Graham’s motion to dismiss.

STATUTES: K.S.A. 20-3018(b); K.S.A. 40-3409; K.S.A. 60-203(a)(1), -215(c)(1), -241(a)(2), -513(a)(7), (c), -518, -3509; and K.S.A. 65-4901, -4902, -4908

NEGLIGENCE, CAUSATION, JOINT LIABILITY, AND SUMMARY JUDGMENT
YOUNT ET AL. V. DEIBERT ET AL.
BOURBON DISTRICT COURT
REVERSED AND REMANDED
COURT OF APPEALS – REVERS
NO. 93,726 – DECEMBER 8, 2006

FACTS: Yount brought suit after her house burned down. Yount, her son, Henry, and one of Henry’s friends were sleeping in the house at the time of the fire. Yount escaped, but Henry and his friend died in the fire. The defendants who were friends of Henry had engaged in various pyromaniacal activities inside the house earlier in the evening. The Kansas State Fire Marshall’s Office could not determine the exact cause of the fire, but ascertained the fire’s point of origin was inside the house on the first floor. Nothing was found to support a conclusion that the fire was anything but accidental, and there was no indications of foul play associated with the fire or deaths. The

district court granted summary judgment to the defendants based on the fact that, regardless of whether the defendants’ actions on the night of the fire were negligent, Yount failed to prove the cause of the fire or which activity caused the fire or which defendant engaged in that particular activity. In a split opinion, the Court of Appeals agreed with the district court and determined that, although there was circumstantial evidence of the defendants’ playing with fire on the night in question, a jury would not be able to make an ultimate decision regarding causation absent speculation or conjecture.

ISSUES: (1) Negligence, (2) causation, (3) joint liability, and (4) summary judgment

HELD: Court held that although it cannot be said with absolute mathematical certainty that the defendants’ activities caused the house fire, there certainly appeared to be sufficient circumstantial evidence to create a question of fact concerning causation. Court stated that in examining the record in the light most favorable to Yount, a factfinder could conclude that the defendants’ action more likely than not caused the fire. Court also held the district court erred in finding that her negligence claims were precluded because the potential liability to identify which of the defendants should be liable, or the difficulty with apportioning liability. Court stated that the Kansas Legislature’s adoption of comparative negligence statutes is intended to impose individual liability for negligence torts based on the proportionate fault of all negligent parties. Court held it will be the jury’s duty in this case to decide, based on the evidence presented at trial, the percentages of fault attributable to the parties and the district court erred in granting summary judgment to the defendants based on this rationale as well.

STATUTE: K.S.A. 60-258a

TEACHER CONTRACTS
DEES V. USD NO. 408
MARION DISTRICT COURT – AFFIRMED
NO. 95,321 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED SEPTEMBER 8, 2006

FACTS: Dees challenged the nonrenewal of her teacher’s contract for the 2003-2004 school year by the Board of Education, USD No. 408. Dees termination was precipitated by the board’s need to reduce staff because of declining enrollment and decreased financial support from the state of Kansas. At Dee’s elementary school, the principal prioritized a recommendation that budget reductions be accomplished by reducing the first grade sections, eliminating the Spanish program, and eliminating the elementary school counselor. Dees was the school counselor and the board passed a resolution to not renew her counselor contract for the 2003-2004 school year and issued a notice of nonrenewal on April 15, 2003. Dees requested a due process hearing where she argued that the board should have not renewed the high school counselor, Phoebe Janzen, and moved Dees into that position, because Dees was certified as a K-12 counselor and had more seniority in the district. The hearing officer found the board acted in good faith. The district court affirmed the decision of the hearing officer.

ISSUE: Teacher contracts

HELD: Court held the evidence established that Dees was not, by contractual definition, fully qualified to replace Janzen and perform the duties of the high school counselor, notwithstanding Dees’ seniority. Court concluded the board followed the reduction in personnel procedure set forth in the negotiated contract. Court stated that Dees did have a contractual right to preference based upon seniority. However, there was nothing in the law that precluded the district from conditioning that preference upon the senior teacher possessing the training and experience necessary to perform the critical duties of the position occupied by a less-senior teacher. Court held there was no improper creation of subspecialties between certification of a K-9 counselor and for 7-12 counselor. Court also held
that the hearing officer’s failure to issue a written opinion within the 30-day time limit did not automatically require the district court to reverse the nonrenewal of Dees contract. The minimal delay of 60 days to issue the written opinion did not deprive Dees of her requisite due process hearing at a meaningful time and in a meaningful manner. Dees failed to establish that the 60-day delay caused her prejudice.

STATUTES: K.S.A. 72-5410, -5413(l), -5436, -5443(a), -5438, -5439, -5443(a) and K.S.A. 1987 Supp. 77-526(g)

WORKERS’ COMPENSATION AND OFFSET
MCINTOSH V. SEDGWICK COUNTY
WORKERS’ COMPENSATION BOARD – REVERSED
COURT OF APPEALS – AFFIRMED
NO. 93,762 – DECEMBER 8, 2006

FACTS: In 1999 McIntosh was 65 years old and working in Sedgwick County’s Department of Security as a security officer. On June 25, 1999, McIntosh slipped and fell while he was making his rounds at the Sedgwick County Courthouse, resulting in severe injuries to his back and shoulders. Before the date of his injury, McIntosh had applied for retirement effective Aug. 1, 1999. After several appeals, the board eventually ordered that the statutory maximum compensation for total permanent disability, $125,000, be reduced by McIntosh’s Social Security and KPERS retirement benefits over a period of 341.53 weeks. The practical effect of this reduction was that the maximum workers’ compensation benefits that McIntosh could receive for his permanent total disability was cut from $125,000 to $30,847.74. The board stated that to calculate the retirement reduction in any other way would effectively dilute or eliminate the offset. The Court of Appeals reversed the board and held that the offset provision reduces the weekly compensation for claimants with permanent total disabilities, but does not reduce the overall award to those recipients. The Court of Appeals stated that the offset provisions only delay the time it takes to reach the $125,000, not to impose a cap on the number of weeks that compensation may be received.

ISSUE: Offset provisions of K.S.A. 2005 Supp. 44-501(h)

HELD: Court held the purpose of the K.S.A. 2005 Supp. 44-501(h) offset provision is to prevent wage-loss duplication, which, under the facts of this case, was accomplished by reducing weekly workers’ compensation benefits by the amount of Social Security and KPERS retirement benefits, thereby preventing wage-loss duplication. The purpose of preventing wage-loss duplication is not frustrated by allowing workers’ compensation claimants with a permanent total disability to recover an offset award for the duration of his or her disability, as required by the plain language of K.S.A. 44-510c(a)(1).


Criminal

STATE V. COOPERWOOD
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,488 – DECEMBER 8, 2006

FACTS: Cooperwood was convicted by a jury of attempted voluntary manslaughter for stabbing Belinda Dorsey in the chest with a steak knife after the two had an argument. Dorsey was delusional and taking medication. The district court excluded evidence of Dr. William Logan, a psychiatrist appointed by the court to assist the defense after Dorsey had been declared competent to testify at trial by a psychologist. Logan was prepared to opine that Dorsey’s medications were ineffective. The defense presented other defense testimony of Dorsey’s delusions and medications.

ISSUES: (1) Right to a fair trial and (2) jury instructions (under affirmative defenses)

HELD: Court held that regardless of how the necessity of expert testimony standard is stated, in this case there was no error in excluding Logan’s testimony. Court stated it was not a jury necessity for a psychiatrist who had only reviewed Dorsey’s “records” and “reports” to testify that her medications were ineffective. The record on appeal reveals no reason why the defense could not have argued to the jury that it should conclude from the testimony and documents, e.g., progress notes, that Dorsey’s medications were ineffective. Court held it was not clearly erroneous for the trial court to not instruct on the state’s continuing burden of proof on affirmative defenses where no instruction was requested and no objection was raised on the failure to instruct.

STATUTES: K.S.A. 20-3018(b); K.S.A. 2005 Supp. 22-3414(3); and K.S.A. 60-261, -401(b), -407(f)

STATE V. DAVIS
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 94,366 – DECEMBER 8, 2006

FACTS: Davis convicted of first-degree premeditated murder. On appeal, he claimed trial court erred in (1) admitting hearsay evidence in violation of confrontation rights, (2) refusing to give cautionary instruction regarding accomplice testimony, (3) refusing to instruct jury that “mere presence” at a crime scene does not necessitate finding of guilt, and (4) assessing Board of Indigent Defense Services (BIDS) fees without first making findings regarding Davis’ ability to pay or the financial burden the fees would impose.

ISSUES: (1) Admission of hearsay evidence, (2) accomplice jury instruction, (3) mere presence jury instruction, and (4) assessment of BIDS fees

HELD: Under facts, the surrounding circumstances and findings of trial court under K.S.A. 60-406(d)(3) were sufficient to satisfy guarantees of trustworthiness required by Confrontation Clause. It would have been especially helpful if trial court had made record of its independent findings of trustworthiness rather than echo statutory provisions. A trial court risks reversal in not recording its findings of trustworthiness.

No evidence to support Davis’ claim that witness for whom Davis requested an accomplice instruction was involved in the crime charged against Davis, thus an accomplice instruction was neither required nor appropriate.

No error in trial court’s refusal to give a mere presence instruction. Aiding and abetting instruction adequately encompassed the “mere presence” rule.

Under State v. Robinson, 281 Kan. 538 (2006), BIDS assessment is reversed and remanded for on-the-record findings of Davis’ ability to pay the fee.

STATUTES: K.S.A. 2005 Supp. 22-4513(b) and K.S.A. 60-459(g)(1), -460(d)(3)

STATE V. HICKS
BARTON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 93,602 – DECEMBER 8, 2006

FACTS: Hicks was charged with three drug possession counts and one count of intent to distribute drugs within 1,000 feet of a school. His arrest followed police execution of a search warrant at his home based on alleged drug activity at the house and a trash bag obtained from behind Hick’s residence next to the alley. The district court suppressed the evidence obtained in the search because there was no corroboration of the informants’ statements and there was no evidence linking the trash bags to Hicks, basically that anyone could have deposited the bags at the location. In the state’s interlocutory
appeal, in a split opinion, the Court of Appeals held that in close call situations, deference should be given to the issuing magistrate judge and they reversed the district court based on the good faith exception in
Leon, 468 U.S. 897.

ISSUES: (1) Proper standard of review and (2) sufficiency of the affidavit in support of search warrant

HELD: Court held the affidavit submitted to the magistrate in support of the application for the search warrant was insufficient. Court held the state waived any argument that the good faith exception to the exclusionary rule in Leon applied. Court clarified the standard of review in stating that when an affidavit in support of an application for search warrant is challenged, the task of the reviewing court is to ensure that the issuing magistrate had a substantial basis for concluding probable cause existed. Court stated this standard is inherently deferential. It does not demand that the reviewing court determine whether, as a matter of law, probable cause existed; rather, the standard translates to whether the affidavit provided a substantial basis for the magistrate's determination that there is a fair probability that evidence will be found in the place to be searched. Because the reviewing court is able to evaluate the necessarily undisputed content of an affidavit as well as the issuing magistrate, the reviewing court may perform its own evaluation of the affidavit's sufficiency under this deferential standard.


STATE V. IBARRA
PRATT DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 89,011 – DECEMBER 8, 2006

FACTS: Police stopped Ibarra and searched car after smelling strong ether odor. Ibarra charged and convicted on drug offenses from evidence discovered in that search. In unpublished opinion, Court of Appeals affirmed in part, reversed in part, and remanded for resentencing. Supreme Court granted state's petition for review. It also granted Ibarra's cross-petition in which he challenged district court's finding that search of car was valid based on probable cause with exigent circumstances.

ISSUE: Odor as probable cause for search

HELD: Issue of first impression in Kansas. Under facts, strong odor of ether alone emanating from a vehicle, even without a legitimate explanation, does not constitute probable cause to search the vehicle. Smell of ether is justification for further investigation but not for a search. Odor as corroborating anonymous tips is discussed. Search of Ibarra's vehicle was unreasonable and unlawful, and evidence obtained should have been suppressed. Other issues raised on appeal are not addressed.

DISSENT: (J. Larson) Would have affirmed decisions below. Issue on appeal should have been whether ether as a lawful substance was being utilised in an unlawful manner. Further discussion of "plain smell" exception to Fourth Amendment.

STATUTE: K.S.A. 65-4152(a)(3), -7006(a)

STATE V. KLEYPAS
CRAWFORD DISTRICT COURT – REVERSED AND REMANDED
NO. 90,650 – DECEMBER 8, 2006

FACTS: Capital case remanded for new penalty phase hearing. District court granted Kleypas' motion to prevent use of stalking of the victim as evidence to prove aggravating factor of crime being committed in an especially heinous, atrocious, or cruel manner. Fact that K.S.A. 21-4635(6) (aggravating factors in capital murder case) was not amended when Legislature amended K.S.A. 2005 Supp. 21-4636 (aggravating factors in hard 50 cases) to include stalking of victim as sufficient basis for determining that aggravating factor does not reflect legislative intent that factors in hard 50 amendment, including stalking, are not relevant in capital murder case. District court's judgment that stalking evidence was not relevant as matter of law is reversed, and case is remanded with directions to consider whether particular stalking evidence proffered by state is in fact relevant to question of whether victim suffered "serious physical abuse or mental anguish" prior to death.

STATUTES: K.S.A. 2005 Supp. 21-4636, -4636(f) subsections (3) and (6) and K.S.A. 21-4625 sections (1), (5) and (6), -4636(f), 22-3603, 60-401 sections (a) and (b), -407(f)

STATE V. PARKER
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 92,541 – DECEMBER 8, 2006

FACTS: Parker convicted of possession of cocaine that an officer found in Parker's possession. On appeal, Parker claimed district court should have excluded this evidence because it was seized while Parker was unlawfully detained. Court of Appeals affirmed, agreeing with district court's finding that Parker's initial encounter with officer was consensual. Judge Caplinger dissented. Parker's petition for review granted.

ISSUE: Legality of detention and search

HELD: Under facts, evidence insufficient to establish a reasonable suspicion that Parker had committed, was committing, or was about to commit a crime, thus Parker was illegally detained when officer asked to check Parker for contraband or drugs. Absent evidence of the cocaine, insufficient evidence supports the conviction. Parker's conviction is reversed and sentence is vacated.

CONCURRING: (J. Beier, joined by J. Allegrucci and J. Lockett) Concur with result in case, but thinks encounter between Parker and officer ceased to be consensual and became investigative detention when officer asked Parker and companion to lift shirts so officer could be reassured whether they were armed. Fourth Amendment violated because officer had no reasonable suspicion at that point to justify such a search.

STATUTE: K.S.A. 22-2402 sections (1) and (2)
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**Civil**

**ADOPITION**

**IN RE ADOPTION OF S.A.M.**

SALINE DISTRICT COURT – REVERSED AND REMANDED FOR FURTHER PROCEEDINGS

NO. 96,260 – DECEMBER 1, 2006

FACTS: The maternal grandmother of S.A.M. filed a petition for adoption claiming she had consent from the mother and to terminate the parental rights of the alleged father on the basis of rape of the natural mother. The alleged father contested the adoption and requested a paternity test. The alleged father claimed that the adoption should be dismissed because he had been acquitted of the rape in juvenile proceedings instigated by the natural mother. The district court accepted the father’s collateral estoppel argument and dismissed the adoption proceeding.

**ISSUE:** Adoption

HELD: Court held that a prior juvenile adjudication on a charge of rape is not necessarily determinative of rights and liabilities of the parties to an adoption proceeding in which a party seeks to terminate the natural father’s parental rights. Court also stated that a juvenile adjudication involving a charge of rape is a determination of criminal guilt for a punitive purpose. The burden of proof in such cases is analogous to a criminal proceeding, requiring proof beyond a reasonable doubt. Contrarily, the burden of proof in a proceeding to terminate parental rights is less onerous than for a criminal adjudication, although heavier than for a typical civil proceeding. An acquittal of the criminal rape charge does not equate to a finding that is res judicata for a civil proceeding under a lesser burden of proof.


**CONTRACT, APPARENT AUTHORITY, AND ATTORNEY FEES**

TOWN CENTER SHOPPING CENTER V. PREMIER MORTGAGE

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 94,917 – DECEMBER 22, 2006

FACTS: Town Center owns a shopping center in Derby, Kan., Premier Mortgage is a mortgage broker that never leases property itself, rather it subleases space from an existing tenant that then becomes the branch manager. Town Center leased property to Empire Lending for residential mortgage brokerage services and Empire could not assign or sublet without the prior written consent of Town Center. Without permission from Town Center, Premier Mortgage leased the property from Empire Financial, an independent, and in this case confusing, entity with independent ownership. Later, Premier, through the branch manager Nancy Bayer, signed a lease with Town Center encompassing the property previously leased to Empire and included a letter indicating the branch was in good standing, but did not explicitly state that Bayer had authority to act on Premier’s behalf or sign the lease. Premier terminated its business and vacated the premises in 2005. Town Center sued for possession of the premises and $5,998.10 in rent, taxes, insurance, and common-area maintenance expenses, and later amended damages for a total amount due of $13,493.18. The district court granted judgment to Town Center for $13,493.18 plus attorney fees.

ISSUES: (1) Binding authority, (2) repudiation, (3) awarding attorney fees, and (4) substantial competent evidence

HELD: Court held that based on the facts and circumstances of this case, Town Center established by clear and satisfactory evidence that Premier’s letter induced Town Center to believe Bayer had apparent authority to act on behalf of Premier and the district court properly concluded that Premier was bound to the lease executed by Bayer. Court held that although the district court found that Premier ratified the lease by not repudiating it, this argument was not supported by clear and satisfactory evidence. Court held that pursuant to the terms of the lease, the district court properly ordered Premier to pay Town Center’s attorney fees. Court stated the record did not indicate where Premier contested the adequacy of the trial court’s findings. Court held the problem with Premier’s argument started with the district court’s adoption of all of Town Center’s findings of fact and conclusions of law, including the conclusion that Premier ratified Bayer’s action of signing the lease. Court stated that because a trial court’s findings and conclusions are the very essence of the judicial function, they should not be surrendered to counsel.

STATUTE: K.S.A. 16a-5-110

**NEGLIGENCE**

PERKINS V. SUSAN B. ALLEN MEM. HOSPITAL

BUTLER DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED

NO. 95,572 – DECEMBER 1, 2006

FACTS: Perkins injured in fall from hospital x-ray table. She filed negligence action for damages. District court granted summary judgment to hospital due to Perkins’ failure to present expert testimony to establish applicable standard of care on medical malpractice claims. Perkins appealed, arguing claims should have been construed as premises liability claims, and common knowledge exception made expert testimony unnecessary.

ISSUES: (1) Common knowledge exception, (2) malpractice, and (3) ordinary negligence

HELD: Common knowledge exception discussed. Under facts, district court properly found the common knowledge exception did not apply.

Under facts, no disputed material fact regarding technicians’ failure to implement common examination routine with Perkins. Summary judgment properly granted on this medical malpractice claim because no expert testimony to establish standard of care and causation. District court erred in classifying claim of failure to warn Per-

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PUNITIVE DAMAGES PUGH V. MUNGUIA
HARVEY DISTRICT COURT – AFFIRMED
NO. 94,709 – DECEMBER 1, 2006

FACTS: Munguia and Pugh were involved in a car accident. Munguia was intoxicated and fled the scene. Pugh sued Munguia to recoup medical expenses for her injuries. The district court granted Pugh’s motion to amend her petition for punitive damages based on Munguia’s elevated blood alcohol level and that he fled the scene. Munguia agreed to stipulate to 100 percent of the liability for the accident as well as to liability for punitive damages. However, Munguia then agreed to not stipulate to liability for punitive damages in exchange for Pugh’s offer not to execute directly against Munguia on any judgment award against him. The district court dismissed Pugh’s claim for punitive damages as moot and against public policy. A jury awarded Pugh $3,958 in compensatory damages.

ISSUE: Punitive damages
HELD: Court held that under the facts of the case, where the plaintiff agreed not to execute against the defendant should punitive damages be awarded, and the defendant’s insurance company, which was the only other party, could not be required to pay punitive damages, it was appropriate for the trial court to dismiss the punitive damages claim.

STATUTES: None

STEPPARENT ADOPTION
IN RE ADOPTION OF S.J.R. AND E.V.R.
KEARNY DISTRICT COURT – AFFIRMED
NO. 96,388 – DECEMBER 22, 2006

FACTS: S.J.R. and E.V.R. are the children of N.R and K.W., married in September 1999 and divorced by 2001. K.W. was given sole custody of the children in the divorce decree due to N.R.’s drug convictions and incarceration. N.R. was incarcerated in county jail until 2002 and then sentenced to prison in late 2002. K.W. married J.W. in February 2003. J.W. petitioned for adoption with K.W.’s consent. They alleged N.R.’s consent was unnecessary because N.R. had failed or refused to assume the duties of a parent for two consecutive years before the adoption petition. N.R. contested the adoption. District court found that N.R. was unfit and ordered his parental rights to be terminated and that J.W. be allowed to adopt the children. The district court further concluded that N.R. had failed to provide comfort, support, or care for the children for at least two consecutive years before the adoption and that his consent was not required.

ISSUES: (1) Legislative intent, K.S.A. 59-2136(d); (2) consent not required; and (3) utilization of opportunities for maintaining of contact
HELD: Court held that K.S.A. 59-2136(d) is the controlling section in a stepparent adoption case. Under this statute, a natural parent’s consent must be given to a stepparent adoption unless such parent has failed or refused to assume parental duties in the two years immediately preceding the filing of the adoption petition or is incapable of giving such consent. Court stated that the district court must look at all the surrounding circumstances when determining whether a nonconsenting parent has failed to assume parental duties for the two preceding consecutive years. Court held the N.R.’s fitness and the best interests of the children, although not controlling factors, were factors to be considered in deciding if the father had failed to perform the obligations of a parent. Court held that N.R., the incarcerated father, failed to make reasonable attempts to maintain close parental relationship with his children and his consent to the adoption was not required under K.S.A. 59-2136(d). Court found the only efforts made by N.R. during his incarceration were to send a few cards and apply for Christmas gifts through the Salvation Army.

STATUTE: K.S.A. 59-2136(d), (h)

STATE V. CISNEROS
LYON DISTRICT COURT – REVERSED AND REMANDED
NO. 96,365 – DECEMBER 8, 2006

FACTS: On last day of 12 month probation period, Cisneros agreed to extension of probation to complete recommended substance abuse counseling. Agreement not approved and filed until four days after probation period expired. A month later, Cisneros violated terms of probation. District court revoked probation and ordered him to serve prison term. Cisneros appealed.

ISSUE: Jurisdiction to extend probation
HELD: District court lost jurisdiction to modify or extend Cisneros’ probation when probation period ended. Because court’s approval of voluntary extension was filed after jurisdiction over Cisneros had terminated, district court lacked jurisdiction to modify or extend Cisneros’ probation, and lacked jurisdiction to revoke probation. 30 day “grace period” in K.S.A. 2005 Supp. 22-3716(d) does not apply to extension agreements.

STATUTES: K.S.A. 2005 Supp. 21-4611(c)(8), 22-3716 sections (a) and (d); and K.S.A. 60-206(a),

IN RE D.T.J.
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 96,075 – DECEMBER 22, 2006

FACTS: The state was denied a motion to try D.T.J. as an adult, but the court designated the proceeding as an extended juvenile jurisdiction prosecution (EJJP). D.J.T. pled guilty to aggravated robbery and he received a juvenile and adult sentence. The district court ordered D.T.J. to be placed in the commissioner’s custody for direct commitment to a juvenile correctional facility until the age of 22 years, 6 months, followed by conditional release until age 23. Noting the proceeding was an EJJP, the district court ordered that D.T.J. could not receive more than 15 percent good time credit on his juvenile sentence. D.T.J. received an adult sentence of 233 months’ imprisonment. The Juvenile Justice Authority (JJA) filed a motion to modify sentence to remove the 15 percent limitation. The district court held JJA lacked standing since it was not a party to the action and denied the motion.

ISSUES: (1) JJA standing and (2) limiting good time credit

(continued on next page)
HELD: Court held that JJA was authorized to file a motion to modify D.T.J.’s custody. The commissioner has a stake in the district court’s decision to limit good time credit, thus the JJA had standing to file its motion to modify D.T.J.’s sentence and challenge the specific order concerning good time credit. Court stated its opinion in no way means that JJA would have standing to challenge a district court’s sentencing order in every juvenile offender case. Court reversed for resentencing finding that the Kansas Juvenile Justice Code contains no express provision limiting good time credit to 15 percent, as is found in the Kansas Criminal Code and such provision could easily have been included by the Legislature. Court remanded for resentencing without the limitation on good time credit.

STATUTES: K.S.A. 21-4603d(e), -4721(i); K.S.A. 2005 Supp. 21-4706(a), -4722(a)(2); K.S.A. 38-1636(f)(3), -1663, -1664, -1683(b), -16,126(a)(2), -16,129(a)(1)(B), -16,130, -16,131; K.S.A. 2005 Supp. 38-1665(c); and K.S.A. 60-2102(b)
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6
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9
Orientation to Kansas Practice
DoubleTree, Overland Park

13
Juvenile Offender Code
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Featured Seminars

19 & 20 7th Annual CLE Slam-Dunk
KSU Alumni Center, Manhattan

27
Invading Your Castle: Warrantless Searches of Your Curtailage & Other “Private” Places
David N. Harger
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28
“Your tag light is out.” – A Primer on Car Stops
David N. Harger
Telephone CLE

MARCH

2
Under the Umbrella: A Lawyer’s Response to the Storms (Ripoffs, Scams, and Frauds)
Robert K. Weary Education Center (KTLA), Topeka

6
Discovery in the ESI (Electronic Stored Information) Era
Christopher V. Cotton
Telephone CLE

7
The “Iron Triangle” Response to High-Profile Litigation
Philip S. Goldberg
Telephone CLE

16
Young Lawyers – Nuts & Bolts of the Law
Topeka & Shawnee Co Public Library, Topeka

23
A Survey of Legal Solutions to Issues Faced by Gay, Lesbian, Bisexual, and Transgender Clients
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30
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