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*Executive Committee*
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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Many of you may be familiar with “Bowling Alone,” the Robert Putnam book that chronicled the erosion of America’s community life, our loss of interest in civic affairs, and the spurning of memberships and activity in organizations of all sorts: community, educational, social, and professional.

The bottom line is, as far too many of us simply ask, “What’s in it for me?”

Putnam pointed out that when Alexis de Tocqueville visited America in the 19th century, he said that the Americans’ propensity for civic association was the key to their unprecedented ability to make democracy work. Tocqueville wrote:

Americans of all ages, all stations in life, and all types of disposition are forever forming associations. There are not only commercial and industrial associations in which all take part, but others of a thousand different types: religious, moral, serious, futile, very general and very limited, immensely large, and very minute. ... Nothing, in my view, deserves more attention than the intellectual and moral associations in America.

But many of those associations are in the past. The trend of isolation from community, Putnam said, has been gaining momentum in America for decades. And now it is happening in Kansas. More specifically, it is happening with lawyers in Kansas. Far too many Kansas lawyers are “bowling alone.” That is a bad thing not only for the Kansas Bar Association and local bar associations, but it is also a very bad thing for the lawyers. Such isolationism and apathy can lead to the loss of both collegiality and respect, in and for the profession.

So we need to do something about that. By “we” I refer to those of us who care and have proved it by our membership in, and commitment to, the Kansas Bar Association. If you are reading this, you are likely one of those people. You already know that lawyers should be members of the KBA. Lawyers need the KBA. The KBA needs lawyers.

In the past, lawyers joined the KBA and other such organizations simply because it was the right thing to do. After all, it is our profession. But now, many “consumer-oriented” lawyers (young and old) ask: “If I join, what do I get? What’s in it for me?”

Of course, I would be remiss if I did not take this opportunity to point out that members do “get” something. With each membership, the lawyer now has access to Casemaker. Casemaker is a comprehensive online library and search engine used for legal research. This research tool provides KBA members with free and unlimited access to a wealth of legal research materials, including state and federal case law, statutes, and regulations. But we still should be members — active members — because the law is our profession. And, yes, there is plenty in it for us.

- Membership in the association, whether by virtue of serving on committees or attending the annual convention, is a terrific networking opportunity. That is particularly important to those in private practice, where a lawyer’s best source of business is other lawyers. There is also the unrivaled opportunity to meet and truly get to know judges from across the state, from all levels of the judiciary.
- Lawyers make great friends. We are fun. The opportunity to meet and greet with other lawyers is truly an enjoyable experience. Through the KBA there are numerous opportunities to get to know your fellow members of the bar.
- The KBA has a full-time lobbyist. And who better to watch proposed legislation. We have no special interest except to protect lawyers. And we have been successful (i.e., no sales tax on lawyer services).
- We also are a united voice for an independent judiciary.

So lawyers need the KBA, and I know that you know that ... but the “action point” that needs to follow this article is for those of us who do recognize the importance of this association to do one thing. Pass it on. It seems so simple. But that does seem to be where we are failing. We need more lawyers to reach out to other lawyers — young and old, male and female — and to pass it on, as Dick Hite, Bud Fanning, and Darrell Kellogg did for me. I would not have just “known” the KBA was important. They told me. They included me. They invited me. They encouraged me.

Certainly some firms “pay” for membership. But that is not enough. We need to teach and encourage. The managing partners of law firms need to actively promote participation. We should reach out to members of small and solo firms. We should reach out to government and corporate lawyers. And we will grow better lawyers as a result.

When I was introduced as president of the KBA at the Annual Meeting in Wichita in June, I quoted a Rudyard Kipling poem on the power of committed individuals working together for common interests and goals. It bears quoting again here:

Now this is the Law of the Jungle – as old and as true as the sky; And the Wolf that shall keep it may prosper, but the wolf that shall break it must die. As the creeper that girdles the tree trunk, the Law runneth forward and back – For the strength of the Pack is the Wolf, and the strength of the Wolf is the Pack.

Linda S. Parks can be reached by e-mail at parks@bhtefanning.com or by phone at (316) 265-7741.
As many of you may know, a new bar year commenced at the recent KBA Annual Meeting in Wichita. It seems appropriate to kick off this bar year with an introduction of the officers appointed at that meeting to head up the Young Lawyers Section and summarize the plans our section has for the future. These officers are committed to ensuring our section is a vital resource to Kansas young lawyers, and I’m excited to chair such a worthy group. Our contact information is included below as an invitation for you to contact any of us with suggestions on social events, newsletter articles, CLE topics, or other benefits you would like to see our section provide. This contact information is also posted on the KBA Web site at www.ksbar.org. Your 2007-2008 officers are:

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As you can see, your leadership is a diverse group, with members from across the state. In the fall, we will add two law student members to our executive committee, one from each of the Kansas law schools. These students will bring a valuable perspective, which enables us to ensure the benefits our section provides are relevant to attorneys just entering the practice as well as those with a few years under their belt. Thanks to these law student members, our section is able to work with the law schools to present social events at which law students and young lawyers can mingle, as well as provide beneficial advice in conjunction with the law schools’ mock interview and mentoring programs.

Our section’s agenda for the upcoming bar year includes:

1) Acting as mock interviewers and mentors for the Kansas law schools’ mock interview and mentor programs;
2) Coordinating the High School Mock Trial Program, including organizing the tournaments held on a Saturday in February and a Saturday in March and acting as coaches and judges for the Kansas high school students who compete in the mini-trials;
3) Assisting with and staffing the Disaster Legal Assistance Hotline for Kansans affected by the recent Greensburg tornado and disastrous flooding in many Kansas counties surrounding that area;
4) Presenting CLE programs for recent law school graduates to satisfy the Kansas Supreme Court’s Orientation to Kansas Practice Requirement (CLE Rule 802A) and the KBA Annual Meeting;
5) Hosting social networking events across the state; and
6) Electronically publishing a periodic newsletter, updating our members on upcoming events, and important aspects of and changes to Kansas law.

Our section has a lot on its plate in the coming year, but don’t let that discourage you from communicating your ideas on how we can better meet your needs. I enjoyed meeting many of you at the hospitality suite our section co-hosted at the recent KBA Annual Meeting in Wichita. I look forward to hearing your ideas for next year and hope to see you again at our upcoming events!
The Kansas Bar Foundation’s Night Out
By Meg Wickham, KBA manager of public services

June 7 marked the Kansas Bar Foundation’s annual Fellows Dinner. With more than 90 attending at the Wichita Country Club, attorneys were celebrated for what they give back to their communities by way of the Kansas Bar Foundation. Bruce W. Kent was welcomed by the Fellows as the 2007-2008 president of the Board of Trustees while Sally Pokorny, 2006-2007 president, was thanked for fulfilling her term. During Pokorny’s term, she worked steadfast on improving the image of the legal profession, showing just how much attorneys give back.

Christopher Masoner and H. David Starkey were recognized for their service on the board as they completed their terms in 2007. Eric G. Kraft and Hon. Ronnie L. Svaty are the newest members of the board. Reappointed board members include Joni J. Franklin, Robert M. Collins, Vaughn Burkholder, and Edward J. Nazar.

Nineteen new Fellows have made a $1,000 commitment, and 25 Fellows have completed the $1,000 pledge.

Forty-four new Fellows Silver were recognized for giving of $1,001-$4,999. Eight new Fellows Gold celebrating giving of $5,000-$9,999, and two new Fellows Diamond recognizing for giving of $10,000-$14,999.

The highlight of the evening was the presentation of the Robert K. Weary Award.

The Board of Trustees established this award in 2000 to recognize lawyers or law firms for their exemplary service and commitment to the goals of the Kansas Bar Foundation. Weary was the first recipient of this award. In 2002 the award was given to Frank C. Norton; Justice Robert L. Gernon in 2005; and Mikel L. Stout received the award in 2006. In 2007, the prestigious award was presented posthumously to Daniel J. “Dan” Sevart. Accepting on his behalf was Sevart’s widow, Shoko. Shoko expressed heartfelt gratitude for the award in her husband’s honor.

“Dan exemplified everything I love about being with lawyers,” said Pokorny. “He was smart, funny, opinionated, and passionate about the law. He was on the ground floor of the movement to change the thinking of the Kansas Bar Foundation from a bricks and mortar organization to a true philanthropic organization that would be dedicated to serving the citizens of Kansas and the legal profession. For these reasons, he truly deserves the Robert K. Weary Award.”

The KBF is celebrating 50 years in 2007. From law-related education projects to promoting IOLTA grants, the Foundation is making a difference. To become a part of the philanthropic arm of the Kansas Bar Association, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org.
Before deciding on a career as an attorney, I had already decided to some day become a parent. Much to the surprise of law students and others alike, I decided to become a parent while I was in law school. When I revealed that I was pregnant during my second semester, the initial response was a surprised “Congratulations,” quickly followed by “How’s that going to work?” While I reassured everyone that my master plan had been well thought out, it was evident that most people thought parenting and law school mix as well as oil and water.

My daughter, Zoe, arrived two and a half weeks before the fall semester of my second year. Becoming a parent has changed how I view law school and the world and for the better. Additionally, parenting has underscored three resounding themes in my life: balance, efficiency, and purpose.

The first lesson I learned upon beginning the journey of parenthood is the importance of knowing my limits. Being a successful student, parent, and wife is a constant balancing act. It often requires minimizing less important areas of my life to maximize my primary relationships and responsibilities. But balancing does not mean limiting; it means prioritizing. While I may not attend every social event or belong to every organization, I involve myself in those that matter the most to me. For example, I am the executive editor for Volume 47 of the Washburn Law Journal. Despite the fact that this responsibility is a huge time commitment, it is an experience I know will have benefits that extend beyond law school.

While any law student knows that efficiency is the key to success, the addition of a new family member multiples its importance exponentially. I schedule my time as much as possible, ask for help when I need it, and try to incorporate my daughter into as many aspects of my life as possible, all in hopes of getting everything accomplished. Although all of this scheduling and prioritizing sounds more like theory than reality, it really does work. I was surprised to find that the biggest struggle I have isn’t finding enough time to meet all of my responsibilities, but rather putting other priorities ahead of my daughter, which leads me to the last of my themes: purpose.

I have met very few of my peers who are not driven individuals. We all have goals; we all have an overarching desire to succeed. In fact, I believe these traits are innate in most of us. Until I became a parent, professional success was also my primary purpose. I struggle with these seemingly conflicting goals of being a good parent, a successful law student, and eventually a successful attorney. While these ideals may appear to conflict on the surface, I believe they truly are compatible.

My daughter has made me look at the world with new eyes, and along with my new perspective came new goals. I no longer wish to succeed just for myself, but also for her and the next generation to come. However idealistic that may be, my newfound purpose has made me more driven than ever before. I want to make the world better for my daughter through my chosen profession, in addition to being a strong female role model for her to look up to as she grows up. My definition of success has broadened to incorporate more than just earning good grades or generating billable hours, embracing the idea of finding a way to do it all and still do it well. While starting a family during law school may be unconventional, the experience has made me a better law student and a better person, and it will make me a better attorney.

About the Author

Denise McNabb, a third-year student at Washburn University School of Law, will graduate in May 2008. She attended Kansas State University as an undergraduate, earning a bachelor’s degree in business administration in 2001. She worked as a branch manager for four years with Enterprise Rent-A-Car before attending law school. She lives in her hometown, Waverly, with her husband, Lee, and her daughter, Zoe, and looks forward to the December arrival of their second child.
Your Cell Phone can Continue Talking Even After you get rid of it

By René Eichem, KBA assistant executive director

You probably don’t clean your garbage before you throw it away, but with technology that is exactly what you should do. Before you sell, donate, or discard your cell phone, make sure that your personal information has been permanently deleted.

According to Trust Digital, a mobile security software company, many phone manufacturers use “flash” memory chips — similar to those used in digital cameras and some music players — to store information. Manufacturers welcome this type of memory chip because it is inexpensive and durable; however, it takes longer to permanently erase information.

Selling your old phone once you upgrade to a fancier model can be like handing over your diaries. All sorts of sensitive information pile up inside our cell phones, and deleting it may be more difficult than you think. A popular practice among sellers, resetting the phone, often means sensitive information appears to have been erased; however, it can easily be resurrected using specialized yet inexpensive (or even free) software found on the Internet.

“The tools are out there for hackers and thieves to rummage through deleted data on used phones,” Trust Digital’s chief technology officer, Norm Laudermilch, said. “It definitely does not take a Ph.D.”

Trust Digital bought 10 different phones on eBay for prices between $192 and $400 each to test phone-security tools it sells for businesses. All the phones were fairly sophisticated models capable of working with corporate e-mail systems. Software experts at Trust Digital resurrected 27,000 pages of information from nine of the 10 used phones (one phone had never been used), including:

- One company’s plans to win a multimillion-dollar federal transportation contract;
- E-mails about another firm’s $50,000 payment for a software license;
- Personal bank accounts and passwords;
- Social Security numbers;
- Details of prescriptions and medical information;
- Personal and business correspondence;
- Computer passwords;
- Racy messages between two married lovers; and
- Other private, competitive, or potentially damaging material.

Many of the phones Trust Digital bought on eBay were owned personally by the sellers but were crammed with sensitive corporate information, underscoring the blurring of work and home. Trust Digital found no evidence thieves or corporate spies are routinely buying used phones to mine them for secrets, noting that they didn’t think “the bad guys have figured this out yet.”

Phone manufacturers usually provide instructions for safely deleting a customer’s information, but it’s not always convenient or easy to find. Palm Inc., which makes the popular Treo phones, puts directions deep within its Web site for what it calls a “zero out reset.” It involves holding down three buttons simultaneously while pressing a fourth tiny button on the back of the phone, which is so awkward to do that even Palm says it may take two people. Palm executives said the company made the process deliberately clumsy because it doesn’t want customers accidentally erasing their information. Nonetheless, Trust Digital tested the “zero out reset” feature on the Treo and found that the information had been effectively deleted and was unrecoverable.

The Privacy Rights Clearinghouse, a nonprofit consumer information and advocacy organization, recommends the following:

- Follow the steps listed in your phone manual for “safely deleting” or “permanently deleting.” If you are not confident that the instructions offer the type of security you are looking for, call your cellular provider and ask about the proper data deletion procedures.
- Consider not storing sensitive information on your phone. Consumers upgrade their cell phones on average about every 18 months, which may mean it is not the ideal place to keep passwords, account numbers, and other valuable information.

Even President Bush’s former cybersecurity adviser, Howard Schmidt, carried up to four phones and e-mail devices at one time. To sanitize his older Blackberry devices, Schmidt would deliberately type his password incorrectly 11 times, which caused data on them to self-destruct.

Phone owners should decide whether to auction their used equipment for a few hundred dollars — and risk revealing their secrets — or effectively toss their old phones under a large truck or give it an acid bath to dispose of them.

Oh, and about those phones Trust Digital bought on eBay — the company said it intends to return all the phones to their original owners and will keep the recovered personal information on a single computer under lock and disconnected from its corporate network at its headquarters in northern Virginia.

FOOTNOTES
CHANGING POSITIONS

Jessica M. Agnelly has joined James & Associates, Lee’s Summit, Mo.

Kristopher S. Amos has joined Barber Emerson L.C., Lawrence.

Erik H. Askelsen has joined Aviva, Topeka.

Miesha M. Bastin has joined Bradshaw Herrington P.C., Kansas City.

Chad C. Beaver has joined Spencer Fane Britt & Brown LLP, Kansas City, Mo.

Kim A. Bell has joined Gilmore & Bell P.C., Wichita.

Amy C. Bixler-Kelley has joined the Kansas Department of Administration, Lawrence.

Katie M. Black, Gregory S. Davey, Heather E. Sigler, and Megan Walawender have joined McNenny Van Cleave & Phillips P.A., Kansas City, Kan., as associates.

John A. Boyd has joined the 10th Judicial District Public Defender’s Office, Olathe.

Edward M. Boyle has joined McCormick Adam & McDonald P.A., Overland Park.

Jared O. Brooner has joined Shughart Thomson & Kilroy P.C., St. Joseph, Mo.

Logan M. Brown has joined Maughan & Maughan, Wichita.

Jon Edward Bunten has joined the Village Development Co., Overland Park.

Michael J. Burbach has joined Bingham McCutchen LLP, Washington, D.C.

Brendan J. Burke has joined Norton, Waserman, Jones & Kelly LLC, Salina.

Duane E. Butler has joined Deep South of Texas, Irving, Texas.

Dennis J. Cassidy has joined Dezube Miller LLC, Kansas City, Mo.

Carol A. Cleaver has joined Seigfreid, Bingham, Levy, Selzer & Gee P.C., Kansas City, Mo., as an associate.

Brent N. Coverdale, Kansas City, Mo., has become a member with Seyferth Knittig LLC.

Shannon S. Crane has been named regional director for the Kansas Legal Services offices in Wichita and Hutchinson.

Michael V. DiPasquale has joined Franke Schultz & Mullern P.C., Kansas City, Mo.

Emily C. Docking and Kristen D. Wheeler have joined Morris, Laing, Evans, Brock & Kennedy Chtd., Wichita.

Ethan B. Domke has joined Kliewer LLP, Garden City.

Jared O. Brooner has joined Account Recovery Specialists Inc., Dodge City.

Gennivee D. Holder, Scott A. Long, and Kevin M. Zeller have joined Polsinelli Shalton Flanagan Suelthaus P.C., Kansas City, Mo.

J. Morgan Houck has joined Glenn, Cornish, Hanson & Karns Chtd., Topeka.

Jeffrey A. Houston has been appointed as McPherson city attorney.

Katherine A. James and Trevor Lee Stiles have joined the Office of the City Attorney for Kansas City, Mo.

Michael J. Judy and Jamie M. Porterfield have joined Dysart Taylor Lay Cotter & McMonigle P.C., Kansas City, Mo.

Allison M. Kenkel has joined Embarq, Overland Park.

Jeffrey Kennard has joined Scharnhorst & Ast P.C., Kansas City, Mo.

Michaiah L. Kinzel has joined Baker Sterchi Cowden & Rice LLC, Kansas City, Mo.

Morgan B. Koon has joined CornerStone Law, Newton.

Judd A. Liebau has become the vice president in the commercial banking department of Intrust Bank, Wichita.

Gillian Rogers Luttrell has joined Hawver Law Office, Olathe.

Samuel G. MacRoberts has joined Ensz & Jester P.C., Kansas City, Mo.

Ali N. Marchant has joined Fleeson, Gooing, Coulson & Kitch LLC, Wichita.

Daniel J. Martinez has joined Mark Ferguson LLC, Kansas City, Mo.

Dan M. McCulley has joined Konza Law LLC, Junction City.

Tiana M. McElroy has joined Richard A. Medley, Attorney at Law, Coffeyville.

Mark W. McGrory has joined Rouse Hendricks German & May P.C., Kansas City, Mo.

Kurt J. McLeay has joined Nations Holding Co., Prairie Village.

Allison M. Meiers has joined Castle Law Office, Kansas City, Mo.

Steven K. Metzler has joined Shook, Hardy & Bacon LLP, Kansas City, Mo.

Kelly M. Nash has joined Bryan Cave LLP, Kansas City, Mo.

Vivien J. Olson is now with the Prairie Band Potawatomi Nation, Mayetta.

James E. Orth has joined Legal Services for Circuit Court of Jackson County, Kansas City, Mo.

Brandon T. Pittenger has become a member with McNearney & Associates LLC, Overland Park.

Jacob B. Price has joined Eyedman Kliwerer LLP, Garden City.

(Continued on the next page)

Dan’s Cartoon by Dan Rosandich

“This doesn’t look good colonel.”
Brianne N. Niemann has joined Boyd & Kenter P.C., Kansas City, Mo.

Brooke R. Rank has joined Martin Leigh Laws & Fritzlen P.C., Kansas City, Mo.

Morgan L. Roach has joined Steve A.J. Bukaty Chtd., Overland Park.

Cody G. Robertson has joined Goodell, Stratton, Edmonds & Palmer LLP, Topeka, as an associate.

Mark T. Rudy has joined the Board of McPherson County Commissioners, Wichita.

Julie A. Shull has joined Kansas City Power & Light, Kansas City, Mo.

H. David Starkey has joined the Kansas Department of Agriculture, Topeka.

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

Razmi M. Tahirkhel has joined the Public Defender's Office, Liberal.

Lee M. Timan has joined the Reno County Public Defender's Office, Hutchinson.

Craig L. Uhrich has joined Buchanan Ingersoll & Rooney, New York.

Kent G. Voth has joined Weingarten Realty Investors, Houston.

John A. Watts has joined Community America Credit Union, Lenexa.

Travis A. Wymore has joined Miller Law Firm P.C., Kansas City, Mo.

Christine Young-Terpening has joined Haynes Benefits P.C., Lee's Summit, Mo.

John J. Ziegelmeyer III has joined Bank of America, Kansas City, Mo.

Glen G. Beal Jr. has moved his office to 11115 Ash St., Leawood, KS 66211-1763.

Richard P. Billings has started his own firm, Billings Law Office, 632 S.W. Van Buren St., Lower Level, Topeka, KS 66603.

Colgan Law Firm LLC has moved to Country Club Bank Building, 11006 Parallel Parkway, Ste. 202, Kansas City, KS 66109-4433.

The Law Office of Samuel K. Cullan has moved to 4151 N. Mulberry Dr., Ste. 200, Kansas City, MO 64116-4600.

Michael P. Dreiling Jr. has opened his own practice, located at 108 E. Poplar, Olathe, KS 66061.

Fleeson Gooing Coulson & Kitch LLC has moved to 1900 Epic Center, 301 N. Main, P.O. Box 997, Wichita, KS 67201-0997.

The Law Office of Michael E. Foster has moved to 240 N. Rock Road, Ste. 305, Wichita.

Hoffman & Hoffman has moved to 100 E. 9th St., 3rd Floor, Topeka, KS 66612.

Holmes Law Office has moved to 11 E. 2nd Ave., Hutchinson, KS 67501.

Ken Joyce has moved his office to 10777 Barkley, Ste. 140, Overland Park, KS 66211-1162.

Jordan & Mahoney P.C. has moved to 615 Story St., P.O. Box 219, Boone, IA 50036.


Kim S. Summers has started her own firm, Summers Law Firm L.C., 8901 State Line Road, Ste. 200, Kansas City, MO 64114.

Teresa A. Woody has started her own firm, located at 1044 Main St., Ste. 500, Kansas City, MO 64105.

Allison L. Bergman, Kansas City, Mo., has been elected to become a member of the executive committee at Lathrop & Gage L.C.

Crissa S. Cook, Leawood, was given the Faculty Award for Outstanding Scholastic Achievement by the University of Kansas School of Law at its hooding ceremony. Donald W. Griffin, Kansas City, Mo., was honored as distinguished alumni, and Adrienne E. Strecker, Olathe, was given the Janean Meigs Memorial Award.

Jeffrey O. Ellis, Overland Park, has been elected to the board of trustees of the Kansas Foundation for Medical Care.

Gerald L. Goodell, Topeka, received the Justice Award from the Kansas Supreme Court.

Michael D. Hockley, Overland Park, received an Unsung Hero Award for his volunteer work.

Terry T. Messick, Anthony, has been named the honorary chairman for Harper County's American Cancer Society Relay for Life.

Michael A. Williams, Kansas City, Mo, has received the Young Lawyer of the Year Award from the Kansas City Metropolitan Bar Association.

Thomas E. Wright, Topeka, has been appointed by Gov. Kathleen Sebelius to serve on the Kansas Corporation Commission. He will serve as chairman.

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.

OBITUARIES

James Elmer Benfer Jr.

James Elmer Benfer Jr., 78, Topeka, died April 21 at Midland Hospice House. Benfer was born July 16, 1928, in Kansas City, Mo., the son of James E. and Doris Garber Benfer. He spent his childhood in Emporia.

Benfer received his bachelor's degree in political science (1950) and J.D. (1953) from Washburn University. He was admitted to practice in Kansas and the U.S. Supreme Court and was a member of the Topeka and Kansas bar associations.

He is survived by his wife, Cornelia M. “Sally” Benfer; four children, Jeb, John, Anne, and Daniels; and four grandchildren.
The Phil Lewis Medal of Distinction recognizes individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

Sen. Charles Patrick “Pat” Roberts is a fourth-generation Kansan from Dodge City. His service to Kansans spans more than two decades, first as an eight-term U.S. Congressman from the First District and now as a second-term U.S. Senator. Roberts has built a reputation as a leader in national security and defense issues, agriculture, and health care. He is an advocate of a strong education system, free and fair trade policies, increased investment in science and technology, a focused foreign policy, and a strong military — all of which are necessary to keep Kansas competitive in today’s rapidly evolving global market.

As a new member of the Senate Finance Committee in the 110th Congress, Roberts gains the opportunity to give Kansans increased leadership on legislation ranging from taxes to trade, health care, Medicare, and Social Security, which are issues that impact all Kansas families.

His record shows his long-standing concern for Kansas communities, businesses, and families. As a member of the Health, Education, Labor, and Pensions (HELP) Committee, he introduced legislation to address the high cost of quality child care and health care for small businesses, the nursing shortage, and fully funding the Individuals with Disabilities in Education Act.

In the House Agriculture Committee (1995-1997), Roberts led the reform of outdated federal farm policies. His advocacy has continued in the Senate as a key member of the Agriculture Committee. In 2000, he wrote sweeping reforms to the federal crop insurance program; he has also worked to bring critical relief to producers suffering from long-term drought. He advocates a more cohesive and aggressive U.S. trade policy, has called for reform of unilateral trade sanctions, and has fought hard to regain access to overseas markets for U.S. beef exports.

Roberts is committed to increasing Kansas’ investment in math, science, and technology by urging schools and universities to remain highly competitive by investing in research infrastructure. Calling this focus “an investment in our future,” in 1997 Roberts established his blue-ribbon Advisory Committee on Science, Technology, and the Future to advise him on Kansas’ technology needs.

Roberts is also an advocate for the state’s military installations and those who serve in uniform. He played a key role in strengthening Kansas’ military missions despite nationwide base closings — bringing thousands of new jobs to Kansas.

Roberts served as chairman of the Senate Intelligence Committee for four years, working to improve intelligence gathering and analysis capabilities at a critical time in our nation’s history. Many of his proposals were included in the Intelligence Reform and Terrorism Prevention Act of 2004. Roberts delivered the prestigious Landon Lecture at Kansas State University in 2004 on national security topics.

Following graduation from Kansas State University in 1958, Roberts served in the U.S. Marine Corps for four years; he then worked as a reporter and editor for several Arizona newspapers. He joined the staff of Kansas’ U.S. Sen. Frank Carlson in 1967 and became administrative assistant to First District U.S. Rep. Keith Sebelius in 1969. He was elected to Congress in 1980, succeeding Sebelius upon his retirement. He was first elected to the U.S. Senate in 1996, following the retirement of Sen. Nancy Kassebaum, and won re-election in 2002.

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The Distinguished Service Award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

J. Eugene “Gene” Balloun, Kansas City, Mo., was recognized with the 2007 KBA Distinguished Service Award for his dedication to the legal profession, longstanding support of his community, and commitment to public service. Balloun, a partner with Shook, Hardy & Bacon LLP, has practiced law for 53 years.

Balloun has appeared before the Kansas Supreme Court and Court of Appeals in more than 150 cases and has been counsel of record in nearly 200 cases, making him one of the most reported lawyers in Kansas. He has also been extremely active in pro bono legal work. In one case, he urged the firm to donate a $200,000 fee award to the Johnson County First Amendment Foundation, a charitable organization founded by Balloun to promote a better understanding of constitutional rights among students. Balloun and his firm have also established a scholarship fund for the benefit of foster and adopted children, which provided 16 scholarships last year.

Balloun and his wife have been foster parents to 29 children over the past 15 years and are adoptive parents to two of these children. He provides crucial legal, financial, and emotional support to the Foster Children of Johnson County; filed a lawsuit designed to bring about changes in the treatment of foster care children; and provides pro bono services to the Children’s Benefit Services for Families, CASA, and many other organizations that benefit children.

Balloun earned his B.S. and his J.D. from the University of Kansas. He was elected a Fellow of the American College of Trial Lawyers and has been selected as one of the outstanding business litigators in Kansas in numerous editions of “The Best Lawyers in America.”

Balloun received the Lifetime Pro Bono Award from Shook, Hardy & Bacon; pro bono awards from both the KBA and ABA; the Justinian Award from the Johnson County Bar Association; the Whittaker Award from the Lawyers Association of Kansas City; and the Lifetime Achievement Award from the Kansas Association of Defense Counsel. He was also named a distinguished alumnus by the University of Kansas School of Law and one of 24 “Legends of Kansas City” by Ingrams Magazine.

Balloun is a lifetime member of the KBA, belongs to the KBA Litigation Section, and served on the Board of Trustees of the Kansas Bar Foundation.

In the 125 years the Kansas Bar Association has been in existence, only three individuals have been given an Honorary KBA Membership: Jonalou Pinnell, 1984; Marcia Poell Holston, 2000; and Bill Kurtis, 2004. This honor is bestowed upon persons who have demonstrated lifelong dedication to the state’s citizens, legal and judicial system, and the Bar Association.

The KBA was proud to present Dr. Howard P. Schwartz, Topeka, with the fourth Honorary KBA Membership. Schwartz graduated with his B.S. and M.S. from Emporia State University and his Ph.D. in personnel administration with a minor in business from East Texas State University. He has served as the judicial administrator at the Kansas Judicial Center since 1980.

Schwartz serves on many local and national committees, including the National Center for State Courts Research Advisory Council, State Court Administrators Past Presidents, State Court Administrators Courts Statistics, and Program Advisory Board for Master of Judicial Studies.

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

Elizabeth Seale Cateforis, Lawrence, is an associate clinical specialist and supervising attorney with the Paul E. Wilson Defender Project at the University of Kansas School of Law. Cateforis received a KBA Outstanding Service Award for her many contributions to the Kansas Bar Association, most recently for serving as the editor and one of 30 authors on the 31-chapter revision and update of the Fourth Edition of the Kansas Criminal Law Handbook. The handbook — a comprehensive guide to Kansas criminal law and procedure as shaped by statutes, state case law, and federal and state constitutional law — is an essential resource for Kansas prosecutors, defense lawyers, and law enforcement professionals.

Cateforis received her bachelor’s degree from Smith College (Mass.) and her law degree from the University of Kansas. Prior to joining the law school faculty in 1999, she was an assistant appellate defender at the Kansas Appellate Defender Office. She is a member of the American and Kansas bar associations, KBA Criminal Law Section, Clinical Legal Education Association, National Legal Aid and Defense Association, and the Kansas and National associations of criminal defense lawyers.

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Joel Goering, Kansas City, Kan., was a recipient of an Outstanding Service Award for his service as a mediator and community organizer for Rosedale Development Association, a nonprofit community development corporation that helps residents resolve ongoing conflicts. Many times these conflicts are between neighbors who involve others in the neighborhood and continue for years. Police and code enforcement departments are also impacted by these conflicts as the parties often report each other for real or perceived infractions.

Goering, a 2004 graduate of Bethel College in Newton, pursued professional training to learn the skills of mediation and alternative dispute resolution (ADR). He was certified by the state of Kansas as a core mediator after attending 40 hours of training through the Community Mediation Center in Independence, Mo., and participating in three practice mediations through the Johnson County small claims court.

Goering works to educate others on ADR and makes presentations on mediation skills to the police, community organizations, and neighborhood groups. His most recent case, which involved two neighborhood leaders and their group members and charges of racism and racial slurs, had reached the Justice Department before being referred back to the KCK Human Relations Council. They turned to Goering to try to bridge the divide, create understanding, and reach common ground.

Hon. Richard D. Greene, Topeka, was appointed to the Kansas Court of Appeals in June 2003 by Gov. Kathleen Sebelius. He was a recipient of the Outstanding Service Award for his dedication to the KBA’s Continuing Legal Education programs and the legal profession as a whole. For the past two years, he has chaired the Association’s Survey of Law Committee, overseeing the Annual Survey of Law Handbook and its companion CLE seminar, the Legislative Case Law Institute, which is the KBA’s most popular CLE and covers a year’s worth of legal developments in one program.

Greene has participated in the KBA’s Oil, Gas, and Mineral Law and Litigation sections and currently serves on the KBA Continuing Legal Education and Bench-Bar committees.

Greene received his B.S. in business administration from the University of Missouri-Columbia and his J.D. from Southern Methodist University in Dallas. Before his appointment to the bench, he practiced law for 28 years with Morris, Laing, Evans, Brock & Kennedy Chtd. (Wichita/Topeka). He is currently presiding judge of the court’s motion panel and is serving his second year as chair of the editorial committee.

Thomas D. Herlocker, Winfield, is a general practitioner with Herlocker Roberts and St. Peter LLC. He was a recipient of the Outstanding Service Award for his many services to the community and the legal profession.

Herlocker received his B.A. from Stanford University and his J.D. from the University of Kansas School of Law in 1963. He served as county counselor (1967-1971) and serves as municipal court judge (1971-present).

He has been an active member of the Kansas Bar Foundation since 1999, serving on the Board of Trustees as a District Four Trustee, the IOLTA Committee (1991-1999), and the Raising the Bar Committee as well as president of the KBF (2002-2003). He also belongs to the KBA Health Law and Corporate, Banking, and Business Law sections.

Herlocker is co-founder of the Cowley County Juvenile Center, Winfield Child Care Center, Canterbury Village (low and moderate income housing), and Canterbury Heights (handicapped and elderly housing). He currently serves as president of the H.L. Snyder Medical Foundation and is a trustee of the William Newton Hospital. He is also an ordained deacon in the Episcopal Church and serves at Grace Episcopal Church in Winfield and on the Bishop’s Commission on Ministry. In addition, he is a coordinator for the Episcopal Social Services representative payee program; provides voluntary legal assistance to several local churches and charities, such as Habitat for Humanity; is a volunteer mediator for small claims cases in the Cowley County District Court; and is the Cowley County Law Library Trustee.

While in law school, Herlocker served on the editorial board of the Kansas Law Review and later on the Board of Governors of the University of Kansas School of Law.
Roger L. McCollister, Lawrence, is currently working with the Midland Professional Associates in Lawrence after recently leaving Kansas Legal Services. He directed the Legal Aid Society of Topeka (1972-1978) and joined forces with Brian Moline and Richard Wallace to incorporate Kansas Legal Services in 1977, which made Kansas one of the first states to have a single, statewide legal aid entity. McCollister’s leadership allowed KLS to provide services to more than 30,000 people each year.

He spearheaded expanding services to meet legal needs, including financially troubled farmers, those seeking Social Security disability benefits, and children’s rights. These services blended with more traditional family law and advocacy services to meet a broad range of needs. For 30 years, legal services have been provided to more than 700,000 Kansans, through KLS staff attorneys and private attorneys or law students working on a pro bono basis. McCollister has helped Kansas move toward the goal of “equal access.”

McCollister belongs to the KBA Employment Law, Health Law, and Administrative Law sections.

Harvey J. Snapp, Newton, graduated from the University of Kansas School of Law in 1949. He practiced in Hoisington (1949-1955) before joining the Railroad Savings and Loan as corporate counsel, where he was the chief title examiner for all of Railroad Savings’ many branch offices statewide. After retiring from Railroad Savings and Loan in 1986, he entered into private practice in Newton, where he continues to practice with his son, Don, at Snapp Law Offices.

In 1963, Snapp joined the KBA Committee on Title Standards, where he has served continuously for 44 years. In addition to chairing the committee for several years, he has edited or assisted in editing at least four editions of the KBA Kansas Title Standards Handbook and was instrumental in the publication of the Seventh Edition. Because of Snapp’s expertise and tenacity with the Title Standards’ project, the handbook is a great resource and popular handbook in the KBA library.

Snapp was a recipient of the KBA’s Outstanding Service Award in 1987 and became a lifetime member of the KBA in 1999.

Nola T. Foulston is the Sedgwick County District Attorney in Wichita (1988-present). She was honored with a Distinguished Government Service Award for “her principled approach to remedying an apparent misuse of the criminal justice system.” In an unprecedented move shortly before leaving office, the then-attorney general of Kansas filed a criminal action in Sedgwick County District Court without obtaining the consent of the local prosecutor, Foulston. She followed the law and asked that the case be properly dismissed based on lack of jurisdiction. In charting a course of action and arguing her case before the court, she demonstrated exemplary scholarship and advocacy. Her quick action, with no regard for her political future, preserved the possibility of prosecution if the facts so merited as well as the integrity of the courts as a place for criminal prosecution and not political persecution.

Prior to being elected district attorney, she served as assistant district attorney for the 18th District (1977-1981); practiced with the law firm of Foulston, Siefkin, Powers and Eberhard (1981-1986); and was an associate with the firm of Foulston and Foulston (1986-1988).

She received her B.A. from Fort Hays State University (1972), attended graduate school at the University of Kansas, and received her J.D. from Washburn University School of Law (1976). She is a member of the Kansas, Wichita, and American bar associations and is admitted to practice in the state and federal courts of Kansas and before the U.S. Supreme Court.

Foulston has participated as a member of many important law enforcement and community-based organizations, including the Kansas County and District Attorneys associations, Domestic Violence Coalition, Forensic Science Center Advisory Board, Sedgwick County Truancy Advisory Board, Sedgwick County Juvenile Justice Advisory Council, Team Justice, and the Wichita Children’s Home board of trustees. Foulston has also been appointed to serve on several...
gubernatorial task forces, including the Kansas Judicial Council Criminal Law Advisory Committee and the Task Force on Railroad Service.

Awards and commendations from law enforcement, community, educational, and professional organizations include the 2001 Kansas Attorney General’s Crime Victim Service Award for Outstanding Prosecutor for Commitment to Crime Victims; Wichita Crime Commission’s 1994 Criminal Justice Professional of the Year; Daughters of the American Revolution Award for Professional Excellence; and many others.

Norman J. Furse, Topeka, is the Kansas Revisor of Statutes Emeritus; he was recognized with a Distinguished Government Service Award for being a “trusted legal advisor to every member of the state Legislature and counselor to the legislative leadership.”

Furse received his J.D. from Washburn University School of Law in 1967 and worked as a Ford Foundation Legislative intern. He joined the Revisor’s Office in 1970 and was appointed Revisor of Statutes by the Legislative Coordinating Council in 1988, a position he held until 2006.

The Revisor of Statutes is one of the most influential, yet least recognized, forces shaping the laws of the state of Kansas. The Revisor’s duties are set out in nearly 70 statutes, and Furse is considered one of the foremost experts on the Kansas legislative process. The Revisor also manages, coordinates, and brings harmony to the various chapters, articles, and sections of the Kansas Statutes Annotated.

Furse was an editor of the Legislative Procedure in Kansas manual and is also an adjunct professor at Washburn University School of Law.

OUTSTANDING YOUNG LAWYER AWARD

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

Chelsey G. Langland, Lawrence, serves as the research attorney for Hon. Christel E. Marquardt of the Kansas Court of Appeals (1999-present). Langland received her B.A. in philosophy from Grinnell College (Iowa) and her J.D. from Washburn University School of Law in 1999.

Langland served on the executive committee of the KBA Young Lawyers Section as pro bono chair; in that position she primarily worked with the Kansas High School Mock Trial program. In her first year as the coordinator of the Kansas Mock Trial, she dedicated untold hours to ensure the program successfully exceeded previous years’ expectations. Langland also served on the KBA Annual Meeting Task Force (2004 and 2005).

In 2003, Langland was awarded the Outstanding Young Lawyer Award by the Topeka Bar Association for her service as a director of the TBA and as chair of the TBA Publications Committee. Langland also served as chair of the CLE Committee and secretary, president-elect, and president (2003-2004) of the Women Attorneys Association of Topeka. She has served on numerous committees for the Kansas Women Attorneys Association (KWAA), including as program committee chair for the 2005 KWAA annual meeting.

Langland has also been active in the Topeka community and currently serves on the board of directors of the Women’s Transitional Care Services.

PRO BONO AWARD

This award recognizes lawyers or law firms for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

T. Lynn Ward, Ward Law Offices LLC, is a family law attorney in Wichita. She represented a young mother who allowed her newborn to be raised by the child’s father rather than put the child up for adoption.

The mother was promised contact, which was difficult to arrange as the mother had moved out of state. The mother returned to Kansas solely to re-establish a relationship with the child but, without court action, was getting nowhere. Ward took the case to trial, devoting nearly 80 hours to the success of the case, resulting in the mother having shared custody.

Ward graduated with honors from Pensacola (Fla.) Christian College with a bachelor’s degree in prelaw (1987) and received her J.D. from Washburn University School of Law (1990). She is certified as a domestic mediator and was one of the first Kansas attorneys trained to handle divorce cases using a collaborative law format.

She is a member of the Kansas and Wichita bar associations, the KBA Family Law Section, and the Central Kansas Collaborative Family Law Practice Group (founding member).
The KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

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

Four individuals have been awarded the 2007 Pro Bono Certificate of Appreciation.

Patricia A. Gilman practices family law with Redmond & Nazar, Wichita. She donated nearly 20 hours to a complex divorce case where the client was the mother of two children. Resolving the divorce required dealing with custody and visitation issues, financial matters, and division of property, among other issues.

Gilman has been an active member of the Sedgwick County Family Law Committee since 1994 and has served on various subcommittees helping revise local rules, develop forms for use in Sedgwick County, and other matters. She served on the board of directors of the Sedgwick County Law Library (1989-1994) and the Wichita Bar Association's Ethics Committee.

Gilman is a member of the American, Kansas, and Wichita bar associations; the Wichita Women Attorneys Association; and the KBA and WBA Family Law sections. She also serves as vice president of the WBA Fee Dispute Committee.

She received her bachelor's degree in accounting (1980) and her J.D. (1983) from Washburn University.

Robert E. Keeshan, Topeka, practices family law with Scott, Quinlan, Willard & Barnes. To date he has donated more than 15 hours to assist an elderly woman whose relationship with her adult child had eroded. The “child” lived with the client intermittently and refused to completely vacate the home of his/her belongings, thus ensuring constant contact with the client. Keeshan helped the client obtain the necessary order, which was appealed by the defendant who was acting pro se. The appeal was dismissed; however, an extensive motion and brief was recently filed by the defendant, seeking reinstatement of the appeal. Keeshan continues to provide pro bono assistance to his client.

Keeshan served as a research attorney for Justice Alfred G. Schroeder (1975-1977) and has more than 30 years’ experience in private practice. He served as an adjunct professor and adjunct domestic relations professor at Washburn University and has spoken at numerous KBA CLE seminars.

He received his B.A. (1972) and law degree (1975) from Washburn University. He is a member of the American, Kansas, and Topeka bar associations; the Kansas Trial Lawyers Association; and the KBA Family Law Section.

Matthew C. Miller, Kansas City, Mo., is of counsel at Shook, Hardy & Bacon LLP. He assisted a disabled mother who had been denied visitation with her children by the paternal grandparents, who were the children’s guardians and who filed for adoption and attempted to terminate the client’s parental rights. A lengthy trial ensued, and Miller and his firm donated more than 50 hours of legal assistance and paid more than $1,000 in expenses.

Miller is a member of the firm’s pro bono committee, the KBA Access to Justice Committee, and the KBA Litigation Section. He has also served on the KBA Legal Aid and Referral, Professional Ethics Advisory, and Lawyers Assistance Program committees.

He received his bachelor’s degree from the University of Notre Dame (1994) and graduated with distinction from the Emory University School of Law (1998), where he was a member of the Order of the Coif and executive managing editor of the Emory International Law Review.

Sheila M. Reynolds, Topeka, is a professor of law at Washburn University. She represented a client in a contested divorce, which included allegations of abuse, and donated more than 50 hours to the case.

Reynolds teaches professional responsibility and supervises third-year students in the Washburn Law Clinic. She also served as associate dean of the law school (1985-1991). She serves on the Topeka Legal Services Committee, working to encourage lawyers and law students to do pro bono work.

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She received her J.D. from the University of Kansas (1971), where she was elected to Order of the Coif. Prior to teaching, she was a legal services lawyer in Kansas City, Mo., and Topeka and was the first legal services developer for the Kansas Department on Aging, setting up legal services programs for older clients. She served on the KBA Professional Ethics Advisory Committee; a KBA task force for Communicating to Pre-Law School Students; and a Kansas Judicial Council committee, drafting Kansas practice forms. She is a member of the American and Kansas bar associations.

**MILESTONES**

**Years of Admittance to the Kansas Bar**

- Lawrence
- Oklahoma City, Okla.
- Lawrence
- Wills Point, Texas
- Council Grove
- Wichita
- Topeka
- Kansas City, Kan.
- Wichita
- Saint Francis
- Merriam
- Overland Park
- Topeka
- Topeka
- Topeka
- Liberal
- La Crosse
- Marysville
- Manhattan
- Ottawa
- Topeka
- Wichita
- Topeka
- Lawrence
- Beloit
- Phillipsburg

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Goodell Receives Justice Award

The Kansas Supreme Court met once in special session at 2 p.m. Friday, May 25, to bestow its Justice Award to longtime Topeka attorney and philanthropist Gerald L. Goodell.

Goodell was recognized for his many years of making significant contributions to the improvement of justice in Kansas. The Justice Award consists of a cash gift, determined by the Supreme Court, and an individualized plaque bearing the signatures of the Kansas Supreme Court justices. Additionally, names of winners are inscribed on a plaque that has been placed on permanent display outside the Supreme Court Courtroom in the Kansas Judicial Center.

The award has been presented to a variety of persons and one organization. Among past recipients are former Chief Justice David Prager; former Governor Robert F. Bennett; Lewis L. Ferguson, former Associated Press Kansas correspondent; and the Marion County Special Education Cooperative Extended Learning Program.

Goodell is of counsel with the Topeka law firm of Goodell, Stratton, Edmonds & Palmer LLP. He joined the firm upon graduation from the Washburn University School of Law in 1958. Soon thereafter, he became counsel to the Urban Renewal Agency of the city of Topeka, a position that provided extensive experience in real estate law and jury trial experience in condemnation proceedings. Goodell was elected as a member of the American College of Real Estate Lawyers in 1984 and is the former editor of the Kansas Bar Association Real Estate Handbook. He is currently listed as a leader in the field of real estate law in the publication “Best Lawyers in America” and represents real estate brokers, developers, and lenders.

Goodell served as general counsel for an internationally known psychiatric school, research, and treatment facility since 1958, representing it in all litigation, corporate, real estate, and general legal matters. Goodell has served as general counsel for all Kansas Savings and Loan Institutions since 1971.

Goodell is extensively involved in professional and community affairs. He served as president of the Kansas (1985-1986) and Topeka (2000-2001) bar associations. He was a member of the Shawnee County District Judge Nominating Committee from 1977 until 2000. He completed a term as chairperson of the Kansas Board of Law Examiners last June, is a member of the Kansas Judicial Council, and is chairperson of the Judicial Council Probate Committee. Goodell also serves as a Supreme Court appointee as a commissioner on the State Ethics Board.

Goodell is a member of the board of trustees for the Washburn Endowment Association and served as its president (2005-2006). He is a past president of the Washburn Alumni Association, Washburn Law School Alumni Association, and the Washburn Law School Foundation. He was a recipient of the Washburn Law School Distinguished Service Award in 1982, the Kansas Bar Association Distinguished Service Award in 1993; and the Topeka Bar Association Warren Shaw Award in 1998. He received a doctorate of law from Washburn Law School in 2002. He has taught trial techniques and real estate mortgages at the law school and has participated on numerous professional panels.

Hon. Christel Marquardt and Gerald L. Goodell at the Justice Award ceremony.
The Kansas Bar Association would like to recognize and thank the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars April through June 2007. Their commitment and invaluable contribution is truly appreciated.

**2007 Outstanding Speakers Recognition**

Professor Jasmine Abdel-khalik, University of Missouri-Kansas City
Julie Ariagno-Moore, Young, Bogle, McCausland, Wells & Blanchard P.A., Wichita
Jeffrey S. Austin, Austin Law P.A., Overland Park
Brooke Bennett Aziere, Foulston Siefkin LLP, Wichita
Michael E. Baker, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Thomas J. Bath Jr., Bath & Edmonds, P.A., Overland Park
Rudolf H. Beebe, Sonnenschein Nath & Rosenthal LLP, Kansas City, Mo.
Sara S. Bezzley, Girard
Joseph W. Booth, Nelson & Booth, Lenexa
John W. Broomes, Hinkle Elkouri Law Firm LLC, Wichita
Mert F. Buckley, Adams Jones Law Firm P.A., Wichita
Brian S. Burris, ICM Inc., Colwich
Hon. Michael B. Buser, Kansas Court of Appeals, Topeka
John W. Campbell, Kansas Insurance Department, Topeka
Hon. Nancy M. Caplinger, Kansas Court of Appeals, Topeka
Arthur S. Chalmers, Hire Fanning & Honeyman LLP, Wichita
Derek R. Chappell, Jordan & Chappell, Attorneys at Law, Ottawa
James W. Clark, Kansas Bar Association, Topeka
Russell B. Cloon, Cloon Legal Services, Baldwin City
Christina I. Collins, Long & Long, Chapel Hill, N.C.
Professor James M. Concannon, Washburn University School of Law, Topeka
Christopher V. Cotton, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Wendell F. “Bud” Cowan Jr., Foulston Siefkin LLP, Overland Park
Whitney B. Damron, Whitney B. Damron P.A., Topeka
Janith Davis, Office of the Disciplinary Administrator, Topeka
Steven C. Day, Woodward, Hernandez, Roth & Day LLC, Wichita
Dennis D. Depew, Depew Law Firm, Neodesha
Patrick H. Donahue, The Midland Group, Lawrence
René Eichem, Kansas Bar Association, Topeka
Timothy G. Elliott, Elliott & Elliott L.C., Shawnee Mission
Mischa Buford Epps, Shook, Hardy & Bacon LLP, Kansas City, Mo.
David P. Eron, U.S. Trustee, Region 20, Wichita
Jerry D. Fairbanks, First National Bank, Goodland
Roger D. Fincher, Bryan, Lykins, Hejtmann & Fincher, Topeka
Bradley R. Finkeldei, Stevens & Brand LLP, Lawrence
Jan L. Fisher, McCullough, Warehouse & LaBunker P.A., Topeka
Gloria Farha Flentje, Spirit AeroSystems Inc. Legal Department, Wichita
Hon. Thomas E. Foster, Johnson County Courthouse Div. 12, Olathe
Mark S. Foster, Stinson Morrison Hecker LLP, Kansas City, Mo.
David R. Frye, Lathrop & Gage L.C., Overland Park
Ezra J. Ginzburg, Kansas Insurance Department, Topeka
Professor Robert L. Glickman, University of Kansas School of Law, Lawrence
Webster L. Golden, Stevens & Brand LLP, Lawrence
Professor David J. Gottlieb, University of Kansas School of Law, Lawrence
Dr. Peter Graham, Acumen Assessments, Lawrence
Hon. Richard D. Greene, Kansas Court of Appeals, Topeka
William H. Griffin II, District of Kansas Chapter 13 Trustee, Fairway
Jan Hamilton, District of Kansas Chapter 13 Trustee, Topeka
Charlie F. Harris, Kaplan, McMillan & Harris, Wichita
Brette S. Hart, Harris McCausland P.C., Kansas City, Mo.
Jerry D. Hawkins, Hire Fanning & Honeyman LLP, Wichita
Bill J. Hays, Shook, Hardy & Bacon LLP, Kansas City, Mo.
Richard F. Hayse, Morris, Laing, Evans, Brock & Kennedy Chtd., Topeka
Stanton A. Hazlett, Disciplinary Administrator, Kansas Supreme Court, Topeka
Lewis A. “Pete” Heaven Jr., Lathrop & Gage L.C., Overland Park
Keith R. Henry, Weary Davis L.C., Junction City
Hon. Stephen D. Hill, Kansas Court of Appeals, Topeka
Donald E. Hill, Martin & Churchill, Chtd., Wichita
Mark D. Hinderks, Stinson Morrison Hecker LLP, Overland Park
Randall Lee Hodgkinson, Kansas Appellate Defender Office, Topeka
Professor Christopher M. Holman, University of Missouri-Kansas City School of Law, Kansas City, Mo.
Christopher M. Hurst, Foulston Siefkin LLP, Wichita
Salvatore D. Intagliata, Sedgwick County District Attorney’s Office, Wichita
Vernon L. Jarboe, Sloan, Eisenbarth, Glassman, McEntire & Jarboe LLC, Topeka
Sarah E. Johnson, Kansas Appellate Defender Office, Topeka
Christina Jordan, Domestic Court Services 10th Judicial District, Olathe
Sen. Phillip B. Journey, Attorney at Law, Wichita
Hon. Janice M. Karlin, U.S. Bankruptcy Court, Topeka
M.A. “Mike” Kautsch, University of Kansas School of Law, Lawrence
Timothy R. Keenan, Keenan Law Firm P.A., Great Bend
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Digital Discovery Trends and the Federal Rules Amendments

By Deborah H. Juhnke and Peter B. Sloan, Digital Discovery and Records Management Group, Blackwell Sanders Peper Martin LLP, Kansas City, Mo.

The prevalence of digital data has led to rapid growth in both digital discovery and litigation cost and complexity. One measure of this phenomenon is the annual revenue growth for the market of vendors that collect, convert, and analyze data in discovery, which has doubled each year since 1999. As the scope and cost of digital discovery increases, it is more important than ever that companies identify and implement effective processes for handling data in litigation.

The evolution of rules and precedent has not been so rapid, and case law has offered little guidance. However, amendments to the Federal Rules of Civil Procedure (FRCP) discovery rules, which became effective on Dec. 1, 2006, provide clarity on several key issues regarding digital evidence discovery. Repercussions of the FRCP amendments include:

- The need for parties to understand the scope and sources of digital data subject to discovery;
- The need for parties to understand the concepts of “accessible” vs. “inaccessible” data, and how these concepts apply to their organization’s data;
- The need to disclose earlier and more completely the methods of identification, collection, and production of digital data;
- The need to negotiate technical protocols with opposing counsel, which demands a common vocabulary and understanding of one’s own data; and
- A heightened responsibility to act quickly and completely when issuing legal holds.

You are not alone

A 2005 Fulbright & Jaworski litigation trends survey of more than 350 corporate counsel in the United States and United Kingdom identified digital discovery as the number one new litigation-related issue for companies with more than $100 million in revenue. A similar study undertaken last year by EDDix LLC, an independent research organization, surveyed 269 general counsel from 1,000 global companies. In this survey, general counsel were asked to rank what concerned them most about digital discovery.

At the top of the list was the ability to predict cost. Following closely behind were understanding the potential universe of evidence, mitigating business and employee disruption, and managing the cost of review. The risk of sanctions resulting from mishandling the preservation and discovery process was ranked last, although some of the more visible and precedent-setting rulings have been tied to multimillion dollar sanctions for discovery abuse.

These survey results suggest that sophisticated general counsel understand the risk of sanctions, but now want a firmer grasp on how their legal hold and digital discovery processes should run, to get the right results at a manageable cost.

The ability to locate and produce responsive information is directly linked to having efficient and comprehensive records management and legal hold systems. The Fulbright survey found that 25 percent of companies with less than $100 million in revenue had no records retention policy, while 33 percent had no litigation hold policy. The key to managing digital discovery costs and results is to have effective records retention and litigation hold processes, and to ensure compliance with those processes.

Managing the funnel

When litigation arises, parties look to the world of their “ordinary course” data to identify and preserve potentially relevant data and data sources. This subset of data is then placed in a process, or “funnel,” in which the data is subjected to filtering, collection, conversion (in some cases), review, and production. The cost and scope of digital discovery are directly affected by how much data must be placed in the funnel. Ensuring compliance at the top of the funnel, therefore, greatly improves the cost efficiency of the discovery process. Failure to manage data in the ordinary course of business increases data volume and discovery cost, and can also be a source of spoliation.

Digital discovery is, of course, not just about e-mail. Responsive data may come from proprietary systems, databases, Web sites, accounting systems, production systems, work station local drives, Blackberries, and removable media. Ideally, companies will have a solid grasp of how their data are managed at the top of the discovery funnel, as the data are maintained in the ordinary course of business.

Medium to large companies face a number of special challenges. Geographic diversity and the resulting complex networks make it difficult to ensure that litigation holds are properly initiated, monitored, and withdrawn when appropriate. Growth through acquisition commonly results in disparate computing systems and, more challenging, archives of historical data that can become the target of discovery. A common oversight is a failure to identify, preserve, and collect noncustodial data. Noncustodial data are data not “owned” by an individual, but by the company. They include corporate systems, databases, accounting records, Web sites, and collaborative tools, among many others.

A company’s use of third parties for information technology infrastructure and data hosting requires that these entities be included in the scope of the company’s records retention and legal hold processes. Additionally, many companies do not address specifically the creation or retention of digital data. Given that 70 percent of all business information is never reduced to paper, this is a significant issue. By way of example, although Lotus Notes is an excellent business collaboration and e-mail program, it also lends itself nicely to the creation of ad hoc files and databases by end users — most of which are typically not tracked or monitored in large organizations.

Management of the funnel is also closely tied to management of each litigation matter, for each case will have unique issues and different custodians, sources, and types of data. The
goal, therefore, is to develop processes to manage the use and disposition of digital data in the ordinary course of business, as well as in response to preservation and discovery requirements in litigation. A company can establish these processes, with input from the general counsel’s office, technology representatives, departmental representatives, records representatives, and end users. Once established, these processes will allow the company to manage better the scope and cost of digital discovery.

Strategies for e-risk management

The most pressing concerns regarding data management in litigation include predicting costs, understanding the potential universe of evidence, minimizing business and employee disruption, and managing the cost of review. Selecting the right vendor to process the data is, of course, important. But to address the above concerns, it is equally important to implement effective processes for records management, legal holds, and data collection.

Calculating the true cost

Because it can be difficult to visualize or quantify the volume of data that must be collected and processed in digital discovery, companies often are astonished when they receive their first processing vendor bill. A drive no larger than a standard hardbound novel can easily contain 300 GB or more of documents, which translates roughly to more than 20 million pages of text. The seemingly innocuous $0.15 per page or $2,000 per gigabyte vendor quote can quickly mushroom into millions of dollars. Consequently, whatever money is spent on the front end to develop processes and to bring the company’s data under control can be saved many times over in a single case.

Ordinary course and preservation

Existing records retention and data backup policies should be updated to include specific references to digital data. The policies should be based on an up-to-date understanding of data sources and actual business practices, which may be gained through data- and practice-mapping. Mapping will help identify specific risk management issues, including potential hot-spots of liability exposure, ad hoc practices, and opportunities for improvement and cost containment.

Companies should also address their current legal hold practices. This review will often unmask areas of risk or disconnection, which can be addressed through modified processes and practices, as well as through optimization of existing or sometimes new software. Such a review also helps address two concerns that general counsel face: (1) a clearer understanding of their organization’s data systems and (2) to minimize business interruption and cost resulting from data identification, collection, and production. Creating the data and practice maps to identify data sources avoids the need to reinvent the wheel with each new lawsuit.

Data management during discovery

Developing a case-specific discovery plan for the identification, collection, filtering, and review of data helps to ensure accurate and thorough collection. It also enables outside counsel to provide the roadmap necessary for supporting personnel, including vendors.

The appropriate and selective use of outside vendors can speed the collection and review process and provide data to attorneys in an easy-to-use manner. Different types of matters will demand varying collection and review tools, so a single-source vendor may not always be the best solution. Vendors should be vetted through a careful analysis of their pricing proposals as they pertain to one or more sample scenarios, along with interviews of current references, and vendor presentations.

Implementation, training, and auditing

Updated processes and best practices should be conveyed to the stakeholders both orally and through written documentation. It is sometimes not enough simply to tell someone what they must do — particularly when dealing with digital data. The best approach is to provide specific guidance as to the ideal methods and storage practices to ensure defensible preservation and collection. Because digital data discovery changes at the pace of technology, it is also important to update policies regularly and to audit their use.

About the Authors

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If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.
Revised Rule for Representing Clients With Diminished Capacity

By Professor Sheila Reynolds, Washburn University School of Law

Kansas lawyers who represent clients with diminished capacity have lamented the lack of ethical guidance in the relevant Kansas Rule of Professional Conduct 1.14, with its accurate but unhelpful comment that “the lawyer's position in such cases is an unavoidably difficult one.” Amended Rule 1.14, effective July 1, provides substantially more guidance. The Kansas Supreme Court adopted the exact revision recommended by the ABA Ethics 2000 Commission, which placed in the Rule and Comments law developed in the past 25 years by court decisions, ABA Ethics Opinions, and the Restatement of Law Governing Lawyers, § 24.

To emphasize the fact that client capacity exists on a continuum, terminology describing the client’s condition has been changed from “mental impairment” to “diminished capacity.” capacity continues to be measured in connection with decisions in the representation, rather than on a wider variety of life issues. Thus a lawyer evaluating client capacity must concentrate on the client’s ability to make decisions about the issues involved in the current representation.

New Comment 6 implies that it is usually the lawyer alone who makes the decision of whether the client’s capacity is so diminished as to permit some protective action, noting that in certain circumstances, the lawyer may seek guidance from an appropriate diagnostian. The comment provides that in making the evaluation, the lawyer should consider factors, such as the client’s ability to explain reasons for a decision, inconsistent state of mind, appreciation of the consequences of a decision, the fairness of the decision, and whether the decision is consistent with what the lawyer knows of the client’s long-term commitments and values.

Paragraph (a) also continues the requirement that the lawyer as far as reasonably possible maintain a normal client-lawyer relationship, even when the client’s capacity is diminished. Paragraph (b) of the previous Rule gave a lawyer discretion to seek guardianship for the client or take other protective action when the lawyer reasonably believed that the client could not adequately act in the client’s own interest in the matter. Revised paragraph (b) adds the requirement of a risk of substantial physical, financial, or other harm to the client before a lawyer takes protective action on behalf of a client.

The revised paragraph also adds suggestions of protective actions that may be taken short of seeking guardianship, including consulting with others who are able to take action to protect the client or seeking the appointment of a guardian ad litem (GAL), conservator, or guardian. New Comment 5 includes suggestions of consulting with family members, using a reconsideration period to permit clarification or improvement of circumstances, using durable powers of attorney or consulting with other agencies that may be able to protect the client.

(continued on next page)

FOOTNOTES
1. The explanations for the revisions to this rule and the other Ethics 2000 Rules are found in the Ethics 2000 Reporter’s Explanation of Changes, http://www.abanet.org/cpr/e2k/e2k-rule114rem.html.
Lawyers confronting serious diminished capacity of a client have wondered if they may ethically discuss the problems they have observed with others, in order to help the client. New paragraph (c) addresses this issue, stating that a lawyer is impliedly authorized under Rule 1.6(a) to reveal otherwise protected client information in order to take protective action for the client, but only to the extent reasonably necessary to protect the client's interests. This is in accord with ABA Ethics Opinion 96-404, which admonishes that the lawyer must be careful to limit disclosures to the information pertinent to the assessment of the client's capacity and discussion of appropriate protective action. New Comment 8 states that the lawyer may make necessary disclosures to protect the client, even when the client directs the lawyer not to disclose, and suggests that before making disclosures, a lawyer should consider whether a person is likely to use the information to act adversely to the client's interests.

A significant deletion was made from a comment to the previous Rule 1.14, which stated “if the person has no guardian or legal representative, the lawyer often must act as de facto guardian.” Lawyers have generally interpreted this provision to permit them to assume the decision-making role on behalf of an incapacitated client, without disclosure of the situation to a judge or others involved in the legal matter. The benefit of acting as de facto guardian was to keep the client’s problems private and forego the adversarial process of obtaining a court-appointed guardian.

The provision was eliminated because it was not clear when a lawyer should be able to assume such a role, what the role of “de facto guardian” meant, or how to limit or provide oversight on the lawyer’s ability to act for the client. With the deletion of this provision, lawyers cannot simply take over for the client; instead, they must either carry out the client's wishes, or take other protective action, perhaps asking for a GAL in a litigated matter or seeking an appointed guardian or conservator to serve under the supervision of the court.2

In an emergency, when a potential client is unable to establish a client-lawyer relationship, new Comments 9 and 10 authorize a lawyer to proceed with legal protective action, under restrictive conditions.

**About the Author**

Professor Sheila Reynolds is a law professor at Washburn University School of Law, where she teaches professional responsibility and an advanced ethics seminar. She previously has taught Law Clinic and a Legal Malpractice Seminar. She has served on the KBA Legal Ethics Advisory Committee and the KBA’s Ethics 2000 Commission. She co-authored two chapters of the KBA Legal Ethics Handbook and the chapter on “Ethical Considerations in Representing an Impaired Client” for the KBA Long-Term Care Handbook.

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2. Further guidance for seeking appointment of a guardian for a client is found in Comment 7 and in ABA Ethics Opinion 96-404.
2007 Legislative Wrap Up: Reflections on the 2007 Session

By James W. Clark, KBA legislative counsel

The most dominant feature of the 2007 Session of the Kansas Legislature for legal practitioners was the lack of a dominant issue. Unlike school finance, which engendered attacks on the independence of the judiciary, there was no such stimulus this year. In fact, there was only one measure, HCR 5008, that sought change in the merit system for selecting appellate judges. That measure proposed allowing direct appointment by the governor, with confirmation by the Senate, similar to the federal system. There was a hearing in the House Federal and State Affairs Committee, which took no action. It is interesting that a proposal allowing Senate confirmation of the nominee was initiated in the House, since a House special committee had spent all summer investigating members of the Senate who went to lunch with Supreme Court justices. The goal of the resolution’s sponsors is apparently confirmation without further communication.

While expanded gambling in the state promises to at least assist in further school financing, it may be years before funding from expanded gambling enters state coffers. Nevertheless, the Legislature felt confident enough to fund the second year of a three-year school finance plan — and to give members of the two appellate courts a raise commensurate with the raises granted district judges and magistrates in the 2006 Session.

In more KBA-specific legislation issues, the 2007 Session was a qualified success. The bill review process implemented by the KBA Board of Governors in 2005, seems to be working well, or maybe slow-learning legislative counsel is just catching on. (And speaking of learning curves, yes, KBA is still publishing Oyez, Oyez, the weekly legislative newsletter, only we are doing it by e-mail, and it is also posted on the KBA Web site.) At any rate, under the bill review system, bills or member proposals affecting particular areas of practice are referred to the appropriate section(s). The sections’ recommendations are passed onto the Legislative Committee, which makes recommendations to the Board of Governors, or the Executive Committee, when a bill appears to be on a fast track.

This year, acting on the recommendations of the KBA Legislative Committee, the Board of Governors adopted the following positions:

- Supported **SB 35**, establishing civil procedure time computation for license suspension hearings. The bill passed, but with numerous, unrelated measures for increasing punishment of DUI.
- Supported **SB 58**, amending the Uniform Trust Code to allow conveyance of property in the trustee’s name, as well as in the trust’s name. The bill passed as written.
- Supported **SB 76**, expanding jurisdiction of estates under $20,000 to include all forms of property. The bill passed as written.
- Opposed a portion of **SB 74**, requiring joining all states that had given medical assistance to decedent or spouse as a party. The provisions of the bill were inserted into **HB 2363** and amended to require only that notice be given to such states.
- Opposed **HB 2089**, extending child support through college or age 23. Did not receive a committee hearing.
- Opposed **HB 2075**, exempting most inspections from ban against disclaimers in home inspection contracts. Did not receive a committee hearing.
- Requested bill to eliminate taking DNA samples prior to finding of probable cause. **SB 237** introduced and heard before Senate Judiciary Committee. No action, but Chairperson Vratil indicated he would request an interim study on the topic. **HB 2384** received a hearing in House Judiciary Committee, and provisions requiring expungement of DNA sample if no probable cause found were ultimately inserted into **SB 103**.
- KBA took a blanket policy opposing increases in sentences and creation of new crimes until the 3R Commission completed its work, and, instead of appearing at myriad hearings with the same speech, sent a letter to all legislators advising them of the KBA position. From the new crimes created and increased in penalties passed in this nonelection year, the KBA position did not prevail.
- KBA again opposed the perennial bill to adopt a “loser pays” system that would award attorney fees to the winning party. This time the bill, **SB 139**, was limited to suits between businesses. But after a young intellectual property lawyer from Kansas State University pointed out that most new products developed at that institution faced legal challenges from Fortune 500 companies, and that a shift to a loser pays system would stifle product development, the bill did not get out of committee.
- Requested a bill to amend K.S.A. 17-6517, striking return receipt delivery requirement for stockholder consents. **SB 162** passed without amendment.
- Opposed **SB 44**, subrogation rights for health insurance companies, which did not get a hearing.
- Supported removal of docket fees unrelated to operation of the courts. **SB 17**, as introduced, did that by removing unrelated docket fees, but was later amended adding fees...
back in but requiring entities supported by such fees to go through the legislative appropriations process. After passing the Senate, bill was assigned to House Judiciary Committee, and received no further action.

- Requested introduction of a bill prohibiting entry of protection from abuse into National Crime Information Center until after a hearing. HB 2381 was heard by House Judiciary Committee and roundly opposed by law enforcement and domestic violence groups, and the committee took no action.

- Opposed HCR 5088, abolishing nominating commission and allow direct appointment of Supreme Court justice by the governor, with confirmation by the Senate. House Federal and State Affairs Committee held a hearing, but took no action. The bill remains alive, however, since 2007 was a holdover year.

The following bills were passed during the 2007 Legislative Session. Except where otherwise indicated, all bills effective July 1. Full text of bills available at www.kslegislature.org.

**Administrative**

SB 351 removes administrative hearings by agencies and places them with the Office of Administrative Hearings, as required by the Kansas Administrative Procedures Act, with the exception of Corporation Commission and Board of Tax Appeals, effective on publication in the Kansas Register (5/24).

HB 2283 clarifies security interest in vehicles to establish perfection at time surrendered title is delivered and application has been submitted, effective on publication in the Kansas Register (4/26).

**Civil Procedure**

SB 53 requires judge, rather than district clerk to release dormant judgments.

SB 269 requires service by publication in child in need of care (CINC) case after showing of due diligence that parent is located in certain area and publication is in that locality.

SB 118 allows judge in CINC case to read reports for evaluation of child’s needs, including those prepared by court appointed special advocate (CASA), but cannot base decision on them unless they are admitted into evidence.

**Consumer Protection**

HB 2268 requires certification of pest inspectors for property involved in real estate transaction.

HB 2451 reinstates immunity from Consumer Protection Act of health care providers where alleged injury is due to negligence (original bill, SB 55, vetoed), effective on publication in the Kansas Register (5/24).

**Construction**

SB 333 enacts the Kansas Fairness in Public Construction Act, which parallels the Private Construction Act passed in 2005. Requires payments according to terms of contract and makes waivers of right to litigation, right to file against a bond, and right of subrogation void.

**Corporations**

SB 162 amends K.S.A. 17-6518 by eliminating return receipt requirement of mailing waiver of notice of meetings.

SB 183 adopts Uniform Commercial Code (UCC) Article 1, general definitions, and clarifies that Article 1 rules only apply to transactions within the scope of other UCC articles; the application of other laws more specific than UCC is preemptive. Also defines “good faith” and “course of performance,” and repeals K.S.A. 84-1-206, statute of frauds limit for personal property. Effective 7/1/2008.

SB 259 establishes uniform standards for business entities registering with secretary of state.


**Courts**

House Substitute for SB 31 allows municipal court to contract for collection of debts owed to court and restitution, and allows concurrent jurisdiction of certain crimes, including DUI and worthless checks, that would be a felony if charged in district court.

HB 2360 allows additional docket fee in Johnson and Sedgwick counties for benefit of law library, not to exceed $4.

**Criminal**

SB 14 allows for grants to counties to defray costs of correction advisory board, increases good time credits for level 3 and 4 drug crimes, and level 7 through 10 nondrug crimes from 15 to 20 percent. Establishes Kansas Criminal Code Recodification Commission, made up of 16 members, to review ALI Model Penal Code and other states’ statutes to compare severity level of Kansas sentences, resolve conflicts in criminal statutes, with final report due Jan. 11, 2009, effective on publication in the Kansas Register (5/14).

House Substitute for SB 35 expands speeding violations that will not be reported or will not be moving violations; prohibits motorized bike license for DUI conviction, suspends driver’s license for one year for second and subsequent 0.08 blood alcohol content (BAC), or for first offense with BAC of 0.15, and first offense of persons under 21 with a BAC of 0.08; and follows Code of Civil Procedure method of computing time in which to request administrative hearing on breath alcohol test.

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Golf

First Place: $100/$400 Total
Cal McMillan, Wichita; Jack Focht, Wichita; Eric Parkhurst, Wichita; and John Woolf, Wichita

Second Place: $85/$340 Total
John Sherwood, Wichita; Greg Drumright, Wichita; Brian Burris, Colwich; and Roger McClellan, Wichita

Closest to the Pin:
Hole #3  Bruce Brumley ..................................... Topeka
Hole #6  Jeffrey Lowe ........................................... Wichita
Hole #10  Jeff DeGraffenreid ..................................... Wichita
Hole #17  Art Chalmers ........................................... Wichita

Longest Drive:
Hole #2  Paul Davis ............................................. Lawrence

Straightest Drive:
Hole #11  Bruce Kent ............................................. Manhattan

Longest Putt:
Hole #8  Dick Ewy .............................................. Wichita
Hole #18  Tom Wright ........................................... Topeka

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2007 Legislative Wrap Up
(continued from Page 27)

**SB 52** codifies rights of mentally ill, with exception of sexually violent predators, creates fund to reimburse counties for expenses in civil determination of sexual violent predators, and allows for release of predator who has suffered debilitating illness.

**SB 75** allows chief judge to negotiate with contract indigent attorneys for less than statutory $80/hour.

**SB 103** requires taking of palm prints, in addition to fingerprints upon taking person into custody, with exception of class C misdemeanors. Allows expungement of DNA samples upon acquittal or upon determination of no probable cause. Also abolishes the court bond program in effect in Shawnee, Johnson, and a few other counties; imposes a uniform cash bond system; and prohibits an administrative fee to courts.

**SB 166** increases penalties for various crimes, including hosting minors consuming alcohol, presumptive prison for new crimes committed in juvenile correctional facility, and expands list of sex offenses with hard 40 sentence for second conviction, effective on publication in the Kansas Register (5/24).

**SB 204** expands list of offenses requiring registration as sex offender, requires offenders to provide updates of information to sheriff three times a year, and establishes jurisdiction for prosecuting failure to register in county of offender's residence or where required to register.

**SB 244** establishes rights of privacy for grieving families by prohibiting demonstrations within 150 yards of location where funeral is held one hour prior and two hours subsequent to services and establishes defamation lawsuit on behalf of the decedent’s estate.

**SB 324** adds volunteers at Department of Corrections facilities to those covered by crime of unlawful sexual relations and amends crime of mistreatment of dependent adults to include taking unfair advantage of dependent adult’s financial resources more than $100,000 as level 6 person felony, level 7 if below.

**SB 2035** creates new misdemeanor crimes for unlawful selling or purchasing scrap metal.

**HB 2062** adds “Alexa’s Law” by including unborn child in crimes against persons, in addition to the mother; expands explosive materials in unlawful explosive crime; attempts to clarify self-defense laws by allowing a prosecutor to file charges on showing of probable cause; and expands pharmacist’s duties to control precursor drugs, effective on publication in the Kansas Register (5/17).

**HB 2074** reverses Judicial Council’s Juvenile Offender Code revision of 2006 by requiring fingerprinting of juveniles prior to adjudication, and allowing photographing, effective on publication in the Kansas Register (3/19).

**SB 2100** amends employment security law by adjusting employer contribution rates, unless security trust fund balance falls below a certain amount, then adjustments are eliminated. Also exempts from week waiting period for those unemployed due to employer terminating operations, filing bankruptcy, or initiating a work force reduction.

**SB 235** clarifies that owner operators of motor vehicles leased to motor carriers are not employees, unless lease specifies otherwise.

**ENVIRONMENT**

**HB 2168** creates a public trust for relocation assistance to families displaced by loss of public services due to location near Superfund sites, and allows buyouts within Superfund sites.

**HB 2303** creates an interagency working group to support Department of Homeland Security compliance with environmental assessment for sites within Kansas, effective on publication in the Kansas Register (2/22).

**HB 2419** authorizes Kansas Corporation Commission to adopt rules for safe injection of underground storage of carbon dioxide.

**HB 2526** requires Kansas Department of Health and Environment to establish mercury monitoring network.

**FAMILY**

**SB 18** enacts the Uniform Child Abduction Prevention Act, which gives courts guidance in determining risk of parental abduction, and grants authority to issue abduction prevention order, including travel restrictions and custody/visitation restrictions.

**SB 88** allows change of name at the time of marriage, and restoration of former name at any time after divorce decree is final.

**HB 2393** implements Supreme Court guidelines into statute; clarifies that attorney providing services on behalf of Social and Rehabilitation Services (SRS) has SRS for a client; and exempts child support payments from dormancy, but does not change time limit on real estate liens.

**GOVERNMENT**

**HB 2058** limits annexation authority of local governments.

**HB 2528** further pre-empts local government regulation of concealed weapons, effective on publication in the Kansas Register (5/3).

**HEALTH**

**HB 2010** is an extensive revision of the Uniform Anatomical Gift Act, giving donor’s intent greater authority, imposing additional duties on hospitals and coroners, and creating a new crime of selling body parts.
Probate

HB 2363 enhances Medicaid recovery efforts by requiring notice in probate proceeding to all states that gave medical assistance to decedent or spouse, and requires statement in final settlement that no such assistance received or that states had been notified.

SB 58 allows trustee to convey trust property in the trustee's name. Effective 7/1/07

SB 76 allows transfer of property of any nature if less than $20,000 in small estates.

Taxation

Senate Substitute for HB 2031 expands earned income tax credit, subtracts Social Security benefits from federal adjusted gross income (AGI) in determining Kansas AGI, and exempts certain publicly traded partnerships from withholding requirements.

Senate Substitute for HB 2171 makes changes in sales tax refund procedures, modifies statutes to comply with multi-state Streamlined Sales and Use Tax Agreement, and creates several new exemptions involving nonprofit entities.

Senate Substitute for HB 2264 phases out corporate franchise tax over a five-year period.

Traffic

SB 8 makes multiple and assorted changes to traffic laws, including doubling fines in school zones, repealing prohibition of televisions in vehicles within driver's vision, and tightening seat belt requirements, especially for those under 18.
I. Introduction

Federal preemption is rooted in the Supremacy Clause of the U.S. Constitution: “This Constitution, and the Laws of the United States, which shall be made in Pursuance thereof ... shall be the supreme Law of the Land.” The U.S. Supreme Court has held that “state law is pre-empted to the extent that it actually conflicts with federal law.” Accordingly, a defendant in a products liability case has a sure defense to liability if a federal law preempts a conflicting state law. Preemption can apply to state statutes, regulations, or common law damages actions. The federal preemption defense has become particularly important in products liability litigation. To date, the defense has been most successful in cases involving chemicals, health care products, consumer goods, and vehicles, but it continues to be asserted in a growing number of cases involving a wide range of products. As one commentator notes, “the defense of federal preemption in recent years has grown from little more than a blip on the radar screen to one of the most powerful defenses in all of products liability law.” The power of this defense in Kansas was illustrated in Jenkins v. Amchem Products, where the Kansas Supreme Court held that federal law preempted a plaintiff’s failure to warn claims against the maker of the popular herbicide 2,4-D.

FOOTNOTES
1. U.S. Const. art. IV, § 2.
3. Free v. Bland, 369 U.S. 663, 666 (1962) (“[A]ny state law, however clearly within a state’s acknowledged power, which interferes with or is contrary to federal law, must yield.”).
4. See Cipollone v. Liggett Group Inc., 505 U.S. 504, 525-31 (holding that federal law can also preempt various common law causes of action, including products liability claims).
8. See, e.g., Geier v. Am. Honda Motor Co., 529 U.S. 861 (2000) (finding that Department of Transportation standards impliedly preempted a claim for failure to include an airbag as part of an automobile design).
This article discusses the doctrine of federal preemption generally and the history of its application in products liability lawsuits involving various types of products. It also discusses the interplay between federal preemption and administrative regulations under the important U.S. Supreme Court case *Chevron USA v. Natural Resources Defense Council Inc.* It concludes by reviewing the limited relevant precedent developed in *Jenkins* and other Kansas cases and highlights some federal statutes and regulations that could be relevant to Kansas practitioners.

II. The Theory of Federal Preemption

There are two types of federal preemption: (1) express preemption and (2) implied preemption.12 Express preemption arises when a federal statute or regulation actually contains preemptive language.13 Implied preemption arises in the form of field preemption or conflict preemption.14 Field preemption occurs when “federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the states to supplement it.”15 Conflict preemption occurs when “compliance with both federal and state regulations is a physical impossibility” or “where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”16

Federal preemption is an affirmative defense, so the defendant bears the burden of demonstrating the preemptive effect of federal law.17 In reality, this burden is substantial, because it requires the defendant to demonstrate that Congress intended a particular statute or regulation to have preemptive effect.18 Consequently, whether the defense asserted is express or implied preemption, the defendant must often utilize the canons of statutory construction to convince the court of the preemptive effect of federal law.19 Given the technical complexity and length of many federal statutes and regulations, it requires a sound grasp of technical subject matter to articulate the preemption argument and a good deal of research to support that argument with convincing authority.

Until 2000, it was clear that defendants had to overcome a heightened “presumption against preemption” in addition to meeting their substantive burden to show congressional intent.20 This presumption rested upon the notion that “the historic police powers of the state were not to be superseded ... [absent] the clear and manifest purpose of Congress.”21 Justice John Paul Stevens characterized the presumption as a “limiting principle” that prevented federal courts from applying preemption too aggressively.22 When coupled with the general reluctance of state courts to deny plaintiffs a remedy, this presumption against preemption was a difficult hurdle to overcome, especially for defendants in state courts. As discussed later in this article, recent Supreme Court decisions have, at the least, weakened the presumption against preemption, if not eliminated it altogether.

A. Express preemption

A federal statute or regulation may expressly preempt certain state law claims by its very language. Similarly, such a statute can preserve state law claims by expressly forbidding preemption. Accordingly, two types of clauses are relevant in express preemption cases: (1) preemption clauses and (2) savings clauses.23 An example of a preemption clause can be found in the Cigarette Labeling and Advertising Act of 1969, which states that “[n]o requirement or prohibition based on smoking and health shall be imposed under state law with respect to the advertising or promotion of any cigarettes, the packages of which are labeled in conformity with this chapter.”24 In *Cipollone v. Liggett Group Inc.*, the U.S. Supreme Court held that this preemption clause precluded a plaintiff’s inadequate warning claim because such a claim constituted a “requirement” that was expressly preempted by the statute.25

In contrast, an example of a “savings clause” can be found in the National Traffic and Motor Vehicle Safety Act of 1966, which states that “[c]ompliance with any [f]ederal motor vehicle safety standard issued under this subchapter does not exempt any person from any liability under common law.”26 While that savings clause has since been repealed, the Supreme Court held that it removed tort actions from the scope of the statute’s express preemption clause.27

The most difficult express preemption cases are those involving statutes that contain both a preemption and a savings clause. For example, the National Traffic and Motor Vehicle Safety Act of 1966 also contains an express preemption clause prohibiting states from enacting “any safety standard ... which is not identical to the Federal standard.”28 In *Geier v. American Honda Motor Co.*,29 the Court concluded that whatever the scope of the express preemption clause, the act’s savings clause permitted state common law damages actions that imposed a higher standard than federal law.30 Even if, however, a court can resolve conflicting express preemption and

13. Id.
14. Id.
15. Id. (internal quotations omitted).
16. Id. (internal quotations and citations omitted).
19. See *Owen*, supra note 9, at 897 (“Put otherwise, statutory construction is the cornerstone of preemption analysis.”).
23. Id. at 898.
27. See *Geier*, 529 U.S. at 868 (suggesting that without a savings clause, the express preemption clause might foreclose both statutory and common law causes of action).
30. Id. at 868.
savings clauses, it must address implied preemption as a separate and independent analysis because a particular federal statute can still give rise to implied preemption even though the challenged state cause of action is beyond the reach of the federal statute’s express preemption clause.31

B. Implied federal preemption

Implied preemption analysis necessarily presumes the absence of any relevant express preemption. As noted previously, implied preemption can occur as either field or conflict preemption. Field preemption occurs either when there is an extremely pervasive federal regulatory scheme or where the subject matter of some field invokes a dominant federal interest such that preclusion is presumed.32 The Occupational Safety and Health Act33 is a well-known federal law that defendants frequently argue is so pervasive that it forms the basis of federal preemption in products liability cases.34 By example, dominant federal interest preemption has been asserted (so far unsuccessfully) by vaccine manufacturers as a defense to defective design claims.35 In one case, the manufacturer of a pertussis vaccine unsuccessfully argued that a federally sponsored program of inoculation triggered dominant federal interest preemption.36

Similarly, implied conflict preemption takes two forms. The first is where a defendant finds it impossible to comply with both federal and state law. For example, in R.F. and R.F. v. Abbott Laboratories,37 the New Jersey Supreme Court held a plaintiff’s failure-to-warn claim was preempted by Food and Drug Administration (FDA) guidelines. In that case, the plaintiff alleged that the maker of an HIV test should have warned that borderline testing results were inherently uncertain and dangerous.38 Because the FDA essentially dictated the warnings the maker was allowed to offer, and severely restricted its ability to offer additional warnings, the court found an implied conflict.39 Likewise, conflict preemption can occur when compliance with state law constrains an obstacle to some federal objective. At least one court has used this type of preemption to preclude a claim that cigarettes are unreasonably dangerous per se because such a ruling would obstruct Congress’ decision not to foreclose the sale of tobacco products.40

C. The presumption against preemption (or lack thereof)

Until recently, the Supreme Court espoused a presumption against preemption that rested on the notion that “the Constitution constrains the federal government, the powers of which are limited and specifically enumerated.”41 The Supreme Court discussed this presumption in the first two products liability preemption cases it addressed, Medtronic Inc. v. Lohr 42 and Cipollone.43 In Cipollone, the Supreme Court held that state failure-to-warn claims against cigarette makers were expressly preempted by the Cigarette Labeling and Advertising Act of 1969; implicitly determining that the preemptive language in the statute was sufficient to overcome the presumption against preemption.44 In Medtronic, the Court rejected a defendant’s argument that FDA regulations preempted design and manufacture claims against a pacemaker manufacturer.45 If anything, the conflicting determinations on preemption in Cipollone and Medtronic demonstrate that the presumption against preemption evidenced a general skepticism of the Court to preemption arguments but that it was not a practical bar to preemption.

In more recent cases, however, the Court appears to have dropped the presumption against preemption altogether, at least with respect to cases involving a clear federal interest. In Geier, the majority never referred to the presumption against preemption,46 an omission observed by Justice Stevens in a dissent joined by three other members of the Court.47 Geier involved a defective
D. The heightened power of preemption under Chevron

Coupled with the Supreme Court’s apparent abandonment of the presumption against preemption, Chevron USA Inc. v. Natural Resources Defense Council Inc.54 may make preemption a particularly potent defense in cases involving regulations promulgated by federal agencies. In Chevron, the Supreme Court held that where a federal statute is ambiguous, courts must defer to any permissible interpretation of that statute by a federal agency vested with administrative authority over the program.55 This holding is profoundly important in products liability litigation where federal agencies like the FDA, DOT, and the Occupational Safety and Health Administration (OSHA) administer comprehensive federal regulatory statutes that arguably preempt state products liability claims. In other words, if a defendant alleges that a federal statute preempts a state claim, and the statute is ambiguous, any permissible agency determination is binding on the courts because interpretive agency regulations can form the basis for preemption.56 Because Chevron's definition of “permissible” is extremely deferential,57 the case vests agencies with tremendous power. In addition, an agency's interpretation of its own regulations is afforded deference under basic principles of administrative law.58 Accordingly, agency rules can form the basis for preemption either by interpreting a federal statute as preemptive or by expressly preempting state law.

Chevron deference already impacted the outcome in one Supreme Court case, Medtronic Inc. v. Lohr.59 In that case, the Court arguably gave deference to an FDA regulation that interpreted the Medical Device Amendments of 1976 (MDA).60 The defendant argued that the act preempted negligence and strict liability claims against a pacemaker manufacturer.61 The FDA promulgated a regulation stating that the act “does not preempt state or local requirements that are equal to, or substantially identical to requirements imposed by or under the act.”62 Five members of the Court argued that deference to the FDA's interpretation63 was proper, but their point was dicta because all agreed that the act did not preempt claims, even absent the FDA's interpretation.64

(continued on next page)

48. Id. at 861-62.
49. Id. at 874-87.
51. Id. at 347.
52. See, e.g., Mary J. Davis, Unmasking the Presumption in Favor of Preemption, 53 S.C.L. Rev. 967 (2002); Calvin Massey, “Joltin’ Joe has Left and Gone Away”: The Vanishing Presumption Against Preemption, 66 Ala. L. Rev. 759 (2003); Rackers-Jordan, supra, note 46.
53. See Owen, supra, note 9 (“However, if Congress has authority under the Commerce Clause to enact particular legislation regulating health and safety, then the Supremacy Clause might seem to certify, automatically, the legitimacy of this federal incursion into a domain normally controlled by the states.”).
55. Id. at 843.
56. See Fidelity Fed. Sav. & Loan As’n v. Caetza, 458 U.S. 141, 153 (1982) (“Federal regulations have no less pre-emptive effect than federal statutes.”).
57. See id. n.11 (“The court need not conclude that the agency construction was the only one it permissibly could have adopted to uphold the construction, or even the reading the court would have reached if the question initially had arisen in a judicial proceeding.”).
58. See Gonzales v. Oregon, 126 S. Ct. 904, 914 (2006) (“An administrative rule may receive substantial deference if it interprets the issuing agency’s own ambiguous regulation.”).
61. Medtronic, 518 U.S. at 470.
62. Id. at 496 (citing 21 C.F.R. § 808.1(d)(2)(1995)).
63. See id. (“The ambiguity in the statute and the congressional grant of authority to the agency ... provide a sound basis for giving substantial weight to the agency’s view of the statute.”) (internal citation and quotations omitted).
Some commentators believe *Chevron* deference is improper in preemption cases and that the Supreme Court should rule as such. Nevertheless, the Second Circuit recently applied *Chevron* deference in a preemption case, using it to overcome the presumption against preemption, which it determined still existed in cases lacking a dominant federal interest. And, the majority opinion in the recent U.S. Supreme Court case *Waters v. Wachovia Bank N.A.* purported to sidestep the *Chevron* issue, prompting a strong dissent by Justice Stevens. Thus, until the Supreme Court rules definitely on the issue, defendants will continue to argue, some successfully, that *Chevron* deference applies to preemption cases.

### III. Federal Preemption and the Kansas Supreme Court in *Jenkins v. AmChem Products Inc.*

The Kansas Supreme Court addressed the issue of federal preemption in *Jenkins*. In this case, the plaintiff sued AmChem, a manufacturer of the herbicide 2,4-D, alleging that the chemical was defective and unreasonably dangerous, AmChem had failed to test its product for dangerous impurities, and AmChem included insufficient product warnings. The defendant countered that the Federal Insecticide, Fungicide & Rodenticide Act (FIFRA) preempted the plaintiff’s claims. The Kansas Supreme Court cited the U.S. Supreme Court’s preemption discussion in *Cipollone*. The court assumed the presumption against preemption applied, probably because *Jenkins* was decided before *Geier* and *Buckman*, the U.S. Supreme Court cases that appeared to eliminate the presumption in certain cases. *Jenkins* then reviewed the intent and purposes of FIFRA — namely to “regulate the use of pesticides” and “extend [f]ederal pesticide regulation to actions entirely within a single state.” Pursuant to this purpose, the court noted that the Environmental Protection Agency (EPA) had “promulgated comprehensive labeling requirements governing the scope, content, wording and format of herbicide labeling.” Next, the court took note of FIFRA’s express preemption clause: “[States] shall not impose or continue in ef-

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68. See id. at 1572 n.13 (“Because we hold the [the statute] itself — independent of [the agency] regulation — preempts the application of the pertinent Michigan laws ... we need not consider ... the dangers of vesting preemptive authority in administrative agencies.”).
69. Id. at 1585 (Stevens, J., dissenting) (“Whatever the Court says, this is a case about an administrative agency’s power to preempt state laws.”).
71. Id. 256 Kan. at 605, 886 P.2d at 872.
74. See id. 256 Kan. at 608, 886 P.2d at 874 (noting that the presumption against preemption can be overcome by a showing of congressional intent).
75. Id.
76. Id.

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**LEGAL ARTICLE: FEDERAL PREEMPTION**

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fect any requirements for labeling or packaging in addition to or different from those required under this subchapter."  

Reviewing the legislative history of FIFRA, the court found evidence that Congress intended to preempt state common law tort claims. While the plaintiff tried to offer legislative history generated subsequent to the enactment of FIFRA, the court rejected the history, stating "[t]he plain language of [FIFRA] and its legislative history show a preemptive intent, and subsequent legislative history cannot negate that intent." The court determined that the plaintiff’s negligence and strict liability for failure to warn claims were preempted. It concluded that strict liability claims for manufacturing or design defects would not be preempted by FIFRA. Finally, the court rejected the plaintiff’s argument that it was unconstitutional to deny him any common law remedy whatsoever. Jenkins demonstrates that the Kansas Supreme Court follows a mainstream approach to preemption that, if anything, tends to favor the defense rather than oppose it. One could expect, given the weakening of the presumption against preemption, that the Kansas Supreme Court will look favorably on meritorious preemption arguments in the future.

Jenkins offers some insights about the state of the preemption defense in Kansas. First, the Kansas Supreme Court relied chiefly on FIFRA’s express preemption clause and legislative history, the two most important factors that other courts consider in preemption cases. Second, the court found preemption, even assuming the presumption against it. And, third, the court flatly rejected a plaintiff’s argument that it was unconstitutional to deny him any common law remedy whatever. Jenkins demonstrates that the Kansas Supreme Court follows a mainstream approach to preemption that, if anything, tends to favor the defense rather than oppose it. One could expect, given the weakening of the presumption against preemption, that the Kansas Supreme Court will look favorably on meritorious preemption arguments in the future.

While Jenkins is the only Kansas Supreme Court decision addressing preemption in a products liability suit, the Kansas Court of Appeals recently addressed the preemptive effect of the MDA, the very statute considered by the U.S. Supreme Court in Medtronic. In Troutman v. Curtis, the court of appeals held that the MDA preempted a plaintiff’s negligent design, manufacture, and labeling claims against the maker of a device used in heart catheterizations. Jenkins reviewed Jenkins as the only Kansas preemption, products liability case, noting “the Kansas Supreme Court followed the majority view that a common law tort claim can impose a requirement different from applicable federal regulations.” The court went on to apply the U.S. Supreme Court’s

77. Id. (citing 7 U.S.C. §136v (1988)).
78. Id. 256 Kan. at 609-10, 886 P.2d at 877.
79. Id.
80. Id. 256 Kan. at 617, 886 P.2d at 880.
81. Id.
test for MDA preemption from Medtronic, finding that a specific FDA regulation had preempted the plaintiff's claims.86 It noted, however, that the MDA would not preempt common law cases based on a defendant's failure to comply with the federal standard itself.87

Troutman is most interesting because the court assumed the presumption against preemption still exists. It did not even address Geier and Buckman, which suggest the presumption has been eliminated or weakened. Nor did it discuss the debate among academics and some courts as to the effect of Geier and Buckman. Accordingly, until the court rules otherwise, or until more definite federal precedent is handed down, Troutman should keep the presumption against preemption alive in Kansas. Second, Troutman illustrates the key point that most federal statutes do not preempt state common law claims per se, but only state common law claims that impose a different standard than federal law. Accordingly, even if a federal statute contains an express preemption clause, it likely permits state common law suits based on the defendant's deviation from the federal standard.

IV. Important Preemption Areas for Kansas Practitioners

While the preemption defense can conceivably arise in a case involving any product regulated by federal law, we have selected some topic areas that are of particular importance to Kansas practitioners.

A. Meats and poultry

Kansans is the third-largest beef producing state in the nation.88 Accordingly, several large meatpacking plants are located throughout the state, particularly in the southwest. The Federal Meat Inspection Act (FMIA)89 “assure[s] that meat distributed to consumers is wholesome, not adulterated, and properly marked, labeled, and packaged.”90 On the basis of an express preemption provision contained within the act, courts have prevented states from enacting additional or different requirements on meat producers than those imposed by the act and Department of Agriculture regulations.91

In one case, a defendant successfully argued that FMIA preempted a plaintiff's claims for breach of implied warranty and negligence against a meat producer whose product was contaminated with E. coli.92 The court found that a plaintiff's tort claims constituted conflicting state requirements because the Department of Agriculture had specifically chosen not to order the inspection of meat for E. coli.93 Defendants have also relied upon the Poultry Products Inspection Act,94 which has been held to preempt claims for inadequate labeling and packaging of poultry products.95 These two statutes illustrate that heavy federal regulation in the field of meat production presents the opportunity for a host of preemption arguments.

B. General aviation aircraft

Aviation production constitutes a sizable portion of the Kansas economy. As a result, Kansas practitioners may be called upon to prosecute or defend products claims against one of the state's several aircraft manufacturers. Preemption is frequently asserted in air crash litigation.96 The Federal Aviation Act (FAA),97 which regulates aviation safety, has been asserted in numerous cases as the basis for a preemption defense. The Tenth Circuit, however, rejected this argument in Cleveland v. Piper Aircraft Corp.,98 where it held that the act's savings clause foreclosed the possibility of implied field preemption of state common law claims.99 The Tenth Circuit's position is the majority view.100 A minority of other circuits disagree and hold that the FAA fully preempts the entire field of aviation regulation.101 Consequently, these circuits hold that state common law claims are preempted, regardless of whether they conflict with any regulation promulgated by the FAA.102 While district courts in the Tenth Circuit have held that the FAA does not give rise to implied conflict or frustration of purpose preemption,103 the Tenth Circuit has not yet ruled on the issue.

C. Animal vaccines

Defective animal vaccines can cause livestock operations significant loss. In Symens v. SmithKline Beecham Corp.,104 a cattle feedlot operator alleged that his cattle contracted “debilitating and mortal infections” from tainted vaccines.105 The defendant asserted federal preemption of the various state products liability claims based on the Virus-Serum-Toxin Act (VSTA).106 The VSTA authorized the Department of Agriculture to “license and regulate the preparation and sale of viruses, serums, toxins, and analogous products, for use in the treatment of domestic animals.”107 The court held that while the VSTA was silent on the matter of preemption, regulations issued

86. Id. 36 Kan. App. 2d at 650-51, 143 P.3d at 86.
87. Id.
92. Boulahanis, 583 N.W.2d at 512.
93. Id.
98. 985 F.2d 1438 (10th Cir. 1993).
99. Id. at 1442.
100. See, e.g., Gee v. Southwest Airlines, 100 F.3d 1400, 1409 (9th Cir. 1997) (O'Scannlain, J. concurring); Hodge v. Delta Airlines Inc., 44 F.3d 334, 338 (5th Cir. 1995); Public Health Trust v. Lake Aircraft Inc., 992 F.2d 291, 295 (11th Cir. 1993).
102. See Abdullah, 181 F.3d at 371 (“[W]e find that any state or territorial standards of care relating to aviation safety are federally preempted.”).
105. 468 F.2d 76, 85 (6th Cir. 1972).
106. Boulahanis, 583 N.W.2d at 512.
107. Id. at 1442.
108. Id.
109. Id. at 1442.
110. Id.
112. 992 F.2d 291, 295 (11th Cir. 1993).
113. 181 F.3d 363, 375 (3d Cir. 1999).
114. 504 F.2d 400, 404 (7th Cir. 1974).
115. 181 F.3d 371 (“[W]e find that any state or territorial standards of care relating to aviation safety are federally preempted.”).
118. 100 F.3d 1438 (10th Cir. 1993).
119. Id. at 1442.
by the Department of Agriculture, pursuant to the VSTA, had a clear preemptive effect. The court held that “States are not free to impose requirements which are different from, or in addition to, those imposed by USDA regarding safety, efficacy, potency, and purity of product.” The court held, however, that state common law claims based on violations of the federal standards were not preempted.

One federal case from the district of Kansas has also found the VSTA to have preemptive effect. The court found that the act preempted a rancher’s claims for breach of implied warranty, false advertising, fraud, negligence, and failure to warn. Citing Chevron, the court gave deference to the agency’s determination that state claims were preempted because that determination was not “arbitrary, capricious, or manifestly contrary to the statute.” To date, no decisions from the state of Kansas or the Tenth Circuit address the preemptive effect of the VSTA.

D. Vehicle safety standards

In Geier, the U.S. Supreme Court considered the preemptive effect of a Federal Motor Vehicle Safety Standard promulgated by the DOT pursuant to the National Traffic and Motor Vehicle Safety Act. The Court concluded that while the act did not expressly preempt conflicting state common law requirements, a plaintiff’s claims impliedly conflicted with the federal standard. Prior to Geier, courts found that federal safety standards did not preempt common law suits relating to defects in gas tanks, brakes, and illumination. Since Geier, most courts still hold that vehicle safety standards do not preempt relevant state common law claims. However, a few have found some common law claims preempted by federal vehicle safety standards. In light of Geier, defendants will surely assert the preemptive effect of the DOT’s new proposed roof crush resistance standards if and when they are adopted.

The notice of proposed rulemaking for the new standards states that “if the proposal were adopted as a final rule, it would preempt all conflicting state common law requirements, including rules of tort law.” One court determined that the roof crush standards in effect in 1974 did not preempt any state claims for strict liability. Given the apparent express preemption language of the proposed standard, however, defendants may well succeed with a preemption defense in future roof crush cases.

V. Conclusion

While the doctrine of federal preemption is complicated and multifaceted, it has become one of the most potent defenses to products liability suits. Practitioners should familiarize themselves with the basic principles of federal preemption and review federal statutes and regulations for preemptive language relating to the products at issue in their particular case. Given the success of the preemption defense in our state, Kansas practitioners should take particular note of the defense and the preemptive language in federal statutes and regulations governing meats, aviation, livestock, and vehicles. However, this article serves only as a starting point. Because of the tremendous scope of federal law and the ever growing number of products subject to litigation, the diligent practitioner will consider the preemption defense in any products liability case.

About the Authors

Stephen J. Torline is a partner with the law firm of Blackwell Sanders Peper Martin LLP. He is a member of the firm’s litigation department and practices out of the Kansas City, Mo. office. In 1997, he graduated magna cum laude from the Washburn University School of Law, where he was an editor for the Washburn Law Journal.

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** Managing Partner, Kansas City
Attorney Discipline

IN RE RICHARD COMFORT
ORIGINAL PROCEEDING IN DISCIPLINE
PUBLISHED CENSURE
NO. 97,287 – JUNE 8, 2007

FACTS: Respondent, a private practitioner in Concordia, was retained by a corporation to resist furnishing documents requested by an attorney pursuant to the Kansas Open Meetings Act from both the city and the corporation. The attorney filing the requests was a partner in the same firm as a member of the corporation’s board of directors who also served as its legal counsel.

Respondent wrote an excessively harsh letter demanding that the records requests be withdrawn and then took it upon himself to provide copies of the letter to at least eight city officials. He eventually reported the other attorney to the Disciplinary Administrator’s Office after that attorney reported the respondent.

A panel found clear and convincing evidence of violations of KRPCs 4.4 (respect for rights of third parties) and 8.4(d) (misconduct prejudicial to the administration of justice). Respondent filed exceptions to the final hearing report, claiming his motives and objectives in sending the letter were legitimate and that the rules were unconstitutionally written and/or applied.

HELD: The Court adopted the findings of fact and conclusions of rules violations and agreed that published censure was the appropriate sanction.

IN RE JAMES LEE DANIELS
ORIGINAL PROCEEDING IN DISCIPLINE
ONE-YEAR DEFINITE SUSPENSION
NO. 98,057 – JUNE 8, 2007

FACTS: Respondent, a private practitioner from Hutchinson, Mo., was admitted in Kansas in 1993 and also practices in Missouri. He was retained to make a claim against the city of Topeka after a 16-year-old girl was struck and killed in a crosswalk by an off-duty Topeka Police Department officer. Her family had already settled with the driver’s insurance carrier, but their attorney declined to pursue a claim against the city.

Respondent was retained 19 months after the accident and failed to file any demand against the city and failed to file a lawsuit in federal court until 39 months after the accident. He did not file a responsive brief to the city’s motion to dismiss, and the case was dismissed with prejudice. Respondent subsequently lied to his client regarding the status of the claim and avoided contact with her.

When she filed a disciplinary complaint, he failed to respond to the Disciplinary Administrator’s Office and to the assigned investigator. At the hearing on the formal complaint, the panel found that he refused to acknowledge the fact that he missed the statute of limitations on the case and further found his testimony to be evasive and unbelievable. The panel unanimously found violations of KRPCs 1.1 (competence), 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), 1.16 (terminating representation), 3.2 (expediting litigation), 7.1 (communications concerning a lawyer’s services), and 8.4(c) (misconduct involving dishonesty, fraud, deceit, or misrepresentation) and Supreme Court Rules 207(b) (duty to provide information) and 211(b) (formal hearings) and recommended suspension of one year from the practice of law.

HELD: As respondent filed no exceptions to the final hearing report, the Court adopted the uncontested findings of fact and conclusions of rules violations. A majority of the Court agreed with the recommended sanction, while a minority would impose a more severe discipline.

IN RE JAMES B. PATTISON
ORIGINAL PROCEEDING IN DISCIPLINE
INDEFINITE SUSPENSION
NO. 98,102 – JUNE 8, 2007

FACTS: Respondent, a private practitioner from Hutchinson, was retained by a felony drug defendant and a collection defendant. Both paid him in advance for attorney’s fees and expenses, but he did not complete the representations. He was replaced as defense counsel in the drug case and failed to appear at the hearing on the collection matter.

After receiving a formal complaint alleging violations of KRPCs 1.3 (diligence), 1.4 (communication), 1.15 (safekeeping property), and 8.4 (misconduct), respondent filed an answer admitting the violations. At the disciplinary hearing, respondent appeared and admitted the factual allegations and rules violations.

The hearing panel recommended indefinite suspension but applied retroactively to the date of his one-year suspension and recommended restitution to the two clients as a precondition to reinstatement. Respondent advised the appellate clerk that he agreed with all aspects of the final hearing report.

HELD: The Court adopted the undisputed findings of fact and conclusions of rules violations and agreed that indefinite suspension was appropriate but declined to impose the suspension retroactively. The Court further ordered that respondent must prove payment of restitution before reinstatement will be considered.
Civil

BANKRUPTCY, HOMESEATD EXEMPTION, AND SELF-SETTLED LIVING REVOCABLE TRUST
REDMOND V. KESTER AND KESTER
ON CERTIFICATION OF QUESTION OF LAW FROM THE
U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT
NO. 97,627 – JUNE 8, 2007

CERTIFIED QUESTION: May a Chapter 7 bankruptcy debtor claim the homestead exemption allowed by K.S.A. 60-2301 for real property that was placed in a self-settled living revocable trust prior to the bankruptcy, where the settlor and the beneficiary, as well as the bankruptcy debtor, are the same person?

HELD: Court stated the homestead right has been zealously guarded and enforced by Kansas courts and that debtors may claim the homestead exemption based on any interest in real estate, whether legal or equitable, as long as the debtors have not abandoned their occupation of or intent to occupy the real estate. Court held that based on the conclusion that a beneficiary has an equitable interest in real estate owned by the trust and an equitable interest is sufficient to claim the homestead exemption as long as the claimant occupies the real estate, the answer to the certified question is yes.

STATUTES: K.S.A. 58a-402, -505, -1106, -1107 and K.S.A. 60-1101, -2301

CHILD IN NEED OF CARE AND HEARSAY EVIDENCE IN RE J.D.C.
SHAWNEE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 95,610 – JUNE 8, 2007

FACTS: Fourteen-year-old J.D.C. reported to her school counselor that her stepfather had been sexually assaulting her for a couple months. Because her stepfather lived in the home with J.D.C., she was placed into emergency custody the same day over her parents' objection and despite the stepfather's offer to leave the home. The state filed Child in Need of Care (CINC) proceedings. At trial, the mother testified that she did not believe the allegations of sexual abuse. The mother conceded that two of J.D.C.'s brothers had previously been adjudicated children in need of care because of physical abuse by the stepfather. The state did not call J.D.C. to testify and neither did the guardian ad litem or counsel for the mother. Throughout the case, the mother's counsel made repeated hearsay objections to J.D.C.'s allegations by various witnesses. The trial court found clear and convincing evidence that J.D.C. was a child in need of care. The Court of Appeals affirmed the district court by finding that the admission of the testimony from the school counselor, the Social and Rehabilitation Services investigator, and the sheriff's detective was erroneous, but that is was harmless error based on the presumption of the two brothers CINC proceedings and the evidence presented.

ISSUES: (1) CINC and (2) hearsay evidence

HELD: Court held that the Confrontation Clause of the Sixth Amendment to the U.S. Constitution applies only in criminal proceedings and that any right that a civil litigant can claim to confrontation and cross-examination is grounded in the Due Process Clause. Court held that under the facts of this CINC case, the parent's due process rights were not violated by the admission of the subject child's hearsay statements pursuant to K.S.A. 60-460(a), despite the state's omission of the child's direct testimony from its case in chief. The parent waived any due process based right she may have had to confront the witness by refusing the district court's offer to put the child on the stand for cross-examination.

STATUTES: K.S.A. 60-401, -459(g), -460(a), (c), (dd) and K.S.A. 2006 Supp. 38-1502(a)(1), (2), (3), -2202[d], -2250

MECHANIC'S LIEN, PREJUDGMENT INTEREST, AND FAIR TRIAL
OWEN LUMBER CO. V. CHARTRAND
JOHNSON DISTRICT COURT – AFFIRMED AND REMANDED WITH DIRECTIONS
NO. 96,391 – MAY 4, 2007

FACTS: Design Build Group constructed a home for the Chartrands. Owen Lumber supplied some of the building materials. Design had problems paying subcontractors. Owen filed a mechanic's lien. Owen gave notice of the lien to Design Build as legal owner but did not give notice to the Chartrands. The district court granted summary judgment to the Chartrands finding Owen failed to give notice. The Court of Appeals reversed finding Owen gave notice to “any owner.” Before the Supreme Court could review the issue the Legislature amended the notice statutes to require notice to the holder of the equitable interest. The district court found the amendments applied retrospectively and because Owen failed to serve notice to the Chartrands, it was precluded from foreclosing its lien. The Supreme Court later reversed and remanded to the district court. The district court granted Owen a lien in the amount of $12,980.61.

ISSUES: (1) Mechanic's lien, (2) prejudgment interest, and (3) fair trial

HELD: Court found that although Owen served notice of the mechanic's lien on the Chartrands by first-class mail, Court held that the presumptive receipt of legal service does not apply in this case because the relevant statutes require service by restricted mail. However, Court found the savings statute applied and Court held the district court correctly applied the savings provisions because the Chartrands obtained actual receipt of the mechanic's lien statement and the statutory notice requirements were satisfied. Court held the district court properly determined the amount of the mechanic's lien. Court held the district court correctly determined that the claim became fixed and liquidated as of the date the Chartrands became owners of the property and the district court did not abuse its discretion in awarding prejudgment interest. Court rejected the Chartrand's argument that they were prejudiced by the fact that the same attorneys represented Owen Lumber and other defendants in the case. Court stated the Chartrands failed to prove the district court arbitrarily disregarded undisputed evidence or some extrinsic consideration such as bias, passion, or prejudice was present.

STATUTES: K.S.A. 16-201; K.S.A. 20-3018(c); and K.S.A. 60-103, -304, -1103(c), (d)

Criminal

STATE V. ADAMS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,857 – JUNE 8, 2007

FACTS: Adams convicted of felony murder. On appeal he claimed his nolo contendere plea was not knowing and voluntary because he did not understand the difference between premeditated first-degree murder and felony murder, and because he was “kept in the dark” as to evidence and option of trial. He also claimed an insufficient factual basis existed to accept his plea and claimed his plea was the product of ineffective assistance of counsel due to attorney-client conflict of interest.

ISSUES: (1) Withdrawal of plea, (2) sufficiency of evidence, and (3) attorney-client conflict of interest

HELD: Adams’ plea was free, knowing, and voluntary under facts of case. District judge properly exercised its discretion in denying motion to withdraw plea. District judge properly concluded a sufficient factual basis was presented to establish the underlying felony for felony murder.

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Under facts, which included Adams’ oral consent, attorney did not err in continuing to represent Adams. State v. Wallace, 258 Kan. 639 (1995), discussed and applied. Nothing in record indicates the attorney’s representation of the complaining witness adversely affected her actions with regard to Adams’ defense. Neither ineffective assistance of counsel, nor a conflict of interest, was demonstrated. A reminder that Kansas Rules of Professional Conduct (KRPC), effective July 1, 2007, requires attorneys to confirm in writing a client’s informed consent to waive a potential conflict of interest. The new “mantra” under KRPCs for waiver of a potential attorney-client conflict of interest thus becomes “Informed Consent, Confirmed in Writing.”

STATE V. CARTER
SALINE DISTRICT COURT – AFFIRMED
NO. 95,335 – JUNE 8, 2007

FACTS: Carter convicted of first-degree murder, aggravated assault, and criminal possession of a firearm. On appeal he claimed district court erred in: (1) denying a continuance for Carter to secure witness for theory of defense, (2) refusing to allow defense counsel to withdraw during trial, (3) failing to instruct jurors they should consider imperfect self-defense as they deliberated first-degree murder, (4) admitting a gruesome photograph, and (5) giving Allen-type instruction. Carter also claimed prosecutorial misconduct, and that cumulative error denied a fair trial.

ISSUES: (1) Right to complete defense, (2) withdrawal of defense counsel, (3) imperfect self-defense, (4) gruesome photograph, (5) Allen-type instruction, (6) prosecutorial misconduct, and (7) cumulative error

HELD: Factors to be weighed when continuance is requested during trial are stated and applied. Under facts, no abuse of discretion or constitutional violation in district court’s denial of continuance. District court judge adequately inquired into Carter’s midtrial dissatisfaction with defense counsel. No abuse of discretion in denying motion for withdrawal of counsel.

Imperfect self-defense relating to voluntary manslaughter is not appropriately considered simultaneously with premeditated first-degree murder. No clear error in the offense and deliberation instructions given at Carter’s trial.

Prosecutor’s isolated misstatement of the law during closing argument was harmless error under facts of case.

Although cause and means of death were not at issue, photograph was still relevant. It was not unduly repetitious or cumulative and not so extreme that it compelled conclusion that it was admitted solely to cause Carter undue prejudice.

Pattern instruction amended in 2005 to omit offending language in prior version. Trial courts are encouraged to discontinue using pre-2005 version. See Scott-Herring, decided this date. Use of prior version in this case was harmless error.

Single error of prosecutor’s misstatement of law cannot support reversal under cumulative error doctrine.

STATUTES: K.S.A. 2006 Supp. 22-3210(a)(4) and K.S.A. 19-702(a), -711, -715(a)-(c), 22-3210, -3210(d)

STATE V. CONWAY
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 93,627 – JUNE 8, 2007

FACTS: Conway convicted of first-degree felony murder based on criminal discharge of firearm and criminal discharge of a firearm at an occupied vehicle. On appeal he claimed: (1) prosecutorial misconduct during closing argument, (2) district court failed to provide limiting instruction concerning gang evidence, (3) jury instruction for criminal discharge of firearm, (4) multiplicity, and (5) cumulative error.

HELD: Record does not support claim that prosecutor misstated facts in closing argument. Prosecutor's statements were based on reasonable inferences regarding evidence presented at trial.

Merit to state’s argument that Conway is attempting to use jury instruction issue to circumvent failure to object at trial to the admission of evidence of gang membership. Under circumstances of case, evidence of gang affiliation indicating Conway as member of a gang was admissible to show motive for an otherwise inexplicable act. No error in trial court not providing limiting instruction sua sponte, and no real possibility the jury would have returned a different verdict had such an instruction been provided.

No error by trial court where instructions mirrored language in statute defining criminal discharge of a firearm at an occupied vehicle.

Felony murder and criminal discharge of a firearm are intended to be separate offenses for which there can be cumulative punishments. Double jeopardy does not attach to convictions under felony-murder statute, K.S.A. 21-3401(b), and felony criminal discharge of a firearm at an occupied vehicle, K.S.A. 2006 Supp. 21-4219(b), even if charges arise from the same conduct.

No merit to cumulative error claim.

STATUTES: K.S.A. 2006 Supp. 21-3414(3), -3436(a), -3436(a)(15), -3436(b), -4219(b) and K.S.A. 21-3401(b), 60-404, -455

STATE V. HERNANDEZ
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 94,295 – JUNE 8, 2007

FACTS: Tina Davidson’s body was found at her residence when police went to her home to investigate reports of an abandoned vehicle. The body, discovered in the kitchen, was severely slashed and mutilated. Police took DNA from a trail of blood drops. The murder remained unsolved for eight years. No match was found for the DNA until 2003. Hernandez was incarcerated on an unrelated charge, and when his DNA profile was entered into the system, a match came up with the DNA found in the trail of blood leaving Davidson's body. Hernandez denied being at Davidson's house. At trial, Hernandez testified on his own behalf and related that he gave Davidson a ride home and that a man at her house began to threaten both of them and that Hernandez left after the man cut Hernandez' hand. He claimed that he did not know Davidson had been murdered until two weeks later. Hernandez' wife testified as a witness for the state. The jury found Hernandez guilty of murder in the first degree. The trial court sentenced Hernandez to life imprisonment under the hard 40.

ISSUES: (1) Prosecutorial misconduct, (2) hearsay evidence, (3) photographic evidence, and (4) hard 40 sentence

HELD: Court found there was a clear implication in the prosecutor's comments during closing argument that were the defendant's testimony at trial true, he would have provided his exculpatory story after he was charged. Court held the prosecutor's comments constituted prosecutorial misconduct. However, the Court held the error was harmless based on the overwhelming evidence of Hernandez' guilt and there was little, if any, likelihood of having changed the result of the trial. Court held it was harmless err to admit the testimony of the defendant's mother. Court held the trial court did not abuse its discretion by admitting photos of Davidson's body and that each of the 26 photos illustrated some different element of the case or aspect of Davidson’s injuries. Court rejected Hernandez' argument concerning the constitutionality of the hard 40 sentencing
statutes, and that there was sufficient evidence to support the trial court's ruling that the murder was committed in "an especially heinous, atrocious, and cruel manner."

STATUTES: K.S.A. 2006 Supp. 21-4635, -4636 and K.S.A. 60-401(b), -407(f)

STATE V. JOHNSON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 92,956 – JUNE 8, 2007

FACTS: Johnson convicted of premeditated first-degree murder, and a hard 50 sentence was imposed based on aggravating circumstances, including Johnson's stalking of the victim and use of brutal force. On appeal Johnson claimed: (1) hard 50 sentencing scheme is unconstitutional, (2) insufficient evidence supported district court's finding of aggravating circumstances, (3) mistrial should have been ordered when state violated limine order to preclude statements about Johnson's criminal record or any previous murder charges; (4) prosecutorial misconduct to ask detective to comment on credibility of Johnson's son, (5) error to admit overly repetitious and gruesome photographs, (6) error to refuse to admit defense exhibit as not meeting criteria for business records exception, and (7) cumulative error denied a fair trial. Johnson also raised issues in supplemental pro se brief.

ISSUES: (1) Constitutionality of hard 50 sentence, (2) sufficiency of evidence for aggravating factor, (3) mistrial, (4) prosecutorial misconduct, (5) admissibility of photographs, (6) admission of hearsay evidence, (7) cumulative error, and (8) pro se issues

HELD: Under current law, Kansas hard 50 sentencing scheme is constitutional. Hard 50 sentence enhances minimum sentence to be served and does not expose a defendant to a higher maximum sentence than provided by statute.

Sufficient evidence supports findings that Johnson made victim aware of possibility of violence awaiting her, and that Johnson subsequently attacked victim in a brutal and ferocious manner that forcibly overcame her attempts to protect herself. These supported aggravating factor that crime was committed in an especially heinous, atrocious, and cruel manner.

District court properly found witness testimony did not technically violate limine order. Innocuous references to Johnson's release from jail as a temporal frame of reference for witness contact with Johnson did not violate spirit of limine order.

Prosecutor's question exceeded wide latitude afforded prosecutors, but no plain error under facts of case.

Photos more clearly depicted wounds. No abuse of discretion to permit doctor to utilize photographs to fully explain his testimony.

No error to admit evidence based on Johnson's failure to establish a business records exception to hearsay rule. Inconsistency in document's content negated any trustworthiness emanating from its preparation in regular course of business.

No merit to cumulative error claim.

No merit to supplemental pro se claims of no jurisdiction, of abuse of discretion to deny counsel's motion to withdraw, and of insufficient evidence.

STATUTES: K.S.A. 2006 Supp. 21-3438, -4635 sections (b)-(d), -4636, -4636(f), -4638, 60-460(m) and K.S.A. 21-425, -4636(f)(1) and (7)

STATE V. STANO
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 95,138 – JUNE 8, 2007

FACTS: Duane Hayes was shot in the head in his own driveway. Hayes had been a habitual user of crack cocaine and Stano shot Hayes multiple times after an argument concerning a drug deal. Multiple witnesses testified concerning the gunshots and also witnesses testifying that Stano told them he murdered Hayes and provided details about the murder. A jury convicted Stano of first-degree, premeditated murder.

ISSUES: (1) Exculpatory statement, (2) unavailable witness testimony (3) informants' testimony, and (4) prosecutorial misconduct

HELD: Court held that Stano's exculpatory hearsay statements to detectives were inadmissible. Court stated that a criminal defendant is present at trial and has an absolute right to testify in his or her own behalf and that Stano could have taken the stand and testified about what he told the detectives, but he chose not to testify. Court held the trial court did not err when it sustained the state's objection and excluded the exculpatory statements made by Stano to the detectives. Court held that a review of the trial record as well as the Kansas and federal constitutional law, demonstrated that no violation of Stano's confrontation rights occurred when the trial court admitted into evidence the written statement and preliminary hearing testimony of an acquaintance of Stano's who did not testify at trial. Court held there was no clear error by the trial court in failing to give a cautionary instruction concerning informants' testimony because three of the informants testified they did not receive anything in exchange for their testimony and the fourth informant received probation instead of imprisonment and Stano cross-examined him on that subject during the preliminary hearing.

Court also stated the testimony of the informants was substantially corroborated at trial. Court held it was error by the prosecutor to admit irrelevant evidence of the impact of the crime on the victims, but that there were only two passing references and the prosecutor's conduct was neither gross and flagrant nor demonstrated any ill will. Court held the prosecutor's comments at closing did not fall outside the bounds of arguing the case to the jury and that any other error was harmless.
STATE V. WALTERS
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 92,592 – JUNE 8, 2007

FACTS: Walters; his girlfriend, Lentz; and Bierman were at Walter’s home. Lentz’ ex-husband, Matt Cochran, drove to the house to contact Lentz. Walters killed Cochran with a shotgun blast to the head and was charged with second-degree murder. A jury convicted Walters of the lesser-included offense of voluntary manslaughter.

ISSUE: Exclusion of evidence

HELD: Court held it was error for the district court to exclude evidence of Cochran’s standoff with the Gardner police approximately two months before the killing in this case. Court held it was not error for the district court to exclude testimony from Lentz’ sister regarding a specific threat made by Cochran toward Lentz and Walters and also evidence that Cochran had not been prosecuted for previous incidents. Court held it was not reversible error for the trial court to exclude this evidence because the admission of the evidence would not have changed the jury’s determination that a reasonable person would not have perceived the necessity of self-defense in Walter’s situation.

STATUTES: K.S.A. 20-3018(b), K.S.A. 21-3211, and K.S.A. 60-401(b), -407(f), -446, -447, -455

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

Notice of Docket Settings: Avoiding or Managing Conflicts

Pursuant to Supreme Court Rule 7.01(d) and 7.02(d), the Appellate Clerk’s Office notifies attorneys of docket settings at least 30 days in advance of hearings. Both the Supreme Court and the Court of Appeals work to provide notice well in advance of that 30 day deadline, and attorneys are expected to be available to appear for argument when scheduled.

Long before notices are sent, however, attorneys can proactively manage their own docket settings. If a case is fully briefed and ready to be set on a docket, the attorney should note the relevant court’s future argument schedule and notify the court in writing if there is a period of time when the attorney will not be available for argument. A letter can be sent to the Clerk of the Appellate Courts with this information, and a conflict will be avoided. Neither appellate court will schedule an argument when there is an unavoidable conflict.

If a case appears on an oral argument docket and the attorney has a conflict, the attorney should ask himself or herself a series of questions:

Can the conflicting event be rescheduled?
Can another attorney appear to present the argument?
Can argument be waived?

If the conflict remains, the attorney should contact the appellate courts to determine what other options, if any, are available. For the Supreme Court, contact Carol G. Green at (785) 296-3229. For the Court of Appeals, contact Kevin Beckwith at (785) 291-3571.

Remember that both the Supreme Court and the Court of Appeals will avoid scheduling argument when there is an unavoidable conflict. Be proactive in managing that scheduling.

For questions about these practices or appellate court rules, call the Clerk’s Office at (785) 296-3229 and ask to speak with Carol G. Green, Clerk of the Appellate Courts.

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Civil

EASEMENTS AND ENCROACHMENT
SOUTHERN STAR CENTRAL GAS PIPELINE CO. V. CUNNING ET AL.
LEAVENWORTH DISTRICT COURT – AFFIRMED
NO. 96,103 – MAY 18, 2007

FACTS: Southern Star Central Gas owns and operates interstate natural gas pipelines in Kansas. Southern Star had a recorded easement across property owned by the Cunnings and in 1959 or 1960 had installed an 8-inch natural gas pipeline across the property, buried 36 inches below the surface. Southern Star filed a petition against the Cunnings for possession and ejectment to enforce the easement rights and to remove a garage because it was within 50 feet of the pipeline. The district court denied the petition finding Southern Star failed to prove it was more probably true than not that the garage constituted an unreasonable interference with the easement and that the encroachment was slight compared to the cost of removing the garage.

ISSUES: (1) Easements and (2) encroachment

HELD: Court held Southern Star’s blanket easement did not expressly define the amount of space Southern Star needed to adequately maintain its pipeline. There was evidence that Southern Star could use means other than its standard practices in order to access and work on the pipeline. The district court weighed the evidence and found no material interference with the easement. This was judgment for the district court to make based upon the evidence presented, and in this case the district court’s decision was supported by substantial competent evidence. This does not mean that a 41-inch clearance from a natural gas pipeline would be considered adequate in every case. Under the facts of this case, however, the court concluded the district court did not err in denying Southern Star’s request for injunctive relief.

STATUTE: K.S.A. 60-1001

INSURANCE
PONDS V. HERTZ CORPORATION
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 96,543 – MAY 25, 2007

FACTS: Littlejohn rented a Hertz rental car and declined optional additional liability insurance. Her sister (Anukum) was driving when a tractor-trailer forced the rental car off the road and into another car, killing her brother (Ponds) who was a passenger in the rental car. Driver of tractor-trailer was never located. Farmers’ insurer paid policy limits to Ponds’ heirs. Ponds’ daughter filed lawsuit against Farmers and Hertz, claiming Ponds was an “insured” under Farmers’ policy, and claiming Hertz was required to provide uninsured motorist (UM) coverage as the vehicle’s owner. District court granted summary judgment to Farmers and Hertz, finding Ponds was not an “insured” under Farmers’ policy. District court also found the rental contract was not an insurance policy and self-insurers are not required to provide UM coverage.

ISSUES: (1) “Replacement” vehicle and (2) self-insurers and UM coverage

HELD: The temporary rental car did not serve as a replacement vehicle under the clear meaning of the policy language, thus Ponds was not riding in an “insured car.” No error in granting Farmers’ motion for summary judgment. Self-insurers are not required to provide UM coverage, and Littlejohn declined the additional liability coverage that included such benefits. Trial court did not err in granting Hertz’ motion for summary judgment.

STATUTE: K.S.A. 60-284(a)

LIMITATION OF ACTIONS
UNDERHILL V. THOMPSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 96,920 – MAY 25, 2007

FACTS: Underhill filed negligence action against Thompson on July 21, 2004, based on automobile accident on Aug. 20, 2002. Investigators were hired to locate Thompson, and district court extended service deadline to Nov. 18, 2004. Service obtained Nov. 19, which was 121 days after petition had been filed. District court granted Thompson’s motion to dismiss action as time barred, finding tolling under K.S.A. 60-517 did not apply.

ISSUE: Tolling of limitations period

HELD: No error in district court granting summary judgment. Due diligence was demonstrated, but under facts, Thompson did not conceal his whereabouts. Thompson furnished correct contact information at scene of accident, and lived at same address for 17 months thereafter. He worked openly and under his own name in Wichita as a city firefighter, had no trouble with the law, did not avoid creditors, and did not live or work under an assumed name or a false Social Security number. Unique circumstances doctrine not applicable under facts of case.

STATUTE: K.S.A. 8-248, 60-102, -203(a), -232(b)(6), -236(a), -513(a)(4), -517

MODIFICATION OF SPOUSAL MAINTENANCE
IN RE MARRIAGE OF EVANS
MONTGOMERY DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 95,214 – MAY 18, 2007

FACTS: Cheryl and John Evans were divorced in 2002. John was ordered to pay a lump sum maintenance award of $143,264 payable at $1,184 per month with the clarification that “the lump sum spousal maintenance is not subject to modification.” The district court denied John’s motion to modify child support and spousal maintenance when John was unemployed because the award was “not subject to modification.”

ISSUE: Modification of spousal maintenance

HELD: Court held that under K.S.A. 60-1610(b), the trial court exceeded its authority when it ordered that maintenance originally ordered after a trial could never be modified. Court remanded to a trial judge who has not previously handled this case to determine if maintenance is merited and, if so, what amount should be ordered.

STATUTE: K.S.A. 2006 Supp. 60-1610(b)(2), (3)

PROMISSORY NOTE, ACCEPTANCE OF LATE PAYMENTS, AND OPTION TO ACCELERATE
FOUNDATION PROPERTY INVESTMENTS LLC V. CTP LLC
BUTLER DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 96,697 – MAY 25, 2007

FACTS: This litigation arises out of a loan made by Foundation to CTP. CTP signed a promissory note for the loan. After receiving 10 late payments from CTP, Foundation accelerated the note and sued to recover the entire balance owed on the note. The ultimate issue in the case was whether Foundation waived its right to accelerate the promissory note by accepting late payments from CTP.
district court granted summary judgment in favor of Foundation in Foundation's action to foreclose the promissory note. The district court found that the language of the note permitted Foundation to exercise the option to accelerate and that Foundation's repeated acceptance of late payments did not constitute a waiver of the option to accelerate. The district court awarded Foundation the loan's principal in full, including accrued interest and attorney fees and costs for a total of $110,975.58.

ISSUES: (1) Promissory note, (2) acceptance of late payments, and (3) option to accelerate.

HELD: Court rejected CTP's arguments that Iowa law applied because the note was signed there. Court held the trial court examined all the factors and correctly applied Kansas law in deciding the case. Court held there was nothing in the record to indicate that Foundation ever objected to CTP's late payments before the July 2005 letter stating that Foundation was exercising its option to accelerate payment on the note. Foundation's action of accepting late payments from CTP was inconsistent with its claim or right to receive prompt payments. Court held that the trial court incorrectly determined that Foundation's conduct did not constitute a waiver of its right of acceleration. Court reversed the summary judgment in favor of Foundation and remanded to the trial court with instructions to enter judgment in favor of CTP.

STATUTES: K.S.A. 60-256 and K.S.A. 84-1-205(1)

PROTECTION FROM STALKING

WENTLAND V. UHLARIK

RILEY DISTRICT COURT – AFFIRMED

NO. 96,390 – MOTION TO PUBLISH,

OPINION ORIGINALLY FILED ON MARCH 23, 2007

FACTS: Multiple times, Gwen Wentland filed for a Protection from Stalking (PFS) order against John Uhlarik, and the district court issued a final PFS order. The latest PFS order involved encounters with Uhlarik at a grocery store in Manhattan and at Logan airport in Boston. The district court found the incidents alone would not place a reasonable person in fear of their safety, but court stated the totality of the circumstances of the entire history, including 5,000 Internet searches, would place a person in reasonable apprehension.

ISSUE: Protection from stalking

HELD: Court held the district court applied the correct legal standard of reasonable apprehension of bodily harm in granting the PFS order. Court found there was substantial competent evidence to support the district court's decision to enter the PFS order, including the course of conduct established by the Internet searches. Court held that viewing the evidence in the light most favorable to Wentland, as prevailing party, Uhlarik's past harassment of Wentland, his ongoing infatuation with her, and the recent encounters at the grocery store and at the airport provided the district court with ample evidence to support the entry of a final PFS order against Uhlarik.

STATUTE: K.S.A.60-252, -455, -3102, -31a01, -31a02, -31a05

SUMMARY JUDGMENT AND REAL ESTATE

ANTRIM, PIPER, WENGER INC. V. LOWE AND LOWE
CHATAQUA DISTRICT COURT – AFFIRMED

NO. 97,308 – JUNE 8, 2007

FACTS: David Lowe signed a nonexclusive right-to-sell agreement with Einer Johnson, a real estate agent for Antrim, Piper, Wenger Inc., to sell the Lowe's ranch. This contract allowed Antrim to list and sell the property for $1.5 million during March 22, 2004, and Aug. 22, 2004. The commission was to be 5 percent. Lewis was interested in the property. Johnson claims Lewis told him that he just wanted to look at the property and to not come to the ranch. Deborah Lowe said that Johnson told Lewis that he had other arrangements that day and could not show the property. Lowe eventually wrote a contract with Lewis and the Lowes refused to pay Antrim a commission on the sale. Antrim sued the Lowes. The trial court granted summary judgment to Antrim.

ISSUES: (1) Summary judgment and (2) real estate

HELD: Court held that despite the fact that the Lowes found the buyers in Sedan, showed them the property, and wrote the contract for sale, the key undisputed fact remained that the Lowes knew that Lewis had been sent to them through the efforts of Johnson, Antrim's salesperson. Since the Lowes did not dispute that they sold the property to a purchaser whom they knew was sent to them by Antrim's salesperson, there was no genuine issue of material fact and summary judgment was appropriate. Court stated the parties contracted within the appropriate time set in the listing agreement and it was unreasonable to assume that Antrim would agree to go without a commission if the Lowes decided to use a 1031 IRS exchange to complete the sale of the property. Court held that the trial court did not abuse its discretion in denying the motion to alter or amend because Deborah's alleged lack of consent to the sale of the ranch was not before the trial court when it entered summary judgment.

STATUTE: K.S.A. 60-259(f)

TAXATION AND EDUCATIONAL AND SCIENTIFIC EXEMPTION

IN RE TAX APPEAL OF K.S.U. SE AGRICULTURAL RESEARCH CENTER

BOARD OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS

NO. 96,519 – MAY 4, 2007

FACTS: Kansas State University Southeast Agricultural Research Center (KSU) appealed the decision of the Kansas Board of Tax Appeals (BOTA) denying its application for an exemption for ad valorem taxation of a home provided for a caretaker of its research farm in Labette County. BOTA found KSU's use of the property as a living quarters for an employee to be used for a residential purpose took it outside of the tax exemption statutes.

ISSUES: (1) Taxation and (2) educational and scientific exemption

HELD: Court concluded that the subject property was owned and operated by a state educational institution for a residential use minimal in scope and incidental to the educational and scientific purposes for the property. The occupancy was clearly for the benefit of KSU rather than the occupant — it was part of the machinery by which the education and research affairs of KSU were administered. Court remanded to BOTA with directions to grant KSU's application for exemption.

STATUTES: K.S.A. 74-2426(c); K.S.A. 76-711, -712; K.S.A. 77-601 et seq., -621(c)(4); and K.S.A. 2006 Supp. 79-201, -201 Sixth, -201a Second

TAXATION, GRAIN ELEVATORS, RAILROAD PROPERTY, AND RECORDING LEASES

IN RE TAX APPEAL OF UNITED AG SERVICES INC.

RUSSELL DISTRICT COURT

REVERSED AND REMANDED WITH DIRECTIONS

NO. 95,947 – JUNE 1, 2007

FACTS: The subject real property contained two grain elevators and two metal grain bins. The metal grain bins were destroyed by wind in 1996 and rebuilt in 2000. In 2000, Russell County reappraised the grain elevators and increased the valuation to more than $300,000 from only $85,000 in 1999. Russell County also issued escaped tax bills for 1998 and 1999 increasing the valuation substantially in those years. Board of Tax Appeals (BOTA) found the subject elevators are located upon land leased from the railroad and said land was state assessed. Consequently, without recording of documentation indicating that the subject improvements are owned by an entity other than the railroad, the instant escaped tax assessments are improper and vacated. The district court reversed BOTA
ISSUES: (1) Taxation, (2) grain elevators, (3) railroad property, and (4) recording leases

HELD: Court held that the subject property was realty for purposes of the appeal, and the conclusion proved critical to the court’s analysis in applying the various statutory schemes purportedly supporting the belated tax assessments under these circumstances. Court stated that because K.S.A. 79-1427a does not apply to real property, and the undervaluation of the real estate parcel qualified neither as “escaped” under K.S.A. 79-1475 nor as a clerical error subject to correction under K.S.A. 79-1701 et seq., there is simply no statutory vehicle to support these assessments under these circumstances. Where the Legislature has not provided a remedy for a taxing district’s undervaluation of a real estate parcel that is not detected prior to sending out tax notices, belated “escaped” tax assessments on the undervalued parcel must be set aside. Court stated that because K.S.A. 79-1427a does not apply to real property, and the undervaluation of the real estate parcel qualified neither as “escaped” under K.S.A. 79-1475 nor as a clerical error subject to correction under K.S.A. 79-1701 et seq., there is simply no statutory vehicle to support these assessments under these circumstances. Where the Legislature has not provided a remedy for a taxing district’s undervaluation of a real estate parcel that is not detected prior to sending out tax notices, belated “escaped” tax assessments on the undervalued parcel must be set aside. Court stated that because K.S.A. 79-1427a does not apply to real property, and the undervaluation of the real estate parcel qualified neither as “escaped” under K.S.A. 79-1475 nor as a clerical error subject to correction under K.S.A. 79-1701 et seq., there is simply no statutory vehicle to support these assessments under these circumstances. Where the Legislature has not provided a remedy for a taxing district’s undervaluation of a real estate parcel that is not detected prior to sending out tax notices, belated “escaped” tax assessments on the undervalued parcel must be set aside. Court stated that because K.S.A. 79-1427a does not apply to real property, and the undervaluation of the real estate parcel qualified neither as “escaped” under K.S.A. 79-1475 nor as a clerical error subject to correction under K.S.A. 79-1701 et seq., there is simply no statutory vehicle to support these assessments under these circumstances. Where the Legislature has not provided a remedy for a taxing district’s undervaluation of a real estate parcel that is not detected prior to sending out tax notices, belated “escaped” tax assessments on the undervalued parcel must be set aside.

STATEMENTS: None

CRIMINAL EXPERTISE

STATE V. BIRTH

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

NO. 94,586 – MAY 18, 2007

FACTS: Birth convicted of aggravated burglary and robbery. On appeal, he claimed (1) admission of hearsay statements of witness not called by state to testify at trial violated the Sixth Amendment right to confrontation, (2) trial court erred in not redacting false statements by police in interrogation tape played to jury, (3) prosecutorial misconduct denied Birth a fair trial, (4) the interrogation tape should have been suppressed, (5) insufficient evidence supports the aggravated burglary conviction, (6) cumulative error denied a fair trial, (7) trial court failed to consider Birth’s financial circumstances before assessing Board of Indigents’ Defense Services and attorney fees, and (8) Apprendi error to include prior convictions in criminal history for sentencing.

ISSUES: (1) Confrontation, (2) admission of false statements, (3) prosecutorial misconduct, (4) motion to suppress, (5) sufficiency of evidence, (6) cumulative error, (7) assessment of fees, and (8) Apprendi sentencing claim

HELD: The “open the door” rule applies in this jurisdiction even after Crawford. Under facts of case, Birth waived his right to confrontation under Sixth Amendment when he opened the door to this otherwise inadmissible hearsay testimony. Birth did not object to the admissibility of the false statements in the interrogation tape. Issue not preserved for appeal. Prosecutor’s comment on the credibility of the state’s evidence, and his improper inference drawn from the evidence, were improper but did not constitute plain error. No merit to claims that prosecutor improperly shifted the burden of proof to the defendant, that prosecutor elicited inadmissible testimony by introducing false statements in the interrogation tape, or that prosecutor denied right of confrontation by not calling the declarant of the out-of-court statements as a witness. No error in the district court denying motion to suppress statements Birth made during his interrogation. Brief examination and rejection of allegations regarding invocation of right to remain silent, error in Miranda warnings, and use of restraints during interrogation.

Prosecutor presented more than sufficient evidence to support the aggravated burglary conviction.

No merit to cumulative error claim.

Trial court erred in not considering on the record Birth’s resources and the nature of the burden the payment of fees would impose.


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**STATE V. BROWN**  
**SHAWNEE DISTRICT COURT – AFFIRMED**  
**NO. 96,862 – MAY 4, 2007**

FACTS: Brown's 1-month-old baby died from multiple injuries. Child in Need of Care (CINC) proceedings initiated against both Browns. On date parental rights were to be terminated, Brown confessed to injuring the baby and was charged with aggravated battery and abuse of child. District court suppressed Brown's confession, finding it was not freely and voluntarily made. State filed interlocutory appeal.

ISSUES: (1) Totality of circumstances and (2) legal sufficiency of decision to suppress

HELD: Totality of circumstances included pressure applied throughout CINC proceedings. Under facts of case, there is substantial competent evidence that the thought of losing his parental rights was likely a material factor in Brown's decision to make a confession.

When a parent is essentially compelled to choose between confessing guilt in abusing own child or losing parental rights, the choice is between two fundamental rights. Under facts of case, it was entirely appropriate for district court to consider the pressure placed on Brown by the CINC proceedings in considering the totality of circumstances surrounding Brown's confession. District court's determination that Brown's statement was not free and voluntary is affirmed.

STATUTES: None

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**STATE V. BRYANT**  
**SEDGWICK DISTRICT COURT – AFFIRMED**  
**NO. 96,274 – JUNE 8, 2007**

FACTS: Bryant pled no contest to multiple crimes involving aggravated robbery, theft, aggravated burglary, forgery, and burglary. At sentencing, the state requested a 30-day extension to determine the proper amount of restitution. The court gave the parties 30 days, otherwise it would schedule a restitution hearing. Nearly four months after sentencing, the state filed a motion for a restitution hearing. After a hearing, the court ordered restitution in an amount just more than $11,000.

ISSUES: (1) Restitution and (2) jurisdiction

HELD: Court held that where the district court initially granted the parties 30 days from sentencing to settle the issue of restitution, the district court did not abuse its discretion in subsequently allowing the state more than 30 days to determine the amount of the defendant's restitution. Court stated that the procedure set forth in K.S.A. 22-3424(d) requiring the district court to hold a hearing to establish restitution before imposing sentence is directory rather than mandatory.

STATUTES: K.S.A. 22-3424(d) and K.S.A. 2006 Supp. 21-4610(d)(1)

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**STATE V. BURTON**  
**SEDGWICK DISTRICT COURT**  
**REVERSED AND REMANDED**  
**NO. 95,970 – JUNE 8, 2007**

FACTS: Burton convicted on stipulated facts of possession of marijuana. Marijuana found during pat down search when officer stopped Burton to investigate a reported disturbance. Issue decided on appeal is whether facts justified the pat down search and whether marijuana seized pursuant to a consent obtained during the pat-down search should have been suppressed.

ISSUES: (1) Investigatory stop and (2) consent

HELD: Frisk search of Burton was not justified, and trial court should have granted motion to suppress. Officer never articulated any fear or concern for his safety and never developed a reasonable articulable suspicion that Burton was armed and dangerous. Consent to search was not voluntary, and no intervening circumstances purged taint of the illegal search.

STATUTE: K.S.A. 22-2302, -2402(1), 65-4162(a)

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**STATE V. DAYHUFF**  
**LABETTE DISTRICT COURT**  
**REVERSED AND REMANDED**  
**NO. 94,797 – MAY 18, 2007**

FACTS: Pam Brown reported to police that her daughter, H.D., had told Brown that she had been sexually abused by Dayhuff. Brown and Dayhuff had been married to each other but had divorced five years earlier. H.D. was 9 years old when she reported that Dayhuff had put his hands down H.D.’s pants and had attempted to get H.D. to touch his penis. A jury convicted Dayhuff of aggravated indecent liberties with a child.

ISSUES: (1) Unanimous verdict, (2) prior crimes evidence, (3) fair trial, and (4) cumulative error

HELD: Court rejected Dayhuff's argument that he was denied his right to a unanimous verdict based on the prosecutor relying on acts not charged in the complaint to obtain a conviction. The jury was properly instructed on the elements of aggravated indecent liberties with a child. The state never argued to the jury that uncharged acts could provide a basis for Dayhuff’s conviction. Also, the jury properly instructed on juror unanimity in a multiple acts case. Court reversed for a new trial based on the trial court’s admission of prior crimes evidence under the plan exception of K.S.A. 60-455. Court stated that because there was insufficient evidence presented to show a “strikingly similar” or a “signature” act, court concluded that the trial court erred in admitting evidence of Dayhuff’s prior crimes from a 1992 case where he pled no contest to two counts of indecent liberties with a child. Court could not conclude the error was harmless. Regarding Dayhuff’s argument that he was denied his right to a fair trial based on the conduct of the child advocate during the child’s testimony, the court held that the trial court's refusal to allow Dayhuff to develop a factual basis for his motion for mistrial at the time of trial denied him the opportunity to show, what, if any, influence the child advocate’s conduct may have had on the child’s testimony when the child’s credibility was being considered by the jury. Court reversed on that issue as well. Court did not address the cumulative error issue finding there was already reversible error established.

STATUTES: K.S.A. 21-3504(a)(3)(A); K.S.A. 22-3403, -3421, -3423; and K.S.A. 60-455
STATE V. JACKSON  
WYANDOTTE DISTRICT COURT – AFFIRMED  
NO. 95,144 – MAY 11, 2007  
FACTS: Jackson convicted of attempted first-degree murder and aggravated battery. On appeal, he claimed he was denied a fair trial because prosecutor in closing argument improperly defined reasonable doubt and interjected his personal opinion on Jackson's credibility.  
ISSUE: Prosecutorial misconduct  
HELD: Prosecutor's statement to jury to vote guilty if reasonably sure of the defendant's guilt was clearly improper and a flagrant misstatement of the proper definition. State v. Shoemake, 228 Kan. 572 (1980), is distinguished. Also, prosecutor stating that Jackson's claims of out-of-body experience and suicide by police were "doozies" and "a crock" amounted to a personal opinion about Jackson's claims of out-of-body experience and suicide by police.  
STATUTES: None

STATE V. MCCORMICK  
DOUGLAS DISTRICT COURT – AFFIRMED  
NO. 92,408 – MAY 25, 2007  
FACTS: McCormick convicted of aggravated kidnapping, aggravated burglary, and aggravated intimidation of a witness or victim. On appeal he alleged district court error in: (1) refusing to appoint substitute counsel; (2) admitting evidence seized in violation of Fourth Amendment, including prejudicial photographs; (3) denying McCormick's request for psychological evaluation of the victim; and (4) instructing the jury. McCormick also claimed the prosecutor withheld exculpatory evidence and committed multiple instances of misconduct.  
ISSUES: (1) Substitute counsel, (2) Fourth Amendment, (3) psychological evaluation of victim, (4) jury instructions, and (5) prosecutorial misconduct  
HELD: No merit to claim that McCormick was denied Sixth Amendment right to counsel. No abuse of trial court's discretion in finding appointment of counsel would be futile under the circumstances. Because no justifiable dissatisfaction with appointed counsel, McCormick's decision to represent himself was not coercion by district court's refusal to appoint new counsel. McCormick's waiver of right to counsel was knowing and intelligent, and his appointed attorneys served as standby counsel.  
Search of McCormick's backpack was reasonable as an inventory search, and district court properly refused to suppress contents of backpack as fruits of an illegal search. Even if search of McCormick's residence and/or computer was illegal, admission of pictures and McCormick's personal journal was clearly harmless under facts of case.  
District court did not err in denying a psychological evaluation of the victim where the victim did not allege McCormick committed a sex crime, and victim's allegations were corroborated by circumstantial evidence.  
Jury instructions for aggravated burglary and aggravated kidnapping are discussed, finding no error.  
No merit to claim that prosecutor withheld KBI laboratory report. Unintentional failure to disclose officer's field notes was not reversible error. Remaining allegations of prosecutorial misconduct had either no foundation in fact or any influence on jury's deliberations.  
STATUTE: K.S.A. 21-3420(b), -3420(c), -3421, -3715, -3833(a)(1)

STATE V. PALMER  
RENO DISTRICT COURT – REVERSED AND REMANDED  
NO. 96,165 – MAY 18, 2007  
ISSUES: (1) Confrontation clause in probation revocation hearing and (2) due process in probation revocation  
HELD: Issue of first impression in Kansas. Consistent with developing trend in other jurisdictions, the right to confront witnesses as provided in Crawford does not extend to defendants in probation revocation proceedings. No violation of Palmer's right to confrontation under Crawford or Kansas Bill of Rights by the admission of the affidavit in Palmer's revocation hearing. 
Palmer still entitled to minimal due process in the proceeding, however, including right to confront and cross-examine adverse witnesses as recognized in State v. Yura, 250 Kan. 198 (1992). Under facts, district court failed to apply two-factor good cause test, Yura, by failing to consider whether state proffered an appropriate explanation why confrontation was undesirable or impractical, and whether affidavit was reliable. Revocation of Palmer's probation is reversed and remanded.  
STATUTES: K.S.A. 2006 Supp. 22-3716(b) and K.S.A. 1990 Supp. 22-3716(2)

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(continued on next page)
CONCURRENCE AND DISSENT (Malone, J.): Agrees no abuse of discretion in not allowing Schow to withdraw plea based on mutual mistake in Schow's criminal history score. District court erred, however, in placing burden on Schow to disprove misdemeanor convictions alleged to be incorrect. District court should have required state to produce further evidence to prove existence of the misdemeanor convictions by preponderance of evidence.

STATUTES: K.S.A. 2006 Supp. 21-4714, -4714(f), -4715, -4715(a), -4715(c) and K.S.A. 21-3715(a), -4714(f), -4724(c)(4)

STATE V. YOUNG

HARVEY DISTRICT COURT – AFFIRMED
NO. 96,115 – MAY 4, 2007

FACTS: Young approached by uniformed police officer on routine patrol in city park who believed he had just witnessed a drug transaction. Young consented to search of his person, which led to discovery of drugs and Young's arrest and conviction on drug charges. On appeal, Young claimed district court should have granted motion to suppress.

ISSUE: Citizen-police encounters

HELD: Leading federal and Kansas cases involving distinction between a voluntary encounter and an investigatory detention are examined. Under facts, encounter between Young and the officer was voluntary when viewed objectively and under totality of circumstances. Young was never seized and his Fourth Amendment rights were not implicated. Search of Young's person was lawful based on his voluntary consent. No error to deny motion to suppress.

STATUTES: None

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

RULES ADOPTED BY THE STATE BOARD OF EXAMINERS OF COURT REPORTERS

No. 10. Rates for Official District Court Transcripts.

Rule No. 10.A is hereby amended to read as follows:

The rate for official district court transcripts shall be $2.75 for each 25-line page of the original transcript and $0.50 for each 25-line page of a copy of the original transcript if copies are ordered. Effective January 1, 2008, the rate for official district court transcripts shall be $3.00 for each 25-line page of the original transcript. Effective January 1, 2010, the rate for official district court transcripts shall be $3.25 for each 25-line page of the original transcript. Effective January 1, 2012, the rate for official district court transcripts shall be $3.50 for each 25-line page of the original transcript. No one shall be required to purchase a copy when requesting production of an original transcript, and access to the record shall be permitted by the district court under the Kansas Open Records Act and Supreme Court Rule 3.06. The “official district court transcript” shall be a transcript produced by any Kansas Certified Court Reporter or person authorized by these rules to produce official transcripts.

BY ORDER OF THE COURT this 25th day of June, 2007

Kay McFarland
Chief Justice
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