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The Kansas Legal Directory

Official Directory of the Kansas Bar Association.
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.

The Journal of the Kansas Bar Association is published monthly with combined issues for July/August and November/December for a total of 10 issues a year. Periodical Postage Rates paid at Topeka, Kan., and at additional mailing offices. The Journal of the Kansas Bar Association (ISSN 0022 -8486) is published by the Kansas Bar Association, 1200 S.W. Harrison, P.O. Box 1037, Topeka, KS 66601 -1037; Phone: (785) 234 -5696; Fax: (785) 234 -3813. Member subscription is $25 a year, which is included in annual dues. Nonmember subscription rate is $45 a year. POSTMASTER: Send address changes to The Journal of the Kansas Bar Association, P.O. Box 1037, Topeka, KS 66601 -1037.

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I am well aware that lawyers do not like to be told what to do; suggesting we “mandate” something is akin to blasphemy. I am truly not in support of anything that makes the practice of law harder. Or more expensive.

But we have an incongruity in the practice of law here in Kansas, which I believe we need to address.

We have mandatory protection for the clients of every licensed lawyer in this state to guard against any lawyer’s dishonest behavior. But we do not have mandatory protection for the clients of lawyers who may commit malpractice. Yet malpractice may be just as damaging to the client and often is more so.

To provide (at least partial) protection against the dishonest lawyer, in 1993 the Kansas Supreme Court established the Lawyers’ Fund for Client Protection pursuant to Supreme Court Rule 227. The stated purpose of the fund is to:

“... promote public confidence in the administration of justice and the integrity of the legal profession by reimbursing losses to clients caused by the dishonest conduct of lawyers admitted and licensed to practice law in the courts of this [s]tate, occurring in the course of a lawyer-client relationship between the lawyer and the claimant.”

In essence, a client who suffers a financial loss as a result of the dishonest conduct of a Kansas lawyer may make a claim. The term “dishonest conduct” is basically defined to cover the conversion (theft) of money or property, the refusal to return a fee in a situation that amounts to conversion, or the borrowing of money by the lawyer from the client in a scenario that likewise amounts to conversion. To recover from the fund, the “ripped-off” client must file a claim with the Kansas Lawyers’ Fund Commission. The commission is comprised of three lawyers, one judge, and two lay people. The client individually may recover up to $75,000; however, there is a $250,000 per lawyer cap.

The fund is “funded” by fellow lawyers, from the annual fees active lawyers pay to become licensed and from the bar discipline fee fund.¹

So, at least as of 1993, it appears that we are our brother and sister lawyers’ keepers — at least if they steal. Certainly, the argument could be made that we should not have to serve this role. Let the buyer, or client, beware! But I believe that since we are a profession — a trusted and, I think, highly regarded profession — then it is appropriate that we have such a fund. Surely there should be some protection for the innocent client who is the victim of a car accident, hires Lucy Lawyer, and recovers $50,000 — only to find out that Lucy converted the $50,000 for an alcohol-fueled cruise to Tahiti.

Now comes the “but.”

What about the innocent client who is the victim of a car accident with damages of $50,000, hires Lucas Lawyer, and cannot recover because Lucas blew the statute of limitations while off on an alcohol-fueled cruise to Tahiti?

Lucas’ professional liability insurance pays, you say. But what if Lucas does not have such insurance? There are lawyers who do not.

It seems to me that the client in the second scenario has suffered just as badly as the one in the first. And it seems to me that if we are to remain as the trusted and highly regarded profession that we are, we should consider protection for clients in both situations.

This is something to discuss while we have the chance to guide the discussion. If we do not do something to guarantee protection of our clients from malpractice, it may only be a matter of time before the Supreme Court mandates it. Or, perish the thought, the Legislature mandates it.

And if we did mandate some form of insurance, could we not pattern it after Rule 227 (or more similarly, perhaps, mandatory automobile insurance) in the sense that there would only (or at least) be a minimum (i.e. $100,000 or $250,000) of coverage required to be purchased? Simplistic, perhaps. I know the devil would be in the details. And currently the Supreme Court does require lawyers to disclose whether they have professional liability insurance. Thus the argument is made that the availability of such information should be sufficient for the unwary client. But I cannot understand how those unwary clients will be wary enough to check into such issues.

Perhaps mandatory professional liability insurance would increase the professional liability rates for us all. But spread across the 10,000-plus lawyers licensed in this state, how bad could it be? Would it be worse than allowing the unsuspecting client to suffer a loss that is within our means to protect against? Perhaps not. Still, I do hate to be told what to do. …

¹ K.S.A. § 20-1a01.

Linda S. Parks can be reached by e-mail at parks@hitefanning.com or by phone at (316) 265-7741.
By Amy Fellows Cline, KBA Young Lawyers Section president

D uring my preparation for the American Bar Association’s (ABA) Annual Meeting in San Francisco, I discovered only a small portion of Kansas young lawyers have joined the ABA. While this column’s readers may be sold on the advantages of state bar membership, I thought I would take this opportunity to invite you to consider the broader perspective provided by national bar involvement.

ABA participation is an excellent compliment to state and local bar membership. It offers a unique perspective seldom experienced by practitioners who do not interact with lawyers in other states. The ABA’s considerable resources enable it to offer even more practice tools and networking opportunities to benefit your practice and improve your skills as a lawyer. The ABA Young Lawyer Division (YLD) also participates in many charitable initiatives that can be quite rewarding. For example, this year’s ABA YLD charitable endeavor is “Wills for Heroes,” whereby young lawyers will prepare simple wills and other documents for first responders, such as firefighters, police officers, and emergency medical technicians, on a pro bono basis. Information on this program can be found on the ABA YLD’s Web site at www.abanet.org/YLD or at www.willsforheroes.org.

Another reason I want to encourage you to join the ABA is that it directly impacts our membership. The number of Kansas young lawyers who are ABA members affects the number of delegates Kansas can send to ABA YLD meetings and conferences. These delegates provide our voice in national bar association policies and initiatives. At these events, the delegates participate in debates over ABA policies, design and shape ABA initiatives and programs, elect ABA YLD leaders, and attend special workshops designed to assist bar leaders in increasing membership and improving benefits provided to their members. They are also able to attend remarkable social events at some really amazing venues, often with behind-the-scenes views not generally available to tourists or even local residents (I mention this perk to entice you to become one of our delegates).

Thanks to our section leaders’ active participation in the ABA, we have also obtained ABA funding for our charitable projects. We have received financial support for our statewide high school mock trial program for a number of years, as well as money and assistance (through the ABA YLD’s contacts with the Federal Emergency Management Agency) to help Kansas residents who suffered in the recent tornado and flooding disasters in Greensburg and its surrounding counties.

The networking ABA participation provides can benefit your practice in many ways. First, it allows you to build relationships with attorneys from other states who may need local counsel. Even if the matter is not in your area of practice, you might be able to refer it to another Kansas attorney who may, in turn, refer you a matter in exchange. Or, one of your clients may need reliable local counsel, which your ABA contacts may be able to provide.

ABA members from other states with whom you have formed a relationship can offer you different perspectives on approaching legal issues, opposing counsel, handling clients, marketing, and law office management. These contacts can be especially valuable for associates in small firms, or those in firms with few associates, as these attorneys may not have many sources for advice from other associates on law office politics, impressing partners, and gaining client contacts.

The ABA also offers impressive continuing legal education opportunities. In addition to the traditional seminars, the ABA Tort, Trial & Insurance Practice Section offers a yearly Trial Academy for a small group of young lawyers. This Trial Academy afforded me the opportunity to hone my trial skills in a year in which I was not able to first chair a jury trial. As part of this program, I participated in a mock jury trial and was able to watch the jurors deliberate via hidden cameras—a frustrating, yet very educational, experience! The attorney students in this program were able to “practice” working with and preparing experts since engineering and medical students served as our experts in the mock jury trial. I also made an appellate argument to members of the Nevada Supreme Court and Court of Appeals, a very “hot” court who peppered me with questions, which provided excellent preparation for the two Kansas appellate arguments I have made this year.

The ABA has formed several task forces over the years, whose reports offer insight into important areas of the law, such as trends and issues related to contingent fees, expert witnesses, diversity in law practice, and unique issues facing women and minority attorneys. It also publishes a variety of newsletters, magazines, and brochures geared toward young lawyers, particular practice areas, or practice size (such as solo and small firm publications). A friend of mine found ABA publications regarding starting one’s own law practice to be extremely useful, and another used a publication on associate salary trends to successfully negotiate a pay raise.

I hope these perks have persuaded you to consider joining this worthy organization and your practice benefits from your participation.

Amy Fellows Cline, Triplett, Woolf & Garretson LLC, Wichita, may be reached at (316) 639-8100 or at amycline@twgfirm.com.
Deadline to Submit 2008 IOLTA Grant Applications is Dec. 3, 2007

The Kansas Bar Foundation (KBF) is soliciting grant applications for the 2008 Interest on Lawyers’ Trust Accounts (IOLTA) grant cycle that runs from April 1, 2008, through March 31, 2009. The deadline to submit applications is Dec. 3, 2007. The KBF Board of Trustees will make a decision on the applications in February 2008.

The Kansas IOLTA program, approved by the Kansas Supreme Court in 1984, is supported by more than 3,450 lawyers across the state. The program collects interest from trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. IOLTA grants are primarily aimed at funding programs that provide civil legal services for low-income people, law-related charitable public service projects, and improvements to the administration of justice, with the largest share going to provide direct legal services for victims of domestic violence.

Grant applications are reviewed by the KBF’s IOLTA Committee, which is comprised of appointees from the KBF, the Kansas Bar Association, the Kansas Supreme Court, the Kansas Trial Lawyers Association, the Kansas Association of Defense Counsel, and the governor’s office. The committee forwards its recommendations to the KBF Board of Trustees for final approval.

In order to qualify for IOLTA funds, an organization must:

• be a 501 (c) (3) or 501 (c) (6) if a local bar association,
• use the funds for a specific charitable purpose,
• agree to an audit or a review of expenses,
• provide quarterly and year-end reports as necessary, and
• demonstrate fiscal responsibility and the ability to provide quality services.

For more information or to request an IOLTA grant application for 2008, contact Meg Wickham, manager of public services, at (785) 234-5696 or at mwickham@ksbar.org or visit www.ksbar.org/public/kbf/iolta.shtml.

Kansas Bar Association Legal Resources
Your Total Resource for Practicing Law in Kansas

Effective Sept. 1, all KBA publications, including handbooks, practice manuals, and practitioner’s guides, will be published by and sold directly through the Kansas Bar Association rather than through LexisNexis.

You can choose from a complete selection of publications that provide everything you need to know about practicing law in Kansas. You’ll find our coverage of Kansas law to be the most comprehensive of any publisher — in print or on CD-ROM.

Now Available!
The 2007 Kansas Annual Survey

Covering 30 areas of law and practice, the “Annual Survey of Kansas Law” summarizes and analyzes legislation that became law after last year’s edition and through mid-April 2007, as well as appellate court decisions of the Kansas Supreme Court and the Kansas Court of Appeals for the same period. Federal decisions are incorporated where relevant. Each topic is arranged along key issues, allowing you to quickly pinpoint areas of particular concern or to easily gain an overview of recent developments.

To order the “Annual Survey of Kansas Law” or for a complete listing of available titles, see the inside back cover of this issue of the Journal; to place an order, fill out the order form located on the back cover, visit www.ksbar.org/bookstore, or call the KBA at (785) 234-5696. ■
Eed clients? Join the KBA Lawyer Referral Service (LRS) … a trusted source for finding the right attorney. This service is not just for low-income persons or individuals that might not have acquaintances with attorneys; it is for everyone. KBA LRS is a standout among attorney referral services nationwide and is American Bar Association (ABA) certified. ABA certification does not come easily, and all attorneys participating in the referral service must be qualified by ABA standards.

The KBA’s LRS is a dependable resource for people who need a lawyer but don’t know how to locate one. In 2006, the LRS answered more than 1,200 calls each month and referred nearly 3,000 cases to participating attorneys; these referrals generated more than $500,000 in client fees for program participants.

When LRS personnel answer incoming calls, they screen the inquiries to determine whether the caller needs to hire a lawyer or simply needs legal advice. Callers needing to hire a lawyer are then referred to an LRS lawyer in their area (pending attorney availability).

LRS staff refer clients in a variety of areas of law. The most common referrals are made in the areas of divorce, medical malpractice, and contested custody. The LRS receives its clients from numerous sources, including advertising campaigns, Kansas Legal Services, the courts, and other attorneys.

Any lawyer who is in good standing with the Kansas Supreme Court may qualify as a member of the LRS, providing they meet the following requirements:

- LRS attorneys must grant a consultation as soon as practicable after the request is made.
- LRS attorneys must agree upon any charges for further service with the client, in keeping with the objectives of the LRS and the client’s ability to pay.
- LRS attorneys must keep their professional liability insurance in force during their association with the LRS.
- When a fee from an LRS client amounts to $300 or more, the LRS attorney must remit 10 percent of that fee to the LRS (unless they are dealing with a bankruptcy case).
- LRS attorneys must submit status reports to the LRS within 30 days of referral.
- LRS attorneys who are KBA members must pay the LRS an annual registration fee of $85. Non-KBA members must pay the LRS an annual registration fee of $260.
- LRS attorneys must pay an additional $100 annual registration fee to receive bankruptcy referrals in lieu of paying a percentage of fees on bankruptcy cases to the LRS.
- LRS attorneys must agree to refer any case not accepted by the referred attorney back to the LRS.

Join now and save for the remainder of 2007! Enrollees can join LRS for only $42.50 through Dec. 31, 2007 (an additional $50 fee for those wishing to receive bankruptcy referrals). If you would like more information or would like an application for the program, please contact the Kansas Bar Association at (785) 234-5696, go to www.ksbar.org/LRS/lrsmidyear.pdf to print the application, or www.ksbar.org/LRS/join.shtml to register online.
Agricultural Law Update

Guest Luncheon Speakers:
U.S. Reps. Nancy Boyda and Jerry Moran

Join your colleagues at the Agricultural Law Update luncheon as U.S. Reps. Nancy Boyda and Jerry Moran discuss the 2007 Kansas Farm bill. The luncheon, which is sponsored by the Kansas State University Foundation, will be held from 11:45 a.m. to 1 p.m. on Friday, Sept. 21, in conjunction with the Agricultural Law Update CLE at the Kansas Farm Bureau in Manhattan.

Friday, September 21, 2007
9 a.m. – 3:45 p.m.

Kansas Farm Bureau Offices
2627 KFB Plaza, Manhattan

To register online or for more detailed information, visit http://www.ksbar.org/public/cle.shtml or call KBA headquarters at (785) 234-5696

This program has been approved for 6.0 hours of CLE credit.
How to be an Utter Failure

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

The Bar Journal’s June 2007 edition welcomed some 120 new members to the Kansas bar. These talented, energetic, excited lawyers will get advice from everyone on how to be successful in this new profession. But probably no one will tell them what this column does. It tells them how not to be successful. Yes, here are the tips and tricks for how to be utter failures when it comes to practicing law.

Let’s start with technology. Use the cell phone and Blackberry. A lot. Especially at lunch and dinner with clients, family, or relatives. Play with the Blackberry at sporting events and anything involving your son or daughter, like plays and dance recitals. It sends a nice message to them and everyone around you. Answer your cell phone whenever it rings, no matter what else you are doing at the time. Like using the toilet at KCI airport. You are important, let others know it. Use your computer to be a word processor, not a thought processor. Troll on eBay to get some good deals on used golf clubs.

Next, clothes. Go casual. Flip flops are fine anytime temperatures get warm. Go with the open collar look, and let the chest hair fly. Ties are for the old guys who try cases.

Social habits are important, so get those wrong from the start. Drink a lot around the client. Especially gin and vodka. Start happy hour at 4:30 p.m. Tell off-color jokes. Mess around with your secretary and paralegal. It’s a good team bonding practice. Retention letters are old fashioned. It’s better to “go with the flow.” Try to be a sports agent. No one does that anymore.

You know you need to get business, so let’s get the basics down. Play lots of golf. The length of your drive will impress a lot of other people who, like you, apparently have too much time on their hands. Yellow page ads are the future. Get a nickname, like “The Giant Killer,” the “Hammer,” or “King of Torts,” that will get you an audience with the discipline administrator. Clients are impressed with attorneys who wear large expensive metallic watches. Huge rings are nice too, especially from your high school. Same with expensive cars that have a sticker on the bumper that says “Enterprise Leasing.”

Relations with your fellow bar members. Don’t bother with bar luncheons. The food is bad, and you never see any of your fraternity buddies there. Use the fax, not the phone, to deal with your opponent. When you lose a case, never call up your adversary and congratulate him on a job well done. Use the Lee Turner, not the Gene Balloun, approach to professionalism.

Work habits. Predict outcomes early and often. Tell the client you know the judge even though you don’t. Spend money you don’t have. Interrupt your opponent when he is delivering an argument in court and help him finish his sentences when he calls you about your case. Bill all your time at the end of the month. It’s easier to do summaries at that time. File lots of motions. At depositions never have extra copies of your exhibits for your adversary or the court reporter.

CLE. Pick it up at Las Vegas. There are great networking opportunities there. The marketing motto, “What happens in Vegas, stays in Vegas,” is something to live by when it comes to CLE.

Giving back. Don’t waste time doing any pro bono cases. For that matter, never take a case you can’t win. Other things like donating time to charitable causes will hurt your golf handicap, and that’s a bad thing. It’s really all about you, so be selfish, it’s OK. The guy who said we should practice random acts of kindness probably finished last in his law school class. What does he know?

So there you have it. There are many other tips and tricks, but this column has a word limit! So get your priorities straight and get some tee times! But bring your cell phone — you will need to make some calls on the back nine when others in your foursome are putting!

About the Author

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

By Mike Fischer, University of Kansas School of Law

New York, New Delhi, and North Kansas City; Beijing, Bangalore, and Blue Springs; Los Angeles, London, and Lawrence. What do these all have in common? These are the world’s great cities, all hubs of international business. The relevance to the legal profession? This is an answer that tenured members of the bar know better than I: Where business goes, lawyers follow. Bear with me while I explain.

To guide me in formulating a topic for this article, I was told to reflect on my years in law school and write about anything that struck me as interesting. Initially, international law did not come close to qualifying. I have never taken a course on international law and have never waxed philosophic about an international treaty. I was, however, continually confronted with the fact that the importance of international law and business has never been greater and will likely have an increasing effect on my life, personally and professionally.

My first glimpse into the relevance of the “international aspects” of our world as American attorneys came on the first day of law school. My contracts professor, Judge John Lungstrum, asked us to introduce ourselves, explain how we got to law school, and state our goals for using our law degrees. I only remember one of the student responses, and it was not my own: “Jung-Seob Bae,” he said was his name. “I come from South Korea, and I am here because of the International Lawyers Program. I plan to go back to my country to work on setting up our telecommunications system.” Only later did I realize Bae was referring to a special program KU had developed that attracts students from all over the world to study in the Heartland, but I still was amazed that a person would come to the middle of the United States to study law, knowing the entire time that he planned on returning to a country where the legal system did not share a common framework.

That was the beginning.

I had always planned on pursuing the joint J.D./MBA degree, but when my brother (an undergraduate accounting major at the time) informed me that he was planning on studying abroad in Italy, and that it appeared that I could complete the business portion of my degree in that country as well, I was sold. What better way to celebrate life after my one-L year than by moving to Italy and sipping lattes, I thought to myself. Fortunately, however, I had gotten myself into much more than a year under the Tuscan sun. Not only was I not in Tuscany, but I was also going to have to work to earn that degree. In addition to the normal studies, students were placed in teams that would consult with local businesses to help advise them on some problem and allow us to apply our classroom knowledge to real-world situations. Based on my single year of law school experience, I was assigned to the team that would advise a small tortellini manufacturer on how to enter the North American markets — meaning that I was put in charge of finding, researching, and explaining the applicable Food and Drug Administration, U.S. Department of Agriculture, and customs regulations to our Italian client. This was my first real eye-opener into the relevance of my basic American legal training to the world of international business.

My experiences with the international aspects of our world did not end when I left Italy. Upon returning to the United States, I completed several legal internships that allowed me to deepen my understanding of how international business might shape my career as an attorney. Working for one of the world’s largest companies out of an office in Blue Springs, Mo., no less, I had the opportunity to help negotiate a contract with a Mexican supplier and study the progress of Kansas City’s attempt to become the first “inland customs checkpoint” with the development of the SmartPort initiative. Later, while working for one of Kansas City’s fastest growing companies, I was able to see how business entities had to be structured to qualify for government contracts in Spain and learn Australian legalese over lunch with a lawyer from Sydney. And at both internships I was able to learn from bright attorneys who themselves were learning the increased relevance their American legal training had in an international business context.

I only fully realized how interrelated these experiences were upon reading Thomas Friedman’s best-selling book, “The World is Flat.” Friedman’s basic hypothesis is that as the relative cost of transportation and communications falls, we will find ourselves in an increasingly global world. This increases the value of all programs aimed at broadening our legal horizons. Any chance to open the mind to new ideas, new ways of life, and new ways of law are positive — whether as an immigration attorney or a mergers and acquisitions attorney.

Finally, while I cannot yet predict how this growing international trend might affect me in the next stage of my professional life representing Kansas City-area businesses, I am certain that it will affect me. I do, however, have a clear idea how this trend is going to affect my personal life in the immediate future. Before taking the bar I moved into a beautiful home in Prairie Village, made available to me while its owners travel abroad for a year on business, and after the exam I will be taking a trip of my own to South America — where I am sure to learn something useful. I just hope it has nothing to do with Brazilian border customs or criminal procedure.

About the Author

Mike Fischer is a recent graduate of the joint J.D./MBA program at the University of Kansas. He is looking forward to joining Payne & Jones Chtd. in Overland Park upon returning from his travels.
CHANGING POSITIONS

Jessica M. Agnelly has joined Randy W. James & Associates P.C., Lee’s Summit, Mo.
Alan C. Anderson, Katharine E. Milberger, and Megan A. Palmer have joined Blackwell Sanders LLP, Kansas City, Mo.
James B. Arnett, Lauren F. Dowling, John J. Fogarty III, and Brett C. Randol have joined Polsinelli Shlaton Flanigan Suelthaus P.C., Kansas City, Mo.
Rachel E. Avey has joined Hite Fanning & Honeyman, Wichita.
Rebecca B. Beal has joined Lathrop & Gage L.C., Kansas City, Mo., as an associate. Andrew T. Starr has joined the firm’s Overland Park office as of counsel.
Timothy M. Belsan and Eric M. Pauly have joined Foulston Siefen LLP, Wichita.
Gregory T. Benefiel has joined Reno County District Attorney’s Office, Hutchinson.
Katie M. Black has joined McAnany, Van Cleave & Phillips P.A., Kansas City, Kan., as an associate. Gregory S. Davey, has joined the firm’s Roeland Park offices.
Stephen L. Brave has joined Pistotnik Law Offices, Wichita.
Eliehue Brunson has joined the Kansas Department of Insurance, Topeka.
Chad B. Cook has joined Katz Law Firm LLP, Kansas City, Mo.
Brent N. Coverdale and Courtney A. Hasselberg have joined Seyferth Knittig & Blumenthal LLC, Kansas City, Mo.
Ken W. Dannenberg has joined Martin, Pringle, Oliver, Wallace & Bauer LLP, Wichita.
Richard C. Dearth has been named interim dean at Pittsburg State University College of Business, Pittsburg.
Erica A. Driskell has joined Berkowitz Cook & Gondering, Kansas City, Mo., as an associate.
Pamela S. Fellin has joined Levy & Craig P.C., Kansas City, Mo.
William N. Fleming has joined Treanor Architects, Lawrence, as general counsel and chief financial officer.
Lacy J. Gilmour has joined the Sedgwick County Public Defender’s Office, Wichita.
Joseph G. Herold has joined Account Recovery Specialists Inc., Dodge City.
Jack J. Hobbs has joined the Kansas Department of Labor, Topeka.
Sheila P. Hochhauser has become the new magistrate judge at Riley County’s 21st District Court, Manhattan.

Jacquelyn C. Jovenal has joined Rasmusen, Willis, Dickey & Moore LLC, Kansas City, Mo.
Linda J. Knak has joined Mitchel, Gaston, Riffel & Riffel PLLC, Enid, Okla.
Andrea L. Lockridge has joined Cameron Mutual Insurance Co., Cameron, Mo.
Samuel G. MacRoberts has joined Ensz & Jester P.C., Kansas City, Mo.
Diana L. Miller has joined Rainey & Rainey LLP, Shawnee.
Kari L. Miller has joined Medicalodges Inc., Coffeyville.
LeAnn E. Miller has joined the Kansas Department of Social and Rehabilitation Services, Dodge City.
Michele M. O’Malley has joined Stinson Morrison Hecker LLP, Kansas City, Mo.
Cynthia Dillard Parres has joined Holihan’s Restaurants Inc., Leawood.
Randy C. Simmons has joined Schwan’s Global Supply Chain Inc., Salina.
Anthony M. Singer has joined Woodard, Hernandez, Roth & Day LLC, Wichita.
Michael J. Smith has joined the Kansas Association of Counties, Topeka.
Andrew T. Starr has become Of Counsel with Lathrop & Gage L.C., Overland Park
Robert A. West has joined Haynes Benefits P.C., Lee’s Summit, Mo.
Nicole L. Yarbrough has joined Swiss Reinsurance America Corp., Overland Park.

CHANGING PLACES

Howard E. Bodney has moved his practice to 11108 W. 114th St., Overland Park, KS 66210.

Patrick T. Callaway has moved his practice to 6900 College Blvd., Ste. 870, Overland Park, KS 66211-1536.
Cranmer Law LLC has moved to 11115 Ash St., Leawood, KS 66211.
Diane G. Edmiston has started Edmiston Law Office LLC, 212 N. Market, Ste. 401, Wichita, KS 67202.
Stephen M. Fletcher has started his own firm, located at 11551 Granada Lane, Ste. 100, Leawood, KS 66211.
Graves & Rosenthal P.C. has moved to 1041 New Hampshire St., Lawrence, KS 66044.
Gromowsky Law Firm LLC has moved to 1100 Main St., Ste. 2800, Kansas City, MO 64105.
Terry A. Iles has started his own practice, Law Office of Terry A. Iles, 214 S.W. 6th Ave., Ste. 305, Topeka, KS 66603.
Kerns Law Office has moved to 729 1/2 Massachusetts St., Ste. 213, Lawrence, KS 66044.
Madden & Orsi has moved to R.H. Garvey Building., Ste. 1000, 300 W. Douglas, Wichita, KS 67202.
Richard A. Schultz has moved his practice to 2440 S.W. Camelot Place, Topeka.
Law Office of Carolyn Sue Edwards P.A. and Law Office of Windell G. Snow P.A. have moved to 8100 E. 22nd St, North, Ste. 2100-2, Wichita, KS 67226.
Law Office of Heath A. Stuart has moved to 4707 College Blvd., Ste. 102, Leawood, KS 66211.
John E. Taylor has started his own practice, 11115 Ash St., Leawood, KS 66211.

(Continued on the next page)
Gabrielle M. Thompson has started her own practice, located at P.O. Box 1713, Manhattan, KS 66505.

David J. Trevino has started Trevino Law Office LLC, 1311 Wakarusa Dr., Ste. 2200, Lawrence, KS 66049.

Kenneth R. Van Blaricum has started his own practice, 415 Belmont Road, Pratt, KS 67124.

Williams Law Group LLC has changed its name to Heartland Law Center LLC and moved to 21087 W. 120th St., Olathe, KS 66061.

Zinn Law Firm P.A. has moved to 11115 Ash St., Leawood, KS 66211.

MISCELLANEOUS

Lauren P. Allen, Lee’s Summit, Mo., has been elected to serve a two-year term as the District 22 representative to the Young Lawyers Division of the American Bar Association.

Thomas J. Drees, Hays, and Daniel E. Monnat, Wichita, have been reappointed by Gov. Kathleen Sebelius to serve on the Kansas Sentencing Commission.

Holly A. Dyer, Wichita, was awarded the President’s Award by the Wichita Bar Association.

Hornbaker Altenhofen McLulcy & Alt Chtd., Junction City, has changed to Altenhofen & Alt Chtd.

Hulnick Law Offices P.A., Wichita, has changed its name to Hulnick Stang & Rapp P.A.

Logan & Logan L.C. has changed its name to Logan Logan P.A., Wichita, Kansas Court of Appeals, president-elect; Douglas T. Shima, Fisher Patterson, Sayler & Smith LLP, president; and James W. Parrish, Parrish Hotel Corp., treasurer; and Larry G. Karns, Glenn, Cornish, Hanson & Karns, secretary; and Kenneth R. Van Blaricum, Kansas Bar Association and a Fellow of the Kansas Bar Foundation.

Wallace F. “Rusty” Davis

Wallace F. “Rusty” Davis, 63, El Dorado, died July 24 after a long battle with cancer. He was born April 3, 1944, to Rudy and Meryl Parsons Davis and grew up north of Rock, Kan., on a dairy farm.

He received his B.A. in history from Washburn University in 1967. Davis was admitted to Washburn Law, but enrolled in the U.S. Army in 1969 after his draft deferment ended. When he was discharged in 1971, he returned to Washburn, where he received his law degree in 1973.

In 1973, Davis was an assistant Butler County attorney before being elected county attorney. In 1976, he and Phil Hamm opened the law firm of Davis & Hamm, which would later become Davis & Manley. He was a member of the Kansas Bar Association, the KBA Ethics Grievance Committee, and the Kansas and American trial lawyers associations. Davis was also a member of the American Legion and served on the board of the South Central Mental Health Counseling Center.

Davis is survived by his wife, Elvira Cook, El Dorado; daughter, Toli Rasmussen, Rock; and four grandchildren. He was preceded in death by his parents and son, Brad.

Michael Shaffer Holland

Michael Shaffer Holland, 66, Russell, died June 7. He was born Sept. 27, 1940, in Ellsworth County to Herbert N. and Helen M. He graduated from the University of Kansas with his bachelor’s degree, 1962, and his juris doctorate, 1965.

He served as Russell County attorney from 1969 to 1975. He was a member of the Kansas and Russell bar associations, Federal Bench Bar Committee, Phi Delta Theta Fraternity, and the athletic board of directors at KU; he was also president of the board of directors of the West Central Kansas Association and a Fellow of the Kansas Bar Foundation.

Survivors include his wife, Nancy, of the home; two sons, Michael and Gene, both of Russell; and one granddaughter.

Lewis E. Nugen

Lewis E. Nugen, 87, Wellington, died May 28. He was born April 4, 1920, at Medicine Lodge, the son of William H. and Grace Leota Nugen and was raised in Geuda Springs.

Nugen volunteered for service in the Army Air Force during World War II, where he was a central fire control gunner and weapons expert on a B-29. After his military service, he earned his undergraduate degree at Southwestern College in Winfield and his law degree from Washburn University School of Law. After law school, Nugen moved his family to Wellington, where he began a private practice, was a probate judge, and served as Sumner County attorney for several years.

He was a lifetime member of the Kansas Bar Association and a member of the Wellington Bar Association, Lion’s Club, the American Legion, and the International Order of Odd Fellows.

Nugen was preceded in death by his parents; four brothers; and one son, Leon.

He is survived by his wife, Wilma Jean, of the home; daughter, Linda McCue, Hutchinson; four grandchildren; and three great-grandchildren.
Karen D. Pendland

Karen D. Pendland, 42, Leawood, died June 24 after battling cancer. Originally from Russell, she received her B.S. in social science and pre-law from Kansas State University in 1986. Pendland then went on to the University of Kansas and received her J.D. in 1990.

She worked for Little & Miller Chtd.; Shughart, Thomson & Kilroy P.C. in Kansas City, Mo.; Fox, Stretz & Quinn P.C.; Royal & SunAlliance; and Slattery and Rawson, before making the decision to stay home to focus on her family and health.

Pendland was a member of the Kansas, Missouri, Kansas City Metropolitan, and Johnson County bar associations. She also served as a board member with the Dream Factory.

She was preceded in death by her parents, Edwin and Virginia Rein. She is survived by her husband, Brian; daughter, Konner; and son, Brett.

Editor’s note

## SEPTEMBER

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Kansas Licensure Issues for Corporate Counsel

By Robert T. Schendel, Jack Henry & Associates Inc., Lenexa, Corporate Counsel Section editor

I must admit at the outset that I know I am preaching to the choir here. If you are a member of the Kansas Bar Association and of its Corporate Counsel Section, you are probably a fully licensed attorney admitted to the bar upon written exam under the Supreme Court’s Rule 704 or perhaps admitted after practicing in another state under the reciprocity provisions of Rule 703.

But on the other hand, if you just moved here from another state or have recently hired someone into your law department from another state, it may be useful to review the licensure rules. In Kansas and virtually all other states, the unauthorized practice of law is prohibited by Rule 5.5 of the Model Rules of Professional Conduct. What actually constitutes the “practice of law” is not defined by the rules. Some in-house business lawyers will tell you that they are not officially “practicing” because they never appear in court. While Kansas law on this point is sparse, there are numerous opinions from other jurisdictions that define the “practice of law” broadly, including generally the giving of legal advice, the preparation of contracts and real estate documents, and the facilitation of various transactions. There is no bright line on this issue at the courthouse steps, and if you are doing legal work and have something “legal” in your title, you are likely to be found to be practicing law under Rule 5.5 by the courts or by the disciplinary authority.

Please note that if you are in a supervisory role in your legal department, you have broad responsibility for the practice by your subordinates. Rule 5.1 imposes the responsibility for unauthorized practice by a subordinate on the supervising attorney. You need to be assured that your juniors in your department are appropriately licensed.

Kansas, like many other states, does have a special rule for admission of lawyers who will be performing restricted legal services for a single employer engaged in business other than the practice of law. Under Rule 706, a “special temporary permit” may be granted if the practice will be full time and limited to the business of the employer and all compensation will come from such employer. The lawyer may be admitted under this special rule without taking the Kansas bar exam if he or she has been admitted in another state or the District of Columbia, without any minimum time of practice as might be required under the reciprocity rules.

Rule 706 contains a number of requirements, such as satisfaction of the CLE requirements of the jurisdiction where the applicant was previously licensed, and the applicant must have good moral character. A recent amendment clarified that the applicant must otherwise be fully qualified to take the bar exam (presumably graduation from an accredited law school, etc.) and must never have failed a Kansas bar exam. An extensive application must be prepared for the permit. Although this is called a “temporary permit,” there does not appear to be any specific time limitation. The permit does terminate immediately upon termination of employment unless the lawyer has accepted like employment from another Kansas employer.

The bottom line: Just because we work in-house, we cannot ignore our own license issues or those of our subordinates.

About the Author

Robert T. Schendel is general counsel of Jack Henry & Associates Inc., Lenexa. He grew up in Topeka, attended Rice University in Houston, and then came home to attend law school at the University of Kansas. Schendel spent more than 20 years in private practice with Shughart, Thomson & Kilroy P.C. in Kansas City, Mo., before joining Jack Henry in 2001. His practice in Jack Henry’s Lenexa office includes securities law, mergers and acquisitions, corporate governance, and compliance matters. He is a former chairman of the Business Law Section of the Missouri Bar and the Securities Law Committee of the Kansas City Metropolitan Bar Association.

Editor’s note: This article was first published in the 2007 summer edition of the Corporate Counsel News newsletter, which is published by the KBA Corporate Counsel Section. If you are interested in joining this or any other KBA section, you may register online at www.ksbar.org or call (785) 234-5696.

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For more information, please contact Beth Warrington, committees and sections coordinator, at (785) 234-5696 or bwarrington@ksbar.org.
"No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law." 

I. Introduction

"... [T]hey didn't look right to me at the time." That was the initial thought of a 39-year police detective as he noticed two men on a downtown Cleveland street corner in the afternoon of Halloween, Oct. 31, 1963. The detective's suspicions led him to stop, detain, frisk, and arrest the men. His actions started a chain of legal events that have resulted in a sea of change in Fourth Amendment jurisprudence. Forty-three years later the issue of when a suspicious police officer may interfere with the free travel of pedestrians and drivers in public places remains hotly contested, especially as law enforcement agencies expand their proactive "criminal interdiction" programs. Kansas has certainly not been immune from this debate.

There are four types of police-citizen encounters recognized in Kansas: (1) voluntary or consensual encounters, (2) investigatory stops or temporary nonarrest detentions, (3) public safety stops, and (4) arrests. The most common is the investigatory stop, or Terry stop, requiring that the investigating officer possess reasonable suspicion that the suspect being detained has committed, is committing, or is about to commit a crime.

The purpose of this article is to provide a practical survey of reasonable suspicion law in Kansas. This article will look at the history of investigative detentions upon less than probable cause, Terry v. Ohio and its progeny, and reasonable suspicion today as well as briefly touch on criminal interdiction. The issues relating to "frisk, arrest, and consent law" are outside the scope of this article and will only be touched on where necessary to illuminate the discussion. A word of caution: The author fully admits his bias that courts should, when weighing reasonable suspicion factors, more consistently give due deference to the training and experience of investigating police officers as U.S. Supreme Court precedent requires.

II. A Little History

"The Fourth Amendment does not require a policeman who lacks probable cause to arrest to simply shrug his shoulders and allow a crime to occur or a criminal to escape ... [a] brief stop of a suspicious
individual, in order to determine his identity or to maintain the status quo momentarily while obtaining more information, may be the most reasonable [action] in light of the facts known to the officer at the time."

To know where we have been allows us to better understand where we are. A nonarrest, investigatory detention is a forced, but temporary, deprivation of a suspect’s right to be left alone, which allows a law enforcement officer the opportunity to seek further information upon which to decide whether to arrest or otherwise invoke the criminal justice system.7

The right of proper authorities to stop and question persons in suspicious circumstances has its roots in English practice where it was approved by the courts and the common-law commentators.10 One might argue, however, that the U.S. Constitution requires something different.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized. U.S. Constitution, Amendment IV.

During our first 150 years, it was generally understood in the United States that the Fourth Amendment required government agents to possess probable cause for any search and for any seizure.11 As a practical matter, police detentions based upon less than probable cause (or even no cause) probably happened every day but were not an issue earlier in our history because there was no exclusionary rule, government civil liability, or an interested court system. A more definite recognition by the U.S. Supreme Court of the rights of criminal suspects did not gain traction until the mid-20th century, following the settlement of private property and general employment rights.

By 1939, however, the Uniform Arrest Act had been promulgated and adopted in a few northeastern states, officially authorizing nonarrest detention, not to exceed two hours, of a person “abroad” who an officer had reasonable ground to suspect was committing, had committed, or was about to commit a crime.12 Surprisingly, Chief Justice Earl Warren, a leader in the protection of personal rights,13 had dissented in a 1959 nontraditional arrest case, thereby joining the growing argument that there was a true difference between the seizing of a suspect for investigation purposes and the seizing of a suspect for a custodial arrest.14 By 1960, the authority to stop and detain suspects in nonarrest situations on less than probable cause was well recognized by numerous state laws and lower court decisions.15

Why the changing court landscape in the mid-20th century? “[Terry and nonarrest detentions and frisks] must be understood in the context of the time. When the case was docketed in the U.S. Supreme Court, the country seemed to be coming apart at the seams. Nonviolent resistance to segregation and other Jim Crow practices had stalled; black nationalist voices were advocating that white violence should be met in kind. Urban rioting unsettled the country as had massive protests against the Vietnam War. There was a growing white backlash to civil rights advances. That backlash was often violent.”16 With the baby boomer generation then entering its late teens, violent crime had increased 81 percent between 1965 and 1970.17 Adding jet fuel to the crime control blaze were the Warren Court’s then recent decisions in Mapp v. Ohio18 (exclusionary rule applicable to states) and Miranda v. Arizona19 (required a warning of right to remain silent), popularly viewed as being a pro-criminal decision. “Impeach Earl Warren” signs appeared along the nation’s highways as the country approached the 1968 presidential election.20

In 1967, the U.S. Supreme Court took up three cases, Terry v. Ohio, Sibron v. New York,21 and Peters v. New York,22 all involving nonarrest stop and search situations. These cases came to be known as the Terry Trilogy. The Court generally focused on the searches involved and only backhandedly discussed the issue of the initial police contact (nonarrest detention). Because Terry is the premier case, it will be the focus here.

The facts upon which Terry rests, at least those chosen for use in the decision by the author, Chief Justice Warren,23 are surprisingly few, and some would say weak at best. The sparse facts, however, are just what make the case so notable in reasonable suspicion analysis. Today, when practitioners are weighing whether reasonable suspicion is present in their

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12. Dix, at 861.
17. See id., endnote 79.
23. There are some interesting differences between the facts found by the trial court and those cited in Terry. See Katz at 431.
The majority of the Court recognized that what the Fourth Amendment forbids is not all searches and seizures, but unreasonable searches and seizures.\(^{34}\) Notwithstanding Justice William O. Douglas’ contrary position,\(^{35}\) the Fourth Amendment is not just one long sentence; rather, it contains two distinct clauses.\(^{36}\) The first sets forth the overriding prohibition against unreasonable searches and seizures, and the second requires probable cause for “traditional” arrests and searches. Therefore, where an “officer observes unusual conduct, which leads him to reasonably conclude in light of his experience that criminal activity may be afoot,” the officer may stop and detain the suspect for further investigation.\(^{37}\) The reasonableness of a seizure of a person that is less intrusive than a traditional arrest depends on a balance between the public interest and the individual’s right to personal security free from arbitrary interference by law officers.\(^{38}\)

The U.S. Supreme Court, with its decision in \textit{Terry}, officially created from whole cloth a new level of suspicion to be used in nonarrest police investigations: something more than an officer’s “inchoate and unparticularized suspicion” or “hunch,” but less than probable cause.

In 1970, after the dust of \textit{Terry} had settled, the Kansas Legislature codified the \textit{Terry} principles in K.S.A. 22-2402, which remains in effect today:

(1) Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed, or is about to commit a crime and may demand the name [and] address of such suspect and an explanation of such suspect’s actions.

### III. Reasonable Suspicion Today in Kansas

“Perhaps more important, the Court’s opinion in \textit{Terry} emphasized the special qualifications of an experienced police officer ... it seems to me proper to take into account a police officer’s trained instinctive judgment operating on a multitude of small gestures and actions impossible to reconstruct.”\(^{39}\)

The Fourth Amendment to the U.S. Constitution and Section 15 of the Kansas Constitution Bill of Rights assure each person’s right to be secure in his or her person and property could be exercised by a magistrate in issuing a warrant to seize that same person. \textit{Terry} at 35-36 & n. 3 (Douglas, J. dissenting); \textit{Sibron} at 62.

36. \textit{Sibron} at 62. This is a topic of serious debate amongst judges, law professors, and practitioners. It is interesting that while the U.S. Supreme Court believes reasonableness is the “central inquiry under the Fourth Amendment ...,” they also insist in the same opinion that they “do not retreat from our holdings that the police must, whenever practicable, obtain advance judicial approval of searches and seizures ...”. \textit{Terry} at 19, 20. For a more scholarly argument about the Fourth Amendment being two distinct clauses ... or not, see (Yale Law School professor) Akhil Ree Amar, \textit{Terry and Fourth Amendment First Principles}, 72 St. John’s L. Rev. 1097 (1998) and George C. Thomas III, \textit{Remapping the Criminal Procedure Universe}, 83 Va. L. Rev. 1819 (1997).

37. \textit{Terry} at 30.


under arrest when he or she is physically restrained or submits to the officer’s custody for the purpose of answering for the commission of a crime. 44

The Kansas stop and detain statute justifies a police officer to request a suspect to identify himself or herself. 55 However, a suspect need not answer. 56 Unlike some other states, Kansas has chosen not to make failing to answer a separate criminal offense. The U.S. Supreme Court has recently held that states who wish to punish suspects who fail to identify themselves during a Terry stop do not offend either the Fourth or Fifth amendments. 57 It is, however, obstruction of official duty for a Kansas suspect to falsely identify himself or herself. 58

Temporary investigative detentions require a minimal level of objective justification that is more than an unparticularized suspicion or hunch, but that is considerably less than probable cause, known today as “reasonable suspicion.” 59 Reasonable suspicion must be present at the time of the stop, not before or after. 60 Determining where a case fits onto the continuum from an unparticularized hunch to reasonable suspicion appears to involve more art than science. 61 Actually, articulating what reasonable suspicion means is not really possible. It is a common sense, nontechnical concept, and each case must be decided on its own facts. 62 The principal components involved include the events that occurred prior to the stop and then whether those events, when viewed from the standpoint of an objectively reasonable police officer, amount to a reasonable suspicion. 63

Reasonable suspicion can be established with information that is different in quantity and quality than probable cause and can arise from less reliable information. 64 An officer’s conduct is judged in light of common sense and ordinary human experience, giving deference to a trained and experienced officer’s ability to distinguish between innocent and suspicious circumstances. 65 Since Terry mandates that officers are entitled to draw inferences from the facts in light of their experience, the test is whether a reasonably cautious police officer, based upon the totality of the circumstances, has a reasonable, ar

42. Deskins, 234 Kan. at 531.
54. K.S.A. 22-2204(1).
55. K.S.A. 22-2402(1).
58. Latimer, 9 Kan. App. 2d at 733.
63. Id. at 696.
The determination of reasonableness is based upon a two-part test: (1) whether the officer's stop was justified at its inception, and (2) whether the officer's actions during the detention were reasonably related in scope to the circumstances justifying the initial interference. The state bears the burden of proof by a preponderance of the evidence to show that the seizure was lawful. Again, the test focuses on the objective facts known to the law enforcement officer, not the officer's subjective intentions or motivations.

What is reasonable is based upon the totality of the circumstances and is viewed in terms as understood by those versed in the field of law enforcement. An officer does not need to know that a suspect has committed a crime. Merely pointing to some facts that would raise a reasonable suspicion is enough.

An officer's mistake of fact may still support the reasonable suspicion necessary for a stop. “Because many situations, which confront officers in the course of executing their duties are more or less ambiguous, room must be allowed for some mistakes on their part, but the mistakes must be those of reasonable men, acting on facts leading sensibly to their conclusions of probability.” On the other hand, a mistake of law is not entitled to such latitude and is objectively unreasonable. “We also note the fundamental unfairness of holding citizens to the traditional rule that ignorance of the law is no excuse, while allowing those entrusted to enforce the law to be ignorant of it.”

Continued detention beyond the original reason for the stop requires reasonable suspicion of another crime. In deciding whether a stop is excessive in duration or scope, a court considers whether the police diligently pursued a means of investigation that was likely to confirm or dispel their suspicions quickly, during which time it was necessary to detain the suspect. There are no bright-line time limits to a particular detention.

So long as a detention is not prolonged by questioning not related to the original stop, police may ask suspects about anything. General on-the-scene questioning as to the facts surrounding a crime or other general questioning of citizens in the fact-finding process does not constitute custodial interrogation requiring Miranda warnings.
ued nervousness, evasion; deception or inconsistencies in stories; lack of eye contact; the route of travel; travel to or from a drug source city; smell of alcohol, ether, and marijuana; use of rental cars (especially when used on only one leg of a journey); air fresheners or other odor masking agents; criminal history; signs that a vehicle has been altered; and appearances of a heavy load or false compartments. The author highly recommends an excellent 2002 KBA Journal article by James Brown that discusses in more detail highway stops resulting in federal prosecution.

Following the officer’s testimony, it is improper for a trial court to “pigeonhole” or evaluate in isolation, and then reject some or all of the officer’s observations, believing that a particular observation by itself was readily susceptible to an innocent explanation and therefore entitled to no weight. The U.S. Supreme Court chastised the Ninth U.S. Circuit Court of Appeals for just such a divide-and-conquer approach, holding that their effort sharply departed from the teachings of Terry and its progeny. An officer’s observations, which by themselves may be “quite consistent with innocent travel,” can collectively amount to reasonable suspicion.

The Court’s evaluation is made from the perspective of the reasonable officer, not the reasonable person. Requiring courts to look to the totality of the circumstances allows officers to draw on their own experience and specialized training to make inferences from the cumulative information available to them that might well elude an untrained person.

There is a line of cases prior to Arvizu holding, however, that “some facts must be outrightly dismissed as so innocent or susceptible to varying interpretations as to be innocuous.” In U.S. v. Wood, a panel of the Tenth Circuit reversed a Kansas federal trial court after picking through, and discarding, facts the trial court had found supported a trooper’s reasonable suspicion. The Wood panel then held that the remaining factors did not amount to reasonable suspicion. However, in a very recent case, and in light of Arvizu, a split panel of the Tenth Circuit held, on identical facts as in Wood, and under the totality of the circumstances (not discarding any of the facts as too innocent to be evaluated), that reasonable suspicion was present for a continued detention and dog sniff.

Though a court is required to accept and weigh every factor relied upon by the officer, some factors may well be more probative than others, and trial courts would, of course, be free to judge the credibility of a particular police witness. Appellate courts are to give due weight to the factual inferences drawn by resident trial court judges and local law enforcement officers.

Practitioners will generally see four different reasonable suspicion scenarios: (1) the suspect is stopped, questioned, or ticketed and released; (2) the suspect is stopped, probable cause will be developed, and a search and/or arrest is made; (3) the suspect is stopped, the officer develops reasonable suspicion of a second crime, and the suspect is further detained until that new suspicion is dispelled through questioning or maybe the use of a drug dog; and (4) the suspect is stopped, the officer develops reasonable suspicion of a second crime, and the officer decides to seek consent as a second justification for further investigation. If consent is obtained, the investigation continues under that consent (with the reasonable suspicion justifying the detention).

(continued on next page)
LEGAL ARTICLE: THEY DIDN’T LOOK RIGHT ...

IV. Public Safety Stops

“If we were to insist upon suspicion of activity amounting to a criminal or civil infraction to meet the Terry/Griffin standard, we would be overlooking the police officer’s legitimate role as a public servant to assist those in distress and to maintain and foster public safety.”96

The fourth type of police-citizen encounter is the public safety, or public welfare, stop first recognized in Kansas in 1992.97 Why would suspects and defense counsel care about the legality of public safety stops? When a police officer stops a citizen, who might also be your client, for a public safety issue and there just happens to be a murderer victim in plain view lying in the back seat, the legality of the initial stop becomes of great interest to counsel.

“Local police officers... engage in what, for want of a better term, may be described as community caretaking functions, totally divorced from the detection, investigation, or acquisition of evidence relating to the violation of a criminal statute.”98 When a police officer initiates an encounter with a person for the purpose other than to investigate criminal activity, the governmental interest in effective crime prevention and detection is irrelevant.99 Law enforcement officers have a legitimate role as public servants to assist those in distress and to maintain and foster public safety.100 Some courts believe it a duty of the police to stop persons who present a hazard to others.101 Therefore, a civil or criminal infraction is not always necessary to justify a stop. Safety reasons alone may justify the stop if the safety reasons are based upon specific and articulable facts.102 Where the danger to the public is clear, urgent, and immediate, the equation is weighed in favor of protecting the public and removing the danger.103

Cases recognizing the public safety or community caretaking function have, however, consistently acknowledged that such actions should be scrutinized carefully so the protections of the Fourth Amendment are not emasculated.104 A public safety stop cannot exceed the original justification for the stop.105 The Kansas Court of Appeals has adopted a Montana court’s three-part analysis of such detentions: “First, as long as there are objective, specific, and articulable facts from which an experienced officer would suspect that a citizen is in need of help or is in peril, then that officer has the right to stop and investigate. Second, if the citizen is in need of aid, then the officer may take appropriate action to render assistance or mitigate the peril. Third, once the officer is assured that the citizen is not in peril, or is no longer in need of assistance, or that the peril has been mitigated, then any actions beyond that constitute a seizure implicating... the protections provided by the Fourth Amendment.”106

Therefore, a public safety stop is not for criminal investigative purposes. Without independent reasonable suspicion of a crime, conducting a criminal investigation, such as confirming vehicle ownership and running criminal histories, exceeds the scope of a public safety stop.”107

V. A Note on “Criminal Interdiction”

Simply put, criminal interdiction occurs when a law enforcement officer, trained in heightened awareness, uses all of his or her senses and social skills during routine enforcement actions to better notice indications of criminal behavior or deception. Some refer to this technique as “going beyond just writing a ticket.” It is not just a few rogue officers gathering for a good time to violate the rights of citizens, as a few Kansas trial courts have suggested to the author, but is a nationally recognized, nationally trained law enforcement technique.

The El Paso Intelligence Center (EPIC) was established in 1974 in response to a U.S. Department of Justice study that recommended the creation of a southwest border service center to track and analyze illegal drug movement and immigration violations. Today, EPIC’s focus has been broadened to include all of the United States and the Western Hemisphere where drug and alien movements are directed toward the United States. Staffing at the Drug Enforcement Agency-led center has increased to more than 300 analysts, agents, and support personnel from 15 federal agencies, the Texas Department of Public Safety, and the Texas Air National Guard. A phone call,
fax, or computer inquiry of EPIC by an officer then involved in a traffic stop will result in real-time information from different federal databases. EPIC also has programs dedicated to post-seizure analysis and training for state and local police in the indicators and concealment methods of criminal couriers on the nation's highways.108

Beginning in the early 1980s, as drug seizures increased, state troopers found that highway drug couriers showed similar characteristics, tendencies, and methods. During routine traffic stops, officers began to ask questions and make better observations. Law enforcement agencies started to share information and provide training in what was then proving to be an extremely effective law enforcement tactic.109 The success of the highway interdiction programs in New Mexico and New Jersey eventually convinced the federal government to create Operation Pipeline in 1984, which increased federal funding and programs to state and local law enforcement.110 Criminal interdiction training includes a familiarization in deceptive behavior, nonverbal communication, interview techniques, fraudulent documents, and the current trends in criminal indicators.111 Today, officers use their training to investigate all crimes, not just those related to drug smuggling. With computer access, officers working in criminal interdiction assignments are updated almost daily on the individual findings of other officers in other states who are also making arrests and seizures. More now than ever before, the knowledge and experience of one criminal interdiction officer becomes the knowledge and experience of national law enforcement.

VI. Summary

Terry v. Ohio is the seminal reasonable suspicion case, and a return to the facts of that case is warranted every once in awhile to allow for the re-setting of the legal benchmark to which the state of Kansas is held.

Without making an arrest, a law enforcement officer may stop any person in a public place whom such officer reasonably suspects is committing, has committed, or is about to commit a crime (or that there then exists a serious public safety problem) and may demand ... the suspect's name, address, and an explanation of such suspect's actions. Reasonable suspicion is a minimal level of objective justification that is more than a hunch, but less than probable cause. The test of a reasonable suspicion is through the eyes of an objective, reasonable, trained, and experienced police officer under the totality of the circumstances. Though a court may judge the credibility and demeanor of a police witness, the U.S. Supreme Court has held that the court is required to weigh all of the factors testified to by the officer and the reasonable inferences therefrom, even though a particular factor may appear innocent or innocuous.

Criminal interdiction is a nationally recognized law enforcement technique that trains officers to better observe their surroundings and, thereby, better detect criminal activity. So-

ciety expects the police to do their jobs ever better, while still respecting our country’s legal and ethical standards.

Based upon the old adage, “it takes one to know one,” the author can comfortably assure the legal community that, with few exceptions, Kansas law enforcement officers strive daily to do the right thing.

About the Author

Colin D. Wood, Caldwell, is a staff attorney and forfeiture counsel for the Kansas Highway Patrol (KHP). He is cross-designated as both a special assistant attorney general and a special assistant U.S. attorney. Wood is a retired KBI senior special agent who began his law enforcement career in 1973. He holds bachelor’s and master’s degrees from Wichita State University and is a graduate of Washburn University School of Law. He has served as mayor, sheriff, and local historian, and on numerous boards and committees, of Caldwell. He is a contributing member of Kansas Bar Association, with a previous KBA Journal article on state asset forfeiture law (2001), and he is a current chapter author for the 2006 “Kansas Criminal Law Handbook.”

The author appreciates and acknowledges the research assistance of Cynthia Waskowiak, KHP law clerk and J.D. candidate (2008) at the Washburn School of Law, as well as the writing and style review and comments of Connie DeArmond, assistant U.S. attorney, District of Kansas, Wichita.
I. Introduction

Lawyers who are computer-literate receive a lot of e-communications from other lawyers, often accompanied by one or more form disclaimers, designed (for example) to maintain the attorney-client privilege or to satisfy the Fair Debt Collection Practices Act. Many attorneys have seen (and been puzzled by) a new form disclaimer, which could (cynically) be translated into nonlawyerese: “Even though you have requested and paid for professional tax advice, it will be useless to you if the IRS decides to penalize you for relying on it.”

What could so possess attorneys to undermine their clients’ morale and their own reputations and perhaps livelihoods? In 2005, revisions were made to the regulations governing practice before the Internal Revenue Service (IRS), which appear in Treasury Department Circular No. 230.1 Careful lawyers are (a) trying not to violate these complicated new rules, while simultaneously (b) trying not to allow their law practices to become paralyzed by Circular 230 analysis and anxiety — or overburdened by gratuitous (and likely gratis) legal work.

So much dissatisfaction with the 2005 Circular 230 amendments has been expressed that many thought the Treasury Department would act quickly to fix the perceived problems, but so far little has been done, at least officially. Thus it seems that attorneys for some time to come will have to live with Circular 230 as it stands.

The average lawyer in Kansas needs to know something about these seemingly abstruse regulations because (a) lawyers who are not tax specialists could nonetheless easily find that they are governed by Circular 230, (b) exactly how tax-related communications are affected by the Circular’s rules is not facially apparent, and (c) the penalties for violating the new rules can be harsh (censure, suspension, or disbarment by the IRS, leaving aside malpractice suits and state court discipline).2

This article will state the purposes of the recent amendments; describe who is an IRS “practitioner” governed by the Circular; summarize the general rules on tax return preparation and advice; analyze what written advice is, or is not, required to conform to the imposing new rules on “covered opinions”; briefly discuss what violations of the rules could lead to IRS discipline; note the special rules that govern supervising tax practitioners in professional firms; and attempt to suggest how average Kansas attorneys can avoid violating Circular 230 without undue labor, expense, and trauma.
II. The “Covered Opinion” Requirements: What the Fuss is About

The focus of the 2005 revisions is the “covered opinion,” i.e., written advice concerning tax reduction or avoidance strategies that the IRS thinks are prone to abuse. Circular 230 (more precisely, its § 10.35(c), which contains numerous subparts) sets out in daunting detail what must be included in any “covered opinion,” and the burdensome investigation, research, and analysis a practitioner must perform in formulating such an opinion.

Instead of addressing how to draft a “covered opinion” that satisfies Circular 230, this article advises nontax specialist lawyers how to avoid drafting a “covered opinion” unwittingly (and improperly). For nontax specialists, the bad news is that using a form disclaimer is not necessarily enough to satisfy Circular 230; the good news is that (a) Circular 230’s intimidating new requirements pertain to advice involving “significant federal tax issues,” and (b) a tax issue is “significant” only if the IRS has a reasonable basis for challenging the taxpayer’s position. In practice, this means (in this author’s opinion) that run-of-the-mill legal advice that is consistent with the IRS’ settled position will largely be unaffected by the new rules.

Purposes of the recent amendments

The recent amendments to Circular 230 seem to have two main purposes:

1. To make it harder for taxpayers to claim reliance on professional advice as a defense against tax penalties and thus to deter abusive tax avoidance strategies. To that end, the amendments make it more burdensome for tax professionals to provide written opinions that clients can use in attempting to avoid monetary penalties when their daring attempts to save tax are disallowed.

2. To discourage professionals from actively promoting aggressive tax avoidance strategies, particularly to persons who are not their existing clients.

The amendments as adopted are, however, much more complex and detailed, and far less immediately clear, than this summary of their purposes would suggest.

Who is a “practitioner” before the IRS and, therefore, covered by Circular 230?

Circular 230 in its terms covers only “practitioners,” i.e., attorneys, certified public accountants, enrolled agents, and enrolled actuaries that engage in practice before the IRS. (Circular 230 provides specific definitions of these practitioner categories.) “Practice before the IRS” covers “all matters connected with a presentation to the Internal Revenue Service or any of its officers or employees relating to a taxpayer’s rights, privileges, or liabilities under laws or regulations administered by the Internal Revenue Service,” e.g., “preparing and filing documents, corresponding and communicating with the Internal Revenue Service, and representing a client at conferences, hearings, and meetings.” Thus, making a single telephone call to the IRS on behalf of a client, or helping a client prepare a tax return, could be enough to make a lawyer a “practitioner” and therefore subject to Circular 230’s rules.

§ 10.34 – Tax return preparation and positions; “Realistic possibility” and “not frivolous” standards

Though not included in the recent amendments, § 10.34, governing “standards for advising with respect to tax return positions and for preparing or signing returns,” is pertinent to their intent. Not limited to written advice, § 10.34 states that a practitioner may not advise a client to take a position on a tax return unless (a) the practitioner determines that the position “satisfies the realistic possibility standard” or (b) (1) the position is ‘not frivolous,’ and (2) the practitioner advises the client about the possibility of avoiding accuracy-related penalties through making adequate disclosure of the position to the IRS. Note that, with respect to tax return-related matters, complying with § 10.34 is necessary, but not sufficient, to satisfy other Circular 230 requirements, e.g., those of § 10.35.

The “realistic possibility” standard is satisfied if a reasonable, well-informed practitioner would conclude that the position being discussed or advocated has at least approximately(!) a one in three chance of success on the merits. However, “[t]he possibility that a tax return will not be audited, that an issue will not be raised on audit, or that an issue will be settled may not be taken into account.” The practitioner may not even consider these practical possibilities in deciding how to advise the client.

In addition, “[a] practitioner advising a client to take a position on a tax return, or preparing or signing a tax return as a preparer, must inform the client of the penalties reasonably likely to apply to the client with respect to the position advised, prepared, or reported.” Under § 10.34(c), “[a] practitioner ... generally may rely in good faith without verification upon information furnished by the client.” This rule is

(continued on Page 30)
Judge Wesley Brown: A Profile of Service

By Beth Warrington, KBA committees and sections coordinator
Judge Wesley Brown began his working career at the age of 7 — selling the Saturday Evening Post at one nickle per paper, mowing lawns, and working at a dry goods store — to help his family after his father lost his eyesight and his job. Brown has never stopped working, even now as a federal district judge for the District of Kansas in Wichita at the age of 100.

Brown was born June 22, 1907, in Hutchinson. While attending Hutchinson High School he was involved with theater, debate, Latin, and science and was even an official cheerleader for the school. Brown also had a newspaper route and worked as a gas station attendant at the Ragland Kingsley Motor Co., at a clothing store, and at a drug store soda fountain during high school. After graduation he worked while attending the University of Kansas and the Kansas City School of Law (now the University of Missouri-Kansas City).

After working eight-hour days on the assembly line at Ford Motor Co. unloading 300 pound motors, Brown would ride a street car to the law school to attend evening classes before heading home to the YMCA where he lived. In 1931 during the Great Depression, he was given the task of typing 3,000 pink slips at Ford, including the last one with the name of “Wesley E. Brown.” After Ford, Brown sold insurance and building and loan stock; worked as a secretary for a local attorney, Wendell Cloud; was an insurance adjuster; and even worked a few months as a baggage man at Continental Bus Co.

After graduating law school, Brown moved back to Hutchinson with his first wife, Mary (a fellow law student he married in 1934), to begin his law career. He joined the offices of Williams, Martindell & Carey.

Brown took time off from practice in 1944 to serve as a lieutenant with the U.S. Navy in the Pacific Campaign during World War II. He returned to his practice in 1946 and eventually became a senior partner at the firm, becoming Williams, Martindell, Carey & Brown. During his time at Williams Martindell he was twice-elected Reno County attorney on the platform of “Enforce the Law.”

In 1958, Brown left the firm to become a referee in bankruptcy (equivalent to a bankruptcy judge) for the District of Kansas, where he remained until his appointment to the federal bench by President John F. Kennedy in 1962. From 1971 to 1977 he was chief judge of the district until he stepped down at the age of 70. He then took senior judge status in 1979, but continued to carry on a full assignment.

Since taking the bench, Brown has been subjected to the opinions of 26 Supreme Court justices, including four chief justices; 33 different circuit judges; more than 3,000 federal crimes on the books; and more than 675 pieces of legislation that either conferred exclusive or concurrent federal court jurisdiction. It has been said that he has authored more than 1,000 reported opinions and more than 5,000 unpublished opinions.

Brown said he still believes the ultimate responsibility to see, within the framework of law, that justice is done. Only by extending that responsibility, he said, to everyone that appears in his courtroom does he feel that society can be provided with a reasonable means of resolving disputes.

During his time on the bench, Brown has seen many changes, including the Sentencing Reform Act of 1984. He believes sentencing a defendant is much easier today than it was years ago as the current system has more guidance and direction in allowing judges to arrive at an appropriate sentence.

Brown can recall sleepless nights, pacing the floor as he tried to reach a decision with his discretion. One of his more notable cases included a claim of land owners against gas producers in the large Hugoton Gas fields that produced helium, along with gas, and sold the helium without accounting for it to the royalty owners. Brown awarded some 25,000 royalty owners a total of $250 million.

Judge Deanell Tacha, chief judge of the 10th U.S. Circuit Court of Appeals, said Brown came to the bench at the advent of modern federal civil rights law, followed closely by federal environmental law, and the proliferation of federal criminal law.

He served as a trial judge in many judicial districts and rendered his services on the court of appeals, as well as the 10th Circuit District judge representative on the Judicial Conference of the United States. Brown has also been honored with appointments to serve on national judicial committees by former U.S. Supreme Court Chief Justice Warren E. Berger.

Brown was appointed by Berger to serve as a member of the Temporary Emergency Court of Appeals (TECA) in Washington, D.C., in 1980. TECA, which Congress established in 1971, was granted exclusive jurisdiction to hear appeals from the decisions of district courts in cases arising under the wage and price control program of the Economic and Stabilization Act of 1970. This court was abolished in 1992.

Brown has been an active participant of many organizations, including the Kansas and American bar associations. He served on the KBA Executive Council from 1950 to 1965 and served as president in 1964. He was the Kansas delegate to the Judicial Administration Section of the ABA and a member of the Consumer Bankruptcy Committee of the ABA's Corporate, Banking, and Business Section from 1960 to 1966.

“He certainly shows an incredible work ethic and commitment to the law,” said Linda Parks, KBA president. “He is active not only as a judge, but also in the association, having participated in many bar shows and CLE presentations.”

Parks said that kind of devotion serves as an example not only for lawyers young and old, but also for the public at large.

“We have all benefitted from Judge Brown’s service to the legal community,” she said.

Judge David J. Waxse of the District of Kansas in Kansas City, Kan., recalls presenting a seminar with Brown and other federal judges. Not only did the seminar show Brown’s willingness to participate, but it also showed another side of him.

“At the end of the seminar, Judge Martin played a song about making fun of federal judges,” he said. “Judge Brown started to get overwhelmed by the music.”

Waxse said Brown started moving his hands in time to the music before he finally pushed his chair back and started dancing.

The seminar and Brown’s dance were both recorded. His dancing would eventually lead to a skit during a bar show at the KBA Annual Meeting.

“The setting was a television station putting on a news broadcast, five or six
years ago,” Waxse said. “When they went
to sports, it was announced there was a
new sport: Competitive Federal Judge
Dancing.”
A video was then shown of Waxse wear-
ing a ladies purple gown and then Brown
was shown dancing from the previously re-
corded seminar; it was well received by the
audience.
“Last year we decided to just do a
dance,” Waxse commented. “He had no
problem agreeing to dance with a guy in a
purple gown. He’s willing to have fun.”
Yet despite his willingness to have fun,
Brown is known for running a strict
court. He expects lawyers appearing in
his court to know what they are talk-
ing about, to talk about it in very few
words, and to behave like ladies and
gentlemen.
“He demands excellent representation
and advocacy from all attorneys who ap-
pear before him,” Tacha said. “He is, and
always has been, a model of the good
lawyer, the good judge, and the consum-
mate legal professional from which the
highest standards of ethics, profession-
alism, and civility are not just easily ut-
tered platitudes, but operating principles
from which he never deviates.”
Parks, who has only appeared once
before Brown, said he was informed, de-
liberate, and to the point — having very
little time between the filing of the case
and the time he addressed it.
“Frankly, it was fun to be able to ap-
ppear before a judge with such a fabulous
and wide-reaching reputation,” she said.
“The lawyer from D.C. was very im-
pressed and marveled at the way Judge
Brown handled the matter.”
During his lifetime, Brown has been
on the receiving end of many honors
and awards, including the 1998 KBA
Phil Lewis Medal of Distinction for out-
standing and conspicuous service to the
state and to the nation in the adminis-
tration of justice; Washburn University
Law School Association Honorary Life
Member for exceptional and meritori-
ous service to Washburn Law in 2000;
Franklin G. Theis Lifetime Achievement
Award from the Wichita Bar Associa-
tion in 2000; and the Judicial Council of
the 10th Circuit Lifetime Achievement
Award, which included not only the
10th Circuit but also the 6th, 7th, 9th,
and 11th circuits.
On accepting the 10th Circuit’s award,
he quipped, “I’m pleased to be here, fund-
damentally because I think that mile-
stones are better than gravestones.”
At a dinner for Brown’s 45th anniver-
sary on the federal bench, Waxse recalls
Brown telling a story about moving into
staged living. Brown wanted a place
where he could get meals and not have
to cook all the time.
“He said, ‘They told me it was staged
living, but there was no mortuary on
site,’” Waxse said.
One of the largest milestones in his life
was turning 100 on June 22. Brown cel-
brated by having a rhubarb pie reception
at the courthouse. Tacha presented Brown
with the Judge Wesley Brown American
Inn of Court, the first in Wichita.
“If we focus exclusively on the longev-
ity of Judge Wesley Brown’s service, we
will have failed to capture the real signifi-
cance of this day and of Judge Brown’s
career,” Tacha said. “For it is the sub-
stance of the man and his work that has
had such a dramatic impact on all of us
both professionally and personally.”
Brown takes great joy in helping to
swear in new U.S. citizens. U.S. Supreme
Court Chief Justice John Roberts recog-
nized him for his efforts during a special
video wish.
“You’ve taken particular pleasure in
welcoming new citizens to our coun-
try and you have greeted them with the
promise, in the eyes of the law, where all
races, all nationalities, all creeds, become
one — become Americans,” he said.
A truly special honor was a resolution
introduced by U.S. Rep. Todd Tiahrt, R-
Goddard, on June 25 in the U.S. House
of Representatives to honor Brown on
his 100th birthday (see the full text of
the resolution on the following page).
“I am pleased to offer this resolution
in honor of the judge,” Tiahrt said in a
statement.
Brown set an example of hard work
and dedication to the rule of law, has
been a living example of the American
Dream, and rose from modest means
and succeeded through hard work and
perseverance, Tiahrt said.
“[Brown] is the longest living federal
judge in the district of Kansas, having
served more than 45 years on the district
district bench,” he said.
Brown said he was appointed to serve
“for life, or for good behavior, whichever
I lose first.”
H. RES. 512

Honoring and commending the Honorable Wesley E. Brown, United States District Court Judge for the District of Kansas, for his commitment and dedication to public service, the judicial system, and equal access to justice as he celebrates his 100th birthday.

IN THE HOUSE OF REPRESENTATIVES

June 22, 2007

Mr. TIAHRT submitted the following resolution; which was referred to the Committee on the Judiciary.

RESOLUTION

Honoring and commending the Honorable Wesley E. Brown, United States District Court Judge for the District of Kansas, for his commitment and dedication to public service, the judicial system, and equal access to justice as he celebrates his 100th birthday.

Whereas Wesley E. Brown was born in 1907 in Hutchinson, Kansas, to Julia Elizabeth Wesley Brown and Morrison (Morey) Houston Heady Brown;

Whereas Wesley E. Brown worked his way through law school, taking night classes at the Kansas City School of Law and working during the day on an assembly line at the Ford Motor Company, helping to build Model “A” Fords;

Whereas at the onset of the Great Depression in 1931, Wesley E. Brown was given the task of typing 3,000 “pink slips” at the Ford Motor Company, including the last one in the pile, bearing the name of “Wesley E. Brown”;

Whereas in 1934, Wesley E. Brown became loving husband to Mary Miller Brown, and together they raised two children, Miller Brown and Loy Wiley;

Whereas Wesley E. Brown entered public service in 1935 when he was elected Reno County Attorney for two consecutive terms on the platform of three words: “Enforce the Law”;

Whereas Wesley E. Brown enlisted in the United States Navy at the age of 37 and served in World War II as a lieutenant stationed at Commander Philippines Sea Frontier;

Whereas Wesley E. Brown was engaged in the practice of law for over 25 years, exhibiting the highest standards of professionalism;

Whereas Wesley E. Brown was instrumental in obtaining State legislation and congressional approval for flood control projects in Kansas that greatly benefited the citizens of Kansas;

Whereas in 1958, Wesley E. Brown was appointed as a Referee in Bankruptcy for the United States District Court, and he served in that capacity until 1962;

Whereas Wesley E. Brown was nominated to serve as a United States District Court Judge for the District of Kansas by John F. Kennedy on March 23, 1962, was confirmed by the Senate on April 2, 1962, and took the oath of office for that position on April 12, 1962;

Whereas Wesley E. Brown served as Chief Judge of the District of Kansas from 1972 through 1979;

Whereas in 1979, Wesley E. Brown became a Senior District Judge in the District of Kansas;

Whereas Wesley E. Brown was appointed to the Temporary Emergency Court of Appeals in 1980 by Chief Justice Warren E. Burger;

Whereas in 1994, Wesley E. Brown married Thadene (Sis) Noel Moore Brown and proudly joined the “Browner” family;

Whereas Wesley E. Brown has contributed significantly to his community and to the judiciary through many activities, such as serving as President of the Kansas Bar Association, presiding as Chairman of the Kansas Rhodes Scholar Selection Committee, and serving as Director of the Hutchinson Chamber of Commerce;

Whereas Wesley E. Brown has been the recipient of numerous honors and awards, such as the Phil Lewis Medal of Distinction for Outstanding and Conspicuous Service to the State and to the Nation in the Administration of Justice, the Lifetime Achievement Award from the Wichita Bar Association, and the Judicial Council of the Tenth Circuit Lifetime Achievement Award;

Whereas Wesley E. Brown has set an example of hard work and dedication to the Rule of Law;

Whereas Wesley E. Brown has been a living example of the American Dream, rising from modest means and succeeding through hard work and perseverance;

Whereas Wesley E. Brown is the longest serving Federal judge in the District of Kansas, having served over 45 years on the district bench; and

Whereas Wesley E. Brown continues to actively serve as a Federal judge, and has declared that, “As long as I can do the job, I'll carry on”: Now, therefore, be it

Resolved, That the House of Representatives commends the Honorable Wesley E. Brown, United States District Court Judge for the District of Kansas, for his commitment and dedication to public service, the judicial system, and equal access to justice as he celebrates his 100th birthday.
LEGAL ARTICLE: THE CIRCULAR FILE ...

(Continued from Page 25)

not, however, generally applicable to “covered opinions,” as to which skepticism about information furnished by clients is encouraged.

§ 10.35 – “Requirements for covered opinions”

This section, the one imposing new requirements upon “covered opinions,” is the occasion of the disclaimer epidemic. Luckily, much tax advice does not constitute a “covered opinion.”

Only “written advice” included

First, since no opinion is a “covered opinion” unless it constitutes “written advice,” oral advice is not governed by these requirements.11

Written advice that is exempt from “covered opinion” rules

Some written advice is exempt from the rules for “covered opinions.” Practitioners should remember, however, that these exemptions may be narrower than their names would suggest.

• Unequivocally negative advice. Written advice is exempt from the requirements for “covered opinions” to the extent that it “does not resolve a [f]ederal tax issue in the taxpayer’s favor.[1]” However, the exemption applies only if the negative advice is absolute and unequivocal; if the advice is “favorable to the taxpayer at any confidence level,” the exemption does not apply.15 “It probably won’t work” advice, or even “it almost certainly won’t work” advice, therefore, does not benefit from this exemption.

• Preliminary advice. Written advice is exempt if the practitioner “is reasonably expected to provide subsequent written advice to the client” that complies with the rules.14

• The three “other oversight” exemptions. Advice in these three categories is exempted from the “covered opinion” requirements, apparently because, in these areas, there is already thought to be enough regulation to deter abusive tax advice. However, these exceptions do not apply if the advice concerns a “listed transaction” or “principal purpose of avoidance or evasion” transaction, discussed below.

1. Qualified plan advice. Written advice is exempt if it “concerns the qualifications of a qualified plan.”

2. State or local bond opinions. Also generally exempt are state or local bond opinions.16

3. Securities and Exchange Commission filings. Advice is also generally exempt if it is “included in documents required to be filed with the Securities and Exchange Commission.”17

• Post-return advice that is not for saving tax via future or amended returns. A practitioner’s purely retrospective advice to a client about a tax return that has already been filed is also exempt, but not if “the practitioner knows or has reason to know that the written advice will be relied upon by the taxpayer to take a position on a tax return (including … an amended return that claims tax benefits not reported on a previously filed return) filed after the date on which the advice is provided to the taxpayer[.]”18

• Employee’s tax liability advice to employer. “Written advice provided to an employer by a practitioner in that practitioner’s capacity as an employee of that employer solely for purposes of determining the tax liability of the employer” is exempt.19

III. What “Written Tax Advice” Must Comply with the “Covered Opinion” Rules

Presence of “federal tax issue”

To be a “covered opinion,” the written advice must first concern “one or more [f]ederal tax issues,” i.e. “a question concerning the [f]ederal tax treatment of an item of income, gain, loss, deduction, or credit; the existence or absence of a taxable transfer of property; or the value of property for [f]ederal tax purposes.”20

The three categories of “covered opinions” (and four “significant purpose” subcategories)

“Written advice,” further, only constitutes a “covered opinion” if it deals with one or more “listed transactions,” “principal purpose of avoidance or evasion” matters, or “significant purpose of avoidance or evasion” matters. The “significant purpose” category contains in turn four subcategories: reliance opinions, marketed opinions, opinions subject to conditions of confidentiality, and conditions subject to contractual protection. These categories are not mutually exclusive; for example, an opinion on a “listed transaction” could also be subject to conditions of confidentiality.22

1. “Listed transactions.” This is a type of transaction that the IRS, pursuant to 26 CFR 106011-4(b)(2), has identified by “published guidance” as an abusive tax avoidance transaction.23 “Listed [t]ransactions are the most aggressive category of transactions[].”24 Any transaction that is “similar to” a listed transaction is treated as one.25

11. § 10.35(b)(2)(i).
12. § 10.35(b)(2)(iii)(E).
13. Id. (emphasis added).
17. § 10.35(b)(2)(ii)(B)(3).
18. § 10.35(b)(2)(ii)(C).
19. § 10.35(b)(3)(D).
20. § 10.35(b)(2)(i).
21. § 10.35(b)(3). The term “question” appears to mean any issue whatsoever as to which tax advice is being given, not just an unresolved question of tax law. The fact that Circular 230 distinguishes between “federal tax issues” and “significant federal tax issues” favors this interpretation.
22. § 10.35(b)(2) and its subparts.
23. § 10.35(b)(2)(A). The 26 CFR regulation cited by the Circular contains no substantive information, so it will be necessary to look elsewhere to find the IRS’s “published guidance.” The IRS has a Web page identifying “Listed Abusive Tax Shelters and Transactions” at www.irs.gov/businesses/corporations/article/0, id=120633,00.html. It is unclear how frequently this list, which might be described as the IRS “Most Unwanted List,” is updated or how comprehensive it purports to be.
25. § 10.35(b)(2)(A).
2. “Principal purpose” matters. Another type of “covered opinion” concerns “any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, the principal purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code” (a “principal purpose” matter).26 The “principal purpose” of a partnership, transaction, etc. “is the avoidance or evasion of any tax imposed by the Internal Revenue Code if that purpose exceeds any other purpose.”27 Avoidance or evasion is not the “principal purpose”; however, if the transaction or business entity “has as its purpose the claiming of tax benefits in a manner consistent with the statute and congressional purpose,” even if the entire actual purpose is the avoidance or evasion of federal tax.28 The IRS apparently concedes that the law so clearly permits some tax avoidance or evasion transactions that there is no justification for forcing written advice about them to run the gauntlet of the “covered opinion” rules. Though how the tax professional is to know whether the “statute and congressional purpose” test is satisfied is not stated, another regulation gives some examples of claiming “tax benefits in a manner consistent with the statute and congressional purpose,” e.g., purchasing or holding obligations bearing tax-free interest or establishing a qualified retirement plan.29

Even though federal tax law inhabits a world to which absolute certainty is alien, nonetheless (in this writer’s opinion) it is reasonable to believe that a transaction of a type historically approved by the IRS satisfies the “statute and congressional purpose” test, at least unless the relevant statutes or judicial interpretations have changed, or for some other reason the IRS changes its position. For example, it seems virtually impossible that divorced parents’ allocating the tax benefits pertaining to their children so as to maximize the total tax benefits to both parents (as the Kansas Child Support Guidelines encourage) would be deemed a “principal purpose” transaction.30

With respect to “listed transaction” and “principal purpose” matters, the presence of a tax penalty disclaimer will not exempt the written advice from the stringent requirements for “covered opinions.” Hence, the possible effectiveness of the standard tax penalty disclaimer is limited to some of the “significant purpose” matters.

3. The four “significant purpose” matters. Written advice on “any partnership or other entity, any investment plan or arrangement, or any other plan or arrangement, a significant purpose of which is the avoidance or evasion of any tax imposed by the Internal Revenue Code” will be a “covered opinion” if the written advice constitutes one of the following: a reliance opinion; a marketed opinion; an opinion that is subject to conditions of confidentiality; or an opinion that is subject to contractual protection.31 Though these four categories are grouped together, Circular 230 does not treat them identically, e.g., with respect to the effectiveness of tax penalty disclaimers.

a. “Reliance opinions”

Written advice is a “reliance opinion” “if the advice concludes at a confidence level of at least more likely than not (a greater than 50 percent likelihood) that one or more significant federal tax issues” would be resolved in the taxpayer’s favor.32 Not every “federal tax issue” is “significant.” “[A] federal tax issue is significant if the Internal Revenue Service has a reasonable basis for a successful challenge and its resolution could have a significant impact, whether beneficial or adverse and under any reasonably foreseeable circumstance, on the overall [f]ederal tax treatment of the transaction(s) or matter(s) addressed in the opinion.”33

26. § 10.35(b)(2)(i)(B). While most of the infamous “listed transactions” would appear also to constitute “principal purpose” transactions, the term “avoidance or evasion” seems not to be intended to connote only matters of dubious legality. (Further, the May 2005 Comments to the Circular 230 revisions state that even a “listed transaction” need not have as its principal purpose the avoidance or evasion of federal tax. Found at www.nsacct.org/uploads/files/Circ%202030%20chgs.pdf.)

27. § 10.35(b)(10). The regulations do not address whether the “principal purpose” is to be determined subjectively, i.e., from the client’s— or practitioner’s— actual state of mind, objectively, e.g., from some reasonable practitioner’s or other person’s point of view, or in some other way. Supra note 24 at 27, opting for an “actual state of mind” test, expresses the (perhaps extreme) opinion that, in deciding whether a matter is a “principal purpose” transaction, “[a] practitioner will be required to determine all the possible purposes or motivations behind a transaction and evaluate the relative weight or importance of those purposes from the taxpayer’s perspective.” Likewise, for what it’s worth, the fact that even a “listed transaction” need not, according to the Treasury, be a “principal purpose” matter suggests an “actual state of mind” test.

28. § 10.35(b)(10).

29. The Treasury Department regulations on substantial understate- ment penalties do discuss, in the obviously germane context of “tax shelters,” the terms “principal purpose” and “consistent with the statute and congressional purpose.” After defining “principal purpose” the same way Circular 230 does, these regulations say that “tax shelters” typically “are transactions structured with little or no motive for the realization of economic gain, and transactions that utilize the mismatching of income and deductions, overvalued assets or assets with values subject to substantial uncertainty, certain nonrecourse financing, financing techniques that do not conform to standard commercial business practices, or the mischaracterization of the substance of the transaction.” 26 CFR § 1.6662-4(g)(2)(i)(C) (A transaction may still however be a tax shelter even if “economic substance” is present. Id.). The same regulation gives some examples of claiming “tax benefits in a manner consistent with the statute and congressional purpose.” E.g., purchasing or holding obligations bearing tax-free interest, or establishing a qualified retirement plan.

29. The Treasury’s May 2005 comments on the final revisions of Circular 230, responding to some practitioner concerns about earlier versions, address whether “principal purpose of tax avoidance or evasion” means the same thing in Circular 230 as in the substantial underpayment penalty regulations. (This is a reasonable question, given that “[t]he distinction between a tax reduction purpose that is the principal purpose, as opposed to just a significant purpose, of a transaction is notoriously ambiguous.” Supra note 24 at 27. The Treasury Department carefully responded that the definition of “principal purpose” in Circular 230 was “similar to the definition in 26 CFR 1.6662-4(g)(2)(i),” but that “a transaction can be a listed transaction or can have a significant purpose of tax avoidance even if it lacks the principal purpose of tax avoidance.” Found at www.nsacct.org/uploads/files/Circ%202030%20chgs.pdf. It appears that the Treasury Department wanted the reach of Circular 230 not to be limited by the description of a “tax shelter” in the substantial underpayment regulations.


31. § 10.35(b)(2)(i)(c)(1)-(4) (emphasis added).

32. § 10.35(b)(4)(i) (emphasis added).

33. § 10.35(b)(3) (emphasis added). (Significant [f]ederal tax issues would of course include those issues involved in “listed transactions” and “principal purpose” matters, but these are separately governed by the “covered opinion” rules.)
Circular 230 does not define a “reasonable basis” for a successful challenge. Unlike “principal purpose” matters, “reliance opinions” admitted do not expressly exclude transactions that satisfy the “consistent with the statute and congressional purpose” test. Nonetheless, the “significant [f]ederal tax issues” element of the definition of “reliance opinions” seems to mean about the same thing: that is, there are presumably no “significant federal tax issues” in a transaction that is “consistent with the statute and congressional purpose.” If this reading is correct, then the tricky task of distinguishing a “principal purpose” matter from a “significant purpose” matter may be far less important than commentators have feared. Again, it seems probable that there is no “significant [f]ederal tax issue” if the tax advice is congruent with the IRS’ settled position, unless there is some reason to believe that position is becoming unsettled.

A practitioner can generally exempt a “reliance opinion” from the “covered opinion” rules, if the practitioner prominently discloses in the written advice that it was not intended or written by the practitioner to be used, and that it cannot be used by the taxpayer, for the purpose of avoiding penalties that may be imposed on the taxpayer. It is this provision that has led to the proliferation of disclaimers.

b. “Marketed opinions”

Written advice is a “marketed opinion” if it is to be used by someone other than the practitioner “in promoting, marketing, or recommending a partnership or other entity, investment plan, or arrangement to one or more taxpayer(s).” By its terms, the definition is broad enough to cover any opinion that is to be used by a client or third party to promote any business deal or investment, or indeed any written tax advice that a client wishes to use to persuade a third party to enter into any ordinary two-party business transaction.

If no “listed transaction” or “principal purpose” matter is involved and a special three-part disclaimer is used, what would otherwise constitute a “marketed opinion” is “not treated as a marketed opinion” and is thereby exempted from the requirements of “covered opinions.” Besides (a) using “not to be used for avoiding tax penalties” language, this special disclaimer must (b) state that the advice was written to support the promotion or marketing of the transactions or matters addressed in the written advice and (c) state that the taxpayer should seek advice from an independent tax adviser based on the taxpayer’s particular circumstances. (Thus, in order not to be treated as a “marketed opinion,” the written advice must paradoxically say that it is intended for marketing/promotion.)

If “marketed opinion” advice also involves a “listed transaction” or “principal purpose” matter, giving the “marketed opinion” disclaimer fails to remove the advice from “marketed opinion” treatment.

c. “Conditions of confidentiality” and “contractual protection” advice

An opinion is subject to “conditions of confidentiality” if the tax practitioner imposes confidentiality upon the one or more of the recipients of the tax advice and “the limitation on disclosure protects the confidentiality of that practitioner’s tax strategies.” Only conditions intended to protect what the tax adviser deems to be (in essence) his or her trade secrets appear to be covered.

An opinion is subject to “contractual protection” if the practitioner’s fee is contingent upon the success of the tax advice, or if the practitioner offers the client something like a money-back guarantee if the advice proves unsuccessful.

The rules on “conditions of confidentiality” and “contractual protection” advice appear to be directed largely against publicly promoted tax avoidance schemes. In practice, tax advice that falls within either of these two categories seems likely to fall under both of them. Further, these two categories are narrowly defined. Most Kansas attorneys seem unlikely to be involved in such transactions. Including a tax penalty disclaimer will not exempt “conditions of confidentiality” or “contractual protection” written advice from the “covered opinion” rules.

“Prominent disclosure” of disclaimers

For inoculating what would otherwise be a “covered opinion,” a disclaimer is “prominently disclosed” if it is readily apparent to a reader of the written advice.” This is to be de-
termined from the particular facts, “including, but not limited to, the sophistication of the taxpayer and the length of the written advice.” At a minimum, to be “prominently disclosed” the disclaimer “must be set forth in a separate section (and not in a footnote), in a typeface that is the same size or larger than the typeface of any discussion of the facts or law in the written advice.”

Required contents of “covered opinions”

It is enough for present purposes to say that “covered opinions” are required to be comprehensive, formal, and highly explicit; that under some circumstances they must disclose any fee or referral arrangements with third parties; that they must be based on due diligence inquiries by the practitioner; that in preparing them the practitioner is encouraged to be suspicious of the taxpayer-client; and that they will be time-consuming to prepare and expensive for clients. Any attorney who is thinking of preparing a “covered opinion” should review Circular 230 itself with great care.

§§ 10.52 and 10.36 — What violations are grounds for discipline; responsibilities of supervising tax practitioners

Given the intimidating character of some of the Circular 230 revisions, it is pleasant to find that not just any violation of the rules discussed above is grounds for discipline. Of course, “willfully violating” any of the mandatory rules is punishable. Also grounds for discipline is “[r]ecklessly or through gross incompetence” violating §§ 10.35, 10.37 (governing written tax advice that does not constitute a “covered opinion”), or (briefly discussed below) 10.36. “[R]eckless conduct is a highly unreasonable omission or misrepresentation involving an extreme departure from the standards of ordinary care that a practitioner should observe under the circumstances.” “Gross incompetence includes conduct that reflects gross indifference, preparation, which is grossly inadequate under the circumstances, and a consistent failure to perform obligations to the client.”

Thus, a single unintentional and nonaggravated violation of the rules is not grounds for IRS discipline. Section 10.36 imposes additional rules on practitioners who have or share the principal authority and responsibility for overseeing a firm’s practice of providing advice on federal tax issues; they can be disciplined by the IRS if there is within the firm a “pattern or practice” of violating § 10.35, and the overseeing practitioner, through “willfullness, recklessness, or gross incompetence,” fails to prevent or correct it.

IV. Summary

1. Form disclaimers are not a Circular 230 panacea; in the majority of “covered opinion” categories they are ineffective to exempt the written advice from the “covered opinion” rules.

2. With two minor exceptions — (a) oral or written “Maybe the IRS won’t catch you!” advice, and (b) “less likely than not” written advice that otherwise fits the definition of a “marketed opinion” and covers a “listed transaction” or “principal purpose” matter — Circular 230 does not seem to prohibit the giving of any particular legal advice. It does impose burdensome requirements concerning the preparation and form of “covered opinions.”

3. In this writer’s opinion, the Circular 230 amendments were not intended to affect routine, nonaggressive tax advice, though it is possible that, as drafted, the amendments may technically cover some such advice. Even in “covered opinions,” only facts and law that are relevant to “significant federal tax issues” must be stated and discussed; rehashing elementary, noncontroversial matters is not required. Further, the rules provide for discipline only for intentional violations or for recklessness or incompetence; nothing indicates that the IRS wishes to set traps for careful, ethical practitioners.

4. Subject to the general exemptions from the “covered opinion” rules, a practitioner who delivers written advice on any “listed transaction” may do so only by satisfying the requirements for a “covered opinion.” The same is generally true for written advice on any “principal purpose” transaction, and any written advice that is subject to “conditions of confidentiality” or “contractual protection.” Note, however, that a “principal purpose” matter is exempt from the “covered opinion” requirements if it is consistent with “the statute and Congressional purpose.”

5. A special disclaimer can take what would otherwise be a “marketed opinion” out of “covered opinion” status. Because “marketed opinions” are defined very broadly, it would be a good idea (at least until it becomes clearer how the Circular 230 amendments will be interpreted) to include the triple “marketed opinion” disclaimer in any written advice that a client may want to use to sell a third party on a proposed business deal; however, this disclaimer will not remove the advice from “covered opinion” status if it concerns a “listed transaction” or “principal purpose” matter.

6. Otherwise, a tax practitioner who desires to avoid the burdens involved in rendering a “covered opinion,” but nonetheless wishes to give written advice on a federal tax question:

(a) will need to be confident

1. that a significant purpose of the transaction in question is not federal tax avoidance or evasion, and that the IRS will agree with the practitioner; or

2. that the transaction involves no significant federal tax issues (i.e. that the IRS has no reasonable basis for challenging the proposed tax-saving transaction) and that the IRS will agree with the practitioner; or

(b) will need to include a disclaimer that complies with Circular 230.

It is also this writer’s opinion that assisting a client in taking an aggressive (i.e. legally dubious) tax-saving position is a legally and ethically serious matter; in advising such a client, it is (even apart from Circular 230) a very good idea for...
an attorney to engage in the diligent preparation and careful analysis required for “covered opinions”; and that any client who could potentially benefit from such advice has both the financial ability and the moral obligation to pay for it in proportion to the attorney’s labor and risk.

About the Author

Casey R. Law was raised in McPherson and graduated from McPherson High School and McPherson College. He received his J.D. from the University of Kansas School of Law in 1982. He practiced six years in Great Bend with Turner & Boisseau Chtd. and in 1989 returned to McPherson to practice with Bremyer & Wise LLC.
The Kiowa, et al. v. The City of Topeka

Annexation and Improvement Districts

Facts: In December 2003, the City Council of Topeka announced its annexation of approximately 10 acres at the intersection of 29th and Urish Road in Topeka. The property is within both the Mission Township and the Sherwood Improvement District. Dillon owns part of the annexed property. The city relied upon consents filed by Dillon's predecessors approximately eight years earlier in order to eliminate the prerequisites to annexation, i.e., the city's resolution of annexation, public notice, and public hearing. Dillon did not consent and contested the annexation. The district court ruled that K.S.A. 12-520(c) was constitutional in barring annexation of improvement districts, but that Dillon's predecessors had previously been informally admonished for violating KRPCs 1.3 (diligence), and 1.4 (communication) in connection with his handling of an estate. Respondent had previously been informally admonished for violating KRPCs 1.3 and 3.2 (expediting litigation) in a different complaint also involving a probate matter.

Held: The Court reviewed the files of the disciplinary administrator's office and found that the surrender should be accepted and the respondent disbarred.

Condemnation, Real Property, Reversionary Interest, and Eminent Domain

Facts: In 1947, the Wilks transferred land by general warranty deed to U.S.D. 214. The deed contained a reversionary clause, providing that the transferred property was to be used for school purposes only and, if abandoned at any time, would revert back to the owners. Many improvements were made on the real property, and it was used for school purposes. Today, the school district no longer conducts classroom activities on the property, but it continues to maintain all facilities in working order. The Youngs acquired the Wilks property in 1997, making them the successor in interest to the grantors in the original warranty deed. The school district filed a condemnation proceeding. The Youngs filed an independent action to enjoin the eminent domain proceedings. The Youngs obtained
an injunction against the school district to stop the school district's eminent domain action against the Youngs' reversionary interest. The district court held that the school district's eminent domain action impaired prior contractual obligations and, thus, violated the Contracts Clause of the U.S. Constitution.

ISSUES: (1) Condemnation, (2) real property, (3) reversionary interest, and (4) eminent domain

HELD: Court held under the facts of this case, the Legislature has deemed that it is in the public interest for the school district to protect its public investment against a reversionary interest by authorizing condemnation of the reversionary interest. The requirement that a taking be made for a "public purpose" is fulfilled by the two conditions set forth in K.S.A. 72-8212a(b). Court concluded that the provisions of K.S.A. 72-8212a are not unconstitutional and that a public purpose exists for the condemnation action filed by the school district.

STATUTES: K.S.A. 26-504 and K.S.A. 72-8212a(b)

CONDEMNATION, RENTAL VALUE, AND ADMISSION OF EVIDENCE
THE CITY OF MISSION HILLS V. SEXTON
JOHNSON DISTRICT COURT – AFFIRMED
NO. 97,151 – JUNE 22, 2007

FACTS: The city of Mission Hills began rehabilitation of its sanitary sewer system so that it could ultimately be transferred to the Johnson County waste system. As part of the project, the city condemned two temporary easements on the Sexton's property so that the existing pipe and an existing manhole could be replaced. In condemnation proceedings, two experts testified regarding the valuation of the Sextons' property. The Sextons' expert estimated damages after the taking were $480,000. The city's expert estimated damages at $10,900. A jury ultimately returned a verdict of $10,900 as just compensation to the Sextons for the city's taking of the two easements on their property.

ISSUES: (1) Condemnation, (2) rental value, and (3) admission of evidence

HELD: Court held that although the valuation testimony of the city's expert was presented in its entirety on direct examination without objection by the Sexton's attorney, the expert did undergo vigorous cross-examination regarding his valuation methodology. The weight of the two experts' opinions was left in the hands of the jury.

The court did not abuse its discretion by allowing testimony pertaining to the city's limited use of the two temporary easements was improper, but the Court found the error was harmless. Court also held the trial court did not abuse its discretion by allowing testimony pertaining to portions of the amended petition concerning the Sextons' use and access to the easements actually described a "conditional taking." Court held there was no reversible error concerning the trial court's erroneous admission of evidence and arguments regarding matters previously ruled inadmissible, namely whether the Sextons' expert had assigned $100,000 in damages for lack of access or whether the evidence concerning the number of landowners impacted by the project implied to the jury that the city already had to pay a large number of residents for easements. Court found no error in the city's attorney making a "speaking objection."

STATUTES: K.S.A. 26-505, -506, -513(a)-(e) and K.S.A. 60-259(a), -261, -401(b), -407(f)

EMINENT DOMAIN
MILLER V. GLACIER DEVELOPMENT CO. LLC
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 94,999 – JULY 13, 2007

FACTS: Glacier Development Co. owned real property in Kansas City, Kan., that was subject to Kansas Department of Transportation’s (KDOT) efforts to reconstruct Interstate 35 at the Kansas-Missouri state line. KDOT filed eminent domain proceedings against Glacier. Expert evidence of the fair market value of the property ranged from $463,000 to $4.6 million. The jury ultimately determined the fair market value of the property was $800,000.

ISSUE: Eminent domain

HELD: Court held it was error for the district court to allow admission of the amount Glacier paid in purchasing the property. However, Court concluded the error was not reversible because the jury's verdict was within the range of values offered by the experts. Court held KDOT failed to demonstrate any prejudice from the district court's denial of its motion for a continuance. Court held the district court's exclusion of the value engineering study was not erroneous because it was conducted to evaluate the engineering alternatives rather than determine the value of Glacier's property. Court found no abuse of discretion in the district court's decision allowing KDOT to take a videotaped deposition to preserve testimony. Court also found no error in the district court's order of trial proceedings, the presentation of evidence, and arguments to the jury.

CONCURRENCE: J. Luckert concurred in the outcome, but held the amount Glacier paid to purchase the property was admissible evidence.

DISSENT: J. Beier dissented in part finding the admission of the amount Glacier paid to purchase the property was unduly prejudicial and reversible error.

STATUTES: K.S.A. 26-504, -507, -508, -513(e); K.S.A. 60-202, -216(e), -226(b)(1), -240(b), -241, -261, -401(b), -407(f); and K.S.A. 79-1437c

FOSTER CARE, ADOPTION, AND MONTHLY SUBSIDY
NINEMIRE V. KANSAS DEPARTMENT OF SOCIAL AND REHABILITATION SERVICES
JOHNSON DISTRICT COURT – AFFIRMED
NO. 96,461 – JULY 13, 2007

FACTS: Kansas Department of Social and Rehabilitation Services (SRS) paid the Ninemires $540 per month as foster care payment for C.L.N., an infant. Later, SRS and the Ninemires entered into an adoption assistance agreement, which provided that the Ninemires would receive Title XIX Medicaid insurance card for C.L.N. and a nonrecurring payment of $550 to cover adoption expenses. The parties also agreed that C.L.N. was eligible for a monthly adoption assistance payment but set the amount subsidy at $0 because there were no special needs identified to justify a monthly subsidy.

A hearing officer affirmed the monthly subsidy amount of $0. The State Appeals Committee and the district court affirmed the hearing officer's decision.

ISSUES: (1) Foster care, (2) adoption, and (3) monthly subsidy

HELD: Court stated the federal guidelines require SRS to consider the circumstances of the adopting parents and the child's needs. Court found the Ninemires submitted two budgets for consideration. Neither budget demonstrated a deficiency due to the adoption of C.L.N. In addition, the Ninemires agreed that C.L.N. was eligible for a monthly adoption assistance payment but set the amount subsidy at $0 because there were no special needs identified to justify a monthly subsidy.

A hearing officer affirmed the monthly subsidy amount of $0. The State Appeals Committee and the district court affirmed the hearing officer's decision.

STATUTES: K.S.A. 26-505, -506, -513(a)-(e) and K.S.A. 60-259(a), -261, -401(b), -407(f)
Children and Family Services Manual emphasizes the child's special needs, here the SRS considered all of the circumstances including the Ninemires' capacity for incorporating C.L.N. into their household. Thus, SRS's decision to deny the Ninemires' request for an increase in the monthly subsidy comports with both the federal and the state guidelines.

STATUTES: K.S.A. 20-3018; K.S.A. 38-321; and K.S.A. 77-603, -621

HABEAS CORPUS
ABASOLO V. STATE
SEDGWICK DISTRICT COURT – REVERS ED
COURT OF APPEALS – AFFIRMED
NO. 93,788 – JUNE 22, 2007

FACTS: Abasolo convicted on plea to drug charges and placed on probation with underlying consecutive 36- and 16-month prison terms. When probation revoked, district court judge pronounced 36-month sentence, but stated 52 months in journal entry. District court denied Abasolo’s 1507 motion to correct the journal entry, and said he mistated the prison term during the revocation proceeding. Court of Appeals reversed, 36 Kan. App. 2d 802 (2006). Supreme Court granted state’s petition for review.

ISSUE: Sentencing pronouncement and journal entry

HELD: Practical effect of court’s pronouncement of sentence at revocation proceeding was to run the prison terms concurrently. District court had authority to impose a reduced sentence and was not required under statutes or case law to set forth reasons for a sentence that does not depart from presumed sentence under the guidelines. A sentence is effective upon pronouncement from the bench, regardless of the court’s intent at time of pronouncement. Court of Appeals correctly found no merit to state’s argument that this rule does not contemplate sentencing at a probation revocation where there is an underlying original sentence. District court erred in denying Abasolo’s motion to correct the journal entry for the revocation proceeding to reflect a 36-month sentence. Holding in State v. Winters, 25 Kan. App. 2d 386, rev. denied, 266 Kan. 1116 (1998), is disapproved.

STATUTES: K.S.A. 2006 Supp. 21-4705(c)(1), 22-3405(1), -3716(b), -3426(d), -3426(e); and K.S.A. 21-4608(a), 22-3716, 60-1507

HABEAS CORPUS AND INEFFECTIVE ASSISTANCE OF APPELLATE COUNSEL
KARGUS V. STATE
JOHNSON DISTRICT COURT – REVERS ED AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – AFFIRMED
NO. 92,432 – JULY 27, 2007

FACTS: Kargus was convicted of aggravated kidnapping and rape. His conviction was affirmed by the Court of Appeals. No petition for review of that decision was filed. Kargus filed a pro se K.S.A. 60-1507 motion arguing ineffective assistance of appellate counsel for failure to file a petition for review. The district court found that Kargus did not have a constitutional right to counsel for the purpose of pursuing a discretionary review in the Kansas Supreme Court and summarily denied the 1507 motion. The Court of Appeals reversed finding that Kargus received ineffective assistance of counsel and that the district court should have conducted an evidentiary hearing on the matter and to determine whether an untimely petition for review should be permitted.

ISSUE: Ineffective assistance of appellate counsel

HELD: Court held that an indigent defendant who has been convicted of a felony and has appealed directly from that conviction has a statutory right to effective assistance of counsel when filing a petition for review in the direct appeal. Court stated that when a claim is made that counsel was ineffective for failing to file a petition for review following a negative outcome in the direct appeal from a felony conviction and sentence, the standards or test to be applied are: (1) If a defendant has requested that a petition for review be filed and the petition was not filed, the appellate attorney provided ineffective assistance; (2) a defendant who explicitly tells his or her attorney not to file a petition for review cannot later complain that, by following instructions, counsel performed deficiently; and (3) in other situations, such as where counsel has not consulted with a defendant or a defendant’s directions are unclear, the defendant must show (a) counsel’s representation fell below an objective standard of reasonableness, considering all the circumstances, and (b) the defendant would have directed the filing of the petition for review. A defendant need not show that a different result would have been achieved but for counsel’s performance. Court held in this case that if Kargus can establish ineffective assistance of counsel in the failure to file a petition of review in his direct appeal, the appropriate remedy is to allow the filing of a petition for review out of time.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-3424(f), -3602(e), -4503(a), (b), -4505(a), -4522; and K.S.A. 60-1507

HABEAS CORPUS, INEFFECTIVE ASSISTANCE OF COUNSEL, PETITION FOR REVIEW, AND DEFECTIVE COMPLAINT
SWENSON V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED FOR FURTHER PROCEEDINGS
COURT OF APPEALS – AFFIRMED IN PART AND REVERSED IN PART
NO. 94,207 – JULY 27, 2007

FACTS: Swenson filed a K.S.A. 60-1507 motion after his conviction by a jury of attempted first-degree murder. Appellate counsel failed to timely file a petition for review with the Supreme Court after the Court of Appeals had affirmed Swenson’s convictions. The district court denied Swenson’s motion in its entirety. The Court of Appeals affirmed in part, reversed in part, and remanded with directions. Swenson argues the Court of Appeals erred in holding that he was not denied effective assistance of counsel when counsel (1) filed a petition for review one day after the deadline for such a filing, (2) did not call Swenson’s mother as a witness at trial, and (3) did not file a motion to arrest judgment because of a defective complaint.

ISSUES: (1) Habeas corpus, (2) ineffective assistance of counsel, (3) petition for review, and (4) defective complaint

HELD: Court reversed the Court of Appeals and the district court on the first two issues, determining that the filing of a petition for review one day out-of-time is ineffective assistance of counsel on appeal and that the Court of Appeals incorrectly concluded that Swenson was required to submit an affidavit from his mother in order to sustain his burden of establishing that there is a substantial question requiring an evidentiary hearing on a K.S.A. 60-1507 motion. Court affirmed the Court of Appeals’ and the district court’s conclusions that trial counsel was not ineffective for failing to file a motion to arrest judgment, because the complaint was not defective.

STATUTES: K.S.A. 21-3401; K.S.A. 22-3502; and K.S.A. 60-1507

HOME RULE AND MUNICIPAL COURT FEES
FARHA V. CITY OF WICHITA
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 95,445 – JULY 13, 2007

FACTS: Plaintiff class representative Michael Farha pursued this action as a result of his October 2001 conviction in Wichita municipal court of inattentive driving. He was fined $100 and assessed court costs of $73. He paid both and did not appeal. Three months
ISSUES: (1) Home rule and (2) municipal court fees

HELD: Court held the city of Wichita was not prevented from exercising its home rule authority to charter out of K.S.A. 12-4112 of the Kansas Code of Procedure for Municipal Courts. Court held the city's charter ordinance cited the specific legislative provision from which the city would be exempt, conveyed that a locally generated and regulated system of municipal court costs would be imposed in place of the legislative provision, and told any interested party exactly where further particulars could be found. Any citizen wishing to challenge the plan to assess municipal court costs under this exercise of home rule authority was, as a result, fully armed with the information necessary to do battle. Court rejected the plaintiffs' argument that the legislative amendments to K.S.A. 12-4112 made after passage of the city's ordinance implicitly repealed the ordinance. Court held the city properly employed a charter ordinance to exercise its home rule authority to opt out of a state statute. It had the constitutional right to reject state regulation in favor of local control. It was not required to duplicate its charter ordinance effort when it adopted an ordinary ordinance to provide further particulars on the courts costs previously authorized by charter. The Legislature had spoken. The city made a different choice. Those who could be assessed municipal court costs got all of the procedural protections to which they were entitled.

STATUTES: K.S.A. 12-137, -3101, -4101, -4112, -4511, -4602; and K.S.A. 73-407, -422, -423, -433, -444

REAL PROPERTY AND RESTRICTIVE COVENANTS

JEREMIAH 29:11 INC. V. SEIFERT
MONTGOMERY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 94,224 – JULY 13, 2007

FACTS: The Jordans sold property to the Dallingas in 1978 for $25,000. The warranty deed had a restrictive covenant that no commercial enterprise was allowed on the property. The Jordans signed the warranty deed, but the Dallingas did not. Several transfers of the property occurred. Jeremiah 29:11 purchased the property in question by general warranty deed in 1999. The Seiferts now own the property surrounding the property in question as previously owned by the Jordans. The case started as a boundary line dispute, but then turned into one to enforce the restrictive covenant against Jeremiah's use of the property as a leadership-training center for pastors and leaders of nonprofit corporations and a Boy Scouts camp. Jeremiah claimed the restrictive covenant was void and unenforceable because the Dallingas had not signed the warranty deed in 1978. The trial court agreed with Jeremiah and held the 1978 transfer was a mutual or indentured deed requiring both signatures and since the Dallingas did not sign the deed, then they did not accept the restrictive covenants. The Court of Appeals reversed and remanded finding all deeds were properly filed and that Jeremiah had constructive notice of the restrictive covenants. The Court of Appeals remanded for the trial court's consideration of the effect of the "Release of Covenants" signed by the Jordans to release the restrictive covenant after Jeremiah had purchased the property.

ISSUES: (1) Real property and (2) restrictive covenants

HELD: Court stated the controlling issue in this case is whether there was constructive notice of the restrictive covenant on commercial enterprises. Court held that the absence of the Dallingas' signatures on the 1978 deed made it insufficient to provide the necessary constructive notice to subsequent purchaser Jeremiah. Notice was not merely key; it was indispensable. Persons who take real property without actual or constructive notice of restrictive covenants will not be bound by them.

STATUTES: K.S.A. 33-106; and K.S.A. 58-2003, -2203, -2221, -2222, -2223

SMOKING ORDINANCES
STEFFES V. CITY OF LAWRENCE
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 96,838 – JUNE 22, 2007

FACTS: The city of Lawrence passed an ordinance regulating smoking with the stated purpose to improve and protect the public's health by eliminating smoking in public places of employment, to guarantee the right of nonsmokers to breathe smoke-free air, and to recognize that the need to breathe smoke-free air shall have priority over the choice to smoke. Steffes was cited for violations of the ordinance, and he challenged the constitutionality of the ordinance.

ISSUE: Smoking ordinances

HELD: Court stated that the Legislature has invited cities to regulate smoking in public places to the maximum extent possible. Court stated that "stringent regulation" can certainly include "absolute prohibition." Court held that the district court did not err in concluding that the city's ordinance regulating smoking is not preempted by state law and is not unconstitutionally vague and that Steffes was not entitled to injunctive relief.

STATUTES: K.S.A. 20-3018(b) and K.S.A. 21-4010, -4013

STATUTORY DEFINITION OF PUBLIC POLICY
IN RE APPEAL OF DIRECTOR OF PROPERTY VALUATION
BOARD OF TAX APPEALS – AFFIRMED
NO. 96,986 – JULY 13, 2007

FACTS: Third in trilogy of cases involving ad valorem property taxation of underground stored natural gas in Kansas. Board of Tax Appeals (BOTA) found 44 non-Kansas municipal and public utilities and natural gas marketing companies (taxpayers) who contracted for gas storage or deferred delivery with interstate natural gas pipeline companies were not public utilities under K.S.A. 2006 Supp. 79-5a01; thus, their natural gas was exempt from property taxation as merchants' inventory under K.S.A. 79-201m. Director of Property Valuation Division (PVD) of the Kansas Department of Revenue appealed.

ISSUE: Statutory definition of public utility

HELD: Rules of statutory construction are restated and applied. The "and" in K.S.A. 2006 Supp. 79-5101, which requires a taxable entity to "own, control, and hold for resale," is construed in the conjunctive and not as "or" as requested by PVD. Based on language of Federal Energy Regulatory Commission-approved tariffs, stipulations of parties, and testimony before BOTA, BOTA's finding that taxpayers are not public utilities as defined by K.S.A. 2006 Supp. 79-5a01 is supported by substantial competent evidence. BOTA correctly concluded the taxpayers' natural gas inventory was exempt from ad valorem taxation.

STATUTES: K.S.A. 2006 Supp. 79-5a01, -5a01(a), -5a01(1)-(7); K.S.A. 20-3017, 74-2348, 79-201m, -213, -5a01; and K.S.A. 1978 Supp. 44-511(a)(4) (A) and (B)

WORKERS' COMPENSATION AND PHYSICIAN'S OPINION OF COMPENSABLE WAGE LOSS
GRAHAM V. DOKTER TRUCKING GROUP ET AL.
WORKERS' COMPENSATION BOARD – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 95,650 – JULY 13, 2007

FACTS: Graham was an over-the-road truck driver who fell from a truck trailer and sustained injuries to his neck, right arm, and right...
Criminal

**STATE V. CARTER**

**SALINE DISTRICT COURT – AFFIRMED**

**NO. 95,335 – JUNE 8, 2007**

**MODIFIED OPINION FILED JUNE 22, 2007**

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, (5) giving Allen-type instruction, and (6) instructing jury on order of their deliberation. 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) instruction on order of deliberation, (7) prosecutorial misconduct, and (8) 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.

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.

**STATE V. GAUDINA**

**JOHNSON DISTRICT COURT – AFFIRMED**

**COURT OF APPEALS – AFFIRMED**

**NO. 95,854 – JUNE 22, 2007**

FACTS: Gaudina was convicted in May 1996 of aggravated burglary and aggravated battery. He received an upward departure prison sentence of 150 months’ incarceration with 36 months’ post-release supervision. Gaudina obtained a reversal of his sentence based on Apprendi and was resentenced to a controlling term of 77 months’ imprisonment and 36 months’ post-release supervision. Gaudina claimed he had already served 32 months beyond his sentence and that he should receive credit toward his post-release supervision. The district court refused to credit the post-release supervision period with the excess time Gaudina spent in custody.

ISSUE: Credit for excess time served

HELD: Court held that a defendant who is resentenced after serving time in prison is not entitled to credit against a post-release supervision period for the amount of time served in prison in excess of the prison time imposed at the resentencing. Court held there is no double jeopardy violation in requiring a defendant who had been resentenced to a shorter time of imprisonment than already served to serve the full extent of a post-release supervision period imposed at the time of resentencing without allowing a credit against the post-release supervision period. Court stated that when a defendant is resentenced and required to serve the entire period of post-release supervision without having that period credited for time served in prison in excess of the prison term imposed at resentencing, there is no equal protection violation because the defendant is being treated the same as all other offenders subject to such resentencing and whose post-release supervision periods are not subject to credit for time served in prison under the Kansas Sentencing Guidelines Act.

**STATE V. HARRIS**

**WYANDOTTE DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, REMANDED**

**NO. 95,723 – JULY 13, 2007**

FACTS: Harris convicted of three counts of capital murder, one count of attempted first-degree murder, and one count of criminal possession of firearm. He claimed on appeal that: (1) capital murder counts were multiplicitous, (2) district court’s judgment should be amended to reflect Harris’ innocence in the murder of one victim, and (3) his confession should have been suppressed as involuntary.

ISSUES: (1) Multiplicity under K.S.A. 2-3439(a)(6), (2) nunc pro tunc judgment, and (3) voluntariness of confession

HELD: Case presents classic “unit of prosecution” multiplicity issue. The allowable unit of prosecution for capital murder under that statute is the intentional and premeditated killing of more than one person. To avoid double jeopardy and federal and state constitutions

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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.

No error in instruction to jury on order of their deliberation.

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

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

**STATUTES:** K.S.A. 2006 Supp. 22-3414(3); and K.S.A. 21-3401(a), -3402(a), -3403(b), 22-3401, 24-3403(b), 60-261, -401(b)
in this case, Harris could be convicted and punished for only one count of capital murder under that statute. Convictions on two of the capital murder counts are vacated. Because there is a valid capital conviction supported by the evidence on the remaining count, no retrial is required.

Nunc pro tunc journal entry to be entered to clarify that Harris had no role in the killing of a fourth victim.

Confession was properly admitted. Under totality of circumstances, no evidence of a benefit promised by the interrogating officer. Harris’s free and independent will was not overborne.

STATE V. MILLER
DUGLAS DISTRICT COURT – AFFIRMED
NO. 95,815 – JULY 27, 2007

FACTS: Miller called 911 in July 2004 stating that he had found his wife, Mary, dead in her bed. Police determined that Mary had been dead for some time. Miller’s daughter told officers that she had awaken to hear her mother scream during the night and had heard Miller’s voice calming her down. Miller denied that it was his voice. There were no signs of struggle in the Miller house or bedroom and no signs of a forced entry. Miller testified in his own defense. The coroner testified that Mary died from asphyxiation by strangulation. The state portrayed Miller living a double life as a family man active in his church and his children’s school, but also as extremely unhappy in his marriage, obsessed with pornography, involved in an extramarital sexual relationship for four years, and active on a number of Internet dating sites. A jury convicted Miller of first-degree murder.

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

HELD: Court concluded that the district court did not abuse its discretion in admitting six personal photographs taken from Miller’s computer showing Miller and his extramarital lover seminude in suggestive positions, as relevant under the state’s theory of the case to the issues of motive and intent. Court stated that although the district court erred in admitting two commercial pornographic photographs taken from Miller’s computer, this error was harmless and did not require reversal. Court held that the evidence that Miller and Cuthbertson, a member of his church who acted as his “caregiver” after Mary’s death, became romantically involved after Mary’s murder and after the extramarital affair had ended, was relevant in order to further demonstrate the state’s “double life” theory. Court found relevant a “Dream of Roses” letter Miller had written stating that his extramarital affair was over and that he was beginning a relationship with Cuthbertson. Court rejected Miller’s argument that the trial court erroneously allowed his extramarital lover to testify regarding statements made by Cuthbertson to her to the effect that Cuthbertson was in love with Miller. Cuthbertson testified at trial, but the content of these statements was first offered in the context of the extramarital lover’s testimony. Court held Cuthbertson’s statements were not testimonial and did not implicate Miller’s rights under the Confrontation Clause and were admissible subject to the hearsay statutes. Court stated that Cuthbertson was also subject to recall. Court found no prosecutorial misconduct in the prosecutor’s closing argument when he referred to Miller as “the killer” six times in his discussion of premeditation. Court stated the prosecutor’s comments were not motivated by ill will and that the evidence against Miller was so overwhelming as to render the comments harmless beyond a reasonable doubt. Court found no cumulative error that would necessitate reversal.

CONCURRENCE: Justice Luckert concurred in the opinion in all respects except the conclusion that is was error to admit the two commercial pornographic photographs. Justice Luckert stated that the evidence was probative and the prejudice, if any, arose because of the nature of Miller’s activities, which the photographs accurately demonstrated to the jury. Chief Justice McFarland and Justice Nuss joined Justice Luckert’s concurring opinion.
CONCURRING: Justice Johnson concurred in the opinion, but clarified his position on the two commercial pornographic photographs. Justice Johnson concluded these two photographs had no probative value in the murder prosecution and did not tend to prove a motive for Miller to kill his wife. Justice Beier joined Justice Johnson's concurring opinion.

STATUTE: K.S.A. 60-401, -404, -407, -445, -460(a)

STATE V. MITCHELL
JOHNSON DISTRICT COURT – AFFIRMED
NO. 96,807 – JUNE 22, 2007

FACTS: Mitchell was convicted in 1988 of aggravated kidnapping, aggravated burglary, rape, and two counts of aggravated sodomy. He was sentenced to a minimum of life plus 60 years and a maximum of two life sentences plus 60 years as a habitual offender with three prior felonies. In 2004, Mitchell filed a motion to correct an illegal sentence. The district court found Mitchell’s sentence was not an illegal sentence and that his motion was also time-barred.

ISSUES: (1) Illegal sentence, (2) time limitation, and (3) constitutional challenges

HELD: Court held Mitchell’s consecutive sentences conformed to the applicable statutory provisions and did not fall within the definition of an illegal sentence. Court stated the district court correctly concluded that it lacked jurisdiction to address Mitchell’s statutory claims. Court also held Mitchell’s motion to correct an illegal sentence was not the proper procedure for challenging the constitutionality of the habitual offender statutes. Court held Mitchell’s motion cannot be construed as a 60-1507 motion because it failed to demonstrate any exceptional circumstances to support a successive motion or any manifest injustice to circumvent the one-year time limitation on such motions.

STATUTES: K.S.A. 20-3018(c); K.S.A. 21-4504(b), -4608; K.S.A. 22-3504; and K.S.A. 60-1507

STATE V. NOAH
ROOKS DISTRICT COURT – REVERSED
AND REMANDED FOR A NEW TRIAL
COURT OF APPEALS – AFFIRMED
NO. 91,353 – JULY 27, 2007

FACTS: When T.C. was 11 years old, she told her brother that Noah, a longtime family friend, had been touching her “private spot.” T.C.’s brother informed T.C.’s mother and stepfather. T.C.’s mother asked T.C. about Noah, and T.C. told her that Noah had been putting his hands down her pants and his finger in her vagina. T.C.’s mother reported the allegations of abuse. Although T.C. testified for a short time at the trial, she was unable to continue her testimony and an expert concluded that T.C. would not be able to testify without “freezing up.” The district court ruled that T.C. was unavailable and her statements to others were admissible. A jury convicted Noah of four counts of aggravated indecent liberties. The Court of Appeals reversed Noah’s convictions and remanded the matter for a new trial, concluding that the admission of T.C.’s hearsay testimony violated Noah’s Sixth Amendment right to confrontation.

ISSUES: (1) Hearsay testimony and (2) child victim

HELD: Court held that the Confrontation Clause under the Sixth Amendment to the U.S. Constitution guarantees an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Court held under the facts of this case that Noah was not given the opportunity to cross-examine the unavailable declarant. Court also found the error was not harmless stating that the harmless error analysis of the erroneous admission of hearsay in violation of a defendant’s right to confrontation is dependent on the following factors: the importance of the witness’ testimony in the prosecution’s case, whether the testimony was cumulative, the presence or absence of evidence corroborating or contradicting the testimony of the witness on material points, the extent of cross-examination otherwise permitted, and the overall strength of the prosecution’s case.

CONCURRING: Justice Davis concurred in the majority’s decision, but disagreed that Noah’s convictions must be reversed based upon its conclusion that the defendant did not have meaningful opportunity to confront the witness against him. Justice Davis held Noah’s convictions must be reversed because they were based upon testimonial hearsay that was never subject to cross-examination before the finder of fact.

STATUTES: K.S.A. 21-3504(a)(3)(A), -3508(a)(2); and K.S.A. 60-460(dd)

STATE V. VOYLES
KINGMAN DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 92,030 – JUNE 22, 2007

FACTS: On charges involving two girls in different locations, Voyles convicted on multiple counts of aggravated indecent solicitation of a child and aggravated criminal sodomy. On appeal he claimed in part that state failed to elect which of several acts it relied upon to constitute each count, and court failed to give jury an unanimity instruction. Court of Appeals affirmed, 34 Kan. App. 2d 110 (2005). Voyles’ petition for review granted.

ISSUES: (1) Unanimity instruction, (2) constitutionality of aggravated criminal sodomy statute, and (3) Board of Indigent Defense Services reimbursement order

HELD: Problematic formula in State v. Hill, 271 Kan. 929 (2001), for failure to “elect or instruct” in multiple acts case, is abandoned. When jury unanimity is at issue, threshold issue is whether an appellate court is presented with multiple acts case. Second question is whether error was committed. If state has not informed jury which act to rely upon in its deliberations, or trial court did not instruct jury to agree on the specific criminal act, then third question is whether that error is harmless. Ultimate general test for harmlessness when unanimity instruction was not requested or given is “clearly erroneous” as in K.S.A. 2006 Supp. 22-3414(3). If defendant presented no general denial, the failure to instruct jury to agree on a specific criminal act warrants reversal under clearly erroneous standard. If defendant made a general denial, error may be reversible when trial is not merely a credibility contest between the victim and defendant, e.g., due to inconsistent testimony from the victim. Applied to present case, court is firmly convinced there is a real possibility the jury would have returned a different verdict if unanimity instruction had been given. Reversed and remanded for new trial.

Aggravated criminal sodomy statute, K.S.A. 21-3506(a), is constitutional. Rational basis test for analyzing Voyles’ due process claim is satisfied because statute implicates legitimate goal of protecting the well-being of children from adult sexual predators.

If Voyles is convicted upon retrial, compliance with State v. Robinson, 281 Kan. 538 (2006), is required.

CONCURRING (McFarland, C.J., joined by Davis and Luckett, J.J.): Agrees with result but voices grave concerns with what is said and unsaid in majority opinion. Majority’s holding as stated in Syllabus 5 and the opinion is unduly restrictive and will have the effect of rendering reversible all cases involving multiple acts in which trial court failed to give unanimity instruction sua sponte. Also, exceptions have to be made for generic evidence child abuse cases for well-stated reasons in Justice Beier, Lurching Toward the Light: Alternative Means and Multiple Acts Cases in Kansas, 44 Washburn L.J. 275 (2005).

STATUTES: K.S.A. 2006 Supp. 22-3414(3), -4513; and K.S.A. 20-3018(b), 21-3506, -3506(a)(1), 3506(a), -3511, 60-261

THE JOURNAL OF THE KANSAS BAR ASSOCIATION

SEPTEMBER 2007 – 41
STATE V. WADE  
CHAUTAUQUA DISTRICT COURT  
REVERSED AND REMANDED  
NO. 95,648 – JULY 13, 2007

FACTS: Wade appealed his convictions for first-degree felony murder and aggravated burglary. He claimed: (1) the aggravated burglary instruction burdened the scope of charges against him in violation of due process, (2) district court abused its discretion by not giving a multiple-counts instruction, (3) district court erred in admitting irrelevant and unduly prejudicial sympathy evidence, and (4) cumulative error denied a fair trial.

ISSUES: (1) Aggravated burglary instruction, (2) multiple counts instruction, (3) sympathy evidence, and (4) cumulative error

HELD: State cured defective initial charging document by naming first-degree premeditated murder as the intended felony upon which the aggravated burglary charge was predicated, but aggravated burglary instruction erroneously included aggravated assault as an alternative ulterior intended felony. This error adversely affected Wade's ability to prepare for and present his defense, and prejudiced critical decision to waive Fifth Amendment right and testify. Conviction for aggravated burglary is reversed and remanded for new trial. Under facts, which included jury confusion regarding premeditation, Wade is entitled to new trial as well on first-degree murder charge. Error to not give multiple counts instruction. Instruction to be given upon retrial.

No abuse of discretion to permit testimony of emergency medical technician who responded to shooting and accompanied victim who died during transport to hospital. Cumulative error claim not addressed.

STATUTES: K.S.A. 2006 Supp. 22-3201(e), -3414(3); and K.S.A. 21-3108(1)(c), -3108(4)(c)

STATE V. WHITE  
BUTLER DISTRICT COURT – AFFIRMED  
NO. 95,621 – JUNE 22, 2007

FACTS: White's conviction for first-degree murder shooting of son-in-law in a Wal-Mart store was reversed and remanded for new trial. State v. White, 279 Kan. 326 (2005). White again convicted. On appeal he claimed prosecutorial misconduct by intentionally withholding evidence that state's rebuttal witness (Dr. Grinage) had changed his opinion prior to trial as to whether White suffered from mental disease or defect that negated his ability to form intent and by inappropriately attacking defense psychologist (Dr. Hutchinson). He also claimed district court erred in allowing narrative response from officer on sequence of events, in instructing jury on issue of mental disease or defect, and in failing to instruct jury on lesser included offense of voluntary manslaughter.

ISSUES: (1) Prosecutorial misconduct, (2) admission of narrative response, (3) jury instruction on mental disease of defect, and (4) jury instruction on lesser included offense

HELD: Prosecutor’s remarks to Hutchinson did not constitute misconduct, and sufficient evidence supports district court’s finding that state had not intentionally sandbagged the defense. No explanation, however, why prosecutor failed to notify court and counsel of Grinage’s change of opinion prior to that witness testifying. Strong disapproval of this misconduct is stated. Under facts, error was harmless. No abuse of discretion to deny motion for mistrial. No objection at trial to officer's testimony, and no merit to claim of prosecutorial misconduct in eliciting the testimony. District court properly instructed jury on issue of mental disease or defect. No error in taking verdict in part directly from K.S.A. 22-3221.

District court did not err in failing to instruct jury on lesser included offense of voluntary manslaughter. State v. Ordway, 261 Kan. 776 (1997), and State v. Baacke, 261 Kan. 422 (1997), are distinguished. As is State v. Hernandez, 253 Kan. 705 (1993), which did not specifically concern imperfect defense of self or others as a basis for an instruction on voluntary manslaughter. Here, there was evidence to explain why White might have believed his grandson had been or would be abused, but no evidence that White believed grandson was in imminent danger when White killed son-in-law.

STATUTES: K.S.A. 2006 Supp. 22-3414(3); and K.S.A. 21-3211, -3403, -3403(b), 22-3219, -3221, -3423(1), -3601(b)(1), 60-261

Forensic Document Examiner  
Plum Creek Forensic Laboratory, LLC  
Darla McCarley-Celentano  
P.O. Box 21  
Castle Rock, CO 80104-0021  
Phone/Fax: (303) 663-2450  
Cell Phone: (303) 229-8002  
E-mail: rdacelentano@att.net  
Specialization: Identification and/or elimination through examination and comparison of handwriting, typewriters, photocopiers, printing processes, paper and inks. Forensic document apprenticeship with the Colorado Bureau of Investigation.
Civil

CORPORATIONS
KIEKEL V. FOUR COLONIES HOMES ASS'N
JOHNSON DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
NO. 95,306 – JULY 13, 2007

FACTS: Fifty-one percent of members in Four Colonies Homes Association, a not-for-profit corporation, approved 2004 amendment, which placed renting restrictions on lot owners. When Four Colonies attempted to enforce bylaw amendment, Kiekels sought declaratory judgment that bylaw was unenforceable. Four Colonies filed counterclaim asking court to enjoin Kiekels from renting their properties. District court denied counterclaim for injunctive relief, found the 2004 bylaw amendment was reasonable and enforceable, and found it did not conflict with Association’s Declaration of Covenants, Conditions, and Restrictions.

ISSUES: (1) Declaratory judgment and (2) injunctive relief

HELD: Legal background on creation of homeowners associations is discussed. District court erred in finding Four Colonies could impose rental restrictions through amendment to bylaws. Declaration in this case intended any property use restrictions, including restrictions on renting, to be achieved through amendment to the declaration, which required approval by 75 percent of the members. Bylaw amendment from 2004 is void and unenforceable.

No error in denying Four Colonies’ request for injunctive relief. Kiekels renting of their property did not violate the declaration’s commercial use restriction or noxious activity restriction.

STATUTES: None

IN RE MARRIAGE OF REINHARDT
RUSSELL DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 97,114 – JULY 6, 2007

FACTS: Dilene and Scott Reinhardt were divorced in 1999. A divorce decree was filed in July 2000, with a later property settlement agreement filed by the trial court in December 2000. In March 2005, Dilene filed a motion to set aside or amend the final divorce judgment, claiming that Scott “committed fraud” by failing to reveal his ownership interest in the property he owned in Russell County at the time of the divorce. The grantors of the property retained a life estate in the property. Scott contended that he did not obtain a fee simple interest in the real estate until December 2001, and he did not pay taxes on the property until December 2003. The trial court granted Dilene’s motion without citing a subsection of K.S.A. 60-260(b).

ISSUES: (1) Divorce, (2) settlement agreement, and (3) fraud

HELD: Court stated that in Dilene’s original motion to set aside the judgment, she overtly accused Scott of committing fraud by failing to reveal his ownership interest in the real property. Court held that regardless of whether Dilene’s contention is meritorious, the claim would place this action squarely within K.S.A. 60-260(b)(3) and its one-year time bar. Moreover, Scott did not receive his fee simple ownership interest until after the divorce was granted. Court concluded that the trial court did not have jurisdiction to reopen the divorce, redistribute property, or distribute Scott’s real property. Court reversed and remanded to the trial court with instructions to reinstate the December 2000 property settlement agreement.

STATUTE: K.S.A. 60-260(b)

ESTATES AND ANTENUPTIAL AGREEMENTS
ESTATE OF DRAPER V. BANK OF AMERICA ET AL.
JOHNSON DISTRICT COURT – REVERSED
NO. 96,060 – JULY 27, 2007

FACTS: In April 1967, Clark Draper and Ethel Catlin executed an antenuptial agreement in contemplation of their marriage. Clark had three children from an earlier marriage; Ethel had no children. The antenuptial agreement stated that both Clark and Ethel had “substantial property and property rights” and if Ethel survived Clark, Ethel was required to maintain a valid will devising to each of Clark’s sons not less than one-fourth of her estate. Clark executed a will leaving a substantial portion of his estate to Ethel should she survive him. Clark died testate in January 1977 and Ethel received her share of his estate. In 1977 Ethel executed an irrevocable trust, whose successor trustee is UMB Bank, giving her the income and corpus during her lifetime; upon her death, it would be distributed to First Christian Church, American Cancer Society, Olathe Medical Center, Mary Moeller, and Janis Murphy. In April 1982, Ethel executed a will dividing her estate equally between Clark’s three sons. That same day she executed another irrevocable trust with the same beneficiaries as the 1977 trust. Ethel died in 2002 leaving an estate of less than $10,000, while the total assets in the two irrevocable trusts exceeded $1 million. Ethel’s will was admitted to probate in January 2003. In December 2003, Clark’s son, Gerald, executor, filed a petition on behalf of the estate against UMB and Bank of America claiming that Ethel exceeded the authority given her in the antenuptial agreement when she transferred the bulk of her assets to irrevocable trusts. On summary judgment, the district court concluded that the antenuptial agreement contained an implied duty, which prevented Ethel from divesting Clark’s sons of their share of the trust assets and that the agreement created a life estate for Ethel in the marital property. The district court ordered the trust property to be placed in a constructive trust for Clark’s sons.

ISSUES: (1) Estates and (2) antenuptial agreements

HELD: Court held the antenuptial agreement was unambiguous. It contained no restrictions on Ethel gifting or inter vivos transfers of property, and there was nothing in the language of the agreement that restricted Ethel from creating irrevocable trusts. Court stated the district court must abide by the clear language of the agreement, and there is no suggestion that Ethel’s ownership rights were limited to a life estate. Court stated that all three of Clark’s sons not less than one-fourth of her estate. Clark executed a will leaving a substantial portion of his estate to Ethel should she survive him. Clark died testate in January 1977 and Ethel received her share of his estate. In 1977 Ethel executed an irrevocable trust, whose successor trustee is UMB Bank, giving her the income and corpus during her lifetime; upon her death, it would be distributed to First Christian Church, American Cancer Society, Olathe Medical Center, Mary Moeller, and Janis Murphy. In April 1982, Ethel executed a will dividing her estate equally between Clark’s three sons. That same day she executed another irrevocable trust with the same beneficiaries as the 1977 trust. Ethel died in 2002 leaving an estate of less than $10,000, while the total assets in the two irrevocable trusts exceeded $1 million. Ethel’s will was admitted to probate in January 2003. In December 2003, Clark’s son, Gerald, executor, filed a petition on behalf of the estate against UMB and Bank of America claiming that Ethel exceeded the authority given her in the antenuptial agreement when she transferred the bulk of her assets to irrevocable trusts. On summary judgment, the district court concluded that the antenuptial agreement contained an implied duty, which prevented Ethel from divesting Clark’s sons of their share of the trust assets and that the agreement created a life estate for Ethel in the marital property. The district court ordered the trust property to be placed in a constructive trust for Clark’s sons.

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ISSUES: (1) Estates and (2) antenuptial agreements
FACTS: Albert H. Nelson III and Markeyta Nelson Dewey (appellants) are the adult children of Margaret Nelson and Albert H. Nelson II (Albert). Under the terms of a 1975 property settlement agreement with Margaret, Albert agreed to execute and maintain a will creating a testamentary trust funded with his entire estate and to provide in the trust for the appellants to receive one-half of the trust income. Albert died on June 19, 2003. No petition for administration of Albert’s estate was filed in Kansas. Nearly two years after Albert died, the appellants sued Doris Nelson (Albert’s second wife); Oklahoma State University Foundation, an Oklahoma nonprofit corporation; Wichita State University, a Kansas nonprofit corporation; and Intrust Bank N.A., as successor trustee of the Albert H. Nelson Jr. Irrevocable Trust (appellees). Although the appellants sought a variety of remedies, their argument was that Albert had breached the terms of the property settlement agreement by conveying various assets to third parties for inadequate consideration. The trial court granted summary judgment in favor of the appellees, determining that the appellants should have brought their claim against Albert’s estate and they failed to do so within a timely manner.

 ISSUES: (1) Estates and (2) nonclaim statute

 HELD: Court held that under K.S.A. 59-2239, if no petition for administration of a decedent’s estate is filed, an action against the decedent’s estate must be brought by starting administration of decedent’s estate within six months of the decedent’s death. Because the appellants failed to file a petition for administration of Albert’s estate within six months of Albert’s death and to assert their demand against his estate, their claims are barred by K.S.A. 59-2239. Court determined that the trial court properly granted summary judgment in favor of the appellees.

 STATUTES: K.S.A. 59-2239 and K.S.A. 60-209(b), -216

LICENSES

WHITE V. KANSAS DEPT. OF REVENUE
ELLIS DISTRICT COURT – AFFIRMED
NO. 94,418 – SEPTEMBER 15, 2006
PUBLISHED VERSION FILED JULY 13, 2007

FACTS: Consolidated appeal by persons whose driver’s licenses were suspended following DUI arrests. Kansas Department of Revenue (KDR) affirmed the suspensions after hearings held in each case. Each filed a petition for judicial review as provided by Kansas Act for Judicial Review and Civil Enforcement of Agency Actions (KJRA), providing their attorney’s name and address instead of their individual mailing addresses. District court granted KDR’s motion to dismiss the petitions as failing to include information required by K.S.A. 77-614(b). Each filed notice of appeal, arguing district court’s application of strict compliance standard as to pleading requirements in K.S.A. 77-614(b) failed to consider that their agency appeal was subject to de novo review. Alternatively, they argued their petitions satisfied the statutory pleading requirements.

 ISSUES: (1) Strict compliance standard and (2) compliance with K.S.A. 77-614(b)

 HELD: Strict compliance with specific pleading requirements in K.S.A. 77-614(b) is required by Pittsburg State University v. Kansas Bd. of Regents, 30 Kan. App. 2d 37 (2001). The KJRA does not exempt a trial de novo judicial review from the specific pleading requirements of K.S.A. 77-614(b). A petition for judicial review of a driver’s license suspension order under K.S.A. 8-259(a) that fails to include the petitioner’s mailing address does not comply with pleading requirements of KJRA and does not invoke district court’s jurisdiction to review actions of KDR.

Failure to include mailing address of each petitioner in his or her petition for judicial review was critical omission, prejudicial to KDR. Petitions did not strictly comply with requirements of K.S.A. 77-614(b), and thus did not invoke district court’s jurisdiction for judicial review of the agency action.

 STATUTE: K.S.A. 8-259(e), -1020(o), 77-601 et seq., -613(e), -614, -614(b), -614(b)(1)

PARENT AND CHILD
IN RE ADOPTION OF G.L.V.
ATCHISON DISTRICT COURT – AFFIRMED
NO. 97,546 – JULY 20, 2007

FACTS: Stepfather filed petition to adopt wife’s minor children, based on natural father having almost no contact with children for nine years and only paying child support through garnished wages. Mother consented but natural father did not. District court denied the petition because natural father provided substantial financial support in the preceding two-year period. Stepfather appealed, arguing trial court failed to properly consider best interest of the children and the fitness of the nonconsenting parent, as provided in 2006 amendment to K.S.A. 59-2136(d).

 ISSUE: Stepparent adoption

 HELD: 2006 amendment, which applies to this case, provides that court may consider best interests of child and the fitness of the nonconsenting parent in determining whether stepparent adoption should be granted, but it does not abrogate parental duties test previously enunciated by Kansas Supreme Court in stepparent adoption cases. By adopting discretionary term “may,” Legislature did not intend best interests of the child to be the overriding factor. Consent of natural parent must be given to the adoption unless natural parent failed or refused to assume duties of a parent for the two preceding consecutive years. This requires a failure of both the “love and affection” side of the ledger and the “financial support” side of the ledger before a court can grant a stepparent adoption without the consent of the natural parent.

 DISSENT (Marquardt, J.): 2006 amended statute no longer makes financial support the sole criteria. Under facts of case, trial court abused its discretion in not granting the adoption.

 STATUTES: K.S.A. 2006 Supp. 59-2136(d); and K.S.A. 59-2136(d) and (h)

TRADEMARK, DIRECTED VERDICT, JURY INSTRUCTIONS, ADMISSION OF EVIDENCE, TREBLE DAMAGES, AND PUNITIVE DAMAGES
FLEETWOOD FOLDING TRAILERS INC. V. THE COLEMAN COMPANY INC.
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 94,950 – JUNE 29, 2007

FACTS: Fleetwood Folding Trailers (FFT) manufactured folding camping trailers and, with permission, placed Coleman’s trademarks on them. Their business relationship began in 1989 with their first trademark license agreement. In September 2002, Coleman conducted an audit of FFT. Based on that audit, Coleman told FFT that it had not fully complied with the agreement on unreported sales and advertising minimums. Over the next six months after the audit, Coleman advised FFT that it continued to misuse Coleman’s trademarks. Finally, on April 11, 2003, Coleman sent written notification to FFT that FFT had breached the
2000 Trademark License Agreement. Coleman later terminated the agreement. FFT sued Coleman seeking declaratory judgment on Coleman’s unlawful termination and a temporary restraining order preventing Coleman from licensing its trademark to other recreational vehicle manufacturers. Coleman counterclaimed alleging trademark infringement. The district court granted a directed verdict in favor of Coleman finding FFT breached the contract by using the trademark outside FFT’s authorized territory and FFT’s continued use breached the agreement, infringed upon Coleman’s federal and state common-law trademark rights, and violated federal law by creating a false designation of origin. A jury determined $508,137 in royalties, that FFT acted in bad faith, FFT had more than $4.5 million in profits during the respective time period, Coleman was entitled to punitive damages, and FFT failed to prove it reasonably relied on competent legal advice when it infringed the trademark.

ISSUES: (1) Trademark, (2) directed verdict, (3) jury instructions, (4) admission of evidence, (5) treble damages, and (6) punitive damages

HELD: Court held the evidence FFT presented at trial undisputedly showed that FFT failed to comply with Coleman’s approval process for FFT’s trailers and FFT’s marketing material. Court also held that FFT did not substantially perform the agreement once notified of the breaches and accordingly, the district court was proper in determining that as a matter of law FFT failed to cure the breaches. Court rejected FFT’s claim that the jury’s award of profits was misguided by the jury instructions. Court held FFT failed to show any error in the instructions or that there was a real possibility that the jury would have returned a different verdict. Court held that even though FFT was unable to present everything it wanted about the Negative Covenant to the jury in its opening statement, it was apparent that FFT was able to present information through Coleman’s expert who confirmed that Coleman could not license its trademarks to any other company besides FFT. Thus, the district court did not abuse its discretion in denying FFT’s request to present the Negative Covenant in its opening statement. Court held the evidence was clear that FFT used Coleman’s registered trademarks in connection with its recreational vehicles and that this use occurred after the agreement was terminated. Thus, FFT’s use met the definition of counterfeit under the Lanham Act and the district court did not err in trebling the profits award, instead of awarding royalties, and did not err in awarding attorney fees to Coleman. Court stated the purposes behind the Lanham Act are similar to the purposes for punitive damages. Court held that since the enhanced award under the Lanham Act was granted and is upheld on appeal, it was not necessary to further punish FFT with punitive damages. Therefore, the district court was correct in declining to enter the jury’s award for punitive damages in addition to the award ordered under the Lanham Act.

STATUTES: None

TRUSTS AND CONTRACTS
LYONS V. HOLDER
SEDGWICK DISTRICT COURT
REVERSED AND REMANDED
NO. 97,130 – JULY 20, 2007

FACTS: Lyons Trust established with Holder as trustee. For 11 years he managed the trust without paying himself fees permitted under the trust. When relationship with trust beneficiary deteriorated, Holder resigned after paying himself $56,850 for 12 years of service and $5,000 for attorney fees. Lyons filed suit against Holder for breach of fiduciary duties and conversion. At conclusion of Lyons's evidence in bench trial, trial court granted Holder's motion for judgment as matter of law. Lyons appealed.

ISSUES: (1) Breach of fiduciary duty, (2) statute of limitations, (3) waiver of compensation, and (4) burden of proof

HELD: Under facts and provisions of the trust, claim sounding in breach of fiduciary duty is rejected. Lyon's claim is viewed exclusively as sounding in waiver of contractual right to compensation. K.S.A. 60-511(4) does not apply to Holder's claim to compensation. Argument based upon statute of limitations fails.

Court fundamentally disagrees with district court's holding that waiver was not to be inferred from Holder's declining or failure to take a fee for previous years. Under facts, district court either ignored undisputed evidence of waiver by inference or based its judgment on a misunderstanding of the law. Judgment against Lyons at close of her evidence was improper. District court is directed to conduct new trial limited to issues of whether Holder waived fees of any period of time prior to any final accounting and, as to any periods where court finds no waiver, the reasonableness of requested fees for such periods.

Issue addressed to assist parties on remand. Lyons has burden of proof on issue of waiver. Although affirmative relief is being sought by reason of waiver, the doctrine is asserted in a defensive manner and must be proven in same manner as if asserted as a defense to affirmative relief.

STATUTES: K.S.A. 2006 Supp. 58a-802 sections (b) and (h) and K.S.A. 60 -208(c), -252(c), -511(4)

Criminal

STATE V. COOK
JOHNSON DISTRICT COURT – AFFIRMED
NO. 93,825 – JUNE 29, 2007

FACTS: Cook convicted of possession of cocaine that was discovered on him when officer stopped truck to investigate activities perceived by the officer as possible drug activity. Sole issue on appeal is whether Cook’s motion to suppress should have been granted because officer’s stop of the truck was based on mere hunch rather than reasonable suspicion.

ISSUE: Reasonable suspicion for Terry stop

HELD: No error in denying motion to suppress. Conduct susceptible of an innocent explanation nevertheless may cause a police officer, trained in drug enforcement and familiar with drug history of the area, to harbor a reasonable and specific suspicion of illegal drug activity that needs further investigation.

DISSENT (Greene, J.): Voices concern that majority opinion moves closer to a purely subjective test for reasonable suspicion and abandons need to rely on objective factors. Examination of facts would not satisfy objective standard. Cook’s suppression motion should have been granted.

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

STATE V. GERAGHTY
JOHNSON DISTRICT COURT
AFFIRMED IN PART AND REMANDED
NO. 95,007 – JULY 20, 2007

FACTS: Geraghty charged with drug offenses after police entered his residence with his daughter to investigate potential methamphetamine lab and then obtained and executed search warrant on the residence. Geraghty moved to suppress, claiming the warrant was based solely on information gained by unlawful police entry. Trial court denied the motion, based on consent from Geraghty’s daughter and exigent circumstances. Geraghty convicted. He ap-
pealed the suppression ruling and the trial court’s failure to consider Geraghty’s financial resources when ordering reimbursement of attorney fees to Board of Indigents’ Defense Services (BIDS).

ISSUES: (1) Motion to suppress and (2) BIDS reimbursement

HELD: Consent and exigent circumstances are separately addressed. Neither justified the police entry into Geraghty’s residence. However, facts in affidavit for search warrant, after excising information obtained through unlawful means, were sufficient to establish probable cause to justify issuance of the warrant. Because evidence seized would have been ultimately discovered in a lawful entry, district court properly denied motion to suppress.

Remanded to trial court for clarification as to whether Geraghty had already reimbursed BIDS the assessed attorney fee. If fee has been paid, trial court to dismiss matter as moot. If the fee has not been fully paid, trial court is directed to resentence in compliance with K.S.A. 2006 Supp. 22-4513 regarding assessment of BIDS attorney fees.


STATE V. HAMPTON
RILEY DISTRICT COURT – AFFIRMED
NO. 96,110 – JULY 27, 2007

FACTS: Eighteen-year-old M.S.O. met Hampton on an online Internet chat room site. They agreed to meet. She was nervous and asked two friends to follow her. M.S.O. and Hampton met in Manhattan and M.S.O. got into Hampton’s car, but M.S.O.’s friends got lost when they tried to follow. Hampton told her to not resist or he would reach for a bag on the floor, inferring some sort of weapon was inside. Hampton was convicted of rape, aggravated kidnapping, and criminal threat.

ISSUES: (1) Prior crimes evidence and (2) multiplicity

HELD: Court stated that whether Hampton restrained M.S.O. in his automobile with the intent to inflict personal injuries upon her in the form of rape was a disputed issue of material fact. Court held the testimony of C.A.W., in which she testified that she was sexually assaulted by Hampton two weeks after the encounter with M.S.O., was relevant to prove M.S.O.’s intent. Court also held Hampton’s convictions for rape and criminal threat were not multiplicitous as both crimes require different elements for proof of the crime.

STATUTES: K.S.A. 21-3420, -3421; and K.S.A. 60-401, -445, -455

IN RE J.M.E.
SALINE DISTRICT COURT – REVERSED
AND REMANDED WITH DIRECTIONS
NO. 97,780 – JULY 27, 2007

FACTS: In 2005, J.M.E., a minor, and three other minors were parked at the end of a dead-end road in Salina. A resident reported the car. When officers approached the car, they immediately smelled marijuana. J.M.E. was the driver. When officers asked J.M.E. to step out of the car, they saw that he was trying to swallow marijuana. J.M.E. was charged with possession of marijuana and was successful in a motion to suppress when the district court held the officers did not have specific and articulable facts on which to base their search.

ISSUE: Motion to suppress

HELD: Court held the encounter in this case clearly fell under the community caretaking function of law enforcement. Court also held the smell of marijuana arising from the car when its windows were rolled down provided the officers with reasonable suspicion of criminal activity and probable cause to search the car. Court held the district court’s decision lacked substantial competent evidence and was the incorrect legal conclusion. Court remanded with directions to admit the evidence seized during the search.

STATUTES: None

IN RE J.R.A.
JOHNSON DISTRICT COURT – REVERSED
NO. 97,690 – JULY 6, 2007

FACTS: J.R.A. placed on probation after being adjudicated of one misdemeanor and one nonperson felony offense. When later adjudicated of another nonperson felony, trial court revoked probation and classified J.R.A. in sentencing as a “chronic offender II, escalating felon” on the juvenile matrix. J.R.A. appealed, claiming trial court erred in treating the prior felony offense as a misdemeanor for purposes of that classification.

ISSUE: Classification as chronic offender

HELD: Reversed and remanded for resentencing. K.S.A. 38-16,129(a)(3)(B)(i) plainly and unambiguously defines a “chronic offender II, escalating felon” in part as an offender with one present felony and two prior misdemeanor adjudications. J.R.A. did not meet these classification requirements.


STATE V. KELLEY
BROWN DISTRICT COURT – AFFIRMED IN PART
AND REVERSED IN PART
NO. 96,181 – JULY 27, 2007

FACTS: Sheriff’s deputies posted signs for “Drug dog working ahead” and “Narcotics Officers working ahead” on a Kansas highway. While approaching the stop, officers saw Kelley lean over toward the passenger’s side of his car and began moving around frantically. Kelley’s car drifted left of center. The drug dog alerted to the front passenger’s side door of Kelley’s car. When officers directed Kelley to step out of the car, he yelled “No” and drove away. Kelley was found guilty at trial of felony obstruction of official duty, possession of drug paraphernalia, and fleeing or attempting to elude a police officer.

ISSUES: (1) Sufficiency of the evidence and (2) motion to suppress

HELD: Court held the traffic stop cited in the complaint upon which Kelley’s obstruction conviction was predicated involved a traffic infraction that is neither a misdemeanor nor a felony. Under K.S.A. 21-3808, obstructing officers in their official duty of conducting a stop for a traffic infraction is not a felony. Kelley’s conviction for felony obstruction is based upon conduct that does not constitute a felony under the statute. Court reversed his conviction for felony obstruction. Court held the district court did not error in denying Kelley’s motion to suppress because there was a valid traffic stop, the drug dog sniffed during the traffic stop, and the use of the drug dog alert to illegal drug activity justified the continued investigation.

STATUTES: K.S.A. 8-1514, -1566, -1567, -1568, -2118(c); K.S.A. 21-3808; and K.S.A. 2006 Supp. 21-3105

STATE V. KOGLER
SALINE DISTRICT COURT – AFFIRMED
NO. 97,586 – JULY 20, 2007

FACTS: In DUI prosecution, trial court granted Kogler’s motion to suppress evidence of breath test because officer failed to give implied consent advisory that became effective two weeks earlier. The new implied consent advisory had lifetime look back period,
rather than five-year period in the earlier advisory. State appealed.

ISSUE: Suppression of breath test

HELD: Notice provisions of K.S.A. 2005 Supp. 8-1001(f) are mandatory and not merely directory. Here, officer's implied consent advisory did not fulfill notice requirement of the statute.

STATUTES: K.S.A. 2005 Supp. 8-1001 sections (f), (h), and (q), -1567(a)(1)-(3); and K.S.A. 8-1566, 22-3603

STATE V. KRAFT

JOHNSON DISTRICT COURT – AFFIRMED IN PART, DISMISSED IN PART, AND REMANDED WITH DIRECTIONS

FACTS: Kraft pled guilty to aggravated escape from custody. Prior to sentencing, he filed a motion to withdraw his plea and to dismiss the complaint because (1) his attorney erred in explaining the charges to him and in concluding that he was in lawful custody at the time he absconded and (2) he would not have pled guilty to a crime he could not have committed. The district court ruled that Kraft was in lawful custody at the time he absconded and had not shown good cause to withdraw the plea.

ISSUES: (1) Motion to withdraw plea and (2) lawful custody

HELD: Court held under the facts of this case, a probationer who was under “house arrest,” i.e. the first phase of conditional release from a residential community corrections program, and failed to abide by the conditions of the release, remained in the “lawful custody” of the program pursuant to K.S.A. 2004 Supp. 21-3810(a)(1). The district court, therefore, did not abuse its discretion in refusing to set aside Kraft’s plea agreement to aggravated escape from custody. Court held Kraft failed to brief the issue on his motion to dismiss. Court remanded for the district court’s imposition of Board of Indigent Defense Services fees in compliance with K.S.A. 2004 Supp. 22-4513.

STATUTES: K.S.A. 2004 Supp. 21-3809(b)(1), -3810, -4603(d); and K.S.A. 2004 Supp. 22-3210(d), -4513

STATE V. LATURNER

CHEROKEE DISTRICT COURT – REVERSED AND REMANDED

FACTS: Laturner was convicted of possession of methamphetamine and drug paraphernalia for possession of four zip-lock bags where three of the four baggies contained methamphetamine. At trial, Laturner objected to a lab report on the four baggies arguing admission of the testimony of the forensic scientist who wrote it was erroneous because the report was not clear as to which baggies tested positive for methamphetamine and the certificate of analysis did not explain what test equipment was used. The district court overruled Laturner’s objection.

ISSUE: Right of confrontation

HELD: Although Laturner failed to object at trial and the motion in limine did not specifically mention the right of confrontation, the court considered the issue to prevent the denial of a fundamental right. Court held that the forensic scientist who prepared Laturner’s lab report was a witness, the statements in her lab report were testimony, and she knew when preparing the report that it would be used by the state at Laturner’s trial to prove he committed the crime of possessing methamphetamine. Court stated that K.S.A. 2006 Supp. 22-3437(3) restricts the objections a defendant can assert to the admission of a lab report, requires the defendant to assert an objection or waive the right of confrontation, and gives the district court the authority to evaluate the defendant’s objections. Court held there is no doubt that this portion of K.S.A. 2006 Supp. 22-3437 undermines a criminal defendant’s Sixth Amendment right of confrontation. Court nullified the offending language in the statute.

Court held there was still an existing workable procedure remaining in the statute. The state in a criminal case shall provide the 20-day notice of intent to offer into evidence the certificate containing the lab test results as required by the statute. The state, or the court on its own motion, then may schedule a pretrial hearing to determine whether it is necessary to present a witness at trial to vouch for the exhibit and testify about it or whether the defendant voluntarily chooses to waive the right of confrontation. Court found no error in the jury instructions and use of his criminal history in sentencing.

STATUTE: K.S.A. 22-3437 - 3438

STATE V. LEWIS

SEDGWICK DISTRICT COURT – AFFIRMED IN PART AND DISMISSED IN PART

FACTS: Lewis convicted of voluntary manslaughter and criminal possession of a firearm. On appeal he claimed district court erred in not granting motion to discharge jury wherein Lewis alleged venire panel was unconstitutionally comprised by county’s jury selection procedure, which resulted in disparity in representation of African-Americans. Second, he claimed the state improperly exercised peremptory challenge in a discriminatory manner to excuse one of three African-Americans on the jury panel. Third, he claimed the district court abused its discretion in denying Lewis’ motion for downward sentencing departure.

ISSUES: (1) Motion to discharge jury panel, (2) Batson challenge, and (3) sentencing departure

HELD: District court properly denied motion to discharge jury. Statistical disparity in this case does not establish purposeful discrimination, and no showing that county’s failure to compel jury service through K.S.A. 43-165 constituted a system of discrimination, which worked to cause disparity in the jury representation of a distinct segment of the community. Taylor v. Louisiana, 419 U.S. 522 (1975), is distinguished.

Record supports prosecutor’s explanation that he did not wish to have unemployed jurors on the jury panel and the challenged African-American was young. Based on record on appeal, district court’s determination that Lewis failed to establish purposeful discrimination in state’s exercise of its peremptory challenge is reasonable and not an abuse of discretion.

Appellate court has no jurisdiction to review a presumptive sentence under the state sentencing guidelines. This issue is dismissed.

STATUTE: K.S.A. 21-4721(c)(1), 22-3407, 43-156, -165

STATE V. McCARLEY

SEDGWICK DISTRICT COURT – AFFIRMED

FACTS: McCarley was convicted of severity level 5 aggravated reckless battery after an exchange following a fender-bender in a grocery store parking lot. At sentencing, the Presentencing Investigation listed McCarley’s crime as severity level 8 aggravated reckless battery, and he was sentenced using an 8-A criminal history score and sentence of 23 months’ incarceration. After time for appeal had expired and approximately 34 days after sentencing, the state filed a motion to correct an illegal sentence, claiming that McCarley was illegally sentenced to a severity level 8 crime when he was convicted of a severity level 5 crime. The district court denied the state’s motion finding that the illegal sentence was in McCarley’s favor and it could not be corrected.

ISSUES: (1) Illegal sentence, (2) state’s challenge, and (3) lesser included offense

HELD: Court found it had jurisdiction to consider a question
reserved as a question of statewide importance whether the state may file a motion to correct an illegal sentence based on an error in severity level after stipulating to it at sentencing and long after the time for appeal has run and whether the sentence imposed was illegal. Court did not answer the question of whether the state could file a motion to correct an illegal sentence, but instead held McCarley's sentence was not illegal. Court held that the district court had jurisdiction to convict and sentence McCarley for severity level 8 aggravated reckless battery because it is a lesser degree of the crime charged. Court held that McCarley's sentence conformed to both the formal record of trial and to the statute defining the crime. Court stated McCarley's sentence was not ambiguous. Court held that the state clearly and unambiguously informed the district court upon inquiry at sentencing that the severity level of the crime was properly identified in the PSI, and the court sentenced McCarley accordingly. The actions of the state at the time of sentence were invited error and thus precluded any complaint regarding the severity level basis for sentencing. Court rejected McCarley's argument that reckless aggravated battery is not a lesser included offense of intentional aggravated battery and therefore it was required to be charged in the complaint. Court also rejected McCarley's argument that the district court erred in failing to give a proximate cause jury instruction.

DISSENT: Judge Knudson dissented in part and concurred in part. Judge Knudson agreed with the majority's decision on McCarley's cross-appeal. However, Judge Knudson held McCarley's sentence was illegal, that an illegal sentence may be corrected at any time, that the invited error analysis is not applicable because the district court lacked jurisdiction to impose the sentence, and that there is no evidence to support an agreement between the parties to circumvent the verdict of the jury or the requirements of law.

STATE V. TEDDER
RENO DISTRICT COURT – REVERSED AND REMANDED
NO. 97,134 – JULY 20, 2007

FACTS: Tedder arrested for illegal transportation of liquor. He was taken to police station and given Miranda warnings. He refused field sobriety testing and asked for attorney. After oral and written notices were given he agreed to testing. District court suppressed breath test results, finding violation of Tedder's constitutional right to consult with attorney before taking breath test.

ISSUE: (1) Breath testing and (2) right to attorney

HELD: There is no constitutional right to consult with an attorney prior to submitting to or refusing a breath test. Also, asking a defendant whether he or she will submit to a test does not constitute custodial interrogation. Under K.S.A. 8-1001(f)(I), Tedder had right to consult with an attorney after completing the test, but failed to invoke his right at that time. Before there can be a violation of a defendant's statutory right to confer with an attorney, a request for counsel must be made after completion of breath test. Suppression order is reversed. Case remanded to district court for trial proceedings.

STATUTE: K.S.A. 8-1001(f), subsections (C) and (I)
Appellate Practice Reminders . . .  
From the Appellate Court Clerk’s Office

Update on the Kansas Lawyers’ Fund for Client Protection

The Client Protection Fund, established by the Kansas Supreme Court in 1993, recently closed its books on the 2006-2007 fiscal year. It seems an appropriate time to update the bar and commend its active members on their support of the fund, which reimburses clients who have suffered financial losses as a result of the dishonest conduct of an active member of the bar in the course of a lawyer-client relationship. The fund is financed entirely by active members of the bar through their annual attorney registration fees. No state funds are involved.

In the past fiscal year, 23 claims were filed against 11 attorneys with a total payout from the fund of $50,310 for dishonest conduct. With an active attorney enrollment of 10,253, those 11 attorneys represent a minuscule fraction of the practicing bar, but their impact on public perception of the profession is large, particularly when collective payments are considered.

Since the fund’s inception in 1993, claims have been filed against 166 Kansas attorneys with a total payout from the Fund of $1,393,230. Multiple claims may be filed against one attorney with the current record being 71 claims paid. Even with that extraordinary number of claims, the fund was able to make each client whole, paying out a total of $140,540 on that attorney.

Decisions on disbursements are made by a seven-member commission, currently chaired by John M. Parisi of Overland Park. Other commission members are Ann Gardner, vice chair (Lawrence); Terry E. Beck (Topeka); Hon. Jerome P. Hellmer (Salina); Glenn I. Kerbs (Dodge City); Terry L. Malone (Wichita); and Melvin Minor (Stafford). Justice Lawton R. Nuss serves as Supreme Court liaison to the commission.

For questions about the Client Protection Fund or its procedures, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229. Claim forms are available through the Appellate Clerk’s Office.

Casemaker 2.0 — Beta Test Site Available

Casemaker is pleased to allow KBA members the first glimpse of Casemaker 2.0. The site is ready for beta-testing for legal library searches. The beta test site is ready for functionality comments only at present. All case law is current through the last Advance Sheet. We will soon be adding case law current to state Web site postings (please use Casemaker 1.0 for more recent releases), and we will also be adding additional data sets as we progress. Jury instructions and other materials that are currently in the state’s library will be added to Casemaker 2.0 in the very near future.

To try out the new Casemaker 2.0, log on to Casemaker at www.ksbar.org/casemaker. Click on the Kansas library and scroll to the bottom of the page. Click on the link that says “Click here to view and experience the new Casemaker 2.0.”

You will notice a feedback button at the bottom of the Field Search page. Please feel free to direct any comments you have about the new site there. The comments will go directly to the site designer and will allow us to modify or otherwise enhance the site to suit your needs. All comments are encouraged.

You will enter the new site through Casemaker 2.0’s Federal library. Go to the top left corner and click on the Library drop-down menu to enter the Kansas library.
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