New Horizons: Kansas Adopts Ethics 2000 Changes
"Join Me at the Bar" T-Shirt

Each shirt is royal blue featuring the KBA logo in white on the front left breast and "Join Me at the Bar" on the back. Show your pride in the KBA as well as your sense of humor by wearing your Bar shirt. Available in heavyweight short sleeve and long sleeve T-shirts and heavyweight sweatshirt.

Padfolio

This Kansas Bar Association standard notepad portfolio is 10" x 13.5" with a gold 2.5" x 3" KBA logo on the front. The inside features a solar-powered calculator, writing pen and holder, file pocket, and business card holder. It also holds a pad of letter size paper (included).

Travel Mug

This 16-oz. blue and black travel mug prominently displays a white KBA logo. Mug features include double wall insulation, snug-fitting drink-through removable lid, and a base that fits most car cupholders.

Water Bottle

This 22-oz. (3" x 9") clear blue polycarbonate bottle with black lid and white KBA logo is perfect for all your extreme adventures. Bottle features include side ounce chart; pop-up, no spill, drink-through lid; molded grip that fits most car cupholders; and a clip for easy carrying.

Mouse Pad

This high-quality Kansas Bar Association mouse pad is optimized to enhance the performance of optical and track-ball computer mice. The 9" x 8" blue mouse pad features the KBA logo and contact information in white.

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Our Mission:
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.

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The Journal of the Kansas Bar Association
June 2007 • Volume 76 • No. 6

Cover photo by David Gilham, KBA staff

The Kansas Bar Association and the members of the Board of Editors assume no responsibility for any opinion or statement of fact in the substantive legal articles published in The Journal of the Kansas Bar Association.

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Will they sing “Somewhere Over the Rainbow” at your funeral? Only if you are an optimist. Are you so optimistic that at age 80 you would return to your hometown from a successful career; build a two-story library with a complete basement on the side of your house and fill it with books, maps, paintings, and artifacts from Kansas history; and be completely confident that you would live to enjoy it to the fullest? Or, would you wonder whether your 80-year-old legs would allow you to enjoy the basement, main floor, and second floor? Would you wonder if your friends would think that you were crazy? If you would go ahead and build this library and then invite all of your friends, their friends, and their children to your library and proudly show them the framed letter from President Kennedy, then you are as optimistic as Justice Harold Herd.

Justice Herd lived a remarkable life. During World War II, he served in the Pacific Theater as a naval officer on the USS Rio Grande and the USS Cache. Having risked his life in one theater of battle, he entered an even more dangerous one: politics. He was elected to the state senate and rose to become Senate Minority Leader from 1969 to 1973.

Are you optimistic enough to think that you could raise a family of six children? Are you optimistic enough to think that you could do it and have a full-time law practice and political career at the same time? Are you optimistic enough to think that the Republicans of Coldwater would elect you, a Democrat, to the state senate? If so, then you are as optimistic as Justice Harold Herd.

Justice Herd’s political career ended and his judicial career began in 1979, when he was appointed to the Kansas Supreme Court. He loved everything about the job. He loved the work, the people, and the lawyers. As his judicial career ended, his academic career began when he became a distinguished jurist in residence at the Washburn University School of Law teaching constitutional history. Justice Herd continued to teach at Washburn after his retirement from the court in 1993 until 2002, at which time he returned to Coldwater to build the largest private library in Comanche County.

I last saw Justice Herd when the Kansas Court of Appeals sat in Dodge City. There was a reception for the court. Justice Herd was one of the first to arrive and one of the last to leave. As always, he was immaculately dressed and ready to discuss any topic.

In short, Justice Herd lived a very full life indeed.

On the 23rd day of April, 2007, Justice Herd passed away. His funeral was a social event. It took place under beautiful skies. There were full military rights and, appropriately, there were both protestors and the Patriot Guard. Justice Herd would have approved. The citizens of Coldwater came out and supported their favorite son. At the funeral, the minister told us that one of Justice Herd’s favorite songs was “Somewhere Over the Rainbow.” A great Kansas song to remember a great Kansan.

Are you so optimistic that you believe?

It has been a privilege to serve you as president of the Kansas Bar Association. I have certainly enjoyed my term and look forward to seeing all of you “Somewhere Over the Rainbow.”

David J. Rebein can be reached by e-mail at drebein@rebeinbangerter.com or by phone at (620) 227-8126.
**My Home Town — Our Home State**

By Eric G. Kraft, Duggan, Shadwick, Doerr & Kurlbaum P.C., Overland Park

On May 4, 2007, beginning at about 9:55 p.m. and continuing for another 20 minutes, my world and the lives of many of our fellow Kansans changed forever. At that time, possibly the largest and most destructive tornado ever recorded in Kansas zeroed in on Greensburg and reduced approximately 90 percent of that town to piles of sticks. To give some reference to the enormity of this tornado, the Kansas State Historical Society currently classifies the Topeka tornado of June 8, 1966, as Kansas’ most destructive tornado. The Topeka tornado was nearly six blocks wide and left hundreds of people homeless in our capital city. The Greensburg tornado was, by some estimates, 1.7 miles wide and left an entire city of about 1,500 people without a home. Time will tell which storm was more destructive, though it is without doubt that the 31-year span between these two impressive storms seems far too recent.

The Greensburg tornado was later classified as an F5 storm — a reference to the Fujita scale of measuring the destructive power of a tornado. One site suggests “The F5 storm produces winds of 261-318 mph and are called ‘incredible tornadoes.’ They lift and blow strong houses, debark trees, cause car-sized objects to fly through the air, and cause incredible damage and phenomena to occur. F4 and F5 tornadoes are called violent and account for a mere one percent of all tornadoes measured from 1950 to 1994. Very few F5 tornadoes occur.” I personally saw the effects of this storm and can attest that this definition holds true. You see, Greensburg is my home town.

My parents, and countless friends and acquaintances, still resided in Greensburg at the time of the storm. Without exception, no one I know in Greensburg has a place to live. My parent’s home, the home in which I grew up, is gone. But we were lucky — Greensburg as a whole was lucky. Residents were warned 20 minutes ahead of the twister, giving precious time to seek cover in basements. Though 10 lives were lost, one being an officer nobly trying to save lives, many more lives were most certainly spared by this advanced warning.

In response to this terrible tragedy, Kansans have rallied around this small town that is so typical of its makeup. Donations have poured into relief agencies from across America. Numerous companies, sports figures, television networks, individuals, and others too numerous to count have offered their help in the form of money, time, donations, and other assistance. Nearly everyone with whom I shared the news of my hometown offered the same thing — “let me know what I can do to help.” You may ask, however, what is it that I, a lawyer, can do to help in such a tragedy? The answer, as you may have guessed, lies in your skills as a lawyer, a listener, a mediator, and a professional.

Within two weeks of the storm, the KBA Young Lawyers Section — with help from the ABA Young Lawyers Division, the KBA Board of Governors, the Kansas Legal Services network, and the KBA staff — set up a hotline to offer the victims of the Greensburg tornado whatever legal assistance they may need, free of charge. As you can imagine, the displacement of so many and the destruction of so much creates legal problems on a scale that we cannot truly imagine. Residents of Greensburg are now faced with real legal issues, which they did not have on May 3. These issues include dealing with leases that can no longer be honored, paying employees, interpreting insurance contracts, finding estate plans, and securing continuances in court. These needs are now being met by disaster legal hotlines and also physically at the shelters that provide a clearinghouse of services for those affected.

Lawyers from all over our state have jumped at the chance to help out their fellow Kansans by volunteering to field legal questions by telephone or to staff a table at the FEMA shelter located in Haviland. Several of you have expressed the desire to mobilize and dig out the courthouse and local attorneys’ offices. This immediate response of assistance reminds me why I love living in Kansas — we each have our neighbor’s best interests at heart, whether that neighbor is next door or 500 miles away.

While gratifying — to ourselves and to those victimized by the wrath of this storm — this first response is also the easiest. It is exceedingly simple to see the need of a town that has been destroyed and its citizens displaced. Bandages, shovels, and shoulders are all needed in these first weeks, and Kansas has certainly delivered. However, the true test of this small town will come in the months ahead, as the town struggles with its very existence. By then, the spotlight may have dimmed, interest may have waned, and the town may have been left twisting in the very wind that caused its destruction. It should be our goal to see that this doesn’t occur to our neighbors.

Your help is and will be needed in the coming months. Volunteers will be needed to assist the rebuilding of this community. Problems that are uniquely suited to your talents as an attorney will not cease to exist once the remains of houses have been removed and the town’s landscape is laid bare. Citizens of Greensburg need your help, and the help of your neighbors and friends, if they are to re-build a community of which we can all be proud as Kansans.

For information on how you can help, see Page 6.

Eric G. Kraft is an associate with the law firm of Duggan, Shadwick, Doerr & Kurlbaum P.C. in Overland Park. He can be reached at ekraft@kc-dsdlaw.com or at (913) 498-3536.

**FOOTNOTE**


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**THE JOURNAL OF THE KANSAS BAR ASSOCIATION**

**JUNE 2007 – 5**
“When Tragedy Strikes, the World Suddenly Becomes Very Small”
The KBF and KBA Reach out to Greensburg Area Residents

We’ve seen the horrifying pictures of the F5 tornado that ripped apart the 121-year-old city of Greensburg on May 4. We’ve watched the horrific videos that show the magnitude of the destruction to the homes, schools, and businesses. And we’ve heard the anguished stories from those whose lives have been forever changed by an event that destroyed the foundation — but not the faith — of an entire community.

Sadly, along with the complete devastation of the community, 10 people also died during this storm; however, more than 1,500 lives were also saved by the city’s tornado sirens and the advanced “Tornado Emergency” warnings issued by the National Weather Service. When tragedy strikes, the world suddenly becomes very small. KBA board member Eric Kraft experienced first-hand the devastation to his hometown (see Page 5), where his parents lived. KBA Legislative Counsel Jim Clark’s father and brother were also Greensburg residents; both escaped with minor abrasions but, like everyone else, their homes were destroyed. Miraculously the family business, a print shop on Main Street, still stands; however, it is not known how long it will be before the impact of the Greensburg tornado brings down the bricks and mortar of that building too.

Many agencies were quickly in place to assist the victims, including the Federal Emergency Management Agency (FEMA), the Red Cross, United Way, and the Salvation Army. People from around the world can donate money and supplies to each of these organizations, which help with food, shelter, basic medical needs, and clothing. But, in the very near future, the citizens of Greensburg are going to need another form of assistance — assistance from the legal community.

What we are doing to assist, and how you can help

In response to this recent disaster, the Kansas Bar Association and its philanthropic arm, the Kansas Bar Foundation, have developed several important public service initiatives to help local residents in need.

First, storm victims who have been affected by the tornadoes and who may need legal assistance should call the KBA’s Lawyer Referral Service at (800) 928-3111 between 8 a.m. and 5 p.m. (CDST), Monday through Friday. Callers should identify they are seeking storm-related legal pro bono representation. Assistance is also available for individuals in several surrounding counties.

Second, the KBA is coordinating with FEMA the opportunity to establish a presence in the immediate area to provide pro bono attorneys for in-person consultations. As of May 21, the KBA has a booth with attorneys on site at the FEMA Disaster Recovery Center located at Barclay College Gym in Haviland.

Third, the KBF is collecting financial contributions that will be specifically earmarked for the court system and law-related relief efforts in the Greensburg area. Donations can be made online at www.ksbar.org/greensburg or by calling the KBF at (785) 234-5696.

“We have all been touched in some way by the disaster in the Greensburg area, and we are looking to help,” said KBF President Sally D. Pokorny, Lawrence. “Donations that are made to the Bar Foundation will allow us to assist the attorneys, court system, and citizens of Greensburg as they cope with the legal issues arising from such a disaster.”

“My thoughts and prayers go out to all of the families affected by the Greensburg disaster,” said KBA President David J. Rebein, Dodge City. “The heroism and pioneer spirit of these courageous people will never cease to amaze me.”

The KBA and KBF would like to thank Kansas Legal Services Inc. and the Kansas Trial Lawyers Association for their assistance with the relief efforts.

For more information, please contact KBF/KBA Executive Director Jeffrey Alderman at (785) 234-5696 or via e-mail at info@ksbar.org.
Welcome Spring 2007 Admittees to the Kansas Bar

Michael Elias Amash
Heather Lynn Ansley
Kelley Ann Appleyard
Shawn Irvin Atkins
Jane Alison Aucter
Emmanuel Njok Ayuk
Jason Corey Bache
Jason Drew Bahnsen
Robert Lea Bailes Jr.
Patrick Ronald Baird
Jennifer Lin Bany
Katherine Lindsay Barber
Tiffany Elizabeth Barman
Carrie Ann Gohn Barney
Jack Matthew Beal Jr.
Rebecca Banks Beal
Stefanie Michele Benson
Jessica Marie Bernard
Jacquelyn Pometto Bernhardt
Katie Marie Black
John Arthur Boyd
Jared Orman Brooner
James Matthew Brun
Suzanne Renea Bruss
Brendan James Burke
Brett Tyson Burmeister
Kenneth Milton Campfield
Adam Nicholas Charlsen
Carol Ann Cleaver
Brian Alan Coon
Brandon Lee Corl
Kristi Marie Cott
Stephen Cott
James Joseph Cronin
Elizabeth ‘Taer Cundiff
Michael Paul Cutler
Amanda Rae Dalsing
Gregory Stephen Davey
Michael Vincent DiPasquale
Ethan Brock Domke
John Leonard Domoney
Lauren Ferris Dowling
Thomas Robert Dowling
Erica Anne Driskell
Sarah England Duncan
Matthew Michael Dwyer
Allison Louise Eblen
Alicia Anne Edelen
Kelly Tauscher Feinster
James William Fletcher Jr.
Alison Michelle Schmidt Flores
Sheri Lynne French
Wayne Leroy French
Joletta Marie Friesen
Dione Christopher Greene

Cara Marie Greve
Mary Jane Groff
Bolko Marek Hamerski
Charles Jason Hannagan
Desarai Gayle Harrah
Jeremiah Duncan Hayes
Emily Walz Hess
Daniel Vincent Hiatt Jr.
Timothy Brandon Hoge
Christopher Aaron Holzman
Jeremy Morgan Houck
Ryan Carleton Hudson
William Fahy Hurst IV
Jacob Gordon Jackson
Katherine Anne James
Keitha Monet Johnson
Michael James Judy
Bret Robert Kassen
Angela Maria Bergmann Kassube
Amy Lynn Kearney
Michaiah Lynn Kinzel
Elizabeth Anne Kruse
Luanne Carol Lees
Jespal Singh Lotay
John Patrick Lynch
Curtis Joseph Mahoney
James Patrick Maloney
Ryan Michael Manies
Rebecca Mann
Katie Marie Many
Ali Nicole Marchant
Melissa Suone Marker
Anna Elizabeth McDowell
John Bernard McEntee Jr.
Sean Michael McGivern
John Paul McGurk
Kevin James McManus
Duncan William McQueen
Matthew Thomas Memmert
Corey James Mertes
Bryan Edward Meyer
Seth Daniel Meyer
Suneetra Nyree Mickle
Darya Vladimirovna Mikhno
Bethany Renee Miller
LeAnn Elizabeth Miller
Jonathan Ryan Moodie
Stephen James Moore
Jamie Lynn Morningstar
Brandi Morris
Sharon June Murray-Roberts
Brianne Nicole Niemann
Alexia Leigh Norris
Matthew John Olson
Mindy Joanna Olson

James Edward Orth Jr.
Megan Ann Palmer
Mandee Rowen Pingel
Eric Scott Playter
Jamie Michelle Porterfield
Pamela Rae Putnam
Grant Steffen Rahmeyer
Melissa Ann Rauch
Benjamin Anthony Reed
Christopher Alan Reed
Aisha Reynolds
Jon-Jason Richie
Morgan Lehi Roach
Cody Garrett Robertson
Edward D. Robertson III
Anne Elizabeth Robinson
Dianne Jean Rosell
Jeffrey Dean Rowe
Sara Elizabeth Rust-Martin
Richard Abrar Samaniego
Claire Joanne Samuels
Randall Wayne Schwartz
Marty Wayne Seaton
Adrian Edward Serene
Thomas Edward Shardlow
Kathy Elizabeth Sheedy
Jaclyn Susanne Smith
Sarah Breege Steen
Timothy Daniel Steffens
Eric James Steinle
Trevor Lee Stiles
Heath Allen Stuart
Shayla Kay Taulbee
Julia Anne Taylor
Karan Manu ‘Hdadani
Sheila Marlene Thiele
Amy June Roth Tillery
Lee Matthew Timan
Michael David Townsend
David Pena Trevino
Keith Charles Volpi
Warren Paul Wade
Megan Kate Walawender
Brandon Joseph Warner
John Arthur Watts
Angela Marie Weatherford
Claudia Jo Weaver
Scott Shane Wells
Randall John Wharton
Kelli Ann Wikoif
Sophie Ann Woodworth
Sudabeh Mirsafian Wright
Travis Andrew Wymore
Kevin Mark Zeller
John Joseph Ziegelmeyer III
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— Jonathan Borinick, Borinick McKeon Sakoulas & Schanker P.C., Kansas City, Mo.

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Invites you to
join us for cocktails
and hors d’oeuvres
as we toast 50 years of
the practice of law by
William B. Pendleton
on Friday, June 29th
from four until eight
in the evening at the
American Legion Post
3408 W. 6th
Lawrence, Kansas

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jdenton@pendletonandsutton.com
Hon. Steve A. Leben will now fill the vacant position on the Kansas Court of Appeals left by newly appointed Kansas Supreme Court Justice Lee Johnson.

“Steve is not only an accomplished jurist, but a respected teacher, writer, and leader in his field,” said Gov. Kathleen Sebelius. “He has a deep understanding of the law and a commitment to fairness and justice in its application.”

Leben said he is deeply appreciative of the Kansas Supreme Court Nominating Commission and the governor for this opportunity. He looks forward to joining a group who function well and get along with each other.

“When I was interviewed by the governor’s office, they asked what I wanted to change at the court,” he said. “I said, ‘Nothing.’ I think my background is well suited for the appellate bench, but there is a lot to learn as you go through it.”

Leben’s journey into law started in high school, which is when he first knew he wanted to become a lawyer.

“Law school is something I always intended to do, even before becoming a journalism major,” Leben said. “I intended to be involved with the government in some way.”

Leben earned his bachelor’s degree in journalism with distinction from the University of Kansas in 1978. During his time at KU, he was elected study body president. Before attending law school he served as a campaign aide and then press secretary for U.S. Congressman Bob Whittaker, R-Kan. Leben earned his law degree in 1982, also from KU, where he was a member of the Order of the Coif and associate editor of the Kansas Law Review.

After law school, he was an associate with Stinson, Mag & Fizzell (now Stinson Morrison Hecker LLP) before opening a solo practice for five years in Overland Park. In 1993 Leben became a district judge in Johnson County.

Several of Leben’s more notable trials include the three-week trial in 2005 of Melinda Raisch, who was convicted of the 1982 murder of her first husband, David Harmon; and the 2006 trial of Benjamin Appleby, who was convicted of the 2002 murder of Ali Kemp at a Leawood swimming pool.

Leben said he relishes the role of a judge. “As a judge you have an obligation to get it right,” he said, “while as an attorney, you are to get the results your client wants. I prefer being a judge.”

Although the Court of Appeals is located in Topeka, Leben said he will commute from his home in Fairway. He believes the court benefits from having members who live in different cities — they can receive a variety of local newspapers and help get a better grasp of the state and its headlines.

“The more diversity of the court, the more likely you are to come up with a fair decision,” he said.

Leben is president of the American Judges Association (AJA), the largest independent judges organization in the country; has been the national editor of Court Review, a quarterly journal for judges, since 1998; and is involved with the University of Kansas School of Law as an adjunct professor of law, teaching statutory interpretation. He received the Distinguished Service Award from the National Center of State Courts in 2003, the William H. Burnett Award from the AJA in 2001, the Outstanding Service Award from the Kansas Bar Association in 2000, and the KBA’s Outstanding Young Lawyer Award in 1993.

He is a member of the Kansas, Johnson County, and American bar associations; the ABA State Administrative Law Committee and Administrative Law Section; and the ABA’s Judicial Division. Leben was editor and chapter author of the KBA’s “Practitioner’s Guide to Kansas Family Law,” published in 1997 and supplemented from 2000 through 2003. He has written numerous articles for the Journal of the Kansas Bar Association, Washburn Law Journal, Kansas Law Review, and other publications.

Throughout his career, Leben has been actively involved with the KBA, having served as a member and vice chair of the Journal Board of Editors, on the Board of Governors, and as an officer of the Administrative Law and Litigation sections. He also served as a member of the Kansas Justice Commission during its existence from 1997 to 1999, and he chaired one of its five working committees.
IOLTA Grant Spotlightson Topeka Youth Court, Heart to Heart, Kansas Legal Services, and SAFEHOME

The Kansas Bar Foundation awarded the Topeka Youth Project with $5,000 in Interest on Lawyers’ Trust Account (IOLTA) grant funding for the Topeka Youth Court. The goal of Youth Court is to assist and guide adolescents to become more responsible and productive citizens. Substantial economic costs can ensue when youth are derailed from a meaningful life path; for most young people, basic support is expected from parents or public welfare. If there is an early onset of drug use and delinquent behavior, their economic dependence may continue into their adult years, which in turn will lessen or negate their potential earnings and contribution to society as they transition into adulthood.

“We want to thank the Kansas Bar Foundation for this generous check,” said Georgianna Wong, executive director of the Topeka Youth Project. “We have very limited funds for this program; therefore, fundraising is one of my top priorities, and you have definitely helped.”

Heart to Heart, Newton, received a grant of $5,900. The money will be used to help purchase digital electronic recording equipment to document interviews with child victims; provide investigations that are done through proper protocol and training; supply an avenue for families to receive services in addressing crimes and support to the families that go through the legal system; and allow defense attorneys access to the recorded interviews of child victims.

Heart to Heart founders Lt. T. Walton of the Newton Police Department and Lori Hardin of the Newton Social Rehabilitation Service Department realized how difficult it was for children when interviews were being conducted at the police station or in squad cars, schools, or even the home where alleged abuse may have taken place. Heart to Heart provides the necessary services, resources, and compassion for children and the families who come to the center reporting abuse.

Kansas Legal Services (KLS) received an IOLTA grant for $105,450 to help maintain the availability of direct legal assistance to low-income Kansans.

“The IOLTA funds are an increasingly critical component for our programs,” said Marilyn Harp, KLS executive director. “These monies will fund legal assistance to low-income victims of domestic violence, sexual assault, and stalking as well as match existing funds for our Kansas Human Rights Commission Media tion Program.”

SAFEHOME, which began in 1980 as a grassroots response to the need for domestic violence services in Johnson County, received a $10,000 grant to help break the cycle of sexual and domestic violence and abuse.

In addition to the many services they provide, in 2005 they assisted nearly 5,000 victims of domestic violence, including more than 400 women and children at the SAFEHOME shelter, and their Community Education Program reached nearly 8,000 people.

Other IOLTA grant recipients include the Episcopal Community Service, KBA Young Lawyers’ High School Mock Trial Program, the University of Kansas School of Law VITA Program, Olathe Youth Court, Topeka Center for Peace and Justice, and KBA Law Related Education.

The KBF encourages all Kansas attorneys to “opt in” with IOLTA. For more information, please contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org.

IOLTA Honor Roll Banks

We wish to thank these Kansas banks for obtaining “Honor Roll Status” with the Kansas Bar Foundation by paying the highest rate of interest on IOLTA accounts during the past three months.

We also want to thank the attorneys who participate in our IOLTA Program. The interest earned on the IOLTA accounts supports programs providing access to the legal system for low-income Kansans, advocacy for children in need of care and victims of domestic violence, scholarships, educational materials, and teacher training for public and private schools about the role of law and lawyers in society.

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Status levels = Gold Status (2.5% and above) Silver Status (2%-2.49%) Bronze Status (1.5%-1.9%)
Almost every year for the last five years, I have traveled to Blackbob Elementary School in Olathe during the spring to make my annual contribution to the Career Day festivities. We all recognize that the practice of law can often be a grueling and mentally exasperating experience. In my subspecialty of litigation, my days are often filled with adversarial phone calls and depositions with opposing parties; hearings before trial courts, which often generate questions that are not only pointed but also difficult to respond to; and seemingly endless interruptions with a steady stream of phone calls from clients inquiring as to the status of their cases.

When I first agreed to speak with the 4th, 5th, and 6th graders at school, I embraced the experience as a way to avoid the day-to-day mental stress and fatigue that often characterizes “the practice of law.”

Instead, I found myself blindsided by rapid-fire questions, which continually cause me to embark on a soul-searching analysis of my legal career.

“Why did you decide to become a lawyer?”

“What do you like best about being a lawyer?”

“What was your favorite case that you ever worked on?”

“Why did you decide to become a lawyer?”

Over the years, I increasingly began looking forward to Career Day. Instead of viewing it as a required activity on my parental checklist in life, I began to recognize that the elementary school children had actually become my unpaid “career counselors” or “job coaches.” I have literally saved thousands of dollars in professional services, not to mention immeasurable time searching my soul, by instead focusing on each Career Day as an annual right of career renewal and self-examination.

The hard truth is that lawyer burnout has become pervasive. The most recent U.S. Census suggests that we have approximately one attorney for every 300 persons in the United States. Our law schools continue to be filled with bright-eyed, eager law students anxious to embark on their legal careers. In 1991, Johns Hopkins University in Baltimore interviewed 12,000 workers about depression. Lawyers ranked number one on the list of occupants who were most depressed. A Quality of Life survey conducted by the North Carolina Bar Association once reported that 26 percent of attorneys exhibited symptoms of clinical depression with more than 10 percent allegedly contemplating suicide at least once per month. In the same survey, more than one out of three attorneys reported not even taking a one-week vacation in the year prior to the survey. According to the New York Bar Association, turnover rates among mid-level legal associates in its law firms is approximately 36 percent. One only need review recent disciplinary opinions from the Kansas Supreme Court to begin to recognize repeated patterns of the toll that the “practice of law” can often extract from its practitioners: depression, alcoholism, drug usage, excessive gambling. While the “law” may be a jealous mistress, there is little debate that she is often difficult to live with.

That’s why I look forward to walking through the front door of Blackbob Elementary every spring. It forces me to remind myself of the importance of career self-examination. “Why DID I decide to become a lawyer?” Perhaps much benefit could be had by analyzing such questions every year.

This process of self-examination has actually generated a story that I now use in most of my trials. When my son, Grant, was in kindergarten, his teacher, Mrs. Harrison, was asking each student about their parents’ jobs, occupations, or what they did in the way of work. After probably explaining and detailing his mother’s work as a registered nurse, Grant stopped. Mrs. Harrison asked him, “And what kind of work does your father do?”

Now, in kindergarten my son’s “L” (like “lap”) came out with the “W” sound (like “wap”). Eventually, Grant looked up at his teacher and explained, “Oh, my daddy doesn’t work for a living; he’s a WARRIOR.”

Again this year I traveled to Blackbob Elementary for Career Day. As I explained again what it’s like to be a lawyer, I was pelted with a series of questions prompting another psychoanalytical opportunity to review my career; the nature of the practice of law; and my small role in that long, storied tradition. I can only hope that the students were somewhat satisfied with my explanations. But during the car ride from the school back to the office to prepare for another deposition, I was thankful for another session of career counseling at the expert hands of my juvenile job coaches. With my internal batteries rejuvenated, it was time to return to being a “warrior.”

If the opportunity should ever present itself, please don’t shy away from participating in “Career Day.” More than likely, you will find that you learn a great deal more about yourself than the children learn about your career.

About the Author

Bradley S. Russell is with Sanders Conkright & Warren LLP, Overland Park. He received his B.A. in political science from Kansas State University in 1985 and his J.D. from the University of Kansas School of Law in 1988. He is licensed to practice in Kansas and Missouri and is a member of the Kansas Bar Association. He may be reached by e-mail at brussell@sanconwar.com.
One of the Best Trial Lawyers to Practice in Kansas

By Michelle Mahieu, Mahieu Law, Dodge City

If you ask anyone in Dodge City, western Kansas, or even Kansas in general about Byron Larson, they might not know who you are talking about. If you ask them about Skip Larson, you will probably get a big grin and a great story. Skip is one of the best trial attorneys who ever practiced in Kansas, but he is such an unassuming and affable fellow that most of the people against whom he won cases never held it against him.

Skip started life in Muskegan, Mich., and the path that led him to Dodge City was like most things in Skip’s life: adventurous. Skip served as a Navy patrol pilot during World War II. The friendships he made in the Navy had a major impact on the direction his life took after the war. A Navy buddy convinced Skip that the University of Colorado held a wealth of opportunity, so Skip headed to Boulder after the war, where he earned his undergraduate degree in 1947 and his law degree in 1951. In addition to the degrees and years of college memories, Skip also found a wife at Boulder; but, she happened to be from Dodge City. So Skip came to Dodge City with his new bride and was soon hired by Jim Williams and Carol Hughes.

Skip’s early practice was a general practice, but he soon started in the direction of trial work, doing insurance defense and gradually expanding the types of cases he tried. Skip is proud to say he knew almost every judge in the state and federal courts and appeared in almost every state court west of Wichita during his career. He also tried cases with attorneys from most of the big firms in Kansas. He remembers in particular the cases he had with Gerry Michaud and Lee Turner. Skip also had a robust federal practice, especially during the late 50s and the 60s when the federal court sat in Dodge City during the first three weeks of September each year. Skip recalls there being about 10 federal trials during those three weeks, of which he participated in about half. They would seat two juries on Monday morning and proceed to the trial of the first matter, usually finishing at the end of the day on Wednesday, and then take up the second trial, finishing at the end of the day on Friday. As Skip says, trial practice is hard work.

Skip has tried many cases over the course of his 56 years in practice, but a few of them stand out. In the 1970s, Skip found himself involved in two workers’ compensation cases with nearly identical facts and issues, but he was plaintiff in one and defendant in the other. Interestingly enough, he won both. Another case involved damage to trees burned on a ranch. After the predictable entry of competing testimony on the value of the trees, it was time for closing arguments. Skip stunned Judge Pat Kelly when for his closing argument he recited the poem “Trees” by Joyce Kilmer.

Skip doesn’t keep a win/loss tally, at least not one he talks about. He does say in jest that belies truth, “never get too high on your wins or too low on your losses. Take it as it happens.” Skip’s mentor and friend, Jim Williams, observed, “When I win a case, the folks on the other side are generally not happy with me; but when Skip wins a case, the folks on the other side never seemed to hold it against him.”

One aspect of his law practice that Skip has enjoyed most over the years has been his associations with fellow attorneys. As a member of the Southwest Kansas and Kansas bar associations and defense and railroad attorney associations, Skip thrived on the camaraderie and support he found in getting to know the attorneys with whom he practiced as individuals. The value of those associations is one thing Skip would urge on everyone who is in or entering in the practice of law. Getting to know the people with whom you practice makes it all easier and more enjoyable.

In 1964, Skip was present during a great moment in history. He was in Virginia visiting a Navy buddy who asked Skip about his local congressman. As it happened, Skip’s congressman, Bob Dole, lived just across the alley. Dole stopped by around midnight that night; when asked why he was out so late, Dole said that he had just watched the Senate vote in the Civil Rights Act of 1964 and, sensing it was a historic moment, wanted to be present. Skip says he had a new appreciation for Congressman Dole after that night.

Skip says the best things in his life have been his wife, Jeanette, and their four children; golf; his time in the Navy; and the 25 years he spent in the active reserves as a generals pilot. And he is quite pleased with his life in the law as well. The legend of Skip Larson, the lawyer and the man, is apparent in the words of a not so long ago KBA Annual Meeting Bar Show in Wichita wherein an actor lamented, “I have to try a case in Dodge City against Skip Larson, and I’m afraid I’m going to get hometowned.”

About the Author

Michelle Mahieu is a Dodge City attorney practicing in the areas of general business, real estate, probate, elder law, and agricultural law. She is a member of the Board of Editors of the Journal of the Kansas Bar Association and secretary/treasurer of the KBA Solo and Small Firm Section.
KU Law School Orientation Day … As I anxiously walked into Green Hall with my new cased laptop hanging on my right shoulder and my bag filled with books on my left, a smile crossed my face, determination filled my eyes, and butterflies attacked my stomach. I was walking into a new journey with two goals. My first was simple: just to get through it. My second goal wasn’t so simple: I wanted to come out on the other end changed. Being raised in Wichita and educated in a private school shaped my views. Though very proud of where I come from, I wanted a new perspective from which to learn, specifically one that could help me do what I believed all attorneys should do — see the other point of view. Seeing the other side did not mean changing who I was or what I believed, but rather opening my beliefs up to further possibilities and allowing myself to understand others better.

With these goals heavy on my head and heart, I walked into my future. The first year was a survival year that challenged my first goal so much my second goal was shelved. As my first year ended, though, a new sense of confidence brought my first goal within reach allowing me to turn my attention toward my second goal. When I first heard of the Paul E. Wilson Defender Project, a clinic in which students help convicted criminals with post-conviction work, my first thought was, how can defense attorneys help criminals? People who have victimized others? In that moment, I realized I was failing my goal. Even though I would likely not practice criminal law, I applied for this clinic to see one of the most challenging “other sides.”

My first few cases were challenging. My reality did not encompass detailed stories that included guns, rape, and murder. I couldn’t escape the trap of concentrating on guilt or innocence. Did I believe this guy? Was he someone worth helping? My supervising attorney kept me on track. I did everything she asked me to do, but it was clear that my mind needed some time to adjust to a new way of thinking.

Slowly, the months passed and my perspective began to change. I began to understand the rights we were fighting to protect. I began to admire the work others in the field were doing. I began to envision the innocent who we were trying to save by protecting the rights of the guilty. I began to see the other side. I began to believe the other side. With my new understanding of what the Defender Project could accomplish, I was asked to be the student director in my third year. Though not the best writer or most experienced in the area, I hoped other students might see something stimulating in me — an open mind.

Now I am anxious yet again. I have that same butterfly-in-the-stomach feeling from orientation day because I know graduation day is near. My anxiety stirs from a mixture of emotions: excitement for being done, fear for the approaching bar exam, sadness about saying goodbye to a place to which I was so dedicated and to people who guided me, and relief in knowing I won’t have to take another law school final ever again. But most of all, I know that as I’m hooded in front of my family, peers, and faculty I’ll feel an overwhelming sense of pride and confidence for my future because I can honestly and humbly say that I achieved both of the goals that I set out for myself three years ago. I might never have what it takes to be a defense attorney for the rest of my career, and I might always be true to my more conservative roots, but I will forever see others’ lives and their views in a different way. And in return, I hope that I make others look back at me in the same different way.

About the Author

Laura Shaker Dakhil Monahan, Wichita, received her B.S. in journalism (with minors in French and leadership studies) and her J.D. from the University of Kansas. This fall, she will begin the MBA program at Washburn University. Next year, she will return to Wichita to work at Hinkle Elkouri Law Firm LLC.

THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF KANSAS CORDIALLY INVITES YOU TO ATTEND A SPECIAL SESSION OF COURT CELEBRATING THE 100TH BIRTHDAY OF THE HONORABLE WESLEY E. BROWN WICHITA COURTHOUSE 401 N. MARKET STREET WICHITA, KANSAS ON FRIDAY, JUNE 29, 2007 AT TWO O’CLOCK P.M.

RHUBARB PIE RECEPTION IMMEDIATELY FOLLOWING CEREMONY SPONSORED IN PART BY THE WICHITA BAR ASSOCIATION R.S.V.P. REQUESTED BY FRIDAY, JUNE 15, 2007 TO KAREN JANNAMAN AT (913) 551-5734 OR KAREN_JANNAMAN@KSD.USCOURTS.GOV IN LIEU OF BIRTHDAY CARDS, GREETINGS MAY BE SENT AT: WWW.JUDGEWESLEYBROWN.ORG PLEASE CHECK THE WEBSITE FOR ADDITIONAL DETAILS AS THE EVENT NEARS
Top 10 Strategic Benefits of Blogging for the law Firm

By Grant D. Griffiths, Clay Center

Blogging (i.e., Web logging) has become a hot topic on the Internet the last couple of years. It has matured from its original use as a personal journal to a viable marketing tool for small business and professional service firms.

A question I get often when visiting about blogging with other lawyers is: “How can a blog benefit my law practice?” In order to provide an answer to this, I have come up with 10 benefits I have seen in my own practice.

1. Search engine marketing
   A blog gives you an increased presence on major search engines like Yahoo! and Google. A well-written, routinely updated, keyword-oriented blog can enhance your chances of getting noticed not only by readers, but also by search engines. Like any marketing effort, with blogging or Internet-based marketing, you want to get noticed. A blog will do just that. Because a blog is not static as a “normal Web site” and because you can easily update a blog, the search engines love them. You will see quicker results too. Not only will you get noticed, but you will get noticed quicker with a blog over a “normal Web site.”

2. Direct communications
   Blogs provide a way to speak directly to your target audience. A blog is similar to an educational publication. You are providing information and a way for a conversation to continue with a marketing blog. By taking advantage of the commenting feature on most blogs, readers can comment on your individual posts and keep a conversation going on topics that interest them. The goal of a marketing blog for a law firm is to establish a readership — readers who will continue to come back to your site time and time again.

3. Brand building
   A blog is another way to promote your practice and the area of law you practice in. For some, this is called brand building. You can establish your blog as the place to go for information. Information that the public is looking for to answer questions they may have.

4. Competitive differentiation
   Because a blog gives you the opportunity to provide information about your area of practice, and provide that information over and over again, you can set yourself apart from your competition. This is a huge benefit of a blog over other marketing efforts such as “normal Web sites” and yellow page ads. With both of those media, you initially set up the marketing tool and it does not change. With a blog you can add to and change your marketing tool as often as you want. You have a competitive advantage over those who only use a “normal Web site” or yellow page ad.

5. Relational marketing
   A well-designed, well-maintained, and updated blog allows you to build personal, long-lasting relationships with your clients and reader base. They will come to trust you as a place to go for information about what concerns them. You are providing this information for free and in the process marketing your firm and gaining clients.

6. Exploiting the niches
   My main marketing tool is my Kansas Family & Divorce Lawyer Blog, kansasfamilylawblog.lexblog.com. This type of blog focuses on one area of law, which is family law. Just as some firms will place yellow page ads in certain subcategories of the attorney section, a firm should do a blog for a niche area of practice. I have seen blogs for family law, estate planning, real estate law, criminal law, and other specific areas. These blogs seem to get the most bang for the buck.

7. Media and public relations
   Blogs are an excellent public relations tool. The media will call you, not your competition, because you are out there providing information.

8. Positioning yourself as the place to go for information
   Blogs enable you to articulate your viewpoints on new case law, share your knowledge, and provide information. A well-maintained and frequently updated blog will become a place for your readers to come for such information. Something you can not do with a yellow page ad.

9. Reputation management
   A good blog can help you manage your online reputation.

10. Low cost
    Blogs are inexpensive to set up, operate, and maintain. Even if you pay a firm like lexBlog (www.lexblog.com), the cost is very reasonable; in fact, it is considerably less than the yellow pages. Other blogging platforms such as Typepad (www.typepad.com) and Wordpress (www.wordpress.com) cost less than $20 per month.

Utilize a marketing blog is certainly not for everyone. However, if incorporated into a firm’s overall marketing efforts, blogging can have benefits to the firm.

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.
**Members in the News**

**CHANGING POSITIONS**

L.J. Buckner Jr. and Elizabeth Raines have joined Baker Sterchi Cowden & Rice LLC, Kansas City, Mo.

Jeffrey W. Deane has joined Allmayer & Associates P.C., Kansas City, Mo.

Aaron R. Disney has joined Hawker Beechcraft Corp., Wichita.

Emily Cassell Docking has joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.

John L. Domoney has joined Winkler Domoney & Schultz, Paola.

Brian P. Duncan has joined the Crawford County District Attorney’s Office, Pittsburg.

Todd D. Epp has joined Galland Law Firm P.C., Harrisburg, S.D.

Eric W. Godderz was appointed by Gov. Kathleen Sebelius as Anderson County district judge.

Angee E. Gregory has joined Leslie Rudd Investment Co, Wichita.

Lee R. Hardee III has joined E3 BioFuels, Shawnee.

Reese H. Hays III has joined the U.S. Air Force Judge Advocate General’s Corps, Maxwell AFB, Ala.

Harold A. Houck has joined Payless Shoe-Source Inc., Topeka.

Aisha Khan and Scottie S. Kleypas have joined Husch & Eppenberger LLC, Kansas City, Mo.

David J. Kim and David R. Vandeninste have joined Bryan Cave LLP, Kansas City, Mo.

Court T. Kennedy has joined Stinson Morrison Hecker LLP, Wichita.

Patrick D. Kuehl Jr. and Edward V. Wilson have joined Blackwell Sanders Peper Martin LLP, Kansas City, Mo.

Shannon M. Marcano has joined White Goss Bowers March Schulte & Weisenfelds P.C., Kansas City, Mo.

Larry L. McCord Jr. has joined Missouri Department of Insurance, Jefferson City, Mo.

Edward T. McNally II has joined CNA Insurance, Overland Park.

Julene L. Miller has joined the office of the Kansas Board of Regents, Topeka.

Kathryn E. Sheedy has joined Stumbo Hanson LLP, Topeka.

Sarah B. Steen has joined Wagstaff & Cartmell LLP, Kansas City, Mo.

Jennifer L. Stultz has joined Biggs Law Group L.C., Wichita.

Jennifer W. Svancara has joined Waldeck Matteuzzi & Sloan P.C., Leawood.

Catherine C. Theisen has joined Barber Emerson L.C., Lawrence.

Heather Wilke has joined the Kansas Department of Labor, Topeka.

Chris Young-Terpening has joined Haynes Benefits P.C., Lee’s Summit, Mo.

**CHANGING PLACES**

Thomas M. Bradshaw and Darren O. Herrington have formed Bradshaw Herrington P.C., 2345 Grand Blvd., Ste. 600, Kansas City, Mo 64108.

The law office of Reginald K. Davis has moved to 753 State Ave., Ste. 707, Kansas City, KS 66101.

Dorothy Law Firm LLC has moved to 8675 W. 96th St., Ste 203, Overland Park, KS 66212.

John Shannon Garrett has started his own firm, the Garrett Law Office, 840 Connecticut, Ste. D, Lawrence, KS 66044.

Edward C. Gillette, Attorney at Law, has moved to 5501 Fox Ridge Dr., Mission, KS 66202.

Jose Hurlstone-Peggs, Attorney at Law, has moved to 609 N. Broadway, Ste. 100, Wichita, KS 67214.

Jeffrey R. King has started his own law office, King Law Offices LLC, 1212 N. 2nd St., Independence, KS 67301.

The Law Office of Valerie L. Moore LLC has moved to 11256 Strang Line Road, Lenexa, KS 66215.

Thomas C. Owens, Attorney at Law, has moved to 7300 W. 110th St., Ste. 900, Overland Park, KS 66210.

Ronald S. Reuter, Attorney at Law, has moved to 4715 Reinhardt Dr., Roland Park, KS 66205-1504.

Williams Venker & Sanders LLC has moved to Bank of America Tower, 100 N. Broadway, 21st Fl., St. Louis, MO 63102.

**MISCELLANEOUS**

Stephen J. Bahr, Kansas City, Mo., has been re-elected managing director of Dystart Taylor Lay Cotter & McMonigle P.C.

Lance H. Cochran, Salina, is the new secretary of the Salina-Ottawa County Bar Association.

Dustin J. Denning, Salina, is the new treasurer.

Richard C. Dearth, Pittsburg, has been appointed the interim dean of the Kelce College of Business at Pittsburg State University.

Thomas J. Drees and Daniel E. Monnat have been appointed to the Kansas Sentencing Commission by Gov. Kathleen Sebelius.

Rand E. Simmons, Emporia, is the new Lyon-Chase County Bar Association president.

The Wichita Bar Association has named William L. Townsley as president, Jon E. Newman as vice president, and J. Michael Kennalley as secretary/treasurer for 2007-2008.

**Correction:** In the May issue it was erroneously reported that Mitchell L. Herren had joined Hinkle Elkouri. In fact he was elected as co-managing director and has been with the firm since 2001. We sincerely apologize to Mr. Herren.

**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.

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“Jest Is For All” by Arnie Glick

“Glick”

“If you ask me, someone should bring a products liability case against the manufacturer of that cheese dispenser.”
Roy Lyman Bulkley

Roy Lyman Bulkley, 85, Topeka, died April 4. He was born on a farm near Auburn, the son of Roy L. and Laura C. Nelson Bulkley. Bulkley received his A.B. from Baker University in 1943 and his LL.B from Washburn University School of Law in 1949.

While still at Baker, he enlisted in the Navy. He served as a navigator and engineer with Task Force 58 of the South Pacific Fleet and was discharged as a lieutenant in 1946.

In 1950 he was elected judge of the court of Topeka and served two terms. In 1954 he was elected Shawnee County attorney and served one term. He was regional council for the Small Business Administration until his retirement.

Bulkley was a lifetime member of the Kansas Bar Association, joining in 1949. He served as president of the Native Sons and Daughters of Kansas and as Senior Council of Topeka. He was a member of the Greeters and Legion Honor, Fortnightly Club, Military Order of World War II, Kiwanis International, the Topeka Retired Officers Association, First Congregational Church, the American Legion, the Veterans of Foreign War, the Society for the Preservation and Encouragement of Barbershop Quartet Singing in America, and Delta Tau Delta.

He is survived by his wife, Betty Lou Compton; son, Timothy; five grandchildren; six great-grandchildren; and one brother, W.L. “Woody,” Topeka.

Howard J. “Jake” Carey Jr.

Howard J. “Jake” Carey Jr., 89, died April 17. He was born Aug. 18, 1917, in Hutchinson, the son of Howard J. Carey Sr. and Louise Banks Carey. He graduated from Dartmouth University in 1938 and the University of Michigan School of Law in 1941. A lifetime resident of Hutchinson, he was the retired president of Carey Salt Co.

Carey was a lifetime member of the Kansas Bar Association, joining in 1941. He was a charter member of the Prairie Dunes Country Club, which was founded by the Carey family. He was also a member of the Augusta National Golf Club and the executive committee of the U.S. Golf Association, past president of the trans-Mississippi Golf Association, a charter inductee in the Kansas Golf Hall of Fame, and numerous other civic community boards. He served in the U.S. Navy from 1941-1946 as an officer in the Seabees, serving in the South Pacific.

He is survived by three sons, Brooks, Charlotte, N.C., Christopher, Richmond, Va., and Michael, Ada, Mich.; a sister, Sis Johnston, St. Augustine, Fla.; and six grandchildren. He was preceded in death by his wife, Patricia; his brother, Bim; and a sister, Marg Klode.

Robert A. Creighton

Robert A. Creighton, 73, Atwood, died April 5. He was born Jan. 30, 1934, in Colorado Springs, Colo. He was an attorney with the law firm of Brown, Creighton & Peckham in Atwood.

He served on the Kansas Board of Regents, Kansas Hospital Closure Commission, Kansas Commission of Judicial Qualifications, Board of Governors of the University of Kansas School of Law, and the KU Hall Center for the Humanities Advisory Board.

Survivors include his wife, Lavina, Atwood; two sons, Alec, Fort Morgan, Colo., and John, Longmont, Colo.; a brother, Thomas, Denver, Colo.; and five grandchildren. He was preceded in death by his first wife, Barbara, in 2002.

Robert J. Gilliland

Robert J. Gilliland, 89, died April 14 at Hospice House, Hutchinson.

He was born March 25, 1918, in Arkansas City, the son of James Finney and Charlotte Inches Gilliland. He graduated from Hutchinson Junior College in 1938, the University of Kansas in 1940, and the University of Kansas School of Law in 1942. A lifetime resident of Hutchinson, he has been a practicing attorney since 1946, founding Gilliland & Hayes Law Firm in 1959 with John Hayes. He also served as the Hutchinson city attorney from 1962 to 1967. He was a past vice president of the Kansas Bar Association.

He was a life member of First Presbyterian Church, where he held numerous positions and was an elder; served on the Hutchinson Hospital board as attorney and secretary from 1969 to 2000; was the first chairman of the original Junior College Basketball Tournament and has served on the executive committee for 50 years; was past president of the Hutchinson Rotary International, Prairie Dunes Country Club, and USD No. 308 School Board; was past commander of the American Legion Lysle Rishel Post No. 68; and belonged to Phi Kappa Psi Fraternity, at the University of Kansas. He served in the U.S. Navy during World War II and was commissioned as an officer on Aug. 5, 1942.

Survivors include his wife, Ruth Peters, of the home; two children, James Gilliland and Patricia Ruth Crews, both of Hutchinson; seven grandchildren; and 11 great-grandchildren.

Justice Harold S. Herd

Justice Harold S. Herd, 88, died April 23 in Coldwater. He was born June 3, 1918, in Comanche County, to J.J. and Bernice Shields Herd.

He attended Southwestern College in Winfield for two years and then transferred to Washburn University to study law. He received his B.A. in 1940 and J.D. in 1942.

Herd then joined the war effort, serving in the Pacific Theater as a naval officer on the USS Rio Grande and USS Cache. He left the Navy as a lieutenant in 1946 and returned to his hometown to practice law. He maintained his private law practice in Coldwater until 1979. During the 1950s, he served as mayor of Coldwater, Comanche County attorney, and Coldwater city attorney. In 1964, he ran for and won election to the Kansas State Senate as a Democrat and was Senate minority leader from 1969-1973.

Herd was appointed to the Kansas Supreme Court in 1979, where he served until 1993, helping interpret the law on a wide range of issues, including water rights, oil and gas, women's rights, and the separation of power to sustain the public good. Upon retiring from the Court, Herd became a distinguished jurist in residence at Washburn University School of Law, teaching constitutional history in that position until 2002, when he retired to his home in Coldwater.
He was past president of the Coldwater Lions Club; a member of Coldwater First Presbyterian Church; and a Master Mason, Masonic Lodge No. 295. He had served on the executive council of the Kansas Bar Association and as president of the Southwest Kansas Bar Association. He also served on the Washburn University School of Law Board of Governors, the Kansas Committee for the Humanities, and the University of Kansas Hall Center for the Humanities. His honors include Who's Who in America, Who's Who in American Law, Who's Who in American Bench and Bar, Fellow of the American and Kansas bar foundations, Distinguished Service awards from the Kansas Bar Association (1991) and the Washburn Law School Association (1995), and special recognition from Kansas high school teachers for his constant efforts in helping students understand the U.S. Constitution.

He was preceded in death by his parents; his brother, Junior Herd; and his son, Hal Herd.

He is survived by his wife of 67 years, Midge Herd; six children, Pamela Brink, Kathy, Mac, Skip, Margie Beeler, and Mike; 13 grandchildren; five great-grandchildren; his siblings, Lorraine Kendrick, Barbara Crane, Ronald, and Eldon; and 15 nieces and nephews.

Robert L. Marietta
Robert L. Marietta, 88, Salina, died March 28. He was born Dec. 11, 1918, in Oklahoma City, the son of C.O. and Lulu A. Marietta. He graduated from the University of Kansas in 1940 and served in the U.S. Army Air Corps in the European Theatre during World War II from 1941-1946. Following the war, he graduated from the University of Kansas School of Law in 1949.

He was an attorney in private practice in Salina from 1949-2007. For the last 30 years he was a partner with Marietta, Kellogg & Price. Marietta was a member of the Kansas, American, and Saline-Ottawa bar associations.

He is survived by six children, Marilyn, Patricia, Betsy, and John, all of Salina, Becky Wright, Mulvane, and Jim, Oska- loosa; eight grandchildren; and two great-grandchildren. He was preceded in death by his wife, Betty.

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Hey Man, You Got a Match?  
The Employment Eligibility Verification and Anti-Identity Theft Act

By Cody G. Robertson, Goodell, Stratton, Edmonds & Palmer LLP, Topeka

As part of the ongoing debate in this country over immigration policy, HR 138, the Employment Eligibility Verification and Anti-Identity Theft Act (Act) was introduced in early January. The Act is intended to curb employment of illegal immigrants in the United States by placing the burden of citizenship verification on employers and imposing penalties on employers who knowingly employ illegal immigrants.

Legislation such as this could greatly impact the construction industry. As evidenced by a visit to almost any large project site, the construction industry relies heavily on immigrant labor. According to the Pew Hispanic Center, Washington, D.C., the construction industry employs more than 1.4 million unauthorized workers, the largest number in any major industry category. In total, unauthorized workers account for about 12 percent of the construction industry workforce. These numbers alone suggest that the construction industry could be a favorite target of enforcement by the Social Security Administration (SSA) if or when the Act is passed.

In a nutshell, the Act directs the commissioner of the SSA to notify employers, by way of a “no match” letter, whenever the combination of a name and Social Security number it submits for an employee does not match SSA records. If the discrepancy is not corrected in a prescribed time, the employer must terminate the employee or face sanctions. Additionally, more stringent requirements are placed on employers who receive more than 20 no-match letters within the same calendar year.

Obviously, passage of the Act would create a huge administrative burden on employers in the construction industry who would be required to respond to the flood of no-match letters initially sent out by the SSA. More importantly, passage of the Act could also leave many employers in the industry scrambling for new employees while at the same time dealing with lawsuits from former employees who feel they were wrongfully terminated.

The Act is not Congress’ first attempt at creating a mandatory employment eligibility verification system. The House passed similar legislation in December 2005 and the Senate passed its version in May 2006. Additionally, Immigration and Customs Enforcement published a proposed rule in June 2006 setting forth the procedures employers are to follow upon the receipt of a no-match letter. Publication of a final rule is expected in the next three to six months.

While it is uncertain at this point exactly what the final product of all this will be, it will almost certainly result in phone calls to the attorneys who represent clients in the construction industry. Are you ready?

About the Author

Cody G. Robertson is an associate with Goodell, Stratton, Edmonds & Palmer LLP in Topeka, where he focuses on general business, transactional, real estate, and construction law. Robertson received both his bachelor’s degree, 2002, and juris doctorate, 2006, from Washburn University.

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I. OVERVIEW

The rules of ethics applicable to lawyers are, like the law generally, evolving creatures. As times change, new legal principles develop. As lawyers change — perhaps a few of them inventing new and different ways to depart from applicable norms — those norms must also evolve. And as disappointed clients look for novel ways of asserting claims, the mechanism for preserving clients’ rights must deal with such changes.

A much-anticipated overhaul of the Model Rules of Professional Conduct (MRPC or Rules) was brought to fruition in the Report of the Ethics 2000 Commission of the American Bar Association, actually published in May 2001. In turn, Kansas took up these changes, which have now been adopted and approved by the Kansas Supreme Court, to become effective on July 1, 2007.

The purpose of this article is to review the history of the changes made by the American Bar Association (ABA) Ethics 2000 Commission, at the national and then the state level, and then to summarize several of the major changes brought about by the amended Rules in this state.

II. HISTORY

A. The ABA Commission

In 1997, the ABA appointed a well-respected panel of lawyers to review the MRPC, which have been adopted in one form or another in the majority of the states. The goal was for the ABA to make global changes to the MRPC by the year 2000, hence the name adopted by that commission, “the Ethics 2000 Commission.” The Commission on Evaluation of the Rules of Professional Conduct (as it was formally named) was comprised of 13 official members who were assisted by 250 advisory councilors. The commission met 39 days over a 40-month period and issued a comprehensive report in November 20001 and its “final” report in May 2001. Even then, the ABA House of Delegates was only able to review and approve one chapter of the rules in August 2001, before approving (with amendment) the entire plan in February 2002.2

FOOTNOTES
While a complete rewrite of the Rules may have been anticipated, the commission left the approach, structure, and most of the Rules in place from the then-existing version. The commission did adopt hundreds of changes, many of which are not significant — and many of which are very significant. Certainly, the goals, objectives, and tenor of the Rules remains unchanged.

B. The KBA Commission

Just two months after the ABA’s adoption of the Ethics 2000 report, then-KBA President James L. Bush appointed a commission of Kansas lawyers in April 2002. The mandate of this Kansas Commission was to review the ABA’s Report and to submit a recommendation on whether to adopt any or all of the ABA’s changes to the MRPC. The members of the KBA Ethics 2000 Committee (KBA/E2K Committee) worked diligently through the remainder of 2002, mainly in committees addressing each chapter of the KRPC.

C. Philosophy

The first act of the Kansas Commission was to consider its philosophy in reviewing the ABA’s recommendations. There were at least two approaches the commission could take; both of which have strong arguments in their favor, and each of which had strong advocates on the commission.

The first approach would be to adopt all the ABA’s changes unless some strong and valid reason justified the disapproval of a particular provision. One argument to support this philosophy is the fact that the ABA Commission, comprised of many very intelligent and qualified lawyers and professors, spent four years and many hours working through every word, phrase, and sentence of the Rules to come up with the proposed changes. Additionally, the more “uniform” the rules from state-to-state, the more predictable the practice for lawyers or firms practicing in several states, and precedents from one state would be more helpful in other states adopting the same changes.

The other approach would be to review each change in the light of whether it would improve the present ethics and disciplinary system in Kansas. The arguments to support this approach include the fact that the present rules and system in Kansas are known and there are precedents on many of the existing rules. Moreover, the current Kansas rules underwent a lengthy approval process when adopted. Proponents of this philosophy argued that Kansas has always been independent, and that the “Model” Rules have not been adopted across the board without change by any state.

Thus, the question devolved to an issue of “burden of proof”: would a change be accepted unless shown to be clearly inappropriate, or would a change be adopted only if it was shown to be an improvement to the existing Rules?

After much debate, it was this latter approach that held sway, and each change was analyzed by the various sub-committees to answer the question whether it would improve the Kansas Rules. This fundamental issue was sufficiently important that the commission reconsidered and redebated it at its meeting in April 2004, with the substantial majority of the commissioners again supporting this approach. That being said, more than 75 percent of the ABA’s proposals were adopted by the Kansas Commission. Yet, the adoption of this philosophy has served to be the lightning rod for criticism of the KBA Commission’s report.

III. THE COMMISSION’S WORK

After working through the summer of 2002, the entire committee met on Oct. 23, 2002. At that time, each sub-committee’s report was reviewed and debated, after which a vote was taken. Some sub-committee recommendations were approved by the Committee-of-the-Whole, and some were not.

A report was then prepared by KBA staff and delivered to the KBA Board of Governors (board). This was followed by a presentation of the report at a meeting of that board on Dec. 6, 2002.

In that meeting, the KBA board requested (a) that the Report be placed in a different format, to allow a side-by-side comparison of the proposed changes to the existing Rules, and (b) that the KBA/E2K Committee explain its failure to adopt the changes proposed by the ABA Commission, which were not adopted by the Kansas Commission.

The requested amended Report was provided to the KBA Board on June 23, 2003, after which a “new” KBA/E2K Committee was appointed, comprised of all persons on the prior commission who were willing to continue serving.

The commission met on Oct. 10, 2003, made decisions and directed the preparation of the fully-amended and supplemental report requested by the KBA board, and that amended report was delivered during winter 2003. The Kansas Commission met again on April 30, 2004, and took up a member’s request to reconsider the “philosophy” issue discussed above, i.e. whether to adopt all changes unless there were good reason not to do so, or to adopt a change only if it represented an improvement to the existing rules and structure. As noted above, the commission voted to stay with its original philosophy.

At the April 30, 2004, meeting, the Kansas Commission also considered and voted on additional changes to the Model Rules, which had been adopted by the ABA since the initial enactment of ABA/E2K. Those actions resulted in another report to the KBA board, which the board in turn took up the KBA/E2K Committee’s recommendations in August 2004.

After the KBA’s approval of the Ethics 2000 Report, the proposed amendments to the KRPC were submitted to the Kansas Supreme Court for approval and adoption. The Court then published the proposed amended Rules, and

3. The Model Rules of Professional Conduct in Kansas appear at Rule 226, Rules of the Kansas Supreme Court, and are known as the “Kansas Rules of Professional Conduct” (KRPC). Rule 226, Rules of the Kansas Supreme Court, Prefatory Rule.

4. The commission was comprised of the following members: Hon. Terry L. Bullock (Topeka); Kevin Breer (Overland Park); Dan Diepenbrock (Liberal); Curtis A. Frasier (Beloit); John Gatz (Colby); Stanton A. Hazlett, disciplinary administrator (Topeka); Mark Hinderks (Overland Park); Donna Lance (Wichita); Joel W. Meinecke (Topeka); Bill Mills (McPherson); Chris Pickering (Kansas City); Sheila Reynolds (Topeka); Craig Shultz (Wichita); Jeff Southard (Lawrence); Paul Davis, KBA staff member (Lawrence); and Nick Badgerow (Overland Park), as chairman.
IV. CHANGES IN THE RULES

With that historical background, it is worthwhile next to consider several of the more significant changes imposed by the new KRPC.

A. Definitions

1. “Informed consent”

While the previous Model Rules included the concept of “consent,” such as the consent to continued representation in the face of a conflict of interest, this new term adds specificity:

‘Informed consent’ denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.

Thus, under this Rule, the concept of “consent after consultation” is expanded to emphasize the lawyer’s duties:

- to communicate “adequate” information about the situation;
- to explain the material risks of the proposed course of conduct; and
- to disclose and explain alternatives to the proposed course of conduct, which are reasonably available.

Of course, recommending the hiring of independent counsel can help to ensure that the client receives an objective description of the issue and the proposed course of action.

2. “Confirmed in writing”

“Informed consent” relates to another important term that pervades the new Rules. This term is “confirmed in writing” and is defined as follows:

‘Confirmed in writing,’ when used in reference to the informed consent of a person, denotes informed consent that is given in writing by the person or a writing that a lawyer promptly transmits to the person confirming an oral informed consent. See paragraph (e) for the definition of ‘informed consent.’ If it is not feasible to obtain or transmit the writing at the time the person gives informed consent, then the lawyer must obtain or transmit it within a reasonable time thereafter.

Obtaining informed consent in writing helps to document the record, and avoids or reduces the opportunity for argument later about the consent.

B. Rule 1.7 – Concurrent Conflicts of Interest

1. Concurrent conflicts

A conflict of interest with current clients is now called “a concurrent conflict of interest” and continues to be addressed by Rule 1.7.

(a) Except as provided in paragraph (b), a lawyer shall not represent a client if the representation involves a concurrent conflict of interest. A concurrent conflict of interest exists if:

1. the representation of one client will be directly adverse to another client; or

2. there is significant risk that the representation of one or more clients will be materially limited by the lawyer’s responsibilities to another client, a former client or a third person or by a personal interest of the lawyer.

This Rule combines, then, conflicts with current clients (formerly covered by Rule 1.7(a)), conflicts with former clients (formerly covered by Rule 1.9(a)), and conflicts with the lawyer’s own interests (formerly covered by Rule 1.7(b)). Conflicts with former clients are still covered expressly by Rule 1.9 as well.

2. Waiver

As noted, however, a concurrent conflict may be waived (a) if the lawyer reasonably believes that he “will be able to provide competent and diligent representation to each affected client”; (b) if the representation is not otherwise prohibited by law, (c) the representation does not involve the direct assertion of a claim by one current client against another current client represented by the lawyer in the same litigation or other proceeding before a tribunal, and (d) “each affected client gives informed consent, confirmed in writing.”

According to the Comments:

It was felt that ‘consultation’ did not adequately convey the requirement that the client receive full disclosure of the nature and implications of the lawyer’s conflict of interest.
Moreover, specific steps are imposed by the new Rules. Under the Comments to Rule 1.7, a concurrent conflict of interest can only be resolved if the lawyer:
(a) clearly identifies the client(s);
(b) determines whether a conflict exists;
(c) decides whether the conflict is consentable; and
(d) consults with all affected clients and obtains their informed consent, confirmed in writing.14

3. Procedures
While the previous iteration of the Comments to Rule 1.7 recommended the adoption of “reasonable procedures ... to determine ... the parties and issues involved and to determine whether there are actual or potential conflicts of interest,”15 the new Comments go on to advise that, “Ignorance caused by the failure to institute such procedures will not excuse a lawyer’s violation of this Rule.”16

4. Sexual relations
Conflicts with the lawyer’s own interests have always been prohibited by the Model Rules. However, the Comments to Rule 1.7 add:

A lawyer is prohibited from engaging in sexual relationships with a client unless the sexual relationship predates the formation of the client-lawyer relationship.17

This language comes from Rule 1.18 of the prior version of the MRPC, which was not adopted in Kansas. However, such relationships were already clearly recognized as creating an impermissible conflict of interest in Kansas,18 so this comment comports with the prior status of the law in this state.

5. Future conflicts
Many law firm engagement letters include a waiver of future conflicts of interest. The Comments to new Rule 1.7 provide that:

The effectiveness of such waivers is generally determined by the extent to which the client reasonably understands the material risks that the waiver entails. ... If the consent is general and open-ended, then the consent ordinarily will be ineffective, because it is not reasonably likely that the client will have understood the material risks involved.19

6. Positional conflicts
Conflicts of interests may arise where the lawyer advocates a particular position on the law for one client and then asserts an opposing position on the same legal point for another client. These are called “positional conflicts.” Positional conflicts are discussed for the first time in the Comments to Rule 1.7, and provide that a lawyer ordinarily may take inconsistent positions on a legal issue — at different times and in different tribunals — without running afoul of the rule against conflicts of interest.

A conflict of interest exists, however, if there is a significant risk that a lawyer’s action on behalf of one client will materially limit the lawyer’s effectiveness in representing another client in a different case; for example, when a decision favoring one client will create a precedent likely to seriously weaken the position taken on behalf of the other client.20

Thus, it would appear to represent an impermissible positional conflict for the attorney to argue contrary legal positions for different clients in the same court at the same time.21

C. Rule 1.8. – Conflicts of Interest – Specific Rules
Rule 1.8 pertains to some specific relationships between lawyer and client, such as business transactions, literary and media rights to the client’s story, advancing legal expenses, bequests from clients, and aggregate settlements. The concept of “informed consent, confirmed in writing” pervades this Rule,22 without other significant changes to the Rules themselves. However, the Comments have been extensively rewritten and contain significantly more detail than the previous Rules.

The prohibition against sexual relationships with a client — quoted in the Comment to Rule 1.7 — is also expressly stated as a part of the new version of Rule 1.8.23

D. Rule 1.9 – Conflicts of Interest with Former Clients
Rule 1.9 continues to prohibit conflicts of interest with former clients.24 This includes a continuation of the prohibition of representing a current client in a matter that is the same as or “substantially related” to the matter on which the lawyer represented the former client, adverse to the “interests” of that former client. The new Rules do no better at describing how a former client’s “interests” may be different — and likely larger

(continued on next page)
— than a representation merely adverse to that former client. Of course, the new Rules replace “consent after consultation” with “informed consent, confirmed in writing.”

The Comments to Rule 1.9 are, again, extensively supplemented. There is significant new discussion of the term “substantially related,” which includes the risk that confidential information may be disclosed. Numerous examples are also given.

E. Rule 1.10 – Imputed Conflicts

1. Lateral lawyers

This Rule pertains to the impact of lawyers moving between firms. The Rule allows a firm to represent a client adverse to the client of a lawyer who has left the firm, if the conflict was based on a personal interest of the lawyer who has left the firm (i.e. an investment or family relationship and not a lawyer-client representation), and the representation of the adverse party by the firm “does not present a significant risk of materially limiting the representation of the client by the remaining lawyers in the firm.”

Of course, even under Rule 1.10, disqualification can be waived “under the conditions stated in Rule 1.7,” i.e. “informed consent, confirmed in writing.”

2. Screening of lateral lawyers

The ABA Ethics 2000 Commission recommended the adoption of screening as a part of its draft version of Rule 1.10, supported by the following logic:

A number of jurisdictions now provide that former-client conflicts of lawyers who have moved laterally are not imputed to the new law firm if the personally disqualified lawyer has been timely screened from participation in the matter and the former client is notified of the screen. The commission is recommending that current Rule 1.10 be amended to permit nonconsensual screening of lawyers who have joined a law firm.

The commission is persuaded that nonconsensual screening in these cases adequately balances the interests of the former client in confidentiality of information, the interests of current clients in hiring the counsel of their choice (including a law firm that may have represented the client in similar matters for many years), and the interests of lawyers in mobility, particularly when they are moving involuntarily because their former law firms have downsized, dissolved, or drifted into bankruptcy. There are presently seven jurisdictions that permit screening of laterals by Rule. The testimony the commission has heard indicates that there have not been any significant numbers of complaints regarding lawyers’ conduct under these Rules.

However, the recommended provision for screening in Rule 1.10 was not approved by the ABA House of Delegates, and so it is not a part of the final ABA Ethics 2000 version of the Model Rules. In view of the teachings of several very clear Kansas authorities, the Kansas Commission did not recommend the adoption of this provision, and the Kansas Supreme Court followed this recommendation. Thus, screening of lateral lawyers — absent client consent — is not an approved method of avoiding conflicts of interest with current or former clients. The only exceptions are those created for judges and governmental lawyers returning to private practice, and the new rule relating to prospective clients, at Rule 1.18 (discussed below).

F. Rules 1.11 and 1.12 – Conflicts of Interest – Government Lawyers and Judges

1. Screening of lateral lawyers

Rule 1.12 also exchanges “informed consent, confirmed in writing,” for “consent after consultation,” with respect to waivers. The same change was not made in the final version of Rule 1.11.

2. Screening

Involving no change on this point, these Rules continue to allow for conflicts to be avoided, in the case of a government employee or judge who has moved to private practice, if “the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.” As noted, the Kansas Supreme Court has consistently refused to permit screening as a method of avoiding conflicts of interest in other circumstances. However, Rules 1.11 and 1.12 continue to allow for screening as a method for judges or lawyers leaving governmental practice to avoid disqualification in appropriate circumstances. This does not represent a change from the existing law.

More about screening is discussed below, under Rule 1.18.

G. Rule 1.18 – Conflicts – Prospective Clients

1. Prospective clients – beauty contests

An entirely new rule is directed to avoiding unnecessary conflicts in a relatively new situation, i.e. that instance where a prospective client interviews a law firm — perhaps with no intention to engage that firm — providing sufficient information to require the later disqualification of that law firm, and then seeking the law firm’s disqualification when it appears for the opposing party in the later-filed action.

Under this new Rule, a “lawyer who has had discussions with a prospective client shall not use or reveal information learned in the consultation, except as Rule 1.9 would per-
mit with respect to information of a former client.”

However, “if the lawyer received information from the prospective client that could be significantly harmful to that person,” then the lawyer “shall not represent a client with interests materially adverse to those of [the] prospective client.”

2. Confidential information
The Comments to this new Rule differentiate between “confidential” information learned from a prospective client — which information must be kept confidential even if the lawyer may later represent a client adverse to the formerly prospective client — and “substantially harmful” information — which will result in disqualification of the lawyer and his firm.

If the discussion stops before ‘significantly harmful’ information is shared, it seems that the law firm’s regular client should not be denied counsel of its choice if a substantially related matter arises.

Thus, the lawyer and his firm should be careful, when being interviewed by prospective clients, only to obtain that information necessary to determine the existence of a conflict of interest, before deciding whether to proceed with the interview by the prospective clients. This is another instance where screening does make sense, to preclude disclosure of confidential information by the lawyer who actually was interviewed by the prospective client, but to allow the regular client’s regular lawyers to represent that regular client in the ordinary course. Otherwise, disqualification will result.

3. Informed consent
This disqualification can be avoided, if the affected client and prospective client “have given informed consent, confirmed in writing,” or if the disqualified lawyer “is timely screened from any participation in the matter and is apportioned no part of the fee therefrom.”

4. Screening lawyers who talked to prospective clients
Because the law firm may be able to take on the representation of another client adverse to a person or entity who was once a prospective client, by screening off the lawyer who talked to that then-prospective client, it is worthwhile to consider when and how such a screen should be erected.

a. Development of the law concerning insulation walls in Kansas

In many jurisdictions, conflict of interest have historically been be avoided, and the firm has been allowed to continue to represent the client, if the conflicted lawyer has been effectively screened from access to any information about the case, if that lawyer is not questioned about the case or his prior representation, and if he does not share in the proceeds of the new case. The main authority on this point appears to be Cromley v. Board of Education of Lockport Township. There, the court held that:

[In deciding the appropriate safeguards necessary in the case of attorney disqualification, we must balance the respective interests of the parties and the public.]

Indeed, recognizing that the Model Rules of Professional Responsibility recommend a “functional approach” to the issue of whether a law firm should be disqualified, in Geisler v. Wyeth Laboratories, the U.S. District Court for the District of Kansas stated:

The Tenth Circuit has recognized that this ‘functional approach’ to the issue of firm disqualification may include the adoption of what has been referred to as the ‘Chinese Wall’ exception. Smith v. Whatcott, 757 F.2d [1098, at 1101-02 ([10th Cir. 1985]). Under this exception, firm-wide disqualification is unnecessary if the firm can prove that the attorney involved in the first matter has been effectively screened from financial interest and participation in the second case.

In the Geisler opinion, Judge Paul J. Kelly discussed the requirements for an adequate wall, quoting from the 10th Circuit’s decision in Smith v. Whatcott: the lawyer must be “effectively screened” from actual participation in the case and from inadvertent disclosure of confidential information, and the law firm must have had in place, prior to the hiring of the conflicted attorney, “firm-wide policies promulgated to prevent the inadvertent flow of confidential communication.”

The key part of the Geisler opinion is now of questionable validity, even in federal court.

The Model Rules thus reject, for lawyers practicing in the private sector at least, any thought that the ‘taint’ of

37. 2007 Rules, Rule 1.18(b) (emphasis added).
38. 2007 Rules, Rule 1.18(c) (emphasis added).
39. 2007 Rules, Rule 1.18, Comments.
40. 2007 Rules, Rule 1.18(d) (1).
41. 2007 Rules, Rule 1.18, Comments.
42. Cromley v. Bd. of Educ. of Lockport Township, 17 F.3d 1059 (7th Cir. 1994).
43. 17 F.3d at 1066.
45. Id. In Geisler, Judge Kelly found the specific procedures adopted by the subject law firm to be “sufficient to overcome the presumption of imputed disqualification.” 716 F. Supp. at 526.
the incoming lawyer can be cured by screening him or her out of the affected client’s matter, or by erecting a ‘Chinese Wall’ or by imposing a ‘cone of silence.’

The court thus rejected the use of insulation walls, “unless agreed to by all parties to the litigation.”

The Kansas federal court followed Parker in Koch v. Koch Industries. There, the firm of Hughes, Hubbard & Reed (HH&R) had adopted an insulation wall to screen files and information regarding former representation of a party who was now adverse to another client of the firm, without obtaining consent of the former client to accept the screening arrangement as sufficient. Under that circumstance, Judge Sam A. Crow held that “HH&R’s implementation of the Chinese Wall does not avert its disqualification.”

After Parker, the Kansas Supreme Court had occasion to revisit the issue in the later case of Lansing-Delaware Water District v. Oak Lane Park Inc. There, the court reaffirmed its holding in Parker, concluding that:

The model rule contains no provisions for use of screening devices in this situation. In fact, such a proposal was rejected at the time the model rules were adopted. Our decision in Parker is controlling on this issue, and we find no merit or reason to reconsider that decision.

Thus, absent consent from the client, a screening device has not been sufficient to avoid disqualification under the previous state of the law in Kansas, other than as permitted by KRPC 1.11 and 1.12, and now by new KRPC Rule 1.18.

As noted above, while, the ABA Ethics 2000 Commission originally recommended changes to Rules 1.9 and 1.10 to include screening as an effective protection against disqualification in many circumstances, those changes were not eventually approved by the ABA, and they have not been adopted in Kansas.

The only situation where screening will be approved — assuming satisfaction of the necessary conditions for its use — is in the case of judges and lawyers leaving government service to take up practice in the private bar, and lawyers who have spoken to prospective clients.

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49. Id. This exception is based, of course, on the proposition that knowing consent can result in a waiver of the conflict.
51. 798 F. Supp. at 1539.
53. 248 Kan. at 574.
b. What screening mechanisms are sufficient?

The KBA Ethics 2000 Rules include the following definition:

‘Screened’ denotes the isolation of a lawyer from any participation in a matter through the timely imposition of procedures within a firm that are reasonably adequate under the circumstances to protect information that the isolated lawyer is obligated to protect under these Rules and other law.54

Assuming that a screen would be appropriate, what steps should be taken to ensure proper protection?

As noted, the District of Kansas approved an insulation wall where it was only demonstrated that the firm prevented the new lawyer from having access to the files in the subject cases, even in the absence of any proof that any other institutional mechanisms had been discussed, adopted, or implemented.

However, the 7th Circuit’s discussion, in Cromley, supra, explores the required mechanisms in more detail. In that case, 1. it was “agreed that absolutely nothing of a substantive nature regarding the instant lawsuit would occur until decisions were made and the clients made aware of them,” 2. the new lawyer was assigned to an office in a different city from the lawyer working on the matter, 3. the lawyer handling the case kept the case files in his own personal office, and 4. the firm adopted specific screening procedures and required all members and employees of the firm to read and sign the memorandum describing the internal rules.56

In the ABA handbook, “Annotated Model Rules of Professional Conduct” (1993), the following factors are listed as appropriate questions to measure an effective wall of insulation: • whether the conflicted lawyer was able to gain access to the case files; • whether the conflicted lawyer shares in the profits or fees derived from the matter; • whether the conflicted lawyer is able to discuss the lawsuit with any of the members of the firm or office personnel; and • whether the disqualified lawyer is given the opportunity to review any of the case documents.57

All the authorities agree that, if an insulation wall is to be established, it must be in place when the potentially disqualifying event occurs.58

H. Rule 2.2 – Conflicts as Mediator or Intermediary

This Rule was deleted and has been replaced by the Preamble and related comments. It is still necessary for any lawyer who serves as a mediator or other intermediary to be free of disqualifying conflicts of interest, or at the least, to make full disclosure of conflicts and obtain the parties’ consent.59

I. Rule 3.3 – Candor Toward the Tribunal

This Rule has been amended to provide an affirmative obligation on the part of the lawyer to come forward and correct any erroneous statement by the lawyer, even if the lawyer believed at the time the statement was made that it was true.60

Thus, if a lawyer subsequently determines that something he previously told a court is or has become inaccurate, the lawyer must come forward and inform the court of that error. This obligation continues until there can be no appeal from the tribunal’s ruling.61

J. Rule 3.7 – Lawyer as Witness

This Rule was not changed substantively, but the concept of “waiver” or “consent” in the Comment was replaced by “informed consent, confirmed in writing.”62

K. Rule 3.8 – Prosecutor

This Rule has not been significantly changed. One addition is to require the prosecutor to “exercise reasonable care to prevent investigators, law enforcement personnel, employees, and other persons assisting or associated with the prosecutor in a criminal case from making an extrajudicial statement that the prosecutor would be prohibited from making under Rule 3.6 or this Rule.”63

L. Rule 4.2 – Parties Represented by Counsel

1. No contact

This Rule expands the prohibition against contacting “parties” known to be represented by counsel to “persons” known to be represented by counsel. The Rule allows such contact, if the lawyer has the consent of the other lawyer or is authorized by law or a court order to make such contact.64

In the case of an organization, the prohibited categories have been narrowed to the employee “who supervises, directs, or regularly consults with the organization’s lawyer concerning the matter or has authority to obligate the organization with respect to the matter, or whose act or omission in connection with the matter may be imputed to the organization for purposes of civil or criminal liability.”65 This deletes the protection formerly accorded to “persons having managerial responsibility on behalf of the organization,” and to one “whose statement may constitute an admission on the part of the organization.”

2. Former employees

The Comments to the new Rule provide that no consent is required to communicate with former employees. “Consent

54. 2007 Rules, Rule 1.0, Terminology.
56. 17 F.3d at 1066. [The specific screening procedures are not stated in the opinion.]
59. 2007 Rules, Preamble.
60. 2007 Rules, Rule 3.3(a) and Comments.
61. Id.
63. 2007 Rules, Rule 3.8(f).
64. 2007 Rules, Rule 4.2.
65. Id.
of the organization’s lawyer is not required for communication with a former constituent.66 This clearly clarifies an issue about which there has been extensive litigation.67

3. Second opinion
In addition, the Rule allows communication between a represented person and another lawyer, where the purpose of that contact is the seeking of a “second opinion” about the current lawyer’s representation.

Nor does this Rule preclude communication with a represented person who is seeking advice from a lawyer who is not otherwise representing a client in the matter.68

The new Rule is logical, and probably restates the law as it has traditionally been viewed.

a. Rule 4.2 already prohibited contacts with represented parties by other lawyers in the course of their “representing a client.” The lawyer who has been requested to give a “second opinion” is not representing a client, and so the Rule should not be implicated.69 A lawyer does not violate either the letter or purposes of Rule 4.2 by rendering a second opinion to a represented party, when the lawyer is not “representing a client” in the same matter.70

b. Clients possess an “inherent right to seek advice or representation for counsel of the client’s choosing,”71 and thus must be free to seek out opinions from other lawyers about their own matters.

c. At the time of the contact, the second lawyer is not “adverse” to the client or to the other lawyer.72 It is adversity that would give rise to a risk of admissions, which might be used against the client.

This question had also been addressed by the Kansas Bar Association Ethics Advisory Opinion Committee. This committee is available to answer questions posed by members of the Kansas bar for guidance, so long as the questions do not relate to pending litigation or to past conduct.73 In KBA Ethics Opinion E-3235 (1987),74 the committee responded that a lawyer may provide a second opinion to a person who is already represented by counsel in the matter. However, the Kansas Opinion also stressed professional courtesy, counseling that the second lawyer “should avoid interfering in an ongoing attorney-client relationship, ... [and] make every effort not to impair the first relationship.” Moreover, the second lawyer “may not use the consultation as a means of soliciting the client.”75

M. Rule 4.4(b) – Receipt of Privileged Information
This new Rule provides:

A lawyer who receives a document relating to the representation of the lawyer’s client and knows or reasonably should know that the document was inadvertently sent shall promptly notify the sender.76

Some courts view any inadvertent production of privileged documents as a waiver of the privilege.77 On the other side of the spectrum, some courts require an intentional waiver by the lawyer’s client, therefore hold that any inadvertent production must be reversed, and that there was no waiver of the privilege.78

Between these two approaches lies the more practical view, which looks at each disclosure on a case-by-case basis. This is the approach taken by Kansas courts.79 Under this approach, the court will consider five factors, each of which suggests practical protections:

1. Reasonableness of precautions taken
The producing party should take means reasonably necessary under the circumstances, such as having a second person review all documents produced, segregating privileged from nonprivileged documents, and preparing a privilege log. This is measured by the “reasonable law firm” test.80

2. How quickly was the problem rectified
Obviously, the more time that passes from the discovery of the inadvertent production until notification to the receiving party, the less sympathetic will be the court to the producing party. So, once it is discovered, the producing party should promptly advise the receiving party and request return of the document.81

3. Scope of requested discovery
If the document was one among 9,000, there will be more sympathy than if the produced document was one among 100.82

4. Extent of the disclosure
If there was just one privileged document produced among many thousands, its production will be more likely to be viewed as inadvertent than if there were scores or hundreds of privileged documents produced.83

5. Fairness and justice
The court will weigh the entire situation and decide the matter equitably. Undue prejudice from disclosure will help cause the return of the document.84

66. 2007 Rules, Rule 4.2, Comment.
68. 2007 Rules, Rule 4.2, Comments.
69. 2007 Rules, Rule 4.2, Comments.
75. Id.
76. 2007 Rules, Rule 4.4(b)
82. Monarch Coal Co. v. Lone Star Indus., 132 F.R.D. 558, 560 (D. Kan. 1990) (6,000 pages was “extensive”).
A party producing documents should, therefore, establish reasonable precautions to avoid inadvertent production. This includes proper training of the people reviewing documents about the privilege, a second-tier review process, segregating any privileged documents to ensure they will not be copied, and prompt action as soon as inadvertent production is discovered.

As noted above, the producing party should demand the return of inadvertently produced privileged documents — once he knows they have been produced. What is required of the party who receives a privileged document that has apparently been produced inadvertently?

KRCP 1.3 requires a lawyer to represent his client zealously. However, an ABA Ethics Opinion previously directed that the receiving lawyer take these steps:

a. Refrain from reviewing the document after determining that it is, in fact, privileged.

b. Notify the producing party of the production.

c. Abide the producing party’s request regarding the return or destruction of the document.

However, amended Rule 4.4(b) deletes the first and third of these requirements, only requiring the receiving lawyer to “notify” the producing party. In view of the adoption of the amended MRPC Rule 4.4(b), a more recent ABA Ethics Opinion withdraws Op. 92-368, and holds, instead, only that the recipient must “promptly notify the sender” of the privileged information, but that he is not required to refrain from looking at the document nor to abide the sender’s instructions.

Thus, the requirement for care on the part of the producing party is even stronger, as the recipient no longer has the obligation to “abide the producing party’s request regarding the return or destruction of the document.”

N. Rule 5.7 – Legal-Related Services

This new Rule provides that, when a lawyer is engaged in “legal-related services,” even when not directly engaged in the “practice of law,” the lawyer “shall be subject to the Rules of Professional Conduct,” if the law-related services are provided:

1. by the lawyer in circumstances that are not distinct from the lawyer’s provision of legal services to clients, or

2. in other circumstances by an entity controlled by the lawyer individually or with others if the lawyer fails to take reasonable measures to assure that a person obtaining the law-related services knows that the services are not legal services and that the protections of the client-lawyer relationship do not exist.88

Examples of law-related services listed in the Comments include “title insurance, financial planning, accounting, trust services, real estate counseling, legislative lobbying, economic analysis, social work, psychological counseling, tax preparation, and patent, medical, or environmental counseling.”89

V. ABA 2000 Rules Not ADOpted in KANSAS

A. Rule 5.5 – Unauthorized Practice and Multijurisdictional Practice

This is an issue undergoing constant study and change. It deserves separate and detailed attention, as well as thoughtful deliberation before enacting a positive rule.

B. Rule 8.5 – Choice of Law

The ABA/E2K changes to this Rule mirror the expanded discussion of unauthorized practice and multijurisdictional practice. It was felt that a change to Rule 8.5 is presently unnecessary, and that the existing Kansas rule on the subject is simple and concise.

C. Rule 1.6 – Confidentiality

This Rule was not expanded to allow disclosure of client confidential information to prevent reasonably certain death or substantial bodily harm or to prevent, mitigate, or rectify substantial injury to the financial interests or property of another. The current and existing rule only allows disclosure of client confidential information (among other circumstances), “[t]o prevent the client from committing a crime.”90

D. Rule 1.13 – Lawyer for Organization Reporting Client Misconduct

This Rule provides a mechanism for a corporate lawyer to express his opinions and advice and to press his position “to the highest authority that can act in behalf of the organization as determined by applicable law.”91 The proposed Rule would allow disclosure outside the organization, if the organization refused to act as the lawyer believes that it should.

VI. CONCLUSION

Significant effort has been expended by the Kansas Commission, the KBA Board of Governors, and the Supreme Court. After a lengthy period of time for public comment (during which very few actual comments were received), the Rules have been adopted and will be applicable to Kansas lawyers beginning on July 1, 2007. Practitioners are encouraged to obtain and review the new Rules.

About the Author

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

IN RE PAUL ARABIA
ORIGINAL PROCEEDING IN DISCIPLINE
DISBARMENT
NO. 97,220 – APRIL 27, 2007

FACTS: Respondent, who was formerly in private practice in Wichita, failed to appear for his disciplinary hearing and for his oral argument before the Supreme Court. He had previously informed the Disciplinary Administrator’s Office that he was retired, had no present forwarding address, and would be sailing for some time before taking up residence in Mexico.

The hearing resulted from a formal complaint that alleged violations of KRPCs 3.3(d) (candor to the tribunal in ex parte proceedings), 8.4(a) (misconduct, violating the rules of professional conduct through the acts of another), 8.4(b) (criminal misconduct), 8.4(c) (misconduct involving dishonesty), 8.4(d) (misconduct prejudicial to the administration of justice), and 9.4(g) (misconduct adversely reflecting on fitness to practice law).

The panel found clear and convincing evidence of these violations with regard to a fraudulent name change petition, considered factors in aggravation and recommended discipline by published censure. See related case In re Lazzo, 283 Kan. 167 (2007).

HELD: No exceptions were filed, so the Court adopted the uncontested findings of fact and conclusions of rules violations. It noted that respondent admitted the violations, agreed to the recommended discipline, and stated that he would reimburse his client for the fees. The majority ordered published censure, while a minority of the Court would impose more severe discipline based on respondent’s failure to date to reimburse the fees.

IN RE BARRY L. ARBUCKLE
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 97,691 – APRIL 27, 2007

FACTS: Respondent, formerly Pratt County attorney, was responsible for receiving payments on traffic diversion cases. Those wishing diversion were to pay by two separate checks — one to the court clerk for the traffic fine and one to a charity, generally reflecting on fitness to practice law.

The matter was also the subject of a disciplinary hearing. The hearing panel found clear and convincing evidence that respondent violated Rule 1.15 (safekeeping property) in failing to protect the property belonging to others adequately and in failing to keep records of that property. The panel considered factors in mitigation and aggravation and recommended discipline by published censure.

A Formal Complaint alleging violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 3.4 (fairness to opposing party), and 8.1(b) and SCR 207(b) (cooperation with the disciplinary process) resulted in a disciplinary hearing. Respondent appeared and was represented by counsel. He stipulated to the violations alleged and presented mitigation evidence. The panel considered factors in mitigation and aggravation and noted that the deputy disciplinary administrator and counsel for respondent both requested published censure. The Final Hearing Report recommended published censure and suggested that respondent pay the court-ordered sanctions and obtain professional liability insurance.

Respondent did not file exceptions.

HELD: The Supreme Court adopted the uncontested findings of fact and conclusions of rules violations. It noted that respondent admitted the violations, agreed to the recommended discipline, and stated that he would reimburse his client for the fees. The majority ordered published censure, while a minority of the Court would impose more severe discipline based on respondent’s failure to date to reimburse the fees.

IN RE THOMAS V. BLACK
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 97,406 – APRIL 27, 2007

FACTS: Respondent, formerly Pratt County attorney, was responsible for receiving payments on traffic diversion cases. Those wishing diversion were to pay by two separate checks — one to the court clerk for the traffic fine and one to a charity, generally reflecting on fitness to practice law.

The matter was also the subject of a disciplinary hearing. The hearing panel found clear and convincing evidence that respondent violated Rule 1.15 (safekeeping property) in failing to protect the property belonging to others adequately and in failing to keep records of that property. The panel considered factors in mitigation and aggravation and recommended discipline by published censure.
HELD: Respondent filed exceptions to the panel's findings and recommended sanction. The Supreme Court examined the evidence and found the facts in the record provided ample evidence of the misconduct constituting the violation. A majority of the Court adopted the recommended discipline, but a minority would impose a harsher sanction.

**IN RE TOMMY LEWIS GREEN**  
**ORIGINAL PROCEEDING IN DISCIPLINE**  
**INDEFINITE SUSPENSION**  
**NO. 97,896 – APRIL 27, 2007**

FACTS: Respondent, a private practitioner from Topeka, faced a disciplinary hearing on seven separate client complaints. The Amended Formal Complaint alleged violations of KRPCs 1.1 (competence), 1.2 (scope of representation), 1.3 (diligence), 1.4 (communication), 1.5 (fees), 1.15 (safekeeping property), 1.16 (terminating representation), 3.2 (expediting litigation), 8.1 (cooperation with the disciplinary administrator), and 8.4(b) (misconduct involving criminal conduct) and SCR 207 (cooperation). Respondent, through counsel, stipulated to the alleged violations and submitted a proposed plan of probation prior to the hearing.

The panel found clear and convincing evidence of the violations alleged and considered several factors in aggravation and mitigation. In its Final Hearing Report, the panel noted that respondent had already put his probation plan into effect and that he is an alcoholic and crack cocaine addict. Respondent has cooperated with the Kansas Impaired Lawyers Assistance Program and had not used cocaine since October 2005.

In considering its recommendation of discipline, the hearing panel reviewed the probation plan and congratulated respondent on his attempts to maintain sobriety. However, the panel concluded that the plan was insufficient to protect the public from the possibility of relapse and recommended indefinite suspension from the practice of law.

HELD: As respondent did not file exceptions, the Supreme Court adopted the facts and rules violations as found by the panel. The Court also acknowledged respondent's successful efforts toward a life of sobriety and encouraged him to continue with these activities. However, the Court agreed that at this time the plan of probation submitted by respondent was not adequate to address all concerns.

**IN RE E. THOMAS PYLE III**  
**ORIGINAL PROCEEDING IN DISCIPLINE**  
**THREE-MONTH DEFINITE SUSPENSION**  
**NO. 96,579 – APRIL 27, 2007**

FACTS: This decision is a comprehensive review of case law on the extent to which free speech rights are tempered because the source of the commentary is a licensed attorney. Respondent, a private practitioner from McPherson, faced a disciplinary hearing based solely on a letter he sent out to 281 acquaintances following his published censure in In re Pyle, 278 Kan. 230 (2004) Pyle I. At issue was whether false statements, illogical deductions, and other criticisms of the Kansas attorney disciplinary system made in the letter constituted violations of the rules of professional conduct or were protected free speech and fair comment as to respondent’s opinions.

Interestingly, the three hearing panel members wrote separate minority hearing reports. One found certain violations but recommended only informal admonition, which is public discipline but is handled at the disciplinary office level and does not proceed to the Kansas Supreme Court. One member concurred and found certain violations but recommended a definite suspension of six months. The third panel member found the letter contained unfortunate and inaccurate language but was legitimate opinion and criticism, thus not violating any of the Kansas Rules of Professional Conduct.

HELD: The Supreme Court carefully reviewed each minority report and examined the uncontroversial facts in relation to the language of each relevant rule. The Court found no violation of Rule 8.4(c) (misconduct involving dishonesty, fraud, deceit or misrepresentation) but concluded that the letter violated Rule 8.4(d) (misconduct prejudicial to the administration of justice) in its suggestion of improper influence in the disciplinary system.

The Court reviewed its prior cases as well as U.S. Supreme Court decisions on attorney free speech and found support for protecting society from unfounded attacks. “There is a line between just and unjust criticism. Respondent crossed it. This is evident from his plainly selfish motive. He displayed no desire to improve the disciplinary system, only to excuse its focus on him.” The majority of the Court concluded that a definite suspension of three months was appropriate, largely due to respondent’s trivialization of his prior published censure, while a minority would impose a less severe sanction.
crops from which rent would be paid and as contemplated by the parties, was a surrender of the premises giving rise to the landlord's duty to relet the properties.

STATUTES: K.S.A. 20-3018(b); K.S.A. 2006 Supp. 22-3602(e); K.S.A. 58-2506(d), 2506a, -2519; K.S.A. 59-1402

INSURANCE CONTRACTS
IRON HORSE AUTO INC. V. LITITZ MUTUAL INSURANCE CO. ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 96,772 – APRIL 27, 2007

FACTS: Iron Horse Auto owned improved real estate as part of its used car dealership business operations. It had a commercial insurance policy with Lititz Mutual Insurance providing, inter alia, fire insurance on its office building with a policy limit of $79,500. The policy also identified William Frye as a named insured and listed Capital City Bank as a mortgage holder on the insured building. After Lititz Insurance denied certain claims, including one for a fire loss, Frye as named insured filed suit against its insurer. Lititz Insurance defended on the basis that Frye and/or his wife had participated in setting the fire that caused the claimed loss. Capital City intervened as a third party and included a claim against Lititz Insurance for failing to pay the bank's damages pursuant to the mortgage holder provisions in the policy. The district court granted summary judgment in favor of Capital City finding that Lititz's commercial insurance policy provided for loss payment to the bank, as mortgage holder, notwithstanding the named insured's filing of a fraudulent claim. Capital City did not participate in the ensuing trial, where the jury found in favor of Lititz. The trial court entered judgment for Capital City against Lititz in the amount of $43,987.15 plus interest.

ISSUE: Insurance contracts

HELD: Court rejected Lititz' argument that K.S.A. 40-2,118(c) excused the payment to the bank or that the policy provisions and endorsements specifically excluded coverage for the bank. Court held the Legislature did not intend for K.S.A. 40-2,118(c) to nullify or invalidate all standard or union mortgage clauses or to preclude an insurer from voluntarily providing coverage under a standard or union mortgage clause. The legislation simply clarifies that an insurer is not required to provide coverage for or make payments to a claimant where the named insured commits a fraudulent insurance act, unless the insurer had voluntarily provided such coverage under the insurance policy. A standard or union mortgage clause does not violate public policy. Court also held the plain and unambiguous language of Lititz's policy provided for loss payments to the bank, notwithstanding a denial of the named insured's claim based upon the Named Insured's Act, even if that act was a fraudulent insurance act. Lititz' policy contained a standard or union mortgage clause. No other provision of the policy or endorsement to the policy could be understood by a reasonably prudent insured as modifying, restricting, or abolishing the standard or union mortgage clause.


STATUTE OF LIMITATIONS, NEGLIGENCE, AND TORTS
BASKA V. SCHERZER ET AL.
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,879 – APRIL 27, 2007

FACTS: Baska brought an action for personal injuries sustained when she attempted to stop a fight by stepping between the defendants, Scherzer and Madrigal. Her action was brought after the expiration of a year from her injury but within two years from the date of her injury. After some discovery, the trial court granted the defendant's motions for summary judgment and dismissed Baska's action based upon its conclusion that her action was governed by the one-year statute of limitations for assault and battery. The Court of Appeals reversed, holding that Baska's action sounded in negligence, and thus was subject to the two-year statute of limitations primarily because she was unintentionally struck by defendants.

ISSUES: (1) Statute of limitations, (2) negligence, and (3) torts

HELD: Court held the undisputed facts showed that the defendants intended to strike and cause harm to one another. When Baska intervened and stepped between the two boys, she was "unintentionally" struck by punches intended for the defendants. Had the defendants struck each other and brought suit, they would be liable to one another for assault and battery. Under the doctrine of transferred intent, which has long been recognized in this state, the fact that the defendants struck the plaintiff does not change the fact that their actions (punching) were intentional. Moreover, the fact that Baska's petition describes her claims against the defendants as actions for negligence does not alter the nature of those claims, which the law recognizes as claims for intentional torts of assault and battery. Court held the trial court correctly granted defendant's motion for summary judgment.

STATUTE: K.S.A. 60-513(a)(4), -514(b)

Criminal

STATE V. BROWN
WASHINGTON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,413 – APRIL 27, 2007

FACTS: Brown filed motion for continuance of Aug. 20 trial date to retain expert witness. District court granted the motion on Aug. 1, reset trial date to Oct. 27, and assessed time to Brown. Trial date was then reset to Nov. 6 because prosecutor was ill. Brown alleged speedy trial violation and filed motion to dismiss the criminal charges. He claimed the delay due to continuance commenced from the Aug. 20 originally scheduled trial date. State claimed delay due to the continuance should be computed from Aug. 1 when the continuance was granted. District court agreed and denied the motion. Court of Appeals affirmed, 34 Kan. App. 2d 746 (2005).

ISSUE: Continuance and speedy trial

HELD: Issue of first impression in Kansas. Under K.S.A. 22-3402(1), the computation of time chargeable to a defendant where the defendant has obtained a continuance of a trial date is discussed. Statute does not set forth how to compute such delay. Under facts of case, delay from date the judge granted Brown's motion for continuance until the rescheduled trial date was chargeable against Brown for speedy trial purposes pursuant to K.S.A. 22-3402(1). State v. White, 275 Kan. 580 (2003), and specific language in K.S.A. 22-3402(3)(c) is distinguished. District court and Court of Appeals are affirmed.

DISSENT (Beier, J.): Only portion of delay between Aug. 1 and Oct. 27 that is attributable to Brown under terms of statute was portion between the Aug. 20 original trial date and the Oct. 27 rescheduled trial date. State v. Arrocha, 30 Kan. App. 2d 120 (2002), is discussed. Concern stated regarding potential adverse impact of majority's holding on motions for a continuance filed by defendants.

STATUTES: K.S.A. 2006 Supp. 8-1567(a)(2), 21-3442, 22-3402(1), -3402(3); and K.S.A. 22-3402, -3402(1), -3402(3)(c)

STATE V. DAVIS
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 95,339 – APRIL 27, 2007

FACTS: Originally, Davis was charged with one count of first degree murder on Jan. 26, 2000. After the state rested its case, defense moved for directed verdict because the state had not presented evidence to prove that Davis and his co-conspirators agreed to commit
murder on Jan. 24, 2000. Over defense objection, the state moved to amend the information to show Jan. 26, 2000, as the only date on which Davis allegedly conspired to commit first-degree murder. The trial court granted the motion. Davis was found guilty. Davis filed a pro se motion to correct an illegal sentence because the state had not memorialized the amendment. The trial court found no prejudice and allowed the state to file a journal entry nunc pro tunc.

ISSUES: (1) Amendment of complaint and (2) jurisdiction

HELD: Court held that a motion to correct an illegal sentence filed pursuant to K.S.A 22-3504 does not provide a defendant a means for a collateral attack of a conviction. Relief is not available to a defendant under K.S.A. 22-3504 based upon a prosecutor's failure to memorialize in writing an oral argument to a complaint or information based upon a claim that the oral amendment prejudiced the defendant.

STATUTES: K.S.A. 22-3504 and K.S.A. 2006 Supp. 22-3201(b), (e)

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STATE V. DENNEY
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 95,495 – APRIL 27, 2007

FACTS: To avoid equal protection violation, DNA testing under K.S.A. 2003 Supp. 21-2512 extended to conduct like that in Denney's offenses, State v. Denney, 278 Kan. 643 (2004). Case was remanded for trial court to determine whether Denney met remaining statutory qualifications for DNA testing. On remand, district court ordered testing of evidence for one of Denney's criminal charges. Finding the test results were unfavorable to Denney, the district court dismissed Denney's petition. Denney's appeal was transferred to the Supreme Court.

ISSUE: Postconviction DNA testing

HELD: Under facts of case, an actual controversy exists, which permits appellate review. Scheme for postconviction forensic DNA testing in K.S.A. 2006 Supp. 21-2512 is not the equivalent of a criminal prosecution. When the results of post-conviction DNA testing are unfavorable to petitioner as described in K.S.A. 2006 Supp. 21-2512(f), the petitioner has no right to confront the individual who conducted the testing and no right to be present at any hearing where the test results are received by the court. Nor is the court's acceptance of the report subject to the strict rules of evidence. District court's dismissal of the petition is affirmed.

STATUTES: K.S.A. 2006 Supp. 21-2512, -2512(c), -2512 (f) subsections (1), (2)(A), and (3); K.S.A. 2003 Supp. 21-2512; and K.S.A. 20-3018(c), 22-3405, 60-1507(b)

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STATE V. GAITHER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,489 – APRIL 27, 2007

FACTS: Gaither convicted of attempted first-degree premeditated murder, first-degree felony murder, aggravated robbery, aggravated kidnaping, and felony obstruction of official duty. On appeal, he claimed (1) judicial misconduct during jury voir dire, (2) charges should have been severed into separate trials, (3) evidence of federal warrant against one victim should have been admitted, (4) evidence was admitted in violation of K.S.A. 60-455, (5) jury was erroneously instructed regarding K.S.A. 60-455 evidence, (6) jury should have been instructed to consider aggravated battery as a lesser included offense to attempted first-degree premeditated murder, (7) cumulative error denied him a fair trial, and (8) sentence was based on criminal history score not proven beyond a reasonable doubt to the jury.

ISSUES: (1) Judicial misconduct, (2) joinder of criminal charges, (3) evidence in support of theory of defense, (4) admission of K.S.A. 60-455 evidence, (5) jury instruction for prior bad acts, (6) jury instruction on lesser included crime, (7) cumulative error, and (8) sentencing

HELD: Expectations for judicial conduct stated. Here, district court judge's comments constituted judicial misconduct where she failed to control her temper and frustrations, declined to exercise control over her conduct and utterances, and allowed prospective jurors to embroil her in conflict. However, her apology and offer to excuse prospective jurors purged taint of the misconduct. No prejudice to Gaither's substantial rights.

Under facts, and compared to State v. Barkdole, 266 Kan. 498 (1999), joinder did not violate K.S.A. 22-3202(1) because charges were of same or similar character. No support for claim that severance was mandated by his inability to testify about one of the crimes, and no merit to claim that joint trial on attempted murder and felony-murder charges allowed state to rely on propensity to commit crime in violation of K.S.A. 60-455.

District court properly excluded evidence of federal warrant against one victim. Evidence was not relevant to material facts and did not prevent Gaither from presenting evidence in support of general denial defense.

Admission of evidence contrary to K.S.A. 60-455 was not preserved for appeal.

No merit to argument that the limiting instruction of other crimes evidence did not restrict consideration of evidence to his attempted first-degree premeditated murder charge.

Aggravated battery does not qualify as lesser-included crime of attempted first-degree murder under K.S.A. 2006 Supp. 21-3107(2)(a).

No reversal for cumulative error where the only error did not deny a fair trial.


STATUTES: K.S.A. 2006 Supp. 21-3107(2)(a) and (b), -3301; and K.S.A. 21-3401, -3414, 22-3601(b)(1), -3602(1), 60-401(b), -407(f), -455

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STATE V. HARP
RICE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,322 – APRIL 27, 2007

FACTS: Harp filed no direct appeal from 2002 conviction of manufacture of methamphetamine as severity level 1 drug felony. He voluntarily dismissed his 2003 motion under 60-1507. After State v. McAdam, 277 Kan. 136 (2004), he filed motion to correct illegal sentence to seek similar relief. District court denied the motion. Court of Appeals affirmed in unpublished opinion. Harp's petition for review granted, and case temporarily remanded to determine if Harp should be permitted to file direct appeal out of time. District court found Harp was not advised of right to appeal and should be allowed to appeal out of time.

ISSUES: (1) Collateral challenge to sentence and (2) out of time direct appeal

HELD: No error in denying motion to correct an illegal sentence. Even if motion were considered under K.S.A. 60-1507, McAdam would not be retroactively available.

Substantial competent evidence supports district court's finding that Harp was entitled to out of time appeal under exceptions stated in State v. Ortiz, 230 Kan. 733 (1982). Harp's direct appeal is properly before the appellate court. Pursuant to State v. Thomas, decided this same date, the appeal is subject to the law in effect when the appeal is granted under an Ortiz exception. Holding in McAdam thus applies. Harp's sentence is vacated. Case is remanded for resentencing as severity level 3 drug felony consistent with McAdam.

STATE V. JOHNSON
SHAWNEE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 91,867 – APRIL 27, 2007

FACTS: A jury convicted Johnson of one count of aggravated indecent solicitation of a child for sex acts with the 4-year-old daughter of the woman he was dating. Johnson had been charged with aggravated indecent liberties.

ISSUES: (1) Jurisdiction, (2) admission of evidence, and (3) prosecutorial misconduct

HELD: Court reversed the district court and the Court of Appeals decisions. Court held that because K.S.A. 21-3511(a) was not specifically stated in the complaint or was not a lesser included offense of one that was, the district court lacked jurisdiction to convict Johnson of that crime. Court reversed Johnson’s conviction and vacated the sentence.

STATUTES: K.S.A. 20-3018(b); K.S.A. 2006 Supp. 21-3107(2)(b); K.S.A. 21-3501(4); K.S.A. 21-3504(a)(3)(A), (B), -3511; and K.S.A. 21-3505(a)(2), (3)

STATE V. LEE
SALINE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,348 – APRIL 27, 2007

FACTS: When police stopped and questioned Lee, he cooperated, disclosed legal weapons, and consented to pat down search. Drugs found in bulge in his coin pocket and in search of his duffel bag resulted in criminal prosecution on drug charges. District court granted Lee’s motion to suppress, finding officers violated limitations of Terry stop and coerced Lee’s consent to search. Court of Appeals reversed, finding Lee’s encounter with officers was consensual, and Lee voluntarily consented to the search. Lee’s petition for review granted.

ISSUE: Fourth Amendment

HELD: District court’s decision to suppress is affirmed notwithstanding disagreement with that court’s analysis. Facts support Court of Appeals opinion that encounter between Lee and the officers was consensual. Although Lee consented to pat-down search for weapons, officer exceeded the scope of the search when he removed plastic baggie of methamphetamine from Lee’s coin pocket. Because plain feel exception does not apply, seizure of methamphetamine violated Fourth Amendment. Discovery of marijuana residue in duffel bag was fruit of the illegal search.

CONCURRING (Beier, J.): Concurs with result, but departs from majority’s analysis concerning whether encounter between Lee and officers became a detention and whether there was sufficient justification for the pat-down search.


STATE V. MCKISSACK
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED IN PART, REVERSED IN PART
NO. 93,670 – APRIL 27, 2007

FACTS: McKissack charged with burglary and misdemeanor theft for forcible entry of estranged girlfriend’s car and removal of stereo equipment and compact discs. Jury convicted him of burglary and criminal deprivation of property, based upon trial court’s instruction that criminal deprivation of property was lesser included

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Oral Arguments Before the Kansas Court of Appeals

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offense of theft. Court of Appeals affirmed in unpublished opinion, finding criminal deprivation of property is lesser included offense of theft, finding insufficiency of evidence claim cannot be upheld merely on basis of inconsistent verdicts, and finding statement was admitted to show McKissack’s state of mind and not to establish the truth of the statement. McKissack’s petition for review granted on these three issues.

ISSUES: (1) Lesser included offense, (2) sufficiency of evidence, and (3) hearsay evidence

HELD: Statutory and case law changes since State v. Keeler, 238 Kan. 356 (1985), examined. Crime of criminal deprivation of property is not a lesser included offense of theft. That part of Keeler is overruled. Trial court erred in instructing jury on criminal deprivation of property, which was neither a lesser included offense nor charged in the complaint or information. Conviction for criminal deprivation of property is reversed because district court lacked jurisdiction to convict McKissack of that crime. McKissack may be charged for this offense on remand unless the charge is barred of statute of limitations or some other procedural barrier.

Under unique circumstances of case, there is real possibility the jury based its conviction of burglary on McKissack’s conviction of criminal deprivation of property rather than other evidence produced at trial. Burglary conviction is reversed, not on basis of inconsistent verdicts or sufficiency of evidence, but because no confidence in guilty verdict.

Trial court and Court of Appeals correctly found statement was not inadmissible hearsay because it was offered as evidence of McKissack’s motive in talking to police, and not to prove the truth of the matter.


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STATE V. THOMAS
MCPherson District Court – Remanded for Resentencing
Court of Appeals – Affirmed
No. 95,733 – April 27, 2007

FACTS: Thomas filed no direct appeal from his 2001 conviction on plea to manufacture of methamphetamine as a drug severity level 1 felony. In 2004, Thomas filed motion to correct illegal sentence pursuant to State v. McAdam, 277 Kan. 136 (2004). District court denied the motion, and Court of Appeals affirmed. Thomas then filed motion to docket a direct appeal out of time. District court granted the motion, finding an exception in State v. Ortiz, 230 Kan. 733 (1982), applied. Thomas then moved for summary disposition of the appeal. Court of Appeals granted the motion and remanded for resentencing per McAdam. State’s petition for review granted.

ISSUE: McAdam resentencing and out of time appeal

HELD: When a late appeal is granted by the district court under Ortiz, the appeal is subject to the law in effect at the time of its granting rather than the law in effect when the defendant should have filed a direct appeal and during its pendency. K.S.A. 21-4721(c) does not bar Thomas’ appeal. Imposition of a presumptive sentence or a plea agreement sentence does not deny an appellate court jurisdiction to address a McAdam-type appeal. Court of Appeals did not err in remanding Thomas’ appeal for resentencing.

STATUTES: K.S.A. 2001 Supp. 65-4152(a)(3), -7006, -7006(a); and K.S.A. 21-4721(c), 22-3504, -3608(a), 65-4159(a), -4161(a)
Court of Appeals

Civil

GRANDPARENT VISITATION
IN RE CREACH AND CREACH, MINOR CHILDREN
SUMNER DISTRICT COURT – REVERSED AND REMANDED WITH INSTRUCTIONS
NO. 97,100 – APRIL 6, 2007

FACTS: Jarred and Rayna Creach are the natural parents of Jayden and Collin Creach. Linda Mason Reynolds is the children’s grandmother. After a falling out, Jarred told Reynolds that he did not want Reynolds to have any contact with the children. After a hearing, the parents stated that although they opposed any grandparent visitation, they offered an alternative visitation plan that they believed was more reasonable than Reynolds’ proposed plan. The trial court concluded that a substantial relationship existed between Reynolds and her grandchildren, and it would be in the children’s best interest to have contact with her. The trial court granted Reynolds’ request for visitation.

ISSUE: Grandparent visitation

HELD: Court held the trial court did not make sufficient findings to allow this court to determine why the parents’ proposed visitation plan was not adopted or why the grandmother’s proposed visitation plan was not revised to address the parents’ concerns. Because it is unclear whether the trial court applied the presumption that parents have a fundamental right to make parenting decisions and whether the trial court gave deference to the parents’ opinions on grandparent visitation, court stated it is impossible to determine whether the trial court unconstitutionally applied K.S.A. 38-129 by interfering with the parents’ due process rights. Court reversed and remanded for the trial court to apply the presumption that fit parents act in the best interests of their children and their opinions on grandparent visitation should be given special weight.

STATUTE: K.S.A. 38-129

HABEAS CORPUS AND INEFFECTIVE ASSISTANCE OF COUNSEL
LUDLOW V. STATE
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 96,319 – APRIL 20, 2007

FACTS: Ludlow was convicted of second degree murder, attempted murder in the first degree, and theft. Ludlow filed a 60-1507 motion on the last day it could be filed, presenting three arguments for relief. He claimed ineffective assistance of both trial and appellate counsel, failure of the state to produce exculpatory evidence, and a sheriff’s report that depicted a domestic dispute between the victim and his girlfriend. The district court dismissed as time barred several additional claims of ineffective assistance of counsel. The district court denied Ludlow’s motion.

ISSUES: (1) Habeas corpus and (2) ineffective assistance of counsel

HELD: Court upheld the district court’s dismissal because a motion filed under K.S.A. 60-1507 is a pleading that is a subset distinct from ordinary civil petitions. As required by statute and Supreme Court Rule, such a motion must contain all of the grounds for relief. Since the statute of limitations for this type of relief had expired in his case, Ludlow could not subsequently amend his motion and have it relate back to the day his original motion was filed. Court also held that there is substantial evidence in the record that supports the district court’s conclusion that Ludlow received effective assistance from his trial and appellate counsel. Furthermore, Ludlow failed to show that his defense was prejudiced by not having the sheriff’s report because extensive evidence of the violent relationship between the victim and his girlfriend was presented at trial. Finally, court concluded the trial court did not err while ruling on this motion when it adopted the facts of the underlying crime of conviction as stated in our Supreme Court’s ruling in the direct appeal.

STATUTE: K.S.A. 60-215, -1507

KANSAS UNIFORM TRANSFER TO MINORS ACT, CERTIFICATE OF DEPOSIT, FIDUCIARY DUTY, AND PUNITIVE DAMAGES
WILSON V. WILSON
MARSHALL DISTRICT COURT – AFFIRMED
NO. 95,792 – APRIL 6, 2007

FACTS: Michael and Penny Wilson established two investment accounts for each of their three children pursuant to the Kansas Uniform Transfer to Minors Act (UTMA). They also opened a certificate of deposit (CD) for each of the three children. After Michael and Penny divorced, Michael withdrew all of the funds in two of the children’s UTMA accounts and two of the CDs. The three children, after reaching the age of majority, sued Michael for violating his duties under the UTMA regarding the investment accounts and for breaching his fiduciary duty regarding the CDs. After a two-day bench trial, the district court ordered Michael to repay the UTMA accounts and CDs with interest and to pay punitive damages.

ISSUES: (1) UTMA, (2) certificate of deposit, (3) fiduciary duty, and (4) punitive damages

HELD: Court held the evidence supports the district court’s conclusion that Michael did not expend the custodial property in the UTMA accounts for the benefit of the children and converted the funds for his own use. Regarding the CDs, court held that even though the CDs were designated by the bank signature cards as joint tenancy accounts, the district court was allowed to consider declaratory evidence concerning the intent of the parties as to ownership and control of the funds. Court held that substantial competent evidence supported the district court’s conclusion that Michael violated the fiduciary duty with his children and the CDs. The district court also correctly considered the appropriate statutory factors for awarding punitive damages and there was no abuse of discretion in the amount of punitive damages awarded. Court denied the children’s motion for appellate attorney fees.

STATUTES: K.S.A. 38-1712(b), -1713(b), -1714(a), -1715(a), (c), -1721(1), (3); K.S.A. 58-501; and K.S.A. 60-3702, -3703

LANDLORD TENANT, JURISDICTION, NOTICE OF APPEAL, AND PUNITIVE DAMAGES
GATES ET AL. V. GOODYEAR ET AL.
LEAVENWORTH DISTRICT COURT
AFFIRMED IN PART AND DISMISSED IN PART
NO. 95,941 – APRIL 13, 2007

FACTS: Gates was the landlord of a lease with Goodyear and Roberts of premises for residential and commercial purposes and from which the tenants would operate their trucking business. Gates filed a petition alleging failure to pay rent and sought possession of the premises and judgment for back rent and interest. After the tenants were forcibly removed, the court permitted the tenants to have access for the purpose of removing personal property. The tenants
filed a motion to hold Gates in contempt for violating the access order and the action was converted to a chapter 60 action. After a bench trial, on Aug. 16, 2005, the district court found: (1) the lease was a tenancy from month to month and a “hybrid” residential and commercial lease, (2) the tenants were not in arrears in rental payments when the initial petition was filed, (3) the forcible entry and detainer action was defective because Gates did not strictly comply with the applicable procedures to terminate the lease, (4) K.S.A. 58-2565(d) was inapplicable to vest lien rights of a landlord in the tenant’s property, (5) Gates’ damage claims were unfounded and his claims to ownership of the retained property were unsubstantiated, (6) Gates’ retention of the tenants’ property constituted conversion, and (7) the conversion was willful and wanton and justified punitive damages. The court set damages in November 2005, finding Gates liable for missing property in the amount of $29,483.62, some of the returned property was damaged in the amount of $13,468.68, and punitive damages set at $10,000. Gates timely appealed the November judgment only, challenging principally the conclusion that he converted the tenants’ property but also the court’s ruling on his motion to strike punitive damages.

ISSUES: (1) Jurisdiction, (2) notice of appeal, and (3) punitive damages

HELD: Court held the issues on appeal were limited due to the restricted language in Gates’ notice of appeal. The notice of appeal only covered Gates’ claim involving K.S.A. 58-2565 and punitive damages. Court held that in the absence of a qualified retention of the tenants’ property under K.S.A. 58-2565, the court agreed with the district court’s conclusion that Gates’ action constituted a conversion under Kansas law. Court held the district court did not err in allowing the tenants to amend to seek punitive damages and the motion was not untimely. Court stated that Gates did not challenge the sufficiency of the motion to amend, the sufficiency of the evidence to support the finding punitive damages were warranted, or the amount of punitive damages assessed. Court held the award of punitive damages based on the tenants’ timely motion to amend was upheld.

STATUTE: K.S.A. 58-2565(d); and K.S.A. 60-102, -216, -2103(b), -3703

TIMELY NOTICE OF APPEAL, JURISDICTION, RIGHT TO APPEAL, STATE’S CROSS APPEAL, AND MCADAM
CASNER V. STATE

SALINE DISTRICT COURT – SENTENCE VACATED AND CASE REMANDED WITH DIRECTIONS; AND CROSS-APPEAL DISMISSED
NO. 94,433 – APRIL 20, 2007

FACTS: Casner pled guilty to attempting to manufacture methamphetamine. Casner filed a 60-1507 motion to correct illegal sentence under McAdam, a motion to correct illegal sentence, and a motion to withdraw his plea. The district court denied the 60-1507 motion finding McAdam did not apply retroactively and denied the motion to withdraw his plea finding no manifest injustice. After a remand on the issue of timely appeal, the district court found Casner qualified under one of the Ortiz exceptions, namely that counsel did not advise Casner of his right to appeal. Casner filed a direct appeal. The state cross-appealed the district court's decision granting the Ortiz hearing.

ISSUES: (1) Timely notice of appeal, (2) jurisdiction, (3) right to appeal, (4) McAdam, and (5) Ortiz

HELD: Court held the district court’s order finding an Ortiz exception does not qualify as an order arresting judgment and the state cannot cross-appeal that holding. Additionally, the court did not find jurisdiction for the cross-appeal under a ruling of fundamental fairness since K.S.A. 2006 Supp. 22-3602(b) is explicit in limiting the grounds the state can raise on appeal. Court dismissed the state’s cross-appeal. Court held the evidence demonstrates that Casner met the first exception under Ortiz that he was not informed of his right to appeal, and the court has jurisdiction to address Casner’s direct appeal. Pursuant to McAdam, the court vacated Casner’s sentence and remanded for resentencing.

STATUTES: K.S.A. 22-3424, -3502, -3503, -3608; K.S.A. 2006 Supp. 22-3602(b); K.S.A. 60-1507; and K.S.A. 65-4159, -4161(b)

TORTS AND RECREATIONAL USE IMMUNITY
POSTON V. U.S.D. NO. 387 ET AL.

WILSON DISTRICT COURT – AFFIRMED
NO. 96,568 – APRIL 27, 2007

FACTS: Poston was at a middle school in the school district picking up his stepson from a city-sponsored basketball practice. Poston was exiting the building through the south doors when one of the brackets on the door came loose and fell on Poston’s head. Poston’s head was cut and bleeding. Poston sued the school district for negligence in allowing the door hinge to become loose and failing to warn him of the danger. The school district claimed it was immune from liability under the recreational use exception of the Tort Claims Act. The school district claimed the injury occurred in an area that was close enough to the indoor gymnasium to qualify as an “open area” for purposes of recreational use immunity. The district court granted summary judgment to school district, finding that the commons area was an “appendage” to the gymnasium such that it qualified under the recreational use exception.

 ISSUES: (1) Torts and (2) recreational use immunity

HELD: Court held that an outside door leading into a commons area that lies directly adjacent to a gymnasium being used for recreational purposes is found to qualify for the limited recreational use immunity from tort liability granted by K.S.A. 2006 Supp. 75-6104(o).

DISSENT (McAnany, J.): He concluded the school district failed to prove its exception to the Tort Claims Act.

STATUTE: K.S.A. 2006 Supp. 75-6101 et seq., -6104(o)

WORKERS’ COMPENSATION AND RETIREMENT
BENEFIT OFFSET
LLERAS V. VIA CHRISTI REGIONAL MEDICAL CENTER ET AL.

WORKERS’ COMPENSATION BOARD – AFFIRMED
NO. 95,901 – APRIL 6, 2007

FACTS: Lleras had a work-related injury at Via Christi. His position was eventually eliminated, and he was terminated. Via Christi paid him a lump sum retirement benefit, fully funded by Via Christi, of $52,999.21 that netted claimant the sum of $42,399.37 after taxes. The board used a mortality table and determined the lump sum should be converted to a weekly equivalent amount by Lleras’ estimated life expectancy, and then Via Christi was entitled to a $36.40 per week retirement credit/offset against his disability award.

ISSUES: (1) Workers’ compensation and (2) retirement benefit offset

HELD: Court reiterated that the purpose of the workers’ compensation benefit offset under K.S.A. 44-501(h) is to prevent wage-loss duplication. Court held that the Workers’ Compensation Board applied a rational interpretation of K.S.A. 44-501(h) in allowing the lump sum payment of Lleras’ retirement benefits to be apportioned over his remaining life expectancy.

STATUTES: K.S.A. 44-501(h); K.S.A. 60-2103(h); and K.S.A. 77-621(c)(4)
Criminal

STATE V. DAVIS
SEDGWICK DISTRICT COURT
AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 93,907 – APRIL 20, 2007

FACTS: Davis was convicted of aggravated robbery of a convenience store. During the robbery, Davis wore pantyhose over his head and held a knife to the throat of the store clerk. Davis demanded money but, before he could take any money, he hit his head and stumbled out of the store with beer and cigarettes. The police officer responding to the scene followed a speeding car to a residence and discovered a knife, cigarettes, and beer in his car. Davis was 17 years old at the time but was prosecuted as an adult.

ISSUES: (1) Peremptory challenges and (2) prosecution of juvenile as an adult

HELD: Court held Davis had standing to challenge the state’s use of peremptory challenges to exclude African-American prospective jurors regardless of whether he was African-American. Court found Davis made a prima facie showing that the prosecutor excluded the only two African-American members of the jury panel on the basis of race. Court found the prosecutor provided a race neutral reason for striking the jurors based on questions concerning burden of proof and that the other juror would overanalyze the case. However, the court held that the trial court never conducted a full analysis on whether Davis had met his burden of proving purposeful discrimination. Regarding the first juror, the court held there was a lack of evidence to support the race neutral reason and that lack of support in the record for the reasons given for a peremptory strike is an indicator of pretext. Regarding the second juror, the court held the trial court should consider on remand whether the final jury members would fit within the prosecutor’s proffered reasons for striking the juror. Court also held the trial court adequately considered the factors in authorizing the prosecution of Davis as an adult and substantial evidence exists to support the trial court’s decision.

CONCURRENCE: Judge Buser concurred in the decision but would have refrained from analyzing the third step of the Batson test.

STATUTES: K.S.A. 21-3427 and K.S.A. 38-1636(a)(2), (e)

STATE V. DUMARS
SALINE DISTRICT COURT
REVERSED AND REMANDED
NO. 96,261 – APRIL 6, 2007

FACTS: DuMars convicted on various drug offenses and charges of child endangerment, obstruction of official duty, and criminal use of a weapon. District court denied DuMars’ motion for mistrial and post-trial motions for acquittal and new trial. Court of Appeals reversed based on cumulative error, which included prosecutorial misconduct, and remanded for new trial on charges of attempted manufacture of methamphetamine and possession of drug manufacturing paraphernalia. DuMars I, 33 Kan. App. 2d 735 (2005). On remand, district court found double jeopardy barred further prosecution on the drug charges and refused to allow retrial. State appealed, arguing district court had no authority to disregard mandate and dismiss the drug charges. DuMars claimed appeal was moot because any conviction on the drug charges would not advance a legitimate state interest where she had already served any sentence that might be imposed and any conviction on the drug charges will not affect her criminal history.

ISSUES: (1) Appellate mandate, (2) mootness, (3) double jeopardy, and (4) due process — fundamental fairness

HELD: District court was authorized to consider DuMars’ double jeopardy claim without violating the appellate court’s mandate. State v. Downey, 29 Kan. App. 2d 467 (2001), is distinguished.
State’s appeal is not moot. Even if particular convictions at issue do not affect collateral consequences imposed because of defendant’s other convictions, state has an interest in prosecuting a violation of the law and in redressing the victims of that violation, including members of society at large.

Double jeopardy does not bar retrial where a criminal defendant has obtained a reversal of a conviction on appeal on the basis of trial error, which includes prosecutorial misconduct. Even if present case were considered a retrial following mistrial, there is no double jeopardy bar under facts of case because no intentional goading of the defendant into requesting a mistrial. Kansas Supreme Court recently reached similar conclusion in State v. Morton, 283 Kan. 1176 (March 16, 2007).

Retrial of DuMars balances significant interests and does not rise to level of shocking or intolerable conduct. No violation of fundamental fairness component of due process in allowing state to retry the drug charges. District court’s dismissal of the charges was error.

STATUTES: None

STATE V. LEMONS
HARVEY DISTRICT COURT – AFFIRMED
NO. 96-400 – APRIL 13, 2007

FACTS: Officers invited into Lemons’ home, searched the home, and discovered evidence of drug manufacture and possession. Lemons arrested and search warrant obtained for further search of the residence. Lemons filed motion to suppress all evidence obtained from the officers’ warrantless sweep and search of his residence. Trial court granted the motion, finding no in-home arrest to justify a protective sweep and no facts to justify the search. State filed interlocutory appeal.

ISSUE: Fourth Amendment and protective sweep
HELD: Protective sweep exception in Maryland v. Buie, 494 U.S. 325 (1990), as adopted in State v. Johnson, 253 Kan. 365 (1993), is discussed. A protective sweep must be performed in conjunction with an in-home arrest and cannot last longer than the arrest itself. Under facts of this case, substantial evidence supports the trial court’s findings and decision.

STATUTES: None

STATE V. MALM
DICKINSON DISTRICT COURT – AFFIRMED
NO. 95-403 – APRIL 6, 2007

FACTS: Malm convicted of conspiracy to manufacture methamphetamine and related drug charges. On appeal, he claimed trial court erred in denying motion to suppress evidence seized in traffic stop and in search of residence pursuant to search warrant. He also alleged prosecutorial misconduct and claimed his convictions related to manufacture of methamphetamine and possession of drug manufacturing paraphernalia were multiplicitous. Regarding sentencing, he claimed error in classification of conspiracy to manufacture methamphetamine offense and in use of convictions in criminal history classification that were not proven to a jury.

ISSUES: (1) Suppression of evidence, (2) prosecutorial misconduct, (3) multiplicity, and (4) sentencing
HELD: No error in refusing to suppress evidence seized from van or residence. Under facts, officer’s stop of van was a seizure under Fourth Amendment, but there was reasonable suspicion to stop the van. State v. Schneider, 32 Kan. App. 2d 258 (2003), is compared and distinguished. There was insufficient nexus between Malm’s suspected criminal activity and his residence for magistrate judge to have a substantial basis to issue search warrant, but good faith exception in United States v. Leon, 468 U.S. 897 (1984), applies. Rationale in State v. Doile, 244 Kan. 493 (1989), is questioned and factually distinguished.

Under facts, prosecutor’s statements to judge did not violate Doyle v. Ohio, 426 U.S. 610 (1976). Officers had not yet taken Malm into custody or Mirandized him when he made statement about having counsel, thus his invocation of right to attorney was not protected by Fifth Amendment.

Manufacture of methamphetamine, K.S.A. 65-7006(a), and possession of drug manufacturing paraphernalia, K.S.A. 65-4152(a)(3), overlap but are not identical. No merit to multiplicity claim.

Under State v. Fanning, 281 Kan. 1176 (2006), and State v. Miles, 35 Kan. App. 2d 211 (2005), no error in classifying conspiracy to manufacture methamphetamine as a drug severity level 1 offense rather than a drug severity level 4 offense. Apprendi claim is defeated by controlling Kansas cases.

DISSENT (Rulon, C.J.): Reliance on the Leon “good faith exception” is unnecessary because search warrant was supported by probable cause.

STATUTE: K.S.A. 21-3205(1), -3205(2), -3401(b), -3436

STATE V. STOREY
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED
NO. 95,592 – APRIL 6, 2007

FACTS: Storey appealed conviction and sentence for burglary. He claims (1) insufficient evidence supported the conviction because entry into unfinished hospital to steal a saw did not satisfy burglary statute, (2) Apprendi error to use prior criminal record to increase sentence, and (3) error to order Board of Indigents’ Defense Services (BIDS) reimbursement without considering on the record Storey’s ability to pay such fees.

ISSUES: (1) Burglary, (2) sentencing, and (3) BIDS assessment
HELD: Issue not previously addressed by Kansas courts. A plain reading of K.S.A. 21-3715 does not require that a building that is not a dwelling be completely enclosed or that it present a barrier to entry before it constitutes a building under the statute. A structure that will become a hospital, which is 70 percent complete with four walls, a roof, and a concrete floor, is a building under the statute.

Apprendi claim is defeated by controlling Kansas decisions, and Storey failed to challenge criminal history score at trial court level. Assessment of BIDS fees is reversed and remanded for compliance with State v. Robinson, 281 Kan. 538 (2006).

CONCURRING AND DISSENTING (Pierron, J.): Dissents from majority’s finding that unfinished structure was a building under the burglary statute. Rationale in State v. Alvis, 30 Kan. App. 2d 889 (2002), should be controlling.

STATUTES: K.S.A. 2006 Supp. 21-3110(7), -3701(a)(1), 22-4513; and K.S.A. 21-3715, -3715(b)

STATE V. STOUT
COWLEY DISTRICT COURT – AFFIRMED
NO. 94,159 – APRIL 6, 2007

FACTS: Stout convicted of involuntary manslaughter and aggravated burglary related to death of victim from complications of gunshot wound sustained when Stout and another person broke into the victim’s apartment. On appeal, Stout challenged the sufficiency of the evidence supporting each conviction. He also raised Apprendi claim that his criminal history had not been proved to a jury beyond a reasonable doubt.

ISSUES: (1) Sufficiency of evidence and (2) sentencing
HELD: Sufficient evidence supports the convictions. Under facts, it was reasonably foreseeable that breaking into a person’s home for the purpose of beating that person could well lead to an aggravated battery or another serious felony. Stout started an uninterrupted string of events leading to the victim’s severe injury and eventual death. State v. Sophophone, 270 Kan. 703 (2001), and
State v. Murphy, 270 Kan. 804 (2001), are analyzed and distin-
guished. Where a victim is attacked and in trying to reasonably
defend oneself inflicts on oneself a fatal wound, the felony-murder
document may be applied.

Apprendi sentencing claim is defeated by controlling Kansas cases. STATUTE: K.S.A. 21-3205(1), -3205(2), -3401(b), -3436

STATE V. THOMPSON
BUTLER DISTRICT COURT – AFFIRMED
NO. 96,035 – APRIL 6, 2007

FACTS: Thompson convicted of possession of marijuana and pos-
session of drug paraphernalia following search of Thompson’s home
after officer at front door smelled marijuana. On appeal Thompson
claimed district court should not have admitted evidence obtained
in the search because his consent was involuntary. He also claimed
the state solicited testimony that was prohibited by pretrial order to
suppress.

ISSUES: (1) Consent to search of home and (2) pretrial suppress-
ion order

HELD: Under facts, where there was only a minor crime in-
volved, no indication of any need for immediate police entry, and
owner had two or three times denied permission for warrantless
entry, Thompson’s consent obtained by police through continued
pressure violated Fourth Amendment. However, evidence was ad-
missible because there was enough probable cause to obtain a search
warrant, which would have lead to inevitable discovery of evidence.

Admission of statement that Thompson refused consent and told
officer he did not want to go to jail that night violated pretrial sup-
pression order, but error was harmless under facts of case.

STATUTE: K.S.A. 22-2402(1)

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The Kansas Bar Association has been notified that nearly 200 of our members who use America Online (AOL) for their e-mail have not been receiving e-mails from the KBA. These e-mails do not always bounce back to us as “undeliverable” so we were not aware there was a problem until recently.

AOL users have not been receiving our weekly eJournal, section newsletters, advanced notification about CLEs, or even e-mails from KBA staff responding to e-mails from AOL users. ALL KBA e-mails have been blocked by AOL, thus we also cannot respond to the public who contact us from AOL e-mail accounts requesting information, including requests for assistance in finding an attorney and inquiries regarding fee disputes, public services, etc.

Although we have contacted AOL in regards to this matter, we have been told that individual AOL users should also contact AOL to have the KBA “white listed” (i.e., added to the safe senders list). Because the messages are being blocked by the receiving e-mail system at AOL, the adjustments may also need to be made there by customers of AOL.

We apologize for this inconvenience, and are working to rectify the problem. Meanwhile, for the most up-to-date information (including copies of the most recent eJournals, section newsletters, etc.), please visit the KBA Web site at http://www.ksbar.org.

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**LEAWOOD OFFICE SPACE.** Leawood attorney looking to share brand new, 1st floor space, one block off of 115th and Roe. This is a premium location with large offices and lots of windows. Includes conference room, copier/fax, and kitchen at an affordable price. Call Paul at Hentzen Law Firm, (913) 451-7900.

**SHARED OFFICES:** Windmill Village, Bldg. 2, 7111 W. 98th Terrace, #140, Overland Park, KS 66212. Nice office suites available now, 12 x 14 or 12 x 16, support staff space also available, includes use of large conference room, receptionist, incoming mail, package handling, kitchen area, janitorial services, and convenient unlocated parking. Nitsoko telephone system and Lamier copier available if needed. Lots of legal reference material available as well. Call Sherry at (913) 385-7990 or e-mail at Sherry@tomesdvorak.com.

**EXECUTIVE OFFICE SUITES** available in Leawood executive office building. Each tenant will be charged a monthly base rent for the tenant’s office. The offices should be available on or about March 15, 2007. Call Glen Beal at (816) 524-6778 for more information.

**STAFF ATTORNEY** Overland Park Law Firm has an immediate opening for a part-time (flex schedule) staff attorney with at least 2 years’ experience in probate and estate planning. Admission to KS and MO bars is required. Send resume to Wallace Saunders, 10111 W. 87th St., Overland Park, KS 66212, Attn HR; Fax to 913-572-5513; or e-mail to hr@wsabe.com.

**LEAWOOD OFFICE SPACE.** Leawood attorney looking to share brand new, 1st floor space, one block off of 115th and Roe. This is a premium location with large offices and lots of windows. Includes conference room, copier/fax, and kitchen at an affordable price. Call Paul at Hentzen Law Firm, (913) 451-7900.

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JUNE

7-9 125th KBA Annual Meeting – Just the Beginning
Hyatt Regency, Wichita

13 The Casemaker Explosion
(12:30 p.m.)
Harvey County Bar Association, Newton

15 Legislative & Case Law Institute Video Debut
3 sites: Overland Park, Topeka, and Wichita

23 Legislative & Case Law Institute Video Replay
Multiple sites statewide & Washington, D.C.

25 Brown Bag Ethics Video Replay
(morning and afternoon)
Topeka

26 Brown Bag Ethics Video Replay (morning)
Multiple sites: Dodge City, Overland Park, Topeka, and Wichita

26 Keeping the “Gold” in the Golden Years –
Elder Law Video Replay (afternoon)
3 sites: Overland Park, Topeka, and Wichita

27 Keeping the “Gold” in the Golden Years –
Elder Law Video Replay (morning)
3 sites: Overland Park, Topeka, and Wichita

27 Brown Bag Ethics Video Replay (afternoon)
Multiple sites: Overland Park, Phillipsburg, Topeka, and Wichita

28 Brown Bag Ethics Video Replay (morning
and afternoon)
Topeka

29 Legislative & Case Law Institute Video Replay
Topeka

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Your Kansas Bar Association teams up with your Kansas City Royals to present the 2nd Annual GRAND SLAM: A KBA ROYAL AFFAIR

Friday July 27 at “The K”

The days events include:

- Tour of Kauffman Stadium (for CLE attendees only)
- CLE Program held in the stadium meeting room
- Pre-game activities: dinner at Brancato’s Bullpen (complete with cash bar), drawings for prizes, fun surprises for kids, and a chance to meet Royals alumni players!
- Field Plaza tickets to the Texas Rangers vs. Kansas City Royals 7:10 p.m. game.

Scheduled CLE Topics

4.0 hours CLE credit, including 1.0 hour professional responsibility credit (pending CLE credit approval)

1:130 p.m. Stadium Tour (for CLE attendees only)
1:30-2 p.m. Registration
2:2:50 p.m. Five Practice Management Myths that Lead to Malpractice (Christian A. Stiegemeyer, The Bar Plan Mutual Insurance Company)
2:50-3:40 p.m. Non-traditional Families – Legal Concerns and Solutions (Valerie L. Moore, Law Offices of Valerie L. Moore LLC)
3:40-3:55 p.m. 7th Inning Stretch (break)
3:55-4:45 p.m. Global Warming & Legal Climate Change in Kansas (Burke W. Griggs, Stevens & Brand)
4:45-5:35 p.m. Law Firm Diversity: Fact or Fiction (L.J. Buckner Jr., Baker Sterchi Cowden & Rice LLC)
6:10 p.m. Dinner – BBQ at Brancato’s Bullpen
7:10 p.m. Game

GAME TICKETS MUST BE RESERVED BY JUNE 29 – NO WALK-INS FOR GAME

CLE CANCELLATION POLICY: Prepaid CLE registration will be refunded with a credit voucher for requests submitted up to 48 hours before the seminar. No refunds will be allowed after that time. NO REFUNDS or credit on game tickets.

Please photocopy this page and mail or fax to the KBA!

2ND ANNUAL GRAND SLAM: A KBA ROYAL AFFAIR (#4085)

Please return this form with your check payable to: Kansas Bar Association, P.O. Box 1037, Topeka, KS 66601-1037, or call (785) 234-5696 and use your MasterCard, Visa, AmEx, or Discover. You may fax the registration to (785) 234-3813. To qualify for early bird discounts, payment must be received by July 20, 2007.

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Note: Tickets will be mailed prior to CLE and Game Day.

For more information or to register today, go to www.ksbar.org or call (785) 234-5696