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Article

22 Brave Lawyers’ Work: The Pillars of Professionalism
By J. Nick Badgerow
No Courts – No Justice – No Freedom!

The Preamble to the U.S. Constitution states:

“We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.”

Our forefathers placed justice in front of domestic tranquility, common defense, and the blessings of liberty. The founders understood that without justice, their other dreams of liberty and prosperity could not be achieved.

From its inception, the United States has observed the rule of law. That rule supports our basic freedoms and liberties by binding our politicians and governments by the same law which governs our citizens. The rule attempts to apply the law fairly and equally to everyone. That rule of law protects the property rights and contract rights of individuals and businesses. Such protections and expectations are the foundation upon which successful societies, past, present, and future, are built.

At the heart of the rule of law is the societal reliance upon and access to justice. Justice which supports the right to a fair and unbiased trial. Justice which supports each of the freedoms we each enjoy as individuals through our Bill of Rights. Unfortunately, as with our other fundamental benefits of citizenship, we begin to take that justice for granted. We tend to believe that because justice has always been there for us, the justice provided by those judges and justices is a natural right, and not a product of our judicial system. Justice which supports the right to a fair trial. Justice which supports each of the free- doms upon which our society is built.

KBA President Lee M. Smithyman may be reached by email at lsmithyman@ksbar.org, by phone at (913) 661-9800.
Meet My Marley

By Brooks G. Severson, Fleeson, Gooing, Coulson & Kitch LLC, Wichita, bseverson@fleeson.com

One of the major struggles I have had with taking this position is the difficulty of not only writing these articles, but also coming up with something interesting to talk about. It seems the majority of people try to keep them somewhat “KBA” focused, and I have spent considerable time debating whether that is something I should do or whether I should just write about whatever I want. At the end of the day, keeping people interested is the ultimate goal, so I decided to just take things month by month. Sometimes you may get to hear about something “law” related and other times you may not. Regardless of which route I go, I hope I can provide you some entertainment in your day.

Many of you have either read the now-famous book, “Marley and Me,” or seen the movie that came out a few years ago. The star of that novel was a loving Labrador retriever who had quite the history of destructive behavior. Now, my story is a bit more tame, but I also have a Marley of sorts – at least during her years of being a puppy. I should premise this story with the fact that I’ve had animals throughout my entire life. In 2004, I finally got “my” first dog, a Poodle/terrier mix named Joey. He is pretty much the most perfect dog you could ask for. He never seemed to mind when I spent hours upon hours studying for the bar exam, nor did he act out when I started working in the fall of 2005, which left him alone far more than he was used to.

After about a year of working at Fleeson Gooing, I had the brilliant idea to rescue a 7-month-old golden retriever that I named Sadey. After being spoiled by perfect little Joey, I had no idea what I was getting myself into. Being single, working a demanding career, and trying to raise a retriever puppy proved to be a challenge at many different times. Needless to say, Sadey gave me a run for my money and taught me “lessons” along the way. So, consider this my cautionary tale for all of you new lawyers out there who are considering getting a dog now that you are officially out on your own.

One of the things I did not anticipate (probably because I never had to worry about it with Joey) was that Sadey could not be left unattended in the house. I think it only took me one destroyed dog bed and a room full of stuff to realize that crate or leaving her outside were my better options. However, regardless of which route I took, if I failed to come home once during the day or was gone longer than an eight-hour period, she would do something to let me know that my absence was not acceptable. Obviously, this was a challenge at times, being that I often had to travel for work, and I did not have anyone to go over to the house to help me out with her. Regardless, these little “lessons” she taught me serve as some of my most favorite memories.

One of the first times I left Sadey outside for the day, it never occurred to me that I should close off the doggie door that went into my garage. After a long day at work (yep, I exceeded my eight-hour “away from Sadey” time limit), I came home to find that the box I kept in the garage to put my newspapers in was empty. For the life of me, I could not figure out what happened to an entire stack of newspapers. Eventually, I looked out into the backyard and darn it if that dog had not dragged every bit of newspaper into that backyard and spread it from corner to corner – some ripped, some shredded, some gracefully laid out so she could read the latest news story. It took me hours to clean that up; however, I couldn’t help but smile at the joy she must have had dragging those papers through the dog door all day (which for the record, was immediately closed off).

There was also the time Sadey decided to pull out every screen on my previously screened-in porch. She was averaging about one screen a day and was more than halfway through the porch when I finally managed to catch her in action. I was shocked to find her standing on top of her dog house and pulling with all her might on a screen she couldn’t otherwise reach. That was, of course, until I yelled her name and caught her by surprise that she fell off the dog house backyards. After that, the dog house was moved, the remaining screens were removed, and just when I thought I had solved the problem, she started chewing on the wood itself. Sometimes you just can’t win!

Over the next couple of years, she grew up and calmed down, and eventually she was allowed more and more freedom. Now, she can be left inside without supervision, and she has “given me permission” to leave her for more than eight hours at a time. She has also become one of the most obedient, loyal, and intelligent dogs I could ask for. Just drop by the house sometime and she’ll be glad to bring you a cold beverage from the fridge. She also has a golden retriever sister now, compliments of my new husband, and I really think they are so busy playing with each other they forget to teach us any “lessons” for things we do that they do not approve of.

I guess the point of this article is for all of you new lawyers who are now out on your own and want to get a dog, especially if you are single and working a large number of hours, I recommend getting a “Joey” over a “Sadey.”

About the Author

Brooks G. Severson is a member of Fleeson, Gooing, Coulson & Kitch LLC in Wichita, where she practices in civil litigation. She currently serves as president of the KBA YLS. Brooks can be reached at bseverson@fleeson.com.

The Journal of the Kansas Bar Association | October 2012    7
A Few Words of Introduction

By Jordan E. Yochim, Kansas Bar Association, Topeka, executive director, jeyochim@ksbar.org

This is my first article for the KBA Journal and I’m honored to have the opportunity to address you. During my interview with the Board of Governors I was asked to express in one word what I thought of the legal profession. I needed three: important, difficult, noble. I think of the legal profession very much as I do the profession in which I have been trained and have practiced – management. I suppose they liked my answer; I began my tenure as executive director of the KBA in mid-May.

The Board’s question to me was particularly striking and personal. I was interested in this position with the KBA for a number of reasons – it serves a worthy cause that benefits my home state; it offers new challenges that extend my current strengths and provides room for professional growth; and it is surrounded by dedicated, capable, and amicable colleagues. But on a very personal level, I wanted this job because I am fascinated by the power of the word – spoken and written. Words matter. I love Shakespeare on the page and in performance. I love well-articulated ideas and well-crafted works across many genres. In my faith we believe that the universe was created with words, or rather what we humans conceive of as words. But most of all, I am fascinated by the fact that the written word holds such enormous authority in our world. The U.S. Constitution, its amendments, and the laws, statutes, regulations, and similar documents at every level of our government dictate the structure and function of our society. Collectively we agree to abide by those words. Moreover, we recognize, judge, remedy and punish any conduct that violates the meaning of those words. The membership and staff of the KBA work in service of those words. It is an important, difficult, and noble effort.

Unfortunately, the importance, difficulty, and nobility of that effort are becoming increasingly misunderstood. Lawyers have been disparagingly perceived since at least Shakespeare’s time some 400 years ago and probably well before that. But the popular perception of the rule of law, and of the need for people well trained in exercising and checking that rule, has generally remained favorable, until recently. The rule of law itself has now become a trite thing worthy of scorn or, even worse, dismissal. Now the public seems to believe that the rule of law, with its checks and balances, may be taken for granted and therefore no longer in need of protection or administration. The dedication and expertise of lawyers and judges from the Supreme Court to the local magistrate judge to you, an attorney in Kansas, have never been more poorly understood or respected. The administration of justice has never been more poorly funded. A simple Google search will provide both anecdotal and data-based evidence for all of this.

What must change? Without a voice, words are useless. With a voice of esteem and authority, words are powerful. I attended my first national conference as a bar executive in August – the National Association of Bar Executives (NABE) meetings in Chicago. One plenary speaker asked members of the audience to raise their hands if they cite “advocacy” as a benefit of joining their bar associations. I raised my hand and was quickly admonished, along with many others, for mistaking advocacy as a benefit because “those who aren’t members are smart enough to know you’ll advocate for them anyway.” At first I felt a bit naïve, but I’ve come to realize the speaker was wrong. Yes, the KBA is among the most trusted and respected voices speaking on behalf of the legal profession in legislative matters at the state and national level. And yes, the KBA advocates on behalf of the entire profession so even non-members benefit from our efforts. Even more than that, when members of the KBA, local, and specialty bar associations speak about the administration of justice and the practice of law with true expertise and compassion, together we enhance the public’s perception of the profession. And yes, that benefits all attorneys, too. But the KBA not only advocates for you, we also make you a better advocate for yourself. By being a member, your voice gains esteem and authority, your words gain power, your efforts gain appreciation for their importance, difficulty, and nobility.

Over the coming years the KBA, in collaboration with partner institutions throughout the state and nation, will be launching a number of initiatives to enhance the public’s perception of the profession, to advance the practice of law and administration of justice in Kansas, and to help (Cont’d. on next page)
Why I Should be a KBA Member...

By Meg Wickham, Kansas Bar Association, Topeka, member services director, mwickham@ksbar.org

The Top 10 Reasons you should become a KBA member or renew your KBA membership:

10. **Free public information pamphlets.** The KBA maintains and continuously updates important public information pamphlets covering a wide variety of legal topics — everything from *Living Trusts and Wills to Divorce and Child Custody.* As a member, you can get these free helpful resources for your office to give to clients and potential clients.

9. **Fee dispute mediation.** The members of the Fee Dispute Resolution Panel have been trained to help resolve fee disputes using various procedures. The panel is available to you and your clients whenever there's a dispute over fees. Cases are assigned by the chair of the panel.

8. **Premium deals on multiple member affiliate programs.** The KBA is always searching for partnerships with affiliate programs to enhance your practice. We offer programs that include incentives or discounts from Office Depot, CoreVault, GEICO, ALPS Professional Liability Insurance, Go Next travel excursions, ABA Retirement Funds, Principal Financial investments, and Insurance Specialist Inc. We also offer an exclusive KBA Visa card with rewards. If something your practice needs isn't on the list, let us know at info@ksbar.org.

7. **Subscription to the KBA Journal and the weekly eJournal.** The KBA Journal, the premier legal journal in Kansas, is issued ten times each year, and includes timely feature articles on all aspects of the law and law practice, information regarding upcoming CLEs, Kansas Bar Foundation articles, classified ads, and much more. The eJournal is a weekly emailed newsletter, featuring notices of digested court opinions, upcoming CLEs, legislative updates, and, like the Journal, has much more to help you be “in the know.”

6. **Statewide Lawyer Referral Service (LRS) membership.** LRS helps you get clients and helps the public find a reputable attorney. The American Bar Association-endorsed KBA LRS is a way for you to receive pre-screened potential clients from a dedicated, in-state call center.

5. **KBA Bookstore.** The KBA Bookstore provides you comprehensive, practice-area-focused handbooks, written by Kansas attorneys with a demonstrated expertise in the field. As a member, you get discounts on all publications.

4. **A legislative voice.** The KBA offers legislative and lobbying services driven by the concerns of our membership. You can track activities in the state House and Senate with your subscription to *Oyez Oyez,* the weekly KBA legislative newsletter.

3. **Discounts on fantastic CLE programming.** From estate law to tax law and all the other kinds of things that aren’t so certain, the KBA meets all of your CLE needs. In addition to traditional CLE presentations that feature experts in the field, including national speakers, the KBA also offers phone and webinars for your convenience.

2. **Casemaker.** This Google-like online legal research tool is provided with your membership dues. It is so powerful it can take the place of other high-priced online research tools. Casemaker alone can provide a solo/small firm attorney with the research expertise of most large firms.

1. **Section membership.** The most valuable aspect of becoming a member of the KBA is the membership of the KBA. You can join any of a wide variety of practice areas and gain immediate access to our section listserves where attorneys with similar practices share information. You’ll also receive a public, interactive and searchable listing of your practice on our website, content-rich section newsletters, section-specific CLEs with an additional discount if you are a section member, and much more. Section membership also gives you the chance to share your expertise as a mentor, or if you’re new to the profession, access the knowledge of Kansas legal experts who practice in the area you want to join.

Membership with the KBA, your partner in the profession, gives you many ways to enhance your practice. Don’t forget to get even more out of your membership by joining us on multiple social media platforms like Facebook, Twitter, and LinkedIn.

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A Few Words of Introduction

our members excel. If you are a member of the KBA, I look forward to meeting you on this adventure. If you are not a member of the KBA, or any bar association, I hope you’ll join now. It will be more than worth your while. You have my word.

About the Author

Jordan E. Yochim is a lifetime resident of Kansas. He studied anthropology (BA) and business (MBA) at the University of Kansas and has worked as a dishwasher, janitor, undergraduate student research assistant in archaeology, graduate student research assistant in neurophysiology and later in management science, consultant for the Small Business Development Counsel in Douglas County, process analyst for a regional bank holding company, quality control supervisor for an international consumer products firm, and research administrator for a large, state university before joining the KBA. He loves Shakespeare (but don't ask him to recite anything). He also loves music—everything from Armstrong to zydeco—and plays the guitar (but don’t ask him to sing anything). In his spare time he serves as a member of the Douglas County Citizen Review Board and as treasurer for a local nonprofit children's organization.

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The Checklist Manifesto

By Larry N. Zimmerman, Valentine, Zimmerman & Zimmerman P.A., Topeka, kslpm@larryzimmerman.com

“T he Checklist Manifesto” by Atul Gawande is not for lawyers who have never made a mistake. You error-free lawyers may stop reading and be comfortable knowing that KRPC 4.1 only prohibits your lying to third parties; you may lie to yourself and apparently remain ethical.

The rest of us know and own our mistakes but quietly worry what still-hidden errors lurk despite our best efforts to uncover them. We feel like Sisyphus as we push harder to remain competent and diligent in the face of growing complexity in the law. Even our “easy” cases can involve competing layers of federal acts and state statues enforced by half a dozen government agencies. Gawande, a surgeon, looks at our profession and notes, “Know-how and sophistication have increased remarkably across almost all our realms of endeavor, and as a result so has our struggle to deliver on them. You see it in the 36 percent increase between 2004 and 2007 in lawsuits against attorneys for legal mistakes – the most common being simple administrative errors, like missed calendar dates and clerical screwups, as well as errors in applying the law.”

Gawande adds, “Such failures carry an emotional valence that seems to cloud how we think about them. Failures of ignorance we can forgive. But if knowledge exists and is not applied correctly, it is difficult not to be infuriated. It is not for nothing that the philosophers gave these failures so unmerci-

ful a name – ineptitude.” Incorrectly applying knowledge impugns lawyers’ ethics and morality threatening new episodes of the disciplinarian’s CSI: Hindsight. We readily agree with Gawande when he says, “For those who … practice the law … the judgment feels like it ignores how extremely difficult the job is. Every day there is more and more to manage and get right and learn. And defeat under conditions of complexity occurs far more often despite great effort rather than from lack of it.”

What does Dr. Gawande prescribe?

“It is a checklist.”

Gawande relates experiences from manned flight and building construction as a biographical background for the humble checklist. A checklist for every flight protects travelers and crews on more than 95,000 commercial flights per day including US Airways Flight 1549 when it landed in the Hudson River in 2009. Construction checklists on every building enable a “building failure” rate of less than 0.00002 percent per year. Anecdotal and empirical evidence suggests checklists are the infrastructure necessary to both enable more complex designs and to allow the professionals to cope with the new complexity. Despite their success, doctors and lawyers are tough customers believing “… our jobs are too complicated to reduce to a checklist.”

Dr. Gawande looked to the checklist’s track record in his time as director of the World Health Organization’s global effort to reduce surgical deaths. His team examined data on common but simple errors threatening patients and collated that evidence enabling his team to create, test, and refine a concise surgical checklist focused on easy-to-verify; important steps and, as importantly, implement processes for unifying surgical teams requiring open communication at key points during procedures. The resulting 19-item checklist reduced the overall death rate among surgery patients from 1.5 percent to 0.8 percent in the first year. Those are “wow” results.

“Man is fallible, but maybe men are less so.”

“The Checklist Manifesto” is not a how-to book; there is not a section that tells lawyers how to recreate the WHO’s surgical checklist for our profession. The book does prompt introspection about our profession, however. A disturbing trend is taking shape as courts, burdened by increasing volume and complexity, abrogate their duties outright, stating they cannot flyspeck what passes beneath their pens. If our courts, which see only a tiny fraction of what clients bring to lawyers, cannot meet their burdens, is it reasonable or logical to suggest attorneys must do so without error? We are gravelly injuring our profession and diminishing overall professionalism when we treat error as a moral or ethical failing absent intent to do harm (or inferring intent from circumstances viewed through hindsight). I once was part of a team of legal professionals who mirrored the WHO’s experiment testing whether we could reduce error by coordinating to locate and stop conditions that led to errors. It was exhilarating and wildly successful – the same feelings are conveyed by Dr. Gawande in “The Checklist Manifesto.”

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.
Substance & Style

Strengthen Your Paragraphs with Tailored Topic Sentences

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

It’s axiomatic: everyone knows that one of the hallmarks of good writing is good organization. In order to readily follow one’s analysis, legal readers need strong organizational cues that go beyond ordinary section headers. That’s where paragraph topic sentences come to the rescue. They reveal structure, show the logical connections between concepts, and form an outline of major arguments or terms.

But what exactly makes a good topic sentence? As with most things in law (and law school), the answer is: it depends. In expository legal writing, most paragraphs serve one of a few basic functions: (1) to tell a story about facts, whether they are procedural facts about a case’s journey through the court system or the underlying story about what happened before the case began; (2) to explain and argue the law; and (3) to apply the law to the facts.1

Paragraphs that tell stories with facts. Procedural histories and statements of fact often contain a mixture of chronological and topical organization. In a strict chronology, the writer should find logical shifts in the timeline to break into new paragraphs, and often begin the topic sentence with a transitional phrase marking the timeline:

- Engaging, informative example: Two months later, on January 14, 2012, Acme called to say it had blue widgets, but not the red widgets described in the agreement.
- A variation: Trouble surfaced two months later. On January 14, ...
- Less effective: On January 14, 2012, Acme called ...

The first example aids the reader more than the last because it quantifies the passage of time rather than merely iterating a bare date. Arguably, the second example is the most effective for readers because rather than merely measuring the passage of time, it foreshadows the erupting crisis point in the client’s story.

For topical paragraphs that do not also require chronological markers, the writer can rely primarily on the types of descriptive summaries or topical shifts shown in the second example above:

- Despite repeated invitations, the Bureau never responded to the Tribal Council’s request to discuss the lease proposal in person. The Council followed up by ...
- Test results were conclusive: nearby wells now contained twenty times the acceptable limit of benzene. In one well, ...

Paragraphs that prove, explain, argue, and illustrate legal rules. Here, the general rule of thumb is to start with, well, a rule. That task may sound simple enough, but in many paragraphs, the lawyer does not merely recite a rule from authority; he or she synthesizes, extracts, or frames a rule in a form more usable to the reader. For example:

- Broad, introductory rule: Arkansas common law disfavors covenants not to compete. The courts will only enforce such a provision when ...
- Narrower rule synthesized from multiple sources: A very different line of cases from the Ninth Circuit suggests that the plaintiff must also prove coercion. For example, in State v. Jones, ...
- Case illustration preceded by the main, extracted principle from that authority: Even when the defendant’s clothing only partially covers a weapon, it is concealed. The Court of Appeals recently addressed those very facts in State v. Smith, where ...
- Ineffective example: In State v. Smith, the defendant carried a knife in his pocket, but the handle protruded ...

Notice that the ineffective, merely descriptive example serves as a perfectly good segue from the preceding topic sentence, which frames and introduces it. Unfortunately, lawyers often leave their readers to divine how a particular case illustration adds meaning to the rules.

Paragraphs that apply law to facts. Unless the lawyer is analyzing a truly pure question of law, the remaining paragraphs in an analytical unit will shift their purpose to application. Here, each paragraph should begin with a sentence that states the lawyer’s thesis for how some part of the rule applies to a decisive fact. Whether in a section header or in a paragraph, a thesis statement generally contains the most operative language from the rule and the most pivotal fact driving the outcome:

- Main thesis for concealment element. Miller’s knife was concealed: When his pocket covered even only the blade, a reasonable, casual observer would not have been on notice of the weapon’s proximity. Just as in the Smith case, where ...
- Thesis for paragraph introducing the counter-analysis: It does not matter that Ms. Patel knew Miller owned a knife; it was her inability to perceive the weapon’s immediate presence that accentuated the very real danger. The holding in Jones, where ..., does not create an exception here because ...

In the preceding examples, notice the use of very concrete facts, including names, objects, and events unique to the client’s

Footnotes
1. We generally know the first category as the procedural history and statement of the facts. In today’s parlance, the latter two are often called rule explanation (or proof) and rule application.
A Nostalgic Touch of Humor

Air Travel Nightmare #45

By Matthew Keenan, Shook, Hardy & Bacon LLP, Kansas City, Mo., mkeenan@shb.com

Many of us remember a time, long ago, when airline travel was fun, efficient, and affordable. In the late 60s, for instance, flying was considered even elegant. That era inspired network series like “Pan Am,” which ran on ABC last year. It featured model-worthy pilots and flight attendants with story lines borrowed from the Playboy Club. Like most things involving airlines, of course, they canceled it after one year.

But in the golden era of air travel, airlines made money, passengers weren’t treated like livestock and attendants did other things, like serve you meals. Life was good, employees were nice, and planes arrived and departed on time.

Today air travel is as much fun as a watching reruns of Turner Gill press conferences. Customer surveys show that causes of frustrations run the gamut from oversold flights, sky-high fares, fees for luggage that gets lost, airplanes shrink to the size of hybrids, and never-on-time schedules. One of my favorite beefs is that customer help lines can’t help you because there is no one there to help. I found a story of one guy who called Qantas Airline and waited on hold while he kept hearing this message: “A representative will be with you shortly.” Fifteen hours and 40 minutes later someone finally picked up. As Time magazine noted three years ago, “The airlines don’t want to talk to their customers.” As angry as we are, can you blame them?

There is a growing list of websites for passengers to vent—AirlineComplaints.org, and Crankyflier.com are just two. Airlines have inspired new acronyms: Delta—Doesn’t Ever Leave the Airport. None of this is news, of course. Still, from time to time it happens to you and that bad feeling returns. Like what happened to me in August—the dreaded connecting flight that you might just miss.

Kansas City is the queen of flight connections. (Along with other five-star cities like Cedar Rapids, Tulsa, Waco, and Wichita.) Airlines service these cities with puddle jumpers and pilots who still wear braces and have acne.

So there I was—Tuesday, August 14—flying home from Boston, connecting in Detroit. I had 40 minutes between flights. We landed in Detroit on time but waited outside the gate for ten minutes for reasons never explained. By the time I got off the jet, my connection time was down to 20 minutes and flight monitors told me two things: Gate A75. Boarding. At that moment I was at gate C35. The distance between these two gates remains elusive to precise calculation except I’m confident it’s at least a mile, maybe two.

Lugging a large litigation briefcase and a hanging bag jammed with underwear, socks, and fluids in three-ounce bottles secured in a zip-closed bag, I started running, sweating, panicking. After passing 10 gates, my undershirt began to stick to my underarms. Pores opened throughout my body. “I can still make it,” I thought. I ran through the C terminal, took the moving walkway underneath C and A, dodging the old, the young, the slow, the obese—like a movie no one would ever pay to see.

The escalator took me up to terminal “A” and the map confirmed my suspicions—my gate was at the farthest end of A. I skipped the shuttle—figuring, wrongly—that waiting for anything was a bad idea, turned to the east and picked up my pace. At roughly gate 55, my eyes looked to the ceiling and I saw something. Traveling along with me, at a faster pace but still roughly with me, was a bird. A sparrow. It was likely heading to the food court to grab another crouton, lettuce, or maybe a taco, and then returning to his nest, presumably someplace far away—like gate A75.

My mind departed from the franticness, panic, and desperation, and like a slow motion scene from the “Matrix,” I found calm. That bird hit the lottery—occupying a home in a terminal. For a moment, I forgot about the connection. To be that bird … never have stress in an airport. Never think once about the TSA. Never be told to remove your belt, shoes, and jacket. Fly around inside all day, all night. How cool. Later I learned that Detroit’s airport doubles as a bird sanctuary—with a large water fountain, artificial plants, and a terminal building with a tall ceiling and loads of natural light. And they can’t get rid of them.

When my focus returned, I had four gates to go, arriving at my destination with five minutes to spare. There were seven people standing around, and they were not happy. The last time I saw people this upset they were wearing Ohio State T-shirts in the Superdome. “It’s gone,” one of them told me. “They left us.” Gasping for air I said—“What? But its only 8:25!” That feeling of seeing the plane holding your full-fare seat, now empty, just 50 feet from the gate but, as far as you were concerned, could be on Mars. Throw in for good measure a gate agent who never read, “How to Win Friends and Influence People,” and you have a five-star bad day.

The lady from the gate looked up, “the rebooking site is just down the terminal.” A place with 50 phones but no employees. Just pick up a phone and call the number. A representative will be with you shortly.
Metadata: What You Can’t See May Hurt You
By David S. Rubenstein, Washburn University School of Law, Topeka, david.rubenstein@washburn.edu

Professional standards are trying to keep pace with technological advancements. One evolutionary strand of this movement involves the transmission and retrieval of “metadata.” Loosely defined, metadata is information embedded in electronic documents. It is generally hidden from plain view except to those looking for it. Metadata takes a variety of forms, including the date the document was created, who worked on the document and when, prior revisions made to the document, and any comments made in the document by its reviewers. Most of the time, nobody cares much about metadata (which is why it’s hidden from plain view, and is why you might not have cared to pay much attention to it before). But, if you transmit electronic documents to opposing counsel or to third parties outside of the attorney-client relationship, keep reading. Electronic documents created in Word, Excel, and similar programs may contain metadata that reveal client communications, litigation and negotiation strategy, attorney work product, or other privileged information.

The inadvertent transmission of otherwise privileged metadata can occur in any number of familiar contexts. For example, a lawyer might draft a document (e.g., motion, contract, settlement agreement) and circulate the draft electronically to a client or other lawyers in the firm for comments and suggested revisions. Unless proper precautions are taken, those comments and edits – even if rejected or hidden by the originating lawyer – become embedded in the document and can be discovered by opposing counsel when the document is forwarded on.

The transmission of non-evidentiary electronic documents raises at least three questions of professional responsibility: First, to what extent is the sending lawyer obligated to prevent the inadvertent disclosure of privileged metadata; second, to what extent may a lawyer who receives an electronic document search (or “mine”) it for metadata; and, third, what are the obligations of the receiving lawyer who finds otherwise privileged metadata? The Kansas Bar Association has not (yet) taken a formal position on any of these questions specifically. However, the American Bar Association (ABA) and at least 13 other state bar associations have done so, with a division of opinion among them.

What is the Sending Attorney’s Duty of Care?

The ABA does not impose any specific duty upon the sending attorney with respect to metadata; instead, the general duty to act competently in protecting client confidences seems to apply. Many of the state bar opinions, however, stress that reasonable care is required with respect to metadata, and caution that technological ignorance of metadata – including its existence and how to remove it – will not excuse a lawyer’s inadvertent disclosure of privileged information. Still, what is reasonable to expect of the sending lawyer will usually depend on the circumstances, including, for example, the sensitivity of the information, the potential consequences of any disclosure, steps taken to prevent the disclosure, and any special instructions given by the client.

May the Receiving Attorney Review or “Mine” Metadata?

While generally it is agreed that sending lawyers bear some measure of responsibility to prevent the disclosure of privileged metadata, sharp disagreement persists over whether lawyers who receive non-evidentiary electronic documents may mine them for metadata. On one hand, some state bars view the act of mining as a prejudicial intrusion into the attorney-client relationship and as an affront to the policies underlying the rules of confidentiality. On the other hand, however, the ABA and other state bars see nothing ethically objectionable about mining for metadata. This latter view stresses that metadata may contain useful non-privileged information, and that lawyers should not be prohibited from seeking out that information in diligently representing their clients’ interests.

Must the Recipient Notify the Sending Attorney if Metadata is Found?

Some metadata may be found simply by passing a cursor over or by right-clicking on a part of a document containing it. Other metadata may be found only through more sophisticated means. Irrespective of the manner in which privileged metadata comes into possession of the receiving lawyer, the question arises: what is the receiving lawyer’s obligation with respect to this information?

Again, the bar associations that have addressed this issue are split. Under the majority view espoused by the ABA and other state bars, the receiving lawyer must notify the sending lawyer about the receipt of potentially privileged information. This is no different than what is generally required in other contexts in which lawyers receive inadvertent disclosures under ABA Model Rule 4.4(b) (e.g., upon receiving a missdirected fax or email). Beyond simply notifying the sending lawyer, the ABA

(Con’t. on Page 17)
“Move out of your comfort zone. You can only grow if you are willing to feel awkward and uncomfortable when you try something new.” —Brian Tracy

My friends know that I tend to socialize only between the hours of 8 to 5. This strategy has been generally successful (even in terms of career development) because I work in an office of impressive attorneys, I lunch with many of my friends/women attorneys who work nearby, and I keep in contact with law school classmates through social networking. So, why become further involved in the Kansas legal community?

A.B. Cruz III answered that question for me at the Asian American Bar Association of Kansas City’s Seventh Annual Dinner, which was held on August 24, 2012. He spoke about not only looking forward in your career, but also looking backward to newer attorneys. Because when one has achieved his or her career goals, it becomes time to step aside to make way for newer attorneys to take over.

Mr. Cruz’s words resonated with me. Before we realize it, we newer attorneys will become the decision makers of our profession. But what will be the state of our legal profession when we take over?

The next day I attended the Fourth Annual Legal Diversity Picnic held in Lawrence and co-sponsored by the law schools in the region: KU, Washburn, UMKC, and Mizzou. Also attending this event was fellow KBA Diversity Committee member Katherine McBride. The purpose of this social event was to provide opportunities to build relationships between peers from firms and law schools across the region to ensure a bright and diverse future for the practice of law.

At the picnic, it was encouraging to see many diverse law students looking forward in their careers by networking with attorneys and having the foresight to work in a variety of legal employment settings before graduation, while also looking backward to newer law students and prospective law students. Third-year law students were coaching 2Ls and 1Ls on how to be successful in law school, 1Ls were informing students taking the LSAT on what to expect, and diverse law students were sharing with each other their individual experiences at their respective law schools. Witnessing the collaboration between diverse law students and attorneys demonstrated that through fostering relationships, our profession has the potential to achieve an inclusive and diverse legal community.

This year, the KBA Diversity Committee is planning to foster such relationships by looking forward and backward within our legal community with our programs. One of our goals is to host a speed networking event between newer diverse attorneys and more experienced attorneys and judges. The purpose of this event is to provide opportunities for newer diverse attorneys to build valuable business relationships with leaders in our legal community. If you are interested in participating or sponsoring this event, please contact me at Eunice.Peters@rs.ks.gov. Our other main goal is for our committee to be more connected with the diverse law student associations in Kansas. Katherine McBride will be serving as the contact person for KU Law, and I will be serving as the contact person for Washburn Law.

Attending these events reminded me why it is important to be an active member of the legal community, even if it takes time outside my regular routine. By getting involved in the Kansas bar, I have the opportunity to shape the future of our legal profession and its value system. I challenge you all to think about doing the same.

About the Author

Eunice C. Peters is an assistant revisor for the Kansas Office of Revisor of Statutes. She is chair of the KBA Diversity Committee and a member of the Kansas Supreme Court-Kansas Bar Association Joint Commission on Professionalism. She received her juris doctorate from Washburn University School of Law in 2006, and her bachelor’s degree from the University of Illinois in 1997.
Upon reading the title for this essay, you might ask yourself: doesn’t the military have its own lawyers? And the answer is yes, but military lawyers – Judge Advocates – are sometimes limited in their assistance to service members. A military attorney advocates for the federal government, not the individual service member. The military has offered free legal assistance since 1943 and currently offers legal assistance to active duty members, their family members, and retirees. Legal assistance began to ensure that members were ready to deploy and has since expanded into providing advice on issues that may have an adverse effect on the member’s ability to perform his or her duties if the issue is not resolved. This article will describe the legal benefits available to military members and the gaps where civilian lawyers can lend their assistance.

Limited Civil Representation. Military attorneys may assist eligible beneficiaries in civil legal matters but not regarding criminal issues, personal commercial enterprises, or matters adverse to the federal government. They are not allowed to represent a person in civilian court or give second opinions if the military member is already represented by a civilian attorney. Typically, military attorneys may draft and execute wills, powers of attorney, and advance medical directives. They also advise on a wide variety of issues, including marriage, divorce, child custody, adoption, immigration and naturalization law, consumer affairs, landlord-tenant, and the Servicemembers Civil Relief Act (formerly called the Soldiers’ and Sailors’ Civil Relief Act).

Judge Advocates may also contact third parties in order to assist the servicemember, but they must avoid creating the impression that they represent the military in resolving the client’s concerns and, by regulation, are not allowed to transition from the role of an advocate to legal representative. Military defense lawyers only defend members in Uniform Code of Military Justice (UCMJ) actions and are not allowed to represent military members in civilian court.

While Judge Advocates can give general legal advice and assistance, they cannot represent the military member in civilian court. Many are also licensed in a different state and thus less familiar with local law. This is where civilian attorneys are vital in filling gaps in military legal assistance. When a military client’s situation requires specialized expertise beyond the scope of a military legal assistance program, a military attorney is authorized to refer the client to a bar referral service operated by the American Bar Association (ABA) or a state or local bar association.

ABA Military Pro Bono Project Opportunities. Civilian attorneys may register with the ABA’s Military Pro Bono Project to be contacted with opportunities to provide pro bono assistance to military families in their geographic and substantive area of expertise. They can also enroll in the ABA’s “Operation Stand-By.” When a civilian attorney joins “Operation Stand-By,” he or she agrees to allow military attorneys to contact him or her with legal questions specific to the location and substantive area of expertise. The ABA’s Family Law Military Committee website also provides many resources for civilian attorneys.

KBA and Kansas Legal Services Pro Bono Opportunities. Kansas Legal Services assists veterans through multiple outreach programs with the aid of volunteer attorneys. Those services are critical to veterans who are unable to travel to a military installation or who do not qualify for legal assistance through the military. Kansas attorneys may also volunteer with the Kansas Bar Association’s “Project Call Up,” which matches Guard and Reserve members and their families with volunteer lawyers who will draft basic wills and durable powers of attorney at no charge. This program is extremely important since Guard and Reserve members not on active duty orders are ineligible to receive legal assistance from a military legal office.

Finally, the Staff Judge Advocate serves as the attorney in charge of a military installation’s legal office, and may accept the services of a licensed attorney or paralegal to provide legal assistance to military members. Civilian attorneys can also volunteer to represent or assist military members on a pro bono or reduced fee basis.

Counseling the Military Client. Civilian attorneys should always remember to ask their clients about present and former military service. An attorney who believes his client may be.

Footnotes
3. Dept. of the Air Force, supra note 1, at ¶ 1.4.
4. Id. at ¶ 1.7.
10. Dept. of the Air Force, supra note 1, at ¶ 1.8.
eligible for free legal assistance from the military can direct the client to legal offices at McConnell Air Force Base, Fort Leavenworth, or Fort Riley.\(^{11}\)

In addition to legal services, there are many benefits available to current and former service members, including health care and education. When representing a service member, it is important to ask which state he or she claims for residency. Many local military members are not Kansas residents and therefore certain issues, such as taxes or domestic relations, may be governed by another jurisdiction’s laws.

The military provides excellent legal assistance to ensure that the military member is combat ready, but when the issue becomes more complex or requires representation in civilian court, it is civilian attorneys who fill the gap by providing pro bono or reduced fee services to military members and their families. ■


**Metadata: What You Can’t See May Hurt You**

*(Con’t. from Page 14)*

and those that join its position impose no additional requirements or restrictions on the receiving lawyer. However, other state bars do. For example, some require the receiving attorney to abide by the instructions of the sending attorney or to seek a determination from a tribunal about how to proceed.

**Conclusion**

The transmission of electronic documents is now commonplace in a variety of contexts, including negotiations, litigation, and due diligence review. Because such documents may contain hidden metadata containing privileged information, lawyers must be sensitive to their professional responsibilities with respect to such information. Although Kansas has yet to provide specific guidance on the issues raised herein, this article is intended to alert you to some potential issues of professional responsibility relating to the treatment of non-evidentiary metadata. ■

**Strengthen Your Paragraphs**

*(Con’t. from Page 12)*

case.\(^2\) Notice also that the rule component uses the operative language from the narrower, “casual observer” legal standard, not just the word “concealment,” which merely describes a required element but does not supply the necessary test.

Finally, once you have a workable draft in place, consider copying and pasting the topic sentence from each of your paragraphs into a blank document. Read them in sequence to see whether they form a clear outline of your points. ■

2. Notice also that the first example actually uses two sentences to introduce the paragraph. While brevity is always at a premium in legal writing, the myth of a one-sentence requirement for point headers and topic sentences promotes too many run-on sentences.

**About the Author**

**Capt. Jessica Switzer** is a third-year student attending Washburn University School of Law on active duty through the United States Air Force’s Funded Legal Education Program. Capt. Switzer graduated in 2005 from the United States Air Force Academy. Prior to entering law school, she was a developmental engineer and served overseas in support of Operations Iraqi Freedom and Enduring Freedom in 2008.

**About the Author**

**David S. Rubenstein** is an associate professor of law at Washburn University School of Law. He teaches in the areas of professional responsibility, administrative law, constitutional law, and immigration. Prior to teaching, Rubenstein clerked for the Hon. Sonia Sotomayor on the Second Circuit Court of Appeals and for the Hon. Barbara S. Jones in the U.S. District Court for the Southern District of New York. He was also formerly an assistant U.S. attorney in the Southern District of New York, and an associate at the law firm of King & Spalding.

**About the Author**

**Tonya Kowalski** is a professor at Washburn University School of Law, where she teaches Legal Analysis, Research & Writing. Kowalski also teaches Indigenous legal studies courses and is a contributing faculty 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 clerked and practiced in the Pacific Northwest. She has been teaching at Washburn since 2006.
Members in the News

CHANGING POSITIONS

Marc Bennett has been elected the new district attorney for the 18th Judicial District.

John F. Bosch has been appointed by Gov. Sam Brownback as a district court judge for the 21st Judicial District.

John R. Bullard has become the city administrator for the city of Cherryvale.

Derek S. Casey has joined Triplett Wolf & Garretson LLC, Wichita.

Christina M. Dunn Gyllenborg has been appointed by Gov. Sam Brownback as a district court judge for the 10th Judicial District.

Stacy N. Harper has joined Lathrop & Gage LLP, Overland Park, as of counsel.

Christine D. Herron has joined Hess Corp., Houston.

Elizabeth M. Myers has joined Ronald W. Nelson P.A., Lenexa, as an associate.

Kelly M. Nash has joined Littler Mendelson P.C., Kansas City, Mo., as an associate.

Ty A. Patton has joined Gay, Riordan, Fincher, Munson & Sinclair P.A., Topeka.

Steven C. Staker has joined Immel Works & Heim, Fredonia.

CHANGING LOCATIONS

Joseph D. Gasper has opened his own practice, Gasper Law Office, 419 Main, Stockton, KS 67669.

Mary Anne McDonald has started her own practice, McDonald Law LLC, 900 N. Poplar, Ste. 300, Newton, KS 67114.

Obituaries

Keith D. Hoffman

Keith D. Hoffman, 62, of Abilene, died August 11 at his home. He was born August 8, 1950, in Abilene, the son of Wilson and Deana (Townsend) Hoffman. He graduated from Chapman High School and later with a law degree from Washburn University School of Law.

Hoffman served as Dickinson Count attorney for 15 years and spent 14 years in private practice. He was named to the Chapman Sports Hall of Fame and later coached the Soloman High School Gorillas women’s basketball team. Hoffman was a member of the Kansas Bar Association and the American Legion. He served in the U.S. Marines during the Vietnam War.

He is survived by his wife, Ruth, of the home; one stepdaughter, Sherie Bronson, of Abilene; two stepsons, Jeff, of Austin, Texas, and Jon Gose, of Abilene; one brother, John Hoffman, of Abilene; one sister, Darlene Schlesener, of Herington; 10 step-grandchildren; and five step-great-grandchildren. He was preceded in death by his parents and one brother, Donald Hoffman.

Lawrence Phillip Ireland

Lawrence Phillip Ireland, 68, of Topeka, died July 24 at his home. He was born September 19, 1943, in Holton, the son of Russell and Pauline Desbien Ireland. He attended Holton High School and graduated from Kansas State University. He later graduated from Washburn University School of Law.

Ireland was a veteran of the Army National Guard, where he served in the Vietnam War and received the Combat Infantry Badge. After returning from the service, he finished school and started practicing law. Ireland practiced law for more than 30 years in Topeka, retiring in 2006.

He is survived by his wife, Linda Lee Woodall, of the home; two sons, Doug Ireland and Brent Ireland, both of Topeka; one grandson, Blake; two granddaughters, Grace and Claire; two brothers, Mike Ireland and Dennis Ireland, both of Holton; one sister, Mary Dexter, of Holton; and a half-sister, Britta Kelly, of Holton.

Eldon L. Meigs

Eldon L. Meigs, 92, of Pratt, died July 21 at his home. He was born July 18, 1920, in Alfalfa County, Okla., the son of Clarence W. and Grace Linden Meigs. The family moved to Woodward County, Okla., where he attended Northwestern High School. He later attended the University of Oklahoma, where he earned a Bachelor of Arts degree and a law degree.

Meigs served in the U.S. Army Air Corps during World War II and obtained the rank of first lieutenant. He was a lifetime member of the Kansas Bar Association, an active member of the Pratt Optimus Club, served on the board of the American Red Cross, and was a member of the Pratt Kilwinning Masonic Lodge.

He is survived by his daughters, Gloria Konold, of Richmond, Texas, and Sherri Lee Taylor, of Manhattan; one son, C.L. Meigs, of Pratt; one brother, Elvin Meigs, of Seiling, Okla.; four grandchildren; six great-grandchildren; and several nieces and nephews.

Meigs was preceded in death by his wife, Edna; daughter, Janean; and two sisters, Evelyn Robertson and Edna Gammon.

Timothy A. Short

Timothy A. Short, 60, of Pittsburg, died August 2 after a prolonged illness. He was born July 17, 1952, in Russell, the son of H. Francis and Ruth Short. He earned his bachelor’s degree in communications from the University of Kansas in 1974 and his juris doctorate from the University of Kansas School of Law in 1976. Short returned to Pittsburg to practice law. Short was a member of the Kansas Bar Association and the Kansas Association for Justice, and also served as a special administrative judge.

Short is survived by his wife, Barbara Phillips, of the home; daughter, Kisha Phillips-Short; mother, Ruth Short; brothers, Stephen Short, of Bradenton, Fla., and Michael Short, of Plano, Texas; and many nieces and nephews. He was preceded in death by his son, Justin Corey Phillips-Short, and his father, H. Francis Short.
Saving Kansas Time and Money: E-Filing of Appellate Court Cases Just Ahead

By Justice Dan Biles, Kansas Supreme Court, Topeka

After several years of hard work and detailed study by many of your colleagues, the Kansas Supreme Court will finally be able to throw the switch, turning on the prototype for the electronic filing system that most counties across the state will be using. This is an exciting leap into the digital world for our courts, the profession, and the state.

On December 3, 2012, a limited number of pilot offices will begin electronically filing in the appellate courts. Soon after that, the system will expand to include at least four judicial districts during 2013. Others will follow as soon as we can establish that the system is functioning well and that funding is available.

Given its importance to the Kansas Bar, and how close we are to implementing the prototype in at least some of our courts, the chief justice asked me to provide a progress report on the effort, which has involved many attorneys, judges, court personnel, and other professionals from across the state. I serve as project liaison for the Supreme Court during the implementation period.

Our electronic filing system is configured for use in the appellate courts and those district courts using the FullCourt case management system. Once installed, the e-filing system will allow filers to submit electronic documents to the court, pay any required filing fees, and receive electronic notices of activity in associated cases. Court clerks will benefit from fewer duplicate data entries and a reduction in the number of filings submitted now by litigants who appear in person at the clerk’s office.

For attorneys, we anticipate the electronic filing experience will be similar to what is occurring now with the federal courts. In other words, a registered filer will be able to go to the Kansas Judicial Branch website to access the system to file a court document in any district court where the e-filing program exists. But our state system eventually will have some enhanced features, including the capability to accept “batch” filings of multiple cases at one time, which Shawnee County has found useful for its limited action cases. And the state’s e-filing vendor, Tybera Development Group, will offer the capability for interested firms to electronically link their case management systems through an application programming interface with the e-filing system. That will provide two-way communication between the systems, which will reduce law firm data entry. Tybera will work with interested firms on a fee-for-service basis to establish and test this integration.

Judges in the pilot districts will have electronic access to documents similar to what is now available internally at the appellate level, and documents filed by them will be processed through the system as well. We anticipate e-filing will be faster and reduce personnel, paper, printing, and delivery costs.

The recent report of the Supreme Court’s Blue Ribbon Commission strongly endorsed continued development of e-filing as a necessary component for an efficient and effective court operation. The commission concluded, “E-filing is critical technology in a time of limited resources. Implementation of e-filing will enable the Judicial Branch to streamline its processes and realize efficiencies that will continue into future years.”

Once in place, Kansas will join 15 other appellate courts with electronic filing capability. An additional 20 states have implemented or are planning to implement the technology statewide. Additional e-filing programs are on a court-by-court basis, but are not part of a statewide initiative.

The testing schedule with volunteer law offices or county or district attorney offices will follow this timeline:

<table>
<thead>
<tr>
<th>Appellate Courts</th>
<th>December 2012</th>
</tr>
</thead>
<tbody>
<tr>
<td>Leavenworth County</td>
<td>January 2013</td>
</tr>
<tr>
<td>Douglas County</td>
<td>March 2013</td>
</tr>
<tr>
<td>Sedgwick County</td>
<td>April 2013</td>
</tr>
<tr>
<td>Shawnee County</td>
<td>July 2013</td>
</tr>
</tbody>
</table>

We anticipate the testing period will take a few months before we can make it available to all attorneys for filings at each of those locations. No firm dates for the switch to mandatory electronic filing in those counties have been set yet; but more information on that, as well as training opportunities for law firm personnel will come soon. Pro se litigants will be brought into the electronic filing world as best as we can and when we can. Access to the system by pro se litigants is very important, but it has a different set of challenges, which we are deferring for the time being.

Phase Two of our project will continue the statewide rollout of the e-filing system to the remaining district courts as funds permit (excluding Johnson County, which is developing its own e-filing program). But Phase Two will require legislative action to find a permanent funding mechanism. Last legislative session, a variety of financing options were discussed, but nothing was resolved. The legislature, however, did appropriate $107,000, which made it possible to add Shawnee County to our efforts in 2013.

Identifying what practicing lawyers, judges, and pro se litigants will need in order to make e-filing successful and identifying the tools to accomplish it has been a long process that many people have contributed to. The Kansas Judicial Branch Electronic Filing Project began with the formation of the Supreme Court Electronic Filing Committee in May 2009 by then-Chief Justice Robert Davis. The committee was tasked with studying electronic filing of court cases and documents in Kansas. The committee consisted of a diverse group, representing various users of the court system and potential users of an e-filing system, including attorneys, support staff of attorneys, and judicial branch employees (clerks, district court administrators, technology specialists, judges, attorneys employed by the appellate courts, judicial branch staff, and justices). In addition, the Committee used the expertise of the director of the Kansas Criminal Justice Information System
and employees of the U.S. District Court for the District of Kansas, which has a mandatory e-filing system.

Justice Marla J. Luckert served as chair of the Committee and I served as the vice chair. The Committee was staffed by Kelly O’Brien, Office of Judicial Administrator (OJA) director of technology, and Steve Berndsen, OJA electronic filing project manager. A complete list of committee members and committee minutes are available at: http://www.kscourts.org/Kansas-Courts/E-filing.

The committee made recommendations to the Supreme Court concerning electronic filing and also participated in the state of Kansas procurement process to select a vendor for the statewide system. As a result, the Supreme Court authorized the OJA to contract with Tybera in order to acquire the electronic filing software program. The committee was disbanded with gratitude after its recommendations were submitted to the Court. Other ad hoc workgroups have been formed to address implementation needs as they have arisen.

The electronic filing solution includes:

- Filer Interface (Web-based solution to send documents and data)
- Clerk/Court Review Interface (web-based solution to accept/reject data in submissions)
- eNotification/eService (notifies case participants on new electronic submissions)
- Processing Application Programming Interfaces (API) - rules for integrating case management systems (CMS), document management systems (DMS), scanning, fee collections, etc.
- Judicial Interface (a unique queue for assisting judges to process proposed orders)

At the end of the day, e-filing capability will help both the court system and the profession respond to two of the bigger complaints about the courts: that justice costs too much and takes too long. Contrast instant e-filings to the days of yore, when filing an appeal included manual typing of 20 legible copies, and complete re-typing if a passage of any length had to be removed or added. (And then sending a runner or trekking over to the clerk’s office yourself).

The Kansas Supreme Court would like to thank everyone for their contributions to this project. We are excited to be achieving such an important step toward reaching this goal, and we will continue updating you about the process and how it will affect your law practice.

About the Author

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Brave Lawyers’ Work: The Pillars of Professionalism

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I. Introduction

In order to address an alarming decline in the public’s perception of lawyers and, more importantly, to address the actual decline in civility and professionalism among some members of the bar, the late Kansas Chief Justice Robert E. Davis suggested what would become the Commission on Professionalism in the Bar (Commission) in 2009.

Over the next two and one-half years, the Commission met recurrently, studied the issues, and conferred through committees and long-distance communication to address Chief Justice Davis’ concerns. The Commission found that no regulatory rules or prosecutorial schemes can enforce civility and professionalism. Rather, it concluded that professionalism is an element of the Law as a Profession, a higher calling, and professional disapprobation, and not necessarily the loss of one’s license.

As Justice Sandra Day O’Connor noted (in her dissent in Shapero lawyer advertising case), membership in the legal profession entails an ethical obligation to temper one’s selfish pursuit of economic success by adhering to standards of conduct that could not be enforced either by legal fiat or through the discipline of the market.

Thus, something beyond minimum “ethical” standards – something higher than the “floor” – is needed. The purpose of this article is to review each of the Pillars of Professionalism, and the foundation for each, with the hope of encouraging knowledge – and self-enforcement by all members of the bar. While some readers may consider the principles set forth in the Pillars to be self-evident, not needing recitation, those readers are not the problem.

II. The Problem

The problem is found in the increasing number of lawyers to whom “professionalism” is apparently not self-evident and the alarming decline in civility among those practicing the profession. This is not a new problem.

For many years (perhaps, centuries), lawyers and members of the public have decried the decline in professionalism in the bar. More than 150 years ago, no less an observer of the times than Charles Dickens expounded:

The one great principle of the English law is, to make business for itself. There is no other principle distinctly, certainly, and consistently maintained through all its narrow turnings. Viewed by this light it becomes a coherent scheme, and not the monstrous maze the laity are apt to think it. Let them but once clearly perceive that its grand principle is to make business for itself at their expense, and surely they will cease to grumble.

In 1953, Dean Roscoe Pound observed that lawyers, as professionals, should hold themselves above mere commercialization. In 1995, retired U.S. Supreme Court Chief Justice Warren Burger noted that, “the organized Bar’s failure to maintain high standards of ethics and professionalism certainly warrants criticism.” Indeed, there are literally dozens of articles on the topic, written by lawyers and judges. Forty percent of non-lawyer respondents to an ABA survey concluded in 1993 that lawyers are not “honest and ethical.”

FOOTNOTES
1. Kansas Rules of Professional Conduct (KRPC), Rule 226, Rules of the Kansas Supreme Court.
Legal commentators are not the only critics. Judges cannot help but see the problem, and some cannot restrain themselves from commenting on it in their judicial decisions. When a fellow lawyer (who happens to be serving as a judge) sees conduct, which “reflects a serious lack of professionalism and good judgment,” one may expect the judge to comment upon it.9

Law is a profession of egos. “Scorpions in a bottle” was a phrase used to describe nine men with a traditional judicial temperament working in a great think tank in Washington – how much more does the phrase apply to trial lawyers who are accustomed to the mortal engines of trial procedure, the rude throats of opposing counsel, and the pride, pomp and circumstance of glorious litigation.10

Further, when observing unprofessionalism, many judges not only comment upon it – they take action.

The most troublesome aspect of this lawsuit is the lack of professionalism and civility displayed by the lawyers. ... This case serves as an example of the unfortunate lack of civility in the practice of law which is receiving considerable attention at this time. ... The adversary process in the judicial arena does not require attorneys to be clothed in a suit of armor and fight to the bitter end. The parties, the profession, and the public all lose when the attorneys fail to treat each other with common courtesy.11

Moreover, lack of professionalism by one lawyer hurts all lawyers, by bringing the very profession into disrepute.12 Lawyers should be mindful that unprofessional conduct “will not be tolerated” by the courts, and that sanctions are available to prevent lawyer misconduct “from bringing [the Bar’s] image into disrepute.”13

There should be little need for further commentary to support the proposition that professionalism in the Bar has eroded, and continues to erode.

III. The Definition

What is a Profession? A profession – more than mere “employment” – carries with it a sense of “calling,”14 involving higher education, standards for admission, standards of conduct, and self-regulation.15 A “profession” is defined by its characteristics, which are:

- the requirements of extensive formal training and learning, admission to practice by a qualifying licensure, a code of ethics imposing standards qualitatively and extensively beyond those that prevail or are tolerated in the marketplace, a system for discipline of its members for violation of the code of ethics, a duty to subordinate financial reward to social responsibility, and, notably, an obligation on its members, even in non-professional matters, to conduct themselves as members of a learned, disciplined, and honorable occupation.16

“...The practice of law is a profession and its uniqueness distinguishes it from all other endeavors.”17 The Law is not just a business; indeed, its best practices are contrary to those found in “business.”

Moreover, lawyers are not interchangeable technicians who apply unbending principles to unassailable facts. Rather, lawyers hold a unique and important historic place in the preservation of law and justice in society.

Since the time of Edward I (King of England 1272-1307) and continuing for centuries to follow, the legal profession has occupied a unique role in society, in part, by virtue of the important responsibilities entrusted to it. Justice Frankfurter eloquently pronounced the legal profession’s responsibilities when writing that “[o]ne does not have to inhale the self-adulatory bombast of after-dinner speeches to affirm that all the interests of man that are comprised under the constitutional guarantees given to ‘life, liberty, and property’ are in the professional keeping of lawyers.” Schware v. Board of Bar Examiners, 353 U.S. 232, 247, 77 S. Ct. 752, 760, 1 L. Ed. 2d 796 (1957) (Frankfurter, J., concurring). A lawyer's responsibility is preeminently to stand “as a shield” [ ] in defense of right and ward off wrong.” Id.19

12. Attorney Griev. Comm’n v. Rose, 391 Md. 101, 111, 892 A.2d 469, 475 (2006) (“conduct which tends to bring the legal profession into disrepute, ... is, ... prejudicial to the administration of justice”).
What is Professionalism? Within this context, then, the Pillars of Professionalism appropriately begin with their own definition.

Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.20

The attitude, the intent, the life-plan to be professional exhibits itself in actions. By committing to a professional attitude, a professional lawyer commits himself to act with civility, respect, fairness, learning, and integrity. The Pillars remind us:

Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with courtesy, respect, and consideration.21

The Pillars’ introductory paragraph then explains that each Pillar pertains to a lawyer’s relationship with five different constituencies—the lawyer’s relationship to Clients,22 to Courts,23 to Opposing Parties and Opposing Counsel,24 to the Legal Process,25 and to the Legal Profession and the Public.26 Each of these will be discussed in the remaining sections of this article.

IV. The Lawyer’s Relation to Clients

The Pillars begin where a lawyer’s duties should begin: with his relationship to his clients. Obviously, there is no “practice of law” without clients. Thus, preserving the relationship with clients should be a high priority for every lawyer.

1. Respect your clients’ goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.

This resonates with the lawyer’s duty under the KRPC to “abide by a client’s decisions concerning the lawful objectives of representation.”27

Additionally, all clients should be treated—and should expect to be treated—with courtesy, respect, and consideration.

As we stated in Broderick’s Case, 106 N.H. 562, 215 A.2d 705 (1965), the purpose of disciplinary action is to assure the public and the bar that “the practice of law is a profession which demands that its members adhere to fiduciary standards of conduct and that the failure to do so will result in expeditious disciplinary action.” Id. at 563, 215 A.2d at 705 (quoting Broderick’s Case, 104 N.H. 175, 179, 181 A.2d 647, 650 (1962)).28

2. Be candid with clients about the reasonable expectations of their matter’s results and costs.

Clients have a reasonable expectation that their lawyers communicate with them about the representation. Clients do not hand a matter over to a lawyer and thereby abandon it.

(a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.29

This does not mean communicating for the sake of satisfying some esoteric rule; it means really communicating, so that clients can make meaningful decisions about their matters. Many times, the obligation is to provide even more detailed information and analysis. Under the KRPC, “informed consent” is defined as follows:

“Informed consent” denotes the agreement by a person to a proposed course of conduct after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.30

As defined, the KRPC cites “informed consent” no less than 20 times.

Further, clients should not be oversold about the value of their case—for example, to encourage the client to engage the lawyer or to prolong a lucrative litigation—nor should they be undersold about the value of their case—e.g., to encourage a quick settlement.

3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.

Even when lawyers are getting along with each other, they should counsel their clients to get along with opposing parties as well. This may mean addressing, and dealing with, the stresses which come from a busy law practice.

The practice of law is a profession which can be attended by significant stress, and a lawyer’s inability to manage such stress can harm the interests of a client. See, e.g., State ex rel. Counsel for Dis. v. Thompson, 264 Neb. 831, 652 N.W.2d 593 (2002) (lawyer’s failure to take necessary actions on behalf of clients related to untreated depression). Substance abuse is often a factor in attorney discipline cases. See State ex rel. Counsel for Dis. v. Hughes, 268 Neb. 668, 686 N.W.2d 588 (2004);

Thus, not only should lawyers agree to extensions of time where they are reasonable (see Section VI, infra), but they should encourage clients to make such concessions and explain the reason.

Further, no one benefits from frivolous claims or delaying tactics, which are also prohibited by the KRPC.

4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.

As noted in the Comment to Rule 1.4 of the KRPC:

(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Thus, the lawyer should obtain and provide sufficient information for a client to understand the various alternatives available to him.

The fact that counsel was in a “pro bono” matter is not an excuse for his failure to make a sufficient investigation of the facts and law to establish probable cause prior to filing any suit. The practice of law is a profession and the fact that an attorney accepts a case without the expectation of receiving a fee does not excuse his conduct.

Then, armed with the client’s decision, the lawyer needs to act promptly and diligently. The Comment to Rule 1.3 sharply observes:

Perhaps no professional shortcoming is more widely resented than procrastination. A client’s interests often can be adversely affected by the passage of time or the change of conditions; in extreme instances, as when a lawyer overlooks a statute of limitations, the client’s legal position may be destroyed. Even when the client’s interests are not affected in substance, however, unreasonable delay can cause a client needless anxiety and undermine confidence in the lawyer’s trustworthiness.

Kansas lawyers in numerous cases have been disciplined for failing to represent clients diligently and with reasonable promptness.

Delay should not be indulged merely for the convenience of the advocates, or for the purpose of frustrating an opposing party’s right to obtain rightful redress or repose. It is not a justification that similar conduct is often tolerated by the bench and bar. The question is whether a competent lawyer acting in good faith would regard the course of action as having some substantial purpose other than delay. Realizing financial or other benefit from otherwise improper delay in litigation is not a legitimate interest of the client.

5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

Clearly, a lawyer should counsel with his client about the facts, the legal issues, and other considerations affecting the matter entrusted to him.

The client should have sufficient information to participate intelligently in decisions concerning the objectives of the representation and the means by which they are to be pursued, to the extent the client is willing and able to do so.

Clients need to be aware of the risks involved in various avenues for action, as well as alternatives available.

In sum, the lawyer’s primary duty is to clients, who should be treated with respect and civility, and who should receive the level and quality of communications which one expects from a professional.

V. The Lawyer’s Relation to Courts

Next, the Pillars of Professionalism address professionalism in a lawyer’s relationship to courts. Because the legal profession is regulated by the judicial branch, unlike any other profession, its members have a special relationship to the courts before which they practice.

“The practice of law is ... a profession the main purpose of which is to aid in the doing of justice. ...” In re Application of Griffiths, 162 Conn. 249, 254-55, 294 A.2d 281 (1972), rev’d and remanded, 413 U.S. 717, 93 S. Ct. 2851, 37 L. Ed. 2d 910 (1973), quoting Rosenthal v. State Bar Examining Committee, 116 Conn. 409, 414, 165 A. 211 (1933). An attorney “as an officer of the court in the administration of justice, is continually accountable to it for the manner in which he exercises the privilege which has been accorded him.” In re Peck, 88 Conn. 447, 450, 91 A. 274 (1914). This “unique position as officers and commissioners of the court ... casts attorneys in a special relationship with the judiciary and subjects them to its discipline.” (Citations omitted.) He hin v. Connecticut Law Clinic of Trantolo & Trantolo, 190 Conn. 510, 524, 461 A.2d 938 (1983).
Because of the unique relationship between lawyers and the courts which admit them to practice and before which they must practice, it is important for lawyers as professionals to treat those courts with respect.

To be sure, at the foundation of the rule of law is respect for the law, the courts and judges who administer it. And the attorneys who practice law and appear in the courts are officers of the court.\(^42\)

As officers of the court, lawyers owe to the court an obligation of respect.

A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials.\(^43\)

1. Treat judges and court personnel with courtesy, respect, and consideration.

The KRPC prohibits disrespect to a court. Rule 3.5(d), KRPC provides that, “A lawyer shall not: (d) engage in undignified or discourteous conduct degrading to a tribunal.”\(^44\) But dignified, courteous, and civil conduct toward the tribunal from which the lawyer’s client hopes for a good result is more than ethical or even professional, it is just common sense. Indeed, “Acts of common courtesy should be encouraged, not discouraged.”\(^45\)

Civility is imperative in the courtroom: it is an essential element of the fair administration of justice. If we as a profession tolerate such an attitude among some of our practitioners, we cannot expect greater respect from the public. Lawyers, as officers of the court, should be problem-solvers, harmonizers, and peacemakers—the healers, not the promoters, of conflict. In the words of Abraham Lincoln: “As a peace-maker the lawyer has a superior opportunity of being a good man. There will still be business enough.”\(^46\) Here we see the necessity for civility.\(^47\)

2. Act with candor, honesty, and fairness toward the court.

Rule 3.3, KPRC, prohibits false statements of fact or law to a court, failure to disclose controlling legal authority, and offering false evidence.\(^48\) Again, the violation of these provisions has resulted in lawyer discipline in a number of cases.\(^49\) And again, to couch the rule in positive terms, lawyers should be candid, honest and fair toward the courts before which they practice.

Law is a profession which demands trust. Lawyers must be able to rely on each other’s word. Courts must take what lawyers say at face value. Clients must be able to rely on the truthfulness of what their lawyers tell them. Otherwise, our system of justice cannot operate. Jarrett’s misconduct in lying to Ms. Smith has ramifications well beyond the injury to Ms. Smith’s belief in the legal profession. His misconduct further erodes public confidence in the members of the bar and our system of justice.\(^50\)

3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.

Because lawyers cannot undertake actions through others that they cannot undertake themselves,\(^51\) lawyers should encourage clients to act with courtesy and respect.\(^52\)

4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client’s rights.

Although one may express respectful disagreement with a court’s decision—in order to preserve and protect a client’s rights—that disagreement should be expressed with the respect which is due to a tribunal. Thus, it is unprofessional for a lawyer openly to express disrespect for a court, including its personnel.

But “[o]ur legal system, indeed the social compact of a civilized society, is predicated upon respect for, and adherence to, the rule of law.” \(People v. Chong\) \((1999)\)

“[I]t is vital to the integrity of our adversary legal process that attorneys strive to maintain the highest standard of ethics, civility, and professionalism in the practice of law. In order to instill public confidence in the legal profession and our judicial system, an attorney must be an example of lawfulness, not lawlessness.” \(Ibid.\)\(^54\)

In a Kansas ethics case, where the respondent lawyer “shouted profanities at the clerks” of a municipal court and “at the court security officers and the United States Deputy Marshals,” and the lawyer “was rude and disruptive” in two courts, the lawyer was disbarred.\(^55\)

The practice of law is a profession. Lawyers, as officers of the Court, and Judges have a mutual obligation each to the other to be considerate of their respective professional positions.\(^56\)


\(^{43}\). KRPC, Preamble, ¶ [5].

\(^{44}\). Rule 3.5(d), KRPC.


\(^{46}\). Citing Abraham Lincoln, Notes for a Law Lecture (July 1, 1850), in The Life and Writings of Abraham Lincoln 327-28 (Phillip Van Doren Stern ed., 1940).

\(^{47}\). Burger, supra note 3, at p. 953.

\(^{48}\). Rule 3.3(a), (b), and (c).


\(^{50}\). Kentucky Bar Ass’n v. Jarrett, 997 S.W.2d 456, 458 (Ky. 1999).

\(^{51}\). Rule 8.4(a), KRPC.

\(^{52}\). See Section IV.3., supra.

\(^{53}\). Rule 3.5(d), KRPC.


\(^{55}\). In re Romious, 240 P.3d 942, 952 (Kan. 2010).

\(^{56}\). In re Thomson, 666 So. 2d 464, 476 (Miss. 1995).
VI. The Lawyer’s Relation to Opposing Parties and Opposing Counsel

While even emotional and unrestrained lawyers hesitate to misbehave before a court, more lawyers appear willing to act in an unprofessional manner toward opposing counsel, perhaps being unwilling or unable to restrain themselves, or perhaps suffering from the misguided belief that it makes the lawyer appear strong.

1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.

The practice of law is an honorable profession, a high calling. Thus, it does and should require a high standard of conduct from its members, including standards of competence, civility, and public service. Disrespectful, discourteous, and impolite conduct should be discouraged, and should not be part of any honorable profession.


In the Kansas case from which this statement was taken, the respondent had sent a letter characterized as “vicious, offensive, and extremely unprofessional,” employing “a number of vile and unprintable epithets referring to opposing counsel.” The lawyer was suspended indefinitely.

Civility, above all, should be exemplified and encouraged by all thinking professionals. Justice Robert Benham, of the Georgia Supreme Court, took the opportunity to comment on the role and importance of civility in litigation in a criminal case in which a defendant claimed his trial counsel had been “ineffective because he showed respect for and friendship with opposing counsel.” Naturally, the court rejected that contention, and Chief Justice Benham – in concurring – took some effort to explain.

While serving as advocates for their clients, lawyers are not required to abandon notions of civility. Quite the contrary, civility, which incorporates respect, courtesy, politeness, graciousness, and basic good manners, is an essential part of effective advocacy. Professionalism’s main building block is civility and it sets the truly accomplished lawyer apart from the ordinary lawyer.

Civility is more than good manners. It is an essential ingredient in an effective adversarial legal system such as ours.

The absence of civility would produce a system of justice that would be out of control and impossible to manage: normal disputes would be unnecessarily laced with anger and discord; citizens would become disrespectful of the rights of others; corporations would become irresponsible in conducting their business; governments would become unresponsive to the needs of those they serve; and alternative dispute resolution would be virtually impossible.

It is important to remain civil even in the face of incivility. A professional should “take the high road” when treated uncivilly, and remain above the fray.

2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.

As discussed above, the prompt resolution of clients’ matters is a valuable goal of the professional practitioner. It is also consistent with the proper administration of justice. Thus, failure to respond to communications and inquiries is inimical to that proper administration of justice. In a Kansas disciplinary case, the respondent lawyer caused...

... substantial delay in two federal cases by repeatedly failing to respond to motions, by repeatedly failing to comply with court orders, [and] by repeatedly failing to properly communicate with opposing counsel.

As a result of this, and other, conduct, the lawyer was disbarred.

3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client’s interests.

Making agreements for extensions of time or other concessions that would likely be granted anyway and/or where no real harm can result to the client’s matter, is common courtesy – and an element of the Golden Rule. One certainly cannot foresee and foretell when an agreement for an extension may be required from the opposing counsel.

When engaged in even the most contentious litigation, attorneys should be ever mindful that the practice of law is a profession and that attorneys are expected to extend professional courtesy to opposing counsel when health problems or other unforeseen events prevent attendance at scheduled proceedings. Moreover, parties are expected to contact the opposing party and attempt to resolve discovery disputes amicably prior to seeking sanctions from the court. See Rule 2-431. Once Glassman knew Post was in the hospital, he made no attempt to reschedule the deposition or otherwise informally resolve the matter. Such conduct does not reflect well on the practice of law, and most assuredly should not be rewarded by the grant of a default judgment.

58. Id. at 622.
59. Id. at 632.
61. Id. at 485 (Benham, C.J., concurring).
63. Id. at 23.
Short and non-repetitive extensions of time to accommodate counsel should be routine, again within the context of protecting the client’s substantive rights.

4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.

Clients often feel strongly in their animosity to opposing parties, particularly in litigation. But, as the spokesperson for his client, the lawyer need not take on the mask of that animosity. Indeed, the professional lawyer remains courteous and civil even when confronted with animosity.

A good attorney is detached from the emotions of the parties. They serve as an objective voice of reason; an independent source of wise counsel. A good attorney understands the conflict, but is never part of the hostilities. A good attorney is above the fray. He or she is careful to never inflame the passions of their client. A good attorney is a peacemaker who resolves disputes, not encourages them.65

This also does not mean the lawyer should act in a passive-aggressive manner, for example acting aloof from the dispute, while counseling or encouraging the client’s boorish behavior.

It is no defense that the individual participant’s conduct, when isolated from that of the group as a whole, would not violate the court’s order. The foregoing applies with equal weight to those who direct, control, plan and supervise activity in defiance of the court order. The true instigators may not be absolved by maintaining the appearance of remaining above the fray. One who conspires to induce contemptuous conduct by others which does in fact occur, may be equally guilty with those who actually engage in that conduct.66

Lawyers should remain professional, and prevent client animosity from infecting attorney relations.

And do as adversaries do in law, strive mightily, but eat and drink as friends.67

5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

“Dilatory practices bring the administration of justice into disrepute.”68 As professionals, lawyers should work to resolve their clients’ matters promptly, and try to work out disputes without having to file motions.69

VII. The Lawyer’s Relation to the Legal Process

1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.

Lawyers should avoid the assertion of frivolous or extraneous claims or defenses, and should assert only those claims or defenses which are meritorious.70 Again, this is not only professional, it is ethical. For example, where a Kansas lawyer “in six federal court cases and two state court cases,” filed “frivolous lawsuits, disob(y[ed]) court orders, fail(ed) to comply with court orders, and fail(ed) to dismiss nonmeritorious cases,” the lawyer was placed on probation for two years.71

2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.

Where discovery seeks information beyond what is relevant, and ventures into the purely personal and private, such discovery “could encourage abusive inquiries designed to harass, embarrass, and discourage plaintiffs from pursuing their claims.”72 Again, the KRPC speaks to this issue, by prohibiting “a frivolous discovery request.”73

3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.

It is no secret that the cost of discovery has escalated exponentially.74 Counsel should attempt to balance the perceived benefit to be derived from discovery requests against the relative cost of responding to those requests.75 This principle is consistent with the civil discovery rules. For example, the Federal Rules and the Kansas state court rules require the court to limit discovery if it finds that the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.76
4. Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.

It is only common sense that a true professional only practices in the subject areas where he is competent to practice and keeps up with changes in the law in those areas, as well as in the rules of professional conduct.

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.77

This requires continuing study and education.78

5. Be prepared on substantive, procedural, and ethical issues involved in the representation.

Of course, legal knowledge is not enough: one must know the issues and be prepared to present the client’s matter or otherwise handle the representation appropriately. First, the issues have to be identified.

Perhaps the most fundamental legal skill consists of determining what kind of legal problems the situation may involve, a skill that necessarily transcends any particular specialized knowledge.79

Then, the matter must be prepared: the lawyer must do the work necessary to accomplish the client’s ends and goals.

Competent handling of a matter includes inquiry into and analysis of the factual and legal elements of the problem, and use of methods and procedures meeting the standards of competent practitioners. It also includes adequate preparation. The required attention and preparation are determined in part by what is at stake; major litigation and complex transactions ordinarily require more elaborate treatment than matters of lesser consequence.80

VIII. The Lawyer’s Relation to the Profession and to the Public

1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.

First, the bar is a self-regulating profession: one whose members take on the responsibility and obligation to report ethical violations by themselves and other members,81 and to assist in enforcing the ethical rules.82

Self-regulation also helps maintain the legal profession’s independence from government dominion. An independent legal profession is an important force in preserving government under law, for abuse of legal authority is more readily challenged by a profession whose members are not dependent on government for the right to practice.

The legal profession’s relative autonomy carries with it special responsibilities of self-government. The profession has a responsibility to assure that its regulations are conceived in the public interest and not in furtherance of parochial or self-interested concerns of the bar. Every lawyer is responsible for observance of the Rules of Professional Conduct. A lawyer should also aid in securing their observance by other lawyers. Neglect of these responsibilities compromises the independence of the profession and the public interest which it serves.83

Second, recognizing the profession to be self-regulating and self-policing, lawyers should conduct themselves in a manner that does not reflect adversely upon their fitness to practice, nor bring disrepute to the profession as a whole.84

A lawyer’s conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer’s business and professional affairs.85

2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.

Lawyers have accepted the high calling to practice this profession. It is up to those most familiar with the rule of law to uphold the rule of law. Further, the law plays no favorites. Justice is blind to color, creed, religion or gender.86

While it is the lawyer’s duty, when necessary, to challenge the rectitude of official action, it is also a lawyer’s duty to uphold legal process.87

Lawyers should also participate actively and willingly in pro bono legal service. Rule 6.1, KRPC, provides:

A lawyer should render public interest legal service. A lawyer may discharge this responsibility by providing professional services at no fee or a reduced fee to persons of limited means or to public service or charitable groups and organizations, by service in activities for improving the law, the legal system or the legal profession,

77. Rule 1.1, KRPC.
78. Id., Official Comment [6].
79. Rule 1.1, KRPC, Official Comment [2].
80. Id., Official Comment [5].
81. Rule 8.3, KRPC and Rule 207(c), Rules of the Kansas Supreme Court.
82. Rule 207(a), Rules of the Kansas Supreme Court.
83. KRPC, Preamble: A Lawyer’s Responsibilities.
84. See Rule 8.4(g), KRPC (“It is professional misconduct for a lawyer to: ... (g) engage in any other conduct that reflects adversely on the lawyer’s fitness to practice law.”).
85. KRPC, Preamble, ¶ [5].
86. Gentry v. State, 625 N.E.2d 1268, 1276 (Ind. App. 1993) (“The State must steadfastly remember that justice is blind and equally available to all, without regard to race, color, or creed.”).
87. KRPC, Preamble, ¶ [5].
and by financial support for organizations that provide legal services to persons of limited means. 88

And the Comments to Rule 6.1 observe that, “Every lawyer, regardless of professional prominence or professional work-load, should find time to participate in or otherwise support the provision of legal services to the disadvantaged.” 89

3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.

As stated in the Preamble to the KRPC, lawyers should “work to strengthen legal education.” 90 The quality of legal education programs and legal publications can only improve if more lawyers offer their time and knowledge to teach and write. Diversity of point of view, experience, and expertise in CLE programs and legal articles will help to expand the legal knowledge and ability of those who participate in those programs and read those articles.

4. Take opportunities to improve the legal system and profession.

Certainly, the practice of law is a profession which, in the public interest, must be jealously guarded. 91

As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of services rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law, and work to strengthen legal education. In addition, a lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority. 92

If lawyers do not take responsibility and take the lead in improving the rule of law, no one else will take that responsibility. Further, if the legal profession does not police itself properly, someone else will try to take on that task.

5. Be mindful of how technology could result in unanticipated consequences. A lawyer's comments and actions can be broadcast to a large and potentially unanticipated audience.

Numerous are the stories of confidential emails which have been misdirected or inadvertently sent to the wrong addressee. This includes a reply to “all,” when a response was intended for one recipient; a message sent to a group, when delivery was intended to one member of that group; delivery to the wrong addressee, when address completion software inserted the recipient’s address when a different recipient was intended; or just sending an impolite or emotional email that would better have been deleted before delivery.

In one highly-publicized incident, a young lawyer inadvertently sent a sexually explicit email to 30 members of his firm, resulting in his suspension from employment. 93 In another instance, a summer associate inadvertently sent an email to 40 lawyers in his group, bragging about doing no work. 94 And in a third case, a press secretary inadvertently attached a confidential salary schedule to an emailed press release. 95

Care should be taken to try not to make mistakes of this nature. 96

6. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.

It is important for lawyers to set the example, not only for other lawyers, but so the public can recognize the practice of law for the profession – the high calling – that it is.

Those who hold themselves out as lawyers should realize that they help shape and mold public opinion as to the role of the law and their role as lawyers. The law sets standards for society and lawyers serve as problem solvers when conflicts arise. To fulfill their responsibility as problem-solvers, lawyers must exhibit a high degree of respect for each other, for the court system, and for the public. By doing so, lawyers help to enhance respect for and trust in our legal system. These notions of respect and trust are critical to the proper functioning of the legal process. 97

IX. Conclusion

As members of a profession, lawyers should aspire to the promise of Justice Oliver Wendell Holmes, speaking proudly of the legal profession, that, “Of all secular professions this has the highest standards.” 98 Along with the KRPC, the Pillars of Professionalism provide a structure for professional attitudes – and action.

“Historically, the practice of law is a profession. It must remain a profession if the purposes of representation in litigation as part of the machinery of justice are to be achieved. A profession is a group of men pursuing a learned art as a common calling in the spirit of public service or an occupation that is a high calling.” 99


88. Rule 6.1, KRPC.
89. Id., Official Comment [3].
90. KRPC, Preamble, ¶ [6].
91. Professional Adjusters Inc. v. Tandon, 433 N.E.2d 779, 786 (Ind. 1982).
92. KRPC, Preamble, ¶ [6].
94. See, Badgerow, supra note 93.
service-no less a public service because incidentally it may be a means of livelihood. The exigencies of the economic order require most persons to gain a livelihood and the gaining of a livelihood is a purpose to which they are constrained to devote their activities. But while in all walks of life men must bear this in mind, in business and trade it is the primary purpose. In a profession, on the other hand, it is an incidental purpose, pursuit of which is held down by traditions of a chief purpose to which the organized activities of those pursuing the calling are to be directed primarily and by which the individual activities of the practitioner are to be restrained and guided." 5 Pound, Jurisprudence 676-677 (1959). The legal profession exists primarily for the advancement of justice. “The best service of the professional man is often rendered for no equivalent or for a trifling equivalent and it is his pride to do what he does in a way worthy of his profession even if done with no expectation of reward. This spirit of public service in which the profession of law is and ought to be exercised is a prerequisite of sound administration of justice according to law,” Pound, The Lawyer From Antiquity to Modern Times 10 (1953).

The privilege of practicing law carries with it obligations and duties, not only to think professionally, but also to exemplify professionalism in every act and deed.

To be a member of the Bar and an officer of the court is a high calling which bestows unique opportunities on one so endowed. However, there is an obligation which corresponds to the privilege of being a member of the Bar and it is best expressed in a passage from the book of our most fundamental laws: “... For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more.”

If lawyers commit to thinking professionally and acting professionally, the practice of law will be improved, thus improving the profession. With that improvement in the Bar and the practice of law, the perception of the Bar and its practitioners from those outside the Bar will naturally improve.

Built on the Law, foundation strong, The Pillars of Profession stand. The Law protects against the Wrong, And every storm it can withstand.

Lawyers answer Law’s high calling, Their oath and pledge do they renew. Strong support keeps Law from falling, These Pillars stand up straight and true.

About the Author

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APPENDIX

Pillars of Professionalism

Professionalism focuses on actions and attitudes. A professional lawyer behaves with civility, respect, fairness, learning and integrity toward clients, as an officer of the legal system, and as a public citizen with special responsibilities for the quality of justice.

Admission to practice law in Kansas carries with it not only the ethical requirements found in the Kansas Rules of Professional Conduct, but also a duty of professionalism. Law students who aspire to be members of the Kansas bar should also heed these guidelines. Kansas lawyers have a duty to perform their work professionally by behaving in a manner that reflects the best legal traditions, with civility, courtesy, and consideration. Acting in such a manner helps lawyers preserve the public trust that lawyers guard and protect the role of justice in our society. Lawyers frequently interact with clients, courts, opposing counsel and parties, and the public at large. A lawyer’s actions also reflect on the entire legal profession. With those interactions in mind, the following Pillars of Professionalism have been prepared. These Pillars should guide lawyers in striving for professionalism.

(Con’t. on next page)
With respect to clients:
1. Respect your clients’ goals and counsel them about their duties and responsibilities as participants in the legal process. Treat clients with courtesy, respect, and consideration.
2. Be candid with clients about the reasonable expectations of their matter's results and costs.
3. Encourage clients to act with civility by, for example, granting reasonable accommodations to opponents. Maintaining a courteous relationship with opponents often helps achieve a more favorable outcome. Counsel clients against frivolous positions or delaying tactics, which are unprofessional even if they may not result in sanctions.
4. Counsel clients about the risks and benefits of alternatives before making significant decisions. Act promptly to resolve the matter once the relevant facts have been obtained and a course of action determined.
5. Communicate regularly with clients about developments. Keep them informed about developments, both positive and negative.

With respect to courts:
1. Treat judges and court personnel with courtesy, respect, and consideration.
2. Act with candor, honesty, and fairness toward the court.
3. Counsel clients to behave courteously, respectfully, and with consideration toward judges and court personnel.
4. Accept all rulings, favorable or unfavorable, in a manner that demonstrates respect for the court, even if expressing respectful disagreement with a ruling is necessary to preserve a client's rights.

With respect to opposing parties and counsel:
1. Be courteous, respectful, and considerate. If the opposing counsel or party behaves unprofessionally, do not reciprocate.
2. Respond to communications and inquiries as promptly as possible, both as a matter of courtesy and to resolve disputes expeditiously.
3. Grant scheduling and other procedural courtesies that are reasonably requested whenever possible without prejudicing your client's interests.
4. Strive to prevent animosity between opposing parties from infecting the relationship between counsel.
5. Be willing and available to cooperate with opposing parties and counsel in order to attempt to settle disputes without the necessity of judicial involvement whenever possible.

With respect to the legal process:
1. Focus on the disputed issues to avoid the assertion of extraneous claims and defenses.
2. Frame discovery requests carefully to elicit only the information pertinent to the issues, and frame discovery responses carefully to provide that which is properly requested.
3. Work with your client, opposing counsel, nonparties, and the court to determine whether the need for requested information is proportional to the cost and difficulty of providing it.
4. Maintain proficiency, not only in the subject matter of the representation, but also in the professional responsibility rules that govern lawyers.
5. Be prepared on substantive, procedural, and ethical issues involved in the representation.

With respect to the profession and the public:
1. Be mindful that, as members of a self-governing profession, lawyers have an obligation to act in a way that does not adversely affect the profession or the system of justice.
2. Be mindful that, as members of the legal profession, lawyers have an obligation to the rule of law and to ensure that the benefits and the burdens of the law are applied equally to all persons.
3. Participate in continuing legal education and legal publications to share best practices for dealing ethically and professionally with all participants in the judicial system.
4. Take opportunities to improve the legal system and profession.
5. Give back to the community through pro bono, civic or charitable involvement, mentoring, or other public service.
6. Defend the profession and the judiciary against unfounded and unreasonable attacks and educate others so that such attacks are minimized or eliminated.
7. Be mindful of how technology could result in unanticipated consequences. A lawyer’s comments and actions can be broadcast to a large and potentially unanticipated audience.
8. In all your activities, act in a manner which, if publicized, would reflect well on the legal profession.
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The History and Future of Offender Registration in Kansas

by Shawn P. Yancy
I. Introduction

Offender registration is a reality of modern life. Following a number of highly publicized sex crimes involving children in the late 1980s and early 1990s, Congress took action to require states to register sex offenders. However, each state was left the autonomy to implement the registration scheme as it saw fit. As a result, no two states applied the mandate in the same manner. In addition, each subsequent highly publicized sex crime has led to additional congressional mandates for stricter registration guidelines.

July 2013 will mark the 20th anniversary of offender registration in Kansas. Over the nearly 20 years since it has registered offenders, Kansas has taken a unique approach to offender registration. First, Kansas registers sex offenders, violent offenders, and drug offenders. Second, Kansas subjects all three to the same registration duties with an exception, in some circumstances, regarding the length of registration. Under the Kansas Offender Registration Act (KORA), all offenders must report with the same frequency, report the same amount of information, and are subjected to the same punishment should they fail to follow the provisions of the act.

KORA has been amended in some way nearly every year since the act was first passed in 1993. The goal of this article is to survey the changes made to offender registration in Kansas and to provide a legal context within which to understand the importance of those changes. This article does not detail every change that has taken place throughout the years, but instead, details the significant changes to the law’s most important provisions.

The article begins by chronicling nine parts of the law: to whom the law applies, how long an offender is required to register, the frequency with which an offender is required to report, the approved methods of reporting, the type and amount of information an offender is required to report, the punishment if an offender does not properly register, public notification, petition for early release from his registration duties, and additional duties placed upon offenders.

Next, the article discusses what has become, arguably, the most significant source of influence on offender registration laws – federal mandates. Federal mandates began in 1994, and though they maintained a relatively limited scope for many years; in 2006, the mandates became significantly more intrusive on the states’ autonomy to regulate offenders.

Finally, the article details the types of legal challenges posed against offender registration laws, with an emphasis on Kansas case law. However, because some of the cases concern provisions of the U.S. Constitution, rather than a provision of the Kansas Constitution, U.S. Supreme Court jurisprudence is also briefly discussed. Before ending the legal discussion, the article touches upon the current state of offender registration in Kansas as a means of making the reader aware of current events that may affect the future of offender registration in Kansas. Although the history of offender registration is clear, the future is not.

II. KORA’s Evolution

A. To Whom the Law Applies

This is the most fundamental inquiry regarding offender registration. When first passed in 1993, the law was known as the Habitual Sex Offender Registration Act (HSORA) and only applied to twice-convicted sex offenders. The law was quickly changed in 1994 to require first-time sex offenders to register, and the law was renamed the Sex Offender Registration Act (SORA). The law remained SORA until it was amended to include more than sex crimes.

A person was initially classified as a sex offender based on the person’s conviction for a sexually violent crime as defined by the law. Thus, for a number of years any amendments that expanded the scope of SORA’s applicability did so by expanding the meaning of “sexually violent crime.” When first passed in 1993, “sexually violent crime” had twelve subparts that defined its scope. After the 2011 amendments, “sex offender” has seven subparts and “sexually violent crime,” has 15 subparts.

In 1997, the law was expanded to include more than sex offenders, and the law was appropriately renamed the Kansas Offender Registration Act (KORA). The legislature accomplished this by adding certain violent crimes as well as certain person-offenses involving victims younger than eighteen years of age. A niche of offenses deemed “aggravated offenses” were identified in 1999.

In 2001, those determined to be sexually violent predators, those who are non-resident students or workers that are required to register in their jurisdiction of origin, and those who become residents who had been required to register in a previous jurisdiction were added to the list of those required to register in Kansas. Juvenile sex offenders became subject to registration duties in 2002. In 2007, the legislature added three drug offenses. When added in 2007, and until 2011, the drug offenses contained an exception to the registration requirement if the court made a finding that the defendant’s possession or manufacture was for personal use. The personal use exception was removed in 2011. Today, the law applies to sex offenders, violent offenders, and drug offenders.

FOOTNOTES

1. Laws 1993, Ch. 253, § 17.
2. Laws 1994, Ch. 107, § 1, § 2(a).
3. The law is sometimes referred to as “SORA,” the Kansas Sex Offender Registration Act. Although K.S.A. 22-4901 never used that language—“Kansas” was not added until 1997—it is useful in some contexts to refer to the law as KSORA rather than merely SORA. This is because in legal challenges, the law is often compared to similar laws in other jurisdictions that may otherwise also be known as SORA. Thus, as you will see, even the Kansas Supreme Court has discussed the law as SORA, despite K.S.A. 22-4901 never referring to the law that way. For ease, especially when discussing the legal challenges, this article will use SORA to describe that law as it existed from 1994 through 1997.
4. Laws 1993, Ch. 253, § 18(b).
5. Laws 2011, Ch. 95, § 2(b) & (c).
7. Laws 1997, Ch. 181, § 8(a)(2) & (3).
10. Laws 2002, Ch. 55, § 1(b).
12. Compare Laws 2007, Ch. 183, § 1(11) and Laws 2010, Ch. 147, § 8(11), with Laws 2011, Ch. 95, § 2(f).
13. Laws 2011, Ch. 95, § 2.
B. Term of Registration
Initially, HSORA required registration for 10 years. In 1994, the law still required an offender to register for 10 years, but the law also required a repeat offender to register for his or her lifetime. When certain crimes were identified as aggravated offenses in 1999, the legislature required defendants convicted of those aggravated offenses to register for the remainder of their lives upon a first offense. The 10-year or lifetime registration scheme remained in place until 2011, though which offenses applied to which time period changed throughout the years. After amending KORA in 2011, the legislature implemented a three-tier reporting period structure whereby offenses are identified as requiring 15 years, 25 years, or lifetime registration.

Juvenile sex offenders, when added to KORA in 2002, were required to register until they reached age 18 or for five years, whichever period was longer. In 2006, those required to register in another state who relocated to Kansas were required to register for the longer of the registration period assigned by the original jurisdiction or the period that Kansas requires for the offense.

C. Frequency of Registration
As you will see shortly, there are two types of reporting periods. First, there have always been what can be called informal reporting periods. This refers to statutory reporting requirements that are not regularly occurring, but rather occur as changes to the reported information occur. For example, under the current law, if an offender were to receive a tattoo, then the offender must report having received the tattoo within three business days because it is an identifying characteristic that falls within the purview of K.S.A. 22-4907. The second type of reporting period is what can be called a formal reporting period. This is a statutory registration period that occurs at regular intervals defined by statute. For example, under the current law all offenders are required to report during their birth month, as well as every 90 days thereafter – quarterly.

For a number of years, the law merely required limited informal reporting. In 1993, an offender had to report within 30 days of entering a county wherein the offender was a resident or wherein the offender intended to temporarily reside if longer than 30 days. Changes in address, however, had to be reported within 10 days of the change. The legislature shortened the 30-day periods to 15 days in 1994. The 15-day period was trimmed again in 1999 to 10 days.

The dual reporting structure in place today first began to take form in 1997. Under the 1997 amendments, the offender would register initially followed by written updates every 90 days thereafter. The system in Kansas was muddied somewhat in 2006 when the legislature added a formal reporting scheme akin to that in place today by requiring semiannual in-person reporting in addition to the 90 day updates and informal periods. The legislature cleaned up the system in 2007 by removing the 90-day written updates and moving to a triennial in-person reporting requirement. From 2007 until 2011, offenders had formal reporting periods three times each year with informal reporting periods during the interim. The informal reporting periods, which evolved from the 30-day requirement in 1993, to a 15-day requirement in 1994, and lowered again to ten days in 1999, were increased in 2010 to 14 days. The increase was a result of the statutory overhaul to accommodate calendar day counting as opposed to business day counting. In 2011, however, the legislature amended KORA to make it compliant with the federal mandate in the Adam Walsh Child Protection and Safety Act of 2006 (Adam Walsh). As a result, all informal reporting periods were lowered to three business days, and KORA now requires quarterly formal reporting.

D. In Person Reporting
Whether an offender had to report in-person was not clear...
in the initial statutory language. Based upon subsequent amendments specifically adding the “in person” requirement beginning in 2006, it may be suggested that in-person reporting was not previously required for any type of reporting – formal or informal.

Today, in-person reporting is mandated for both types of reporting. However, KORA lists a couple of exceptions to in-person reporting. First, if an offender is unable to report, for example, because the offender is injured or hospitalized, then the offender can be excused from immediately reporting in person. Second, the law enforcement agency to which the offender reports may permit the offender, only if a drug or violent offender, to make one of the quarterly formal reports by certified letter.

E. Information Required to be Reported

This section explores one of the more practical portions of the law and does so focusing more on the quantity of information to be reported, rather than emphasizing the type of information to be reported. Thus, what follows is a list of information that was required in 1993, the additional information required as of 1997, and then the current list of information listed in K.S.A. 22-4907.

In 1993, the law required an offender to report name, date of birth, offense committed, date and location of conviction, and Social Security number; as well as requiring an offender to submit to a photograph and fingerprinting. By 1997, KORA also required the offender to report the offender’s place of birth; the age and sex of the victim; the offender’s identifying characteristics such as hair color, eye color, scars, and blood type; the offender’s occupation; the name of the offender’s employer; the offender’s driver’s license and vehicle information; documentation of any treatment received; any anticipated future residence; and DNA exemplars if such had not previously been provided.

Today, KORA requires an offender to report the following:

1. Name and all alias names;
2. Date and city, state and country of birth, and any alias dates or places of birth;
3. Title and statute number of each offense or offenses committed, date of each conviction or adjudication and court case numbers for each conviction or adjudication;
4. City, county, state or country of conviction or adjudication;
5. Sex and date of birth or purported age of each victim of all offenses requiring registration;
6. Current residential address, any anticipated future residence and any temporary lodging information including, but not limited to, address, telephone number and dates of travel for any place in which the offender is staying for seven or more days; and, if transient, the locations where the offender has stayed and frequented since last reporting for registration;
7. All telephone numbers at which the offender may be contacted including, but not limited to, all mobile telephone numbers;
8. Social Security number, and all alias Social Security numbers;
9. Identifying characteristics, such as race, ethnicity, skin tone, sex, age, height, weight, hair and eye color, scars, tattoos, and blood type;
10. Occupation and name, addresses or addresses and telephone number of employer or employers, and name of any anticipated employer and place of employment;
11. All current driver’s licenses or identification cards, including a photocopy of all such driver’s licenses or identification cards and their numbers, states of issuance and expiration dates.

31. See Laws 1993, Ch. 253, § 23.
32. Laws 2006, Ch. 214, § 7(d).
33. Laws 2011, Ch. 95, § 5.
34. Laws 2011, Ch. 95, § 5(a).
35. Laws 2011, Ch. 95, § 5(b)
36. Laws 1993, Ch. 253, § 23(a).
37. Laws 1997, Ch. 181, § 12(a). As an additional note, “current address” was included in this list by 1997 but it was omitted here because change to a residential address has always required updating within the framework of the informal reporting periods. While this particular redundancy has largely been satiated, similar redundancies continue to exist. For example, 2011 Supp. K.S.A. 22-4905(g) requires changes to the information listed in 2011 Supp. K.S.A. 22-4907 to be reported within three business days. Atop the 22-4907 list is the offender’s name. Yet, 2011 Supp. K.S.A. 22-4905(h) also indicates that a change in name must be reported within three days.
(12) all vehicle information, including the license plate number, registration number and any other identifier and description of any vehicle owned or operated by the offender, or any vehicle the offender regularly drives, either for personal use or in the course of employment, and information concerning the location or locations such vehicle or vehicles are habitually parked or otherwise kept;

(13) license plate number, registration number or other identifier and description of any aircraft or watercraft owned or operated by the offender, and information concerning the location or locations such aircraft or watercraft are habitually parked, docked or otherwise kept;

(14) all professional licenses, designations and certifications;

(15) documentation of any treatment received for a mental abnormality or personality disorder of the offender; for purposes of documenting the treatment received, registering law enforcement agencies, correctional facility officials, treatment facility officials and courts may rely on information that is readily available to them from existing records and the offender;

(16) a photograph or photographs;

(17) fingerprints and palm prints;

(18) any and all schools and satellite schools attended or expected to be attended and the locations of attendance and telephone number;

(19) any and all email addresses, any and all online identities used by the offender on the internet and any information relating to membership in any online social networks;

(20) all travel and immigration documents; and

(21) name and telephone number of the offender’s probation, parole or community corrections officer.58

F. The Punishment for Failing to Register

Initially, failing to register in Kansas was a class A non-person misdemeanor.59 In 1999, failing to register became a level 10, non-person felony.60 In 2006, failing to register became a level 5, person felony, and KORA made a failure to register that lasted more than 30 days a new and separate offense for that 30-day period and for every subsequent 30-day period.41

The punishment remained a level 5, person felony until 2011 when a graduated punishment scheme was passed making conviction for an initial failure to register a level 6, person felony; a second failure a level 5, person felony; and a third or subsequent failure to register a level 3, person felony.62 In addition, an aggravated failure to register, a failure lasting more than 180 consecutive days, is a level 3, person felony.63 Just as with the 30-day period, every 180 days of failure will constitute a new and separate offense.

Lastly, an offender is subject to prosecution for the above violations in any county where the offender resides, in any county wherein the offender is required to register, in any county wherein the offender is located during the time of non-compliance, or in the county of conviction for the offense which gave rise to registration duties.44

G. Public Notification65

Offender registration is a means of advancing public safety. The cornerstone of promoting public safety through offender registration is public notification. As initially passed in 1993, the registrant’s information was not subject to public disclosure.66 In 1994, however, the legislature switched gears to allow for open inspection only at the sheriff’s office.67 In 1997, a clause was added prohibiting the public disclosure of the victim information that offenders are required to report pursuant to K.S.A. 22-4907.68 In 2001, the provision was amended to allow public disclosure at the KBI headquarters and via the KBI and/or sheriff’s office websites.69

In 2005, provisions were added to allow for notification of schools and child care facilities if registered offenders were near their facilities, and to require that published information make clear whether or not the person is a sex offender as opposed to a violent or drug offender.70 Today, the statute remains largely unchanged, except to include a group of exceptions to public disclosure such as federal witness protection parties.71

H. Early Release from Registration Duties

Initially, the Act allowed a registrant to petition for relief from registration obligations.72 In 2001, however, the legislature amended the provision allowing such relief, and explicitly made clear that no registrant shall be relieved of his or her registration obligations.73 This is the law today, and in 2011, it was expanded to include those from out of state with convictions that would require registration in Kansas.74
I. Additional Burdens

There are two additional burdens placed upon offenders that are worth pointing out. First, since 2006, offenders have been required to pay a $20.00 fee when registering. From 2006 until 2011, KORA has required payment of the fee “on each occasion when the person reports to the sheriff’s office.” As part of the 2011 KORA overhaul, the frequency with which KORA required payment of the fee was limited to the instances of formal quarterly reporting.56

Second, offenders are subject to more frequent driver’s license renewals. In 2006, the legislature amended the statutes to limit the valid term of an offender’s driver’s license or state issued identification to one-year.57 The one-year limitation remains in place today.58

III. Federal Mandates

Some of the changes to KORA and its predecessors occurred as the result of federal mandates. Indeed, many states began requiring offenders to register due to the onset of federal mandates so requiring. Since federal mandates began, they have exponentially grown in their impact on state law.

In 1994, Congress passed the Jacob Wetterling Crimes Against Children and Sexually Violent Offender Registration Act (Jacob Wetterling).59 Jacob Wetterling “required states to track sex offenders by confirming their place of residence annually for ten years after their release into the community or quarterly for the rest of their lives if the sex offender was convicted of a violent sex crime.”60

Congress passed Megan’s Law in 1996, which mandated public disclosure of “relevant information necessary to protect the public.”61 In 1997, Congress passed the Jacob Wetterling Improvements Act, which as the name suggests, took the provisions of Jacob Wetterling and expanded them to include provisions for registering non-resident students and workers and participation in a national offender registry.62 Congress required states to create websites whereby registration information could be located in 2003.63

Arguably, Congress passed the farthest reaching federal mandate on offender registration when it passed Adam Walsh in 2006.64 Adam Walsh mandated a three-tier classification scheme based solely upon the crime committed; three-day informal reporting periods; quarterly reporting for at least the most severe crimes; reporting terms of 15 years, 25 years, or life; mandatory punishment for failing to register; additional information that must be reported; and the addition of certain enumerated crimes.65

One of the goals of Adam Walsh was to make the various state registration schemes more uniform.66 Thus, how Adam Walsh affected each states’ laws varied. For example, Kansas has always applied registration duties based upon the crime committed.67 However, other states have adopted a risk analysis approach to assigning duties whereby a person convicted of a registration offense is assessed and assigned a risk classification based on a number of factors that include the offense committed. Provisions of Adam Walsh became law in Kansas as a part of the 2011 KORA amendments. Thus, the 2011 amendments already detailed were largely due to the impact of the far-reaching provisions of Adam Walsh.

The most important reason to consider the impact of federal mandates on Kansas law is that such mandates were not designed to apply as broadly as they do in Kansas. The provisions of Adam Walsh, although intended to apply to sex offenders and a limited number of violent offenders, nevertheless apply to all sex, violent, and drug offenders in Kansas.

IV. Offender Registration in the Courts

At this point, this article has explained the changes that have occurred to KORA and the influence of federal mandates on some of those changes. Now, however, the article will switch gears to provide a legal context within which to understand the possible significance of such changes.

Offender registration laws are frequently the subjects of constitutional challenges. Thus, there is no shortage of cases dealing with offender registration from every jurisdiction in the United States. There have been three general challenges levied against offender registration laws. First, the laws have been challenged as violating the ex post facto clause of the U.S. Constitution. Second, the laws have been challenged under the Eighth Amendment prohibition against cruel and unusual punishment. Finally, the laws have been challenged as a violation of due process. Kansas has seen all three challenges, and all three challenges have failed with regard to registration.68

An ex post facto law is a law that imposes punishment after the fact – retroactively. Inherent in the prohibition against retroactive punishment is the limitation that such laws only apply in a context wherein punishment is occurring. The U.S. Constitution prohibits Congress or the states from passing ex post facto laws.69 Even with the clear federal bar upon the states, some states have incorporated similar prohibitions into their state constitutions, and some states have taken the bar one step farther by prohibiting retroactive application of all laws.70 By contrast, the Kansas Constitution does not contain

55. Id.
56. Laws 2011, Ch. 95, § 5(fk).
58. Laws 2011, Ch. 95, § 5(j).
60. Id.
61. Id.
62. Id.
63. Id.
64. Id.
66. See, e.g., Congressional Record, H680, March 8, 2006; Congressional Record, S8013, July 20, 2006.
69. U.S. Const. art. I, § 9, cl. 3 (prohibiting Congress); U.S. Const. art. I, § 10, cl. 1 (prohibiting states).
70. Mo. Const. art I, § 13 (“That no ex post facto law, nor law impairing the obligation of contracts, or retrospective in its operation ... “); See also Doe v. Phillips, 194 S.W.3d 833, 849-52 (Mo. Banc 2006).
an independent bar against ex post facto laws or otherwise prohibit laws that are to be retroactively applied. Thus, the law in Kansas discussing ex post facto challenges does so based upon the bar in the U.S. Constitution.

The leading case in Kansas is State v. Myers.71 In Myers, the Kansas Supreme Court considered an ex post facto challenge to SORA. The Court considered the two parts of SORA: registration and notification. As to registration, the Court found the law remedial in nature – not punishment – and, thus, not a violation of the ex post facto clause of the U.S. Constitution.72 However, the Court determined that public notification, if retroactively applied, would violate the ex post facto clause.73 Because Myers considered the 1994 version of SORA, the year public notification was authorized, offenders to whom SORA or KORA has been retroactively applied have not been subject to public notification since Myers was decided in 1996.

One of the issues raised by the frequent amendments to the law is that some offenses, for example, originally required a ten-year registration term but had been reclassified to require lifetime registration. This issue is only heightened by the Adam Walsh amendments wherein every registration term, save lifetime registration, saw an increase in registration term up to and including life. This was the issue in State v. Evans.74

In Evans, the defendant sought release from his duty to register arguing that he fulfilled his 10-year duty in 2008. However, KORA's 2007 amendments reclassified the offense that Evans committed to require lifetime registration. Almost as an aside because the issue was first raised on appeal, and in reliance on Myers, the Court of Appeals ruled that the 2007 amendments applied retroactively and that Evans was required by KORA to register for the remainder of his life.

Because Kansas does not have its own ex post facto clause upon which to base its decisions, thus relying on federal constitutional law, it is worth identifying the only U.S. Supreme Court decision concerning offender registration laws and the ex post facto clause, Smith v. Doe.75 There, the U.S. Supreme Court considered an ex post facto challenge to Alaska's 1994 version of its offender registration law and held the law to be constitutional.76 Interestingly, the case returned to the Alaska state courts which, on state constitutional grounds, found the law to violate the Alaska constitution.77 The U.S. Supreme Court recently avoided an ex post facto challenge to a portion of Adam Walsh by holding that provisions of 18 U.S.C. § 2250(a) did not apply retroactively and, thus, did not trigger the ex post facto clause.78

Due process challenges to the law have commonly concerned automatic reclassification of an offender’s applicable registration term, such as was previously discussed in State v. Evans. A Kansas case concerning a different type of due process claim is State v. Wilkinson.79 In that case, the defendant argued that SORA violated due process because it did not afford the defendant a hearing to assess his actual risk to the public prior to exposing him to public notification.80 Furthermore, the defendant argued a due process violation because SORA imposed registration duties based solely upon the crime committed rather than by considering the offender's actual risk via a risk assessment.81 The court held that the only process to which the defendant was entitled was that process required in order to convict the defendant for the underlying criminal offense which then triggered the remedial duty to register under SORA.82

The U.S. Constitution's prohibition against cruel and unusual punishment has also been used to challenge offender registration. The issue was first raised in State v. Scott.83 In Scott, the Kansas Supreme Court reviewed a Kansas Court of Appeals decision finding that the public notification provisions of SORA constituted cruel and unusual punishment.84 Such punishment is prohibited by the Eighth Amendment of the U.S. Constitution, applied to the states through the Fourteenth Amendment, and by Section Nine of the Kansas Constitution Bill of Rights.85 The Supreme Court, in relevant part, reversed the Court of Appeals, finding that SORA does not constitute cruel and unusual punishment under either the U.S. Constitution or the Kansas Constitution.86

It is not within the scope of this article to discuss the merits of challenges to KORA. However, my goal is to raise interest in the topic of offender registration and the potential implications of the various changes made throughout the life of KORA. Challenges to offender registration show no signs of stopping, especially as the law is constantly in flux. In Shawnee County, for example, the district court recently ruled KORA’s registration requirement an ex post facto violation.87

In State v. O’Dell, the defendant was charged with failing to register.88 The defendant was convicted of possession of a controlled substance with intent to sell within 1,000 feet of a school in 2002.89 That crime was not one requiring registration until 2007.90 The Court found that the defendant was under no obligation to register at the time he was sentenced, and that no court imposed such an obligation upon the defendant.91 Instead, administrative officers had imposed registration duties retroactively after the 2007 amendments, thus, modifying the defendant’s sentence retroactively.92

72. Id. at 695.
73. Id. at 699.
75. 538 U.S. 84, 123 S.Ct. 1140, 155 L. Ed. 2d 164 (2002).
76. Id. at 106.
80. Id. at 605.
81. Id.
82. Id. at 614.
84. Id. at 2.
85. Id. at 5.
86. Id. at 15.
88. O’Dell, supra note 87, Supplemental Memorandum Decision and Order, 11 CR 51, 1.
89. Id.
90. Laws 2007, Ch. 183, § 1(a)(11).
91. O’Dell, supra note 87, Supplemental Memorandum Decision and Order, 11 CR 51, 8.
92. Id.
nee County District Attorney’s Office filed a notice of appeal in the case, but voluntarily dismissed its appeal before it was heard by the Kansas Supreme Court.93

V. Conclusion

Offender registration laws are in place to promote public safety throughout the United States. Approaching its 20th anniversary in Kansas, offender registration has left a sizable imprint on Kansas’s legal landscape. With each new year comes the opportunity for additional changes to Kansas law as well as new legal challenges to be made against the law in the Kansas courts and in courts all around the country. ■

About the Author

Shawn Yancy graduated from Bob Jones University in Greenville, S.C., in 2004 with a bachelor’s degree in pre-law and from Washburn University School of Law in 2011, where he was admitted into the Order of the Barristers. While in law school, Yancy clerked for the judges of the 3rd Judicial District Court. Currently, he is an unemployment insurance appeals referee for the Kansas Department of Labor. Yancy is also the KBA Young Lawyer Section CLE liaison and a member of the YLS High School Mock Trial Committee. He may be reached at shawnpyancy@gmail.com.

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

RULES RELATING TO CONTINUING LEGAL EDUCATION

Supreme Court Rule 803(d)(3) is hereby amended to read as follows, effective the 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 hours 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 requirement 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 justice or judge who is prohibited from engaging in the private practice of law. All active and retired federal and state judges or justices, bankruptcy judges, and full-time magistrates of the United States District Court for the District of Kansas who are not engaged in the practice of law. Federal and state administrative judges are not eligible for this exemption.

(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 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 written request and preapproval, complete the annual CLE requirement by nontraditional programming.

BY ORDER OF THE COURT, this 24th day of August, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice
Rule 204 is hereby amended, effective August 15, 2012.

(a) **Purpose.** The Supreme Court shall appoint a twenty member board to be known as the Kansas Board for Discipline of Attorneys (hereinafter referred to as the Board or Disciplinary Board). The term of each member shall be three years or such other period of time as determined by the Supreme Court. Vacancies shall be filled by the Supreme Court.

(b) **Review Committee.** The Supreme Court shall designate one member as chairman and another as vice chair. The chairman shall appoint a secretary. The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Rules, including the power and duty to assign periodically three attorneys, at least two of whom will be members of the Board, as a review committee to review and approve or modify recommendations by the Disciplinary Administrator for dismissals, informal admonitions, and institution charges. The members of the review committee will not participate in any final hearing by the Board, or by a hearing panel appointed by the Board, on any complaint they have reviewed.

(c) **Terms.** The Board shall act only with the concurrence of a majority of those present and eligible to vote. Eight members shall constitute a quorum. The term of each member will be four years. No member may be appointed to an additional term after the member completes 12 years of service. A board member may return to service on the Board after a one-term break in service. A board member whose term will expire July 1, 2012, and who has completed 12 years of service will be appointed for an additional term of one year.

(d) **Chair and Vice-Chair.** Board members shall refrain from taking part in any proceeding in which a judge similarly situated would be required to abstain. The Supreme Court will designate one member as chair and another as vice-chair. The chairman shall appoint a secretary.

(e) **Quorum; Limits.** The Board shall exercise the powers and perform the duties conferred and imposed upon it by these Rules, including the power and duty to assign periodically three attorneys, at least two of whom shall be members of the Board, as a review committee to review and approve or modify recommendations by the Disciplinary Administrator for dismissals, informal admonitions, and institution of formal charges. The members of the review committee shall not participate in any final hearing by the Board, or by a hearing panel appointed by it, on any complaint they have reviewed. The Board shall may act only with the concurrence of a majority of those present and eligible to vote. Eight members shall will constitute a quorum. A Board board members member shall refrain from may not taking take part in any a proceeding in which a judge similarly situated would be required to abstain.

(f) **Expenses.** The per diem and expenses of the members of the Board, review committee, hearing panels, and special prosecutors shall will be paid out of the funds collected under the provisions of Rule 208.

(g) **Other Rules.** The Board may adopt procedural rules consistent with these rules.

BY ORDER OF THE COURT, this 15th day of August, 2012.

FOR THE COURT

Lawton R. Nuss
Chief Justice
ATTORNEY DISCIPLINE

ORDER OF DISBARMENT
IN RE RICHARD B. PAYNE
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 18,308 – AUGUST 17, 2012

FACTS: In a letter received by the clerk of the appellate courts dated August 15, 2012, respondent Richard B. Payne, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. At the time the respondent surrendered his license, a complaint docketed for investigation was pending. The complaint contains allegations of misconduct by the respondent in committing multiple violations of traffic laws, eluding police, and unlawfully disposing of a loaded firearm. Respondent’s trial is pending in the Wyandotte County District Court for the alleged misconduct.

HELD: Court examined the files of the disciplinary administrator and found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.

ORDER OF DISBARMENT
IN RE CLIFFORD R. ROTH
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 08,087 – AUGUST 15, 2012

FACTS: In a letter received by the clerk of the appellate courts on August 10, 2012, respondent Clifford R. Roth, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. At the time the respondent surrendered his license, there was a panel hearing pending. The complaint alleged that respondent violated Kansas Rules of Professional Conduct 4.1 (2011 Kan. Ct. R. Annot. 581) and 8.4(b) (2011 Kan. Ct. R. Annot. 618).

HELD: Court examined the files of the disciplinary administrator and found that the surrender of the respondent’s license should be accepted and that the respondent should be disbarred.

CIVIL

MEASURE OF DAMAGES AND REPLACEMENT COST OR DIMINUTION OF VALUE
EVENSON V. LILLEY
GREENWOOD DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,100 – AUGUST 17, 2012

FACTS: The Evensons own a 160-acre tract of land in rural Greenwood County, which they use primarily for recreation. The Evensons have maintained a number of pine trees, fruit trees, and grape and berry plants that existed on the property at the time they purchased the land in 2002. The property also had a utility building, a three-sided pole barn, and a three-sided shed or lean-to at the time of purchase. All of the structures were made of wood with tin roofs. The Evensons leased a portion of the property for the production of crops. Lilley leased pastureland on property adjacent to the Evensons’ tract for grazing cattle. On April 12, 2006, Lilley started a controlled burn of his leased pastureland, but the fire grew out of control and passed over to the Evensons’ property, essentially burning the entire tract. The Evensons filed suit against Lilley for negligence, claiming damages in excess of $75,000. The district court ruled the damage to the property was permanent in nature and the proper measure of damages was the diminution in the value of the property, consistent with PIK Civ. 4th 171.20. The court adopted the appraisal values submitted by Lilley and the debris clean-up cost submitted by the Evensons, awarding the Evensons a total of $7,687 plus applicable interest. Court of Appeals affirmed and stated that in light of the lack of evidence demonstrating the value of the trees destroyed by the fire, the proper measure of damages is the difference between the market value of the property before and after the fire.

ISSUES: (1) Measure of damages and (2) replacement cost or diminution of value

HELD: Court held the Evensons made little showing that the trees had any value independent of their value to the land. It is true that Mark Evenson testified that his family used the land recreationally for picnicking and hunting, but he proffered no showing that the trees were important to those activities or that the enjoyment of those activities was reduced in any substantial way by the loss of trees in general or the loss of particular trees. He provided some speculative testimony that he might someday build a residence on the land, despite the lack of electricity, water, or sewage facilities, but he did not attempt to show that the damaged trees would have improved the value of such a residence. Court held that the district court and the Court of Appeals incorrectly attempted to superimpose principles of temporary and permanent damages on the facts of this case. Their conclusions were correct, however, and the district court did not err in relying on a diminished-value calculation of property loss.

STATUTES: No statutes cited.
providing two expert witnesses access to documents to use in evaluating Ontiberos, and for appellate record. Jury found Ontiberos was a sexually violent predator. He appealed claiming KSVPA is unconstitutional because it contains no way to contest competence of court-appointed attorney. Supreme Court granted motion to remand to district court for Van Cleave hearing on newly asserted claim of ineffective assistance of counsel. On remand, district court conducted hearing and denied ineffective assistance of counsel claim, finding defense counsel stipulated to the exhibit, and foundation for admitting the documents could have been proven. Ontiberos appealed. Court of Appeals vacated the commitment and remanded for new trial, 45 Kan. App. 2d 235 (2011). It rejected Ontiberos’ claim that KSVPA was unconstitutional, but found Ontiberos received ineffective assistance of counsel and state’s attorney committed misconduct during the trial. Both sides petitioned for review.

ISSUES: (1) Constitutionality of KSVPA, (2) ineffective assistance of counsel in KSVPA proceeding, and (3) opposing counsel’s misconduct

HELD: Court of Appeals failed to distinguish KSVPA proceedings from those under K.S.A. 60-1507. Under case law and factors in Mathews v. Eldridge, 424 U.S. 319 (1976), a person has due process right to assistance of counsel at a KSVPA trial, thus a correlative right to competent, effective counsel. KSVPA is constitutional even though it contains no specific statute allowing a respondent to challenge the effectiveness of court appointed counsel. A person detained under KSVPA may raise an ineffective assistance of trial counsel claim on direct appeal using Van Cleave remand procedure or through a collateral attack using K.S.A. 60-1501.

Trial counsel was ineffective. Two prong Strickland test applies. The more limited test applied by Montana courts is not adopted. Defense counsel’s performance fell below objective standard of reasonableness because he failed to introduce evidence of favorable 2006 test, failed to familiarize himself with statutory evidentiary requirements and court decisions before stipulating to allowing expert review evidence that was arguable inadmissible, failed to object when state impeached Ontiberos and his expert witness without introducing extrinsic evidence to complete the impeachment, and failed to object to state’s mischaracterization of corrections department discipline report. Given pervasive nature of counsel’s errors, there was reasonable probability that outcome would have been different.

Addressing issue that may arise on remand, court notes state’s misconduct in attempting to impeach Ontiberos and doctor without admitting evidence to complete the impeachment.

STATUTES: K.S.A. 2011 Supp. 59-29a06(c); K.S.A. 20-3018(b); K.S.A. 59-29a01 et seq., -29a03(a), -29a03(e), -29a04(a), -29a05, -29a05(a), -29a05(b), -29a05(c)(1), -29a06(a), -29a06(b), -29a06(e), -29a07, -29a07(a); and K.S.A. 60-456(b), -460m, -1501, -1501(a), -1507, -1507(a)

**CRIMINAL**

**STATE V. BROWN**

**COWLEY DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE AFFIRMED IN PART AND VACATED IN PART, AND CASE REMANDED WITH DIRECTIONS**

**NO. 103,842 – AUGUST 24, 2012**

FACTS: A jury found Brown guilty of one count of aggravated indecent liberties with a child under the age of 14 and one count of lewd and lascivious behavior in the presence of a person under the age of 16. These convictions were related to conduct that occurred during the weekend of April 17, 2009, to April 19, 2009, when an 8-year-old girl, G.V., stayed with Brown. The trial court sentenced Brown to life imprisonment with a mandatory minimum term of not less than 25 years for the aggravated indecent liberties conviction and to a concurrent sentence of 12 months’ probation with an underlying term of 12

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**Appellate Practice Reminders . . .**

*From the Appellate Court Clerk’s Office*

**Rules 4.01 and 4.01A – Interlocutory Appeals in Civil Cases**

Rule 4.01 covers discretionary civil interlocutory appeals under K.S.A. 60-2102(c) from a district judge's order, not otherwise appealable, in which the judge has made a finding that the case involves “a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.” A party may, not later than 14 days after an order is entered making those findings, file with the Court of Appeals an application for permission to take an interlocutory appeal.

If a district judge enters an order which does not contain the statutory language required to seek permission to take an interlocutory appeal, the order may be amended to include those findings. See Rule 4.01(b). The motion to amend must be served and filed not later than 14 days after the order is filed. If an order is amended, the application for permission to take the appeal must be served and filed not later than 14 days after the amended order is entered. The chain of orders must be submitted to the Court of Appeals with the application in order to establish jurisdiction. See Rule 4.01(d)(3) and (4).

Rule 4.01(d)(1) and (2) cover the contents of the application and should be followed in detail. Interlocutory appeals are closely scrutinized because additional judicial resources are being expended. Incomplete information would be reason to deny the application.

A response may be filed to the application, not later than seven days after service of the application. The Court of Appeals will hold the application for that response time to run.

If the Court of Appeals grants permission to appeal, there is no need to return to the district court to file a notice of appeal. Effective July 1, 2012, the procedure has changed. The date when the order granting permission to appeal is entered serves as the date of the notice of appeal for calculating time under the appellate rules. The party must, not later than 21 days after the order is entered, file the transcript information and the docketing statement with the Court of Appeals. The appeal will be docketed using the number assigned to the application.

Effective July 1, 2012, new Rule 4.01A adopted similar discretionary interlocutory procedures for an order granting or denying class action certification under K.S.A. 60-223.

For questions about these or other appellate procedures and practices, call the Clerk’s Office and ask to speak with Carol G. Green, Clerk of the Appellate Courts, at (785) 296-3229.
months’ imprisonment for the lewd and lascivious behavior conviction. Although not announced at the sentencing hearing, the journal entry indicated the court also imposed a term of lifetime post-release supervision for the aggravated indecent liberties conviction.

ISSUES: (1) Alternative means, (2) admission of evidence, (3) prosecutorial misconduct, and (4) sentencing

HELD: Court rejected Brown's alternative means arguments concerning both of his convictions. Court held that a statute – and any instruction that incorporates it – must list distinct alternatives for a material element of the crime, not merely describe a material element or a factual circumstance that would prove the crime, in order to qualify for an alternative means analysis and application of the super-sufficiency requirement. Court held that the legislature did not define the requisite mens rea element for aggravated indecent liberties with a child under K.S.A. 21-3504(a)(3)(A) in two or more distinct ways. The phrase “either the child or the offender, or both” merely describes a secondary matter, the potential incidental objects of the offender’s required intent. This phrase also outlines options within a means, and it can be accurately described as purely descriptive of factual circumstances that may prove the distinct, material mental state element of the crime. Court made similar findings concerning the lewd and lascivious behavior statute. Court concluded that Brown’s jury was not presented with alternative means on the aggravated indecent liberties or the lewd and lascivious behavior charges against him in this case. Next, Court held the trial court erred in allowing the state to reopen its case-in-chief to present evidence of Brown’s age. We reject this argument because the trial court did not abuse its discretion in granting the state’s request; as the trial court determined, the additional evidence could assist the jury in determining Brown’s guilt of the off-grid crime of aggravated indecent liberties with a child, and the timing of the additional evidence did not cause legal prejudice. Court next rejected Brown’s argument that the prosecutor committed reversible misconduct during jury selection and closing argument. Court stated that while the prosecutor committed misconduct in giving personal opinion and pleading to the jury’s emotion, the misconduct was harmless. Court agreed with Brown’s argument that the trial court erred in imposing lifetime post-release supervision and, consequently, vacated that portion of his sentence. Court reaffirmed the long line of cases holding that the use of a defendant’s prior criminal history is not contrary to the right to a jury trial.

CONCURRING: Justice Moritz concurred in the majority opinion and the rationale developed by the majority for determining whether a statute contains alternative means. Justice Mortiz wrote separately to find it unnecessary to engage in that analysis in this case. Instead, she would accept the state’s invitation to reconsider State v. Wright, 290 Kan. 194, 224 P.3d 1159 (2010), and find that Wright permits a modified harmless error analysis in this case.

STATUTES: K.S.A. 21-3502, -3504, -3508, -4643; K.S.A. 21-5201, -5202; and K.S.A. 22-3414, -3421, -3504

STATE V. CHEEVER
GREENWOOD DISTRICT COURT – AFFIRMED IN PART,
REVERSED IN PART, AND REMANDED
NO. 99,988 – AUGUST 24, 2012

FACTS: In case that first involved federal prosecution of Cheever under Federal Death Penalty Act, Dr. Welner conducted court- ordered mental exam prior to the federal case being dismissed without prejudice. Cheever was then convicted in Greenwood District Court of capital murder for killing sheriff, for which death sentence imposed. He was also convicted of four counts of attempted capital murder of law enforcement officers, criminal possession of a firearm, and manufacture of methamphetamine. Cheever appealed, claiming rebuttal and impeachment use of court ordered mental examination violated Fifth Amendment. State argued that the constitutional challenge was not preserved for review. Cheever also claimed in part: first-degree murder instruction should have included felony murder as lesser-included offense of capital murder; judge’s voir dire remarks

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that ultimate responsibility for sentence rested with the appellate courts and that... an Eighth Amendment
conviction without jury's finding that... sentenced to death was warranted. Continuing his dissent in State v. Stallings, 284 Kan. 741 (2007), he believes capital defendants are denied statutory right of allocution to sentencing jury.

STATUTES: K.S.A. 2011 Supp. 21-5109(b)(1); K.S.A. 21-3107, 3107(2), 3107(2)(a), -3301(a), -3439(a)(a), -4204(a)(3), -4622, -4624, -4624(b), -4624(e), -4627, -4627(b), -4643; K.S.A. 22-3219, -3219(1), -3219(2), -3220, -3424(e); K.S.A. 60-404; K.S.A. 65-4159(a); and 18 U.S.C. § 3591 et seq.

STATE V. CLINE

Wyandotte District Court – Affirmed
No. 102,877 – August 17, 2012

FACTS: Cline was convicted of premeditated first-degree murder when he shot his neighbor with a .22 caliber rifle because he thought his neighbor was stealing his electricity. Cline testified that he was high on PCP at the time of the shooting. The trial court sentenced Cline to life imprisonment without the possibility of parole for 25 years.

ISSUES: (1) Evidence of defendant's special education instruction and (2) suppression of police statement

HELD: Court held that the trial court did not abuse its discretion in excluding the special education testimony. There are numerous reasons a student is placed in special education classes, many not pertaining to low intellectual functioning. Here, Cline did not offer any evidence or testimony that completion of the tenth grade in special education classes as opposed to any other classes had any bearing on his erratic behavior with the investigating officers. Court stated that the trial court may have drawn the line more narrowly than necessary, but its decision was within wide range of latitude allowed for the admission of evidence. Court also held that the trial court erred by jumping ahead to consider Cline's statements after he stated he was through talking, but the error was harmless. The trial court found that after Cline made the disputed statement, he only repeated his previous description of events and stated that he lied to the police officers initially because he was scared. At trial, Cline testified that he told the officers various versions of his story because he was scared. Finally, the state alleges there was overwhelming evidence of Cline's guilt, including eyewitness testimony, the weapon recovered from under Cline's bed, and the shell casing found on the ground below the balcony. Regardless of whether Cline invoked his right to remain silent, Court accepted the trial court's finding that the final 3-1/2 minutes of the interview consisted of nothing more than repetition of Cline's earlier statements and was not prejudicial.

STATUTES: No statutes cited.

STATE V. GARCIA

Morton District Court – Reversed and Remanded with Instructions
Court of Appeals – Reversed
No. 102,140 – August 17, 2012

FACTS: Garcia pled guilty to reckless aggravated battery. He thought his criminal history score was C, but it turned out to be category B based on use of a 13-year-old adjudication that would be treated as a person felony. The B score doubled his presumptive sentencing range. Garcia obtained new counsel and filed a motion to withdraw his plea arguing manifest injustice. The district court denied the motion finding Garcia had competent representation, that he was not mislead, and his plea was fairly and understandably made. The district court sentenced Garcia to the high end of his presumptive sentencing range. The Court of Appeals affirmed the denial of his motion to withdraw his plea finding that Garcia had not established that the district judge based his decision on an incorrect understanding of the law.
ISSUE: Motion to withdraw plea
HELD: Court stated the problem in the case was that the district judge's statements at the plea withdrawal hearing lead to the conclusion that he may have given the absence of an allegation of innocence more weight than it deserved. Court was not reassured enough by the district judge's discussion of its factors so as to discount or disregard the possibly inappropriate emphasis on the absence of an allegation of innocence. Court held the district judge's decision may have been guided by an erroneous legal conclusion, making the denial of García’s motion an abuse of discretion. Court reversed the district judge's denial of García's motion to withdraw plea and remanded for another hearing to apply the appropriate legal standards. The judge must determine whether García has made his good cause showing under K.S.A. 22-3210(b) and then exercise his discretion in ruling on the motion.

CONCURRING: Justice Rosen concurred and wrote separately to state that the statutorily derived procedure of determining criminal history post-conviction prevents the defendant from an intelligent understanding of the presumed consequences of the plea.

CONCURRING: Justice Johnson concurred and wrote separately to state that the district court simply identified the appropriate factors and did not give them the appropriate consideration. He would have the district court reassess the appropriate factors in the context of the misunderstanding on criminal history score, as well as have the district court consider any other factors germane to the good cause determination. Justice Johnson would direct that the district court apply the good cause test as a less stringent standard than both manifest injustice and a constitutional violation.

DISSENT: Justice Nuss, joined by Justice Biles, dissented and would conclude that the district court essentially followed the appropriate guidance regarding the alleged mutual mistake about García's criminal history. It did not abuse its discretion in denying García’s motion.

STATUTES: K.S.A. 21-4701, -4704, -4714; and K.S.A. 22-3210

STATE V. HOLMAN
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, VACATED IN PART, AND REMANDED NO. 101,204 – AUGUST 24, 2012

FACTS: Holman convicted of three counts of aggravated indecent liberties with 10-year-old stepdaughter. On appeal, he claimed trial court erred in admitting evidence of uncharged sexual offense against the victim without a limiting instruction. Alternatively he claimed error in not admitting evidence pursuant to Kansas rape shield statute of prior sexual conduct of victim, or of prior sexual conduct of victim's sister. Holman also claimed: limitations on his cross-examination of victim violated Confrontation Clause; allowing state to expand time frame of offense by 18 days at conclusion of defense case was reversible error; convictions on counts IV and V subjected him to multiple punishments for same offense in violation of Double Jeopardy Clause; and error in imposing enhanced sentences on those two counts because state failed to plead and prove Holman was 18 years of age or older as element of crimes charged and Jessica’s Law.

ISSUES: (1) Evidence of prior uncharged crime, (2) evidence of prior sexual conduct, (3) confrontation – cross-examination, (4) amendment of charging document, (5) double jeopardy – multiple punishments, and (6) enhanced sentences
HELD: Holman’s failure to renew pretrial objection to admission of uncharged crime evidence offered under K.S.A. 60-455 by specifically and contemporaneously objecting at trial precludes appellate review. Under facts of case, district court's failure to provide jury with limiting instruction was not clearly error.

Prior instances of victim's sexual conduct were not integral to defense that sister induced victim to lie about molestations. Trial court did not err in excluding proffered evidence regarding sexual conduct of victim and sister where Holman failed to show evidence was material or probative of any disputed material fact.

Even if error in limiting cross exam of victim's pretrial preparation is assumed, when reviewed under relevant factors in State v. Nguyen, 281 Kan. 702 (2006), including overall strength of state's case, no reasonable possibility that any such error affected outcome of trial.

Under facts in case, no error in that particular amendment. Better practice is for state to amend charging document to conform to trial evidence at close of its case-in-chief, to afford defense an opportunity to address the amendment in presenting evidence without resort to recess or continuance of trial, if necessary.

Jury convicted Holman of unitary conduct of lewd touching of victim and causing victim to lewdly touch him. Given that K.S.A. 21-3504(a)(3)(A) creates a single unit of prosecution of this conduct, Holman's convictions in counts IV and V are multiplicitous. Conviction under count IV is affirmed. Conviction under count V is reversed and sentence on that count is vacated.

Under circumstances in case, Holman was adequately informed of charge in count IV and possible penalty of life imprisonment. Any deficiency in charging document did not invalidate conviction or sentence for that count. On Apprendi claim regarding Jessica’s Law sentence, failure to provide jury with appropriate instruction and failure to prove beyond a reasonable doubt to jury that Holman was 18 years of age or older when committing offense charged in count IV was not harmless error. Off-grid sentence imposed on that count is vacated. Case is remanded for resentencing.

CONCURRENCE AND DISSENT (Johnson, J.): Writes separately to disagree with majority's continuing reliance on misinterpretation of K.S.A. 60-404, and would hold that trial court's limitation on cross examination of the victim denied Holman a fair trial
STATUTES: K.S.A. 21-3502(a)(2), -3504(a)(3)(A), -3504(c), 3525, -3525(b), -4643, -4643(a)(1)(C); K.S.A. 22-3201(e), -3215(6), -3216(2), -3216(3), -3414(3), -3601(b)(1); and K.S.A. 60-404, -455

STATE V. MCWILLIAMS
LABETTE DISTRICT COURT – AFFIRMED COURT OF APPEALS – REVERSED NO. 102,688 – AUGUST 17, 2012

FACTS: McWilliams was convicted of defrauding the Medicaid program as a personal care attendant for his wife and her day-to-day life activities. The trial court found McWilliams guilty of fraudulently billing Medicaid for PCA hours while his wife was hospitalized.

ISSUE: Sufficiency of the evidence
HELD: Court held that the district court, as the finder of fact, could reasonably infer from the evidence that McWilliams' later-submitted claims for payment of hospital hours sufficiently demonstrated his intent to defraud the Medicaid program. Court held the services McWilliams indisputably performed in the hospital simply were not “personal care services.” And he previously signed the form expressly acknowledging that he was not authorized to provide the hospital services. So his representation that he had performed personal care services during those times would be knowingly false. This alone is ample evidence of the specific fraud element that McWilliams contends is insufficient for conviction: the untrue statement known to be untrue by the party making it. Court rejected McWilliams' claim that the evidence is insufficient to prove the fraud element that requires him to make an untrue statement with the intent to deceive, i.e., that the evidence did not support the specific crime charged. His conviction is affirmed.

DISSENT: Justice Johnson dissented and would hold that the Court of Appeals’ decision was correct. The state charged McWilliams with submitting claims to Medicaid for services that he did not render, but the evidence failed to refute that McWilliams did,
in fact, provide those claimed services to his wife, albeit the services may not have been authorized for Medicaid payment.


STATE V. NAMBO
SEDGWICK DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 100,464 – AUGUST 3, 2012

FACTS: Nambo pled guilty to aggravated robbery after he and two others participated in armed seizure of one vehicle and attempted armed seizure of another vehicle. Trial court required Nambo to register under Kansas Offender Registration Act (KORA). Nambo appealed, claiming in part that the definition of an “offender” under K.S.A. 22-4902(a)(7) did not include unarmed accomplices such as himself. Court of Appeals affirmed on this issue of first impression. 42 Kan. App. 2d 731 (2009). Review granted on this single issue.

ISSUE: Registration of offender under K.S.A. 22-4902(a)(7)

HELD: K.S.A. 22-4902(a)(7) includes one definition of “offender” as used in KORA, K.S.A. 22-4901 et seq. This statutory definition does not exclude unarmed accomplices, and no such exclusion will be read into the statute by an appellate court.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-4618(a), -4704(h), -6707(a), -6804(h); and K.S.A. 22-4901 et seq., -4902(a)(7)

STATE V. PLUMMER
RENO DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED

FACTS: Plummer convicted of aggravated robbery of store employee. Plummer appealed arguing trial court failed to instruct jury on theft as a lesser included offense. Court of Appeals found refusal to give theft instruction was reversible error not saved by skip rule, and remanded for new trial. 45 Kan. App. 2d 700 (2011). State petitioned for review, claiming Court of Appeals applied incomplete standard of review, and improperly interpreted skip rule.

ISSUES: (1) Standard of appellate review, (2) jury instruction, and (3) skip rule

HELD: Accurate description of standard review is not recited by either party, but lack of clarity and consistency in appellate court decisions is noted. For jury instruction issues, (1) appellate court should first consider reviewability of issue from jurisdiction and preservation viewpoints, exercising unlimited standard of review, (2) court should next use unlimited review to determine whether instruction was legally appropriate, (3) court should then determine whether there was sufficient evidence, viewed in light most favorable to the defendant or requesting party, that would support the instruction, and (4) if error, court must determine whether error was harmless utilizing test and degree of certainty set forth in State v. Ward, 292 Kan. 541 (2011), cert. denied (2012).

No reviewability problem in this case. Consistent with longstanding precedent, it was legally appropriate to give theft instruction as lesser-included offense of aggravated robbery. Noting inconsistency in prior cases as to when theft is deemed complete, conduct in this case was sufficient for jury to find theft was completed by the time Plummer used force on store security officer. Instruction on theft as lesser included offense thus was legally and factually appropriate, and district court erred in refusing to give the instruction. Under facts of case, court cannot declare that error was harmless.

State’s mechanistic application of court-made skip rule would emasculate clear statutory mandate to instruct on all lesser included offenses supported by the evidence. Court of Appeals correctly viewed skip rule as simply providing route to harmlessness in circumstances when elements of crime of conviction, as compared to a rejected lesser included offense, necessarily show that jury would have rejected or eliminated an even lesser offense. Jury’s verdict does not logically lead to harmlessness in this case. Conviction for aggravated robbery is reversed, and matter remanded for new trial.

STATUTES: K.S.A. 21-3107(2)(1), -3426, -3427, -3701(a)(1); and K.S.A. 22-3414(3)

STATE V. SIMMONS
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – AFFIRMED
NO. 102,715 – AUGUST 24, 2012

FACTS: Simmons convicted of aggravated battery and two misdemeanors when he punched girlfriend and stole her property. He appealed, claiming district court committed reversible error by refusing to instruct jury on simple battery as lesser included offense. Court of Appeals reversed and remanded for new trial. 45 Kan. App. 2d 491 (2011). State petitioned for review, claiming Court of Appeals applied incomplete standard of review, and improperly interpreted skip rule.

ISSUES: (1) Standard of appellate review, (2) jury instruction, and (3) skip rule

HELD: Analytical framework for instructional issues with corresponding standards of review set forth in State v. Plummer, decided on same date. (See digested opinion supra.)

In this case, issue properly preserved for full consideration on the merits. As matter of law, simple battery is lesser-included offense of aggravated battery. State’s argument that consistent defense theory is a condition precedent to entitlement of lesser-included offense instruction is rejected. Jury was precluded from fulfilling its role as factfinder on question whether injury constituted great bodily harm. District court erred in refusing to give requested lesser included offense instruction on simple battery. Under facts of case, court cannot declare error was harmless.

As in Plummer, skip rule does not lead to harmlessness. Court of Appeals decision reversing the district court and remanding for a new trial is affirmed.

STATUTE: K.S.A. 21-3107(2)(a), -3412, -3412(a)(1), -3412(a) (1)(B)
CIVIL

ARBITRATION AND UNIONS
UNIFIED GOVERNMENT OF WYANDOTTE COUNTY/
KANSAS CITY V. IBEW LOCAL 53
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 106,845 – AUGUST 24, 2012

FACTS: This appeal arises out of the arbitration undertaken by
the parties regarding the discharge of an employee of the Unified
Government’s Water Pollution Control Division (UG). The em-
ployee, Herron, was protected by the provisions of the Memoran-
dum of Agreement (MOA) previously negotiated between the Inter-
national Brotherhood of Electrical Workers, Local 53 (IBEW) and
UG. Under this contract, the issue of whether UG had “just cause”
to terminate Herron’s employment was submitted to arbitration.
Herron got into a fight with a co-worker, Rangel. The arbitrator
elicited testimony at a hearing as well as legal arguments in the form
of briefs and rendered a decision in favor of Herron and IBEW. The
arbitrator ordered UG to reduce Herron’s discharge to a suspension.
At UG’s request, the district court reviewed the contract between
the parties, the decision of the arbitrator, and the legal arguments
of the parties, and then issued a memorandum decision affirming the
arbitrator’s decision.

ISSUES: (1) Arbitration and (2) unions

HELD: Court stated that the arbitrator used the appropriate
seven-part test to decide whether he should reduce Herron’s disci-
pline. Court also stated that the arbitrator’s use of the test’s appro-
priateness/reasonableness prong was far from unreasonable. Before
exercising his discretion to reduce Herron’s discipline, the arbitrator
made factual findings regarding Herron’s work record (good em-
ployee for almost 10 years and was promoted to foreman) and other
mitigating circumstances (Herron was provoked and was genuinely
remorseful about assaulting Rangel). These findings suggest the ar-
bitrator believed UG would not be harmed by Herron’s continued
employment and that Herron would benefit from a chance to re-
demnify himself. Court set forth the disclaimer that the award does
not mean every UG employee who assaults another employee will
be reinstated – not every arbitrator will exercise his or her discretion
to reduce discipline, not every employee will have a sparkling work
record, and not every situation will have compelling mitigating cir-
cumstances. Court also clarified that because of the rule against re-
weighing evidence, it could not consider UG’s claim that Herron
was not truly sorry about hurting Rangel.

STATUTE: K.S.A. 75-4330

CONSTRUCTION CONTRACTS - ARBITRATION
NEIGHBORS CONSTRUCTION CO. INC. V. WOODLAND
PARK AT SOLDIER CREEK LLC
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 106,536 – AUGUST 3, 2012

FACTS: Under construction agreement, Neighbors Construction
was to serve as general contractor for Woodland Park’s housing proj-
ect in Topeka. When dispute arose over payment of 20th progress
payment, Neighbors Construction filed demand for arbitration. Ar-
bitrator awarded Neighbors Construction more than $1.2 million,
finding Woodland Park materially breached the contract. In district
court action to confirm arbitrator’s award, Woodland Park filed an
application to vacate or modify and correct the award. Trial court
found architect’s decision to rescind certification for the disputed
nonpayment was not entitled to deference, and found Woodland
Park failed to prove the arbitrator exceeded his power or showed a
manifest disregard for the law. Woodland Park appealed, and also
claimed that trial court erred in awarding Neighbors Construction
attorney fees and interest, and erred in denying its motion to add
the arbitration transcript to record on appeal.

ISSUE: (1) Standard of review, (2) exceeding arbitrator’s statutory
authority or manifest disregard for the law, (3) attorney fees, and (4)
arbitration transcript

HELD: Under facts of case, architect’s payment dispute decision
was not final and binding. Trial court did not err in deferring to
arbtrator’s decision instead of architect’s decision.

Applying provisions in Kansas Uniform Arbitration Act to broad
arbitration clause in the contract, there was no merit to any of
Woodland Park’s specific arguments that arbitrator exceeded his
power. Nonstatutory grounds for vacating an arbitration award by
showing manifest disregard for the law do not apply when arbitrator
simply misinterprets the law, and no Kansas case has stated what is
required to show an award was based on an irrational interpretation
of the contract. Other jurisdictions hold that an arbitration award
may be found irrational only in exceptional circumstances, but there
was no such circumstances under facts in this case.

Arbitrator did not exceed his authority in awarding attorney fees.
Neighbors Construction was the prevailing party, and arbitrator’s re-
liance on the Private rather than Public Construction Contract Act
was harmless error and insufficient to vacate the award. No merit to
Woodland Park’s claims based on consequential damages waiver clause.
Argument of error regarding arbitration transcript in record on
appeal is deemed waived or abandoned.

STATUTES: K.S.A. 5-401 et seq., -402, -405, -412(a), -412(a)
(3), -418(a); and K.S.A. 16-1801 et seq., -1806, -1901 et seq., -1903,
-1906

EMPLOYMENT LAW AND ARBITRATION
HAGUE V. HALLMARK CARDS INC. ET AL.
DOUGLAS DISTRICT COURT – REVERSED AND
REMANDED WITH DIRECTIONS
NO. 106,470 – AUGUST 24, 2012

FACTS: Hague began suffering health problems in 2008, and she
took a leave of absence from her employment at Hallmark Cards
Inc. Hallmark provides short-term disability benefits to its employ-
ees under a company-funded program, and Hallmark initially ap-
proved Hague’s application for short-term disability benefits. But
after additional review, Hallmark denied further benefits. Hallmark’s
decision was supported by Union Security Insurance Co., which
Hallmark hired to review short-term disability benefit requests.
Hague didn’t return to work, and Hallmark fired her. Hague filed
suit against Hallmark. She asked that the court determine that she
program didn’t require her to arbitrate her claims, and the district
court agreed. The district court cited a provision in the short-term
disability policy that it quoted as saying: “STD [short-term disabil-

The district court held that “any conflicting language” in the dispute-resolution policy must be “construed against Hallmark,” apparently because Hallmark chose the language.

ISSUES: (1) Employment law and (2) arbitration

HELD: Court stated that the Federal Arbitration Act applies when a case involves a written agreement and interstate commerce. The Act establishes a strong federal policy in favor of arbitration. Under the Act, once it has been determined that there is a valid agreement between the parties to arbitrate disputes, arbitration should be ordered unless the arbitration clause is not susceptible of an interpretation that covers the dispute at issue. Doubts should be resolved in favor of arbitration. Courts held that under the facts of this case, an arbitration agreement that applied to claims “under the law” and “arising out of the employee’s employment” requires arbitration of the employee’s claims for employer-provided disability benefits, unpaid wages, and other damages arising out of the employment. Court stated that Hague’s claims are subject to arbitration under her employment agreement, which includes the Hallmark dispute-resolution program. Court reversed the district court’s order and remanded the case with directions to grant Hallmark’s motion to stay further proceedings in the lawsuit and compel arbitration.

STATUTES: No statutes cited

INSURANCE
RILEY V. ALLSTATE INS. CO.
BARTON DISTRICT COURT – AFFIRMED
NO. 106,817 – AUGUST 3, 2012

FACTS: Marian suffered injuries in accident while driving parents’ car. Marian and parents carried separate Allstate automobile policies, each with $25,000 in personal injury protection (PIP) benefits. Marian made PIP claims under both policies. Allstate paid maximum benefit under Marian’s policy but refused to pay under parents’ policy, even though Marian was listed as driver on that policy and her eligible loss exceeded $25,000 already paid by Allstate. Marian filed action against Allstate, claiming anti-stacking language in K.S.A. 40-3109(b) did not apply when the additional PIP benefits would not constitute a windfall under her circumstances. District court granted summary judgment in favor of Allstate. Marian appealed.

ISSUE: K.S.A. 40-3109(b) and K.S.A. 40-3109(a)(3)

HELD: District court’s summary judgment in favor of Allstate is affirmed for a different reason. No Kansas case has interpreted current version of K.S.A. 40-3109(b). That subsection does not apply in this case. Instead, K.S.A. 40-3109(a)(3) is more applicable. Where a single insurer has written separate automobile policies for both the automobile owner and the person injured while occupying the vehicle, the injured person may not stack PIP coverage under both policies.


JUDGMENT - GUARANTY
UHLMANN V. RICHARDSON
JOHNSON DISTRICT COURT – REVERSED AND REMANDED
NO. 105,147 – AUGUST 3, 2012

FACTS: Uhlmann guaranteed the debt of a failed self-storage business. Jury decided that the Richardsongs did too, though they denied having done so. When the business failed, Uhlmann paid the remaining business debt and then sued Richardsongs for their share under theories of contribution and unjust enrichment. Trial judge submitted unjust-enrichment claim to jury, and jury ruled in Uhlmann’s favor. Richardsongs appealed, claiming unjust-enrichment claim should not have been submitted to the jury. When Richardsongs posted appeal bond, district court stayed Uhlmann’s garnishment proceedings to collect on the judgment, with no funds having been collected through garnishment. Uhlmann cross-appealed to preserve contribution claim if unjust-enrichment claim did not apply. Richardsongs claim Uhlmann lost ability to pursue cross-appeal when he issued garnishment orders trying to collect on the judgment.

ISSUES: (1) Unjust-enrichment, (2) equitable-contribution, and (3) acquiescence in judgment

HELD: Generic rules for unjust-enrichment claims do not apply here because more specific ones for contribution do. Case should not have been submitted to jury under a generic unjust-enrichment legal theory. District court’s judgment is reversed.

Subject to any equitable defenses, Richardsongs are liable to Uhlmann for their pro rata share of the loan deficiency, which in this case is slightly greater than jury’s award. Remand is necessary for trial court’s consideration of equitable defenses asserted by Richardsongs.

Uhlmann did not lose right to appeal by getting the Richardsongs to post appeal bond but not collecting any money on the judgment. A judgment creditor who initiates some part of the process of executing on a judgment but does not collect any money or sell any of the debtor’s property has not acquiesced in the judgment. This is so even if the debtor, in response, posts a supersedeas bond, which protects the judgment creditor’s ability to collect the judgment while the appeal is pending.

STATUTE: K.S.A. 60-262(d), -731, -733, -734, -2419

NEGLIGENCE - LANDLORD AND TENANT
CARR V. VANNOSTER
MONTGOMERY DISTRICT COURT – AFFIRMED
NO. 106,177 – AUGUST 3, 2012

FACTS: Pit bull owned by Rodney Vannoster bit Carr while she was on premises occupied by Rodney. Carr sued Rodney and his wife, Mary. She also filed negligence claims against Rodney’s father (Jim Vannoster) who owned the property, claiming Jim was negligent in failing to act on his knowledge that the dog was dangerous, failing to direct Rodney to properly restrain and pen the dog, failing to post a warning sign, and failing to expel Rodney and/or the dog from the property. Summary judgment granted to Carr against Rodney and Mary. Trial court also granted Jim’s motion for summary judgment against Carr. Carr appealed.

ISSUE: Liability for negligence as a landlord

HELD: If Jim was a landlord, he had no liability to Carr for her injuries and was entitled to judgment as a matter of law. General rule in Borders v. Roseberry, 216 Kan. 486 (1975), of no liability for landlord’s insulated him from liability for injury caused by dog owned by tenant on leased property, and the two exceptions to Borders advanced by Carr did not apply under facts of case. Cited cases in other jurisdictions as expanding landlord liability do not reflect Kansas law. If Jim was not a landlord, with guidance of Restatement (Second) of Torts, there was no genuine issue of material fact as to whether Jim harbored the dog, thus Jim entitled to judgment as a matter of law on Carr’s theory of strict liability.

STATUTE: K.S.A. 2011 60-256(c)(2), -256(e)(2)

CRIMINAL
STATE V. CATO-PERRY
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 104,870 – AUGUST 17, 2012

FACTS: Jury convicted Cato-Perry of aggravated robbery. On appeal, Cato-Perry asserted four alternative means arguments, including claim that evidence was insufficient to support alternative means of acting as a principal or as aider and abettor.

ISSUE: Alternative means – sufficiency of evidence

DISSENT (Ward, J.): Dissents from majority’s conclusion and adoption of *Boyd* that aiding and abetting is alternative means of committing a crime. History of alternative means statute is examined. Evidence in this case plainly established that two men acting in concert committed each and every element of aggravated robbery. Believes majority’s decision in this case and in *Boyd* portend significant problems for state in codefendant cases.


**STATE V. GILL**
**SHAWNEE DISTRICT COURT – REVERSED AND REMANDED**
**NO. 106,388 – AUGUST 17, 2012**

FACTS: Gill arrested in April 2009 on misdemeanor theft charge. Charge dismissed without prejudice February 2010. Felony theft charge on same event filed December 2010. Gill arrested February 2011. He filed motion to dismiss felony theft charge, alleging speedy trial violations. District court granted the motion, finding the time the misdemeanor charge was pending, and the time during which no charges were pending, should be considered as part of overall delay in bringing Gill to trial. District court also found Gill had been prejudiced as a result of delay in bringing him to trial. Gill appealed, claiming that he was denied constitutional right to speedy trial, or alternatively, that delay in filing felon charge violated Gill’s constitutional right to reasonably timely prosecution. State appealed.

ISSUES: (1) Constitutional right to speedy trial - length of delay and (2) due process

HELD: No constitutional speedy trial violation occurred in this case. *Barker v. Wingo*, 470 U.S. (1972). Factors for determining Sixth Amendment speedy trial violation are each applied, noting courts are split on whether time period between when charges are dismissed and then refilled should be counted in length of delay. As issue of first impression in Kansas, when state dismisses a charge and files another one, the constitutional speedy trial clock will start anew in second case if state dismissed first case because of necessity or the charge in the second case is not identical to charge previously dismissed. If, however, first case was not dismissed because of necessity and charge in second case is identical to previously dismissed charge, then dismissal of first case will be construed as merely tolling the constitutional speedy trial clock. Here, six-month delay between December 2010 felony charge and district court’s dismissal of case in June 2011 was not presumptively prejudicial, and only one *Barker* factor weighs in Gill’s favor.

Due process claim fails because mere possibility of prejudice by state’s delay in filing charges does not satisfy “actual prejudice” requirement, and there was no support to find state intentionally delayed filing felony charge to gain tactical advantage.

STATUTE: K.S.A. 22-3402

**STATE V. PARKER**
**SALINE DISTRICT COURT – AFFIRMED**
**NO. 105,558 – AUGUST 10, 2012**

FACTS: Jury convicted Parker of rape and other charges involving 94-year-old hospitalized woman. On appeal, Parker claimed
District court abused its discretion by denying Parker’s motion to fund a public-opinion poll about effects of pretrial publicity, and by denying motion to change venue. Parker also challenged sufficiency of evidence of his rape, attempted rape, and aggravated burglary convictions. Parker further claimed district court erred in ruling DNA swabs taken from Parker’s hands were admissible.

**ISSUES:** (1) Funding public-opinion poll, (2) change of venue, (3) evidence of lack of consent, force, or physical powerlessness, (4) rape and attempted rape, (5) aggravated burglary, and (6) suppression of DNA evidence

**HELD:** No abuse of discretion or unequal treatment in district court telling Parker that Board of Indigents’ Services was free to fund a study if it chose to, but court was not going to order it to do so.

No abuse of discretion in denying motion for change of venue. Parker made no showing of inability to select a fair and impartial jury, and district court effectively managed jury-selection process so as to eliminate those who might be biased against Parker.

On facts of case, there was sufficient evidence that victim did not consent to Parker’s act, that she was overcome by force, and that she was physically powerless to resist.

**State v. Schreiner,** 46 Kan. App. 2d 778 (2011), followed. Rape statute does not create alternative means of committing that offense. State not required to present evidence that victim was penetrated by both Parker’s finger and penis for him to be convicted of rape, or that Parker tried but failed to achieve penetration by both to be convicted of attempted rape.

Hospital room occupied by a patient constitutes a structure for purpose of aggravated-burglary charge. Like other structures, the room has a door, is temporarily leased to an occupant, is designed to exclude others, and is intended to protect the occupant’s privacy and security. **State v. Hall,** 270 Kan. 194 (2000), is distinguished.

District court properly denied Parker’s motion to suppress DNA evidence. Where Parker was apprehended and identified as having committed rape in the hospital by identified witnesses and he had substances on his hands that could have been wiped off – even while handcuffed – before a warrant was obtained, officer could take swab samples for DNA testing from Parker’s hand without first obtaining search warrant.

**STATUTES:** K.S.A. 21-3501(1), -3502(a)(1)(A), -3502(a)(1)(B), -3518(a), -3518(a)(1), -3518(a)(2), -3301(a), -3716; and K.S.A. 22-2616(1), -4508

**STATE V. REESE**

**JOHNSON DISTRICT COURT – AFFIRMED**

**NO. 106,703 – AUGUST 10, 2012**

**FACTS:** Reese arrested in July 2009 for DUI. District court sentenced him for fifth lifetime DUI conviction after denying Reese’s motion to strike DUI convictions in 1983, 1985, 1988, and 1999 through retroactive application of 2011 amendment to K.S.A. 8-1567(j)(3) which shortened the “look-back” provision language to “only convictions occurring on or after July 1, 2001” for purposes of determining whether a DUI conviction is first, second, third, fourth, or subsequent conviction. Reese appealed, arguing he should have been sentenced as a first-time offender under amended statute that became effective before his sentencing.

**ISSUE:** Retroactive application of K.S.A. 2011 Supp. 8-1567(j)(3)

**HELD:** District court properly found the “look-back” amendment was substantive change in the law that should not be applied retroactively. K.S.A. 2011 Supp. 8-1567(j)(3) applies only to crimes committed on or after the effective date of the statutory amendment.

**STATUTES:** K.S.A. 2011 Supp. 8-1014, -1014(g), -1567(j); and K.S.A. 2009 Supp. 8-1567, -1567(o)(3)
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OFFICE SHARING/OFFICE FOR LEASE – COUNTRY CLUB PLAZA, KANSAS CITY. Office sharing or office lease opportunity on the Country Club Plaza in a Class A high profile corner building with ample free public parking for clients. 200 to 11,000 square feet available. Window offices available, high-speed DSL, printer, copier, facsimile, scanning, telephone, kitchen facilities, reception area, and multiple conference rooms. Offices are state-of-the-art with award-winning interior finish and design. Dedicated area available for your assistant if needed. Reasonable rent. No long-term lease required. Some possibility of business referrals depending on your area of practice. We are an AV-rated litigation firm with full management, accounting, research, and other support services. We would consider cost sharing these services with a compatible transactional, tax, and/or real estate practice. Professional, collegial, friendly atmosphere with other attorneys. Confidential inquiries can be made to Michael Grier at mgrier@wardengrier.com.

OFFICE SPACE AVAILABLE. Great space for attorney, businessperson, or CPA. Up to 3,000 feet available, conference room, security system, easy access to downtown Topeka or interstate. Call Bob Evenson at (785) 231-7987.

OFFICE SPACE AVAILABLE. One office (approximately 14” x 15”) is available in AV-rated firm located at Metcalf and 110th Street in the Commerce Plaza Building in Overland Park. Available immediately. Excellent location and a Class A building. Recently redecorated. Furniture not included. Competitive price including all the amenities of a full service law firm (phone, Internet access, copier, fax, coffee galley, etc.). Staff support available if needed. Please contact Tara Davis at (913) 498-1700 or tdavis@ktplaw.com.

OFFICE SPACE for one attorney in class A, high profile building at One Hallbrook Place in Leawood. No long term lease required. For more information please contact April at (913) 661-9600 ext. 125.

A Tradition of Credibility and Success

We are plaintiff’s trial attorneys with a long tradition of credibility and success in the courtroom. Because of this tradition of success, our substantial resources and our unparalleled experience, we have maximized the value of cases referred to our firm for over 40 years and will continue to do so into the future.

If you have a client with a catastrophic injury or death case we would welcome a referral or co-counsel relationship with you.

Our Experience Pays