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Focus

The 2011 Kansas Workers Compensation Act: Too Sharp A Right Turn?
By Tim Alvarez

Items of Interest

9 The Kansas Bar Association Seeks Candidates for Executive Director’s Position
10 Found Email Treasure: But Can You Use It?
11 Found Email Treasure: But Can You Use It?
17 Advanced Notice: Elections for 2012 KBA Officers and Board of Governors
18 2012 Kansas Bar Association Awards
20 2012 Legislative Outlook
22 2011 Outstanding Speakers Recognition
23 2011 Journal Authors Recognition
33 Supreme Court Rule 803: Rules Relating to Continuing Legal Education
35 Notice of Amendment of the Local Rules of Practice of the United State District Court
38 2012 Supreme Court Session Schedule

Regular Features

6 President’s Message
8 Young Lawyers Section News
11 The Diversity Corner
13 Law Students’ Corner
15 Law Practice Management Tips & Tricks
16 Members in the News
34 Appellate Decisions
37 Appellate Practice Reminders
42 Classified Advertisements

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

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TABLE OF CONTENTS CON’T.

Article

12 Substance & Style: Mentoring New Legal Writers
By Tonya Kowalski

Cover layout & design by Ryan Purcell npurcell@ksbar.org

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Kansas Bar Association, Topeka, Kan.
Since my last column, I began my local and specialty bar meetings in Colby for the 15th Judicial District fall meeting. Allan Taylor hosted the event. About 20 judges and attorneys attended, including Jeff Mason (KBA governor), Cal Williams, Joni Thadani, Justin Barrett, and Judge Schiffner. We convened at the Meadow Lakes golf course for lunch and refreshments, followed by either golf or a friendly card game of “knock.” I chose knock. I learned a few things from the judges and lawyers from the “big 15th,” including: (1) never sit next to Judge Kvasnicka (Judge K), he leaches the toxic card poison to all other card players around the table and eventually wins all the quarters; (2) I am from the eastern part of the state, even though I am from Wichita; (3) Ron Vignery has a fine voice and is able to break out into song at the drop of a hat whether he is winning at knock, or when Judge K, is leeching the card life blood from his body; and (4) do NOT go for a cheap joke by referring to the Marion County Bar Association members as frugal children with unmarried parents (in so many words) for failing to buy your lunch, unlike the generous Thomas County Bar, unless you are prepared to receive this check from the chief administrative judge, Mike Powers, on behalf of the Marion County Bar, in front of a room full of people, including Chief Justice Lawton Nuss.

Please note who is authorized to sign checks for the Marion County Bar Association. This check was presented in great fun and with much hilarity; Keith Collett, Rep. Bob Brookens, and Judge Powers, you and your bar are the greatest! I prize this check; it will be framed and displayed in my office.

I then met with the Barton County Bar Association for lunch. Perhaps, I wondered, Great Bend should be renamed “Keenanland” as a good percentage of Bar members share the last name Keenan. I found Dennis Keenan to be particularly amusing, as was Glenn Opie (who was also honored at the meeting for his World War II service). Tom Berscheidt, Judge Hannelore Kitts, Addie Baird, and Brock McPherson were all in attendance for a wonderful lunch, laughs, and an update on what their Kansas Bar Association has been doing.

I was pleased to be invited to lunch by the Kansas Association of Criminal Defense Lawyers, who has never had a KBA president attend their biannual meeting. Their association brings in amazing speakers, and there were some wonderful lawyers in attendance. Gail Jensen, Rod Iverson, Pat Lewis, Jennifer Roth, Justin Barrett, Cal Williams, and Lisa Montgomery were among the approximately 100 attendees. The association gave out little handcuffs, among other things, to those in attendance; it took no time for my 10 and 13-year-old sons to figure out the size was perfect for our cat, who spent a few days in hiding.

Now, the Cowley Bar Association is an organized group, who keeps and distributes minutes even though, in the minutes, the secretary, Lee Velasquez, reported “Minutes of the July 14, 2011, Cowley County Bar Meeting were presented, reviewed, and ignored.” There was good attendance with, among other lawyers, Chad Giles, Jennifer Passiglia, Bill Muret (KBA governor), Lucy Herlocker, N.M. Iverson, Lee Velasquez, Mark Krusor, and Judges Jim Pringle and LaDonna Lanning.

The Riley County Bar Association was a wonderful host at their November meeting where about 25 were in attendance. They meet at the Manhattan Country Club, which has a beautiful view overlooking the city of Manhattan. The president, Mark Knackendoffel, remarked that he had been a member of the Riley County Bar Association for the past 21 years and didn’t remember a KBA president ever attending one of their meetings; Jim Morrison chimed in that he has been a member for 41 years and didn’t recall the KBA president attending a meeting. Judge Jerry Mershon received his 50-year pin from the KBA. It was great to see some friends again, Curt Loub, Dick Seaton, Bruce Kent (KBA governor), and Gabrielle Thompson. And, it was wonderful to meet some new friends, Craig Cox, Amethyst Matthews, Pete Paukstelis, and Gerry Shivley.

Approximately 30 of our friends met in Reno County in November. The event was quite well attended, and we had the chance to honor John Shaffer, a World War II veteran. Judges Trish Rose and Patricia Macke Dick attended, as did many others, Jerry Green (KBA secretary/treasurer), John Swearer (KBA governor), and Bill Swearer, KBA past president. It was great to see Melissa Moodie, Candace Bridgess, Ron Leslie, and Tim Givan, president of the Reno County Bar Association.

Finally, in December, I was invited to attend the diamond jubilee dinner in Kansas City for the Kansas Association for
Justice (KsAJ). The event was held at the Loose Mansion in Kansas City. KsAJ turned 60 this year, and the dinner and program were just fantastic. Don Vasos emceed the event and began with his remembrances of the start of the association, when a part of being president meant that you became personally liable for the bank debt. It was a truly wonderful gathering; some of those attending, Jeff Carmichael, John Parisi, John Johnson, Jerry Levy, Dave Rebein, and Karen Renwick, KsAJ president.

KBA President Rachael Pirner may be reached by email at rpirner@ksbar.org, by phone at (316) 630-8100, or by posting a note on our Facebook page at www.facebook.com/ksbar.

Kansas Association for Justice Diamond Jubilee Dinner (top left): Don Vasos and May Vasos; (top right) KsAJ President Karen Renwick and Margaret Farley.

15th Judicial District Fall Meeting (bottom left, l-r): Joni Thadani, Karan Thadani, and Kevin Berens; (bottom right, l-r) Judge Robert Van Allen, Justin Barrett, and Jeff Mason.

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As lawyers, we have knowledge and skills that enable us to assist our communities in unique ways. However, most of us are also fortunate enough to have monetary resources that can also be used to support and assist the community, and certainly, all of us in private practice have trust accounts where we keep our clients’ money safe. This is where the Kansas Bar Foundation (KBF) and the Kansas IOLTA (Interest on Lawyers’ Trust Accounts) program come in.

For those of you who are unfamiliar with the KBF and the IOLTA program (especially the young lawyers new to the profession), let me provide a little information, background, and history. The KBF is a 501(c)(3) charitable organization that was founded by members of the Kansas Bar Association in 1957. The mission of the KBF is to “serve the citizens of Kansas and the legal profession through funding charitable and educational projects that foster the welfare, honor, and integrity of the legal system by improving its accessibility, equality, and uniformity, by enhancing public opinion of the role of lawyers in our society.” The KBF is supported solely through the contributions of lawyers, the KBF Fellows program, and IOLTA.

Becoming a member of the KBF Fellows program is easy, the pain it inflict on your checkbook is also relatively nonexistent. To become a KBF Fellow, all you have to do is pledge to contribute at least $1,000 to the KBF. While $1,000 is not a nominal amount, the KBF allows you to pay off this pledge in 10 annual payments of $100. By becoming a Fellow, you receive the normal tax deductions that you receive when contributing to 501(c)(3) organizations. Additionally, you also get the benefit of being invited to the annual Fellows Dinner that is held in conjunction with the KBA Annual Meeting each year. This is a great chance, especially for young lawyers, to meet and network with lawyers and judges from all across the state.

If you’re interested in becoming a KBF Fellow, please contact me or Kelsey Schrempp, KBA public service manager, so that we can send you a pledge card. As a Fellow, I would be happy to speak with you and answer any questions you may have.

One of the primary contributing sources of financial support to the KBF is the IOLTA program. By participating in IOLTA, lawyers agree to allow the IOLTA program to collect interest from their trust accounts in which funds are nominal in amount or are expected to be held for a short period of time. The interest that is collected is then contributed to the KBF. This is a voluntary program, so you have to agree to participate.

The IOLTA Committee — made up of representatives from the KBA, KBF, the Kansas Supreme Court, a representative from the Kansas Bankers Association, and other representatives from the bar — reviews applications and approves grants for the collected IOLTA funds. Grants are made based upon careful review of applications from programs and entities, which must be 501(c)(3), show financial responsibility and stability, and agree to audits of their expenses, if requested. Historically, 80 percent of the funds are allocated to the provision of legal services to low-income citizens. Since the IOLTA program was started in 1986, the program has made a total of $3.7 million in grants.

From the beginning of 2011 to the end of August 2011, the IOLTA program has collected $62,058.47. Projections indicate that the IOLTA program will collect approximately $100,000 by the end of 2011. This year, the IOLTA program has made $84,500 in grants. Recipients of these grants include Kansas Legal Services, CASA of Kansas, the KBA YLS Mock Trial program, and local legal aid societies. However, the amount of money that has been granted in recent years is sharply down from previous years. For example, from 2006 to 2009, IOLTA made yearly grants totaling between $128,000 and $261,395. Certainly, the recent economic downturn has played a role in this decline. Nevertheless, participation numbers in the program can also be improved. Currently, there are about 10,700 lawyers who are licensed in Kansas. However, only 3,609 participate in IOLTA. While many attorneys who are licensed in Kansas practice in other states, many other attorneys do practice law in a private setting that requires a trust account. Surely, we can work to get more private-practice lawyers in the state to participate.

I’m not writing this to throw stones. In fact, I just became a KBF Fellow in 2011. I should have joined earlier, but I never really had much information about or awareness of the programs. That’s why I’m writing this column. Please, carefully consider the information I have provided about the programs. If you want more information, contact the KBA. Consider whether contributing to the KBF, or participating in the IOLTA program (or both) is right for you. By participating in these programs, you’ll not only be helping yourself, but most importantly, you’ll be contributing to programs that provide important legal assistance to those who are less fortunate in our communities. You’ll also be helping programs that promote our great profession.

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A., where he maintains a civil litigation practice. He received his bachelor’s degree from Benedictine College in 2002 and his juris doctorate from Washburn University School of Law in 2005, where he was a member of the Washburn Law Journal. Cox is a member of the Topeka and Kansas bar associations and is past president of the Topeka Bar Association Young Lawyers Division.
The Kansas Bar Association Seeks Candidates for Executive Director’s Position

The Board of Governors of the Kansas Bar Association is seeking applications from qualified candidates who would like to be considered for the position of Executive Director of the Kansas Bar Association. Interested candidates should send resumes, along with specific salary and benefit requirements, to PO Box 780312, Wichita, KS 67278, by close of business, **February 17, 2012**. Qualified candidates will be interviewed thereafter and a final selection will be made in late March 2012. Specific questions on the selection or interview process may be addressed to the Chairperson of the Search Committee:

**Lee M. Smithyman, Chairperson**  
KBA Executive Director Search Committee  
Phone: (913) 661-9800  
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Thinking Ethics

Found Email Treasure: But Can You Use It?
By J. Nick Badgerow, Spencer Fane Britt & Browne LLP, Overland Park, nbadgerow@spencerfane.com

Given the ubiquity of email communications in the 21st century, there is no doubt that much useful evidence, admissions, and information can be found in the electronic communications of one’s opposing party in litigation. One such situation is found where an employer finds an email in its own computer system sent to an employee by her attorney. Locating and mining the gold is easy enough. But questions may arise as to the propriety of using what is found.

A recent ABA Opinion finds no ethical violation in the use of privileged emails properly received or found by an opposing party in its own email system. But, as the Opinion points out, there are still risks based on judicial precedents going beyond the Model Rules.

1. Rule 4.4(b), KRPC. Rule 4.4(b) of the Kansas Rules of Professional Conduct requires a lawyer “promptly [to] notify the sender” if the lawyer comes into possession of a privileged communication which the receiving lawyer “knows or reasonably should know ... was inadvertently sent.”

2. Op. 11-460. Focusing on this concept of “inadvertence,” the ABA Opinion finds that, when an employer locates an attorney-client communication in its own email system sent by an employee’s lawyer to the employee-client, Rule 4.4(b) does not apply, “because emails between an employee and his or her counsel are not ‘inadvertently sent’ by either of them.” This position is supported by previous ABA opinions, which held that an attorney may ethically review metadata imbedded in documents which were intentionally produced, and that an attorney has no ethical obligation to advise an opposing counsel that he has received privileged materials from some third-party, “if the materials were not provided as ‘the result of the sender’s inadvertence.’” Especially when there is a properly-drafted company policy, an employee generally has no expectation of privacy in emails sent to or received from the computer provided by his employer.

However, Op. 11-460 wisely notes that this is not the end of the inquiry. Following the advice in the Comment to Rule 4.4, the Opinion notes that courts may require lawyers to notify an opposing party’s attorney, and the rules of civil procedure may require notification of the opposing party and even more. Indeed they may.

3. Stengart v. Loving Care Agency Inc. This case is cited in the Opinion, and provides a good historical background for the issue. Plaintiff claimed constructive discharge against her former employer, which then hired a computer forensic expert to find information on the plaintiff’s work computer. The search found privileged emails, which it then attempted to use in the case. The New Jersey Supreme Court held that the employee had an expectation of privacy, because the employer’s email policy was unclear, and remanded the case for a review of the emails and a determination of other issues, including possible disqualification of the employer’s policy.

4. Parnes v. Parnes. In this divorce case, the wife found attorney-client emails between her husband and his attorney in the family computer. Her lawyer then used those emails in the deposition of the husband, after which the wife joined her husband’s lawyer as a defendant in the lawsuit and served a subpoena on the lawyer for his records. The trial court prohibited the use of any of the emails (finding them privileged), quashed the subpoena, dismissed claims against the husband’s lawyer, and disqualified the wife’s lawyer.

On appeal, the Appellate Division found that the privilege had been waived by the husband as to one page of the email, which he had printed and left in a room used by several people,

Footnotes
My Korean grandfather died in South Korea on July 4, 2008, after a very painful battle with cancer. Approximately a year prior to his passing, he completed written advance directives in anticipation of his death. Many cultural norms common within Korean society affected the legal circumstances surrounding his end-of-life medical decisions.

The U.S. Congress passed the Patient Self-Determination Act in 1990, which required health care providers to notify patients of their right to execute advance directives. The act shed light on a number of cultural values held by minority groups. Family decision-making, communication of “bad news” and attitudes toward advance directives were identified as three elements of end-of-life treatment that varied from culture to culture.

**Family Decision-Making**

End-of-life choices ultimately made by minority elders are often the result of family-based decisions due to the emphasis non-Western cultures place upon moral principles, such as beneficence and non-maleficence.

Family-based medical decisions made within Asian cultures are a function of filial piety. The notion of filial piety derives from Confucianism, and is prevalent within many east Asian countries where caregiving is seen as a natural commitment to elder parents. Adult children are expected to ensure both the physical and mental well-being of their aging parents, especially when making end-of-life decisions on their parents’ behalf. However, as saving the life of a parent is a duty associated with filial piety, a parent’s preference against life-sustaining treatment may not always be honored.

Under Korean law, custodians are to give consent for medical treatment for incapacitated persons. However, the accepted cultural expectation is that the family will make all medical decisions for a patient, despite the patient’s competence. Though my grandfather was mentally competent until a few days prior to his death, my family was extremely involved in the decisions made regarding his health care treatment, physician-patient communications, end-of-life decisions regarding resuscitation and incapacitation, and a bequest of his body to the local university.

**Medically-Informed Consent: Communication of “Bad News”**

In our informed-consent society, physicians may be unaware that communication of “bad news” to family members is an important issue within minority families. It is not unusual for family members within Hispanic, Chinese, and Pakistani communities to protect terminally-ill patients from understanding bad news and therefore their medical conditions. In the U.S., such protections can involve the purposeful non-translation of diagnoses or medical information by family members.

The reasons attributed to nondisclosure of “bad news” to ailing minority patients include difficulty of discussing the concept of death or serious illness, as it is seen as disrespectful or impolite and the belief that discussion of serious illness or impending death may cause a patient’s unnecessary depression or anxiety. Filipino patients, for example, may not want to participate in end-of-life treatment discussions, as doing so would disrespect the belief that an individual’s fate is determined by God. In other cultures, it is believed that direct disclosure of terminal illness or death may eliminate a patient’s hope or will to live.

**Attitudes of African-American and Hispanics Toward Advance Directives**

African-Americans and Hispanics have a significantly lower probability of completing advance directives compared to whites. African-American disuse of advance directives is attributed to a historical skepticism of a white-dominated health care system. Advance directives have been perceived as documents that limit or prematurely end expensive medical treatment. Thus, life sustaining therapies are more likely to be accepted by African-American patients than white patients with comparable medical conditions.

(Con’t. on Page 21)
Mentoring New Legal Writers

By Tonya Kowalski, Washburn University School of Law, Topeka, tonya.kowalski@washburn.edu

Welcome to Substance & Style, a new feature in the KBA Journal. The column’s purpose is to promote better research, analysis, ethics, professionalism, and style in legal writing. We also hope to foster more effective strategy, storytelling, and communication, not just for litigation documents, but for everything from letters to legislation to oral argument. The column will be authored by faculty members from Kansas’s two law schools, Washburn University School of Law and University of Kansas School of Law. We welcome your suggestions for future topics.

As members of the bench and bar, one of our greatest services can be to mentor new colleagues in legal writing. As all practitioners know, a lawyer’s nearly vertical learning curve merely begins in law school and continues for several years before settling into lifelong growth. Students graduate with novice proficiency in many core skills, and then depend on their colleagues and on their own trials and failures to guide them toward mastery.

Writing — even expository writing — is very sensitive and personal to the author. With planning and patience, mentoring and feedback can provide great satisfaction to both parties. But when done in haste and frustration, it can impede learning by igniting profound anxiety in the novice. Mentors can become good teachers by (1) understanding that adult learners often do not recognize when to “transfer” their previous training to a pending assignment; (2) teaching professional expectations; and (3) learning simple triage and feedback techniques.

New Legal Writers and the “Transfer” Barrier

Do you ever marvel that novices sometimes forget basic document sections or even to identify the governing rule? It is easy to assume that the problem lies with youth or with legal education. While even the most skills-friendly law schools must continue evolving to produce truly “practice-ready” lawyers, contemporary graduates do learn fundamental research, analysis, and citation. Moreover, at Washburn, students also take an average of nine upper-level skills credits. If that is the case, why do novices struggle to apply those skills?

Surprisingly, some answers lie in a field of cognitive psychology and educational theory called “transfer of learning.” Novices tend to readily apply their skills only when a new assignment looks almost identical to those from past experiences. When the assignment appears even marginally unfamiliar, the novice’s cognitive problem-solving systems tend to reject prior experiences as irrelevant, and he may flounder. For example, a student trained to write an appellate brief in law school may not — without prompting — recognize that most of his persuasive brief-writing skills can also apply to a motion brief on summary judgment. By making the connection explicit, mentors can help to “bridge” the transfer gap. Providing exemplars and a practical litigation writing text like Thomas A. Mauet’s “Pretrial” can also work wonders, as can recommending a favorite practice manual or transactional drafting guide.

New Legal Writers and the Professionalism Gap

In addition to style and content, mentors should also teach professional expectations for planning and delivering work product. To an experienced attorney, it can be frustrating — even alarming — to have an associate arrive for an assignment meeting without prepared questions and possibly even without pen and paper. Many of us worked our way through school and came to our first internships with a developing sense of professional standards. While today many students are the same, more are coming to law school with laudable public service credentials but less traditional business experience. While such service develops important collaborative and organizational skills, it does not necessarily inculcate the norms of business culture.

For those with less traditional experience, a mentor can illuminate unwritten professional expectations by making them explicit. Although it may sound like “coddling,” new hires may need coaching to clarify the scope of the assignment, deadline, form of work product, delivery method, electronic research charges, and billing practices. By teaching the norms of a foreign organizational culture, supervisors can encourage better work product and more efficient production.

Effective Triage and Feedback Techniques

To become an effective writing mentor, one must practice diagnosing and discussing problems of organization, proof, and style. As expert legal analysts, we naturally may struggle to articulate to another person what to us seems so instinctive. Even more disorienting is that recent graduates speak a new jargon for legal writing that has emerged since the later 1990s. Fortunately, most novice errors and legal writing jargon concern the same recurring themes:

- Stating a clear thesis that presages both the operative legal test and determinative facts;
- Fully proving and illustrating all rules before applying them to the client’s facts;
- Addressing the stronger countervailing rules or arguments;
- Keeping elements and other discrete units of analysis in separate “proofs” — think IRAC or the increasingly popular “CREAC” (conclusion-rule-explanation-application-conclusion);
- Accurately comprehending and describing the primary authorities;
- Using effective paragraph topic sentences to state or apply rules or to introduce additional examples;
- Discussing only one rule or part of a rule at a time, particularly within a single paragraph;
- Describing a sufficient “bandwidth” of authorities to prove or apply a rule;
- Locating binding law from each of the three branches of government, as appropriate;

(Con’t. on Page 14)
Public Service: Try It, You’ll Like It

By Whitney Casement, Washburn University School of Law, Topeka, whitney.casement@washburn.edu

The best advice I received from a third-year law student when I began my first year of law school was to take the time to do something for someone else. As the student explained, nothing else will provide a release from the stress of law school more than serving another person in need. How true that has turned out to be! That advice extends beyond law school into the legal profession. Not only does helping the disadvantaged provide a welcome reprieve from the stressors of our profession because of the reward it brings, but it provides a greater sense of purpose and allows us to look beyond our own lives to understand the needs around us.

Pro bono work is like community service for professionals — even a small amount of volunteering can have a significant impact. However, attorneys must not take it lightly. Pro bono clients are entitled to the same level of competence from an attorney as any other client. Volunteering at Kansas Legal Services (KLS) the summer after my first year of law school opened my eyes to the rewards of using my newly acquired professional skills to help another person in need. I discovered that the attorneys at KLS handle a heavy caseload, and the small amount of assistance I could provide freed those attorneys to take on more complex cases. I also learned how easily I could answer a simple legal question for a client who did not have the small amount of money needed to pay an attorney for an initial interview. These seemingly insignificant acts can make a world of difference.

Although sacrificing a Saturday afternoon to volunteer at the local rescue mission is important, as the gatekeepers of the legal profession, attorneys have a higher duty to provide legal services for the disadvantaged. It is the responsibility of the Kansas lawyer to use her expertise to aid the disadvantaged, to inform the uninformed, and to provide a means of justice to the impoverished. Our own Kansas Rules of Professional Conduct advise us to “render public interest legal service.” KRPC 6.1. The Kansas rules prescribe no minimum number of hours, but the Model Rules of Professional Conduct do suggest a minimum of 50 hours of public service per year. See MRPC 6.1. That is less than one hour per week — a standard every attorney can strive to attain and surpass.

Significantly, the Kansas rules do not require public service and will not discipline the lawyer who fails to provide service. The idea is that a freshly-minted graduate should not have to be told that she owes service to the public upon entering the legal profession. The advantage of having a closed bar is that our profession can regulate itself and ensure a minimum level of competence. The obvious disadvantage is that attorneys have a monopoly over legal services, and a person in need of legal services must depend on that closed bar despite her limited means. As guardians of the legal profession, we have a duty to serve those of limited and modest means.

A lawyer can fulfill this duty in a variety of ways. Lawyers can apply to provide pro bono services through KLS for cases that the organization is unable to accept due to conflicts or other reasons. In addition to referring cases out to pro bono attorneys, KLS periodically holds document preparation and legal advice clinics across the state for which attorneys can volunteer. Private attorneys should also inquire whether their firms will allow pro bono hours to count toward billable hour requirements, a practice some law firms have begun to adopt. Serving on one of the Kansas Bar Association committees is another way to obtain pro bono hours. I am thankful to the Washburn Law School Pro Bono Program for informing me of how I could fulfill my duty to perform pro bono services and helping me to achieve that goal. The opportunities for pro bono service are endless. It should not be difficult for Kansas attorneys to meet the 50-hour minimum suggested by the Model Rules of Professional Conduct.

Many of us entered the legal profession with the goal of helping others in need. Although this seems a simplistic concept, those of us who began with this goal should never forget that it was the basis for our choosing this honorable profession. When I was in high school, I was inspired by a local southwest Kansas attorney named Moran Tomson who took the time to mentor me. I remember sitting in on meetings with clients whose needs were readily apparent and discovering that Mr. Tomson was taking the case on pro bono. Through this experience, I saw how rewarding the legal profession can be, and it was at that time that I knew I wanted to be an attorney.

It was also at that moment that I knew that I would always have a greater sense of purpose as an attorney and professional. Even though law school debt, family support obligations, or other reasons may prevent attorneys from choosing a career in public service, all attorneys can and should fulfill their public service mission through pro bono work. This holds true not only because we have a duty to do so, but also because of the rewards pro bono service brings.

About the Author

Whitney Casement is a third-year student at Washburn University School of Law. She received her Bachelor of Arts in history and English from Washburn University in 2009. Casement is a member of the Moot Court Council and is currently serving in the Consumer Protection and Antitrust Division in the Kansas Office of the Attorney General.
Persuading through the client’s story (“narrative”) and not just through linear, rule-based logic;
Simplifying convoluted sentences by putting them into basic subject-verb-object order.

After triage, mentors should try to provide written and oral feedback. Generally, it is best not to redline a mentee’s work, but rather to identify examples and instruct her to find others. Further, one should motivate by identifying strengths as well as weaknesses, for example: “Although this paragraph needs to include the facts of the case under discussion, it contains a clear, accurate rule as the topic sentence.” Finally, rather than merely labeling a passage as “wordy,” “weak,” or “awkward,” try to give a reason and some advice for devising a solution.

In conclusion, becoming a good mentor is much like becoming a good lawyer: it takes time, practice, and patience, but yields untold rewards.

Further Reading:

About the Author

Tonya Kowalski is an associate professor at Washburn University School of Law. She teaches in Washburn’s nationally ranked Legal Analysis, Research & Writing program, which is one of only a handful of truly tenure-track legal writing programs in the nation. Prof. Kowalski also teaches in Washburn’s Indigenous Legal Studies program and is a contributing faculty member and advisory board member in the Institute for Law Teaching and Learning, which is co-hosted at Washburn. She received her juris doctorate from Duke University School of Law in 1995 and has been teaching at Washburn since 2006.

Found Email Treasure
(Con’t. from Page 10)

but further held that the remainder were privileged, because the husband and his lawyer had taken reasonable steps to maintain the confidentiality of his email account. The appellate court did not condone the participation of the wife’s attorney, but did order that he should not be disqualified, since the better solution was to preclude use of the privileged documents.

5. Terraphase Engineering Inc. v. Arcadis U.S. Inc. In this case, a party’s lawyer inadvertently sent a privileged email to his client’s email address at work. The employer retrieved the email (which contained a chain of prior messages) and attempted to use it in the case. In a sweeping protective order, the Court disqualified the employer’s outside counsel and in-house counsel, and required new counsel to certify that she had not reviewed the privileged communication.

6. Rules of Civil Procedure. Rule 26(b)(5)(B), FRCP and K.S.A. 60-226(b)(7)(B) provide that, if a party is notified that an opposing party has produced privileged or work product information, the notified party “must” promptly return, sequester, or destroy the information, “must” not use or disclose it until the privilege issue is resolved, and “must” take reasonable steps to retrieve the information if it were disclosed before the notification was given. (Emphasis added.)

Thus, it is clear that an employer’s policy must be clear in order for the court to find that employees have no expectation of privacy in emails sent to the employer’s computer. Even then, employers (and their counsel) who receive such emails should be careful to review case authorities beyond the ethics rules before using those emails.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park. He is chairman of the KBA Ethics Advisory Opinion Committee, Johnson County (Kan.) Ethics and Grievance Committee, and Kansas Judicial Council Civil Code Advisory Committee; and a member of the Kansas State Board of Discipline for Attorneys, KBA Joint Commission on Professionalism, and Kansas Judicial Council.
Printers Get Interesting, Finally

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, ksbar.org

Christmas 2011 was a particularly boring gadget year. Apple went the safe route releasing a new iPhone notable for nothing much. A variety of late-start Android devices were uninspiring as well. The only real heat in smart phones is a brewing patent war as the vision shifts from innovation to holding market share. Though 2011 started bold for 3-D graphics in games and movies, it fizzled and may yet end up as game changing as the stereotypes from the stuffy Victorian age. In the midst of the dull gadget front, a small movement of interest is just beginning to gather momentum. The hardware probably has little direct application in the daily affairs of a law firm but some of the issues it will raise are truly fun legal quandaries.

Three-Dimensional Printers

A 3-D hobby printer sits on a desktop controlled by a PC/Mac and feeds a plastic “wire” through a heated nozzle (think hot glue gun) onto a platform that shifts in concert with the nozzle building a three-dimensional plastic object. A discussion and demonstration of one hobby model, the MakerBot Thing-O-Matic, can be viewed at YouTube (youtu.be/WOn9A_5_CG0). Another popular variant is the RepRap (demonstrated in video at reprap.org). Each is available now and priced around $1,200-$1,500 – about the same as the first laser printers or the first color printers. In other words, the cost of putting 3-D printing on a desktop is comparable to 2-D printing of just a few years ago and already going down as demand and technology improves.

While not aimed at the legal market, a 3-D hobby printer prompts some ideas for application. Instead of a 2-D photo of an accident scene, why not print out a 3-D layout of the intersection, vehicles, buildings, and pedestrians? Suppose a cross-section photo of a defective machine is replaced with a printed, working 3-D model? The effect and impact of seeing a physical, tactile object instead of a photograph or even a computerized 3-D graphic could be dramatic. In a more pragmatic sphere, there have been stories of users printing a broken part for some office appliance rather than junking the whole machine or paying exorbitant fees for proprietary, OEM parts. Therein lays the true interest to lawyers.

Dynamic Legal Environment

Shifts in the music industry came quickly as easy MP3 file-sharing swept the Internet in the ‘90s. Some argue the after-shocks of that technological leap are still shaking up the culture and are certainly still driving public policy through Net Neutrality regulations and the proposed Stop Online Piracy Act. More recently, pronouncements that print journalism is dead due to easily available hardware (cameras and smartphones) and Internet distribution ring some of the same warning bells. Now imagine the excitement if physical objects are as easily copied and shared as music, movies, and books. We are inches from that reality.

One key to the success of hobby 3-D printers is the communities that spring up around them. Individuals share software files which are blueprints for items that can be built using the desktop printers. At the moment, the more mainstream communities are self-policing and generally swap original creations rather than copies of trademarked or patented items. Even that can cause unique issues, however, as discovered this summer when a user uploaded the code for printing a functional, extended-capacity magazine for an AR-15 rifle. Another set of plans produced working handcuff keys. Circulating in the darker alleys of the Internet are plans for printing overlays to conceal card skimmers on ATMs. When producing a physical object is as simple as downloading a file, things become interesting in a legal sense really quickly.

Give the Gift of the Future

I cannot imagine that many lawyers will find an IRS-approved office use for a 3-D printer. Any lawyer with children, grandchildren, nieces, nephews, or even godchildren ought to consider one, though. Consider a hobby 3-D printer as the keys to an exciting industrial world already being realized where custom medical devices are printed in the hospital lab, where circuit boards for specialized controllers are printed in-house, and even where entire buildings are printed using concrete instead of plastic. It’s not a Star Trek replicator yet but we just might print one in our lifetime.

About the Author

Larry N. Zimmerman, Topeka, is a partner at Valentine, Zimmerman & Zimmerman P.A. and an adjunct professor teaching law and technology at Washburn University School of Law. He has spoken on legal technology issues at national and state seminars and is a member of the Kansas Credit Attorney Association and the American, Kansas, and Topeka bar associations. He is one of the founding members of the KBA Law Practice Management Section, where he serves as president-elect and legislative liaison.
Members in the News

Changing Positions
Collin B. Altieri, Brandon B. Ferguson, and Joseph P. Langston have joined Polsinelli Shughart P.C., Kansas City, Mo.
Robert A. Fox has joined the Kansas Corporation Commission, Topeka, as the senior litigation counsel.
Jonathan W. McConnell has joined Monnat & Spurrier Chtd., Wichita.
Kurt D. Maahs has joined O’Connor & Campbell P.C., Phoenix.
Angela Y. Madathil has joined Schively & Lannin P.C. LLO, Lincoln, Neb.
Pamela R. Putnam has joined Trapp Law Firm, Kansas City, Mo.
Lloyd W. Raber has joined Allmayer & Associates P.C., Kansas City, Mo., as an associate attorney.
Wendy M. Rohleder-Sook has joined Fort Hays State University, Hays, as a financial assistant counselor.
Daniel J. Schowengerdt has joined Johnson Law Office P.A., Iola.
Randall W. Schroer has joined Morrow, Willnauer, Klofterman, Church LLC, Kansas City, Mo.
Marion L. Stern has joined Stockton Law Firm, Gardner.
Gary R. Terrill has joined Kansas Department of Labor, Topeka, as a member of the Workers Compensation Board.
Joni C. Thadani and Karan M. Thadani have joined James M. Milliken Chtd., Saint Francis.
Taylor J. Wine has become a judge at the Osage County District Court, Lyndon.

Changing Locations
Richard W. Byrum P.C. has moved to 435 Nichols Rd., Ste. 200, Kansas City, MO 64112.
Serena A. Hawkins has started her own practice, Serena A. Hawkins Law LLC, 650 Minnesota Ave., Kansas City, KS 66101.

Duane A. Martin has moved to 2401 Bernadette Dr., Ste. 117, Columbia, MO 65203.
Jerome R. Smith has moved to 4600 Madison Ave., 10th Fl., Kansas City, MO 64112.
Speer & Holliday LLP has moved to 100 E. Park St., Ste. 204, Olathe, KS 66061.

Miscellaneous
Hon. Bryce A. Abbott, Wichita, received the “Service to Consumers” award by the National Alliance on Mental Illness of Kansas at the 2011 annual convention.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
Advance Notice
Elections for 2012
KBA Officers
and
Board of Governors

It's not too early to start thinking about KBA leadership positions for the 2012-2013 leadership year.

OFFICERS

KBA President-elect: (Current – Lee M. Smithyman, Overland Park)
KBA Vice President: (Current – Dennis D. Depew, Neodesha)
KBA Secretary-Treasurer: (Current – Gerald L. Green, Hutchinson)
KBA Delegate to ABA House of Delegates: Linda S. Parks, Wichita, is eligible for re-election

The KBA Nominating Committee, chaired by Glenn R. Braun, Hays, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates. If you are interested or know someone who should be considered, please send detailed information to Deana Mead, KBA CLE Director, 1200 SW Harrison St., Topeka, KS 66612-1806, by Wednesday, January 18, 2012. This information will be distributed to the Nominating Committee prior to its meeting on Friday, January 20, 2012. In accordance with Article V – Elections, Section 5.2 of the Kansas Bar Association Bylaws, candidates for Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House may be nominated by petition bearing 50 signatures of regular members of the KBA with at least one signature from each Governor district.

BOARD OF GOVERNORS

There will be seven positions on the KBA Board of Governors up for election in 2012. Candidates seeking a position on the Board must file a nominating petition, signed by at least 25 KBA members from that district, with Deana Mead by Friday, February 10, 2012. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. KBA districts with seats up for election in 2012 are:

• District 1: Incumbent Eric G. Kraft is not eligible for re-election. Johnson County.
• District 2: Incumbent Charles E. Branson is eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
• District 4: Incumbent William E. Muret is not eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
• District 5: Incumbent Natalie G. Haag is eligible for re-election. Shawnee County.
• District 6: Incumbent Bruce W. Kent is eligible for re-election. Clay, Cloud, Dickinson, Ellsworth, Geary, Lincoln, Marion, Marshall, McPherson, Morris, Ottawa, Republic, Riley, Saline, and Washington counties.
• District 7: Incumbent Calvin D. Rider is eligible for re-election. Sedgwick County.

For more information

To obtain a petition for the Board of Governors, please contact Christa Ingenthron at the KBA office at (785) 234-5696 or via email at cingenthron@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 Glenn R. Braun at (785) 625-6919 or via email at grbraun@haysamerica.com or Deana Mead at (785) 234-5696 or via email at dmead@ksbar.org.
The KBA Awards Committee is seeking nominations for award recipients for the 2012 KBA Awards. These awards will be presented at the KBA Annual Meeting and Joint Judicial Conference from June 13-15 in Overland Park. Below is an explanation of each award, and a nomination form can be found on Page 19. The Awards Committee, chaired by Hon. Michael B. Buser, of Topeka, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! Deadline for nominations is Friday, March 2.

**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.

**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.
- The 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.
- The award is only given 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.

**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.

**Outstanding Service Awards:** 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.
- A total of 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 be given to 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:** 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. 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 that does not have 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 on the part of low and moderate income persons.

**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:** This award recognizes 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.

**Diversity Award:** This award recognizes 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.

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
☐ Outstanding Service Award
☐ Outstanding Young Lawyer Award
☐ Distinguished Government Service Award
☐ Distinguished Service Award
☐ Diversity Award
☐ Professionalism Award
☐ Pro Bono Award/Certificates
☐ Courageous Attorney Award

Nominator’s Name ____________________________

Address ______________________________________

Phone ____________________________ E-mail ____________________________

Return Nomination Form by Friday, March 2, 2012, to:

KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
The Kansas Legislature will open its doors on Monday, January 9, with a number of large proposals that need its attention. Last fall the KBA was given the opportunity to learn about these topics during the annual Fall Legislative Conference. Representatives from all three branches of government sat down with more than 100 attendees to discuss proposals that will dominate the 2012 session.

On the mind of our elected officials is the reapportionment of all 165 House and Senate seats and the U.S. Congressional District seats. There has been substantial interest in the remapping of Kansas since this will directly impact both primary and general elections. All members of the Kansas Legislature, as well as four members of the congressional delegation will be up for election. This past summer the reapportionment committee traveled around the state hosting information gatherings with an eye on unveiling their recommendations this spring. How this proposal divvies up the state will determine how tense the action is under the dome.

Our elected officials are not the only people dealing with a high profile report due this session. The Kansas Supreme Court will be finalizing and submitting its weighted caseload study that was recently completed. That study and subsequent recommendations will shed some light on the inefficiencies of the state court system and how best to allocate resources. Many believe that judicial resources will be pulled from western districts and inserted into more densely populated urban areas. How this is accomplished will depend upon the specifics of the court’s recommendations, but one can venture to guess that expanding the roles of magistrate judges, consolidating judicial districts, eliminating the one judge per county requirement and recovering local law library funds are all on the table.

While these topics are very important, they all seem to pale in comparison to the 2012 primary and general elections. All 165 Kansas legislators will run for redrawn district seats. House conservatives will look to extend their reach by changing the Kansas Court of Appeals gained significant traction; however, a bill aimed at changing the Kansas Court of Appeals gained significant traction. HB 2101 would have eliminated the nominating commission and allowed the governor to select an individual to serve on the Court of Appeals once confirmed by the Kansas Senate. This system was similar to the current federal model of selection of judges absent lifetime tenure. The Kansas House passed this proposal with 66 votes twice after the first vote failed to get a hearing in the Kansas Senate.

The election for Kansas Senate seats will be more interesting since a number of incumbent Senate Republicans already have primary opponents and these opponents are House Republicans. The Kansas Senate election will have a significant impact on Kansas policy going forward. Here are a few of the bigger primary races that are expected this year:

• Senate President Steve Morris (R-Hugoton) is being challenged by Rep. Larry Powell (R-Garden City). Powell serves as chair of the House Agriculture Committee.

• Senate Vice President John Vratil has a non-legislative challenger.

• Senate Federal and State Affairs Chair Pete Brungardt (R-Salina) is being challenged by freshman Rep. Tom Arpke (R-Salina). Brungardt narrowly defeated Arpke in a Republican primary in 2008.

• Senate Judiciary Chair Tim Owens (R-Overland Park) is being challenged by freshman Rep. Greg Smith (R-Overland Park).

• Senate Public Health and Welfare Chair Vicki Schmidt (R-Topeka) is being challenged by Rep. Joe Patton (R-Topeka). Patton serves as vice chair of the House Judiciary Committee.

• Senate Education Chair Jean Schodorff (R-Wichita) is being challenged by Rep. Brenda Landwehr (R-Wichita). Landwehr serves as chair of the House Health and Human Services Committee.

2012 Legislative Proposals

With the 2012 elections right around the corner, several legislative proposals will provide ample opportunity for political gamesmanship and headline grabbing. In 2012, we can anticipate proposals to reform the school finance formula, an attempt to lower the corporate and income tax structure, extending immigration law changes, and altering how Kansans receive Medicaid benefits. Even more mundane legislative topics will become election year fodder.

Senate Confirmation Proposals

In 2011, we saw three bills attempt to alter how appellate judges are selected in Kansas. Two of these proposals fell by the wayside rather early in the discussion; however, a bill aimed at changing the Kansas Court of Appeals gained significant traction. HB 2101 would have eliminated the nominating commission and allowed the governor to select an individual to serve on the Court of Appeals once confirmed by the Kansas Senate. This system was similar to the current federal model of selection of judges absent lifetime tenure. The Kansas House passed this proposal with 66 votes twice after the first vote failed to get a hearing in the Kansas Senate.

Look for another push to pass the Court of Appeals bill or something similar in 2012 as the legislative mechanics of altering that court are easier to apply than amending the Kansas Supreme Court.

Caps on Non-Economic Damages

Currently, the state of Kansas places a statutory limit on the amount a plaintiff can recover for non-economic damages; that limit is set at $250,000. This limit has been challenged by the plaintiffs in Miller v. Johnson, a medical malpractice case currently before the Kansas Supreme Court. While the Supreme Court has not issued a ruling on the case, oral arguments were heard in October 2009. An unconstitutional
holding would be enough to trigger a host of bills aimed at changing it. In anticipation of such a finding, supporters of the $250,000 cap introduced legislation in 2010, HCR 5036, that would allow the Kansas Legislature to set a cap on noneconomic damages. If the Supreme Court does strike the current law, we can expect a very similar resolution to be introduced in 2012.

Loser Pay Provision

In 2011, the state of Texas passed a bill that would require the loser of a lawsuit to pay certain fees of opposing counsel. The Texas law is quite limited in scope, only applying to certain cases after specific settlement offers have been rejected, but it does provide a model for supporters in Kansas to follow.

Apology Bill

In 2011, the KBA reviewed three separate proposals dealing with the Apology Bill. The KBA supported SB 142, which was proposed by the Kansas Judicial Council after a summer interim review. Unfortunately, SB 142 did not become law, which will allow its opponents another bite at the apple in 2012.

Websites of Interest

For campaign finance reports, including contributions and expenditures of candidates and PACs, you can visit the Kansas Governmental Ethics Commission website at: http://www.kansas.gov/ethics.

For information on the 2011 Kansas Legislature, you can refer to the official website of the Legislature at: http://www.kslegislature.org/li.

The state of Kansas’ website can be found at: http://www.kansas.gov.

About the Author

Joseph N. Molina III is the director of governmental and legal affairs for the Kansas Bar Association. Prior to joining the KBA, he was chief legal counsel for the Topeka Metropolitan Transit Authority, where his practice involved insurance subrogation, and labor and employment law. He also previously served as an assistant attorney general, acting as the chief of the Kansas No-Call Act. Molina holds a Bachelor of Arts in political science, philosophy, and economics from Eastern Oregon University and a juris doctorate from the Washburn University School of Law.

[A Life] Lived Diligently
(Con’t. from Page 11)

The Hispanic community’s lack of acceptance of advance directives has been linked to the unwillingness of Hispanic patients to appoint a single family member to make medical treatment decisions. Due to concern over offending other family member opinions, a family-oriented decision making process is preferred. Reducing these family-made decisions to writing in the form of advance directives is perceived as unnecessary.

As older adults are representing an increasingly greater proportion of the American population, coupled with an increase in the number of racially and ethnically diverse populations, a practitioner’s awareness of differing cultural values may be relevant in the understanding of minority elder end-of-life decisions. Despite my grandfather’s clear indications, the involvement of my family in my grandfather’s medical and legal decisions during the final weeks of his life was a reflection of cultural values that cannot be ignored.

About the Author

Katherine Lee McBride is an assistant revisor for the Kansas Office of Revisor of Statutes and a member of the KBA Diversity Committee. She received her Juris Doctor from Washburn University School of Law in 2010 and is a candidate for a Master of Law in elder law from the University of Kansas School of Law in 2012.
2011 Outstanding Speakers Recognition
The Kansas Bar Association would like to extend a special thank you to and recognition of the following individuals who gave so generously of their time and expertise in speaking at our Continuing Legal Education seminars for September through December 2011.
Your commitment and invaluable contribution is truly appreciated.

Christina Lewis Abate, The Bar Plan Mutual Insurance Co., St. Louis
Matthew D. All, Blue Cross & Blue Shield of Kansas, Topeka
Mark A. Andersen, Barber Emerson L.C., Lawrence
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Suzanne Valdez – “What Every Lawyer Should Know About Crime Victims’ Rights in Kansas” (November/December)
Teresa L. Watson – “Adult Entertainment and Zoning: A Starting Point for Adopting orUpdating Adult Business Ordinances” (April)
The 2011 Kansas Workers Compensation Act: Too Sharp a Right Turn?

By Tim Alvarez

Endnotes begin on Page 30.
Introduction

A new Kansas Workers Compensation Act [new Act] became effective May 15, 2011. It represents a substantial revision of the previous 1993 amendments commonly referred to as the 1993 Act. The legislation is certainly the most extensive change to Kansas workers compensation statutory law in 18 years and amends or repeals 28 existing statutes.

The changes were the result of a number of developments, one of the more important of which may have been the Kansas Supreme Court’s recent emphasis on a strict construction approach in interpreting workers compensation statutes. Although a strict construction analysis was utilized by the Kansas Supreme Court in its 2007 decision in Casco v. Armour Swift-Eckrich, it was the Court’s 2009 decision in Bergstrom v. Spears Manufacturing Co. that underscored the significance and impact of strict construction.

The practical result of these decisions was to vacate case law that had provided guidance for the interpretation and application of workers compensation statutes for many years. This was particularly true of the case law interpreting the 1993 Act. Significant decisions, such as those in Faulk v. Colonial Terrace and Copeland v. Johnson Group Inc., were suddenly disapproved, resulting in considerable uncertainty as to the application of the remaining statutory framework.

Attorneys on behalf of various interested groups negotiated and drafted proposed legislation that was introduced in the Kansas House of Representatives as House Bill 2134. The bill was amended in the House and then in the Kansas Senate. Conflicting amendments were resolved in conference committee, resulting in an amended bill renamed Substitute for House Bill No. 2134 that was passed overwhelmingly by both houses and signed into law by Gov. Sam Brownback.

Reflecting existing realities, the 2011 Act is largely pro-employer. The adoption of the prevailing factor standard, shortening of the notice provisions, mitigating the effects of the Bergstrom decision and amending certain statutory definitions, particularly that of “arising out of and in the course of employment,” all favor employers. However, Kansas workers did gain from a statutory abrogation of the decisions under the new Act.

Accident and Repetitive Trauma

Under the new Act, repetitive trauma is defined separately to distinguish those injuries from accidental injuries and occupational diseases. Furthermore, the definition of an accident is amended in K.S.A. 44-508(d) to include “traumatic” and to provide that “an accident shall be identifiable by time and place of occurrence, produce at the time symptoms of an injury, and occur during a single work shift.” Significantly, the accident must be the prevailing factor in causing the injury.

“Repetitive trauma” is defined as an injury that occurs as a result of “repetitive use, cumulative traumas or microtraumas” and must be demonstrated by “diagnostic or clinical tests.” As with an accident, the repetitive trauma must be the prevailing factor in causing the injury.

The date of an accident in repetitive trauma cases is amended to be the earliest of: (1) The date the employee is taken off work by a physician due to the diagnosed repetitive trauma; (2) The date the employee is placed on modified or restricted duty by a physician due to the diagnosed repetitive trauma; (3) The date the employee is advised by a physician that the condition is work-related; or (4) The date the employee last worked for the employer. The statute provides that in no event can the date of the accident in a repetitive trauma claim be later than the last day worked by the employee for the employer.

Arising Out of and in the Course of Employment

Significant changes were made to the definition of “arising out of and in the course of employment” in K.S.A. 2010 Supp. 44-508(f)(2). Some of those changes reverse well-established case law and will be the focus of much litigation in the future. Many of the statutory changes focus on the single phrase “arising out of.”
Under the new Act, “arising out of and in the course of employment” does not include accidents or injuries that occur as a result of the natural aging process or the normal activities of day-to-day living, 36 arise out of a neutral risk, 31 arise out of a risk personal to the worker, 32 or arise directly or indirectly from idiopathic causes. 33 An injury does not “arise out of and in the course of employment” and is therefore not compensable if work was merely a triggering or precipitating factor; 34 if the injury aggravated, accelerated, or exacerbated a pre-existing condition; 35 or if the injury rendered a pre-existing condition symptomatic. 36 Injuries that occur during recreational or social events which the employee was under no duty to attend do not arise out of and in the course of employment if the injury did not result from the performance of tasks related to the employee’s normal work duties or tasks that the employee was specifically instructed by the employer to perform. 37

Changes were also made to the definition of “arising out of.” As mentioned above, an injury by accident or repetitive trauma will be deemed to “arise out of employment” only if the accident or repetitive trauma meets the particular prevailing factor requirements of each respective subsection. 38 An injury by accident will be deemed to arise out of employment only if there is a causal connection between the conditions of the work and the resulting accident. 39 Injury by repetitive trauma will be deemed to arise out of employment only if the worker is exposed to an increased risk or hazard as compared to non-employment life. 40

Prevailing Factor

A major change in the new Act is the adoption of the prevailing factor standard for causation. Much of the language is borrowed from the Missouri experience. 41 Prevailing factor language now appears in the statutes addressing accidents, 42 repetitive trauma, 43 arising out of and in the course of employment, 44 and post-award medical benefits. 45 The effect of the adoption of the prevailing factor standard will be to eliminate many injuries that were previously compensable as workers compensation injuries.

K.S.A. 2010 Supp. 44-508(g) provides the definition for prevailing factor. “Prevailing” as it relates to the term “factor” means the primary factor, in relation to any other factor. 46 The statute provides that the administrative law judge, in determining what constitutes the prevailing factor in any given case, “shall consider all relevant evidence submitted by the parties.” 47 The statutes provide that an accident or repetitive trauma “must be the prevailing factor in causing the injury.” 48 An injury by accident will be deemed to arise out of employment only if “the accident is the prevailing factor in causing the injury, medical condition, and resulting disability or impairment.” 49

Notice

The notice statute, K.S.A. 44-520, is amended by eliminating the 75-day just cause provision and the necessity of service of the written claim for compensation. For both injury by accident or repetitive trauma, notice must be given by the earliest of 30 days from the date of the accident or repetitive trauma, 20 days from the date the employee seeks medical treatment or 20 days after the employee’s last day of work. 50 Notice may be given orally or in writing. 51

If notice is provided orally and the employer has designated and communicated in writing to the employee an individual or department to whom notice must be given, notice must be given to that individual or department. If notice is made orally and the employer has not made a designation, then notice must be given to “a supervisor or manager.” 52

If notice is provided in writing, it must be sent to a supervisor or manager at the employee’s principal location of employment regardless of designation. 53 Notice, whether provided orally or in writing, must include the name of the injured worker and the time, date, place, and particulars of the injury. 54 The notice must also state that the employee is claiming benefits under the act or has suffered a work-related injury. 55

This statutory notice requirement is waived under certain circumstances that include when the employer had actual knowledge of the injury, when the employer was not available to receive notice, or the employee was physically unable to provide notice. 56

The shorter time periods contained in the new notice provisions will result in more claims being denied as not timely. The elimination of the 75-day just cause provision of the old Act means workers will have, at the most, 30 days to give notice of their injuries. Workers acting in good faith who seek treatment from their personal physicians may unwittingly be subject to the shorter 20-day notice period and ultimately be denied compensation under the Act.

Abrogation of the Casco Decision

The new Act abrogates the Kansas Supreme Court decision in Casco v. Swift-Eckrich 57 and returns certain bilateral upper and lower extremity injuries to non-scheduled injuries and potential work disability claims. Case law going back as far as 1931 had established the parallel injury rule under which certain bilateral extremity injuries, such as injuries involving both feet or both arms, were compensated as non-scheduled injuries. 58 In Casco, the Kansas Supreme Court reversed this line of cases holding that such parallel injuries are not expressly included in the non-scheduled injury statute, K.S.A. 44-510e, and that a statute should not be read to add that which is not contained in the language of the statute. 59

In the new Act, certain bilateral extremity injuries are now included in the non-scheduled injury statute. K.S.A. 44-510e specifically provides that compensation for permanent partial general disability shall be paid for “the loss of or loss of use of a shoulder, arm, forearm, or hand of one upper extremity” when combined with “the loss of or loss of use of a shoulder, arm, forearm, or hand of the other upper extremity.” 60 Similar language is used for bilateral lower extremity injuries involving the loss of or loss of use of a leg, lower leg, or foot. 61 Finally, injuries involving the loss of or loss of use of both eyes are also to be compensated as non-scheduled injuries. 62

Although the new statute abrogates Casco, it apparently does not change the application of the Kansas Supreme Court’s
earlier decision in *Pruter v. Larned State Hospital*. In *Pruter*, the Kansas Supreme Court affirmed the Court of Appeals’ decision denying compensation as a non-scheduled injury when the employee had simultaneously injured her right wrist and right ankle. The Kansas Court of Appeals had held that these injuries were not to “parallel limbs” and therefore not subject to the parallel injury rule established in *Horn*. Because the new Act compensates as non-scheduled injuries combinations of upper extremity injuries separately from combinations of lower extremity injuries, it is likely that combinations of upper and lower extremities, for example a knee and an elbow, remain scheduled injuries under *Pruter*.

**Permanent Partial General Disability (Work Disability)**

Substantial revisions have been made to K.S.A. 44-510e relating to work disability. The effect of the revisions will be to make it more difficult for workers to obtain work disability benefits. Under the new Act, there is now a minimum functional impairment threshold that must be met to obtain work disability benefits. Specifically, the employee must have sustained functional impairment caused solely by the current injury that exceeds 7.5 percent to the body as a whole or, in cases in which there is pre-existing functional impairment, the overall impairment must equal or exceed 10 percent to the body as a whole.

The new Act retains a minimum post-injury wage loss threshold of “at least 10 [percent],” which is slightly less than the 1993 Act, which required the wage loss to be greater than 10 percent. Assuming the functional impairment and wage loss thresholds are met, the extent of work disability is still determined by averaging the percentage of post-injury task loss together with the percentage of post-injury wage loss. However, the determination and computation of the wage loss and task loss components of the work disability formula have been significantly modified.

In determining the appropriate task loss, the employee’s relevant task history is shortened to five years from the previous 15 years. The task loss must be demonstrated by the employee to have been caused by the injury. In determining the task loss, the amended statute requires that the permanent restrictions issued by a physician shall be used. Additionally, any tasks lost due to pre-existing permanent restrictions will be excluded in calculating the current task loss.

The new Act also significantly changes the determination of the employee’s post-injury average weekly wage by replacing the prior law’s actual earnings test with an earnings capacity test. Under the amended statute, the post-injury wage is determined by what the employee is capable of earning rather than the employee’s actual post-injury earnings. By adopting a earning capacity test, the good-faith requirement to seek post-injury gainful employment as first outlined in *Faulk and Copeland* is no longer necessary. Under the new law, the administrative law judge will impute an appropriate post-injury wage based upon a consideration of all factors. “All factors” include, but are not limited to, the injured worker’s age, physical capabilities, education and training, prior experience, and availability of jobs in the open labor market.

The definition of the wage loss component of the work disability formula has also been changed. In determining the appropriate wage loss, the wage loss must be “directly attributable to the work injury and not to other causes or factors.” Termination for cause or voluntary resignation shall not be considered a wage loss directly attributable to the work injury. The employee’s refusal of accommodated work at a wage equal to or exceeding 90 percent of the employee’s pre-injury wage will result in a rebuttable presumption of no wage loss. To establish a wage loss, a worker must have the “legal capacity” to enter into a valid contract of employment. Finally, the actual or projected value of employer-paid fringe benefits is now added to the employee’s post-injury average weekly wage in determining wage loss for purposes of work disability.

**Increases in Maximum Compensation Benefits (Caps)**

The new Act increases the maximum compensation benefits payable. The caps on maximum compensation benefits for permanent total disability, permanent partial disability, permanent partial disability (functional only) had not been increased since 1993. The new Act increases the maximum compensation benefits as follows:

1. Permanent Total Disability from $125,000 to $155,000.
2. Permanent partial disability from $100,000 to $130,000.
3. Permanent partial disability for functional impairment only from $50,000 to $75,000. This applies whether or not temporary total disability or temporary partial disability benefits were paid.
4. The death benefit from $250,000 to $300,000. Additionally, the death statute now requires respondent to pay court-appointed conservator fees, where necessary, not to exceed $1,000.

**Average Weekly Wage**

The new Act makes significant changes to the average weekly wage statute, K.S.A. 2010 Supp. 44-511. Eliminated is the prior law’s reliance on the number of hours the employee “usually and regularly worked or was expected to work” and “customary number of working hours.” Under the amended statute, the average weekly wage is computed based on wages actually earned. Specifically, the sum of the wages actually earned by the employee during the 26 weeks immediately preceding the date of the injury is divided by 26 or the number of calendar weeks actually worked. Bonuses and gratuities are now included in the definition of “money.” Employer-paid disability insurance is added to the definition of “additional compensation” and is to be included in the calculation of the average weekly wage if discontinued.
Determination of Pre-existing Functional Impairment

The new Act changes the determination and calculation of pre-existing functional impairment in K.S.A. 2010 Supp. 44–501(c). When the employee has received an award of compensation for permanent impairment, work disability, or total disability, the award must be reduced for any pre-existing functional impairment. When there has been an award of benefits under Kansas law, then the percentage basis of the prior award or settlement conclusively establishes the amount of pre-existing functional impairment. When the prior award of compensation was not pursuant to Kansas law, the amount of pre-existing functional impairment will be determined by competent evidence.

The amount of the deduction for pre-existing functional impairment may be either a monetary offset or a percentage offset, depending on whether the two claims are against the same employer. If the pre-existing functional impairment is a result of an injury that occurred during employment with the same employer as the current injury, the reduction is the “current dollar value” of the pre-existing functional impairment. The current dollar value is determined by multiplying the pre-existing impairment percentage by the current injury’s compensation rate. In all other cases, the reduction is a percentage offset determined by deducting the percentage amount of pre-existing functional impairment.

Temporary Total and Temporary Partial Disability Benefits

The new Act changes the determination of when temporary total disability exists. In determining whether an employee’s temporary restrictions preclude substantial and gainful employment, new language has been added providing that the opinion of the authorized treating doctor shall be presumed to be determinative. Because the opinion of the authorized physician is only “presumed” to be determinative, claimants should have the right to rebut any presumption with evidence to the contrary.

The new statute also corrects the prior statute’s ambiguity when the employee, although not completely and temporarily incapable of engaging in any type substantial gainful employment, is nevertheless unable to work for the employer because the employee is under temporary restrictions that the employer is not able to accommodate. The new statute specifically provides that an employee shall be entitled to temporary total disability benefits if the authorized treating physician imposes temporary restrictions but the employer is not able to accommodate.

New subsections in K.S.A. 44-510c detail specific situations in which the employee will not be entitled to temporary total disability benefits. If the employee refuses an offer of accommodated work that is within the restrictions issued by the authorized treating physician, there is a rebuttable presumption that the worker is not entitled to benefits. If the employee quits or is terminated for cause and the employer could have accommodated the restrictions, the employer is not liable for the payment of temporary total disability benefits. Finally, an employee is not entitled to the payment of temporary total disability benefits if receiving unemployment compensation benefits.

K.S.A. 44-510d, the scheduled injury statute, is amended to allow the payment of temporary partial disability benefits in scheduled injury claims. Equally important, K.S.A. 44-510d is amended by adding a new subsection defining the method for determining the number of temporary partial disability weeks to be deducted from the schedule. Specifically, the new subsection provides that the total dollar amount of temporary partial disability benefits paid shall be divided by the appropriate permanent partial disability rate. The result will be fewer weeks being subtracted from the overall schedule.

Finally, K.S.A. 44-510f(b) is amended to allow reimbursement in which the employer pays unearned wages in excess of weekly temporary total disability benefits owed while the employee is off work due to the injury. Specifically, such an overpayment shall be deducted from any final settlement or, if the employee’s average weekly wage exceeds 125 percent of the state’s average weekly wage, the overpayment may be withheld from the employee’s wages in weekly amounts equal to the weekly amount actually paid in excess of the weekly temporary total disability benefits owed.

Future Medical Treatment

The new Act significantly restricts an employee’s rights to future medical treatment. The amendments restrict an employee’s ability to retain future medical treatment by adding a rebuttable presumption that the employer’s obligation to provide medical treatment terminates when the employee reaches maximum medical improvement. The presumption is rebutted with medical evidence establishing “that it is more probably true than not” that additional medical treatment will be necessary.

Additionally, K.S.A. 44-525, the “form of findings and awards” statute, is amended to require that no award shall include the right to future medical treatment unless it is proven by the claimant that it is more probably true than not that future medical treatment will be required. The provision will apply to settlements as well as to awards following a regular hearing.

The new Act restricts an employee’s right to obtain future medical treatment under the post-award medical statute by providing that the administrative law judge can make an award for additional medical treatment only if it is more probably true than not true that the injury which was the subject of the underlying award is the prevailing factor in the need for further medical care. Additionally, the employer or insurance company can seek the termination of medical treatment.

The new law allows the employer to seek the permanent termination of future medical benefits if the claimant has not received authorized medical treatment within two years of the date of the award or two years from the date the claimant last received authorized medical treatment. The statute creates a rebuttable presumption that no further medical care is needed.
Dismissal of Claim for Lack of Prosecution

Claimants will get some relief from the automatic five-year dismissal provisions of the prior statute. Under the prior provisions of K.S.A. 2010 Supp. 44-523, any claim that had not proceeded to an award or settlement hearing within five years from the date of the filing of the application for hearing “shall be dismissed” by the administrative law judge unless extended for good cause shown. The burden was on the claimant to prove good cause before the expiration of five years or the claim would be dismissed.

Under the new provisions of K.S.A. 2010 Supp. 44-523, the period of time is shortened to three years, but the dismissal is not automatic. Instead, the burden shifts to the employer to file an application for dismissal based on lack of prosecution. A hearing is required, and notice of the hearing must be given to the claimant’s attorney of record or, if unrepresented, to the claimant at the claimant’s last known address.

A similar provision allowing for the dismissal of a claim after one year following a preliminary award denying compensability is added to the amended statute. Specifically, the employer is permitted to file an application for dismissal based on lack of prosecution of any claim which has not proceeded to regular hearing within one year from the date of a preliminary award denying compensability. Again, notice of the hearing must be given to claimant’s attorney of record or, if unrepresented, to the claimant at the claimant’s last known address. Under both provisions, the administrative law judge may grant an extension for good cause shown. However, if the claimant does not establish good cause, the claim shall be dismissed. The dismissal shall have the effect of a final disposition for purposes of employer reimbursement from the fund pursuant to K.S.A. 44-534(a).

Amendments to Statutory Defenses

The new Act amends several statutory defenses. New subparagraphs are added to K.S.A. 2010 Supp. 44-501(a)(1) disallowing compensation for an employee’s reckless violation of workplace safety rules or regulations or for voluntary participation in fighting or horseplay. However, a mitigating paragraph is added relating to the failure to use safety equipment that allows compensation if it was reasonable under the totality of the circumstances for the employee not to use safety equipment or if the employer approved the work. Procedures and penalties relating to the use of alcohol or drugs in the workplace are strengthened. Impairment established by a positive drug or alcohol test now constitutes a rebuttable presumption that the impairment contributed to the injury. Under the prior law, the employer had to prove contribution. An employee’s refusal to submit to drug or alcohol testing will now result in a forfeiture of benefits if the employer had sufficient cause to suspect drug or alcohol use or if the employer’s policy authorizes post-injury testing. Under the prior law, an employee’s refusal was admissible to prove impairment only if there was probable cause to believe that the employee had used, possessed or was impaired by drugs or alcohol. Thus, under the new provisions, if an employer adopts a policy authorizing post-injury testing, it will not have to show probable cause, or even sufficient cause, to deny benefits if an employee fails to submit to testing.

Miscellaneous Amendments

There are many other amendments under the new law that are short in length but have important implications. Some of the amendments include:

Definition of Functional Impairment: The definition of functional impairment is amended to require proof by “competent medical evidence.” Functional impairment is defined in K.S.A. 2010 Supp. 44-508(u) as the loss of a portion of the total physiological capabilities established by competent medical evidence and based on the fourth edition of the AMA Guides to the Evaluation of Permanent Impairment.

Expanded Definition of Mail: “Mail” means U.S. Mail or other land-based delivery service or transmission by electronic means as designated by the director of workers compensation. K.S.A. 2010 Supp. 44-508(w).

Presumption of Permanent Total Disability Eliminated: K.S.A. 44-510c(a)(2) is amended to eliminate the presumption of permanent total disability for the loss of both eyes, hands, arms, feet, legs, or any combination thereof. The new statute now provides that “expert evidence shall be required to prove permanent total disability.” The statute is also amended to provide that an employee is limited to one award of permanent total disability.

Multiple Impairments to Single Extremity: K.S.A. 44-510d(b) is amended to add a new paragraph providing that when there are functional impairments to more than one scheduled member within a single extremity, the functional impairments shall be combined pursuant to the AMA Guides and calculated to the highest scheduled member actually impaired.

Employee’s Failure to Submit to Medical Exam: K.S.A. 44-515 is amended to suspend all benefits due an employee who refuses to submit to a medical exam requested by the employer until the employee complies. Upon written request, an employee must be provided a copy of the report within “a reasonable period of time.” This changes the prior law’s 15-day provision.

Court Ordered Independent Medical Exams: New subsection (b) of K.S.A. 44-516 allows the administrative law judge to obtain the opinion of a health care provider agreed to by the parties or, in the absence of agreement, selected by the administrative law judge when medical opinions disagree as to the percentage of functional impairment. This opinion “shall be considered” by the administrative law judge in making the final determination.

Lump-sum Settlements: K.S.A. 44-531 is amended to eliminate the prior preclusion of lump-sum settlements for nine months in those cases in which the claimant would have otherwise been entitled to work disability but for the employer’s accommodation.

Life Expectancy Proration of Lump-sum Settlements: The common practice of prorating lump-sum settlements over the life expectancy of the injured worker is codified in
K.S.A. 44-531 to comply with Social Security regulations. The statute specifically provides that this section “shall be retroactive in effect.”13 This is the only provision in the new Act that is expressly made retroactive.

**Video or Telephone Conferencing:** K.S.A. 44-549 is amended to provide that all workers compensation hearings shall be held by the administrative law judge in person “or by video conferencing or telephone conference” unless otherwise mutually agreed.

**Certified Court Reporter Fees:** A new subsection (d) is added to K.S.A. 2010 Supp. 44-552 requiring that the court reporter’s fee be taxed directly to the division of workers compensation if a fee is incurred but no record is taken.

**Change of Physician:** Reflecting the difficulty in sometimes locating three alternative physicians, K.S.A. 2010 Supp. 44-510 is amended to reduce from three to two the number of alternative physicians respondent is required to submit following a claimant’s request for change of physician.

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**ENDNOTES**


4. 283 Kan. 508, 154 P.3d 494 (2007). The Kansas Supreme Court held that parallel extremity injuries are not compensable as nonscheduled injuries as they are not expressly included in the nonscheduled injury statute, K.S.A. 44-510c, and a statute should not be read to add that which is not contained the language of the statute. Syl. ¶¶ 6 & 9.

5. 289 Kan. 605, 214 P.3d 676 (2009). The Court disapproved prior Court of Appeals’ decisions that added a good-faith requirement for a worker to seek post-injury employment. The decision states that, when a workers compensation statute is plain and unambiguous, the courts must give effect to its express language rather than determine what the law should or should not be. Syl. ¶ 1.

6. 2 Kan. App. 2d 277, 284, 887 P.2d 140 (1994). In Faulk, the Court of Appeals concluded that the nonscheduled injury statute implicitly contained a requirement that an injured worker must make a good-faith effort to find subsequent employment.

7. 24 Kan. App. 2d 306, 320, 944 P.2d 179 (1997). The Court of Appeals in Copeland expanded its decision in Faulk by holding that the factfinder must determine if claimant has made a good-faith effort to find subsequent employment and, if not, impute a wage based on all of the evidence.

8. “Prevaling factor” is defined in K.S.A. 44-508(g). It is used in the definition of “accident” in K.S.A. 2010 Supp. 44-508(d) and in the definition of “repetitive trauma” in K.S.A. 2010 Supp. 44-508(e).


10. The Supreme Court’s decision in Bergstrom eliminated the good-faith requirement established in the Faulk and Copeland decisions requiring claimants to make a good-faith effort to obtain employment before being eligible for work disability benefits. Substitute for House Bill No. 2134 eliminates the effects of the Bergstrom decision by amending K.S.A. 44-510c, the work disability statute, to substitute an earning capacity test in place of the previous actual earnings test and thus eliminating the need for a good-faith requirement.


12. K.S.A. 2010 Supp. 44-508(f)(2). The amended definition eliminates many injuries that were previously compensable including for example the aggravation, acceleration or intensification of a pre-existing condition.

13. In Casco, the Supreme Court reversed the line of cases holding that parallel injuries are not expressly included in the nonscheduled injury statute, K.S.A. 44-510c, and therefore cannot be the basis for work disability benefits. Substitute for House Bill No. 2134 specifically adds certain bilateral extremity injuries to K.S.A. 44-510c.


15. K.S.A. 44-510d(a).

16. Although shortened from five years to three, the amendment of the dismissal provisions of K.S.A. 2010 Supp. 44-523 from the previous automatic dismissal to a procedure that respondent must initiate with notice to claimant should help eliminate inadvertent dismissals with prejudice. The requirement of service of a claim for compensation by claimant should or should not be. Syl. ¶ 1.


18. Some administrative law judges had already interpreted the restrictive future medical provisions contained in newly amended K.S.A. 2010 Supp. 44-510b to apply retroactively to claims in which the injury had occurred before May 15, 2011, the effective date of the new Act.


20. In Bryant, claimant had injured his low back but the Court of Appeals held his injuries were the result of the normal activities of daily living and denied compensation. On appeal, the Kansas Supreme Court held that claimant’s activities in reaching for his tool belt or carrying out his welding tasks are activities connected to or inherent in performance of his job and reversed and remanded. Id. at 8.

21. K.S.A. 44-531(c) codifies the practice of prorating lump-sum settlements over the life expectancy of the injured worker to minimize or avoid the Social Security Disability Income offset.


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**Conclusion**

There are many other amendments under the new law that are not addressed in this article. Many have very important implications. Attorneys are therefore strongly encouraged to read and become familiar with the new Act in its entirety.

**About the Author**

Tim Alvarez is the principal in The Alvarez Law Firm P.A. in Kansas City, Kan. His practice is limited to workers’ compensation, nursing home negligence, and personal injury litigation in Kansas and Missouri. Alvarez is past president of the Kansas Trial Lawyers Association and past editor of its journal. He is also past president of the Wyandotte Bar Association and is a member of several state and local workers’ compensation committees and a longtime workers’ compensation practitioner.
25. Id.
26. Id.
27. Id.

However, K.S.A. 2010 Supp. 44-508(f)(2) now excludes such injuries.

35. Id.
36. Id.

41. See Section 287.020.3 R.S.Mo. 2005 providing that an injury is compensable only if the accident was the prevailing factor in causing both the resulting medical condition and disability. “The prevailing factor” is defined to be the primary factor, in relation to any other factor, causing both the resulting medical condition and disability.


47. Id.
50. K.S.A. 44-520.

51. Id.
52. K.S.A. 44-520(a)(2).
53. K.S.A. 44-520(a)(3).
55. Id.
56. K.S.A. 44-520(b).
59. Supra note 57, Syl. ¶ 6.
61. Id. 44-510(c)(2)(A)(ii).
62. Id. 44-510(c)(2)(A)(iii).
64. Id., Syl. ¶ 4.
65. Id. at 872.
67. Id. 44-510(c)(2)(C)(ii).
68. Id.
69. Id. 44-510(c)(2)(D).
70. Id. 44-510(c)(2)(C)(ii).
71. Id. 44-510(c)(2)(D).
72. Id.
73. Id. 44-510(c)(2)(E).

74. Under an earnings capacity test, the focus is on an employee’s capacity to earn as opposed to actual earnings. However, an employee’s good-faith but unsuccessful effort to obtain employment may still be relevant to prove the capacity to earn wages in a given labor market.
From compiling to printing to final delivery, we maximize our resources to provide a directory that allows customers to reach you faster and more efficiently. And with over 70 years of publishing expertise we can minimize your effort to accelerate the exposure of your professional business listing across the state. The KANSAS LEGAL DIRECTORY can help you reach a bigger market.

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RULES RELATING TO CONTINUING LEGAL EDUCATION

Supreme Court Rule 803 is hereby amended, effective date of this order.

RULE 803

MINIMUM REQUIREMENTS

(a) **Credit Hours.** An active practitioner must earn a minimum of 12 CLE credit hours at approved programs in each compliance period (July 1 to June 30). Of the 12 hours, at least 2 hours must be in the area of ethics and professionalism.

(b) **Carryover Credit.** If an active practitioner completes CLE credit hours at approved programs during a compliance period exceeding the number of hours required by subsection (a) and the practitioner complies with the requirements of Rule 806, the practitioner may carry forward to the next compliance period up to 10 unused general attendance credit hours from the compliance period during which the credit hours were earned. However, ethics and professionalism credit hours in excess of the 2-hour requirement in subsection (a) may be carried forward as general attendance credit but not as ethics and professionalism credit. CLE credit hours approved for teaching, authorship, or law practice management credit do not qualify for carryover credit.

(c) **Reporting.** CLE credit hours at an approved program for each attorney must be reported to the Commission in the form and manner the Commission prescribes.

(d) **Exemptions.** The following attorneys are not required to fulfill the CLE requirements in subsection (a):

1. An attorney newly admitted to practice law in Kansas during the period prior to the first compliance period beginning after admission to practice.
2. An attorney during the time the attorney is on retired or inactive status pursuant to Supreme Court Rule 208 and registered on inactive status with the CLE Commission.
3. A federal or state judge who is prohibited from engaging in the private practice of law.
4. An attorney exempted by the Commission for good cause pursuant to subsection (e).

(e) **Exemptions for Good Cause.** The Commission may grant an exemption to the strict requirement of these rules to complete continuing legal education because of good cause, e.g. disability or hardship. A request for exemption must be submitted to the Commission in writing with full explanation of the circumstances necessitating the request. An attorney with a disability or hardship that affects the attorney’s ability to attend CLE programs may file annually a request for a substitute program in lieu of attendance and must propose a substitute program the attorney can complete. The Commission must review and approve or disapprove a substitute program on an individual basis. An attorney who receives approval of a substitute program is responsible for the annual CLE fee required by Rule 808.

(f) **Legislative Service.** An attorney serving in the Kansas Legislature may, on request, receive a reduction of the 6 of the 10 general attendance credit hours required for the compliance period in which the attorney serves.

(g) **Accommodation for Attorneys Employed Out-of-Country.** An attorney employed full time outside the United States for a minimum of 8 months during the compliance period may, upon request and preapproval, complete the annual CLE requirement by nontraditional programming.

BY ORDER OF THE COURT this 8th day of November, 2011.

FOR THE COURT

Lawton R. Nuss
Chief Justice
All opinion digests are available on the KBA members-only website at www.ksbar.org. We also send out a weekly eJournal informing KBA members of the latest decisions. If you do not have access to the KBA members-only site, or if your email address or other contact information has changed, please contact member services at info@ksbar.org or at (785) 234-5696. You may go to the courts’ website at www.kscourts.org for the full opinions.
STATE V. HARSH
JOHNSON DISTRICT COURT – AFFIRMED IN PART AND VACATED IN PART
NO. 103,491 – NOVEMBER 18, 2011

FACTS: John Harsh pled nolo contendere to one count of rape for engaging in sexual intercourse with a girl under the age of 14, an off-grid person felony. Prior to sentencing, Harsh moved for a downward departure from the mandatory minimum sentence under Jessica’s Law seeking instead a sentence of 258 months. The district court denied Harsh’s motion and imposed a sentence of life imprisonment with a mandatory minimum term of imprisonment of 586 months and lifetime post-release supervision. ISSUE: (1) Jessica’s Law and (2) lifetime post-release supervision
HELD: Court held that under the facts of this case, the sentencing court did not abuse its discretion in finding no substantial and compelling reason to depart from the mandatory minimum sentence under Jessica’s Law and in denying the defendant’s motion for downward departure. The state had urged the court to deny the departure, pointing out that Harsh had raped three separate underage girls after befriending their parents and obtaining access to the victims. However, court vacated the portion of Harsh’s sentence ordering lifetime post-release supervision because Harsh’s crimes occurred after July 1, 2006.
STATUTES: K.S.A. 21-3502, -3504, -4643; and K.S.A. 22-3717

STATE V. MILLER
SALINE DISTRICT COURT – AFFIRMED COURT OF APPEALS – AFFIRMED

FACTS: After mistrial in first trial, Miller was convicted of rape, aggravated criminal sodomy, and aggravated indecent liberties with a child. District court denied Miller’s pretrial motion to suppress statements made to officer. District court also determined a child witness was a victim but unavailable and disqualified because she was unable or unwilling to take oath, and entered pretrial order limiting testimony about what the child victim said. On appeal, Miller claimed: (1) second trial violated double jeopardy clause, (2) prosecutor improperly appealed to jury’s sense of compassion for the victim, (3) district court did not sufficiently investigate whether the child victim was disqualified as a witness, or alternatively, should have required the child victim to testify via closed-circuit television, (4) right to confrontation violated by admission of statements to nurse examiner without opportunity to cross-examine the child victim, (5) district court erred in sentencing him to aggravated sentence without proving aggravating factors or criminal history to a jury, and (6) cumulative error denied him a fair trial. The Court of Appeals affirmed Miller’s convictions.
ISSUES: (1) Double jeopardy, (2) appeal to jury’s compassion, (3) disqualified of child victim as a witness, (4) confrontation clause, (5) sentencing and criminal history, and (6) cumulative error
HELD: Court affirmed the Court of Appeals decisions that although prosecutor violated pretrial order and caused mistrial to be declared, no evidence the state’s conduct was deliberate, a product of ill will, or calculated to force Miller to move for mistrial. No double jeopardy violation in ordering a new trial. Claims regarding prosecutor’s questions during trial were not addressed because no contemporaneous objections. No prosecutorial misconduct in closing argument, where prosecutor was responding to Miller’s closing argument. Court agreed with the Court of Appeals that the record does not support Miller’s claim that district court failed to make required findings of disqualification. Court found no violation of the confrontation clause. Court stated that an objective evaluation of the totality of the circumstances lead to the conclusion that the child victim’s statements in response to the nurse examiner’s inquiry about what happened were nontestimonial. These circumstances include the victim’s age, her complaint that she was “hurting,” the mother’s decision to seek medical treatment independent of any request to do so by law enforcement officers, the nurse examiner’s action of asking questions common to all medical examinations, and the nurse examiner’s action of providing some medical treatment. Court found the appellate court has no jurisdiction to review sentence imposed within presumptive range and there was no support in record for cumulative error claim.
STATUTES: K.S.A. 8-1602, -1603, -1604, -1606; K.S.A. 20-3018; K.S.A. 21-3108, -4704-4721; K.S.A. 22-3434, -3602(e); K.S.A. 60-404, -460(m), (dd); and K.S.A. 65-448

NOTICE OF AMENDMENT OF LOCAL RULES OF PRACTICE OF THE UNITED STATES DISTRICT COURT

The United States District Court for the District of Kansas gives notice of the amendment of local rule 77.6. Copies of the amendment are available to the bar and the public at the offices of the Clerk at Wichita, Topeka, and Kansas City. The offices are open from 9 a.m. to 4:30 p.m. on all days except Saturdays, Sundays, and federal legal holidays. The amendment is also available on the United States District Court website at www.ksd.uscourts.gov.

Interested persons, whether or not members of the bar, may submit comments on the amendment addressed to the Clerk at any of the record offices. All comments must be in writing and, to receive consideration by the Court, must be received by the Clerk on or before 4:30 p.m., January 30, 2012.

Timothy M. O’Brien
United States District Court
District of Kansas
Appellate Decisions

COURT OF APPEALS

CIVIL

DUI, DRIVER’S LICENSE, AND DUE PROCESS
TURNER V. KANSAS DEPARTMENT OF REVENUE
SALINE DISTRICT COURT – REVERSED AND
REMANDED WITH DIRECTIONS
NO. 105,353 – NOVEMBER 10, 2011

FACTS: Turner was pulled over for crossing the center line. When the officer approached the vehicle, she noticed that the driver, Turner, had a moderate odor of alcohol coming from his person and his eyes were bloodshot. Turner eventually admitted that he had consumed two beers and two alcoholic drinks before driving. Turner performed field sobriety tests, and he exhibited five clues on the walk-and-turn test and one clue on the one-leg-stand test. Turner refused to take the preliminary breath test. Gile arrested Turner for driving under the influence of alcohol and transported him to the Saline County jail. Turner agreed to take a breathalyzer test and the result was 0.151. Gile provided Turner with the DC-27 form, which notified Turner of his one-year driver’s license suspension for a breath test failure and served as his temporary license throughout the appeal process. Turner requested an administrative hearing of his driver’s license suspension. The hearing was held on July 31, 2009, and the primary issue was whether Gile had reasonable grounds to believe Turner was operating his vehicle while under the influence of alcohol. After hearing the evidence, the hearing officer took the matter under advisement. The administrative order affirming Turner’s driver’s license suspension was issued nearly nine months later, on April 16, 2010, and received by Turner on April 19, 2010. Turner filed a timely petition for judicial review of the administrative order. One of the grounds for relief in the petition was that Turner had been prejudiced as a result of the delay by the hearing officer in rendering a decision. The district court found that Gile had reasonable grounds to believe Turner was operating his vehicle while under the influence of alcohol and upheld the basis for the driver’s license suspension. Without expressly finding a due process violation, the district court found that the administrative suspension had been “unduly and unreasonably delayed” and restored his driving privileges retroactive to 30 days after the hearing, which meant that he was entitled to the restoration of his driving privileges as of that date.

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

HELD: Court held the district court lacked statutory authority to modify the administrative suspension of Turner’s driver’s license by making the suspension order retroactive. Turner failed to establish a due process violation in this particular case as a result of the hearing officer’s delay in rendering a decision and the uncertainty of whether Turner would lose his license after the appeals process was not sufficient evidence of a due process violation. The district court’s decision modifying the administrative suspension order was reversed and remanded with directions for the district court to reinstate the administrative order without modification.

STATUTES: K.S.A. 8-259(a), -292, -1020(n); and K.S.A. 60-2103(h)

MENTAL HEALTH - EVIDENCE
IN RE CARE & TREATMENT OF PALMER
JOHNSON DISTRICT COURT – AFFIRMED
NO. 103,964 – NOVEMBER 19, 2011

FACTS: Palmer waived probable cause hearing in state’s petition under Sexually Violent Predator Act (KSVPA) to have Palmer deemed a sexually violent predator. When two evaluators at Larned State Security Hospital later disagreed whether Palmer qualified as a sexually violent predator, Palmer filed motion to dismiss and/or for summary judgment. Trial court denied the motion, finding K.S.A. 59-29106(a) has no provision for such a dismissal. Jury then found Palmer to be a sexually violent predator. On appeal Palmer claimed: (1) trial court erred in failing to dismiss the action; (2) there was insufficient evidence to find he was a sexually violent predator; and (3) trial court erred in admitting redacted child pornography images as a sample of what Palmer had on his computer in underlying conviction for sexual exploitation of a child.

ISSUES: (1) Summary judgment motion in KSVPA proceeding, (2) sufficiency of the evidence, and (3) admission of child pornography images

HELD: Trial court’s determination of probable cause under KSVPA is compared to probable cause determination at preliminary examination stage of a felony criminal proceeding. Once there is a finding of probable cause in a proceeding to determine if someone is a sexually violent predator, summary judgment is not available to either the state or the respondent. No error in trial court denying Palmer’s motion.

Testing and analysis of testifying doctors is reviewed, finding sufficient evidence that Palmer is likely to reoffend, and that a reasonable factfinder could find beyond a reasonable doubt that Palmer was a sexually violent predator.

Nature of a judicial proceeding under KSVPA requires this type of evidence of the crime. Relevancy of the evidence in this case is discussed. No error found in trial court’s admission of the images.

STATUTES: K.S.A. 2010 Supp. 22-2902(a), -3208(1), -3208(4), 59-2902(a), -29a07(a)-(e); K.S.A. 21-3516; K.S.A. 59-29a01 et seq., -29a04(a), -29a05, -29a05(d), -29a06(a), -29a06(c); and K.S.A. 60-407(f), -455

OIL AND GAS, AD VALOREM TAX, AND
FLUSH PRODUCTION
IN RE EQUALIZATION APPEALS
OF EOG RESOURCES INC.
KANSAS COURT OF TAX APPEALS – REVERSED AND
REMANDED WITH DIRECTIONS
NO. 104,631 – NOVEMBER 10, 2011

FACTS: In 2005, EOG acquired several new oil and gas leases in Seward County, and production was obtained through new wells on five of these properties subsequent to July 1, 2006, and on a sixth property in late 2007. For tax years 2007 and 2008, EOG argued about the proper methodology to calculate valuation for purposes of ad valorem taxation, and they principally argued about the correct manner to exclude for purposes of that valuation the distorting effect of flush production apparent on each lease. The dispute ultimately reached the Kansas Court of Tax Appeals (COTA), which heard evidence before issuing an order that redetermined the valuation of each leasehold interest for each of the tax years at issue.

EOG argues that COTA erred as a matter of law or acted in a manner that was arbitrary, capricious, and unreasonable by failing to exclude the phenomena of flush production in determining either the annual production rate or the proper rate of decline for new wells on these six leases.

ISSUES: (1) Oil and gas, (2) ad valorem tax, and (3) flush production
HELD: Court held that where initial production on an oil or gas well is established after July 1 of the year prior to valuation and reflects several months of flush production, (1) annualization of all available actual production data prior to April 1 of the tax year is required to determine the production rate; (2) the 40 percent reduction mandated by K.S.A. 2010 Supp. 79-331(b) must be applied to that annualization; (3) the decline rate should not be assumed if there is available data demonstrating a decline that exceeds the assumed rate; (4) back-to-back quarterly comparisons of actual production are permissible for both oil and gas wells, and (5) such quarterly comparisons provide reliable information to calculate the annual rate where flush production no longer distorts any monthly production amount used in the calculations. Court reversed COTA’s valuation determinations for all properties and all respective tax years framed by this appeal, concluding that (1) COTA erroneously interpreted or applied the law in failing to recognize the pernicious influence of flush production on the production and decline rates employed in its final valuation determinations and in failing to consider all data available as of the appraisal date; (2) COTA failed to follow prescribed procedures in endorsing assumption of decline rates that were facially erroneous considering all available data; and (3) COTA’s final valuation determinations were unreasonable in utilizing overstated production rates and understated decline rates.

STATUTES: K.S.A. 77-621; and K.S.A. 79-331(b)

TAXATION - ADMINISTRATIVE LAW AND PROCEDURE
WAGNER V. STATE
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 105,442 – NOVEMBER 18, 2011

FACTS: Wagner bought real estate, listed it for sale at a much higher price, and her appraised value rose. She sued the state of Kansas and secretary of Kansas Department of Revenue claiming directive No. 98-033 exceeded the agency’s statutory authority and improperly allowed appraisers to consider the homeowner’s listing price on real estate as one of the factors to consider when assessing fair market value. Wagner claimed the directive is illegal and infringes on her freedom of speech as a homeowner. District court granted defendants’ motion for judgment on the pleadings and dismissed Wagner’s petition. Wagner appealed.

ISSUES: (1) Administrative regulations and (2) freedom of speech

HELD: Process for appraisal of real property for taxation purposes to determine its fair market value is reviewed. Appraisal directives adopted by director of property valuation are considered administrative rules or regulations, have the force and effect of law, and are presumed valid. Wagner failed to show how K.S.A. 2010 Supp. 79-503a prohibits the use of listing information. The listing price is one factor the appraiser can consider. If listing price is used for fair market value without other support for that value, it can be appealed and should be corrected by the appeal process as it was in Wagner’s case. District court properly granted judgment on the pleadings to defendants.

Appraisal directive No. 98-033 is a content-neutral regulation that serves a legitimate governmental purpose of preventing county appraisers from taking shortcuts and not following the law. Because the directive does not chill a property owner’s right to list property for sale at price of choosing, it does not violate free speech.

FACTS: The Garden City Co. owned three water rights: FI 168’s original use was irrigation; FI 229’s and Application 2,342’s original uses were industrial. After the water diverted under FI 229 and Application 2,342 cooled the Garden City Co.’s power plant, the company used the water for irrigation under FI 168. In 1957, Wheatland Electric Cooperative bought the power plant and all three water rights from the Garden City Co. In the 1990’s, Wheatland decided to transform itself into a water utility to help curb the City of Garden City’s inferior water-quality problem. To make its water-treatment goal possible, Wheatland needed to change FI 168’s use type from irrigation to municipal and the place of use from Wheatland to Garden City. Wheatland applied for these changes in March 2002. At the same time and to further effect its goal, Wheatland applied to change FI 229’s place of use and Application 2,342’s type of use and place of use. The chief engineer of the state’s division of water resources approved Wheatland’s requested changes, but reduced FI 168’s water usage from 840 acre-feet of water a year to 91 acre-feet a year. The Division also limited FI 229’s and Application 2,342’s water usage. The Secretary of Agriculture declined to 91 acre-feet a year. The Division also limited FI 229’s and Application 2,342’s consumptive-use entitlement. Court remanded the case to the Division to reconsider Wheatland’s requested changes, but reduced FI 168’s water usage from 840 acre-feet of water a year to 91 acre-feet a year. The Division also limited FI 229’s and Application 2,342’s water usage. The Secretary of Agriculture declined to exercise review. Wheatland then petitioned the Shawnee County District Court to review the Division’s decision. The Division’s decision remanded the case to the Division to reconsider the rights’ consumptive-use limitation, and the Division then initiated abandonment proceedings and terminated the unused portions of those rights. The district court reviewed the Division’s actions again, this time finding that the division couldn’t partially terminate Wheatland’s water rights. Both parties appealed. In addition to refuting Wheatland’s claims that the Division couldn’t limit the rights’ consumptive use, the Division insists that it could declare a partial abandonment of the rights.

ISSUE: Water rights

Held: Court held that the consumptive-use regulations adopted by the Kansas Department of Agriculture’s Division of Water Resources in K.A.R. 5-5-8 are valid. On the facts of this case, Court held that application of the Division of Water Resources’ consumptive-use regulations has not been shown to have taken any property rights without due compensation. Court held that the chief engineer of the Division my limit consumptive use in connection with the approval of change-of-use application. Court also held that based on the evidence before this court, the state has a great interest in ensuring that the public isn’t adversely impacted by changing another water right. Wheatland hasn’t shown that the chief engineer’s water-usage reduction impacted its rights in such a way as to outweigh the state’s great interest and cause an unconstitutional taking. Court concluded that the Division of Water Resources’ application of its consumptive-use regulations was not unreasonable, arbitrary, or capricious. But, court held that Division does not have the authority to declare the partial abandonment of a water right. Court remanded to the district court for the district court to send the case back to the Division to reconsider Wheatland’s consumptive-use entitlement.


WATER RIGHTS
WHEATLAND ELECTRIC COOPERATIVE V. POLANSKY ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND REMANDED WITH DIRECTIONS
NO. 102,881 – NOVEMBER 4, 2011

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

2012 SUPREME COURT SESSION SCHEDULE

February 6-13
April 10-16
*May 21-25, 29
August 27-31
October 3
October 22-26
December 10-14

BY ORDER OF THE COURT this 8th day of November, 2011.

Lawton R. Nuss
Chief Justice


Amended 2011 SC 71

WORKERS’ COMPENSATION, NOTICE OF INJURY, AND FILING ACCIDENT REPORT
NILGES V. STATE ET AL.
WORKERS COMPENSATION BOARD – REVERSED AND REMANDED
NO. 105,787 – NOVEMBER 23, 2011

FACTS: Nilges was employed by the Kansas Department of Transportation (state) as an equipment operator. On April 21, 2008, Nilges was injured when he refastened a lid on a water truck. While descending from the truck, his feet slipped, so he held onto the truck with his hands. He immediately felt pain in his upper back, especially his right shoulder.

That same evening, Nilges reported the accident to his supervisor, Garrett Brandt. However, no accident report was initially completed. Nilges’ condition continued to worsen. Nilges testified that because Brandt would not fill out an accident report, he sought medical treatment on his own, including chiropractor treatment. An accident report was eventually completed on December 2, 2008. According to Nilges, the report was completed only after he had complained to Brandt’s supervisor that Brandt had refused to fill out an accident report. In June 2009, the state canceled its authorization for Nilges’ medical treatment. Nilges filed a written claim for compensation on June 25, 2009. The ALJ found that Nilges’ claim was timely and awarded benefits, but this decision was reversed and remanded by the Board. Nilges resumed medical treatment and received benefits. The state could not accommodate the restrictions, and Nilges was released from his job on February 4, 2010. A new ALJ found that Nilges’ claim was timely and awarded benefits. The Board found that Nilges did not file his claim within 200 days of the date of his injury on April 21, 2008. The Board also found that the state was not required to file an accident report when Nilges initially notified his supervisor of the injury, so as to extend the deadline for Nilges to file a claim. Thus, the Board concluded that Nilges failed to file a timely written claim, and the Board did not reach the remaining issues.

ISSUES: (1) Workers’ compensation, (2) notice of injury, and (3) filing accident report

www.ksbar.org
HELD: Court stated that under K.S.A. 44-557(c), if an employer has notice of an employee’s work-related accident and fails to file an accident report as provided in K.S.A. 44-557(a), whether or not such accident report is required to be filed, the time limitation for the employee to file a written claim for compensation is extended beyond the usual deadline of 200 days after the date of the accident. Court relied squarely on Ricker v. Yellow Transit, 191 Kan. 151, and held that the statutory language of K.S.A. 44-557 has not changed in any material respect since Ricker was decided. The Ricker court stated that as long as the employer has notice of the accident, “all [time] limitations in the act are suspended if the employer fails to file a report of the accident as provided for in G.S. 1961 Supp., 44-557.” 191 Kan. at 155. The Ricker court expressly rejected the state’s argument herein that the time limitation for filing a written claim for compensation is only extended when an employer fails to file a required accident report. Court expounded the public policy that the reason for the extension of time for filing the claim as provided in K.S.A. 44-557(c) is that if the employer gives notice of an accident to the director of workers compensation, the director will then mail material to the employee advising the employee of his or her rights under the Act, including the deadline to file a written claim for compensation. If no accident report is filed by the employer, the employee may never learn of his or her rights under the Act. This notification process might be defeated in some cases if the time limitation for filing a written claim is only extended when an employer fails to file a required accident report.

STATUTE: K.S.A. 44-520, -520a, -557(a), (c)

CRIMINAL

STATE V. ENRIQUEZ
FORD DISTRICT COURT – AFFIRMED
NO. 103,397 – NOVEMBER 4, 2011

FACTS: Enriquez convicted of conspiracy to commit first-degree murder and possession of cocaine. On appeal he claimed trial court erred in instructing jury it could consider evidence of Enriquez’s prior crimes or bad acts in determining whether he possessed cocaine with intent to sell, and erred in not giving limiting instruction as to how jury should consider such evidence. Enriquez also claimed trial court erred in not giving specific unanimity instruction to jury regarding overt acts supporting the conspiracy.

ISSUES: (1) Jury instruction regarding prior crimes and bad acts and no limiting instruction, and (2) unanimity instruction

HELD: Trial court erred in failing to perform K.S.A. 60-455 analysis before admitting prior crimes evidence and in failing to give limiting jury instruction. Error was not harmless in light of other evidence of guilt, and because the prior crimes evidence would have been admissible to prove material disputed facts had it been subjected to K.S.A. 60-455 analysis with a limiting instruction.

Recognizing Kansas appellate courts have not specifically determined the question, in context of a conspiracy case, an alternative means situation rather than multiple acts situation is presented. Substantial evidence that Enriquez or another coconspirator committed each of the overt acts. No error in trial court’s failure to give specific unanimity instruction concerning overt acts of the conspiracy.

STATUTES: K.S.A. 21-3302(a), -3414(3); and K.S.A. 60-261, -455

STATE V. GREBE
SEDGWICK DISTRICT COURT – APPEAL DISMISSED IN PART AND AFFIRMED IN PART
NO. 104,144 – OCTOBER 28, 2011

FACTS: Grebe appeals his sentences imposed in a consolidated sentencing after convictions in four cases where he was charged with driving under the influence, driving while suspended, offender registration violations, and domestic battery. Grebe challenges the fines imposed, arguing the district court failed to consider the alternative payment method for the fines. Grebe challenges the imprisonment imposed, arguing the court erred (1) in failing to consider his motion for departure and (2) in enhancing his sentence based on his criminal history.

ISSUES: (1) Fines, (2) motion for departure, and (3) criminal history

HELD: Court rejected Grebe’s argument that the district court was required to consider the alternative method of paying the required fines by community service. Court cited prior caselaw and held that because Grebe was sentenced to 59 months in jail and because the applicable statute requires any community service imposed to be performed within one year of imposition, the community service option was not available to Grebe and need not be considered by the district court. Court rejected Grebe’s Apprendi argument and also a challenge to the presumptive terms of imprisonment entered in Grebe’s convictions. Court affirmed both the fines and imprisonment imposed, and dismissed the general sentencing challenge.

STATUTES: K.S.A. 8-1567(j); and K.S.A. 21-4721

STATE V. HARRIS
SHAWNEE DISTRICT COURT – REVERSED AND REMANDED
NO. 105,435 – NOVEMBER 10, 2011

FACTS: Harris convicted of domestic battery. On appeal he claimed the state failed to present any evidence that victim was at least 18 years old at the time of the alleged incident, an essential element of crime of domestic battery. State did not confront that argument, and sought remand with direction for judgment and sentencing for misdemeanor battery.
ISSUES: (1) Domestic battery conviction and (2) lesser-included offense

HELD: Domestic battery conviction is reversed because state failed to present evidence of victim’s age.

Unpublished Court of Appeals opinion followed, finding battery is a lesser-included offense of domestic battery. Case is remanded with directions that Harris be convicted and sentenced for battery under K.S.A. 21-3412.

STATEMENTS: K.S.A. 2009 Supp. 21-3412a, -3412a(a), -3412a(b) (2), -3412a(c)(1); and K.S.A. 21-3107(2), -3107(2)(a), -3107(2)(b), -3412, -3412(b)

STATE V. JOHNSON
CLAY DISTRICT COURT – AFFIRMED
NO. 105,598 – NOVEMBER 18, 2011

FACTS: Michael Holcom was struck by Jennifer Johnson and was later beaten in his home by Andrew “A.J.” Haught, allegedly at Johnson’s request. Johnson was charged with misdemeanor battery and aggravated battery by aiding and abetting. A jury convicted Johnson of one count of aggravated battery. Johnson claims the district court erred in instructing the jury. She claims the district court erred by denying her request to instruct the jury on the lesser-included offenses of intentional and reckless aggravated battery. She also claims the district court erred by failing to instruct the jury on the defense of voluntary intoxication. Johnson claims there was insufficient evidence to support her conviction of aggravated battery by aiding and abetting because the aiding and abetting statute sets forth alternative means to commit a crime, and the state failed to provide sufficient evidence to support each alternative means.

ISSUES: (1) Sufficient evidence, (2) lesser-included instructions, (3) voluntary intoxication instruction, and (4) alternative means

HELD: Court stated the evidence showed that Holcom’s left cheekbone was broken in several pieces and his upper jaw was totally disassociated from the rest of his face. Holcom was hospitalized for five days and his injuries required surgery to repair, which involved affixing titanium plates to realign bone fragments and wiring his upper jaw to his lower teeth. Several photographs admitted at trial show Holcom’s bed and wall covered in blood and the extensive swelling, bruising, and laceration of Holcom’s face. Bell, who performed surgery on Holcom, characterized his injuries as “in the top five worst facial injuries I’ve ever seen, including car wrecks and other types of massive trauma,” in his 30 years of medical practice. Given the extent of Holcom’s injuries, no reasonable jury could conclude he did not suffer great bodily harm, and therefore the district court did not err in refusing to instruct the jury on lesser-included charges involving mere bodily harm. Court stated the evidence showed that although Johnson had been drinking, she was able to drive to pick up her friend’s children, drive to her friend’s house, and later drive to Holcom’s house and back. Her friend testified that Johnson did not appear to be drunk, and she was oriented to her surroundings. Although Johnson testified on her own behalf, she did not claim that she was too drunk to be responsible for her actions. Her defense at trial was that she never requested A.J. to beat Holcom and that he took this action on his own. Johnson’s ability to give a detailed and coherent account of her actions on the night in question is inconsistent with a defense of intoxication. Court concluded the evidence presented at trial was insufficient to show that Johnson’s mental faculties were impaired to the extent she was incapable of forming the specific intent necessary to aid and abet an aggravated battery and the district court did not err in failing to instruct the jury on the defense of voluntary intoxication. Court held the aiding and abetting statute does not set forth alternative means of committing the crime. The terms “aids,” “abets,” “advises,” “hires,” “counsels,” and “procures,” do not entail materially different or distinct ways of committing the crime. Court held that although there was evidence in the record which supported a different conclusion, it was the jury’s prerogative to determine witness credibility, the weight of the evidence, and any reasonable inferences that may be drawn from the evidence. Considering the evidence in the light most favorable to the prosecution, Court concluded there was sufficient evidence to support Johnson’s conviction of aggravated battery by aiding and abetting.

STATEMENT: K.S.A. 21-3201, -3205, -3414(a)(1)(A)

STATE V. RICHARDSON
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 104,676 – NOVEMBER 4, 2011

FACTS: Richardson filed motion for jail time credit towards his Wyandotte County conviction for 375 days in custody on his Lyon County conviction which was later reversed by the Kansas Supreme Court. District court denied the motion. Richardson appealed.

ISSUE: Jail time credit

HELD: Chronology of Richardson’s convictions in three counties is outlined. K.S.A. 21-4614 means what it says. Jail time credit can be earned only for time spent in jail solely on account of the offense for which the defendant is being sentenced. A defendant is not entitled to receive jail time credit toward one conviction for time spent in custody on another conviction, even if the other conviction ultimately was reversed on appeal. Underlying premise to Richardson’s equity argument is speculative at best.

STATEMENT: K.S.A. 21-3435, -4614

STATE V. SCHREINER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 104,149 – NOVEMBER 4, 2011

FACTS: Schreiner convicted of rape and aggravated criminal sodomy. On appeal he claimed statutory language criminalizing “penetration” of female genitalia created alternative means of committing rape, and claimed aggravated criminal sodomy conviction must be reversed for lack of evidence to support all alternative means submitted to jury. He also claimed the prosecutor misstated the law regarding voluntary intoxication as a defense, and claimed the trial judge improperly sentenced him because jury did not decide aggravated prison term or Schreiner’s criminal history.

ISSUES: (1) Rape and alternative means, (2) aggravated sodomy and alternative means, (3) prosecutorial misconduct, and (4) sentencing

HELD: No alternative means error in Schreiner’s rape conviction. Criminal statutes defining rape and sexual intercourse describe a single means of committing the offense. Definitional statute for characterizing and listing instrumentailities for penetration does not create alternative means of committing rape. Development of alternative means offenses in Kansas is discussed.

Statutes criminalizing sodomy present alternative means of committing an offense, and no evidence supported one of the alternative means set forth in jury instruction. Invited error rule applied because Schreiner requested that instruction. His alternative means challenge to aggravated sodomy conviction is not addressed because invited error ends inquiry, even if relief would have been afforded for the error had he not caused it.

Prosecutor’s two comments regarding intoxication examined, finding one was proper statement of law. Second comment that intoxication was not an excuse for Schreiner’s behavior was more problematic and could have resulted in misstatement of law to jury, but criteria for reversible error not satisfied.

Both sentencing claims are defeated by controlling Kansas Supreme Court precedent.
STATE V. STEPHENS
CHASE DISTRICT COURT – AFFIRMED
NO. 105,156 – NOVEMBER 18, 2011

FACTS: Stephens entered guilty plea pursuant to plea agreement. At sentencing, three undisclosed Colorado misdemeanors were converted to a felony for purposes of Stephens’ criminal history, which resulted in presumptive prison term instead of probation. District court denied Stephens’ motion for downward departure sentence of probation. Stephens then moved to withdraw his guilty plea, claiming trial counsel was ineffective in failing to discover the extent of Stephens’ criminal history. District court denied Stephens’ motion. Stephens appealed.

ISSUE: Assistance of counsel in sentencing

HELD: Defense counsel was not obligated to ignore Stephens’ statements of past crimes, to conduct an independent search of court records, and then to compile a criminal history that duplicates the presentence investigation report prepared by court staff. Padilla v. Kentucky, 559 U.S. __, 130 S. Ct. 1473 (2010), is distinguished and does not require a criminal defense counsel for citizen of the United States to investigate the defendant’s criminal history in anticipation of the defendant’s guilty plea.

STATUTES: None

STATE V. WEST
SEWARD DISTRICT COURT – AFFIRMED
NO. 103,224 – MOTION TO PUBLISH
OPINION ORIGINALLY FILED JANUARY 7, 2011

FACTS: West was charged, tried, convicted, and sentenced in separate cases that have been consolidated for proceedings here and, at various times, in the trial court. In his first appeal, West successfully challenged several of the convictions but raised other arguments that were considered and found to be without merit. The case was returned for resentencing. West’s current appeal raises only the same arguments that this court found wanting in his first appeal.

ISSUE: Law-of-the-case

HELD: Court held that West argued that the sale convictions should have been treated as severity level 2 offenses, rather than severity level 1 offenses. This is the same issue West asserted unsuccessfully in his first appeal. The rule of law-of-the-case typically bars repetitive arguments on successive appeals in the same action. Because law-of-the-case governs, each of the arguments West advanced was foreclosed.

CONCURRENCE: Judge Atcheson concurred with the majority and expressed his opinion on the way in which West was resentenced, but that West did not expressly raise the issue on appeal, so the court should refrain from doing so on its own.

STATUTES: K.S.A. 21-4704; and K.S.A. 22-3422, -3424
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