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SEE YOU THERE!
See the cover wrap for more information!
It is difficult to be a good trial lawyer. I have had the good fortune of being in the same courtroom with good trial lawyers. I notice that they have certain habits that tend to make them persuasive with judges. I’ve listed some of them for your information.

- A good trial lawyer is on time.
- A good trial lawyer is both a zealous advocate and a civil advocate. The rules talk about being courteous, dignified, and displaying a respect for the judicial office. All of this boils down to directing your argument to the court rather than complaining about conduct of the other side. The more that a lawyer stays to the issues, and ignores the other attorney, the more persuasive the lawyer’s argument.
- A good trial lawyer is not afraid of the judge and can accept an adverse ruling and simply move on, taking only enough time to make a good record.
- A good trial lawyer does not need to interrupt a question to make an objection. There is plenty of time for objections.
- A good trial lawyer does not trade insults or make personal comments about opposing counsel but rather directs objections, requests, and questions to the court.
- A good trial lawyer does not need to berate witnesses or intimidate them, but rather can make a point with tough questions and wins by preparation.
- A good trial lawyer stands when addressing the court or if being addressed by the court.
- A good trial lawyer knows the importance of good posture and appropriate attire. Everything about the lawyer projects an air of confidence and sincerity.
- A good trial lawyer knows when to be brief and is a good editor.
- A good trial lawyer knows how to get to the point.
- A good trial lawyer is not afraid to make an admission in a close case.
- A good trial lawyer knows that the judge’s best friend is the court reporter.
- A good trial lawyer knows the difference between a jury trial and an argument to a judge.
- A good trial lawyer cares most about the client.
- A good trial lawyer learns to love questions from the court and can even anticipate some of them.
- A good trial lawyer does not dodge questions or make the mistake of thinking that appearing in court is like “Meet the Press” where you answer the question you wish had been asked.
- A good trial lawyer handles the other lawyer and doesn’t ask the court to fight his or her battles.
- A good trial lawyer is not afraid to concede the unimportant and takes the time to illuminate the critical points.
- A good trial lawyer checks out the turf ahead of time. Perhaps even to the point of watching some hearings and trials where the judge is involved.
- A good trial lawyer learns to anticipate what the judge expects and wants and is familiar with the local rules.
- A good trial lawyer does not need to have ex parte communication with the judge but, instead, depends upon extraordinary preparation.
- A good trial lawyer knows that preparation not only adds to your confidence but is also a sign of respect for the system.
- A good trial lawyer knows that the lawyer, not the client, is in charge of how the case is presented and will determine how opposing counsel is treated.
- A good trial lawyer never lets the client dictate what kind of lawyer he or she is.
- A good trial lawyer respects the obligation to represent every client vigorously but also embraces the obligation to uphold the honor of the legal system.
- A good trial lawyer is an advocate but an advocate with a code.
- A good trial lawyer recognizes that advocacy is an art, and we can all be persuasive if we have respect for the system and for our craft and take the time to prepare.

In this age of “Court TV” and Judge Judy, it is easy to miss the artistry of the truly effective advocate. If you have the good fortune to find yourself in the company of a good trial lawyer at work, sit back and enjoy. You will be proud that you, too, are a member of this great profession.
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Reflections on Being a Young Lawyer

By Paul T. Davis, KBA Young Lawyers Section president

D uring the aging process, we all hit a few milestones. When one is young, these milestones are usually celebratory occasions where new opportunities are opened up. School graduations, being able to vote at age 18, being able to go to a bar and order a drink at age 21 (a milestone that most college students look forward to for several years!), and your car insurance costs going down at age 25. I’ve hit all of these milestones and am now reaching an age where some of these youthful opportunities expire.

Unfortunately, there is a ceiling on how old one may be and still be considered a young lawyer. And I’m just about there! An additional deadline I’m dealing with is that I will only be president of the KBA Young Lawyers Section for a little more than a month. As I graduate to old lawyer status (boy, that just doesn’t sound quite right), I thought I would take a look back at the nine years I’ve been practicing law and share a few reflections.

When I was in law school, I worked for a solo practitioner who had a fairly general practice with an emphasis in family law. I learned a great deal from him, but I was in no way prepared to hit the ground running. I had not taken a trial advocacy class in law school (which, by the way, I think should be a required class and not an elective) or participated in the law school clinic program. It was safe to say that I had about as much knowledge of what I was doing in a courtroom as any Joe Citizen off the street.

I recall my first appearance in court. It was before Judge Robert Fairchild, and it was a simple criminal first appearance docket. However, I was truly terrified. I hoped my client couldn’t tell that I was 20 times more nervous than he was, and I wasn’t the guy who had been charged with a crime. I arrived early and watched a number of experienced attorneys walk up to the podium with their clients and confer with the judge. I was pretty sure I knew what needed to be said to the judge but was praying that he wouldn’t ask me some question that I wasn’t prepared for. Fortunately, I managed to survive this experience and continued taking baby steps toward feeling more comfortable with the practice of law.

I managed to work my way up to a few bench trials (incidentally, I won my first bench trial with a client who literally called me to represent him about two hours before the trial started — I was able to interview him for about 15 minutes beforehand — perhaps I was too green to think of asking for a continuance), appellate oral arguments, and jury trials. The knowledge of Kansas law and just plain lawyering that I have learned has been immense. However, the most important lesson I’ve garnered from my nine years of legal practice and what I believe makes the legal practice one of the most challenging and rewarding professions is the fact that you learn something new everyday.

If there is an attorney who has mastered the practice of law, I would sure like to meet him or her. Each case that walks in the door is a new adventure where you have to utilize a somewhat unfamiliar part of the law and often calls upon you to display different lawyering skills. I have learned that the more experience you have practicing law, the easier it is for you to adapt to the challenges of new and different cases. A seasoned lawyer knows where the resources are, can figure out the procedure necessary to employ in the case, and is able to navigate the pitfalls of a somewhat unfamiliar set of facts.

This is why it is so important for young lawyers to practice in a setting where more experienced lawyers are available to teach and serve as a resource. After I had been practicing a few years, I became acquainted with a person who was working at our local courthouse. It turned out that he was also attending law school. One day, he informed me that he was going to graduate in a few months and that he and a classmate were going to hang out a shingle and open their own law firm. Having struggled to learn how to practice law with a couple of somewhat experienced attorneys in my office, I knew these guys were in for trouble. Sure enough, they didn’t last long.

Unfortunately, many law school graduates aren’t able to land positions where they will have the resource of several experienced attorneys at their disposal. There will be many young lawyers who will continue to struggle to grasp the practice of law. It is incumbent upon the more seasoned attorneys to help out young lawyers. I wish that there was some type of formal mentoring program or apprentice program for young lawyers, but there isn’t. Maybe someday there will be. But for now, I am grateful that I have a number of attorneys that I can call upon to ask questions and always provide me with a helpful response. Perhaps when I graduate from being a young lawyer, I can be one of those attorneys that helps to mentor and gives a hand to a new young lawyer. I hope you will be one too!

Paul T. Davis is a partner with the firm of Skepnek Fagan Meyer & Davis P.A., Lawrence. He may be reached by phone at (785) 843-7674 or by e-mail at pauldavis@sunflower.com.
Civility Among Lawyers: The Minority View

By Sally D. Pokorny, Kansas Bar Foundation president

Civility among lawyers has been a hot topic of late and now that I have my very own column, I might as well weigh in.

I love practicing law because I love hanging out with lawyers. They usually know the best jokes and can rattlle them off faster than Jay Leno. They always know the latest gossip. They have opinions on just about every topic in the universe and are not hesitant to share those opinions, which, though I may not agree with them, are usually well reasoned and well thought out. But the primary reason I love being around lawyers is they are all willing to help me.

Some of you who are reading this might think, “Well, yeah, you have only practiced in a small town and people are nice there.” Maybe. However, I am now practicing in Lawrence, which is huge compared to Independence. So far, I have found the bar to be very welcoming with many attorneys offering to be of assistance, giving me telephone numbers, and saying, “Just call if you need anything.”

I keep a little fence around my field of practice. In that field I do family law cases and all those horrible things that go with it — custody battles, child support issues, guardianships, abused and neglected children, division of debts, division of property. Sometimes I get to do a fun thing, like an adoption. There is also an acre or so of that field devoted to criminal law. I go from handling a DUI in the county to running over to the county jail to talk to my poor client who is charged with murder. And then there is a half-acre in the field I call miscellaneous.

I don’t have any part of my acreage devoted to bankruptcy cases, but bankruptcy is always a looming issue in divorces. When I have a divorce with a peculiar bankruptcy issue, I know 10 lawyers I can call who will answer my questions without hesitation, and I have never been billed. I don’t do tax law, but I know a couple of lawyers I can call who will answer my tax questions. I don’t do medical malpractice cases, but I have several firms in my Rolodex I can call if this issue comes up in the office; I ask for free legal advice, and I get it.

Sometimes attorneys call me and ask for legal advice. I have always helped the attorney who called, and I have never sent a bill.

Those of us who practice in more than one county know each county has unwritten rules of procedure. How have I found out about those secret rules? I usually call my opposing counsel who practices in that county on a regular basis and ask what the secret rules are, and the lawyer has always told me! I think that goes way beyond being civil.

I am not saying I have never had a bad experience with another lawyer who had “uncivil” ways, I have had these experiences and actually they have been doozies. However, I have never felt the whole bar was coming apart because of a few people with bad attitudes.

Taken as a whole, lawyers are very caring, giving, funny, and civil. The next time you run into one of those “uncivil” lawyers, after dealing with him or her, think of all the lawyers who have made your practice of law easier, not only because they were civil, but also because they have done one or two more things for you beyond what civility requires.

Oh, and when you remember those lawyers and those times, tell somebody what a great experience you had with that lawyer. It is just another way to “toot our own horn.”
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Matt Birch

Matt is a trial lawyer representing the victims of medical negligence and defective products. He has experience representing clients in both state and federal court and has handled cases at both the trial and appellate level. He is a member of the American Association for Justice, the Missouri Association of Trial Attorneys and the Kansas Trial Lawyers Association. He graduated with distinction in 2000 from the University of Missouri-Kansas City School of Law where he served as Managing Editor of the UMKC Law Review and spent two years as a Judicial Law Clerk for the Hon. H. Dean Whipple of the United States District Court for the Western District of Missouri.

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**Tech Tips**

**Programs to Help the Mac Lawyer be More Productive**

By Grant D. Griffiths, Clay Center

Recently, while cruising the Internet, I came upon an article listing programs to help lawyers be more productive. The programs were for the Windows computer and not the Macintosh computer. In response, I felt compelled to do my own list targeted to the Mac-using attorney.

**Dictation**

For the Windows machine there is a program called Dragon Naturally Speaking, which allows you to do dictation right to your computer. Voice recognition software has been out for a while; however, one of the disadvantages is that it is not as accurate as it should be. The best answer I have found for dictation in my own practice is digital dictation. Gone are the days of the clunky old machines that are hard-wired to the front desk and the stack of microcassettes on your desk. Now we have devices that enable us to dictate a digital file and send it to our assistants via the office network or e-mail. The best system I have found is the Start-Stop system. The equipment plugs right into your assistant’s computer. You use a hand-held digital recording device that you can take with you wherever you go. No longer are you tied to your desk to do your dictation.

**Faxing**

Fax machines and faxing have become a routine practice in most law offices. The problem again has been that you were tied to the office to send and receive faxes. You also had all that paper piling up from the faxes you would receive. There are services like eFax and other Internet-based services; however, the problem for a lot of us in Kansas is the fact you cannot get a local number for such services. For the Mac-using attorney, there is PageSender, which is a program that sits right on your computer and uses the same line for your DSL and fax. The faxes come into your computer as a PDF, which you can either print or save directly to a client’s virtual file on your computer network. I have faxes sent to my e-mail address; that way, no matter where I am, I get my faxes with my laptop wherever I have Internet access.

**Case Management**

There are many programs on the market that are used for case management, including such market leaders as the suite of programs from Casesoft. For the Mac-using attorney there is a very flexible program called Circus Ponies Notebook. It’s a combination outliner and free-form database that lets you clip, annotate, share, and organize your information using a familiar notebook interface complete with pages and tabs. Best of all you can organize a case in a way that makes sense to you, not the way the software company believes it should be done. You can import photos, images, film clips, and sounds directly into Notebook from any source.

Notebook includes tabs on the right side just like a trial notebook. I set mine up like a bindertech trial notebook, labeled and color-coded just like a hardcopy notebook. However, with Notebook, I can put my finger on items much faster than the hardcopy of my trial notebook. And I can use it to present information and exhibits in court. Notebook also works with Apple’s popular iCal, where you can set and manage calendars, alarms, and to-dos for your case.

**Trial Management**

For trial presentation software, there are programs available from Clarity Legal Software, including TrialSmart. TrialSmart is used to create, edit, and show video and graphics. It allows you to present synchronized video to a jury using the presentation view. You can also synchronize transcript text to video testimony for later playback.

Another program from Clarity is DepoSmart. With DepoSmart, you can analyze, annotate, and print transcripts. Users can also connect to and import realtime transcripts from a court reporter during a deposition. Importing case materials like exhibits, image files, attachments, and synchronized video is easy. You can share transcripts with others by exporting .dml files for use in their free transcript viewer.

**Practice Management**

One of the areas that gets the most comments and questions from attorneys who are considering the Macintosh computer in their law practice is practice management software. There is no “perfect” system out there. The important thing is to see which ones seem like a decent fit and then outline exactly what you are looking for and compare it to how well those programs provide it. Once you decide on the items that are important to you, put them in categories of how important they are: have to have, would be nice to have, and it’s okay not to have. Then decide how good of a fit each program is for each of the items you have listed.

One program that is getting a lot of press lately for the Mac computer is Daylite. I use Daylite 3 to help me keep my office organized. What I like best about it is that I can set up a case (they call them projects) and have links to everyone and everything I need for that case in one location. No more hunting for phone numbers, addresses, or even client files. It is all linked in one place. Daylite will also do basic document production with its merge feature. I have used it to do some simple task, such as envelopes and letters. The calendar and contact management is also great, and it syncs to my Treo 650. While Daylite is not perfect, it does a great job. But again, no practice management software package is perfect.

There are other programs available for the Mac-using attorney to be more productive. However, all of the programs mentioned above are being used in my own practice.

About the Author: Grant D. Griffiths is a solo practitioner from Clay Center. He can be reached at gdgrifflaw@mac.com or at (785) 632-6612.

**Footnotes**

The relationship among the branches of government is, by design, one of dynamic tension through checks and balances. A district judge and two Kansas legislators joined forces to illustrate the legislative/judicial connections for a group of Manhattan High School students. Reps. Sydney Carlin, D-Manhattan, and Tom Hawk, D-Manhattan and Hon. David L. Stutzman, 21st District, Manhattan, wanted to show the students that when legislators and judges disagree, it is not a contest of wills between the branches, but the fulfillment of unique responsibilities allocated to each under the Constitution, always arising in the framework of the facts of a specific case.

The legislators and judge demonstrated their point by tracking a hypothetical bill through the Legislature and a subsequent court challenge. The bill presented to the students made it unlawful for any person under the age of 21 to use any communication device while operating a motor vehicle. The broad prohibition was limited in its application to those whose license and actual residence was in Kansas counties with a population greater than 50,000. An exception was made for any communication to law enforcement or emergency responders.

Carlin and Hawk initially sat as the House Transportation Committee to conduct a hearing on the bill. Stutzman drafted student “volunteers” to offer testimony to the committee presenting the various views of a statewide student organization, an insurance company, and a telecommunications provider. After listening carefully to the testimony and questioning the student lobbyists, the panel voted the proposed bill out of committee for consideration on the floor of the House. With the passage of the bill and the governor’s signature, the stage was set for the second phase of the presentation as the law was challenged through the courts.

Again, students were the key players in the roles of an aggrieved defendant, defense counsel, and the prosecutor. Stutzman first considered the constitutional challenge, on equal protection grounds, which he rejected, then with complete impartiality assumed the role of an appellate judge to review the correctness of his trial court decision. The judge and legislators then discussed the legislative alternatives for correcting the legislation if it were found to be constitutionally defective.

“For many teenagers government is an abstract thing that is far removed from their daily lives,” said Tim Ekart, Manhattan High social science teacher. “This program personalizes the process a bill goes through to become a law and illustrates how the constitutional system of checks and balances operates from the real people who make it happen. Not only is this a great opportunity for my students to meet and hear their elected officials but it also, quite literally speaking, puts a face on their local government.”

The legislators also viewed the presentation as a positive step. Carlin commented, “I expected this to be an opportunity for us to educate students about how they are protected by the independence of the three branches of government, and we did it. However, I was also delighted with what I learned from our interaction about the sophistication of these young people and their willingness to speak up for their views.”

Hawk agreed, noting that “This exercise, with an actual judge and legislators, engaged the students in a realistic simulation of how the process of checks and balances between the branches actually operates.” He also felt the involvement of the students in the role-plays was more effective than merely talking “at the students.” All of the participants agreed that the exercise should be refined and repeated with other student groups.
The Risk of Losing Yourself in Law School Rating Systems

By Staci N. Lane, Washburn University School of Law

When I applied to law school during my senior year of college, I thought the U.S. News and World Report law school rankings were one of the most important indicators of a law school’s quality. Before making my decision, I referred to the rankings to see how the school I was considering matched up, despite the advice of my wonderful prelaw advisor who emphasized that choosing the right law school is an individualized decision.

When I was accepted to a top 60 law school 1,200 miles away from home, I was very excited. The school had just started some new “cutting-edge” programs, and I was confident that there would be better professors and smarter students than at other, lower-ranked law schools. I thought that getting this “high-quality” education was going to make me a better lawyer and that choosing this school was my best option.

After spending only one semester at that law school, I was positive I had made a mistake. The new program had a lot of “glitches,” and the faculty was unwilling to listen to students when they offered suggestions or complained about their experiences. For example, I was waiting in an office to talk to one of my professors when I overheard the professor in charge of the new programs say, “These students just don’t want to do the work. They don’t know what hard work is.” That is the kind of attitude the faculty had when working with their students. The faculty did not have the kind of open-door policy or desire to work with students that my undergraduate professors had, and I realized how much I missed that quality.

I also disliked the location of the law school. It was in a much bigger city with a lot of pollution. I had to drive 45 minutes back and forth from school every day through a seedy part of town where I was afraid for my safety, especially if I happened to get lost. I got e-mails about muggings and other crimes that took place around the campus almost daily. And of course, I really missed my friends and family back home. It was too far away to go home for anything but the most important occasions. During the winter break, I made the decision to drop out and reapply to different law schools for the next fall.

When I started the application process over again, I contacted my former prelaw advisor, who graciously agreed to help me go through the process a second time. This time I looked at what qualities were important to me — and not at the rankings. I visited the schools and talked to lawyers in the community to see what they thought about the law schools and what their experiences had been when they were in school. I checked out the cities where the law schools were located, and I looked at how far away from home they were. At the end of that process, I decided that Washburn was the law school for me, and I was thrilled to be accepted.

Law school at Washburn has been a completely different experience. From the first events for admitted students, I could feel a difference in how the faculty and students treated each other. The school was a welcoming place where people were interested in talking to me and making me feel like I fit in, even though I was not a traditional first-year law student. I was also pleased to find that the quality of the professors and students was the same as at my old school. Washburn has a wonderfully diverse faculty that is very knowledgeable in their respective areas of the law, and the students have all proven to be of the same high caliber as the ones I was working with at that “top 60” school.

I knew I had made the right decision after talking to my legal writing professor about the differences between Washburn’s writing program and the “new” program at my old school. She was genuinely interested in my experiences and how she could use that information to make the program at Washburn better. One thing I encouraged her to consider was using the Association of Legal Writing Directors (ALWD) citation manual1 to teach legal citation skills instead of the Bluebook.2 I’m not sure how much effect my input had, but Washburn now teaches ALWD to their incoming students. It is good to be at a school where the faculty and the students respect and value each others’ input.

Another thing I learned from this experience is how valuable it is to be close to my friends and family. After transferring to Washburn, I have been able to go home to visit my friends and family and attend weddings and other special events. Being close to home has allowed me to balance the stresses of law school with a rich personal life. My quality of life is better, and I am so much happier. It really is better to follow your heart rather than the hype of an arbitrary law school rating system.

About the Author

Staci N. Lane is a third-year student at Washburn University School of Law. In 2004, she earned a Bachelor of Science degree from Kansas State University in criminology, with minors in philosophy and political science. She plans to become a criminal prosecutor following her anticipated law school graduation in December.

FOOTNOTES
1. Ass’n of Legal Writing Directors & Darby Dickerson, ALWD Citation Manual: A Professional System of Citation (3d. ed. 2006).
2. The Bluebook: A Uniform System of Citation (18th ed. 2005). For a detailed comparison of earlier editions of the two citation manuals see Alex Glashausser, Citation and Representation, 55 Vand. L. Rev. 59 (2002).
S
ome days it seems the world is full of nothing but bad
news. Iraq, Iran, North Korea, Afghanistan, Bob Hug-
gins, Mark Turgeon, Gitmo, Katrina, tornadoes, cancer,
global warming, and the Jayhawks collapsing in the NCAA
tournament. And then, out of nowhere, the newspaper
brings good news. And it happened in March.
The New York Times on Friday, March
23, reported that cell phones won’t be al-
lowed on planes. The report said that
the “FCC will give up on the idea
of allowing cell phone use on air-
planes.” The story went on to
say “while the chairman, Kevin
Martin, cited a technical rea-
son, thousands of air passen-
gers have written to the FCC
urging rejection of the propos-
al because of the potential for
irritating passengers in airline
cabins.” The story continued:
“The step backward for wire-
less devices on planes probably
comes to the relief of some pas-
sengers.” The FCC received more
than 8,100 comments on the pro-
posal. Most were against the idea.
If this sounds like a nonevent, let
me explain further. Late last year, a
Dubai-based airline announced plans to
become the world’s first air carrier to allow
passengers to make in-flight cell phone calls. The
airline, which obtained approval from air safety and telecom-
munications regulators in 25 countries in Europe, the Middle
East, and Asia, expects to allow usage on a Boeing 777 by May
1. The experts were predicting that the FCC was going to ac-
cede to this trend and make the friendly skies much less so.
In my book, phones should never be allowed on a plane,
even when the plane is sitting at the gate. Maybe it’s me, but
I always get the seat next to the sales guy blabbing to his re-
gional manager about why he couldn’t meet his quarterly sales
targets. These calls go like this: “I hope the trade show in Tulsa
next week can put me over my goal! If I make my number, can
I qualify for that trip to Buffalo?” And after that call, sales guy
then dials up his daughter to get quality time from row 33,
seat C. These conversations go like this: “Hi sweetie. It’s dad.
I’m almost there. (pause) In just a little bit. We just landed.
(pause) That is so sweet. I love you too. OK, now put Hunter
on the phone. Hi Huntie baby. (pause) What? Speak louder,
honey. (pause) Yes, I bought you something special. It’s a se-
cret. What are you watching? (pause) The Lion King? Don’t
be scared baby doll. It’s a movie.” And it went on and on.
Everyone within six rows pretended not to hear a word of this
foolishness. Except me. I located the barf bag and put it to
good use.
So anyway, back to the good news. The Times, on the next
day, Saturday, March 24, had a follow-up article. This includ-
ed comments from readers who, like me, were thrilled
with the news. Some of these comments must be shared:
“My idea of Dante’s seventh ring
of hell – squashed between two fat,
sweating people talking on cell
phones while a child kicks the back
of my seat the whole trip – no,
no, no – I’ll take a boat first.”

Other Comments:
“Allow cell phone calls dur-
ing flights and you won’t have
to worry about terrorists. Even
they will stop flying. All we’ll
have left are a bunch of cell-
phone addicts crashing their
cars on the ground and driving
people crazy in the air.”

“As long as the cell phone us-
ers have to step outside to use their
phone, I have no problem with it.”

“Never, never, never ever allow cell phones
on planes. It’s bad enough to hear people bab-
bling all day, no matter where they are. Flying is mis-
erable enough without those added egotistic talkers. Have a
Heart.”

And then another reader had this to say:
“I guess everyone has forgotten that cell phones saved the
day on September 11. They are the reason that White House
is still standing.”

Look for balance, folks: Restrict most cell phone use during
flights, but allow text messaging and emergency calls.

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 LLP. He may be
reached at mkeenan@shb.com.
CHANGING POSITIONS

Carmen D. Bakarich has joined Kansas Department of Transportation, Topeka.
John W. Broomes and Mitchell L. Herren have joined Hinkde Elkouri Law Firm LLC, Wichita.
Jon Edward Bunten has joined the Village Development Co., Overland Park.
Mary E. Christopher and Jennifer H. Sherber have joined the Health Care Stabilization Fund, Topeka.
Shannon S. Crane is the new regional director for Kansas Legal Services offices in Wichita and Hutchinson.
Jeffrey W. Deane has joined Allmayer & Associates P.C., Kansas City, Mo.
David C. DeGreeff and Michael James Hundley have joined Levy & Craig P.C., Kansas City, Mo.
Johnnye L. Dennis has joined Lockton Companies, Liberty, Mo.
Christina E. Gondering has become partner with Berkowitz & Cook, now Berkowitz Cook & Gondering, Kansas City, Mo.
Darla J. Goodrich has joined Brokers International Financial Services LLC, Pandra, Iowa.
Kate A. Hansen has joined H&R Block, Topeka.
Heath A. Hawk has joined Husch & Eppenberger LLC, Kansas City, Mo.
Bryan C. Hitchcock has joined the Sedgwick County District Attorney’s Office, Wichita.
Adam M. LaBoda has joined Spencer Fane Britt & Browne LLP, Kansas City, Mo.
Teresa Laidacker has joined Shook, Hardy & Bacon LLP, Kansas City, Mo.
Sarah J. Loquist and Thomas R. Powell have joined Unified School District No. 259, Wichita.
Andrea G. McCarthy has joined Gould Thompson & Bucher P.C., as of counsel, Kansas City, Mo.
Carrie E. Martsching has joined Quitmeyer & Martsching P.C., Kansas City, Mo.
Julene L. Miller has joined the Kansas Board of Regents, Topeka.
Kenneth B. Miller has joined Rork Law Office, Topeka.
Sarah E. Millin has joined Lathrop & Gage L.C. as an associate, Kansas City, Mo.
Marcus William Mountford has joined Trillion Technologies LLC, Austin, Texas.

Scott C. Nehr-bass has become partner with Foulston Siefken LLP, Overland Park. Tara S. Eberline, Overland Park; Nicholas R. Grillot, Topeka; and John S. Neas, Wichita, have become associates of the firm.
David A. Page has joined Mcpherson County Attorney’s Office, McPherson.
Jeffrey A. Rogers has joined The Talon Group, Orlando, Fla.
Jay Nelson Selanders has joined Kutak Rock LLP, Kansas City, Mo.
K. Kim Shaffer has joined Swanson Middley LLC, Kansas City, Mo.
Heather L. Slawson has joined Upshur County District Attorney’s Office, Overland Park.
Mark A. Van Blaricum has joined the Overland Park Regional Medical Center, Overland Park.
Hans H. Van Zanten has joined Yonke & Pottenger LLC, Kansas City, Mo.
A. Scott Waddell has joined Sanders Conkright & Warren LLP, Overland Park.
Catherine A. Walter has joined the Kansas Human Rights Commission, Topeka.
Charles A. Zimmerman has been appointed district magistrate judge for Geary County.
Kevin J. Zolotor has joined Ellis Law Office, Springhill.

CHANGING PLACES

Ariagno, Kerns, Man k & White LLC has moved to 328 N. Main, Wichita, KS 67202.
James B. Arnett has moved to 700 W. 47th St., Ste 100, Kansas City, MO 64112.
Friend & Cooper LLC has moved to 1901 W. 47th Place, Ste. 103, Westwood, KS 66205.
Rex W. Henoch LLC has moved to 8717 W. 110th St., Ste. 400, Overland Park, KS 66210-2101.
Neis & Michaux P.A. has moved to 534 S. Kansas Ave., Ste. 1425, Topeka, KS 66601-2487.
Ryan & Mullin LLC has opened a new office, 112 C St., P.O. Box 8, Washington, KS 66968.
Courtney B. Waits has started her own firm, 901 W. 43rd St., Kansas City, KS 64111-3464.
Wyrsch Hobbs & Mirakian P.C. has moved to 1000 Walnut, Ste. 1600, Kansas City, MO 64106.
Zinn Law Firm P.A. has moved to 10975 Benson Dr., Ste. 570, Overland Park, KS 66210.

Members in the News

Dan’s Cartoon by Dan Rosandich

“ ‘It’s bad enough that I was arrested by an off-duty cop, but then I was sentenced by an off-duty judge!’ ”
Robert L. Kennedy

Robert L. Kennedy, 82, died March 17 in Lenexa. He was born Sept. 26, 1924, in Larkinburg, the son of Leon and Ethel Montgomery Kennedy. After graduating high school in 1942 he enlisted in the U.S. Army and was assigned to the Air Corps. He retired from the Air Force in 1970 with the rank of lieutenant colonel.

After his retirement he obtained his bachelor's and law degrees from Washburn University and was admitted to the bar in 1977. In 1980 he moved to Kansas City, Kan., and joined the firm of Holbrook & Ellis, now Holbrook & Osborne, Overland Park, and continued to practice law until 2006.

He is survived by his wife of 32 years, Gladys; four children, Robert L. Kennedy Jr., Topeka, Anne Courter, Salina, Timothy Kennedy, Lawrence, and Daniel Kennedy, Brandon, Fla.; brother, Glenn Kennedy, New Mexico; sister, Peggy Rodda, Abilene; eight grandchildren; and four great-grandchildren. He was preceded in death by his first wife, Margaret.

Phillip C. “Phil” Lacey

Phillip C. “Phil” Lacey, 57, died March 29 at Memorial Hospital, McPherson. He was born Dec. 8, 1949, in Lawrence, the son of Charles E. and Ruthanne Finley Lacey. He graduated from the University of Kansas in 1971 and from its School of Law in 1974.

A resident of McPherson since 1974, he was an attorney for Gilmore & Bell, Wichita, and Bremyer & Wise, McPherson, and served as the McPherson city attorney since 1976. He was a member of New Hope Evangelical Church, Central Christian College of Kansas board of trustees, Kansas Bar Association, National Association of Bond Lawyers, and the City Attorney’s Association of Kansas, serving as president from 1990-1991.

Survivors include his wife, Sharylyn S. Gelvin, of the home; two sons, Jason, Wichita, and Bryson, Manhattan; a daughter, Alexia Lacey, Colorado Springs, Colo.; his mother, Lawrence; a brother, Bruce, San Anselmo, Calif.; and a sister, Jean Pollock, Middleboro, Mass. He was preceded in death by his father and a sister, Marilyn Pendleton.

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.

ALPS has helped Kansas legal professionals build well-protected and successful law firms for nearly two decades and we are still always here for you.
Employer Responsibility in Preventing Identity Theft

By Jeannie M. DeVeney, Spencer Fane Britt & Browne LLP, Overland Park; Employment Law Section president

In today’s world of online shopping and technology-savvy criminals, the problem of identity theft has crept into our lives at an alarming rate. Seven to 10 million individuals fall victim to identity theft each year. It is currently the number one consumer crime in the United States and accounts for more than one-third of the complaints made to the Federal Trade Commission.

Unfortunately for the victims, this is an area where the law has not caught up with the crime. Unfortunately for employers, this is yet another area where inadequate policies and training may result in employer liability for the acts of their employees.

Real life examples of identity theft procedures include employees reviewing old personnel files and employment applications and gleaning information from human resource databases. There have also been employees who have used “skimmers” to download personal information when a consumer uses a credit card for their purchase.

Currently, the only federal regulation at play relates to the Fair and Accurate Credit Transaction Act (FACTA), 16 CFR Part 682. That regulation requires businesses to take “reasonable measures” to prevent the unauthorized access to consumer information when disposing of consumer reports. Examples of “reasonable measures” include policies, procedures, training, monitoring, and the use of due diligence in selecting disposal vendors.

Congress is also considering a bill (HR 4127) that would require certain security measures, including policies and the designation of a point person responsible for implementing and monitoring those policies. HR 4127 also includes specific notification procedures if a business determines that individuals are at risk for identity theft.

In addition, at least 25 percent of the states have statutes restricting the use of personal information, and most of the remaining states have legislation pending. For example, Michigan enacted a statute, effective Jan. 1, 2006, requiring all businesses who collect more than one Social Security number to create a policy that (1) ensures confidentiality, (2) prohibits unlawful disclosures, (3) limits access to Social Security numbers, (4) describes how to properly dispose of documents with Social Security numbers, and (5) establishes penalties for violation of the policy. The policy must be maintained in a handbook or similar document. M.C.L.A. 445.84.

Some states have enacted similar statutes, and identity theft victims have begun to file lawsuits against employers, claiming the employers did not take sufficient steps to ensure the confidentiality of personal information.

As this area of the law develops, employers will likely end up with some duty to protect personal information, and if the employer does not comply with that duty, it may be held responsible for the damages of the victim. These damages may include emotional distress associated with the problem. Following are some ideas that will help your employer client prevent identity theft and will also help to show that the employer has taken reasonable steps to prevent this problem in the workplace:

1. Implement a policy: (a) limiting access to personal information; (b) prohibiting the dissemination of personal information; (c) outlining information employees can obtain from applicants and employees and prohibiting employees from obtaining other information; (d) requiring prompt, appropriate disposal of information no longer needed.
2. Have employees acknowledge receipt of these policies, monitor the implementation of the policies, and consider training on the policies.
3. Maintain a separate filing system for documents with personal information on them.
4. Review the policies/practices of allowing employees to take documents or access databases with personal information in/on them. (Culprits may be those with whom the employee associates at home — sons, daughters, etc. — rather than the employee him/herself.)
5. Review the policies/practices regarding storing personnel files of terminated employees.
6. Implement a mandatory reporting system. (If you have an employee who has targeted others in the workforce, it will be easier to fix the problem if you know it has happened to more than one person.)
7. Enhance security for databases that have personal information in them.

About the Author

Jeannie M. DeVeney is a partner in the labor and employment law group at Spencer Fane Britt & Browne LLP, Overland Park.

DeVeney received her B.A. in 1992 from the University of Kansas and her J.D. in 1995 from Creighton University School of Law.

She is admitted to practice in all state and federal courts in Kansas and Missouri. She participates in the National Retail Federation Employment Law Committee and is a member of the Alternative Dispute Resolution and EEO committees of the American Bar Association.

Editor’s note: This article was first published in the spring edition of the Employment Law Line newsletter, which is published by the KBA Employment Law Section.

If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
The frontier regions of the attorney-client privilege continue to be subject of legal skirmishes, as the borders of privilege are pushed forward and back, decision by decision. The lawyer’s ethical duties reflect this tension, with the lawyer obligated by KRPC 1.6 to protect client confidences (including privileged information), and obligated by KRPC 3.4 not to obstruct, or fail to make a diligent effort to comply with discovery. This column will address a nuance in the law of privilege: when the presence of a third party (neither lawyer nor client, nor agent of either) may not constitute a waiver of privilege.

Privilege has long been extended to protect otherwise privileged communications in the presence of an interpreter. E.g., 
Hawes v. State, 7 So. 302, 313 (Ala. 1890). That function remains part of the doctrine today, but the original rationale has also been extended to other, nonlinguistic “translations” of information necessary to assist communication or representation in a privileged environment. In the leading case of United States v. Kovel, 296 F.2d 918, 922 (2nd Cir. 1961), the presence of an accountant during attorney-client discussions did not waive privilege because the accountant was determined to be necessary to help the attorney understand the client’s situation and render legal advice. The Kovel rationale has been followed in several contexts:

- Accountants. Grand Jury Proceedings Under Seal v. United States, 947 F.2d 1188 (4th Cir. 1991) (communications involving accountant consistent with Kovel rationale protected);
- United States v. Judson, 322 F.2d 460, 462-63 (9th Cir. 1963) (attorney-client privilege protected document prepared by accountant communicated to attorney when the accountant’s role was to “facilitate an accurate and complete consultation between the client and the attorney about the former’s financial picture”).
- Appraisers. Steele v. First Nat’l Bank, 1992 WL 123818 at *2 (D. Kan. May 26, 1992) (appraiser working closely with a bank regarding the plaintiff’s collateral and whose information was important to the bank’s legal strategy).
- Public relations consultants. F.T.C. v. GlaxoSmithKline, 294 F.3d 141, 148 (D.C. Cir. 2002) (attorney-client privilege extends to communications with public relations and governmental affairs consultants to deal with matters intertwined with legal issues); American Legacy Foundation v. Lorillard Tobacco Co., 2004 WL 2521289 *4-5 (Del. Ch. Nov. 3, 2004) (confidential communications with public relations firm may be protected by attorney-client privilege in certain circumstances; proponent of privilege failed to establish factual predicate); In re Grand Jury Subpoenas, 265 F. Supp. 2d 321, 332 (S.D.N.Y. 2003) (confidential communications between lawyers and public relations consultants for the purpose of giving or receiving advice directed to handling client’s legal problems are protected by the attorney-client privilege).
- Engineers. MLC Automotive LLC v. Town of Southern Pines, 2007 WL 128945 *3-4 (M.D.N.C. Jan. 11, 2007) (communications with engineer to assist counsel in providing legal advice are within attorney-client privilege).

Of course, there are limitations on this application of privilege. General discussions of business or technical matters, not necessary to facilitate legal advice, will not be privileged. See, e.g., Cavallaro v. United States, 284 F.3d 236, 240 (1st Cir. 2002) (Kovel doctrine requires showing that accountant must be “necessary, or at least highly useful for the effective consultation between the client and the lawyer”). In addition, other elements of privilege must also be present.

About the Author

Mark D. Hinderks is the managing partner of the Overland Park office of Stinson Morrison Hecker LLP, practicing business litigation. He also serves as the firm’s co-general counsel and is a frequent speaker and author on matters of professional responsibility and trial practice.

By Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park
Lost in the shuffle?

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Will the Legal Profession Ever Be the Same? 
Disappearing Trials and ADR in Kansas 
By Hon. Robert W. Fairchild and Arthur J. Thompson

I. Introduction 

The trial lawyer is the most glamorous figure in the law. A quick screening of every “lawyer show” on television will confirm this fact. The trial lawyer is the star of the legal profession. However, recent experience, supported by recent statistics, demonstrates that the role of the trial lawyer is in transition — a transition away from trials. Along with the trial lawyer’s role, the roles of the trial judge and the courts in general are also changing. To accommodate these changes, those of us who are involved in the legal system need to be aware of our evolving roles and work to keep our system relevant and viable.

The U.S. Constitution vests the “Judicial Power” of the United States in “one supreme court, and in such inferior courts as the Congress may from time to time ordain and establish.”1 The Constitution of the state of Kansas vests the judicial power of the state in one court of justice, “which shall be divided into one supreme court, district courts, and such other courts as are provided by law.”2 Neither constitution establishes courts as the primary dispute resolvers of the nation or state. Nevertheless, it is this role that courts are increasingly coming to play.

If our nation’s courts are to remain viable and relevant they must recognize that their role has changed and adapt and change the way in which they do business. As researchers have collected data about the manner in which disputes are being resolved it has become apparent that lawyers have accepted and adapted to the change in their role far more quickly than the courts have. We intend to look at the data that has been gathered concerning the number of trials being conducted in our courts and reach some conclusions concerning the implications this data has for the manner in which the courts function.

FOOTNOTES
On Dec. 8, 2003, the American Bar Association (ABA) issued the following media release concerning the decreasing numbers of trials experienced by our courts:

The data speak to a trend that could have long-term implications for the legal system, for the practice of law as we know it, and for the public. Will the decrease in trials pose a long-term threat to the fair and impartial administration of justice? Or are new methods of resolving disputes satisfactorily replacing the trial process? Is the increase in the number of arbitrations and mediations equivalent to the decline in the number of trials? Has the decline affected the training of lawyers and judges? Will the courts’ participation in disputes be radically changed? How will these trends affect the public’s right to know? What steps should the organized bar take in light of this phenomenon? Does justice need to be ‘seen’ to be ‘done’?

II. The Data

Trial courts workloads have grown steadily in recent years but the number of federal and state trials have declined dramatically. While Kansas civil filings have increased 280 percent from 1978 to 2005, the number of cases going to trial have decreased 24 percent. The Kansas district court statistics and charts used in this article come from a compilation of the Annual Reports of the Courts of Kansas from fiscal years 1978 to 2005.

Recently, the ABA has devoted a great deal of effort to examining the phenomenon of the decrease in the number of trials. The ABA Litigation Section contracted with Marc Galanter of the University of Wisconsin Law School to collect as much data as possible about the number of trials held in our courts, especially in the federal court. That data and other research projects were discussed and analyzed in a two-day symposium convened in December 2003.

Over the past few years many different organizations have gathered and examined data on the numbers of trials being held in our courts. In federal court:

... dispositions have increased by a factor of five – from 50 to 258 thousand cases. But the number of civil trials in 2002 was more than 20 percent lower than the number in 1962 – some 4,569 now to 5,802 then. So the portion of dispositions that were by trial was less than one-sixth of what it was in 1962 – 1.8 percent now as opposed to 11.5 percent in 1962.

There may be reason to question whether the total number of days devoted to trials has decreased at the same rate as trials themselves have. Galanter reports that for federal courts:

The number of Chapter 60 and 61 and domestic cases filed in Kansas district courts has increased from 68,937 in 1978 to 198,872 in 2005, a 280 percent increase. In the same period, the number of cases going to trial decreased from 7,783 to 5,880, a 24 percent decrease. During this same period in which there was this 280 percent increase in case filings, the number of judges hearing these cases increased from 211 (in 1978) to 238 (in 2005), a 13 percent increase. In a National Center for State Courts (NCSC) survey of 11 unified courts, Kansas ranked as having the highest number of civil cases per 100,000 population (7,511) while being ranked 34th in population.

The Kansas statistics are very similar to the statistics gathered in other states. The NCSC prepared a report comparing state trial court case filings and cases tried on a national basis.

3. American Bar Association, ABA Section of Litigation Symposium To Address Impact of “Vanishing Trials” on Justice System (Dec. 8, 2003).
4. The Kansas Office of Judicial Administration submits an Annual Report to the Supreme Court of Kansas (Annual Reports).
5. The Symposium on The Vanishing Trial, sponsored by the Section of Litigation of the American Bar Association in San Francisco (Dec. 12-14, 2003).
7. Id. at 26.
The report shows the number of trials in the courts of general jurisdiction of 21 states (and the District of Columbia) that contain 58 percent of the U.S. population for the years 1976 to 2002. The percentage of cases reaching jury trial declined from 1.8 percent to 0.6 percent of total dispositions and the percentage of cases being tried to the bench fell from 34.3 percent to 15.2 percent of the total case dispositions.9

A. Chapter 60 civil cases
Chapter 60 civil case filings in Kansas increased 62 percent from 15,592 in 1978 to 25,029 in 2005.10 In the same time period, cases going to trial decreased from 3,333 to 1,692, a 49 percent decrease. Jury trials decreased by 70 percent from a high of 502 in 1982 (the highest number) to 150 in 2005.

B. Chapter 61 civil cases
Chapter 61 civil cases increased from 29,345 in 1978 to 135,706 in 2005, a 4.6 times increase.11 Trials to the court decreased from 1,337 in 1979 (the first year for that statistic) to 1,267, a 5 percent decrease. The highest number of trials held was 2,517 in 1996, and in the last 10 years there has been a 50 percent decrease in trials.12

C. Domestic cases
At a time when the total domestic filings increased from 23,138 in 1983 to 38,137 in 2005, a 65 percent increase, domestic cases going to trial decreased from 3,936 in 1983 (the first year for keeping this statistic) to 2,921 in 2005, a 26 percent decrease.13 The highest number of domestic trials was 6,215 in 1999. There has been a 53 percent decline in domestic bench trials in the last seven years.

One factor that may have affected the decrease in domestic trials is the decline in the number of divorces. Divorces de-

9. Id. at 66-67.
10. Annual Reports, supra note 4.
11. Id.
12. Id.
13. Id.
creased from a high of 21,702 in 1981 to 15,047 in 2005, a 31 percent decrease.

NCSC studied the factors that affect the growth of domestic relations cases. The NCSC concluded, “While many factors may affect the growth of the domestic relations caseload, one force has been the increase in civil protection/restraining order cases. Much of the workload associated with domestic relations cases occurs as post-judgment activity. For example, requests for modification of support orders or visitation orders can occur multiple times over many years.”

The number of Kansas petitions filed seeking Protection from Abuse and Protection from Stalking orders has increased significantly. In 2005, 30 percent of all Kansas domestic cases were protection orders. Protection from Stalking cases went from 2,390 in 2003 to 3,287 in 2005, a 38 percent increase.

D. Felony cases

Kansas courts have seen an increase in felony case filings from 9,901 in 1979 to 18,803 in 2004, a 90 percent increase. Felony jury trials did not increase at the same rate during this same time period, going from 463 to 479, or a 7 percent increase.

In federal courts, the decline in trials has been steep and dramatic. In 1962, there were 5,802 civil trials in the federal courts and 5,097 criminal trials, for a total of 10,899. In 1985, total federal trials had risen to 12,529. By 2002, however, trials had dropped to 4,569 civil trials and 3,574 criminal trials or 8,143. Thus, our federal courts actually tried fewer cases in 2002 than they did in 1962, despite a five-fold increase in the number of civil filings and more than a doubling of the criminal filings over the same time frame. In 1962, 11.5 percent of federal civil cases were disposed of by trial. By 2002, that figure had plummeted to 1.8 percent.

There is a similar phenomenon of declining civil trials in British and some Canadian courts. A study found that one cause of the decrease in trials is the increasing use of alternative dispute resolution (ADR).

III. The Causes

Galanter does not reach firm conclusions about the causes or consequences of the declining numbers of trials, but he does suggest a few possibilities. He proposes that the causes may include the increasing complexity and cost of litigation, litigant fear of large judgments, judges acting as managers and promoters of settlement, “failing faith” in trials by the public, and greater use of ADR. Galanter argues that the expansion of private dispute resolution should be considered “the relocation of trials outside public courts” rather than “the disappearance of trials.”

15. Annual Reports, supra note 4.
18. Galanter, supra note 6, at 79.
Galanter traces the beginnings of the present decline in the use of trials to the adoption of new laws emphasizing remedies and accountability during the New Deal era. By the end of the 1960s, courts, legislatures, and lawyers had transformed the legal landscape, opening courtroom doors (and birthing the slogan, “access to justice”) to traditional outsiders, such as women, minorities, and prisoners. The supply of courthouses and judges did not keep up with demand, and at the same time, the cost and complexity of cases continued to climb. Galanter contends that these changes in the system provoked a profound reaction – tort reform.

The national data collected by the ABA points to the explosion in new case filings as one of the main reasons for vanishing trials. The sheer time it takes to manage these large caseloads may place such pressure on court resources that there simply is not the time to try many cases.

### A. Increased use of ADR

An informal survey of the American College of Trial Lawyers members reflects that they perceived that the increased use of alternative dispute resolution is the most substantial reason for the decrease in trials.

The total number of Kansas cases reported to have utilized ADR has increased 35 percent from 2000 to 2004. The majority of the cases utilizing ADR, approximately 4,439 in 2000 and 6,239 in 2004, were Chapter 60, 61, and domestic cases.

The growing use of ADR was listed by the ABA Litigation Section as one of the reasons for the declining trial rates. The section literature also indicates that the trend toward privatization of dispute resolution continues to expand across the country. Most consumer contracts now have an ADR clause and there is not an easy way to measure just how often alternatives to litigation are used because they are primarily conducted in private.

### 1. Attorneys and ADR

The authors anticipate that as even more judges routinely order the parties to participate in ADR the total number of court-ordered mediations per average court caseload will decline as attorneys begin to settle their cases without court intervention. Those cases that remain will involve the more difficult disputes and will require the assistance of the most skilled neutrals. Some Kansas district court judges have indicated to the authors that as they began routinely requiring domestic mediation, parties began settling cases on their own prior to mediation.

In a 1999 random survey of 490 KBA members, 81 percent of attorneys surveyed believed that ADR saves time resolving cases and a majority (58 percent) believed that the courts operate more smoothly when ADR is available to clients. More than 75 percent indicated that ADR helps to reduce the number of issues in a dispute. Only a minority of attorneys (17 percent) believed that ADR methods are highly overrated.


2. Courts and ADR

Galanter believes that judges began to assume the role of intensive case managers and actively promoted the idea that settlements produce superior results to trials. In Galanter's model the trial judge's primary job is to facilitate the resolution of disputes, leading both to settlements and to a substantial increase in non-trial dispositions, such as orders sustaining motions for summary judgments and motions to dismiss.25

Galanter noted that in federal court:

Filing per sitting judge has more than doubled, from 196 in 1962 to 443 in 2002.26 Concurrently, the number of non-Article III personnel and total expenditures grew more rapidly ...27 So the decline in trials is accompanied by a larger judicial establishment of which judges form a smaller portion.28

The most common form of dispute resolution in state courts is the use of mediation. The first Kansas court began experimenting with mediation in 1980.29

K.S.A. 5-502 (f) provides that: 'mediation' means the intervention into a dispute by a third party who has no decision making authority, is impartial to the issues being discussed, assists the parties in defining the issues in dispute, facilitates communication between the parties, and assists the parties in reaching resolution.

The use of mediation in domestic cases was the primary use until the last decade.30

The use of mediation as a tool ordered or encouraged by Kansas judges has expanded to include virtually every type of case. Beyond its use in domestic cases, it is used in the largest, most complex civil cases to small claims disputes. Courts use victim-offender mediation with first time juvenile offenders convicted with property crimes to negotiate with victims on a diversion plan. Experienced judges, not assigned to the case, are being used in the Johnson County court to help mediate plea-bargains in felony cases. (Plea-bargaining is itself a form of dispute resolution.) The Sedgwick County Juvenile Court has established four rules addressing the use of mediation in domestic cases.31

In the 1999 survey, Kansas judges (140 responses) indicated that judges were somewhat or very satisfied with the process and results of mediation (75 percent) and negotiation (57 percent), but are less satisfied with arbitration (26 percent) and domestic case management (28 percent).32

In the fall of 2004, all Kansas district court judges were surveyed by the Office of Judicial Administration regarding their individual use of dispute resolution.33 Seventy-two percent of all judges, representing at least one judge from each of the 31 judicial districts, responded to the survey. Most, 96 percent, indicated that they used some form of dispute resolution and most often multiple forms are used. Private providers were solely used by 41 percent of the judges while 51 percent used a combination of court service officers (CSO) and private providers. Generally the CSOs were used to provide services to the lower income parties. Seventy-five percent of the judges indicated a need for additional dispute resolution services for lower income parties. Several of the judges who use CSO for this purpose did not see such a need.

Next to mediation the most commonly used dispute resolution process by Kansas judges is the use of settlement conferences allowed by K.S.A. 5-509. A settlement conference usually includes an informal discussion among the parties, their attorneys, and the person conducting the conference. The person conducting the settlement conference may privately express his/her view concerning the actual dollar settlement value or other reasonable dispositions of the case. Usually a settlement conference is conducted by a judge not assigned to the case.

The Supreme Court's Advisory Council on Dispute Resolution produced a manual for judges on the various forms of dispute resolution, and it listed 16 different forms of dispute resolution that had been used in some variation in Kansas.34 The more common include mediation, neutral evaluation, conciliation, arbitration, special master, case management, dispute resolution counseling/limited case management, family group conferencing, and facilitation.

There are a growing number of Kansas statutes that allow for the use of dispute resolution, usually mediation or arbitration. In 1994, the Legislature passed the Dispute Resolution Act, K.S.A. 5-501 et seg., which established definitions and procedures for dispute resolution. The Kansas Supreme Court has established four rules addressing the use of mediation in Kansas courts.35

26. Galanter, supra note 6, at 59.
27. Galanter, supra note 6, at 61.
28. Galanter, supra note 6, at 63.
29. Johnson County District Judge Herbert Walton assigned a court services officer, Gary Ketchmer, to begin using mediation in custody/visitation cases in 1980.
30. The Kansas statutes governing domestic mediation are contained in K.S.A. 23-601 et. seq.: mediation under this section is the process by which a neutral mediator appointed by the court, or by a hearing officer, assists the parties in reaching a mutually acceptable agreement as to issues of child custody, residency, visitation, parenting time, division of property or other issues. The role of the mediator is to aid the parties in identifying the issues, reducing misunderstandings, clarifying priorities, exploring areas of compromise, and finding points of agreement. An agreement reached by the parties is to be based on the decisions of the parties and not the decisions of the mediator.
32. Kansas Supreme Court Rule 901 addresses when an attorney serves as a mediator. Rule 902 establishes minimum guidelines for becoming an approved mediator. Rule 903 serves as a guide for the conduct of mediators, to inform mediating parties, and to promote public confidence in mediation as a process for resolving disputes. Rule 904 provides the rules on how much continuing mediation education is required each year.
33. Hughes, supra note 24.
One of the primary shortcomings of the use of dispute resolution in Kansas court is that many lower income parties cannot afford the process.

3. Criminal trials

Some commentators have suggested that the decline in civil trials is a result of an increase in the number of criminal trials. Galanter rejects this suggestion as it concerns federal courts. He indicates that there has actually been a decrease of 30 percent in the raw numbers of criminal trials. Galanter and others indicate that the increase in plea bargains is a major reason for the reduction in the number of trials. However, this reduction in jury trials may not result in a concomitant decrease in demand on the court’s resources. These writers contend from discussions with Kansas court staff that the increase in plea bargains may often result in more probation violation allegations, the resolution of which utilizes court time and is not reflected in felony case statistics.

Galanter suggests that the implementation of determinate sentencing may be a factor in the decrease in the number of criminal trials in federal court. For a few years immediately following implementation there was an increase in the number of criminal bench trials. This increase has been followed by a steady decline in the number of trials. The same phenomenon occurred with the implementation of the Kansas sentencing guidelines in 1993, See charts Felony Cases to Trials to Jury, supra at pg. 21.

B. Trial costs

Refo, past chair of the ABA Litigation Section, declares, “When one trial uses more than its fair share of court resources, that leaves fewer resources for the next trial.” She says that potential litigants see the process of getting to trial as being too expensive and the trials as taking too long. Refo also believes that discovery is too broad, takes too much time and costs the parties too much money. There are some who argue that litigants — particularly corporate litigants — can no longer abide the perceived uncertainty and unpredictability of the jury trial system.

C. Risk minimization

An ongoing study of the country’s 1,000 largest corporations is being conducted by Cornell University in cooperation with the Foundation for Prevention and Early Resolution of Conflict (PERC), a nonprofit organization in New York City. The study shows that in the past few years, the vast majority of U.S. corporations have used one or more forms of ADR in resolving a broad range of disputes, including employment, environmental, sexual harassment, contracts, securities, and age discrimination claims. The report says that ADR processes are not haphazard or incidental but are integral to a systematic long-term change in the way corporations resolve disputes. Mediation was the preferred ADR process because of its emphasis on party self-determination. Based on the survey responses of more than 600 corporate counsel, deputy counsel, and chief corporate litigators, Cornell researchers believe that this use is likely to grow significantly in the future, due at least in part to the rising costs of litigation, an increase of ADR provisions in employment and commercial contracts, and court mandates of ADR processes.

IV. The Future

A. Role of attorneys in ADR

One consideration for attorneys in the growing use of dispute resolution is the benefit of increasing client satisfaction. Dispute resolution, and especially mediation, can increase client satisfaction. The litigation process is not intended or designed to further the relationship of the various parties. Most forms of dispute resolution allow the parties to express their views, even if in a courtroom they may be considered immaterial, hearsay, or not relevant to the case. Their opinion may be very relevant to the party and by being able to express that opinion they may feel like they have been heard.

The use of a neutral third party can allow attorneys several opportunities beyond simply increasing client satisfaction with a dispute resolution process. There are situations where the money component of a civil case may be the easiest thing to settle and the emotional component is the hardest. There may be a party or another lawyer in the case who has unrealistic expectations of what settlement they can obtain. The neutral may be used to obtain a more realistic appraisal of the case.

In relation to the phenomenon of declining trial rates, it may become more common for attorneys to engage as the neutral attorneys with trial experience in order to get the benefit of what the neutral may know about what the likely outcome of case going to trial may be. Or they may find it beneficial to use a neutral who is familiar with how a particular court or judge may react to the particulars of their case. Dispute resolution also allows attorneys to craft settlements that might not be possible in a case that goes to trial. Not only are less experienced attorneys not gaining the experience of trials but also a lot of judges newer to the bench also lack trial experience.

Attorneys will continue to be essential to the appropriate use of dispute resolution in Kansas. As Galanter points out:

Ultimately courts will become more of a place for conflict assessment and referral to the most appropriate

35. Galanter, supra note 6, at 492.
36. Galanter, supra note 6, at 50.
37. Refo, supra note 23, at 3.
38. Refo, supra note 23, at 3.
dispute resolution process, including litigation, and refer to the most appropriate provider of that service. This does not imply that attorneys will not continue to also do both of these functions. Attorneys may also become more involved in assisting institutions with how to avoid conflict. ...42

The CPR Institute is a nonprofit alliance of global corporations, law firms, scholars, and public institutions dedicated to the principles of conflict prevention and solution through alternative dispute resolutions. They say:

More and more of the players in the legal arena are corporate actors who view participation in the legal arena in terms of long-term strategy. Increasingly they regard much legal involvement as just another business input, one that must be subjected to cost controls. One part of such control is alternative sourcing — diverting what might have been in the courts into alternative forums.43

As attorneys find themselves conducting fewer trials, they will work more frequently with dispute resolution service providers. The courts, their clients, and private contracts will all be requesting these dispute resolution services. Refo suggests that American trial practice is increasingly moving toward a barrister system because fewer attorneys have trial experience. “Now, firms routinely elect new litigation partners who have never even second-chaired a trial.”44 At the same time, attorneys will continue to be the most valuable link in making dispute resolution a successful process for their clients.

A recent Office of Judicial Administration survey of mediators’ styles showed that Kansas mediators vary in the ways they view the mediation process and the degree to which they are facilitative or evaluative. (Facilitative mediators are not as involved in assessing the case as evaluative mediators are.)45 This data suggest a variance in the manner in how approved Kansas mediators approach and handle the mediation. Some are more settlement driven, while others are more process-driven. Settlement-driven mediators are much more likely to provide advice and point out weaknesses in a case than process-driven mediators.

It is important to emphasize that in most courts attorneys are able to select the provider they believe is the most appropriate for their case and their clients. Attorneys who are familiar with ADR often make an assessment when referring their clients to a specific dispute resolution process and a specific service provider. Some cases are better addressed not only by one type of process over another but also by one provider over another. A case may need a neutral who allows the parties to arrive at the terms of the settlement on their own, or it may need a neutral person who gives more assistance in analyzing the case. This process makes attorneys a very important part of making the dispute resolution process successful. Judges may also wish to consider conducting an assessment with the parties to determine the best dispute resolution process and the best provider for a particular case.

The use of dispute resolution methods allows attorneys to better control the outcome of their cases. Their negotiation skills become the key component of how the case will settle rather than relying on a judge or jury.

B. Problem Solving Courts

There has been a noticeable increase in state courts establishing problem-solving mechanisms. These have developed in response to frustration experienced by courts and legislatures with the large number of cases that require repeated disposition in the courts but are never entirely resolved.46 Some of the alternative processes that have been developed by Kansas courts focus on a closer collaboration with local service agencies and encourage a collaborative, multidisciplinary, problem-solving approach to address the underlying issues of litigants and defendants.

The NCSC reports that during 2003, 39 percent of all incoming domestic relations cases were reopened or reactivated after having been closed.47 The disputes in these cases often involve relationship problems, not legal problems.

In Kansas, these dispute resolution processes have included high conflict resolution parenting classes, drug courts, mediation, conciliation, dispute resolution counseling, limited case management, and case management. In addition, some Kansas family practice attorneys are establishing collaborative law agreements, whereby they agree to work with other collaborative lawyers to settle a case but will not take it to trial.

The Conference of State Court Administrators has recommended that courts and legislatures de-emphasize the adversarial process and give greater flexibility and latitude to judges to resolve family disputes and provide needed services to families in crisis.48 The authors of their Position Paper on Effective Management of Family Law, published in August 2002, propose that family court judges and court personnel should “view their roles and actions as defined by both the law and the unique needs of each family.”49

In recent years Kansas courts have increasingly used case management to resolve high conflict domestic disputes, usually post divorce motions. The judge in a high conflict domestic dispute appoints a case manager and the parties are required to meet with the case manager. The case manager is given access to all information concerning the parties and the case. The case manager makes binding recommendations to resolve minor parenting time disputes. Six years ago, three judicial

42. Galanter, supra note 6, at 82.
44. Refo, supra note 23, at 4.
45. Dr. Kathie Nichols, Kansas Survey of Mediation Styles, Advisory Council on Dispute Resolution, at 33 (2005): “In the authors’ view, mediation styles can be viewed more effectively not as a continuum or grid but rather as interlocking circles. All three circles intersect at a common point where the core values reside, self-determination, confidentiality, and the neutrality of the mediator.”
47. National Perspective, supra note 8, at 32.
49. Id. at 6.
districts used case management and, in December 2004, 29 districts utilized this process.

The Johnson County District Court initiated the Higher Ground program to address high conflict divorces. Higher Ground is a court-ordered group for separated parents that educates families about creating healthy restructuring homes, provides concrete approaches to cooperative parenting, and offers peer support and learning opportunities to apply conflict resolution skills to parenting decisions. Parents must be ordered by the court to complete the program. Usually both parents will participate together. The complete program consists of six biweekly sessions of two and one-half hours each. Sessions are highly structured with assigned groups and strict ground rules. The court record is checked every three months to determine if parents who have completed the program have filed new parenting motions. Seventy-two percent of parents completing the program have not filed new custody motions from March 2004 until the end of 2005.

C. Judges as Case Managers

Once cases are filed in court, they may be diverted into mediation or other forms of dispute resolution with the court's encouragement. Much of the most visible ADR in Kansas occurs after a case is filed in court. Thus, in many cases, ADR is not serving as an alternative to the filing of cases, but as a management tool once a case is filed.

In the past, judges relied on the parties in a case to present all the information to the judge for her to base her decision. But with increasing dockets and longer trials, judges are prompted to take a more active role in pretrial case management. There is anecdotal evidence, from conversations between the authors and state judges, that one of the main benefits of dispute resolution is that it encourages parties to negotiate at an earlier stage in the court process. The judges felt that while many of these cases might have settled without going to court or utilizing an alternative dispute resolution process, the judge ordering or suggesting alternative dispute resolution encouraged earlier settlement. One commentator observed that:

As fewer cases go to trial and pretrial adjudications take on increasing significance, settlements tend to happen sooner and tend to occur on the eve of an important pretrial event, such as a hearing or ruling on a dispositive motion. To the extent that the earlier settlement saves litigation costs, this change may be a positive side effect.

V. Conclusion

The expansion in the use of alternatives to litigation raises questions for the legal system. Is the use of private dispute resolution promoted because court-based dispute resolution systems do not address participants' needs? Is the use of ADR more appropriate when it includes a provision for judicial oversight? Do private dispute resolution methods protect the public's interests? How does resolution by mediation of such a high percentage of cases affect the continuing evolution of the common law?

Stipanowich also participated in the Symposium on the Vanishing Trial conducted by the ABA Litigation Section. He wrote:

... when binding arbitration is conducted pursuant to boilerplate that is a condition of employment, it raises questions about the ability of private judges and private procedures to protect employee rights and remedies – whether stemming from constitutional and statutory protections or reasonable expectations under a bargain.

Arbitration awards are subject to limited appellate review and arbitrators are not bound by precedent. Many commentators and lawyers have questioned whether individual rights are sufficiently protected by binding arbitration that is required by the terms of an adhesion contract.

While some persons argue that ADR processes are undermining the legal system, John Lande, in the ABA Dispute Resolution Magazine, suggests:

Some in the alternative dispute resolution community are afraid that ADR will be blamed for the apparent disappearance of trials. A close look at the data, however, suggests that changing patterns of litigation are not necessarily bad and that the growth of ADR is probably as much a result of these changes as a cause of them.

These comments reinforce Galanter’s observation that in the old days when the “threat” of a trial was a potential, settlements often did not happen until the eve of the trial. As fewer cases go to trial and pretrial adjudications take on increasing significance, settlements tend to happen sooner and tend to occur on the eve of an important pretrial event, such as a hearing or ruling on a dispositive motion. To the extent that the earlier settlement saves litigation costs, this change may be a positive effect.

What increased as trials disappeared was not settlement, but nontrial adjudication. This is consistent with a documented increase in the prevalence of summary judgment.

We would suggest that the “dispute resolution” should include any method of resolving a dispute short of going to trial. The main emphasis is how to resolve the dispute as early in the process as is reasonably possible.

50. See courts.jocogov.org/cs_dhg.htm.
54. Stipanowich, supra note 22, at 5.
55. John Lande, The Vanishing Trial Report, An Alternative View of the

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Most writers in this area agree that the phenomenon of the vanishing trial is not a temporary occurrence. The manner in which lawyers and judges assist parties in resolving their disputes has changed and will continue to change. Legal professionals need to make sure that our legal system embraces the productive elements of these changes, works to ameliorate any undesirable effects, and remains a relevant institution in our society.

John Lande, of the University of Missouri-Columbia, was asked by the ABA Litigation Section to respond to Galanter’s research on the effects of ADR on reduced trials. He commented, “...many parts of the legal system are intricately interconnected, as Galanter's report shows. Thus, we should focus on the operation of the system overall rather than on a single element such as the trial rate.”

Lande went on to say that because of the complexity of today's litigation, courts are prudent to devote more resources to pretrial case management and ADR than they once did. “Telling this story as a success would cast ADR as one of the heroes rather than a possible villain,” Lande stated. “Similarly, judges would be applauded as wise managers of public institutions rather than suspected of shirking their duty and letting trials vanish.”

Research from the NCSC reinforces the need for a better understanding of all the methods of resolving conflict. The NCSC reports that:

The composition of case dispositions in the nation’s state courts is changing. As the use of trials declines, knowledge of the use of nontrial dispositions becomes increasingly important as a means of maintaining public trust and confidence in the courts.

This raises the question about how lawyers should be educated. There is a need for an enhanced curriculum that more fully equips lawyers to operate successfully when involved with settlement conferences, mandatory mediation, case management, and other forms of encouraging settlement. Many Kansas lawyers have received little or no legal education in the use of ADR methods.

As one of the authors recently noted, legal educators, attorneys, and judges are all in the dispute prevention and resolution business. They should use every means at their disposal to help the patrons of the legal system resolve their problems and disputes quickly and effectively.

We should celebrate the number and variety of tools available to us to accomplish our purpose and continually look for better and more effective means to carry out our mission. Today we have the opportunity to be more creative than ever before in carrying out our responsibilities as lawyers, legal educators, and judges.

About the Authors

Hon. Robert W. Fairchild is the chief judge of the 7th Judicial District. Prior to taking the bench he was in private practice in Lawrence for 25 years. While in private practice he also served as a mediator for 10 years. He is an adjunct professor of law at the University of Kansas Law School and teaches alternative dispute resolution. He is the immediate past chair of the Kansas Supreme Court Dispute Resolution Council. In 2006 he received the President’s Award for service to the mediation profession from Heartland Mediators Association.

Arthur J. (Art) Thompson is the dispute resolution coordinator with the Kansas Office of Judicial Administration, Topeka. Thompson spent 16 years with the Kansas Bar Association and the Kansas Bar Foundation as the public services director. He served on two Kansas Supreme Court committees concerning alternative dispute resolution, in 1988 and 1992, and a Kansas Legislature authorized Advisory Council on Dispute Resolution, from 1995 until 1999. He received his domestic mediation training from CDR Associates in 1985, civil mediation training from the Kansas Bar Association in 1994, and juvenile dependency mediation training from Midland Mediation and Settlement Solutions in 2005. He currently mediates employment disputes and volunteers with juvenile and small claims cases.

The United States District Court for the District of Kansas invites you to honor Ralph DeLoach, Clerk of Court, in recognition of his 32 years of dedication and service to the Court, on May 10, 2007, at the Robert Dole United States Courthouse, 500 State Avenue, Courtroom 655, Kansas City, Kan., at 2:00 p.m. Reception will follow.

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60. Id.
Jurisdiction of Arbitrators to Decide Their Own Jurisdiction: Compétence-Compétence in Kansas and MBNA America Bank N.A. v. Credit

By Christopher R. Drahozal*

I. Introduction

An arbitration decision by the Kansas Supreme Court is a rare thing — sufficiently rare that when one comes along it is important that it be right. Unfortunately, the Court’s recent arbitration opinion, MBNA America Bank N.A. v. Credit, while reaching a defensible result, contains an unfortunate dictum that, if followed, would put Kansas out of step with well-accepted principles of American arbitration law.

The issue is one of arbitral authority: do arbitrators have jurisdiction to decide their own jurisdiction, and, if so, to what extent? The Kansas Supreme Court asserted in Credit that an arbitration proceeding must stop if a party complains to the arbitrators that it has not agreed to arbitrate — in other words, arbitrators have no authority to address the issue of assent (which is the basis for their jurisdiction), even in the first instance. Such a view is flatly contrary to the usual approach under both the Uniform Arbitration Act (UAA), which Kansas has enacted, and the Federal Arbitration Act (FAA). Practicing attorneys should recognize that the language is dictum and challenge such assertions in future cases.

II. Facts

MBNA initiated an arbitration proceeding under the Code of Procedure of the National Arbitration Forum (NAF) against Loretta K. Credit, in which it sought to recover an alleged credit card debt of more than $21,000. Credit did not participate in the arbitration proceeding, other than to write a letter to the arbitrator objecting that she had not agreed to arbitrate. Nor did she seek to enjoin the arbitration proceeding. Likewise, MBNA did not petition a court to compel Credit to arbitrate. Instead, it proceeded with the arbitration in Credit’s absence — i.e., on an ex parte basis.

On Sept. 7, 2004, the arbitrator ruled in favor of MBNA and awarded it $21,094.74. In the award, the arbitrator found that “the Parties entered into an agreement providing that this matter shall be resolved through binding arbitration.” The award included a certificate of service, signed by the director of arbitration for the NAF, which provided as follows:

This award was duly entered and the Forum hereby certifies that a copy of this Award was sent by first class mail postage prepaid to the parties at the above referenced addresses on this date.5

* I appreciate helpful comments from Rusty Park and Steve Ware. This article previously appeared in 17 World Arbitration and Mediation Report 296 (2006). Copyright © 2006 by Christopher R. Drahozal.
3. 281 Kan. at 656, 132 P.3d at 899.
4. Id.
5. Id.
The record contained no evidence that Credit actually received the award. At oral argument, she stated that the address listed on the award was her correct address but that she did not know if she had ever received the award.

MBNA moved to confirm the award at the end of December 2004. It did not file a copy of the arbitration agreement with its motion. In response, Credit filed a pro se motion to vacate the award, arguing that she had never agreed to arbitrate the dispute. MBNA challenged the motion as untimely because it was filed more than 90 days after the date shown on the certificate of service.6 The district court nonetheless vacated the award, finding that “there is no existing agreement between the parties to arbitrate and therefore the award entered against Defendant is null and void.”7

III. The Kansas Supreme Court Decision

The Kansas Supreme Court affirmed. It identified one controlling question: “Did Credit’s effort to thwart confirmation of the award come too late? If so, the district court did not have authority to vacate the award. If not, the district court had the authority it needed to enter its rulings.”8 In answering that question, the Court indicated that it “evaluated both federal and state law as well as National Arbitration Forum rules when relevant.”9

The Court’s analysis proceeded in four steps. The first two steps addressed the timeliness issue, and the last two steps addressed the correctness of the district court’s rulings on MBNA’s motion to confirm and Credit’s motion to vacate.

First, the Court stated that MBNA could not “rely on Credit’s tardiness in challenging the award” because she denied that she had agreed to arbitrate.10 There is authority supporting that proposition, although the Court does not cite it.11 In MCI Telecommunications Corp. v. Exalon Industries Inc.,12 for example, the 1st Circuit held (under the FAA) that the time limits for challenging an award do not apply when a party challenges the existence of an arbitration agreement. According to the court of appeals:

A party that contends that it is not bound by an agreement to arbitrate can, therefore, simply abstain from participation in the proceedings, and raise the inexistence of a written contractual agreement to arbitrate as a defense to a proceeding seeking confirmation of the arbitration award, without the [time] limitations contained in section 12, which are only applicable to those bound by a written agreement to arbitrate.13

There is contrary authority as well,14 although professor Alan Scott Rau states that “[t]he correct rule is undoubtedly stated in MCI Telecommunications.”

Second, because the arbitration award was not served on Credit as required by the Kansas Uniform Arbitration Act (KUAA), the Court held that the time for filing a motion to vacate the award never began to run.15 As a result, Credit’s motion to vacate was not untimely. The Court found service flawed in two respects under the KUAA. First, the certificate of service recited that the NAF (rather than the arbitrator) had served the award. Second, the award was served by regular mail rather than by certified mail or personal service.16 Of course, service of the award appears to comply with the FAA Code of Procedure, which provides that the “Forum shall serve a copy of the Award upon all Parties or their Representatives or as directed by any Party”17 using “the postal service of the United States or any country, or … a reliable private service, or … facsimile, e-mail, electronic, or computer transmission.”18 Because the KUAA requirements for service apply only when the parties have not agreed otherwise,19 service appeared improper to the Court only because of the dispute over the existence of an arbitration agreement (compounded by MBNA’s inexplicable failure to attach the arbitration agreement to its motion to confirm the award).

Third, the Court concluded that the district court properly denied MBNA’s motion to confirm. According to the Court, MBNA’s failure to attach a copy of the arbitration agreement to its motion “violated the Federal Arbitration Act” and “alone would have justified the district court in its decision to deny MBNA’s motion to confirm the award.”20 The Court does not suggest, however, that the KUAA contains such a requirement.

Fourth, the Court held that the district court properly vacated the award. The fact that a party did not agree to arbitrate is a ground for vacating an award under both the KUAA (because “[t]here was no arbitration agreement”)21 and the FAA (because “the arbitrators exceeded their powers”).22 The
Court emphasized that “MBNA made no legally sufficient response” to Credit’s contention that she had not agreed to arbitrate.24

At the end of its opinion, the Court noted a number of other cases (including one from the Kansas Court of Appeals)25 that “appear to reflect a national trend in which consumers are questioning MBNA and whether arbitration agreements exist.”26 Interestingly, of the six non-Kansas cases cited by the Court, two actually upheld lower court decisions confirming awards in favor of MBNA.27 Moreover, the Court did not cite two very recent cases from the U.S. District Court for the District of Kansas, both of which compelled cardholders to arbitrate their disputes with MBNA.28 The Court’s parting shot, however, referring to “MBNA’s casual approach to this litigation,”29 seems hard to dispute.

IV. The Arbitrator’s Jurisdiction to Decide Jurisdiction (aka Compétence-Compétence)

On the whole, the Kansas Supreme Court reached a defensible conclusion on (largely) defensible grounds. So why make a fuss? The problem is with a lengthy dictum in the Court’s opinion that is contrary to the usual interpretation of both the UAA and the FAA and that incorrectly limits the power of arbitrators to rule on their own jurisdiction. In the end, the Court’s conclusion is inconsistent with its own analysis, and so is no more than dictum. Practicing attorneys should recognize that it is dictum and challenge attempts to apply it in future cases.

A. An overview of compétence-compétence doctrine

The problem discussed by the Kansas Supreme Court is a recurring one in arbitration law: to what extent do arbitrators have the power to rule on their own jurisdiction over a dispute? The issue arises from the contractual nature of arbitration. “Arbitration,” the U.S. Supreme Court has stated, “is a matter of contract and a party cannot be required to submit to arbitration any dispute, which he has not agreed so to submit.”30 If the parties have not agreed to arbitrate, an arbitrator purporting to resolve their dispute is merely an “interloper.”31 But that statement merely poses, rather than resolves, the question of whether arbitrators can rule on whether there is an arbitration agreement in the first place.

At a practical level, the extent of the arbitrators’ authority to rule on their own jurisdiction (their compétence-compétence or “jurisdiction concerning jurisdiction”32) can determine both the extent of, and the timing of, court review of any arbitration award. According to professor William W. Park:

Depending on the context, reference to an arbitrator’s “jurisdiction to decide jurisdiction” has operated with at least three quite distinct meanings: (1) arbitrators need not stop the arbitration when one party objects to their jurisdiction, (2) courts will delay consideration of arbitral jurisdiction until an award is made, and (3) arbitrators may decide on their own jurisdiction free from judicial review.33

Robert H. Smit explains that “the general rule in the United States has been that while arbitrators have authority under the FAA to consider challenges to their jurisdiction, disputes over arbitration agreements — raised on a motion to stay litigation, to compel or enjoin arbitration or to enforce or nullify an arbitration award — are reserved for

24. 281 Kan. at 660, 132 P.3d at 901.
29. 281 Kan. at 660, 132 P.3d at 902.
33. Id. Park continues:

In its simplest formulation, compétence-compétence means no more than that arbitrators can look into their own jurisdiction without waiting for a court to do so. In other words, when one side says the arbitration clause is invalid, there is no need to halt proceedings and refer the question to a judge. However, under this brand of compétence-compétence the arbitrators’ determination about their power would be subject to judicial review at any time, whether after an award is rendered or when a motion is made to stay court proceedings or to compel arbitration.

Id.
independent judicial determination.” In other words, the accepted approach to *compétence-compétence* in the United States is that arbitrators can decide jurisdictional issues in the first instance, subject to de novo review on a challenge to the award, so long as one of the parties has not yet gone to court.

B. The Kansas Supreme Court’s dictum on *compétence-compétence*

In *Credit*, the Kansas Supreme Court rejected even the “simplest formulation” of *compétence-compétence*, albeit only in dicta. In holding that a challenge to the existence of an agreement to arbitrate is not subject to the time limits of state (and federal) arbitration law, the court began by stating its conclusion: “We note first that MBNA cannot rely on Credit’s tardiness in challenging the award if the arbitrator never had jurisdiction.” As discussed above, the Court’s conclusion on this question was consistent with at least some prior law and, in the words of a leading commentator, “undoubtedly” the “correct rule.”

It then continued:

An agreement to arbitrate bestows such jurisdiction. When the existence of the agreement is challenged, the issue must be settled by a court before the arbitrator may proceed. See 9 U.S.C. § 4; K.S.A. 5-402.

... Under both federal and state law, Credit’s objection to the arbitrator meant the responsibility fell to MBNA to litigate the issue of the agreement’s existence. See 9

U.S.C. § 4; K.S.A. 5-402. Neither MBNA, as the party asserting existence of an arbitration agreement, nor the arbitrator was simply free to go forward with the arbitration as though Credit had not challenged the existence of an agreement to do so.

Here, the Court goes well beyond merely excusing Credit’s late filing of a motion to vacate the award. It states that Credit’s objection that she had not agreed to arbitrate made to the arbitrator — required MBNA to stop the arbitration process and go to court to have that issue adjudicated.

In support of that statement, the Court cites three sources (none of which support its statement, as discussed below). The first two — § 4 of the FAA and K.S.A. 5-402 – both provide that a party may seek to have the court compel a recalcitrant party to arbitrate. The third is the following excerpt from an article in the *Journal of the Kansas Bar Association*:

“... Under either the Federal Act or the Kansas Act, the arbitrator’s power to resolve the dispute must find its source in the agreement between the parties. The arbitrator has no independent source of jurisdiction apart from consent of the parties. ... Dreyer, *Arbitration Under the Kansas Arbitration Act*:

“If there is a challenge to the arbitration, it is for the courts, not the arbitrator, to decide whether the agreement to arbitrate exists and whether the issue in dispute falls within the agreement to arbitrate.


“Substantive arbitrability is concerned with the question of whether the parties have contractually agreed to submit a particular dispute to arbitration. The courts decide this question because no one must arbitrate a dispute unless he has so consented.” (59 J.K.B.A. at 35 n. 42 quoting *Denhardt v. Trailways Inc.*, 767 F.2d 687, 690 (10th Cir. 1985)).

In fact, the authority cited by the Kansas Supreme Court does not support its rejection of even the “simplest formulation” of *compétence-compétence*. To understand why, it may be helpful to examine more systematically Credit’s right to court review of her contention that she had not agreed to arbitrate.
C. Court review of challenges to arbitrators’ jurisdictional rulings

In the rest of this section, I will put timeliness issues aside and instead focus on when and to what extent Credit might have obtained court review of the issue of assent.

So long as the issue is properly preserved in the arbitration proceeding, a party is entitled to de novo review of its contention that it had not agreed to arbitrate — in an action to vacate the award. In First Options of Chicago Inc. v. Kaplan,43 the U.S. Supreme Court held that a court need not defer to the arbitrators’ finding that a party had agreed to arbitrate, but instead should determine the issue itself.44

Credit’s objection that she had not agreed to arbitrate — made to the arbitrator rather than a court — likely was sufficient to preserve the issue of assent for post-award review. Certainly if Credit had participated in the arbitration proceeding without challenging the existence of an arbitration agreement, she would have waived the issue.45 Under the KUAA, however, because she “did not participate in the arbitration hearing without raising the objection,” she was entitled to seek to vacate the award on the ground that “[t]here was no arbitration agreement.”46 By comparison, federal courts are divided on whether an objection to arbitration, but instead should deter-
Moreover, the Dreyer article quoted by the Court refers not to cases like *Credit*, in which Credit made her objection to the arbitrator, but rather to cases like *AT&T Technologies*, in which the objection was raised in a court proceeding. The context of the quotes makes this clear: the quotes refer to cases in which the court is “addressing the motion to compel arbitration,” and Dreyer cites *AT&T Technologies* as authority. As a result, the authority cited by the Kansas Supreme Court simply does not support its assertion that an objection to the arbitrator’s jurisdiction stops the arbitration proceeding in its tracks.

That said, there is some authority — albeit very much in the minority — that the Court might have cited in support of its dictum. In *Smith v. Currency Trading International Inc.*, the respondents did not participate in the arbitration other than to assert that they had not agreed to arbitrate. Under *First Options*, they certainly were entitled to de novo court review of the assent issue post-award (assuming no waiver). But the district court did not itself determine whether the parties had agreed to arbitrate. Instead, it vacated the award on the ground that “the arbitration panel exceeded its authority by entering an award before judicial determination whether an arbitration agreement exists.” The 10th Circuit affirmed in an unpublished opinion.

But as already noted, the *Smith* case is very much an outlier. As Rau explains in discussing *Smith*: “If this were indeed ‘the law,’ it would obviously render unworkable any contractual provision for ex parte arbitration. It would also compel litigation — this time, on the part of the claimant rather than the respondent — every time that an arbitrator’s jurisdiction is challenged.” Rau concludes: “Fortunately, the law as properly understood is otherwise.”

**V. Conclusion**

Under both federal and state arbitration law, arbitrators are generally understood to have the authority to rule on their own jurisdiction in the first instance, including ruling on whether the parties have agreed to arbitrate. A party that asserts it has not agreed to arbitrate is entitled to have a court adjudicate that issue (assuming it has not waived the issue), either before an award is made (on a motion to enjoin the arbitration) or after (on a motion to vacate the award). The Kansas Supreme Court’s dictum in *Credit* — that the arbitration proceeding should have stopped once Credit asserted to the arbitrator that she had not agreed to arbitrate — departs from the usual approach in American cases and should not be followed.

**About the Author**

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In the end, the Kansas Supreme Court’s statement was only dicta. Indeed, the Court itself did not follow through on the implications of its assertion. If the arbitrator had no jurisdiction to go forward once Credit had raised her jurisdictional challenge, the court should have vacated the award without regard to whether MBNA had presented any evidence of an arbitration agreement. Instead, the district court in *Credit* found that there was “no existing agreement between the parties to arbitrate.” The Kansas Supreme Court concluded that the district court had not erred.
Attorney Discipline

IN RE THOMAS E. GACKLE
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 97,528 – MARCH 16, 2007

FACTS: Respondent was admitted in Missouri and Kansas, practicing primarily in Missouri. From summer 1998 through fall 2000, he viewed, collected, and possessed child and adult pornography. When an employee found pictures of nude children in a locked storage trunk, she alerted the FBI. Respondent entered a diversion agreement for unlawfully possessing child pornography, a felony. He completed the diversion successfully, and his license was suspended by the Missouri Supreme Court for a period of six months.

Based on SCR 202, the hearing panel found an adjudication in another jurisdiction that a lawyer has been guilty of misconduct establishes the misconduct conclusively for purposes of disciplinary proceedings in Kansas. The panel concluded that respondent violated KRPCs 8.4(a) (attempting to violate the rules of professional conduct) and 8.4(b) (misconduct involving criminal conduct).

The panel considered numerous factors in aggravation and mitigation and found that respondent should be indefinitely suspended. However, the panel recommended the date of suspension be imposed retroactively to the date he was administratively suspended for failure to pay his annual registration fee. Respondent filed no exceptions to the final hearing report, and the disciplinary administrator continued to request indefinite suspension applied prospectively from the date of the Court’s order.

HELD: The Supreme Court concluded that the panel’s legal conclusions were supported by findings of fact based on clear and convincing evidence. Noting that respondent’s diversion constitutes a conviction of the felony crime, it imposed indefinite suspension, effective from the date of the decision.

IN RE CARLTON W. KENNARD
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 98,058 – MARCH 12, 2007

FACTS: Respondent, a private practitioner from Pittsburg, had a disciplinary hearing on two complaints. The formal complaint alleged violations of KRPCs 1.3 (diligence), 3.2 (failure to expedite litigation), 1.15 (commingling client funds with law firm assets), 3.4 (complying with discovery requests), and 8.4(c) (misconduct based on respondent’s systematic embezzlement of partnership funds totaling nearly $100,000). The hearing panel found clear and convincing evidence of the violations alleged as well as failure to answer letters from the investigator (SCR 207 and KRPC 8.1(b)) and failure to file an answer to the formal complaint (SCR 211(b)).

The panel’s final hearing report was filed with the Kansas Supreme Court and was awaiting oral argument when respondent wrote to the clerk of the appellate courts on March 2, voluntarily surrendering his license to practice law pursuant to SCR 217.

HELD: The Court examined the files of the disciplinary administrator, found the surrender should be accepted and disbarred respondent.
Civil

ARBITRATION AGREEMENT AND EMPLOYMENT
ANDERSON V. DILLARD'S ET AL.
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED

FACTS: Anderson worked full-time as a medic for the city of Lenexa and also worked part-time for the Spring Hill Police Department as a reserve police officer. He also supplemented his income by working as a part-time security officer for Dillard's. Anderson signed an arbitration agreement as a condition of his employment requiring employees to resolve disputes related to their employment through arbitration. Dillard's permitted Anderson to select merchandise for purchase while he worked in the store, carry the items in a shopping bag, and pay for them at the end of the shift. On Aug. 1, 2003, Anderson selected some items and then claimed he was distracted by a family emergency and inadvertently left the store with the shopping bag without paying. Officers detained Anderson at his car for shoplifting. Anderson returned the merchandise to the store and was terminated. On Aug. 4, 2003, Anderson notified his superiors at the Lenexa Fire Department and the Spring Hill Police Department of the alleged shoplifting incident. On Aug. 5, 2003, Rod Cole, Dillard's loss control prevention coordinator and a Kansas Highway Patrol (KHP) trooper, called the Spring Hill Police Department and informed them of the incident. Cole made a similar phone call the next day to the Lenexa Fire Department. Anderson was terminated or indefinitely suspended from both jobs. Anderson sued Cole, Dillard's, and the KHP for defamation, invasion of privacy, and tortious interference with contractual relations. Dillard's filed a motion to compel arbitration.

ISSUES: (1) Arbitration agreement and (2) employment

HELD: Court stated that Dillard's properly raised the application of the arbitration agreement and the district court's decision became a final and appealable order. Court found that Anderson's claims do not rely on Cole's conduct at the time of the alleged shoplifting incident or the termination of Anderson's employment with Dillard's. Court held Anderson's claims did not result from the termination of his employment with Dillard's as required by the arbitration agreement.

STATUTE: K.S.A. 5-401(c)(3)

EMINENT DOMAIN
MOONEY V. CITY OF OVERLAND PARK
JOHNSON DISTRICT COURT – AFFIRMED
NO. 94,468 – MARCH 23, 2007

FACTS: Landowners (Mooneys) appealed jury's determined value of their property taken by city of Overland Park by eminent domain. Mooneys challenged (1) district court's exclusion of their proffered testimony about a prior sale of a portion of their land to Southwestern Bell, and (2) district court's admission of prior appraisal by an appraiser hired by Mooneys as a statement against interest for impeachment.

ISSUES: (1) Exclusion evidence of prior sale and (2) admission of evidence of prior appraisal

HELD: City's contention that evidence of prior sale was disqualified because Southwestern Bell has power of eminent domain is rejected. General rule, that sale of land subject to condemnation by purchaser but which is transferred by private sale and deed cannot be used as comparable sale evidence, is not applicable because evidence indicates an arm-length transaction occurred. No abuse of discretion by trial court's exclusion of this evidence.

Trial court properly allowed city to use prior appraiser's valuation opinion in cross-examination of Mooneys. When owners of land subject to eminent domain hire an appraiser to assess value of the condemned land and submit the written appraisal to court-appointed appraisers, the valuation opinion is a statement attributable to the landowners which, is admissible as an admission under K.S.A. 60-460(g) in a subsequent trial de novo in the eminent domain proceedings.

STATUTE: K.S.A. 60-226(b)(6)(A), -460(a), -460(g)

INSURANCE, BAD FAITH, THIRD-PARTY SUIT, TORT ACTION, AND PRESUIT SETTLEMENT AGREEMENT
NUNGESSER V. BRYANT
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 94,176 – MARCH 23, 2007

FACTS: On July 8, 2002, Bryant, a minor, driving a pickup truck, failed to yield the right of way to Nungesser, who was riding a motorcycle. Nungesser suffered a serious brain injury and was hospitalized at Wesley Hospital. After Nungesser was discharged, Wesley filed notice of a $45,532.85 hospital lien and served Nungesser, Bryant, and EMCASCO (Bryant's insurance company). The Bryant family's auto policy with EMCASCO had a $300,000 single liability limit. EMCASCO extended an offer to settle for policy limits in the form of a check made out to Nungesser and Wesley jointly. The Nungessers attempted to pay their portion of the Wesley bill, the remainder paid by Nungesser's HMO. No agreement had been reached to settle for policy limits. Nungesser sued Bryant on Jan. 6, 2003, seeking $10 million in damages. Wesley later released its lien. Bryant filed a third-party action against Wesley and EMCASCO for full indemnity on tortious interference with contract and breach of fiduciary theories, claiming EMCASCO negligently or in bad faith failed to settle Nungesser's claim within its $300,000 policy limit before suit was filed. EMCASCO filed a motion to dismiss Bryant's third-party claims. The district court denied the motion to dismiss. Bryant and Nungesser agreed between themselves to settle Nungesser's negligence claim against Bryant through the entry of a confessed judgment in the amount of $2 million. The court entered summary judgment finding there was no binding settlement agreement and denied EMCASCO's summary judgment motion on Bryant's third-party claims. The jury found EMCASCO had not acted in bad faith but had acted negligently in failing to settle Nungesser's claim against Bryant before suit was filed. Judgment was granted to Nungesser against EMCASCO in the confessed amount of $2 million. The district court granted Bryant attorney fees in the amount of $726,549.69.

ISSUES: (1) Insurance, (2) bad faith, (3) third-party suit, (4) tort action, and (5) presuit settlement agreement

HELD: Court stated that an insured's action against his or her insurer for negligent or bad faith failure to settle a case must wait for the liability of the insured to be decided. A defendant in an auto liability case may not sue his or her insurer on such claims until the tort claim against him or her has been reduced to judgment. Court stated there is no way to know how or how much the presence of EMCASCO in the case from September 2003 forward altered subsequent events. Court reversed the jury's verdict in favor of the Bryant and Nungesser parties and vacated the $2 million judgment and award of attorney fees. Court stated the mediation agreements are null and void. Court remanded the case to the district court for further proceedings, starting from the place the parties would have been in if Judge Ballinger had granted EMCASCO's first motion to dismiss. While mooting most issues, Court found it did not moot the presuit settlement agreement issue. Court affirmed Judge Clark's partial summary judgment order that no binding settlement was arrived at before Nungesser's suit against Bryant was filed.

STATUTES: K.S.A. 40-256, -908 and K.S.A. 60-214
FACTS: This is an appeal from an order of the district court granting defendant Ernesto Flores’ motion to disqualify the law firm of Weary Davis from serving as counsel for plaintiff Flores Rentals LLC or its owner, Rosemary Flores. The question of potential disqualification arose after an attorney in the Weary law firm was identified as a potential witness because the attorney had previously represented Ernesto, Rosemary, and Flores Rentals in certain real estate transactions. The district court found Ernesto had a substantial relationship with the Weary law firm and met the requirements establishing a conflict of interest. The Court of Appeals denied the motion to take an interlocutory appeal. Ernesto subsequently filed a docketing statement and notice of appeal. Ruling on a show cause order, the Court of Appeals stated that it appeared an interlocutory appeal was the only immediate remedy for Flores Rentals. The case was transferred to the Kansas Supreme Court.

ISSUES: (1) Jurisdiction, (2) interlocutory appeal, and (3) collateral order of doctrine

HELD: Court held that an order disqualifying counsel who may be a witness in the litigation is not a final decision for purposes of an appeal pursuant to K.S.A. 60-2101(a)(4), which requires a final decision before an appellate court acquires jurisdiction. The only appellate remedy available to a party appealing from an order disqualifying counsel, at least in the circumstances where the issue is intertwined with the merits of the case, is to take an interlocutory appeal or to appeal after a final decision. Court stated that it was unnecessary to decide whether the collateral order doctrine is recognized in Kansas. Court found that where the motion for disqualification arises, because an attorney may be a witness, the second prong of the test cannot be met: the merits are inextricably intertwined with the merits of the case.

STATUTE: K.S.A. 60-2101, -2102(a)(4), (c), 3016, -3018

KANSAS TORT CLAIMS ACT AND RECREATIONAL USE EXCEPTION

LANE V. ATCHISON HERITAGE CONFERENCE CENTER
ATCHISON DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 94,634 – MARCH 16, 2007

FACTS: Lane was injured when he slipped and fell on ice at the loading dock of the Atchison Heritage Conference Center (AHCC) in December 2002. He brought this negligence action against the AHCC to recover for his injuries. The AHCC moved for summary judgment on the basis that it was immune from liability under the recreational use exception to the Kansas Tort Claims Act (KTCA). The district court granted summary judgment to AHCC. The Court of Appeals reversed the decision, concluding that the recreational use exception of the KTCA did not apply where the facility’s recreational use was only incidental to its primary function. Because the AHCC’s “primary function” was not recreational, the Court of Appeals held that the AHCC had not met its burden of establishing immunity from the KTCA.

ISSUES: (1) Kansas Tort Claims Act and (2) recreational use exception

HELD: Court stated that immunity from liability under the recreational use exception to the KTCA does not depend upon the “primary use” of the property but rather depends on the character of the property in question. Court stated the recreational use exception applies when property is “intended or permitted” to be used for recreational purposes. The correct test to be applied is whether the property has been used for recreational purposes in the past or whether recreation has been encouraged. Court concluded that AHCC has been used on numerous occasions for recreational events and activities. The injury alleged here took place at such a recreational event (New Year’s Eve dance). Thus, the district court correctly granted the AHCC’s motion for summary judgment regarding the recreational use exception to tort liability under the KTCA.

STATUTE: K.S.A. 2006 Supp. 75-6103(a), -6104(o)

LABOR AND EMPLOYMENT

COMA CORPORATION V. KANSAS DEPT. OF LABOR
SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 95,537 – MARCH 23, 2007

FACTS: Illegal alien (Corral) filed a claim for earned but unpaid wages for his work as a cook for Coma Corp. Kansas Department of Labor (KDOL) awarded wages and interest and penalty. Coma filed action for judicial review. District court found Kansas Wage Payment Act (KWPA) applied to undocumented workers, but Corral only entitled to minimum wage for work performed. Penalty award reversed because Immigration Reform and Control Act (IRCA) pre-empted state statutes. Also, employment contract was contrary to IRCA, thus illegal under Kansas law and unenforceable under KWPA. KDOL appealed.

ISSUES: (1) KWPA and undocumented workers, (2) legality of employment contract, and (3) KWPA penalty for willful failure to pay wages

HELD: Little to no Kansas precedent on issue. KWPA applies to earned but unpaid wages of an undocumented worker. IRCA does not pre-empt KWPA on this issue. Payment of unpaid wages for work actually performed further federal immigration policy. Kansas has not examined this issue. Under facts, an undocumented worker’s employment contract was not illegal under IRCA and was enforceable under KWPA. District court erred in holding otherwise.

Accordingly, under uncontested facts, district court erred in reversing penalty imposed against an employer pursuant to K.S.A. 44-315(b) for willful failure to pay wages.

STATUTES: 8 U.S.C. § 1324a et seq. (2000) and K.S.A. 44-312 et seq., -313(b), -314(a), -315(b), -322a(c), -508(b), -5,120(k), 77-601 et seq., -621(a)(1), -621(c)(4) and (7)

STATUTE OF LIMITATIONS, ESTATES, AND JURISDICTION

VORHEES V. BALTAZAR ET AL.
LINN DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 94,123 – MARCH 16, 2007

FACTS: On Feb. 12, 2002, Vorhees and Baltazar were involved in a two-vehicle accident. Baltazar died that day, Vorhees suffered severe injuries. On Jan. 26, 2004, Vorhees sued Baltazar and the administrator of Baltaza’s estate. Service on the administrator was returned because it was not known. On Feb. 11, 2004, Vorhees filed a petition for issuance of letters of administration incorrectly citing Baltazar lived in Linn County and requested Zachary Graber be appointed administrator. On April 22, 2004, Vorhees filed for a 30-day extension to serve the administrator and it was granted. On May 11, 2004, the Crawford District Court appointed Steven Horak as administrator and issued letters of administration incorrectly labeled “letters testamentary.” Two weeks later, Horak went to Vorhees’s attorney’s office where he executed a return of service, but Vorhees never took any steps to amend his original petition to acknowledge Horak as administrator. The district court granted a motion to dismiss in favor of Horak reasoning that neither defendant had the capacity to be sued before the statute of limitations. The Court of Appeals reversed, holding that the district court had
subject matter jurisdiction, Vorhees timely commenced the action before the statute of limitations, and that service was properly effected upon the administrator.

ISSUES: (1) Statute of limitations, (2) estates, and (3) jurisdiction

HELD: Court held the Court of Appeals did not abuse its discretion in allowing Vorhees’ docketing out of time because Vorhees demonstrated excusable neglect for his late filing. Court held a timely filed petition for appointment of an estate administrator did not cure the capacity deficiency of the yet-to-be-appointed administrator listed as a defendant in the timely filed negligence petition. Mere filing for appointment of the administrator does not equate to actual appointment. Court also held where a person injury petition against the yet-to-be-appointed administrator of the decedent’s estate is filed, and the administrator is appointed within 90 days of the original lawsuit filing; and the administrator is then served with process by the 120-day deadline for service granted by the court, the suit is held to be timely filed against the administrator under K.S.A. 60-203(a). Court also held where a personal injury petition against the yet-to-be-appointed administrator of the decedent’s estate is filed, and the administrator is appointed after the statute of limitations has run but is timely served with process, no formal motion to amend the petition under K.S.A. 60-215 is required because only the capacity of the defendant administrator to be sued has been in dispute.

STATUTES: K.S.A. 20-3018(b); K.S.A. 59-705, -710, -2201, -2204, -2239(2); and K.S.A. 60-102, -203(a), -209, -215, -225, -303(d)(3), (e), -513

SUMMARY JUDGMENT, INSURANCE COVERAGE, AND AUTOMOBILE ACCIDENT
WARNER ET AL. V. STOVER ET AL.
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED

FACTS: In December 2002, Warner, his wife, Patricia, and Vivian Dunn were passengers in a pickup truck driven by Stover. In Texas, the truck hit a patch of ice, slid into a ditch, and rolled twice, killing Patricia. The truck’s certificate of title and registration listed only Stover’s son, Charles. Farmers provided insurance coverage on the pickup with a policy insuring Charles. Charles reported the accident. Farmers paid its policy limits of $25,000 to Warner for his injuries and $25,000 for Patricia’s death. Charles was the president and owner of Western Liquid Express, a company using trucks to transport building materials, farm machinery, and parts. Western’s vehicles are covered by insurance with Canal Insurance Co. in the amount of $1 million per occurrence. Warner filed a personal injury and wrongful death action against Stover and Canal. The district court granted summary judgment to Canal finding the insurance policy only provided coverage for vehicles owned by Western, that the truck was “owned and titled” to Charles personally, and that no Canal coverage existed. Trial proceeded against Stover and judgment was awarded to Warner in an amount just more than $600,000. The Court of Appeals affirmed the summary judgment ruling.

ISSUES: (1) Summary judgment, (2) insurance coverage, and (3) automobile accident

HELD: Court found the granting of summary judgment was premature. Court acknowledged a substantial amount of evidence suggested Charles’ personal ownership of the pickup. However, questions remained concerning the transfer of the title to Charles using his company’s address, dealings with the Kansas Department of Revenue concerning title-apportioned registration using the company’s information, and dealings with the Kansas Corporation Commission. Court remanded for further development and clarification of the legal theories and defenses controlling the case.

STATUTES: K.S.A. 20-3018(b) and K.S.A. 66-1,128, -1,139

WORKERS’ COMPENSATION
CASCO V. ARMOUR SWIFT-ECKRICH
WORKERS’ COMPENSATION BOARD – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 93,984 – MARCH 23, 2007

FACTS: Casco sustained work-related injury to left shoulder and then injured right shoulder while continuing to work and overcompensate for left shoulder injury. Administrative law judge (ALJ) found right shoulder injury was natural and probable consequence of left shoulder injury; with total award of $100,000. Workers’ Compensation Board (Board) found Casco suffered a new and separate accident to right shoulder due to repetitive use, for total award of approximately $35,000. On Casco’s appeal, Court of Appeals reversed the Board’s decision, finding the Board ignored undisputed medical testimony regarding causation of Casco’s right shoulder injury, 34 Kan. App. 2d 670 (2005). Supreme Court granted Armour’s petition for review.

ISSUES: (1) Second injury rule and (2) parallel injuries

HELD: Resolution of issue involves application of second injury rule in Jackson v. Stevens Well Services, 208 Kan. 637 (1972). Under facts, Board’s factual determination that Casco suffered an injury to right shoulder due to repetitive use is not supported by the record. Board ignored uncontested evidence and erroneously interpreted and applied the second injury rule.

History of parallel injury rule from Honn v. Elliott, 132 Kan. 454 (1931), is discussed. Because injury to Casco’s right shoulder is natural and probable consequence of injury to left shoulder, the disability
in both arms is the result of a single injury. Court of Appeals' application of secondary injury rule and parallel injury rule is affirmed. Case remanded because neither the ALJ nor the Board made findings as to whether Casco was completely and permanently incapable of engaging in any type of substantial and gainful employment.

STATUTES: K.S.A. 2005 Supp. 44-556(a) and K.S.A. 44-510c, -510c(a)(2), -510d, -510d(a)(11)-(18) and (21), -510e, -510f, 77-601 et seq., -621(c), -621(c)(4), -621(c)(7)

Criminal

STATE V. ADAMS
GEARY DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 93,640 – MARCH 16, 2007

FACTS: Adams convicted of drug offenses. Court of Appeals reversed one conviction and affirmed remaining convictions and sentence, 35 Kan. App. 2d 439 (2006). Supreme Court granted petition for review on sentencing issue and discovered obvious statutory speedy trial issue raised by Adams before the district court but not included in his appeal.

ISSUE: Speedy trial

HELD: Case presents exceptional circumstances for sua sponte consideration of statutory speedy trial issue. Adams convictions are reversed and sentences are vacated. Record does not support state's claim that Adams waived right to speedy trial by acquiescing to a continuance where scheduled trial was canceled because state assumed Adams would not appear. No merit to state's claim that Adams failed to assert right to speedy trial when defense counsel did not object to rescheduled trial date outside the 180-day statutory period. Defendants are not required to take any affirmative action to enforce this statutory right. Although state claims Adams was not prejudiced, the statute mandates a trial within 180 days without consideration of whether the defendant is prejudiced by delay beyond that period.

STATE V. ALBRIGHT
KINGMAN DISTRICT COURT – AFFIRMED
NO. 94,244 – MARCH 16, 2007


ISSUES: (1) Constitutionality of Kansas hard 40 sentencing scheme, (2) motions for mistrial, and (3) prosecutorial misconduct


Under facts, prosecutor's passing reference to prior trial rather than prior testimony was inadvertent and isolated, and prosecutor immediately corrected himself after the slip. No attention was drawn to the mistake, and Albright declined district court's offer of a curative instruction. Prosecutor's conduct was not gross or flagrant and did not appear to be the product of ill will or bad faith. Mistake not likely to have any weight in minds of jury. Likewise, no abuse of discretion by district court's refusal to grant mistrial after state's expert witness mentioned that Albright's fingerprints were obtained from KBI's central records. This unsolicited statement did not inevitably suggest that Albright had a prior criminal record.

Under facts, nothing improper about prosecutor's characterization of defense theory as "some other dude did it," or analogizing to the Family Circus "Not Me" character. Prosecutor's references to a defense expert's demeanor as evasive and antagonistic and to state's own expert as straightforward and cooperative, were not outside the latitude given to a prosecutor's discussion of evidence.

STATUTES: K.S.A. 21-3401(a), -4635, -4635(a), -4635(d), -4636, -4637, -4638, -4706(c), 22-3423(c), 60-261, -455 and K.S.A. 1998 Supp. 22-3717(b)(1)

STATE V. ALLEN
SEDGWICK DISTRICT COURT – REVERSED, SENTENCE VACATED, AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 93,940 – MARCH 16, 2007

FACTS: Allen convicted of aggravated indecent liberties with a child and sentenced as a "persistent sex offender" based on district court's finding that Allen's 1987 juvenile adjudication of aggravated incest qualified as a sexually motivated offense under K.S.A. 2004 Supp. 22-3717(d)(2)(L). Court of Appeals reversed the enhanced sentence, finding subsection (L) was not a "catch-all" phrase to expand list of per se sexually violent crimes, 35 Kan. App. 2d 466 (2006). It also summarily rejected Allen's claim that the enhanced sentence was unconstitutional under Apprendi and Gould. Supreme Court granted Allen's and state's petitions for review.

ISSUES: (1) K.S.A. 2004 Supp. 21-4704(j) and (2) Apprendi

HELD: Court of Appeals is affirmed for different reasons. To sentence Allen as a persistent sex offender, trial court had to make a determination beyond a reasonable doubt that Allen's 1987 aggravated incest adjudication was sexually motivated. This finding of fact by the trial court exposed Allen to greater punishment than would have been
authorized based upon his current conviction, which violated Apprendi and Gould. Sentence vacated and case remanded for resentencing.


STATE V. DAVIS
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 Indigents’ 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: Confrontation Clause after Davis v. Washington, __ U.S. __, 126 S. Ct. 2266 (2006), substantially altered the analysis in Kansas cases, especially the two prong unavailability and reliability test applied regardless of the testimonial character of the statement in question. To the extent the analysis in previous decisions differs from Confrontation Clause analysis in this opinion, the previous decisions are overturned. Because hearsay statement in this case was not testimonial, Davis’ rights under Confrontation Clause not implicated. Trial court did not err in allowing testimony as to the hearsay statement.
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. FISHER
POTTAWATOMIE DISTRICT COURT – AFFIRMED IN PART, SENTENCE VACATED, AND REMANDED FOR RESENTENCING COURT OF APPEALS – AFFIRMED NO. 89,300 – MARCH 16, 2007
FACTS: Fisher convicted of drug charges related to the use and manufacture of methamphetamine. Fisher appealed, claiming (1) district court erred in failing to suppress evidence obtained pursuant to search warrant partially based upon contents of trash bag seized from Fisher’s rural property, (2) admission of hearsay evidence of witness not called to testify violated right of confrontation, and (3) convictions for possession of ephedrine and possession of paraphernalia for use in manufacture of methamphetamine are multiplicitous. In unpublished opinion, Court of Appeals affirmed the convictions and remanded for resentencing pursuant to State v. McAdam, 277 Kan. 136 (2004). Supreme Court granted Fisher’s petition for review.

(continued on next page)
ISSUES: (1) Suppression of evidence, (2) confrontation, (3) and multiplicity

HELD: Extensive discussion of question of curtilage, finding it to be a mixed question of fact and law. Under facts of case, trash bag was found within property's curtilage, and Fisher maintained a reasonable expectation of privacy in the trash bag at its specific location. Law enforcement exceeded the scope of its lawful intrusion into the curtilage of the property, and state's attempt to apply plain view doctrine to evidence observed during knock and talk procedure is disapproved. Although district court and Court of Appeals erred in upholding seizure of the trash bag, under totality of circumstances the magistrate's issuance of search warrant was valid even without evidence of contents of trash bag. Thus, for a different reason, district court correctly denied motion to suppress.

District court did not err in finding Fisher forfeited right to confrontation and waived hearsay objections by opening door to otherwise inadmissible evidence from a nontestifying witness.

Court of Appeals correctly found convictions were not multiplicitious and correctly remanded for resentencing under McAdam.

CONCURRING (Davis, J., joined by McFarland, C.J., and Luckert, J.): Agrees search warrant was valid, but disagrees with majority's reasoning. Plain view exception should have applied to officer's seizure of the trash bag.

DISSENT (Allegrucci, J.): Agrees that district court erred in failing to suppress the warrantless seizure of the trash bag, but disagrees that there was sufficient substantive evidence absent the contents of the trash bag to support the issuance of a search warrant.


STATE V. FLORES
FORD DISTRICT COURT – AFFIRMED
NO. 93,973 – MARCH 16, 2007

FACTS: Trial court certified Flores as an adult offender and accepted Flores’ no contest plea to felony murder and attempted voluntary manslaughter. Plea agreement recommended concurrent sentences but consecutive sentences imposed. Supreme Court dismissed Flores’ direct appeal as having no jurisdiction to review consecutive sentencing. Years later, Flores filed motion to correct illegal sentence, claiming Juvenile Offenders Code in effect at time precluded imposition of an adult sentence. District court denied the motion, finding the adult certification was authorized by the original first-degree murder charge, and the entire case remained in adult court for sentencing. Alternatively, district court found motion was procedurally barred. Flores appealed.

ISSUES: (1) Illegal sentence, (2) application of K.S.A. 38-1636(i) (Furse 1993), and (3) ineffective assistance of counsel

HELD: The motion is not time barred. A defendant may file a motion to correct an illegal sentence at any time. A motion to correct an illegal sentence is not subject to the one-year limitation in K.S.A. 60-1507(f), and a defendant’s failure to challenge an illegal sentence on direct appeal does not procedurally bar a subsequent motion to correct an illegal sentence. Flores’ failure to include illegal sentence claim in his dismissed direct appeal did not preclude his motion to correct an illegal sentence and does not deprive Supreme Court of jurisdiction of this appeal.

A conviction, as charged, on at least one of the qualifying felonies, which supported the juvenile’s certification as an adult will keep the entire case in adult court. A juvenile certified as an adult reverts to juvenile offender status with a corresponding juvenile disposition only where he or she is not convicted of any of the principal crimes, which supported the certification.

Issue of ineffective assistance of counsel is raised for first time on appeal, is not briefed, and is not supported by any showing of error in counsel’s performance.

STATUTES: K.S.A. 8-1523; K.S.A. 22-2402(1); K.S.A. 65-4163(a)(3); and K.S.A. 79-5204(a), -5208

STATE V. GREEN
JOHNSON DISTRICT COURT – AFFIRMED
NO. 94,162 – MARCH 23, 2007

FACTS: Green entered no contest plea in 1996 to charges of capital murder of two children, attempted capital murder of husband, and aggravated arson. In 2004, Green filed motion to withdraw plea to all counts except attempted first-degree murder, arguing evidence of advances in fire investigation, if known at time of plea, would have rendered factual basis of the charges unreliable and insufficient. District court denied the motion. Green appealed.

ISSUE: Withdrawal of plea

HELD: If new evidence disproves an element of a crime, then factual basis for a guilty or nolo contendere plea to the charge of committing that crime is undermined. Under facts, Green did not meet her burden of demonstrating the factual basis for her plea being so undercut by new evidence that prosecution could not have proved its case beyond a reasonable doubt. There was no manifest injustice to correct. District court did not abuse its discretion in denying Green’s motion.

STATUTE: K.S.A. 2006 Supp. 22-3210(d)

STATE V. MOORE
GEARY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 93,386 – MARCH 16, 2007

FACTS: Moore was pulled over for following too closely. The car was registered to someone else. Officer Jimerson noted that Moore appeared highly nervous and he smelled a slight odor of fabric softener often used to conceal the odor of drugs. Moore’s license was initially reported as suspended. Moore was surprised to learn of this fact. Moore said he was returning from Las Vegas to his home in Maryland. Dispatch informed the officers that Moore's license was actually not suspended. Jimerson told Moore of the error and issued a warning for following too closely and said that was “all [he] had for him.” Jimerson said that Moore placed his hand on the gearshift to leave. Moore said that he could not leave because Jimerson was leaning against the frame of the passenger window. Jimerson asked Moore whether he would answer some more questions. Moore agreed and denied possessing contraband. Moore agreed to a search of the car.

The car had a nonfactory quarter panel. After Jimerson removed the quarter panel, he saw green vegetation that he believed was marijuana. The district court denied Moore’s motion to suppress and the court convicted Moore of possession of 55 pounds of marijuana with intent to deliver and no drug tax stamp. The Court of Appeals affirmed Moore’s conviction.

ISSUES: (1) Denial of the motion to suppress and (2) violation of Fourth Amendment

HELD: Court independently concluded that Jimerson’s use of two different tests to determine how close Moore followed the car in front of him provided an objective justification of reasonable suspicion justifying the stop of Moore’s vehicle. Court held there was substantial competent evidence to support the findings of the district court that Jimerson had reasonable suspicion of illegal activity during the stop. Court found there was substantial competent evidence to support the district court’s finding that Moore consented to extend the stop, there was an unlimited scope of Moore’s consent, and that Jimerson’s removal of the molding occurred only after probable cause had developed, entitling him to expand his search.

STATUTES: K.S.A. 22-3504, -3504(i), -3601(b)(1), -4506, 38-1636, -1636(a), 60-1507(f); and K.S.A. 38-1636(i) (Furse 1993)
STATE V. MORTON  
WYANDOTTE DISTRICT COURT – AFFIRMED  
NO. 94,815 – MARCH 16, 2007

FACTS: In direct appeal from conviction of first-degree murder and aggravated robbery on retrial, Morton alleged (1) prosecutorial misconduct in first trial to provoke a mistrial barred a new trial on first-degree murder charge, (2) district court’s original ruling on motion in limine excluding certain expert testimony should have controlled issue on retrial, and (3) state failed to prove premeditation beyond reasonable doubt.

ISSUES: (1) Prosecutorial misconduct, (2) prior ruling on motion in limine, and (3) sufficiency of evidence of premeditation

HELD: Under facts, double jeopardy does not prevent retrial. Oregon v. Kennedy, 456 U.S. 667 (1987), is discussed and found not applicable to facts of this case.

Under facts, neither law of the case, mandate rule, nor protection against double jeopardy applied on remand to prevent district court from modifying its ruling on pretrial evidentiary matter not challenged or addressed on appeal. The court originally excluded this testimony to avoid prejudice of unfair surprise, and this reason no longer applied on retrial.

Ample evidence supports the jury’s finding of premeditation.

STATUTE: K.S.A. 21-3107, -3108, 60-2106(e), -456(b)

STATE V. SHOPTEESE  
BROWN DISTRICT COURT – AFFIRMED  
NO. 92,512 – MARCH 16, 2007

FACTS: Following nine months of evaluation and treatment at Larned, Shopteese was pronounced competent to stand trial. He entered no contest plea to charges of felony murder and aggravated burglary. Unhappy with the sentence imposed, Shopteese filed motion to withdraw his plea. District court denied the motion. Shopteese appealed, claiming his marginal I.Q. and unmedicated mental illness rendered his pleas involuntary.

ISSUE: Competency to enter guilty plea

HELD: Court considers merits of issue not raised below because acceptance of a guilty plea by an incompetent defendant implicates due process. Under facts, no manifest injustice or abuse of discretion in district court’s denial of motion to withdraw pleas. Although Shopteese’s competence was initially dubious, his no contest pleas were knowingly and voluntarily entered.

STATUTES: K.S.A. 2006 Supp. 22-3210(a) and K.S.A. 22-3301(1)

STATE V. WALKER  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 95,095 – MARCH 23, 2007

FACTS: In drive-by shooting that killed a 16-month-old child, Walker convicted of first-degree felony murder and criminal discharge of firearm at occupied building. Conviction reversed based on trial court’s admission of statements Walker made to police after he had invoked right to counsel, 276 Kan. 939 (2003). Walker again convicted on retrial. He appealed, claiming (1) trial court should have suppressed all statements and evidence discovered as a result of police interrogation because statements were not voluntary and evidence was “fruit of poisonous tree,” (2) error to deny “motion to change judge,” (3) double jeopardy violation to sentence him for both felony murder and discharge of a firearm, (4) error to include juvenile adjudications in his criminal history, and (5) increased sentence for criminal discharge of a weapon was illegal and showed vindictiveness by judge.

ISSUES: (1) Motion to suppress, (2) change of judge, (3) double jeopardy in sentencing, (4) juvenile adjudication in criminal history, and (5) vindictive resentencing

HELD: Combined factors to be considered when determining voluntariness of a statement are stated and discussed against facts of case. Under totality of factors and circumstances of interrogation, Walker’s statement that he was driving the car was product of Walker’s free and independent will. No suppression of physical evidence discovered in car was required because trial court correctly found evidence would have ultimately or inevitably been discovered by lawful means.

Procedure under K.S.A. 2006 Supp. 20-311d examined and applied. Nothing in record demonstrates trial court actually exhibited bias or prejudice at either of Walker’s trials. Ruling on motion to change judge did not create reversible error.

Double jeopardy claim considered even though raised for first time on appeal. Double jeopardy does not attach to convictions under felony murder statute and felony discharge of a firearm at an occupied dwelling, even if charges arise from same conduct. Walker’s sentences for these convictions are not multiplicitous and do not violate right against double jeopardy.

Use of prior juvenile adjudications in a defendant’s criminal history is not unconstitutional. No new case law or argument presented to disturb this precedent.

District court explained that felony murder was incorrectly calculated as the primary crime in first sentencing. This time, presumptive sentence for criminal discharge of firearm was greater because it was the base sentence. Any possible presumption of vindictiveness in sentencing was completely dissuaded by court’s clear and sound explanation.

STATUTES: K.S.A. 2006 Supp. 20-311d, -311d(a)-(c), -311(c)(5), 21-3436(a), -3436(a)(15), -4219(b), -4704, -4720(b)(2) and (5) and K.S.A. 21-3401(b), -4219, -4721(e), -4721(e)(1) and (3)

STATE V. WILLIAMS  
JOHNSON DISTRICT COURT – AFFIRMED  
NO. 95,890 – MARCH 16, 2007

FACTS: Williams convicted of first-degree murder and attempted first-degree murder and did not challenge district court’s jurisdiction to prosecute him as an adult. Supreme Court affirmed murder convictions in Williams’ direct appeal, and remanded attempted murder convictions for a new trial, 268 Kan. 1 (1999). In 2005, Williams filed motion to correct an illegal sentence. District court denied that motion, finding Williams was not a juvenile offender for purposes of prosecution, the adult criminal court had jurisdiction, thus the sentence imposed was not illegal. Williams appealed.

ISSUE: Jurisdiction to prosecute juvenile as an adult

HELD: Under facts, district court had jurisdiction to prosecute 17-year-old defendant under criminal code for adults, and the ensuing sentence does not fit the definition of an illegal sentence.


KBA Annual Meeting  
June 7-9, 2007  
Wichita, Kansas
Appellate Practice Reminders . . .
From the Appellate Court Clerk's Office

Annual Attorney Registration Begins

On May 10 the Appellate Clerk's Office will mail 2007-2008 attorney registration forms to the 13,399 attorneys currently registered in Kansas. Fees are due on or before July 1 and a $100 late fee will be imposed on Aug. 1. In 2006, there were 662 attorneys who paid the late fee and 203 who were suspended from the practice of law for failure to pay the fee.

Fees remain the same as 2006. Active attorneys will pay $150 and inactive attorneys $50. Those who are 66 years of age or older and elect retired status do not pay a fee. Only attorneys registered as active may practice law in Kansas.

Advances in electronic banking have created problems with the registration process. The completed registration form and the fee must be sent together in the self-addressed envelope provided. Any form that is received without an enclosed fee will be returned to the sender. A check or money order is acceptable.

Firms may remit fees for more than one attorney in a single check. The check must be accompanied by (1) a list giving firm name, firm address, name of each attorney, attorney's registration number, and amount paid for each attorney; and (2) a completed registration form for each attorney listed.

Advances in electronic communication have worked to the advantage of attorneys as well as the Registration Office. A great deal of communication is now done by e-mail. Inquiries can be addressed to registration@kscourts.org. The registration form will, beginning this year, include e-mail addresses for attorneys.

Remember that registration fees are sent to a bank lockbox. Upon receipt by the bank, fees are deposited, and the forms are sent to the Registration Office for data entry. The bank deposit date is used to credit the attorney's payment. Mail the registration form and fee well before the deadline to avoid late charges.

For further information about attorney registration or the status of a particular Kansas attorney, call Sally Brown at (785) 296-8409. For other questions related to appellate practice, call the Clerk's Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
Civil

ARBITRATION
THE CITY OF ANDOVER V. SOUTHWESTERN BELL TELEPHONE
BUTLER DISTRICT COURT – AFFIRMED
NO. 96,823 – MARCH 9, 2007

FACTS: Andover sued Southwestern Bell (SWBT), alleging that the phone company’s negligence in not promptly locating its buried cables forced the city into later making a contract with SWBT to move those cables. SWBT successfully moved the cables and was paid for its work. But the parties contract had an arbitration clause and, when sued by Andover, SWBT unsuccessfully sought arbitration of the claim. The district court found Andover’s claim was for unjust enrichment and refused to compel arbitration because under Kansas law, claims in equity are not subject to contract provisions requiring arbitration of disputes.

ISSUE: Compelling arbitration

HELD: Court held the damages claimed by Andover were not caused by SWBT in the course of doing the relocation work described in their agreement. Andover claims damages for the failures of SWBT prior to execution of the contract. The arbitration clause is not nullified by allowing Andover to proceed with its claim in tort. To the contrary, any disputes arisen regarding the ability, cost, or timeliness of SWBT in relocating the cables, Andover would have been compelled to submit its claims to arbitration. Court stated that even though the district court improperly interpreted the petition as a claim in equity rather than tort, the court arrived at the proper conclusion. Andover’s tort claim is not a disguised contract claim and is outside the subject matter of the arbitration provision. Andover cannot be compelled to submit to arbitration because claims in tort are exempt from arbitration.

STATUTE: K.S.A. 5-401(b), (c)

CHILD SUPPORT AND LUMP SUM SEVERANCE PACKAGE
BRANCH V. BRANCH
COWLEY DISTRICT COURT – AFFIRMED
NO. 95,756 – MARCH 9, 2007

FACTS: Deborah and Clayton Branch were divorced on Nov. 29, 1998. Clayton was ordered to pay $957 per month in child support. In 2005, Clayton lost his job at Boeing. The district court reduced Clayton’s child support to $393 and ordered that Clayton pay 20 percent of the severance package he received of a net amount of more than $14,000.

ISSUES: (1) Child support and (2) lump sum severance package

HELD: Court held the proceeds from a lump sum severance package are income for purposes of calculating child support. Court also held under the facts of this case that the district court did not abuse its discretion in ordering Clayton to pay 20 percent of the severance package for child support.

STATUTES: No statutes cited

DRIVER’S LICENSE SUSPENSION
THOMPSON V. KANSAS DEPARTMENT OF REVENUE
SEGDWICK DISTRICT COURT – AFFIRMED
NO. 92,913 – MARCH 2, 2007

FACTS: Thompson had a car accident where he missed a curve and ended up in a creek ravine. Officers detected alcohol on Thompson’s breath and he was taken to the hospital. At the hospital after Thompson was stabilized, an officer read the implied consent advisory and gave him the DC-70 form. Thompson claimed he did not read the form. Thompson refused to take a blood test. The Kansas Department of Revenue (KDOR) suspended Thompson’s driver’s license based on his refusal to submit to a blood test. The district court found there was substantial compliance with the consent statutes and affirmed the KDOR.

ISSUE: Driver’s license suspension

HELD: Court held the officer and Thompson agreed that the written implied consent advisory was placed in Thompson’s hand and that Thompson received his verbal notice. Thompson was conscious, did not tell the deputy that he could not read the form, and did not ask for assistance to read the form. Court concluded there is substantial competent evidence Thompson was given the oral and written notice as required under K.S.A. 8-1001(f).

STATUTE: K.S.A. 8-1001(f), (m)

DUI, COMMERCIAL DRIVER’S LICENSE, AND DUE PROCESS
ROBINSON V. KANSAS DEPARTMENT OF REVENUE
LYON DISTRICT COURT – AFFIRMED
NO. 95,931 – MARCH 16, 2007

FACTS: Robinson held a commercial driver’s license by the state of New Mexico. Robinson was driving a noncommercial vehicle when he was pulled over for DUI. The trooper gave Robinson the proper warnings and notice for driver of a noncommercial vehicle. The trooper did not advise Robinson as to how a test failure, test refusal, or DUI conviction would affect his commercial driver’s license. Robinson failed the breath test. Robinson challenged the suspension of his commercial driver’s license on due process grounds. The trial court rejected his claim.

ISSUES: (1) DUI, (2) commercial driver’s lincense, and (3) due process

HELD: Court held that Robinson received all of the notice, which he was statutorily entitled. Court stated the trial court correctly found that Robinson was afforded two opportunities, the administrative hearing and the de novo review before the district court, to contest the finding that he failed the test. Robinson made no assertion that those proceedings were in any way defective.

STATUTE: K.S.A. 2006 Supp. 8-1001(a), (f), (g), (m), -1014, -2,142(a)(2), -2,145

ESTATES AND HOMESTEAD RIGHTS
IN RE ESTATE OF PRITCHARD
JEFFERSON DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS
NO. 94,645 – MARCH 2, 2007

FACTS: Donald Pritchard died intestate on Sept. 17, 2001, survived by his wife, Margaret, and four adult children from a previous marriage. At the time of his death, Pritchard owned a house in McLouth, titled only in his name. Pritchard and Margaret had moved earlier that month from the McLouth property to a bed and breakfast owned by Margaret’s daughter in Meriden. Five days prior to Pritchard’s death, he and Margaret had executed a listing agreement with a realtor for the sale of the McLouth property. Ronald Schulteis, a CPA and the husband of one of Pritchard’s children, was requested by the heirs to file petition for issuance of letters of administration and he was later appointed administrator. Margaret filed

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entry of appearance and waiver indicating an address in Meriden. Schulteis filed petition for sale of the McLouth property alleging the property was not a homestead. Margaret waived notice of the sale hearing again with address in Meriden. The property was sold and proceeds used to pay debts. No objection to sale filed. Five months later, Margaret filed a petition claiming spousal survivor benefits and that neither Schulteis nor his attorney, Neff, had informed her of her statutory rights. The magistrate judge ruled that the McLouth property was a homestead and exempt from distribution. The magistrate granted attorney fees to Margaret and ordered that neither Schulteis nor Neff receive any fees for administration. Schulteis was liable for perpetrating a fraud against Margaret by failing to inform her of the homestead right and Neff failed in duty as officer of the court. The district court found no family settlement agreement controlled the administration of the estate and Margaret never knowingly and voluntarily relinquished her statutory homestead rights or spousal allowance nor did she abandon those rights by listing the property for sale. The court found no authority for attorney fees granted to Margaret, but affirmed the magistrate's decision rejecting Schulteis and Neff's administration fees.

ISSUES: (1) Estates and (2) homestead rights
HELD: Court held under the facts of the case: (1) The district court did not have subject matter or personal jurisdiction upon which a personal money judgment could be granted against the attorney for the administrator of the estate; (2) the administrator of the estate and his attorney did not have the duty to inform the decendent's widow of her possible homestead and other statutory rights; (3) when an unappealed order confirming a sale of real property becomes final, the question of whether a widow had homestead rights in such real property becomes moot as it cannot have any effect on the issues in this case; (4) the widow is estopped from contesting in such real property becomes moot as it cannot have any effect on the issues in this case; (5) the district court erred in assessing attorney fees for the widow's counsel against the administrator and his attorney because there was no statutory authority or agreement of the parties to do so; and (6) the failure of the administrator or his attorney to brief or raise as an issue on appeal the district court's order removing the administrator and denying the administrator and his attorney compensation and expenses for their services results in these issues being waived and abandoned.

STATUTES: K.S.A. 59-101, -103, -104, -401, -403, -404, -505, -618a, -1504, -1704, -1717, -2103a, -2213, -2214, -2233, -2401(a)(6), -2408, -6a207, -6a215; K.S.A. 60-260, -209

HABEAS CORPUS AND INEFFECTIVE ASSISTANCE OF COUNSEL
KING V. STATE
SUMNER DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 94,117 – MARCH 30, 2007

FACTS: King pled no contest to second-degree murder and the trial court, on its own motion, imposed an upward durational departure. King filed a notice of appeal and docketing statement and was appointed counsel. Several extensions to file appellate brief were granted. King's sixth motion for extension was denied and the appeal was dismissed. A motion to reinstate the appeal was denied and the Supreme Court denied a petition for review. King filed a motion for relief under K.S.A. 60-1507 claiming ineffective assistance of counsel on multiple grounds and that the trial court violated his constitutional rights in many respects. The trial court appointed counsel and denied the motion after a non evidentiary hearing.

ISSUES: (1) Habeas corpus and (2) ineffective assistance of counsel
HELD: Court held the failure of King's counsel to timely file a brief effectively denied King the right to a direct appeal of his sen-
filed a motion to correct sentence under McAdam. Fowler appealed, but the appeal was contemporaneously dismissed with Fowler's filing of a motion to docket his original appeal out of time based on his counsel's failure to docket the appeal contrary to his request and that he never consented to withdraw his direct appeal. The Court of Appeals denied his motion and the Supreme Court denied his petition for review. Fowler filed a motion pursuant to K.S.A. 60-1507. The district court found that although trial counsel failed to docket Fowler's appeal, the appeal was without merit because he entered his plea prior to McAdam and it was unlikely that his appeal would have taken more than 11 months to decide. The district court denied Fowler's 60-1507 motion because Fowler would have had no basis for a direct appeal and therefore Ortiz did not apply.

**ISSUES:** (1) Habes corpus, (2) McAdam and Ortiz, and (3) res judicata

**HELD:** Court held a denial by the Court of Appeals of a motion to docket an appeal out of time does not bar appellant's subsequent K.S.A. 60-1507 motion requesting the same relief. Court held that having determined that an appeal is properly before the court, having determined that an appeal would likely have been pending at the time McAdam was decided, and having determined that the exclusive relief sought in a subsequent K.S.A. 60-1507 motion was res judicata under McAdam, court concluded that the defendant is entitled to McAdam relief.

**STATUTE:** K.S.A. 60-1507, -2103

**KANSAS CONSUMER PROTECTION ACT, INMATES, KOSHER DIET, AND THIRD-PARTY BENEFICIARY ELLIBEE V. ARAMARK CORRECTIONAL SERVICES BUTLER DISTRICT COURT – AFFIRMED NO. 96,809 – MARCH 16, 2007**

**FACTS:** The Kansas Department of Corrections (DOC) contracts with Aramark to provide meals to inmates. Ellibee follows the Jewish faith. He filed a complaint against Aramark alleging the meals provided were not kosher and violated the Kansas Consumer Protection Act (KCPA). The DOC concluded that Ellibee's meals were set by guidelines made by a rabbi and thus he was provided an adequate kosher diet. The trial court granted Aramark's motion to dismiss finding that there was no support for a KCPA claim by an alleged third-party beneficiary.

**ISSUES:** (1) KCPA, (2) inmates, (3) kosher diet, and (4) third-party beneficiary

**HELD:** Court found there was no evidence that Aramark ever made any representation directly to Ellibee since Aramark negotiated its contract with the DOC. There was also no evidence of any sale or trade, as the DOC is legally required to provide sustenance for all inmates. Court held a third-party beneficiary is not a party to a KCPA consumer transaction. Court also rejected Ellibee's arguments concerning negligence and fraud.

**STATUTE:** K.S.A. 50-623, -624

**LIMITED ACTIONS HUTCHINSON HOSPITAL CORPORATION V. NEAL RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS NO. 96,330 – MARCH 30, 2007**

**FACTS:** Hutchinson Hospital Corporation (hospital) sued Neal in a limited actions proceeding to collect unpaid medical bills in the amount of $23,938.53 plus prejudgment interest, but provided no basis for its calculation. Neal denied the claim. At the pretrial conference, Neal stated that he did not intend to call any witnesses but planned to cross-examine the hospital's witnesses in order to prove the unreasonableness of the hospital's charges. The district court found this was not an adequate defense and entered judgment to the hospital.

**ISSUE:** Limited actions

**HELD:** Court stated the district court had before it no evidence whatsoever with which to establish the value of the hospital's services. Court held judgment was improper without further findings because the amount and reasonableness of the medical bills were material facts that remained in dispute. Court stated that while the limited actions proceedings are proved to be speedy and inexpensive, justice is not served by denying a trial to resolve disputed material facts and by entering a judgment for which there is no evidentiary support. Court vacated judgment and remanded for trial. However, Court stated there was no evidence in the record to support Neal's claim that the district court judge was biased in favor of the hospital.

**STATUTE:** K.S.A. 61-2806; 3201(d)

**MECHANICS' LIEN IN RE MECHANIC'S LIEN AGAINST CITY OF KANSAS CITY WYANDOTTE DISTRICT COURT – AFFIRMED NO. 97,086 – MARCH 23, 2007**

**FACTS:** Trans World leased commercial property from Unified Government of Wyandotte County (Unified Government), and contracted electric and sheet metal companies (Mark One) to make improvements on the property. Mark One filed mechanic's lien when it was not paid for labor, materials, and services. Unified Government filed motion for judicial review of the lien. At non-evidentiary hearing, district court found no evidence that Unified Government authorized or consented to the improvements, and set aside Mark One's lien as fraudulent. Mark One appealed.

**ISSUE:** Mechanic's lien

**HELD:** Issue of first impression in Kansas. K.S.A. 58-4301 is discussed and applied. Mark One's argument for application of a summary judgment standard is rejected. District court complied with statute and its findings were supported by substantial competent evidence.

**STATUTE:** K.S.A. 58-4301, -4301(c), -4301(e), -4301(e)(2)

**REAL ESTATE CONTRACTS AVALLA V. SOUTHRIDGE PRESBYTERIAN CHURCH JOHNSON DISTRICT COURT – AFFIRMED NO. 96,118 – MARCH 2, 2007**

**FACTS:** Southridge Presbyterian Church offered to sell a residential home for $134,500. Ayalla made a written offer to purchase the home for $130,000 on April 26, 2005. The written offer was made on a residential real estate sale contract furnished by Southridge's real estate agent, Jim Henderson. Ayalla gave Henderson a check for $1,000 as earnest money and Henderson and Ayalla's mortgage broker negotiated closing costs. On April 28, 2005, Henderson orally told Ayalla's mortgage broker that Southridge had accepted the offer. The following day, Henderson orally told Ayalla personally that Southridge had accepted the offer. Henderson and Ayalla agreed to meet May 1, 2005, to complete the paper work. Before the meeting, Henderson called Ayalla and told her that Southridge had accepted a higher offer of $142,500 from the Hamiltons. Ayalla filed suit for an injunction and damages. The trial court granted summary judgment to Southridge finding that no enforceable contract under the statute of frauds existed between the parties for the sale of the property.

**ISSUES:** Was there an enforceable agreement between Ayalla and Southridge based on Henderson's oral acceptance of her written offer? Was the sale contract, which was signed by Henderson, sufficient to satisfy the statute of frauds?

**HELD:** Court held the material facts were not in dispute. Court stated the trial court correctly explained to Ayalla that Henderson's signature on the sale contract did not satisfy the signature requirement of the statute of frauds. Henderson's signature was not meant
to be an acceptance of Ayalla’s offer but simply a certification that the form was an approved real estate contract form. Court held Ayalla’s fraud claim was not properly plead and she did not rely on any misrepresentation. Court stated that even if Ayalla was attempting to assert a claim for equitable relief, the doctrines of promissory estoppel and part performance were not applicable. Court denied Southridge’s claim for costs and attorney fees finding there was no evidence that Ayalla pursued this appeal frivolously or for the purposes of harassment or delay.

STATUTES: K.S.A. 33-106; K.S.A. 50-626(a); K.S.A. 60-209(b)

REAL ESTATE AND INSPECTIONS
BRENNAN ET AL. V. KUNZLE ET AL.

FACTS: Christian and Janet Kunzle purchased a house from Derek and Catherine Brennan for approximately $1 million. The Kunzle partially financed the house by taking out a mortgage for $435,000 with the Brennans and signing a promissory note. The Brennans sued the Kunzle after the Kunzle defaulted on their mortgage and promissory note. The Kunzle counterclaimed against the Brennans for fraud, misrepresentation, negligence, and breach of implied warranties. The central issue involved a failure by the Brennans to disclose a professional inspection report to the Kunzle. This report revealed potential latent defects in the house. The Kunzle argue the failure to disclose the report constituted fraud by silence. The Brennans contend that the Kunzle would have discovered the hidden defects if they had inspected for water leaks before the sale. Although acknowledging that the Kunzle had conducted a number of inspections of the house, the trial court implicitly determined that had the Kunzle hired professional inspectors specifically for water leak issues, they would have learned of the defects. The trial court granted summary judgment for the Brennans for $433,924.24 plus interest, but denied the Brennans attorney fees to defend the counterclaims.

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

HELD: Court reversed the district court’s granting of summary judgment because the question of Kunzle’s fraud by silence counterclaim presented a genuine issue of material fact regarding the reasonableness of the Kunzle inspections. Court affirmed the granting of summary judgment in favor of the Brennans on the claims of fraudulent and negligent misrepresentation, negligence and breach of implied warranties. Court also held there was no error by the district court in granting judgment on the Brennans’ mortgage foreclosure action because the Kunzle’s counterclaims did not provide a defense to and would not have affected the mortgage foreclosure. Court held the promissory note and mortgage allowed the Brennans to recover attorney fees incurred in enforcing the promissory note and in foreclosing the mortgage but do not allow for attorney fees in defending the counterclaims asserted by the Kunzle. Court reversed the award of interest and remanded the case for the trial court to recalculate interest at the fixed rate of 7.93 percent.

STATUTES: K.S.A. 2006 Supp. 16-207 and K.S.A. 60-213(j), -242(b)

TRIALS - JURIES
ATWELL V. IMSEIS

FACTS: Atwell filed lawsuit seeking damages from Dr. Imseis as negligent in prescribing a particular antibiotic and not closely monitoring Atwell. Jury verdict for Imseis. Atwell appealed, claiming (1) abuse of discretion by district’s refusal to use of jury questionnaire, (2) all of Imseis’ patients should have been automatically removed from the panel, and (3) trial court asked potential jurors unduly leading questions and should have avoided asking rehabilitative questions.

 ISSUES: (1) Jury questionnaire, (2) removal of patients from panel, and (3) examination of prospective jurors

HELD: No Kansas case addresses use or denial of use of a jury questionnaire in a civil trial. Under facts, most questions on proposed questionnaire were asked during voir dire, and no time limit was placed on voice dire. Failure to use questionnaire did not negatively impact composition of jury.

Kansas has not addressed whether a patient of a party should be removed from jury panel for cause. When doctor-patient relationship exists between one of the parties to litigation and a prospective juror, such prospective juror is not disqualified per se, but special care should be taken by trial judge to ascertain the prospective juror is free from bias or prejudice.

Under facts, trial court showed no bias and was not coercive or improper in its questioning of prospective jurors.

STATUTE: K.S.A. 60-247(b)

WORKERS' COMPENSATION
EDWARDS V. THE BOEING COMPANY ET AL.
WORKERS’ COMPENSATION BOARD – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 95,566 – MARCH 30, 2007

FACTS: Edwards sustained a compensable injury to his back in 1998 while working at Boeing in the tooling department. He was given accommodated jobs in the department and received an award of 15 percent general body disability. In 2001, Edwards sustained an injury to his neck while working in the tooling department. He was laid off for eight months and received additional restrictions. Boeing said it did not have work within the restrictions and Edwards asked for the additional restrictions to be lifted. When Edwards returned to work in late 2003, there had been layoffs in the tooling department and Edwards moved to the modification department. Edwards was awarded 20 percent impairment to the body as a whole for the neck injury. Edwards worked in the modification department for seven months and then was given a medical layoff because Boeing did not have any jobs that would accommodate his medical restrictions resulting from the low back injury. Edwards requested review and modification of his awards. The administrative law judge found Edwards made a good faith effort to locate employment and his actual wage loss of 100 percent should be used in calculating the award resulting in a work disability of 50 percent. The board agreed that Edwards’ injuries contributed to his wage loss and his reduced capacity to work and he suffered a 100 percent wage loss in both the back and neck claims.

ISSUE: Workers’ compensation

HELD: Court stated the board’s modification of the two underlying awards is not supported by the evidence. Edwards was laid off from work because he could no longer be provided accommodation resulting from his first injury. There was no finding by the Board that there had been any change in claimant’s physical condition after the second award and his return to employment without further accommodation. Court held Edwards’ wage loss was solely attributable to his first injury.

STATUTE: K.S.A. 44-510a, -510e, -528

THE JOURNAL OF THE KANSAS BAR ASSOCIATION
FACTS: Smith was injured in work-related accidents at the Rossville Valley Manor on April 20, 2001, June 14, 2001, and Jan. 3, 2002. After the first injury she returned to light duty. After the second injury, her pain temporarily increased but returned to the level after the first injury. Several months after her second injury she was scheduled for surgery, but it was postponed and later canceled. Smith filed for workers’ compensation benefits for the first and second injuries, but she continued to work at the manor on light duty. On Jan. 1, 2002, the Manor changed insurance coverage from Legion Insurance to Liberty Mutual. After the third accident on Jan. 3, 2002, Smith was placed on indefinite medical leave and she filed a claim for the third accident. The administrative law judge and board ordered Manor to pay Smith’s workers’ compensation award and that Legion was the responsible insurance carrier.

ISSUES: (1) Workers’ compensation and (2) last injurious exposure

HELD: Court applied the last injurious exposure rule and held that where substantial competent evidence supports the board’s conclusion that Smith’s final work-related injury caused only a temporary aggravation of the claimant’s condition and did not affect her permanent work disability, the insurance carrier at the time of the primary work-related injury was responsible for payment of the claimant’s award.

STATUTES: None

FACTS: Mendoza worked for DCS Sanitation (DCS) at the National Beef Packing Co. in Liberal. He did not receive his paycheck at the packing plant, but picked it up at the DCS office. Mendoza drove to DCS to pick up his paycheck. While assisting the lady actually delivering the paychecks to DCS, he fell and broke his right ankle. The administrative law judge ruled Mendoza’s injury arose out of and in the course of his employment and ordered DCS to pay Mendoza’s medical bills. A majority of the Workers’ Compensation Board denied benefits finding that although DCS directed its employees to come to its business office to pick up their paychecks and that this benefited DCS, it denied benefits because Mendoza’s travel did not comprise a business mission or errand. Two board members dissented.

ISSUES: (1) Workers’ compensation and (2) going and coming rule

HELD: Court held the business of employment in this state necessarily includes the payment of wages to employees. Where the employer has directed employees to pick up paychecks at a location separate and apart from the workplace, the employee’s trip to do so is a business mission or work-related errand that is necessary to the employment. An employee’s trip to the employer’s off-worksit location for this purpose falls squarely within the work-related errand exception to the going and coming rule, and an injury sustained during such trip is fully compensable under the Workers’ Compensation Act.

STATUTES: K.S.A. 2006 Supp. 44-314, -501(a), -508(f), -556(a) and K.S.A. 77-601, -621(c)(7)

FACTS: Beck convicted for operating vehicle with no proof of liability insurance in violation of K.S.A. 40-3104. On appeal, Beck claimed there was insufficient evidence that he knowingly drove an uninsured motor vehicle to convict under K.S.A. 40-3104(c).

ISSUE: Proof of liability insurance

HELD: K.S.A. 40-3104 is analyzed and applied. Facts in case only support a charge under K.S.A. 60-4104(d), and sufficient evidence supports Beck’s conviction under that section. No merit to Beck’s claim that he was charged and convicted under K.S.A. 40-3104(c).

STATUTE: K.S.A. 40-3104 sections (b), (c) and (c)

STATE V. BUCKNER
WASHINGTON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

FACTS: During a traffic stop of Buckner’s common law ex-wife, officers saw a backpack in the vehicle containing a bag full of white powdery substance. She claimed it was laundry detergent and she was going to visit Buckner. Officer let her go, but followed her to the residence of Robert Lechwar, where they encountered Buckner in the yard. After a short pretextual conversation with Buckner, the officers left the scene and obtained a search warrant. Upon execution of the warrant, officers found a clandestine methamphetamine lab. Lechwar said that Buckner was making meth two-to-three times per week. At trial, no unanimity instruction was requested or given, and there was no objection to the instruction defining attempt to manufacture meth, which omitted the definition of “overt act.” The jury convicted Buckner of the alternative charge of attempt to manufacture meth and other related charges.

ISSUES: (1) Jury instructions, (2) unanimity, and (3) multiple acts

HELD: Court reversed and remanded for new trial. Court stated the state conceded this was a multiple acts case. Court stated that Buckner’s defense strategy was not a “general denial” of the charges, but rather as separate defenses to each occasion when he allegedly participated in the meth production. Court concluded this was a classic multiple acts case and Buckner was convicted by less than unanimous jury. The district court’s failure to give the unanimity instruction was clear error.


STATE V. FEWELL
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 95041 – MARCH 2, 2007

FACTS: Trooper stopped car and smelled marijuana. Driver (Fewell) stepped out of car as trooper requested and admitted that passenger had smoked marijuana. Trooper searched passenger and discovered marijuana and cash. Trooper then returned to Fewell and arrested Fewell based on evidence obtained in patdown search. District court denied motion to suppress this evidence, and jury convicted Fewell of possession of drugs and drug paraphernalia, criminal use of weapons, and speeding. Fewell appealed, claiming trooper lacked probable cause for search, and that prosecutorial misconduct and cumulative error denied a fair trial. Fewell also claimed Apprendi error in prior convictions being included in criminal history score for sentencing.

ISSUES: (1) Probable cause for search, (2) prosecutorial misconduct, and (3) sentencing
HELD: District court properly denied motion to suppress. Under facts, where officer smells strong odor of burnt marijuana coming from inside of stopped auto; the driver admitted that his passenger had smoked marijuana in the car; and marijuana was found in possession of passenger, the officer had probable cause to search driver for possession of drugs. These facts, coupled with exigencies of being alone with two suspects and real possibility of loss of evidence, support the warrantless search. Holding in State v. MacDonald, 253 Kan. 320 (1993), is extended to facts of this case.

No showing that prosecutor violated order in limine precluding mention of specific evidence, or that questioning about redacted video evidence substantially prejudiced the defendant. No error to support cumulative error claim.

Apprendi claim is defeated by Kansas Supreme Court precedent in State v. Ivory, 273 Kan. 44 (2002).

DISSENT (Green, J.): Issue of probable cause to search driver of car was extremely close and difficult in this case, and should have been resolved against state as not satisfying substantial burden of proving search was lawful. Disagrees that MacDonald or State v. Thomas, 28 Kan. App. 2d 70 (2001), are controlling or instructive. Kansas Supreme Court has not yet held that mere odor of marijuana emanating from a vehicle supports probable cause to search occupants of the vehicle.

STATUTES: None

STATE V. HESS
SEDGWICK DISTRICT COURT – REVERSED
NO. 94,318 – NOVEMBER 17, 2006
PUBLISHED VERSION FILED MARCH 8, 2007

FACTS: Officer stopped car that was hugging the line, smelled marijuana, and found marijuana bricks during search of trunk. Hess filed motion to suppress that evidence, claiming traffic stop was illegal. Hess appealed district court’s denial of that motion.

ISSUE: Legality of traffic stop

HELD: District court erred in finding initial traffic stop was lawful. Stop was based on suspicion that driver of car was impaired rather than for traffic infraction, but under facts, officer’s observation that vehicle was proceeding in a straight line close to the lane divider markings did not provide an objectively reasonable and particularized suspicion that driver was operating vehicle while impaired. Review of videotape in officer’s case is discussed.

STATUTES: None

STATE V. LANDIS
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED
NO. 95,466 – MARCH 16, 2007

FACTS: Landis convicted on drug charges based on evidence discovered upon execution of search warrant at Landis’ residence. The affidavit submitted for the warrant reported statements by Melroy who had participated in the drug activity. In motion to suppress, Landis claimed there was no probable cause to issue the warrant because there was no information to support Melroy’s veracity, and material information about Melroy was deliberately omitted from the affidavit. Trial court found the officer deliberately withheld material information about Melroy’s initial inconsistent statements, but denied motion to suppress finding a warrant would have been issued even if that information had been provided. Landis appealed.

ISSUE: Probable cause for issuance of search warrant

HELD: Reversed and remanded with directions to suppress evidence obtained from the search. Under totality of circumstances set forth in the affidavit, issuing magistrate did not have a substantial basis for concluding there was probable cause to search Landis’ residence. Substantial competent evidence supports trial court’s finding of deliberate omission. Search warrant affidavit was based solely on hearsay statements from Melroy who was a participant in the crime under investigation, and independent police investigation only to verify the location of Landis’ residence was inadequate to establish that Melroy was a reliable source.

STATUTE: K.S.A. 65-4151, -4152, -4160, -4163(b), 79-5208

STATE V. POULTON
RENO DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 95,353 – MARCH 2, 2007

FACTS: In criminal cases consolidated after motions to suppress evidence were denied in each case, Poulton was convicted on 14 drug charges and one count of child endangerment. Convictions based on evidence obtained in searches of Poulton’s home in November and December 2003. Poulton appealed, claiming district court erred in finding that officers had implied consent to enter home in November 2003 to find third-party parole violator, and that evidence obtained in December search should have been suppressed as fruit of poisonous tree from illegal November search. Poulton also claimed trial court failed to consider Poulton’s ability to reimburse Board of Indigents’ Defense Services (BIDS). Issues:

1. November 2003 search
2. December 2003 search
3. Assessment of BIDS fees

HELD: No Kansas precedent holding that consent to enter a house may be implied. Fact that Poulton acquiesced or impliedly consented in officers’ entry does not meet standard for voluntary consent. Moreover, even if there had been consent, officers exceeded scope of search to which defendant consented.

Argument that evidence obtained during December 2003 search of home should have been suppressed as fruit of poisonous tree due to the illegal November 2003 search was not raised in Poulton’s motion to suppress evidence in that search, and is not properly before the appellate court.


STATE V. PREBBLE
MCPHERSON DISTRICT COURT
REVERSED AND REMANDED
NO. 95,596 – MARCH 2, 2007

FACTS: Prebble held in McPherson County jail 231 days pending disposition of McPherson felony charges. At sentencing, district court denied jail time credit because Prebble was subject to outstanding arrest warrant issued by Rice County, which had been lodged as a detainer.

ISSUE: Jail time credit

HELD: District court’s denial of jail time credit simply because Prebble had pending Rice County detainer at time of sentencing is reversed. Prebble entitled to jail time credit for time held in McPherson County jail pending disposition of his case in that district, but is not entitled to credit for this time in any other case. Four cases applying K.S.A. 21-4614 are examined.

STATUTE: K.S.A. 2006 21-4614

STATE V. SCOVILLE
DICKINSON DISTRICT COURT – AFFIRMED
NO. 96,405 – MARCH 9, 2007

FACTS: Scoville filed no appeal from downward departure sentence imposed June 2003, but in February 2004 filed motion to correct illegal sentence. District court’s denial of that motion was affirmed on appeal. Scoville then filed motion to file a direct appeal out of time. District court denied that motion. Scoville appealed.
STATE V. SHAW
LOGAN DISTRICT COURT – AFFIRMED
NO. 95-936 – MARCH 30, 2007

FACTS: Shaw was arrested for DUI. He blew a 0.12 in the Intoxilyzer 5000. The officer realized he had not given Shaw either the oral or written implied consent advisories. The officer gave the warnings and then Shaw blew a 0.109 on his second test. Shaw was charged with felony DUI as a third-time offender. After the preliminary hearing, Shaw filed a motion to dismiss the complaint arguing the state failed to present sufficient evidence of the two prior DUIs or alternatively a motion to suppress both tests based on the irregularities in the consent warnings. He argues the preliminary breath test was an unconstitutional seizure and the results of the later breath test were inadmissible as “fruit of the poisonous tree.” Trial court denied the motion to dismiss and/or motion to suppress. Shaw agreed to a bench trial on stipulated facts and he was found guilty.

ISSUES: (1) Felony DUI, (2) proof of prior offenses, and (3) motion to suppress

HELD: Court found the state presented Shaw’s certified driving record at the preliminary hearing that indicated Shaw had two prior DUI convictions. Court held the state presented some evidence of Shaw’s prior DUI convictions and the evidence was sufficient for purposes of the preliminary hearing to establish probable cause that Shaw had committed a felony. Court held the officer administering the second test were not the fruit of the poisonous tree.” Trial court denied the motion to dismiss and/or motion to suppress. Shaw agreed to a bench trial on stipulated facts and he was found guilty.

STATUTES: K.S.A. 8-1001(f), (h); K.S.A. 2006 Supp. 8-1567(f), (m)(1); and K.S.A. 2006 Supp. 22-2902(3)

STATE V. WILLIAMS
SEDGWICK DISTRICT COURT – APPEAL DISMISSED
NO. 95-155 – MARCH 16, 2007

FACTS: Williams convicted on guilty plea to various criminal charges. District court denied Williams’ motion for a duration and dispositional downward departure sentence, and imposed sentence within the presumptive guideline range. Williams appealed, challenging the sufficiency of the factual basis for his plea, and claiming the trial court abused discretion in denying the departure motion.

ISSUE: Appellate jurisdiction

HELD: Proper procedure for challenging sufficiency of the factual basis for a plea is a district court motion to withdraw the plea. Pursuant to State v. Thorpe, 36 Kan. App. 2d 475 (2006), appellate court lacks jurisdiction to review Williams’ guilty plea because he did not move to withdraw his plea.

Sentencing court followed plea agreement and imposed a presumptive sentence, thus appellate court lacks jurisdiction to review the denial of Williams’ departure motion.

STATUTES: K.S.A. 2006 Supp. 21-3413(a)(1), -3701(a)(1), -3701(b)(4), 22-3210(a)(4), -3210(d), -3602(a), 65-4160(a); and K.S.A. 21-3701(a)(1), -3701(b)(2), -3715(a), -3715(c), -4721(c)

STATE V. ZECKSER
WABAUNSEE DISTRICT COURT – AFFIRMED
NO. 95,566 – MARCH 9, 2007

FACTS: Zeckser appealed conviction for speeding, challenging authority of city officer who stopped him and issued the speeding citation because infraction occurred outside city limits, officer was not in fresh pursuit, and county had not asked for assistance. District court found the stop and citation were authorized because the officer was also a deputy county sheriff pursuant to K.S.A. 19-805(a), and the offense occurred in that county.

ISSUE: Jurisdiction of city law enforcement officer

HELD: K.S.A. 22-2401a is interpreted and applied. The limited jurisdiction afforded a city law enforcement officer may be expanded to the entire county in which the city is located under K.S.A. 2006 Supp. 22-2401a when that officer has been deputized as a deputy sheriff of the county. Zeckser’s conviction is affirmed.

STATUTES: K.S.A. 2006 22-2401a subsections (1), (2), (2)(b), and (5); K.S.A. 19-805(a), 22-2401a(1)(a), -2401a(4)

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The Kansas CLE Commission 2007-2008 Registration and Annual CLE Remittance Form was mailed to your address of record in late April. This is the only notice you will receive. If you have misplaced your copy, you may contact our office for another form. The registration form must be returned with payment by July 1 for your CLE record to reflect compliance. Credit cards, debit cards, and EFT cannot be accepted. Please note that incomplete forms will be returned and may result in a delay of processing your annual registration. Fees received in the CLE Commission Office on or after Aug. 1 of the year in which due shall be accompanied by a $50 late payment fee.

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IMPORTANT – DON’T MISS – DATES:

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Last day to file 2006-07 hours.
All paperwork must be received in our office by 5 p.m. to avoid late filing penalties.

Fax and e-mail submissions will not be accepted.
THE DIRECTOR OF WORKERS’ COMPENSATION for the State of Kansas is accepting applications for one membership on the Workers’ Compensation Board for the term beginning Oct. 3, 2007, and ending Oct. 8, 2011, pursuant K.S.A. 44-555c. In order to be considered by the nominating committee, each applicant shall be an attorney regularly admitted to practice law in Kansas for a period of at least seven (7) years and shall have engaged in the active practice of law during such period as a lawyer, judge of a court of record or any court in Kansas, or a full-time teacher of law in an accredited law school, or any combination of such types of practice. Excellent writing skills are required. Please send your application and/or resume by July 1, 2007, addressed to: Paula S. Greathouse, Director, Division of Workers’ Compensation, 800 S.W. Jackson, Suite 600, Topeka, KS 66612-1227.

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

Look for more information in your June edition of The Journal!
# CLE Docket

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<td><strong>Brown Bag Ethics Video Replay</strong>&lt;br&gt;(morning and afternoon)&lt;br&gt;Topeka</td>
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<td><strong>Brown Bag Ethics Video Replay</strong>&lt;br&gt;(morning)&lt;br&gt;Multiple sites: Dodge City, Overland Park, Topeka, and Wichita</td>
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<td><strong>Keeping the “Gold” in the Golden Years - Elder Law Video Replay</strong>&lt;br&gt;(afternoon)&lt;br&gt;3 sites: Overland Park, Topeka, and Wichita</td>
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