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The Journal of the Kansas Bar Association

2016-17
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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Patti Van Slyke, Journal Editor, pvanslyke@ksbar.org.

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The Kansas Bar Association (KBAs) 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.
2017-18 KBA Officers & Board of Governors Elections

It’s not too early to start thinking about KBA leadership positions for the 2017-18 leadership year.

The KBA Nominating Committee, chaired by Natalie Haag of Topeka, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, KBA Delegate to the ABA House of Delegates, and Young Lawyer Delegate to the ABA.

Officers

- **President**: Steve Six, 2016-17, Greg Goheen 2017-18
- **President-elect**: Greg Goheen, 2016-17, Bruce W. Kent 2017-18
- **Vice President**: OPEN, Mira Mdivani is eligible for nomination
- **Secretary-Treasurer**: OPEN
- **KBA Delegate to the ABA House of Delegates**: Rachael K. Pirner is eligible for re-election
- **Young Lawyer Delegate to the ABA**: Joslyn Kusiak is eligible for re-election

Interested candidates should send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612, or at jeyochim@ksbar.org by **Friday, January 6, 2017** for distribution to the Nominating Committee. Candidates seeking an officer position may be nominated by petition bearing 50 signatures of regular members of the KBA, with at least one signature from each governor district. Petitions are due **January 27, 2017**.

Board of Governors

Candidates seeking a position on the Board of Governors must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by **Friday, January 27, 2017**. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. The six KBA districts with seats up for election are:

- **District 1**: Diana Toman is eligible for re-election, Johnson County.
- **District 3**: OPEN-Eric Rosenblad is **not** eligible for re-election, Allen, Anderson, Bourbon, Cherokee, Crawford, Labette, Linn, Montgomery, Neosho, Wilson, Woodson counties.
- **District 7**: Gary Ayers is eligible for re-election, Sedgwick County.
- **District 8**: OPEN-John Swearer is **not** eligible for re-election, Barber, Barton, Harper, Harvey, Kingman, Pratt, Reno, Rice, and Stafford counties.
- **District 11**: OPEN-Nancy Gonzales is **not** eligible for re-election, Wyandotte County.
- **District 12**: 3 OPEN Positions-William Quick is **not** eligible for re-election, Out-of-state.

To obtain a petition for the Board of Governors, please contact Jordan Yochim at the KBA office at (785) 234-5696 or via email at jeyochim@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Natalie Haag via email at nhaag@capfed.com, or Jordan Yochim at (785) 234-5696 or via email at jeyochim@ksbar.org.
Free and Independent Courts for a Free and Independent People

The words above the entrance to the Sedgwick County Courthouse express what Kansans want from their judges: independence. Because only independent courts prevent encroachment on our freedoms from the popular political wind. Kansans expressed their views through their votes and retained all five Supreme Court Justices. The results are in, and Kansans sent a strong message of support to the appellate courts to continue to base decisions on the Constitution and the law without regard to popularity.

For the first time in its history, Kansas saw a well funded effort to unseat justices with the amorphous claim that they are “activist” justices, which is simply a label for a judge who does not decide things the way you want her to. Pleasing the public is not the job. Making the tough decisions according to the Constitution and the law when you know it is going to bring an attack is the very definition of independence. Our Kansas Supreme Court Justices were faced with decisions they knew would put their jobs on the line, they made the tough calls according to the Constitution and the law, and the attack came. Kansans supported the justices and court of appeals judges. Our appellate courts remain free and independent.

The battle is won but the fight is not over. The judicial code of conduct prevents the justices from defending themselves. The people who know them best need to stand with the justices for the coming election cycles. Lawyers need to remain vigilant. The vote to retain the justices ranged from 55% to 71%. The vote to retain the court of appeals judges ranged from 59% to 73%. Lawyers must continue to educate voters on the value of an independent judiciary. Many lawyers around the state worked tirelessly to get the word out—too many to acknowledge here—but our continued freedom is their reward.

About the KBA President

Steve Six is a partner at Stueve Siegel Hanson in Kansas City, Mo. He specializes in complex litigation, focusing on class actions and commercial litigation.

ssix@ksbar.org

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Each summer for the last 13 years, Eric Rosenblad (of Kansas Legal Services in Pittsburg, Kan.) has helped lead high school students on mission trips to do home repairs in Central Appalachia in the heart of coal country.

Rosenblad said, “Working with the Appalachia Service Project, we meet families that are among the poorest and most disadvantaged in the entire nation. Learning basic home repair skills is really just a side benefit to the very real experience of learning about others in different places and how we can all make a difference when we share a little of ourselves in a positive way.”

Photos:
1. Eric helping youth volunteer remove damaged flooring.
2. Youth volunteer learning to measure lumber for new subfloor.
3. Eric helping youth volunteer install new subfloor.
4. Youth volunteers install new wood flooring over the new subfloor.

Do you know an attorney doing good? Please let us know! Contact Patti Van Slyke, Journal Editor pvanslyke@ksbar.org • 785-861-8816
The Essentials of Opposing Ideologies

Earlier this year in Indiana, Beech Grove Mayor Dennis Buckley posted a comment on the police department’s Facebook page after a department arrest. Mayor Buckley observed, “Another job well done by BGPD. Just received the August report, crime reporting down 9.6% from August 2014.” In response, Beech Grove resident Kymberly Quick posted a number of statistics relating to violent crimes in Beech Grove and proceeded to question whether crime was indeed down in the community:

Mayor Buckley, wonderful to see you on Facebook. I have a few questions. I am looking over the Aug 2015 Police Department numbers for our next Beech Grove Crime Watch Meeting. Part I Crime in regards to violent cases up by 29.4% (this includes assaults, homicides, rape, & robbery)…Is it just that citizens are refusing to file reports, is it police not filing reports because of a criteria not being met, or what? And what exactly does the category “drug case” under this category Part II Crimes signify…what does this mean and include? I know from listening to others that drugs and vandalism have been quite rampant in our City. Please provide some insight into this…I look forward to your responses in regards to my questions.

According to a federal lawsuit filed later by Ms. Quick, the city responded with an Orwellian swiftness by deleting the comment. Ms. Quick argued that the City of Beech Grove opened its Facebook pages for viewership and commentary to anyone with a Facebook account—arguably a public forum. Eventually, the parties entered a consent injunction agreeing that the city would no longer remove citizens’ comments for their viewpoints.

This scenario is interesting on multiple levels. First, it is interesting to observe how organizations respond to criticism, particularly when the organization is a government entity. My job with the Kansas Association of Counties provides a number of opportunities to study how local governments function, and we regularly receive calls from local officials regarding issues that touch on both legal and political matters. The solutions are seldom easy, but the deliberations are always worthwhile.

While I remain personally and professionally curious about government conduct in the technological version of public space and speech, there seems to be a deeper issue that warrants consideration. It is even more interesting reflecting on the way we collectively digest and respond to information—particularly information we dispute.

As I read about how the City of Beech Grove allegedly responded to the critiques of its citizens, I revisited a Dwight Eisenhower biography I read over the summer. Jean Edward Smith’s 2012 biography, “Eisenhower in War and Peace,” explored Eisenhower’s roots, his service in the military, and his presidency. But the period I knew least about was his tenure as president of Columbia University.

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**Administrative Law**

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Where Does the Money Go?
Our designated charities for 2017 are:
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• Safehome and Hope House (domestic violence programs)
• Metropolitan Organization to Counter Sexual Assault (MOCSA)
• Kansas Bar Foundation
• Midwest Foster Care and Adoption Association
• In addition, we will fund Ethics for Good Scholarships to each of the KU, Washburn and UMKC Law Schools and the Johnson County Community College paralegal program.

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Who Are these Intrepid Presenters?
Stan Davis, Legal humorist, consultant and gadfly
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst Moneymaker, Swope Health Services
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

Wednesday, June 28, 2017, 2:30 – 4:10 p.m.
The Nelson-Atkins Museum of Art, Atkins Auditorium
4525 Oak St.
Kansas City, Mo.
Parking: $8 museum non-member parking fee; carpooling encouraged

Friday, June 30, 2017, 2:30 – 4:10 p.m.*
Polsky Theatre, JCCC Carlsen Center
12345 College Blvd. (College & Quivira)
Overland Park, Kan.
*Reception afterward sponsored by the JCCC Foundation

Questions?
Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 861-8839.

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Check Scammers - Look for Inconsistencies

Sometimes, the check really is in the mail. In my case, it was a $350,000 check for “…the money we owe your client.” A great mail day, right?

Sadly, this $350,000 check was nothing but bait on a sharp hook tossed in hopes of snagging my trust account. The attack is simple. I was told to deposit the $350,000 check in my trust account. I could then move my fee to my operating account and wire the surplus back to the sender via Western Union. The hook sets when my bank discovers, too late, that the check is a fraud. By then my trust account is drained, I owe my bank the loss, and I am in a serious financial and ethical mess.

This sort of scam has been prevalent on Craigslist, eBay, and even “work from home” job offers posted on signs and light poles at local street intersections. The scam produces such a reliable return that the business model has expanded to specifically targeted law firms. In my case, the check and instructions were sent without any advance communication. The check arrived unannounced and so it was suspect immediately. Interviews and reviews with banks, lawyers, and various state bar associations suggest that is unusual. In most cases, the fraudulent checks generally arrive after a believable cover story softens the lawyers’ defenses.

Lawyer Targets

One firm practicing in real estate was contacted to review documents related to proposed sale of a property in Northeast Kansas. Both the proposed sale and the provided documents appeared legitimate, and the firm began the work before a bogus check arrived. Another lawyer was contacted by a corresponding attorney from another state seeking assistance from a local attorney in enforcing a local judgment. That, too, seemed legitimate on its face until the bogus check arrived. The marks are not just business and transactional lawyers either; several family lawyers have been targeted with cover stories about adoption or child support modification. Seemingly random and clumsy attempts to perpetrate the scam continue but cons targeting a lawyer or firm with a sophisticated and believable cover story should put us all on edge.

Warning Signs

Every version and attempt at the scam reviewed so far have one thing in common: overpayment of an agreed price or fee. The scam does not work if there is no “refund” coming back to the scammer, so any overpaying check should be immediately suspect. Dig a little deeper and look for inconsistencies in the cover story or the instrument itself. For example, the fake check sent to me was missing some of the security features the check itself indicated should be present (e.g. watermark and micro-printing). Also, the company name on the check did not match the company email domain for my purported contact (e.g. Tecnet vs. tech-center.com). At the very least, hold off on wiring any funds until verification from your bank that the funds cleared.

A second warning sign—standard in every case reviewed so far—is the request that overpayment be wired immediately. The scammers pressure the lawyer to remit immediately and insist on a Western Union transfer. If the purported client is keeping the pressure on for a quick wire transfer, the whole relationship should be suspect. Start back at the beginning, and review documents and communications anew for inconsistencies that betray nefarious intent including:

- Use of Canadian or European postal system to deliver documents and check.
- Addresses inconsistent with post-mark and with the address to which you are supposed to wire funds.
- Inconsistent names used in documents and communications—especially business names.
- Website and email addresses that do not match company or individuals. (Note: email contact could include suspect attachments containing malware.)
- “Client” appears to know much about you but is a cold-call diving right into significant representation.

Ethics Problems

Check scammers do not just create financial problems for lawyers; they can lead to a legitimate ethical mess. This is especially true when a lawyer misses the warning signs and is successfully taken in by the scam. Almost all attempts reviewed took aim at the trust account and would have resulted
in the loss of legitimate clients’ funds. If the scam overdrew the account, then the Disciplinary Administrator will likely get notice direct from the bank, and the lawyer may expect a gray envelope. Even if the scam does not overdraw the account, and insurance or self-funding can replace the lost client funds, a lawyer taken in by such a scam should still contact ethics counsel.

There is more nuance when the lawyer was not successfully scammed. In the event the scammer led with a cover story that only unraveled later, the lawyer may still want to treat the scammer as a client, preserving their confidences—especially if an engagement letter was signed. Formal termination of representation is recommended. Some have suggested that even being contacted by a scammer providing a cover story may trigger ethical duties to a prospective client under our Rule 1.18. You may want to contact the Disciplinary Administrator for guidance before discussing the attempted criminal attack on your firm with others.

If you are the actual or attempted victim of such a scam and are cleared to do so by ethics counsel or the Disciplinary Administrator, the FBI maintains a reporting portal at ic3.gov. Use it. Additionally, consider warning your bank and colleagues. Knowing what a scam looks like helps us all erect better defenses against them.

Opposing Ideologies, con’t. from Pg. 8

The anecdote that stuck with me took place in 1947. Columbia had a Marxist study group, and they invited Arnold Johnson of the American Communist Party to speak at Pupin Hall, a National Historic Landmark and home to Columbia’s physics and astronomy departments. Columbia renamed the building after Serbian physicist, Mihajlo Pupin, who graduated from Columbia, and his daughter wrote Eisenhower after the university did not object to Johnson’s lecture. In her letter she asked whether Columbia would keep traitors out of Pupin Hall.

Eisenhower responded in full support of Columbia’s decision:

The virtues of our system will never be fully appreciated unless we also understand the essentials of opposing ideologies. I deem it not only unobjectionable but very wise to allow opposing systems to be presented by their proponents. Indeed, I believe that arbitrary refusal to allow students, especially upon their own request, to hear the apostles of these false systems would create in their minds a justified suspicion that we ourselves fear a real comparison between democracy and dictatorship.

Given the atrocities of World War II, it might seem appropriate for Eisenhower to respond with an authoritarian fervor to Johnson’s lecture. But instead, he maintained the confidence of an individual who was prepared to give a defense for what he holds true.

It might be easy to dismiss Eisenhower’s stance as the convictions of a man from a simple and bygone era. But it is hard to imagine the challenges we face as anywhere near as daunting as those confronted by Eisenhower and his World War II contemporaries. It is also hard to imagine Eisenhower ordering the removal of a comment instead of formulating a meaningful response.

Opposing ideologies can be frustrating, time-consuming, and even challenging to our very core. But as my 4-year old recently observed “it’s fun because it’s tricky.” Rather than shy away from conversations that may seem challenging, wrong-headed, or foolish, it is worthwhile to consider and respond with gentleness and respect. Such discussions may take place online or in person, but responding well is the best method by which we can provide solutions to the problems we may face.
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Everyone Benefits from Your Participation in IOLTA

The Interest on Lawyers’ Trust Accounts (IOLTA) program is an idea that originated in British, Canadian, and Australian jurisdictions in the 1960s. In the United States, IOLTA was pioneered in Florida and now exists in every state in the country. The Kansas IOLTA program was established in 1984 as a voluntary program. Through IOLTA, attorneys and law firms place IOLTA-eligible client funds in a pooled interest bearing trust account. IOLTA funds support the following:

• Legal services to the disadvantaged
• Public education about the law
• Administration of justice programs and other programs as approved by the Court.

Without IOLTA, nominal or short-term client funds held in non-interest bearing, pooled checking accounts benefit neither the client nor the lawyer. Under IOLTA, these same nominal or short-term funds are pooled into one account. Kansas banks may remit interest on these pooled accounts to the Kansas Bar Foundation. Each year, the IOLTA Committee selects organizations to receive IOLTA grants. In the past few years, approximately $80,000 per year has been distributed to organizations in Kansas that provide civil legal services to low-income Kansans.

It is easy to join almost 4,000 Kansas attorneys who are part of the IOLTA program.

• Visit http://www.ksbar.org/iolta to complete an IOLTA application.
• Take the completed and signed application to an approved financial institution. There is a list of approved institutions on http://www.ksbar.org/iolta.
• Mail, fax, or email a scanned copy of the completed and signed IOLTA application to:

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  Topeka, KS 66612-1806
  Fax: (785) 234-3813
  Phone: (785) 234-5696
  Email: info@ksbar.org

(To use IOLTA Application in the subject line)

A complete description of the IOLTA program is found in the Money of Others booklet or by visiting http://www.ksbar.org/iolta and selecting Money of Others under the About IOLTA section.

Frequently Asked Questions About IOLTA

How do I know if I have an IOLTA account?
You may call the KBA at (785) 234-5696 and we can let you know if the Kansas Bar Foundation is receiving interest from your account. We check this by searching for your name, name of your firm, or account number. If we do not locate your information, you will need to call your banker and ask if your trust account is an IOLTA account.

If I discover I do not have an IOLTA account, what do I need to do?
You can find a list of approved financial institutions and contact them about setting up an account. The list of approved financial institutions and the steps to take to setup an IOLTA account can be found online at http://www.ksbar.org/iolta.

What should I know about setting up the IOLTA account with my bank?
Find out if your bank charges maintenance fees. Sometimes the maintenance fees are larger than the interest generated on the account. If possible, select a financial institution that does not charge maintenance fees on an IOLTA account.

How often does my financial institution send interest to the Kansas Bar Foundation?
There are two options. Your financial institution can send us interest quarterly or monthly. If possible, ask to have the transaction done via ACH. That reduces paperwork and eliminates the need to send a hard copy check.
Traditionally the Kansas Legislative Session begins on the 2nd Monday in January. This year is no different with the House and Senate gaveling in on Jan. 9, 2017. However, that is where the similarities with the 2016 Legislature end. The biggest difference is in the composition of the Kansas House, where a long and distinguished list of conservative members failed to win reelection. These now former conservative legislators lost out to both moderate Republicans in the August primary and to Democrats in the general election. These losses have bolstered Democrat representation by 12 with an equal number of moderate Republicans now taking their places in the House Chamber.

On the Senate side, we saw a similar shift in the primaries, with several conservative members losing to moderate challengers. However, senate Democrats were unable to make the gains seen in the House. In the end, Democrats were only able to add one seat to their number. Final tallies have Republicans controlling both chambers with an 85/40 majority in the House and a 31/9 margin in the Senate. Even with Republicans dominating both chambers, there exists an opportunity for moderate Republicans and Democrats to coalesce around certain issues to create a governing majority. Which issues those might be remains to be seen.

With the election behind them, legislators will now focus on the task at hand: governing! The issue that will dominate all conversations this session is the budget, and how best to balance the budget and maintain essential services. Month-to-month projections have failed to show much of the promise originally touted in the 2012 tax cuts, so much so that projections have fallen off significantly. The Kansas Consensus Revenue Estimating Group has projected a sharp drop in revenue for the 2017 fiscal year. The number tops out at $345.9 million or 5.5% lower than April's estimate. This number DOES NOT include any amount related to the school finance decision. The report from the Kansas Consensus Revenue Estimating Group can be found at http://budget.ks.gov/files/FY2018/CRE_Short_Memo_Nov2016.pdf. These estimates will be revisited in April 2017.

Over the last several years the state budget has been buoyed using a one-time transfer (see KDOT/KPERS), a sales tax increase and other accounting tools. This year, those options appear to be less abundant, requiring a serious discussion on tax policy. Moderate Republicans ran on a platform calling for the repeal of the LLC loophole. This issue was discussed last session but not enough votes were available to pass such a measure. However, that does not seem to be the case this year, and we can expect some type of roll back proposal from the House. The odds of this becoming law falls squarely on the governor’s desk. The tax plan remains the key component of the governor's fiscal policy, and last year he was against any changes to his tax cut plan. However, this may no longer be the case as the Governor has made some public comments stating his willingness to discuss the issue.

Even if the LLC loophole is closed, it will not be enough to bridge the gap entirely or to affect this fiscal year's bottom line. One way to balance the budget, in part, would be another round of sales tax increases. This would be a very difficult proposition as the last sales tax increase barely passed. There have also been murmurs about securitizing the tobacco settlement funds to use as a one-time, stop-gap measure to fill the shortfall. This idea has been criticized in the past by many children’s advocates as the tobacco fund settlement money is directed to several children’s initiatives. However the 2017 legislature chooses to proceed, it will face political consequences.

The Kansas Bar Association will be engaged on several technical issues with a direct impact on the practice of law. For instance, the KBA supports changes to the Kansas Supreme Court’s budget proposals, the Uniform Family Law Act, the Uniform Family Law Arbitration Act, Benefit Corporation enactments and a variety of probate issues. These proposals, along with other information pertaining to the Kansas Legislature, can be found on the Kansas Bar Association website found at: www.ksbar.org

About the Author

Joseph N. Molina III serves as the director of legislative services for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority and served as assistant attorney general, acting as chief of the Kansas No-Call Act. Molina earned a B.A. in political science, philosophy, and economics from Eastern Oregon University and a J.D. from Washburn University School of Law.

jmolina@ksbar.org
Lawyers and Law-Trained Legislators
2017 Kansas Legislature

KANSAS SENATE

Senator David Haley
Senate District No. 4
D-Kansas City

Sen. David Haley is the managing partner of Village East, a redevelopment company in Kansas City, Kansas. He served in the Kansas House of Representatives from 1994-2000 and was elected to the Kansas Senate in 2000. He was reelected in 2004, 2008, 2012 and 2016. Senator Haley is the Ranking Minority Member of the Senate Committee on Judiciary and the Senate Committee on Public Health and Welfare. He is also a member of other joint committees. Senator Haley received his J.D. from Howard University.
kslegislature.org/li/b2017_18/members/sen_haley_david_1/

KANSAS HOUSE OF REPRESENTATIVES

Representative John Carmichael
House District 92
D-Wichita

Rep. John Carmichael represents the 92nd District in Wichita. He earned his Political Science degree from the University of Kansas in 1979, his Administration of Justice degree from Wichita State University in 1980 and his law degree from KU School of Law in 1982. Rep. Carmichael is Of Counsel with the law firm of Conlee, Schmidt and Emerson, LLP in Wichita. Rep. Carmichael has been a member of the Wichita Bar Association and the Kansas Bar Association for more than 30 years. Rep. Carmichael will serve as ranking minority member on the House Judiciary, as a member on Elections and Energy/Environment and Local Government committees this session.
kslegislature.org/li/b2017_18/members/rep_carmichael_john_1/

Representative John Barker
House District No. 70
R-Abilene

Rep. Barker is a farmer, retired District Court Judge, and U.S. Army veteran. Rep. Barker served 25 years as a judge for the Eighth Judicial District covering Dickinson, Geary, Marion, and Morris counties. Rep. Barker has been recognized for his work with Kansas youth, championing initiatives to prevent drug and alcohol abuse, working with local school districts to reduce truancy rates, and working with juvenile offender programs. Rep. Barker and his wife of 30 years live in Dickinson County where they raised their two children.
kslegislature.org/li/b2017_18/members/rep_barker_john_1/

Representative Blaine Finch
House District No. 59
R-Ottawa

Rep. Finch is majority owner and President of Green, Finch & Covington, Chrd. His practice covers a broad spectrum of legal issues including municipal law, real estate, contracts, corporate law and estate planning. He also teaches at Ottawa University as an adjunct faculty member in the fields of History, Political Science and Pre-Law. Finch is a former city commissioner and mayor of the City of Ottawa. Rep-Elect Finch graduated Summa Cum Laude from Ottawa University with degrees in History, Political Science and Psychology. Finch is a member of the Kansas Bar Association and a member and past president of the Franklin County Bar Association. He attended Washburn University School of Law.
kslegislature.org/li/b2017_18/members/rep_finch_blaine_1/

Representative Steve Becker
House District No. 104
R-Buhler

kslegislature.org/li/b2017_18/members/rep_becker_steven_1/

Representative Erin Davis
House district No. 15
R- Olathe

Erin Davis represents the 15th House District in Olathe, Kan. She was reelected in 2016. A recent graduate of the University of Kansas Law School, she is a member of the Rokusek Law Office, LLP in Lenexa, Kan., specializing in family law, including divorce, custody, Child in Need of Care parent’s attorney and Guardian ad Litem, juvenile offender and adult criminal work.
kslegislature.org/li/b2017_18/members/rep_davis_erin_1/
Representative Dennis “Boog” Highberger
House District No. 46
D-Lawrence

Rep. Highberger graduated from the University of Kansas Law School in 1992. His areas of private practice have included wills, estates, contracts, family law, federal communications law, and general civil practice. Highberger served on the Lawrence City Commission from 2003 to 2009 and was mayor in 2005/2006. He has been an active member of the Lawrence community and currently serves on the Douglas County Food Policy Council, the City of Lawrence’s Public Incentives Review Committee (PIRC) and Sustainability Advisory Board (SAB), and the boards of directors of Independence, Inc., the Community Mercantile Education Foundation (CMEF), and the East Lawrence Neighborhood Association (ELNA).

Representative Tim Hodge
House District No. 72
R-North Newton

Representative-elect Hodge is member of the Adrian & Pankratz law firm in Newton, Kan. Hodge has developed his practice in diverse areas such as tax law, real estate, business law, secured transactions, and Medicaid Planning. He has served as an adjunct professor of business law at Tabor College. During law school, he clerked for the Kansas Board of Tax Appeals and the Kansas National Education Association. Before law school, Mr. Hodge served as a teacher and a coach at Peabody High School. He and his wife reside in North Newton with their three children. His wife is a teacher in the Newton school district. Hodge graduated Magna cum laude from Tabor College in 1999 and received his JD from Washburn Law School in 2003. Hodge also attended the Oxford Honours Program in 1998. He has been a KBA member since 2004.

Representative Susan Humphries
House District No. 99
R-Wichita

Representative-elect Humphries joined the Kansas Bar in 2014, after graduating from the University of Denver Sturm College of Law. During law school Humphries had clinical experience in mediation and at the Rocky Mountain Children’s Law Center. Humphries practices at Shultz Law Office, P.A., in Wichita, with a focus on adoption and general law. Humphries is the coordinator for Wichita Christian Legal Aid, which offers free legal aid at three non-profits. Humphries married husband Cary after graduating from Texas Christian University, and they proceeded to live in (and enjoy!) five states and two foreign countries. They moved to Kansas for the first time in 1981, and have considered it their married home ever since. They have four adult children (two are married), and one grandson. Humphries will serve as Representative for the 99th district, which includes Andover and east Wichita.

Representative Leonard Mastroni
House District No. 117
R-La Crosse

Representative-elect Mastroni is currently a Rush County Commissioner, having served in that capacity since 2011. Prior to his service as a county commissioner he was a District Magistrate Judge where he served on the KDMJA Legislative committee for 12 years. Mastroni also served a chairman of the KDMJA Legislative committee and its educational committee. Mastroni attended Fort Hays University where he received his BA in political science. Mastroni also attended the University of Nevada at Reno where he graduated from the national judicial college.

Representative Vic Miller
House District No. 58
D-Topeka

Representative-Elect Vic Miller is returning to the Kansas House. He previously served for three terms. Miller also served as Shawnee County Commissioner (15 yrs.), and Topeka City Councilman (8 yrs.), once acting as Topeka Deputy Mayor. Miller also served as Topeka Municipal Judge and Kansas Property Valuation Director. Miller has spent his legal career as a sole practitioner. Miller graduated from Emporia State and Washburn University School of Law.

Representative Fred Patton
House District No. 50
R-Topeka

Rep. Patton graduated from the University of Kansas Law School before joining the legal research staff at the Shawnee County District Court. Currently, Patton owns and operates Patton Law Offices, LLC, in North Topeka with a varied practice area including banking, business/corporate, construction, estate planning, general civil, probate, and real estate. Patton is very active in the community having leadership roles in more than 15 local organizations.
Representative Bradley Ralph
House District No. 119
R-Dodge City

Representative-elect Ralph is currently the city attorney for Dodge City, Kan. Prior to this position he was in private practice with the firm of Williams, Malone & Ralph for 25 years. His private practice focused on representation of insurance companies, healthcare providers, schools, and municipalities. Ralph has been active in his community in leadership positions with his church and the Community Foundation of Southwest Kansas. He has also served the legal profession on several committees, including the Professional Ethics Committee. He is a graduate of St. Mary of the Plains College and Washburn University School of Law. Ralph and his wife Shannon have three adult children.

Representative Jim Ward
House District No. 86
D-Wichita

Rep. Ward is the owner of the Law Offices of James Ward of Wichita. He was appointed to the Kansas Senate to fill a vacancy in 1992. He was later elected to the Kansas House in 2002 and reelected every two years through 2016. Representative Ward serves as the Assistant House Minority Leader and is a member of the House Committees on Calendar and Printing, Health and Human Services, Interstate Cooperation, Judiciary and Legislative Budget, as well as several joint committees. He received his J.D. from Washburn University School of Law.

Representative John Wheeler
House District No. 123
R-Garden City

Representative-elect Wheeler is the former Finney County Attorney, first elected in 1993. He was elected to the House in 2016 to his first term. He is a graduate of Fort Hays State College (1969) with a degree in political science and pre-law. He graduated from Washburn School of Law in 1976. Prior to being elected as Finney County Attorney, Rep. Wheeler was in private practice with Calihan, Green, Calihan and Loyd, Associate, 1976-1979, then Soldner & Wheeler, Partner, 1979-1987, and finally with John P. Wheeler, Attorney at Law, Solo Practitioner, 1988-1992. Rep. Wheeler is a proud member of Harry H. Renick American Legion Post #9, Past Commander; Garden City Salvation Army Advisory Board; Garden City Noon Lions Club; and the Finney County Historical Society.

*Note: hyperlinks and photos have been updated in this version to reflect 2017-18 legislative session after publication went to press.

2017 Kansas Legislature

Kansas Senate:
31 Republicans/9 Democrats

Kansas House of Representatives:
85 Republicans/40 Democrats

The official website for the Kansas Legislature is: www.kslegislature.org

From that site, you can find information on each House and Senate member along with contact information, legislative calendars, bill introductions, committee activity, committee minutes, committee memberships and virtually anything related to the Kansas Legislature.

Other sites of note:
Governor Sam Brownback/Lt. Governor Jeff Colyer:
www.kansas.gov

Attorney General Derek Schmidt
www.ag.ks.org

Kramer & Frank, P.C., is proud to announce:

Courtney H. Mikesic, Managing Attorney of our Kansas City office, was elected to the bench of the 10th Judicial District in Wyandotte Co., Kansas. She obtained her J.D from Washburn School of Law and will ascend to the bench in Jan. 2017.

The firm is also proudly announces: Jennifer L. Shipman, another graduate of Washburn School of Law, has accepted the Managing Attorney position of our Kansas City office.
Changes in bylaws affect upcoming KBA elections

The Kansas Bar Association’s new bylaws call for a few changes in the governing structure of our organization and hence our election. The new bylaws:

- limit the number of Governors from any district to no more than three. In the coming election, District 1 (Johnson County), which had four Governors, will retain three. The Governor position being vacated by Mark Dupree will be eliminated.
- clarify that only voting members are to be counted in determining the number of Governors for each district. Voting members include regular and government attorneys, judges, and inactive and lifetime members. Non-lawyer magistrate judges, paralegals and students will not be included in the member count for this purpose. In the coming election District 5 (including Topeka), home to many student members, will retain two Governors, rather than three. The Governor position being vacated by Terri Savely will be eliminated.
- no longer limit the representation from District 12 (out-of-state members) to one Governor. In the coming election District 12 will be able to elect three Governors in accordance with the number of out-of-state voting members.

IMPORTANT DATES:

- Nominations for Vice President, Secretary Treasurer, KBA Delegate to the ABA, and KBA Young Lawyer Delegate to the ABA are due to the Executive Director, Jordan Yochim (jeyochim@ksbar.org, 785-234-5696) by January 6, 2017.
- The Nominating Committee will meet on January 13, 2017 at the KBA offices.
- Petitions for officer, delegate or Governor positions are due January 27, 2017.

For more information, please contact Jordan Yochim (jeyochim@ksbar.org, 785-234-5696).

About the Executive Director

Jordan Yochim studied anthropology (B.A.) and business (MBA) at the University of Kansas. He worked as a research administrator for a large state university before joining the KBA. In his spare time he serves as a member of the Douglas County Citizen Review Board and of a local nonprofit children’s organization.

jeyochim@ksbar.org

Not sure which district you are in? Check out the map on Page 45 or go to the KBA website: www.kba.org

Bankruptcy & Insolvency CLE 2017 CLE

APRIL 7, 2017
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For more information visit: http://www.ksbar.org/event/2017BankruptcyCLE
To badly misquote Jane Austen, “It is a truth universally acknowledged that a single lawyer in possession of good facts must also be in possession of a bad legal situation.” (And vice versa).1 In the happy event, however, that facts and law align, the lawyer will feel the need to file a motion for summary judgment, so as to spare all of the parties, including the judge and jury members, the expense and tedium of a trial.

However, before any of the dear readers rush to file such motions in the expectation of victory, one thing must be said: It is still possible to screw this up. Even if the law itself is not in dispute, summary judgment is still not proper unless the lawyer can establish the necessary facts. Failing to do so can result in the motion being denied, thus leading to the unnecessary expenditure of both time and treasure.

The flowery Regency language of the two preceding paragraphs aside, the truth is that summary judgment motions are pretty darn important, and they bring with them rules of their own that are somewhat unique in the whole subject matter of legal writing. While there are a number of ways to mess up a summary judgment motion, one of the most face-palm inducing is when the lawyer does not take proper care to prepare the statement of uncontroverted facts. Make no mistake, there is an art to creating statements of uncontroverted facts in a summary judgment motion, and it is not to be taken lightly. While a comprehensive guide is probably deserving of a full-length article, it is still possible to set forth some general principles to guide practitioners in this task.

The journey starts, as do most legal journeys, with the language of the rule itself. Whether operating under Federal Rule of Civil Procedure 56 or its Kansas counterpart, K.S.A. 60-256, the burden is the same. The party seeking summary judgment must “show[] that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.”2 Unpacking this standard reveals three very important concepts: 1) “show”; 2) “no genuine dispute as to any material fact”; and 3) “entitled to judgment as a matter of law.” These three concepts are vital to the crafting of a good summary judgment motion, and neglecting any of them is simply asking for trouble (or, in fact, a trial).

1. Show

At its most basic, this requirement is about comprehensiveness and clarity. It is the duty of the party seeking summary judgment to affirmatively demonstrate the two requirements for summary judgment. With regard to uncontroverted facts, this means the lawyer must assert enough facts to support the motion, and must assert them with enough clarity that the trial judge can determine that they are in fact uncontroverted. In order to make this happen, there are some important steps to observe.

First, determine whether you need to set out each fact in a separately numbered paragraph. As readers of this column might know, I’m not a huge fan of Kansas’s separately numbered paragraph requirement in motions,3 as I believe it can be an obstacle to good persuasive writing.4 Nevertheless, the requirement makes sense in the context of a Motion for Summary Judgment, because it more easily allows the court to see the facts and match them up to determine whether any material facts are controverted.5 When judges look at summary judgment motions, that’s basically what they do: They take each statement of uncontroverted fact, look to see if the cited page of the record or document supports the statement, and look at the response to see if it is controverted and whether the cited page or document is sufficient to show that a controversy over the fact exists. This is much easier to do when the facts are numbered than when they are set out in a larger paragraph. When writing such a motion, the lawyer should keep in mind that judges are busy, and may not want to comb through pages of narrative. Make it easy on them.

Next, remember that the facts in the statement of uncontroverted facts have to make sense. That means you should still write in a narrative format.6 All of your separate facts taken together should still tell your story, and you should include every fact you plan to address in the argument section of the motion. Don’t just throw facts together at random.7 After all, you still have to persuasively show that you are entitled to the relief you seek. That’s much easier to do if your statement of uncontroverted facts is an easy read for your audience.
2. No genuine dispute as to any material fact

This is where the rules and best practices for the summary judgment motion diverge just a bit from that of other motions. The purpose of the uncontroverted fact section of the summary judgment motion is to show that the material facts are uncontroverted. Here, the need for clarity is paramount. Many summary judgment motions have met their demise, not because the facts they asserted were actually controverted, but instead because the court could not determine whether a fact was actually supported by the authority cited, or because the description of the fact in the statement of uncontroverted facts went beyond that which the citation would support. In order to avoid such problems, follow these basic rules:

First, don’t try to do too much in a sentence. There is no limit on the number of paragraphs you can have, so there really is no reason not to use as many numbered paragraphs as you need. Put each fact in a separate one.

Second, use a concise and active sentence structure with the subject and verb close together. This is good advice in any writing, but it is especially important here. Trying to use complicated language and rhetorical flourishes will only make your sentence harder to understand and may make it easier to controvert. Keep it simple. Keep it direct.

Don’t try to be more persuasive than the language of the authority that you are citing for the fact can support. This can only hurt. While everyone likes to think they are persuasive, this really isn’t the time to show off your skill. Let the facts and your arrangement of them do the talking instead. While you are at it, avoid using language different than the language used in the cited part of the record. Any confusion is bad, and any time you stray from the supporting document, you run the risk of confusion.

3. Entitled to Judgment as a Matter of Law

When considering a summary judgment motion, there is a temptation to see this requirement as the domain of the argument section. However, it is equally important to understand as a factual matter. Your statement of the facts must show that you are entitled to judgment as a matter of law. The importance of keeping this in mind was driven home to me by a case I worked on as a judge’s clerk. The district court had granted summary judgment, and the case was now on appeal. It was a classic mismatch in lawyering. The party asking for summary judgment had set forth five pages of uncontroverted facts in a fairly complicated legal argument. (Although not in separately numbered paragraphs, as there was no rule requiring it. I have to say that this did not endear him to me.) In contrast, the lawyer opposing summary judgment had dropped the ball entirely, failing to provide any support for his responses. The district court deemed all of the facts set out by the moving party as uncontroverted, and granted the motion. There was, however, one small problem. In spite of the five pages of facts, the moving lawyer had neglected to assert facts pertaining to one essential element of the cause of action. Therefore, even though all of the facts asserted were uncontroverted, they still failed to show that the moving party was “entitled to judgment as a matter of law,” and summary judgment was not proper. I shudder to think of how the lawyer explained all of this to his client. The closing big lesson here is that even if you have the facts necessary to win, you still need to make sure that you have asserted them, or all your work will be for naught.

1. The reference here is, of course, to the famous opening of Pride and Prejudice. See Jane Austen, Pride and Prejudice 1 (1813).
2. Fed. R. Civ. P. 56(a); K.S.A. 60-256(c)(2).
3. See K.S.A. 60-210(b) (providing that all pleadings contain separately numbered paragraphs).
5. Many federal district courts, including those in Kansas, also require separately numbered paragraphs in summary judgment motions, even where they are not required in other motions. See, e.g., D. Kan. R. 56.1.
7. See id. (warning of the dangers inherent in the “organization-by-shotgun” method)
8. See id. (noting that “If the judge concludes that your case is so clear that anyone could win it, then you will win”).

About the Author

Jeffrey D. Jackson is a professor of law at Washburn University School of Law, where he teaches Legal Analysis, Research and Writing, Constitutional Law, Constitutional History, and Comparative Constitutional Law. He received his B.B.A. in economics from Washburn University in 1989, his J.D. from Washburn Law in 1992, and his LL.M. in constitutional law from Georgetown University Law Center in 2003. While at Washburn, Jackson was assistant editor for the Washburn Law Journal and currently serves on the Kansas Judicial Council Death Penalty Advisory Committee.

jeffrey.jackson@washburn.edu
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There is a new TV show on CBS entitled “Bull.” The story is roughly based on “Dr. Phil” McGraw’s life in the world of jury consulting before he became a television psychologist. I’ll admit, the first time I watched the show, I pretty much only watched it because Michael Weatherly was in it. I loved him in “NCIS,” and I was really disappointed when he wanted to try new things; however, I was quickly hooked. The show makes some fascinating points about how, for trial attorneys, it’s sometimes not the facts of the case that decide the verdict; it’s the makeup of the jury. Is the juror male or female? What is the juror’s job? With what political ideology does the juror identify?

The second episode of the season dealt with a female commercial pilot whose airplane had crashed. The company was being sued for wrongful death, and the case swirled around whether the pilot had acted recklessly. In the episode, Dr. Bull’s company ran numerous trial simulations with similar jurors, and in every single simulation, the pilot was found guilty. Out of desperation, they tried one last simulation -- and the pilot was found innocent. When asked what variable had changed, the response was that the only thing changed was the pilot’s gender. In test scenarios where the pilot was male, the jury found him innocent. Everything else was the same: both pilots were portrayed as having the same amount of combat time, the same number of flying hours, the same personal habits, etc. The only difference was the pilot’s gender. The remainder of the episode focused on implicit gender bias and how to overcome it in the pilot’s jury trial.

The theory of “implicit bias” was developed about twenty years ago by psychologists Mahzarin Banaji and Anthony Greenwald in their book, “Blindspot.” Implicit bias “refers to the attitudes or stereotypes that affect our understanding, actions, and decisions in an unconscious manner. These biases, which encompass both favorable and unfavorable assessments, are activated involuntarily and without an individual’s awareness or intentional control. Residing deep in the subconscious, these biases are different from known biases that individuals may choose to conceal for the purposes of social and/or political correctness. Rather, implicit biases are not accessible through introspection.

The implicit associations we harbor in our subconscious cause us to have feelings and attitudes about other people based on characteristics such as race, ethnicity, age, and appearance. These associations develop over the course of a lifetime beginning at a very early age through exposure to direct and indirect messages. In addition to early life experiences, the media and news programming are often-cited origins of implicit associations.”

The phrase “implicit bias” is currently being thrown around a lot in the media. It was also mentioned at both the Presidential and Vice Presidential debates; however, the term is often used incorrectly. In an NPR interview with Professor Banaji, the following exchange occurred when discussing the Vice Presidential Debate:

“BANAJI: When I heard Mike Pence speak about implicit bias, it was obvious that he didn’t know what it was.

MIKE PENCE: When an African-American police officer’s involved in a police-action shooting involving an African-American, why would Hillary Clinton accuse that African-American police officer of implicit bias?

BANAJI: That’s when I thought, oh, Mike Pence doesn’t get it. He thinks that if a black police officer shoots at a black person, that can’t be implicit bias. That’s how much work we have to do that we haven’t even gotten the simple idea through that women don’t hire women and black police officers shoot black people because the bias is implicit.”

The Kirwan Institute found the following are a few key characteristics of implicit bias:

• Implicit biases are pervasive. Everyone possesses them, even people with avowed commitments to impartiality such as judges.
• Implicit and explicit biases are related but distinct mental constructs. They are not mutually exclusive and may even reinforce each other.
• The implicit associations we hold do not necessarily align with our declared beliefs or even reflect stances we would explicitly endorse.
• We generally tend to hold implicit biases that favor our own ingroup, though research has shown that we can still hold implicit biases against our ingroup.
• Implicit biases are malleable. Our brains are incredibly complex, and the implicit associations that we have formed can be gradually unlearned through a variety of debiasing techniques.”
We all have implicit biases, and that's not a bad thing to admit; however, until you are willing to recognize your implicit bias, you can't evolve. It is hard to solve a problem you refuse to acknowledge. So what steps can you take to help identify your implicit biases? "Project Implicit" has developed a test to help reveal/identify implicit bias. The test can be found at https://implicit.harvard.edu/implicit/takeatest.html

“The Implicit Association Test (IAT) measures attitudes and beliefs that people may be unwilling or unable to report. The IAT may be especially interesting if it shows that you have an implicit attitudethat you did not know about. For example, you may believe that women and men should be equally associated with science, but your automatic associations could show that you (like many others) associate men with science more than you associate women with science.”?

The first step in personal evolution is identifying where you need to evolve. As attorneys, our implicit biases affect how we treat our clients, witnesses, jurors, and even fellow attorneys. To be more effective advocates for our clients, it is in our best interest to recognize how implicit biases impact daily life.

### About the Author

Amanda Stanley is a member of the KBA Diversity Committee. She received her juris doctorate from the University of Kansas School of Law in 2014 and her Bachelor of Science in Biology from Newman University in 2008. Stanley currently serves as a Research Attorney for the Kansas Court of Appeals.

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5. https://implicit.harvard.edu/implicit/education.html
Honorable Richard D. Rogers, 94, of Topeka, Kan., and formerly of Wamego and Manhattan, Kan., passed away on Nov. 25, 2016. Rogers was a prominent leader in Kansas politics until 1975, when he was nominated by President Ford and confirmed by the Senate as a United States District Judge. Judge Rogers served in that position for 40 years in Topeka, Kan. Rogers was born on December 29, 1921, in Oberlin, Kan. to William C. Rogers and Evelyn Mae (Christian) Rogers. He moved with his parents to Wamego when he was in the first grade. He had a boyhood job in a drugstore where he served, among other customers, Delmas C. Hill, later to become a federal appeals court judge, and Robert H. Kaul, who became a Kansas Supreme Court Justice. He credited these men as inspiring his legal career. In high school, Rogers was a talented athlete who, according to newspaper reports, "stood out like Venus on a clear night" as he helped his team win championships in football and basketball. In 2009, he was inducted into the Wamego High School Sports Hall of Fame. He received an athletic scholarship to play football at Kansas State University, which at that time meant he had a job with the stadium gang working for 30 cents an hour. At K-State, he joined the Beta Theta Pi fraternity. He also was a member of ROTC. In his junior year he was placed in the Army Reserve as a corporal when Japan bombed Pearl Harbor. Rogers obtained a business administration degree at Kansas State in Jan. of 1943 and was sent to infantry school at Ft. Benning, Georgia. He taught basic training to infantry troops and then transferred into the Air Corps, where he became a bombardier. Stationed in Italy, he flew 33 combat missions in a B-24 over the European Theatre and was the recipient of the Distinguished Flying Cross. On one mission, he was the lead bombardier of a group that destroyed a German jet plane factory. After the war, he attended law school at the University of Kansas where he received his J.D. degree. From there, he returned to Manhattan, where he became associated with Alvin Springer, an able and respected lawyer in town. After the death of Mr. Springer in 1956, Rogers formed a law partnership with John Stites. He continued his law career with the firm of Rogers, Stites & Hill until his appointment to the federal bench. Rogers combined an active political career with his legal practice. He was on the Manhattan City Commission for several terms in the 1950s and 1960s. Twice, he was mayor of Manhattan. He also served two terms as Riley County Attorney. Rogers moved into state elective politics in 1964 when he started his first of two terms as state representative. In 1968, he moved to the Kansas Senate where he rose to the position of Senate President in 1975. Rogers held Republican Party posts as precinct committee, chairman of the county committee, chairman of the 2nd District Congressional Committee, and Republican State Chairman. He was a member of the Kansas delegation to the 1964 Republican National Convention, where he chose to support William Scranton. He also managed the successful campaigns of Sen. James Pearson and Governors John Anderson and Robert Bennett. Before he became a federal judge, Rogers served as general counsel for the Kansas Farm Bureau and was on the board of directors for the Kansas Power and Light Company as well as several local financial institutions. He had close ties to Kansas State University, where he taught business law and served as president of the Endowment Association. Rogers also was the president of the University of Kansas Law School Board of Governors. During his tenure as a federal judge, he presided over hundreds of civil and criminal trials. He dealt with cases concerning prison overcrowding, reapportionment, school desegregation, and the Cuban refugees. He had a great respect for the Kansas attorneys who practiced in his court. Judge Rogers served terms as President of the Kansas State Historical Society and the Topeka YMCA. He also belonged to the state and local bar associations as well as local Shrine and veterans groups. He received awards and recognition from the University of Kansas (Distinguished Alumnus Citation), Kansas State University (Honorary Doctor of Humane Letters) and Washburn University (Honorary Life Members Award). In 1985, he was selected Distinguished Kansan of the Year by the Kansas Native Sons and Daughters organization. He also served as president of the Tenth Circuit District Judges Association from 1984-86. Judge Rogers was a member of the First Presbyterian Church of Topeka, Kan. Rogers married Beth Stewart in 1946. She died in 1983. They had three children all of whom survive: Letitia Appignani (Peter) of Harpers Ferry, Va.; Cappi Nelson (Doug) of Topeka; and Kurt Rogers (Jennifer) of Taft, Calif. In 1987, he married Cynthia Conklin. She survives, along with her children, Katherine Burenheide Foster (Daryl) of Topeka; and Kenneth Conklin (Karen) of Olathe, Kan. He has eleven grandchildren and one great-grandchild. Judge Rogers was an avid reader and a great student of history. He was a wonderful joke and story teller who was in frequent demand as a public speaker. He had a great energy and desire to give the world the best of himself. He was dedicated to the legal system and valued its place in our democracy. And he did his best to see that his decisions followed the letter and spirit of the law. Private services with military honors are planned. Memorials are suggested to First Presbyterian Church of Topeka, the Kansas State Historical Society Foundation, or the Washburn University Law School Foundation, and may be left in care of Stewart Funeral Home of Wamego, P.O. Box 48, Wamego, Kan., 66547.
No Wifi? Exhale and Count to Ten

Generally speaking, this thing called Twitter has done more to destroy the normal order of the universe than the previous biggest offender—text messaging. Every once in a while, however, it does a public service. And when it does, critics like me are obliged to pause, take note, and give it its due.

This happened a couple weeks ago. Someone started a “conversation” on Twitter—which is being generous since anything that happens in that space is limited—no more than 140 ‘characters’—aka letters allowed to make your point. In this case, however, that’s all you needed. Someone started a ‘trending’ topic that was this: describe scary stories in five words. In twitter speak it was: #scarystoriesin5words.

This intrigued me. For once, I did more than spin through Twitter thinking my time was being wasted. I mean, it was being wasted, but now there was a potential column in my reach.

And quickly I hit column gold.

These were some of the more popular contributions:

- “Forgot to charge the battery.”
- “Welcome to hell. I’m Kanye.”
- “You didn’t kill that spider.”
- “My parents are on Snapchat.”
- “I lost the handcuff keys.”
- “I’m Chris Hanson. Sit down.”
- “Listen to my life story.”

But the winner, hands down, was this one: “Sorry we don’t have Wifi.”

Followed closely by:

- “I forgot the Wifi password”
- “My wifi isn’t working”
- “Neighbors changed their WIFI password”

These days ‘no wifi’ sends people into outright panic. Just years ago we seemed to manage just fine with dial up, where broadband was limited to places like Internet cafes.

It was a horrible time, apparently. Everyone found their way around using something called maps, and people used phones with cords where they actually spoke to people.

Consider what I saw transpire a couple weeks ago on a Southwest flight. I was sitting on the plane and had a direct view of a lady who walked down the aisle and approached the flight attendant. The passenger was nervous. She had the hallmarks of a business traveler with a pants suit, manicured nails, and pumps on the feet.

“Excuse me” she said to the attendant. “Does this plane have wifi?” The flight attendant paused, as if to contemplate how to share this horrific news. “I’m sorry. No.” Desperation came over the passenger’s face. Life, as she knew it, was over.

The flight attendant used commendable restraint. She could have said a number of things including these:

- “Hey lady. It’s an hour flight to Kansas City. Chill out.”
- “Ma’am, I can see you are stressed. Here are three drink tickets and ten bags of peanuts.”
- “I can tell you are disappointed. I will tell the pilot to go really fast.”
- “I’m sorry. But I have some good news. We have some nice magazines covered with germs you can read. On page 33 you can discover the best plastic surgeons in America.”
- “Shopping at J Crew? It will have to wait.”

The woman turned around and went to back to her seat, which happily was nowhere near mine.

Had the woman found the seat next to me? Now that would be one scary story. ■

About the Author

Matthew Keenan has practiced with Shook, Hardy & Bacon LLP, Kansas City, Mo., since 1985.
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2017 KBA Awards

The KBA Awards Committee is seeking nominations for award recipients for the 2017 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Manhattan. Below is an explanation of each award and a nomination form for completion. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! **Deadline for nominations is Friday, March 3.**

**Phil Lewis Medal of Distinction**

The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- A recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession;
- This award is only given in those years when it is determined that there is a worthy recipient.

**Distinguished Service Award**

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

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public;
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Professionalism Award**

This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

**Pillars of the Community Award**

This award is available to a Kansas lawyer and KBA member with a minimum of 10 years active non-specialized, general legal practice in a predominately low-density population area of Kansas. Recipients will have had substantial practice in small or solo law firms or local government service. Requirements are flexible but consideration will be given to the following factors, including how such factors apply to the lawyer’s community:

- Variety/diversity of law practiced
- Impact/high profile law work
- General contributions to the law and legal profession
- Specific contributions to the legal profession
- Mentoring and support for legal education
- Contributions to the state/community
- Notable civic activities
- Periods of elected or appointed public/government service
- Military service
- Examples of volunteerism and charitable activity
- Reputation in the organized bar, state and community

This award may be but need not be given every year. More than one recipient can receive the award in one year.
Distinguished Government Service Award
This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

Courageous Attorney Award
The KBA created a new award in 2000 to recognize a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet monetary quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

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

Diversity Award
This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

The award will be given only in those years when it is determined there is a worthy recipient.

Outstanding Service Award(s)
These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- No more than six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.
Outstanding Service Awards may recognize:

- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award(s)**

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

- No more than three Pro Bono Awards may be given in any one year.

In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

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

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KBA Awards Nomination Form

Nominee’s Name ________________________________________________________________

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

☐ Phil Lewis Medal of Distinction ☐ Courageous Attorney Award
☐ Distinguished Service Award ☐ Outstanding Young Lawyer
☐ Professionalism Award ☐ Diversity Award
☐ Pillars of the Community Award (NEW) ☐ Outstanding Service Award
☐ Distinguished Government Service Award ☐ Pro Bono Award/Certificates

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______________________________________________________________________________

Nominator’s Name ______________________________________________________________
Address ________________________________________________________________
Phone ___________________________ E-mail ____________________________

Return Nomination Form by Friday, March 3, 2017, to:

KBA Awards Committee
Attn: Deana Mead
KANSAS BAR ASSOCIATION

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The Defend Trade Secrets Act of 2016

By Mitchell Herren and Rachael Silva
I. Introduction

As market forces increasingly demand that more and more workers have digital access 24/7 to their employers’ company information, the line is blurred between what is appropriate for employees to access and store, especially on personally owned devices, and what remains protected company information. This, combined with the age-old reality that some competitors will simply attempt to steal what does not belong to them, has led many state legislatures to pass laws protecting trade secret information. The Uniform Trade Secrets Act has been adopted by many states, including Kansas.

Trade secret owners now also have an avenue in federal court to seek a civil remedy for thefts of certain trade secrets. The Defend Trade Secrets Act of 2016 (DTSA) applies to trade secret thefts within the Act’s jurisdiction occurring on or after the date of enactment. Prior to the enactment of the DTSA, the Economic Espionage Act (EEA) limited civil proceedings concerning the theft of trade secrets solely to the Attorney General. The DTSA was enacted to “allow trade secret owners to protect their innovations by seeking redress in Federal court, bringing their rights into alignment with those long enjoyed by owners of other forms of intellectual property, including copyrights, patents, and trademarks.” It was unanimously passed by the Senate and later ratified by a vote of 410-2 in the House.

Section 5 of the DTSA states the sense of Congress in enacting the DTSA as follows:

1. Trade secret theft occurs in the United States and around the world;
2. Trade secret theft, wherever it occurs, harms the companies that own the trade secrets and the employees of the companies;
3. chapter 90 of title 18, United States Code (commonly known as the “Economic Espionage Act of 1996”), applies broadly to protect trade secrets from theft; and
4. It is important when seizing information to balance the need to prevent or remedy misappropriation with the need to avoid interrupting the—
   (A) Business of third parties; and
   (B) legitimate interests of the party accused of wrongdoing.

Notably, the DTSA does not preempt state law, meaning a trade secret owner may file a petition in a United States District Court alleging claims under both the DTSA and, if applicable, the Uniform Trade Secrets Act (UTSA), which is codified in Kansas at K.S.A. 60-3320, et seq. (KUTSA). Several provisions of the DTSA largely mirror those of the UTSA. However, the DTSA contains additional provisions requiring that trade secret owners notify employees in writing of certain immunities to the DTSA, such as whistleblower immunity, and allowing ex parte seizures of misappropriated trade secrets in some circumstances. These important provisions will be discussed infra in Sections III. A. and C.

This article will first review basic elements of a trade secret action under the DTSA, comparing some provisions with those of the KUTSA. It will then address similarities and differences between the two acts that may be of importance to attorneys and owners contemplating an action to remedy a misappropriation of trade secrets.

II. Basics of Trade Secret Misappropriation Cases

A. Jurisdiction

Prior to the DTSA, a party alleging a claim under the KUTSA could only bring an action in federal court by establishing diversity jurisdiction pursuant to 18 U.S.C. § 1332. The DTSA provides that the “district courts of the United States shall have original jurisdiction of civil actions brought under this section.” A trade secret owner alleging a claim under the DTSA may now bring a claim in federal court without regard to the amount in controversy or the domicile of the parties. A trade secret owner may then also allege a claim under the KUTSA or other state-law theory under the district court’s supplemental jurisdiction, 18 U.S.C. § 1367.

While the DTSA allows entry to federal court for a trade secret owner alleging misappropriation, that entry is limited to trade secrets that are “used in, or intended for use in, interstate or foreign commerce.” The “intended for use in” clause may provide for interesting issues of proof.

B. Misappropriation

The goal of most trade secret litigation is to prove the defendant “misappropriated” a “trade secret.” The definition of “misappropriation” in the DTSA is substantially the same as the definition under the KUTSA, with only minor drafting changes. “Misappropriation” under the DTSA is defined as:

(A) acquisition of a trade secret of another by a person who knows or has reason to know the trade secret was acquired by improper means; or
(B) disclosure or use of a trade secret of another without express or implied consent by a person who—
   (i) used improper means to acquire knowledge of the trade secret;
   (ii) at the time of disclosure or use, knew or had reason to know the knowledge of the trade secret was—
      (I) derived from or through a person who had used improper means to acquire the trade secret;
(II) acquired under circumstances giving rise to a duty to maintain the secrecy of the trade secret or limit the use of the trade secret; or
(III) derived from or through a person who owed a duty to the person seeking relief to maintain the secrecy of the trade secret or limit the use of the trade secret; or
(iii) before a material change of the position of the person, knew or had reason to know that—
(I) the trade secret was a trade secret; and
(II) knowledge of the trade secret had been acquired by accident or mistake.  

Practically speaking, there is no material difference in establishing a misappropriation of a trade secret under both the DTSA and the KUTSA.  

C. “Trade Secret”

The definition of trade secret under the EEA was largely unchanged by the DTSA. While the definition does not mirror that of the KUTSA, they are similar.

The DTSA defines trade secret as:

(3) “Trade secret” means all forms and types of financial, business, scientific, technical, economic, or engineering information, including patterns, plans, compilations, program devices, formulas, designs, prototypes, methods, techniques, processes, procedures, programs, or codes, whether tangible or intangible, and whether or how stored, compiled, or memorialized physically, electronically, graphically, photographically, or in writing if—
(A) the owner thereof has taken reasonable measures to keep such information secret; and
(B) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. 

The KUTSA definition refers to “information.” The DTSA definition, however, specifies certain types of information. While this may seem to indicate the DTSA has a more narrow definition of what comprises a trade secret, the reality is that the words “financial, business, scientific, technical, economic, or engineering information” are likely intended to clarify the intended broad nature of the definition.

D. “Improper Means”

In the DTSA, the term “improper means”: “(A) includes theft, bribery, misrepresentation, breach or inducement of a breach of a duty to maintain secrecy, or espionage through electronic or other means; and (B) does not include reverse engineering, independent derivation, or any other lawful means of acquisition.” This latter section (B) language does not appear in the KUTSA.

While the definition of improper means under the DTSA appears to go a step farther than the KUTSA in excluding certain acts as improper means, this language appears to be adopted from comments to the UTSA, which are not codified in the KUTSA. In Comment 1 to the UTSA, proper means includes “discovery by independent invention,” “discovery by reverse engineering,” “discovery under a license from the owner of the trade secret,” “observation of the item in public use or on public display,” and “obtaining the trade secret from published literature.” Therefore, in all likelihood, there will be no material distinction between the DTSA and KUTSA’s definitions of improper means.

E. Remedies

The remedies set forth in the DTSA are largely adopted from the UTSA, with notable distinctions relevant to employer-employee cases.

1. Injunction

The DTSA injunction provision is similar to the KUTSA provision, and provides that the court may grant an injunction 1) “to prevent any actual or threatened misappropriation;” 2) requiring actions to protect the trade secret (as long as the injunction does not “prevent a person from entering into an employment relationship”); and 3) condition future use on payment of a royalty.

The notable difference in the injunctive provisions is the DTSA’s attempt to not limit employee mobility based on what has come to be known as the “inevitable disclosure doctrine.” This issue will be addressed infra in Section III. D.

2. Damages

Both the DTSA and KUTSA provide for damages for the actual loss caused by the misappropriation of the trade secret, as well as damages for any unjust enrichment caused by the misappropriation not taken into account in computing the actual loss. Likewise, both the DTSA and the KUTSA provide a royalty damages alternative in lieu of damages measured by any other method.

Both the DTSA and the KUTSA provide for punitive damages in the amount of up to two times the amount of the actual damage award. Both require willful and malicious misappropriation before exemplary damages can be awarded.

In the employment context, exemplary damages under the DTSA are only available to employers who have provided necessary notice of an employee’s whistleblower rights. This important issue is discussed infra in Section III. B.

3. Attorney Fees

Both the DTSA and the KUTSA provide that if a claim of “misappropriation is made in bad faith,” a “motion to terminate an injunction is made or opposed in bad faith, or the trade secret was willfully and maliciously misappropriated,” the court may award reasonable attorney’s fees to the prevailing party.

Similar to the availability of exemplary damages, in the employment context, attorney’s fees under the DTSA are only available to employers who have
III. Notable Differences Between the DTSA and the KUTSA

A. Immunity for Whistleblowers and Use in Court

1. Disclosure to Government or In Court

The DTSA provides criminal and civil immunity for disclosures of trade secrets made under certain conditions. This provision, which is unique to the DTSA, provides immunity for an individual who discloses a trade secret 1) “in confidence to a Federal, State, or local government official, either directly or indirectly, or to an attorney; and solely for the purpose of reporting or investigating a suspected violation of law; or” 2) in a “complaint or other document filed in a lawsuit or other proceeding, if such filing is made under seal.” The whistleblower immunity provision applies to civil actions brought under both federal and state law. Therefore, this provision would act to protect a whistleblower using trade secret information, or anyone properly using trade secret information in a court filing, from the claim that using the trade secret information was, in itself, a misappropriation of the trade secret.

2. Disclosure in Anti-Retaliation Suit

The second basis for immunity from suit is the disclosure of the trade secret when it is used in a lawsuit for retaliation. The provision states as follows:

An individual who files a lawsuit for retaliation by an employer for reporting a suspected violation of law may disclose the trade secret to the attorney of the individual and use the trade secret information in the court proceeding, if the individual—

(A) files any document containing the trade secret under seal; and

(B) does not disclose the trade secret, except pursuant to court order.

3. Government’s Use of Trade Secrets

Although the immunity provisions contemplate a disclosure of a trade secret made to a government official for the purpose of reporting or investigating a violation of law, the DTSA does not provide any mechanism for the safekeeping of that trade secret outside of an actual proceeding under the DTSA. Therefore, trade secret owners may rightfully be concerned with the safekeeping of their trade secrets. The DTSA does not create a private right for “any otherwise lawful activity conducted by a government-
3. Employee Defined
The notice provision does not only apply to W-2 employees. Rather, the DTSA defines employee to include “any individual performing work as a contractor or consultant for an employer.” Therefore, the notice provision applies to any agreement that governs use of a trade secret of confidential information entered into with an employee, contractor or consultant.

4. Unlawful Conduct
The DTSA explicitly states “nothing in this subsection shall be construed to authorize, or limit liability for, an act that is otherwise prohibited by law, such as the unlawful access of material by unauthorized means.” This language clarifies that the immunity provision only limits liability for the reasons set forth in section 1833(b), concerning whistleblowers, and not for unlawful conduct, such as violating the Computer Fraud and Abuse Act.

C. Ex Parte Seizures - 18 U.S.C.A. § 1836(b)(2)
Unique to the DTSA is its civil seizure provision, which states that the court may “upon ex parte application but only in extraordinary circumstances, issue an order providing for the seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action.” While extraordinary circumstances is not defined, the legislative history of the DTSA evidences that this remedy is “expected to be used in instances in which a defendant is seeking to flee the country or planning to disclose the trade secret to a third party immediately or is otherwise not amenable to the enforcement of the court’s order.” To grant an application for an ex parte seizure, the court must find that it “clearly appears from specific facts that” several factors have been met.

Summarized, the factors include: 1) the remedy of an injunction would be inadequate; 2) “immediate and irreparable injury will occur;” 3) the harm of a denial outweighs the harm to other parties; 4) the applicant is likely to succeed on the merits; 5) the person has actual possession; 6) the application identifies the location of the matter to be seized and describes the matter with reasonable particularity; 7) the person or persons “would destroy, move, hide, or otherwise make such matter inaccessible to the court,” if notice was given; and 8) the applicant has not publicized the requested seizure.

When granting an ex parte application for civil seizure, the court order must “set forth findings of fact and conclusions of law” and provide the following: the narrowest seizure possible; protect property from disclosure; provide guidance to law enforcement who will execute the seizure; set a seizure hearing not later than seven days after the order has issued (except in limited circumstances); and require the applicant to provide a security in an amount determined adequate by the court for potential payment of damages as a result of a wrongful or excessive seizure.

Once information is seized pursuant to an order, the court will take custody of the materials. Recognizing that the DTSA does not provide any guidance as to seizure procedures other than requiring the materials to be secure, section six of the DTSA requires the Federal Judicial Center to “develop recommended best practices for (1) seizing information and media storing the information; and (2) securing the information and media once seized” no later than two years after enactment of the DTSA.

A seizure hearing is to be held within seven days of the order unless all parties consent to another date. At the seizure hearing, the applicant has the “burden to prove the facts supporting the findings of fact and conclusions of law necessary to support the order.” Depending on the evidence adduced at the hearing, the seizure order will stand, be modified or be dissolved.

While the civil seizure provision may be seen as an enticing weapon in the evolving realm of trade secrets law, civil seizure may not always be the best tactic in litigation. First, the applicant must establish all eight factors in an affidavit or verified complaint. This includes verified facts showing that a party would not comply with an order issued pursuant to Rule 65, which includes the entry of a preliminary injunction or a temporary restraining order. This may be difficult to show unless, for example, the party is going to leave the country or there is evidence that the party has not previously complied with legal orders.

Second, a practitioner advising his or her client must also consider that a party who is harmed by the wrongful or excessive seizure may bring an action against the applicant for damages. Those damages include “lost profits, cost of materials, loss of good will, [] punitive damages in instances where the seizure was sought in bad faith, and, unless the court finds extenuating circumstances, [] reasonable attorney’s fee[s].” It will be interesting to see how this section of the DTSA, referred to as the Seizure Provision, will be interpreted by courts. Consider a common scenario for trade secret litigation – an employee who leaves an established company to start a competitive business and who retains some form of customer and product information from the former employer. In such circumstances, it is not uncommon for the former employer to assert that any such information in the possession of the new, competing company is trade secret information.

If the former employer seeks an ex parte court order seizing what it believes to be its trade secrets, it may not be very challenging to convince a judge in an ex parte hearing that the information constitutes trade secrets. The judge may or may not be familiar enough with trade secret litigation to know that customer and product information may or may not be a trade secret, depending on the facts of the particular situation. Since the DTSA's Seizure Provision allows the “seizure of property necessary to prevent the propagation or dissemination of the trade secret that is the subject of the action,” and since such information is likely to be found on multiple electronic devices of the former employer and the new company, seizure of all such “property necessary” may mean seizure of all computers of the new company, and possibly even its cloud-based storage accounts. The Seizure Provision does contemplate the “narrowest seizure of property necessary,” but since electronically stored data is often available and copied across multiple platforms, the seizure of electronic devices and accounts could be very broad.
Such a seizure, even for the limited time contemplated by the DTSA before a contested hearing could be had, could be devastating for a new company. Although the Seizure Provision provides redress for a victim of wrongfully seized property, issues of proof could be complicated and costly to litigate. The courts are often reluctant to allow damages for lost profits or good will of a new company since such damages are often considered speculative. Will the court hold a party who, in hindsight, obtained a wrongful seizure to a strict liability standard, or will the wronged party need to prove the party that obtained the ex parte seizure order acted in bad faith? These are just examples of issues courts will face as they consider Seizure Provision of the DTSA.

D. Employee Mobility

The DTSA clearly answers the question of employee mobility, which has been a subject of contested litigation under the UTSA. Under the DTSA, the court may not order an injunction that prevents a person from entering into an employee relationship. The statute also makes clear that any other type of condition the court places on employment must be “based on evidence of threatened misappropriation and not merely on the information the person knows.” Any injunction entered by the court pursuant to the DTSA must also not conflict with “applicable State law prohibiting restraints on the practice of a lawful profession, trade, or business.”

These provisions will work to further prevent restrictions on employee mobility after leaving an employer and essentially nullifies the “inevitable disclosure doctrine” applied in some states. This doctrine in essence holds that if an employee’s new job duties with a competitor of the former employer would inevitably cause the employee to disclose highly valuable trade secrets of the former employer, the new employment can be enjoined.

The inevitable disclosure doctrine has been applied in other jurisdictions but has not yet been addressed by Kansas courts. In Bradbury Co. v. Teissier-du-Cros, the District of Kansas acknowledged the doctrine but did not answer the question of its applicability in Kansas after determining that the statute of limitations had run on the plaintiff’s claim. Although Kansas has not addressed the doctrine, an employer who would like to seek to prevent an employee from working for a direct competitor due to the potential for inevitable disclosure of the employer’s trade secret should pursue a trade secret claim under the KUTSA, and not the DTSA.

E. Action Must be Brought by Owner

The DTSA provides that an action must be brought by a trade secret “owner.” The term “owner,” “with respect to a trade secret, means the person or entity in whom or in which rightful legal or equitable title to, or license in, the trade secret is reposed.” The KUTSA does not require that the action be brought by an “owner.” However, the definition of misappropriation in both statutes identifies the trade secret as the “trade secret of another.” Also, the comments to the injunctive relief section in the UTSA discuss a “trade secret owner.” Although the plaintiff in a trade secret misappropriation case is often the owner, such is not always the case.

F. Preemption

1. KUTSA

The KUTSA preempts any other civil claims that are based on misappropriation of a trade secret, except for claims based on contract. It does not preempt other civil remedies not based on misappropriation of a trade secret or criminal remedies of any nature. Common tort claims that have been preempted under this statute include breach of fiduciary duty and tortious interference.

2. DTSA

The DTSA does not preempt state law claims for misappropriation of a trade secret, with the exception of claims made against whistleblowers. The applicable provision states as follows:

Except as provided in section 1833(b), this chapter shall not be construed to preempt or displace any other remedies, whether civil or criminal, provided by United States Federal, State, commonwealth, possession, or territory law for the misappropriation of a trade secret, or to affect the otherwise lawful disclosure of information by any Government employee or contractor.64

This raises the interesting question of whether an action brought in Kansas federal court pursuant to only the DTSA will allow the trade secret owner to also pursue tort claims that would have been preempted had the action been brought pursuant to the KUTSA. One argument would be that an action brought only under the DTSA should be allowed to contain related tort claims for the same trade secret misappropriation because the DTSA expressly does not preempt such actions. The counter argument would be that the KUTSA even if not utilized in the lawsuit, preempts such tort claims because of the applicability of the KUTSA. It remains to be seen how Kansas federal courts will handle this question.

G. Confidentiality

Both the KUTSA and DTSA have a general provision that requires courts to “preserve the confidentiality of trade secrets.” The DTSA provides that:

In any prosecution or other proceeding under this chapter, the court shall enter such orders and take such other action as may be necessary and appropriate to preserve the confidentiality of trade secrets, consistent with the requirements of the Federal Rules of Criminal and Civil Procedure, the Federal Rules of Evidence, and all other applicable laws. An interlocutory appeal by the United States shall lie from a decision or order of a district court authorizing or directing the disclosure of any trade secret.

The KUTSA provides:

In an action under this act, a court shall preserve the secrecy of an alleged trade secret by reasonable means, which may include granting protective orders in connection with discovery proceedings, holding in-camera hearings, sealing the records of the action, and ordering any person involved in the litigation not to disclose an alleged trade secret without prior court approval.
The DTSA, however, goes on to expand the confidentiality provision to further protect the trade secret owner by providing that the court must not direct disclosure of information an “owner asserts to be a trade secret unless” the owner is given an “opportunity to file a submission under seal that describes the interest of the owner in keeping the information confidential.”

IV. Conclusion

The Defend Trade Secrets Act will provide trade secret owners with another useful tool to protect their valuable information and to use in seeking redress when misappropriation occurs. It provides federal court access and, in extraordinary situations, the opportunity for ex parte civil seizure of misappropriated trade secrets if used or intended to be used in interstate commerce. It does not preempt state tort claims arising out of the misappropriation. Trade secret owners wishing to have access to remedies of exemplary damages and attorney fees should update their employee agreements to provide the notice required by the DTSA. It does not appear to allow for use of the doctrine of “inevitable disclosure,” so those wishing to press for remedies based on that doctrine should avoid using the DTSA.

In short, the DTSA will provide trade secret owners access to the federal courts and provide protections similar to those available to holders of other forms of intellectual property. It will be interesting to see how the federal courts develop this avenue of law and whether owners will tend to choose federal or state forums when seeking to protect their trade secrets.

About the Authors

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1. K.S.A. 60-3320 et seq.
5. 18 U.S.C.A. § 1832, note.
6. Id. § 1836(c).
7. Id. § 1836(b)(1).
8. 18 U.S.C.A. § 1839(5); K.S.A. 60-3320(2).
12. Id. § 1839(6).
15. Id. § 1836(b)(3)(B); K.S.A. 60-3322(a).
16. Id. § 1836(b)(3)(B); K.S.A. 60-3322(a).
17. 18 U.S.C.A. § 1836(b)(3)(C); K.S.A. 60-3322(b).
20. Id. § 1836(d); K.S.A. 60-3325.
22. Id. § 1833(b)(1).
23. Id.
24. Id. § 1833(b)(2).
25. See discussion on confidentiality infra in Section III. G.
27. Id. § 1833(b)(3)(A).
28. Id. § 1833(b)(3).
29. Id. § 1833(b)(3)(D).
30. Id. § 1833(b)(3)(B).
31. Id. § 1833(b)(3)(C).
32. Id.
33. Id. § 1833(b)(4).
34. Id. § 1833(b)(5).
35. Id. § 1030.
36. Id. § 1836(b)(2)(A)(i).
39. Id. § 1836(b)(2)(A)(ii).
40. Id. § 1836(b)(2)(B).
41. Id. § 1836(b)(2)(D).
44. Id.
45. Id. § 1836(b)(2)(A)(i).
46. Id. § 1836(b)(2)(G).
49. Id. § 1836(b)(2)(B)(ii).
52. Id.
53. Id. § 1836(b)(3)(A)(ii).
54. See PepsiCo, Inc. v. Redmond, 54 F.3d 1262, 1270-71 (7th Cir. 1995).
59. See Progressive Prod., Inc. v. Swartz, 41 Kan. App. 2d 745, 760, 205 P.3d 766, 777 (2009), aff’d in part, rev’d in part, 329 Kan. 947, 258 P.3d 969 (2011) (“Put in simpler terms, this [UTSA] comment provides for exceptional circumstances when (1) there is an overriding public interest, or (2) the trade secret at issue was acquired in good faith and the resulting prejudice to the innocent misappropriator in restraining future use outweighs the interests of the aggrieved owner of the trade secret.”) (emphasis supplied).
60. See e.g., DTM Research, LLC v. AT & T Corp., 245 F.3d 327, 333 (4th Cir. 2001); Advanced Fluid Sys., Inc. v. Huber, 28 F. Supp. 3d 306, 323 (M.D. Pa. 2014) (“The court concludes that ownership, in the traditional sense, is not prerequisite to a trade secret misappropriation claim.”); Metso Minerals Indus. v. PLSmooth-Excel LLC, 733 F. Supp. 2d 969, 978 (E.D. Wis. 2010).
61. K.S.A. 60-3326.
63. 18 U.S.C.A. § 1838.
64. Id.
66. Id.
68. 18 U.S.C.A. § 1835(b).
ATTORNEY DISCIPLINE

ORIGINAL PROCEEDING IN DISCIPLINE
IN THE MATTER OF TED E. KNOPP
90-DAY SUSPENSION
NO. 113,368 – FRIDAY, DEC. 2, 2016

FACTS: A hearing panel determined that Knopp violated KRPC 3.1 (meritorious claims and contentions), 3.3(a)(1) (candor towards the tribunal), 8.4(c) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), 8.4(d) (engaging in conduct prejudicial to the administration of justice), and 8.4(g) (engaging in conduct adversely reflecting on a lawyer’s fitness to practice law). The charges arose after Knopp represented a client who had been evicted from her mobile home park. Even though the mobile home park had always invited Knopp’s client to return to claim her property, Knopp filed an action for conversion against the mobile home park. After the district court denied that motion for conversion, Knopp was put on notice that the district court believed that there was no factual basis for the cause of action. Knopp persisted and filed a motion for summary judgment, which was also denied. Upon motion, the district court awarded the defendants almost $6,000 in sanctions against Knopp personally. Knopp appealed the motion for summary judgment. The decision of the district court was affirmed, and the Court of Appeals assessed attorney fees against Knopp. Knopp self-reported the violation to the Office of the Disciplinary Administrator.

HEARING PANEL: After finding that Knopp filed frivolous actions, the hearing panel noted that Knopp’s actions appeared to be motivated by a genuine desire to help his client. Further, Knopp’s actions were in part due to his relevant personality traits of narcissism, obsessive-compulsive personality, and histrionic features. Knopp also paid both of the penalties assessed against him in connection with this case. Because Knopp formulated a workable probation plan, the hearing panel recommended that probation was appropriate, with a suspended underlying discipline of 90 days’ suspension.

HELD: The court adopted the hearing panel’s findings and conclusions. During the proceeding before the Kansas Supreme Court, the court heard evidence that Knopp has already successfully completed almost 2 years of probation, including obtaining the required psychological treatment. A majority of the court believed that an additional 6 months of probation was appropriate, with an underlying 90-day suspension. A minority of the court would have imposed a lesser sanction.
The Journal of the Kansas Bar Association

CRIMINAL

JURY INSTRUCTION–PROSECUTORIAL MISCONDUCT–SENTENCING
STATE V. LOUIS
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 110,853 – WEDNESDAY, NOV. 23, 2016

FACTS: Louis was involved in a gun battle with members of a rival gang. Ballistics evidence showed that Louis was one of two shooters, although there was conflicting evidence about who fired the first shot. Louis claimed that he only fired a gun in self-defense. The altercation spread from a restaurant parking lot to a residential neighborhood and played out over a 30 minute period. Both eyewitness and ballistics evidence pointed to Louis being the shooter in the neighborhood. Louis was convicted of 12 crimes, including first-degree felony murder and two counts of attempted first-degree murder.

ISSUES: (1) was Louis entitled to a jury instruction on attempted second-degree murder as a lesser included offense of attempted first-degree murder, (2) was Louis entitled to a jury instruction on attempted reckless involuntary manslaughter, (3) did the prosecutor commit error by commenting on an evidentiary ruling, (4) was Louis’ sentence illegally lengthy

HELD: Attempted intentional second-degree murder is a legally appropriate lesser included offense of attempted first-degree murder. But in this case, there was overwhelming evidence of premeditation, such that there is no reasonable probability that the jury would have convicted Louis of attempted second-degree murder had the instruction been given. Attempted involuntary manslaughter is not an offense, so the instruction requested by Louis was not legally appropriate. It is unclear from the record whether the prosecutor was actually commenting on an evidentiary ruling. Although it was a close call, the prosecutor’s isolated comment made during rebuttal was within the latitude afforded to prosecutors. The “double rule” applies to grid sentences only after a defendant serves the off-grid portion of the sentence. Accordingly, Louis’ sentence was appropriate.

STATUTES: K.S.A. 2015 Supp. 21-5201(a), -5202(a), -5202(c), -5202(h), -5202(i), -5301(a), -5402(a)(1), -5403(a)(1), -5405(a)(1), 22-3414(3); K.S.A. 2011 Supp. 21-6806(c), -6819(b)(4)

CIVIL

CIVIL PROCEDURE–PUNITIVE DAMAGES–TRUSTS
ALAIN ELLIS LIVING TRUST V. HARVEY D. ELLIS LIVING TRUST
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 113,097 – FRIDAY, NOV. 18, 2016

FACTS: Dr. Harvey and Mrs. Alain Ellis created two trusts during their lifetimes; the Alain Ellis Living Trust and the Harvey D. Ellis Living Trust. Alain died in March 2007. As the surviving trustee of her trust, Dr. Ellis was entitled to all of the income from her trust during his life. The beneficiaries of Alain’s trust were the couple’s sons plus one granddaughter. The beneficiaries did not know about Alain’s trust when she died. While serving as trustee of Alain’s trust, Dr. Ellis improperly converted approximately $1.5 million from that trust, depositing the funds into his own trust. Dr. Ellis also amended his trust to name a bank as successor trustee and to remove his heirs as beneficiaries. Dr. Ellis died in 2011. At the time of his death, the beneficiaries to the considerable assets in the trust were all charitable institutions. Shortly after Dr. Ellis’ death, an heir and court-appointed special trustees for both trusts investigated improper transfers between the trusts. Following that investigation, funds were transferred back to Alain’s trust. Alain’s trust filed suit against numerous parties, including Dr. Ellis’ trust, the bank serving as successor trustee, and the attorney who altered the terms of Dr. Ellis’ trust. This appeal follows a decision adverse to Alain’s trust.

ISSUES: (1) Did the district court err by ruling that punitive damages cannot be awarded against the assets of a deceased settlor’s revocable trust, (2) Did the district court err by ruling that K.S.A. 58a-1002(a)(3) does not allow a double damage penalty to be assessed against a deceased malfeasant trustee


ARMS OF DISCRETION–WITHDRAWAL OF PLEA
STATE V. SCHAAL
WYANDOTTE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 111,513 – FRIDAY, NOV. 18, 2016

FACTS: In exchange for certain promises from the State, Schaal pled guilty to the crime of eluding a police officer. However, neither Schaal’s attorney nor the prosecutor knew at the time the plea was entered that Schaal was already serving probation for another crime. It was only after this information came to light that Schaal learned that the court was authorized to impose a custodial sentence. After learning of this fact, Schaal hired new counsel and filed a motion to withdraw his plea. At the hearing on the motion to withdraw plea, the court asked Schaal several questions that touched on his credibility. After finding that Schaal was less than truthful during the plea hearing, the district court denied the motion to withdraw. The Court of Appeals affirmed that decision, and the Supreme Court granted Schaal’s petition for review.

ISSUE: (1) Did the district court abuse its discretion by denying Schaal’s motion to withdraw plea on several findings that were not supported by substantial competent evidence

HELD: The district court’s recollections about its colloquy with Schaal at the plea hearing were mistaken; the district court did not ask Schaal the questions that it believed were asked. Further, the district court failed to determine whether Schaal was misled into believing that he would be sentenced to probation. Although the district court made credibility judgments about Schaal, most of those judgments were based on faulty recollections. The case was remanded to a new hearing on the motion to withdraw plea. At that hearing, the district court should apply the three Edgar factors.

HELD: The issue of whether a claim of punitive damages survives the death of the wrongdoer is an issue of first impression. The district court denied Alain’s trust’s motion to amend the petition to claim punitive damages against Dr. Ellis’ estate and trust. An award for punitive damages is not designed to compensate a plaintiff for harm but is rather given in addition as a punishment for wrongdoing by the tortfeasor. There is no doubt in this case that Dr. Ellis willfully acted in such a way that punitive damages could have been pursued during his life. But a claim for punitive damages is not a cause of action, separate and distinct from a claim for compensatory damages. Accordingly, in the absence of a statute expressly allowing such action, a claim for punitive damages does not survive the death of the wrongdoer. K.S.A. 58a-1002(a)(3) allows for an award of double damages for a breach of trust if the trustee knowingly converts the trust’s property "to the trustee’s own use.” Although Dr. Ellis did not spend the money he transferred but rather bequeathed it to charity, this action would have subjected him to double damages had he been alive during litigation. But because he was not, the punitive double damage provision of K.S.A. 5a-1002(a)(3) cannot apply.

STATUTE: K.S.A. 58a-1002(a)(3), -1004, 59-1704, 60-1801,-3702(a), -3702(c), -3702(d)(1), -3702(d)(2)

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Observance of these dates may be deferred if holiday would interfere with judicial proceedings in progress. At the discretion of the chief judge and approval of judicial administrator, a district court may remain open on any of the designated holidays when the local county courthouse is open for business, and may observe as a substitute holiday a county-designated holiday not otherwise observed by the Judicial Branch.

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New Years’ Resolutions for Lawyers Suggested by the Appellate Court Clerk.

10. Pay my annual fees, both to CLE and Attorney Registration, before they are overdue.
9. Don’t let work ruin my personal life. Do I live to work or work to live?
7. If I change addresses, I will complete the online form on the ks courts.org website.
6. I will read the applicable Supreme Court rule to see if it answers my question.
5. I will file my brief or motion before the last day it is due so that if I have trouble electronically filing it, I can still be timely.
4. Be quick to listen and slow to judge.
3. I will proof read my wok so I dont look ellitorate.
2. Call the clerk’s office, 296-3229, if I have appellate practice questions.
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Court of Appeals

Criminal

Probation Revocation; Intermediate Sanctions; Failure to Raise Issue Below
State v. Battle
Sedgwick District Court – Affirmed

FACTS: Andre K. Battle was convicted in separate cases of possession of cocaine and three counts of burglary. He received a controlling sentence of 11 months’ incarceration for the burglary convictions and a consecutive sentence of 28 months’ incarceration for possession of cocaine. The district court granted probation in both cases for a period of 18 months. After repeated probation revocations and reinstatements, the district court eventually revoked Battle’s probation for good. He did not challenge the order to serve his underlying incarceration sentence.

ISSUES: Probation Revocation; Intermediate Sanctions; Failure to Raise Issue Below

HELD: Court held Battle’s issue on appeal was not properly raised either at the probation revocation hearing or before he filed his notice of appeal. Court concluded the intermediate sanction issue was not preserved for appellate review.

STATUTE: K.S.A. 22-3716

Illegal Sentence—Sentence Modification
State v. Herrmann
Reno District Court – Affirmed
No. 114,887 – Friday, Nov. 18, 2016

FACTS: Herrmann pled guilty to one count of attempted aggravated indecent liberties with a child. He was initially given a term of 24 months’ imprisonment plus 24 months’ postrelease supervision. However, the State later learned that the district court should have sentenced Herrmann to a lifetime term of postrelease supervision. Accordingly, the State filed a motion to correct illegal sentence, which was granted.

ISSUE: (1) Did the district court have jurisdiction to resentence Herrmann because of a change in the law

HELD: The 2013 amendments to K.S.A. 22-3717(d)(1)(D) do not alter the requirement that a person convicted of a sexually violent crime after July 1, 2006, receive lifetime postrelease supervision. While the general rule is that the penalty in existence at the time of the offense controls, the legislature can give retroactive effect to statutory changes made after the crime is committed. In this case, subparagraph (G) of K.S.A. 2015 Supp. 22-3717(d) unambiguously applies, and Herrmann’s 24-month term of postrelease supervision remained an illegal sentence, even after the 2013 amendments to K.S.A. 22-3717(d)(1).

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