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Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Moneymaker, Stinson Leonard Street L.L.P.
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Reflections of the Past and Hopes for the Future

As my year as KBA president comes to a close, this last column is devoted to thanking those who have helped make the year possible and looking to the future. The year has flown by and is now almost gone, seemingly having just started.

The first to be thanked are my family, firm, and clients. Without the support of my family to be allowed to devote the time to this position, the work could not have gotten done. The same applies to my office family as they have had to play “catch me while you can” to try and keep things moving along. My clients have been willing to talk a lot more with staff and understand that I was simply not as accessible this past year. While electronic communication has made it much easier, there is still no substitute for being in the office, able to see and talk to clients, go to court, and review paperwork.

The next group to mention is the attorneys and judges I practice with and in front of. They have been extraordinarily gracious and accommodating in terms of scheduling and general patience. As I have said before, we have great bar and judges to work with here in Southeast Kansas and they have gone above and beyond to ensure that I have been able to devote the time needed to KBA matters. More than one attorney and judge has made the comment that they will be “glad to have me back” when my term ends. It will be good to be back.

The KBA staff and Board of Governors have also gone above and beyond to make the year go as smoothly as possible. In last month’s column I recognized the staff and provided to you their job duties, direct contact information, and, most importantly, their photos so that when you interact with them via phone or email you will know who you are dealing with. The board is made up of quality attorneys from all across Kansas. Board members are not hesitant to speak their minds and that ensures that all viewpoints are discussed. The staff and board are the glue that holds the KBA operation together and for them I am extremely grateful.

In the past, KBA presidents have had a theme and then spent their year working on activities that promoted that theme. Several years ago, the executive committee decided that there were ongoing goals and projects that would need the terms of several presidents to develop and implement. At times, it seems that progress can be slow, but the KBA is moving forward on a number of fronts.

We will be moving the KBA Lawyer Referral Service (LRS) in-house by the end of this year. That should allow the KBA to focus more on customer service to those who call LRS, as well as increase and enhance the LRS experience for our attorney members who participate.

We have begun the KBA Law Office Management Assistance Program (LOMAP) and have had a very positive response to that program. It is a great way for those of us who have been practicing a while to get a jump start into modernizing our practice and using technology better. It is also a great way for attorneys just starting out who are flying solo or forming small firms to get the assistance they need to hit the ground running.

We have implemented serious upgrades to the KBA website and are continuing to enhance it regularly based on feedback from our members. The usability and features of the website have increased dramatically. Casemaker has continued to upgrade as well, which has enhanced our members’ online research capability.

We have created a Board of Publishers to enhance the creation and distribution of KBA publications. The board will be working more closely with our practice sections and committees to produce publications that are timelier and more relevant. We are going to be exploring more electronic publications as newer lawyers find that form of delivery better suited to their needs.

We have created a Bar Prep Committee that is actively working on trying to bring better and cheaper bar exam preparation to the future lawyers of Kansas. It will be reporting to the KBA board in the next year with its recommendations on how to better assist law school graduates as they prepare for the Kansas Bar Exam.

We are participating with a number of other organizations to try to resume the evaluation of Kansas appellate judges. The goal of this coalition is to provide important information to the citizens of Kansas about how our appellate judges are performing as well as provide valuable insight to the judges and justices about how they are doing and what, if any, areas they can work on to better serve the citizens of Kansas. Both Kansas appellate courts are fully on board with this project and looking forward to seeing it successfully implemented.

The KBA has worked with the Kansas legislature to get some important changes made in the law that we work with every day. There have been significant improvements made to the Kansas LLC statutes this past session and there will be more improvements suggested in other areas in next year’s session. Our KBA governmental relations staff and section leaders have worked overtime this past year to get things done. We will continue to build upon these successes in future legislative sessions. We appreciate those legislators who have supported the KBA positions on issues, and we also appreciate the fact that even if a legislator was not able to support the KBA position, he or she was still willing to listen and recognize that the KBA is the voice of Kansas lawyers.

We have implemented quarterly meetings between the KBA president and the chief justice to identify and work together on issues of common concern. Those meetings have helped the bar and court system work better together and keep important lines of communication open. The KBA appreciates its close working relationship with the judicial branch and will continue to foster that relationship in the future.

The issue of relationships brings me to what has been, for me, the greatest disappointment in my year as KBA president. The continued deterioration of the relationships between the judicial, legislative, and executive branches of Kansas government does not serve Kansans well. I was asked by a reporter recently what my impression was of the status of relationships between the judicial branch and the other branches of government. My reply was simple, it is the worst I have ever seen.
it in 31 years of practicing law. The KBA has reached out to all three branches about trying to help work on improving those relationships. The framers of our constitution specifically delineated the roles of the three branches of government. There is, by design, a limited amount of tension built in to the relationship between the branches in the checks and balances built in to our state constitution. The tension we are now experiencing goes far beyond what was intended. When there appears to be open feuding between branches, there is an erosion of confidence in all branches in the minds of our citizens. Ultimately that erosion in confidence harms our system of government and all who are a part of it. All three branches of government are comprised of Kansans. They all want Kansas to be the best state it can be. We are all on the same team. The situation can and must improve. The KBA and I stand ready to offer any assistance we can to make that happen.

About the President

Dennis D. Depew is an attorney with the Depew Law Firm in Neodesha. He currently serves as president of the Kansas Bar Association.

ddepew@ksbar.org
(620) 325-2626

2014 KBA ELECTIONS

Voting will begin soon for two contested elections: Secretary-Treasurer and District 7 Governor (only available to members practicing in District 7). This year marks the second year that elections will be conducted online rather than by mail; voting remains completely anonymous.

VOTING BEGINS ON MONDAY, JULY 7

All ballot information will be sent via email. Make sure the KBA has your correct email by logging into the website at www.ksbar.org and updating your member profile.

Should you have any questions, please contact Jordan Yochim, Executive Director, at jeyochim@ksbar.org or at (785) 861-8834 or Beth Warrington, Communication Services Director, at bwarrington@ksbar.org or at (785) 861-8816.

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Looking Back and Saying Thanks

It has been a fun ride. Unfortunately, this is the last article you will read from me as KBA YLS president. Like my predecessor, Brooks Severson, when I became actively involved in the YLS just a few short years ago I had neither an idea nor an expectation that I would once lead this great section. Since I will never win an Oscar, Emmy, Grammy, etc., wherein I would have the opportunity to give an acceptance/thank you speech, I am going to use this platform to thank all the people who made this ride possible.

While I have always been a member of the KBA, I was not always an active one. A few years ago, current KBA President Dennis Depew encouraged me to get involved and threw in a good word for me with the YLS Board in place at that time. The YLS Board, with an open position and more than likely blinded by the extreme pattern combinations provided by my shirt, bow tie and sport jacket, welcomed me in and the rest is history. Ironically, I have been honored to serve as YLS president as the same time Dennis Depew is serving as KBA president; even more so as Southeast Kansas is often under-represented in the KBA. This underrepresentation is, sadly, due in large part to a general lack of involvement. To have two attorneys from two small towns with populations of 2,400 (Neodesha) and 9,200 (Independence), located a mere 15 miles apart, both serving in KBA leadership positions in the same year is quite astonishing. Dennis has done an amazing job leading the KBA and I thank him for encouraging me to get involved.

A big thank you to the YLS Board. I would thank each board member individually and list his/her many accomplishments this past year, but my article word count limit will not allow it. Alternatively, I would note that with the board’s hard work and countless hours of volunteering, the KBA YLS continued its tradition of successfully running the Kansas High School Mock Trial Tournament; grew the Judicial Internship Program that is in its second year; put on a great CLE program tailored toward young lawyers; and offered networking opportunities for young lawyers and law students in Lawrence, Topeka, and Hays; and that’s just the tip of the iceberg. One of my key duties was to assign people to serve in the leadership roles involved in the aforementioned, and other, programs and I often got to enjoy the fruit of their labor. I truly appreciate everything they did to make my year run smoothly and the assistance they provided to me the many, many times when I was most in need.

Based on my experiences, I would be remiss if I did not encourage all young lawyers to be sure and apply for a position on 2014-2015 KBA YLS Board. Applications are now being accepted through June 13. There are many capacities in which one can serve. It is a great opportunity to network with attorneys across the state, both young and more seasoned, and make a difference in the state of the Kansas Bar for years to come. I find my time in the YLS to be very rewarding both professionally and socially. Professionally, I have made contacts with attorneys of varying experience across the state and country with whom I have made and received referrals. I also know who I can turn to for help on just about any area of practice. Socially, I have become friends with many of these same attorneys and let’s be honest, who couldn’t use more friends? I have also had the privilege and opportunity to represent the KBA YLS at ABA conferences in San Francisco, Phoenix, Chicago, and Pittsburgh; conferences that I may not have otherwise had the means to attend. In short, the benefits of getting involved in the YLS far outweigh any perceived negatives. If you are interested in serving, you may find more information on the KBA website at www.ksbar.org, as well as the KBA YLS Facebook page.

I would also be remiss if I didn’t thank my firm for their patience and understanding when my KBA YLS obligations took me away from the office for a few days here and there. I appreciate their support and encouragement to continue to stay involved in the KBA. A big thank you to my wonderful administrative assistant, Jan, who often helped me come up with topics for my monthly article and spent what little free time she had editing my musings.

Lastly, I need to thank Beth Warrington at the KBA for her patience as I almost consistently never submitted my column on time. I am sure she grew increasingly frustrated with me, but not once did she let that be known to me. She, along with all the other KBA staffers, have difficult jobs and they all do them exceptionally well.

And now I must bring this to a close. The next YLS president column you read will be from incoming president Sarah Warner. I have no doubt that not only will her monthly column be a great read, but she will also do a wonderful job leading the YLS this upcoming term. Sarah, I now yield this space in the Journal to you.

About the YLS President

Jeffrey W. Gettler is a partner at the Independence law firm of Emert, Chubb & Gettler LLC. He is also the prosecutor for the City of Independence.

jgettler@sehc-law.com
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Keynote Speakers

Sean Carter

He is a Harvard Law School graduate who spent a decade as a corporate securities and M&A lawyer before leaving law to pursue a career as the country’s foremost Humorist at Law. His presentations run the gamut from legal ethics to diversity to the U.S. Supreme Court, but they all have one thing in common — humor and plenty of it.

Dean Erwin Chemerinsky

He is the founding Dean and Distinguished Professor of Law, and Raymond Pryke Professor of First Amendment Law at the University of California, Irvine School of Law. Previously, he taught at Duke Law School for four years and 21 years at the University of Southern California School of Law. He is the author of eight books, over 200 law review articles and frequently argues appellate cases.

Friday Topics

• Hot Topics in Constitutional Law
• U.S. Supreme Court Review

Saturday Topics

• IT’S NOT THE FRUIT, IT’S THE ROOT: Getting to the Bottom of Our Ethics Ills
• Fail Better: Continuing Efforts to Eliminate Bias in the Practice of Law
Passing the Gavel

There are events and times in our lives that go by so quickly that we want a do-over immediately. Others are excruciatingly slow. The birth of a child may seem an eternity on the day it’s happening. The time until that child miraculously has a child of her own seems so short. Junior high is an eternity, while the time between graduation from high school and the 50th reunion is unimaginably short when you are at the look-back stage. I am almost at the look-back period for my term as KBF president. It does seem like the proverbial yesterday that Joni handed me the gavel. I would love to have some do-overs and a lot more time to accomplish the goals I had. However, I am so gratified that I was given this honor. I have appreciated the opportunity to work with such a stellar board and staff. And, I am amazed at the amount of work they have completed this year. I have also had the profound opportunity to work with KBA President Dennis Depew on multiple issues.

One of the greatest challenges of the trustees is creating a balanced budget which adequately and fairly supports the KBA, as well as providing financial support to numerous entities in need. It entails lengthy meetings about investment strategies, giving, expense sharing with the KBA, and support of the building housing the KBA and KBF. Being a trustee takes many hours a year out from a member’s practice time. And yet, there never seems to be resistance from a member to giving that time. Thank you to the members for the countless hours you have given.

As I pass the gavel on to my esteemed colleague, Ed Nazar, I am pleased to pass on a number of completed tasks. They are only the beginning tasks for the upcoming strategic planning, and I look forward to supporting Ed in the next steps. Going forward, we have a lot of new programming, goals, and challenges. The more new members we have, the more challenges we can meet. I hope everyone reading this column will consider becoming a foundation member or increasing your level of foundation giving.

Many thanks to all the KBF members for allowing us the chance to provide all the fulfilling services we have provided the past year. Special thanks to the KBF Board of Trustees:

- Sara S. Bezley, Girard
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- Kenneth W. Wasserman, Salina
- Hon. Evelyn Z. Wilson, Topeka

About the President

Kathy Kirk has been involved in bar and foundation activities for many years. Prior to being in small firm practice with the Law Offices of Jerry K. Levy P.A., she served as the first ADR coordinator for the Kansas Supreme Court. Kirk is currently president of the Kansas Bar Foundation and treasurer of the Kansas Association for Justice.

kathykirk@earthlink.net

PLAN NOW TO RECEIVE THE 2014-15 LAW WISE IN YOUR INBOX

Visit www.ksbar.org/lawwise to subscribe. Law Wise is coordinated by the Law Related Education Committee and funded by a Kansas Bar Foundation grant. Published six times during the school year, you will find Law Wise especially helpful if you are invited to speak at a school about your profession or the law.

Issues in the 2013-14 school year included:

- Celebrate Freedom Week and Constitution Day • Celebrate Pro Bono Week/What is Pro Bono?
- Bullying in Schools/Cyberbullying • The First Amendment and Students’ Free Speech Rights
- 60th Anniversary of Brown v. Board of Education of Topeka • Law Day and Kansas Voting Laws

Do you have a suggestion for topics to cover in the 2014-15 school year? Please send your ideas to Anne Woods, public services manager, at awoods@ksbar.org.
Everyone Benefits from Your Participation in IOLTA

The Interest on Lawyers’ Trust Accounts (IOLTA) program is an idea that originated in British, Canadian, and Australian jurisdictions in the 1960s. In the United States, IOLTA was pioneered in Florida and now exists in every state in the country. The Kansas IOLTA program was established in 1984 as a voluntary program and celebrates its 30th anniversary this year.

Through IOLTA, attorneys and law firms place IOLTA – eligible client funds – in a pooled interest bearing trust account. IOLTA funds support the following:

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

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

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

- Visit http://www.ksbar.org/iolta to complete an IOLTA application.
- Take the completed and signed application to an approved financial institution. There is a list of approved institutions on http://www.ksbar.org/iolta.
- Mail, fax, or email a scanned copy of the completed and signed IOLTA application to:
  
  Kansas Bar Foundation
  1200 SW Harrison
  Topeka, KS 66612-1806
  Fax: (785) 234-3813
  Phone: (785) 234-5696
  Email: info@ksbar.org

  (Please put IOLTA Application in the subject line)

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

Frequently Asked Questions About IOLTA

How do I know if I have an IOLTA account?

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

If I discover I do not have an IOLTA account, what do I need to do?

You can find a list of approved financial institutions and contact them about setting up an account. The list of approved financial institutions and the steps to take to setup an IOLTA account can be found online at http://www.ksbar.org/iolta.

What should I know about setting up the IOLTA account with my bank?

Find out if your bank charges maintenance fees. Sometimes the maintenance fees are larger than the interest generated on the account. If possible, select a financial institution that does not charge maintenance fees on an IOLTA account.

How often does my financial institution send interest to the Kansas Bar Foundation?

There are two options. Your financial institution can send us interest quarterly or monthly. If possible, ask to have the transaction done via ACH. That reduces paperwork and eliminates the need to send a hard copy check.
Washburn University School of Law: Helping to Create a Diverse Bar

The demographic face of America is changing rapidly. A 2011 Congressional Research Service Report1 not surprisingly concludes that the “U.S. population is becoming more racially and ethnically diverse” as the combined forces of immigration and differences in population growth take hold.2 That trend will continue. For example, the report projects that between 2000 and 2050 the Hispanic and Latino population (which now makes up the largest minority population) will increase from 12.6 percent to 30.2 percent of the total U.S. population.

As America changes, so too must the legion of lawyers trained to protect and defend the rights of its citizens. For some time, individual and corporate clients have demanded increased diversity in the group of professionals who represent their interests. That has put pressure on the legal profession to keep pace with the demand for diversity in the profession. State bar associations, including that in Kansas, have recognized this need and have created diversity committees charged with fostering “an inclusive, diverse bar association, promoting understanding and respect for different points of view, and supporting the advancement of diversity within the . . . legal profession and justice system.”3 However, 50 diversity committees in 50 states will be unable to meet that goal unless the nation’s law schools dedicate themselves to recruiting, retaining, and training a diverse population of soon-to-be lawyers. That is where Washburn University School of Law has and will continue to play a leading role.

Washburn has a proud and strong history of admitting a diverse student population, and preparing diverse attorneys for the practice of law in Kansas and throughout the world. From Washburn University’s 1865 founding as Lincoln College, it has been dedicated to affording “to all classes without distinction of color, the advantages of a liberal education.”4 As early as 1910, Washburn graduated its first African-American attorney, and in 1912, it graduated its first female attorney. Washburn Law alumni practiced on both sides of the 1951 landmark Brown v. Board of Education case and Washburn Law faculty participated in the reopening of the case in the 1990s. Washburn Law has also produced a number of Kansas firsts, including Elisha Scott, Kansas’ first African-American to run for statewide office, and Kay McFarland, Kansas’ first female chief justice of the Kansas Supreme Court.

Washburn Law’s current diversity efforts begin with its dedication to bringing multiple perspectives to the classroom and to leadership. Nearly all of the school’s leadership posts are filled by women. The law faculty includes nearly 13 percent racial minorities, a self-identified member of a sexual orientation minority, three members who are foreign nationals, and six members who were born abroad. Importantly, unlike the vast majority of law schools, Washburn Law boasts a unified tenure track system under which all full-time faculty are eligible for tenure and earn substantially similar salaries depending on length of service. Most other law schools exclude from the tenure system professors teaching the important legal research and writing and clinical courses and pay those professors a fraction of what the doctrinal professors earn. It would not surprise many to learn that historically, legal writing and clinical positions have largely been filled by women. Washburn Law was among the first to break through that glass ceiling and treat its entire full-time tenure track faculty equally.

Washburn Law also takes seriously its obligation to find and recruit a qualified diverse student population. Washburn Law’s current minority student population outpaces the total percentage of Kansas “non-white alone” general population. Washburn has also been home to many students with disabilities, including students who were deaf, blind, or both. Washburn Law was also named one of the Top 5 Best Law Schools in the Mountain Region for African-American students by “The Black Student’s Guide of Law Schools” in 2013. Washburn offers scholarships to attract diverse talented students, including the Si Se Puede scholarship for highly qualified Hispanic applicants. This success at recruiting a diverse class stems from Washburn Law’s active recruitment at diversity law fairs throughout the country and the investment of its faculty and staff in pipeline to law school programs such as “Grow Your Own Lawyer” and the Council on Legal Education Opportunity, a non-profit project of the ABA Fund for Justice and Education to expand opportunities for minority and low-income students to attend law school.

Once at Washburn, students must select an upper division perspectives course focused on diversity issues. Washburn has a growing international presence with the recent creation of its Center for International and Comparative Law, its establishment of an LL.M. degree for foreign lawyers, and its study abroad program at the University of the West Indies at Cave Hill in Barbados. Participation in this program affords students the opportunity to live and study in an environment in which they are racial minorities – in many cases for the first time. This invaluable experience helps students to better understand the challenges that many of their potential clients face on a daily basis.

Washburn Law’s commitment to diversity does not end at the front door of the Law building, but extends to the community. During the current academic year, Washburn Law students will have provided nearly 9,000 hours of pro bono work for Kansas’ underserved communities through the Washburn Law Clinic. That work includes assisting 17 individuals and their families to normalize their immigration status, represent-

Footnotes
2. Id. at 20.
3. KBA Diversity Committee Mission Statement.
ing individuals before the Prairie Band Potawatomi Nation Tribal District Court, and providing other representation to those in need. Outside of the clinic, Washburn Law students serve local diverse communities throughout the year in many ways, including generating nearly $300,000 in tax refunds for 200 low-income families through its Volunteer Income Tax Assistance program.

Finally, Washburn Law is a key participant in the national conversation regarding diversity issues. Washburn Law recently hosted a symposium on “Brown v. Board at 60: Looking Back, Looking Forward” and will dedicate an upcoming issue of the Washburn Law Journal to publishing articles generated from the symposium. It has hosted conferences on generating strategies for effectively teaching an increasingly diverse student population and on affirmative action. Washburn Law faculty are regular speakers for the Dorothy L. Thomson Civil Liberties Lecture Series at Kansas State University, speaking on issues such as constitutional issues stemming from traffic stops, the Voting Rights Act, and religious freedom and civil rights.

All in all, Washburn Law is working to meet the challenge the legal profession faces due to our changing population. Through its classroom interactions in both Kansas and Barbados, commitment to the community and to the profession, and emphasis on equality, Washburn is dedicated to training skilled attorneys who can continue to serve the profession in Kansas and beyond. More work is always necessary, however. By working together with the KBA, other local law schools, the local communities, and local attorneys, we can create the bar that Kansas will need to serve its citizens.

About the Author

Joseph Mastrosimone is an associate professor of law at Washburn University School of Law, where he teaches in the nationally ranked Legal Analysis, Research, and Writing program. Prior to joining Washburn Law, he served as chief legal counsel for the Kansas Human Rights Commission and as senior legal counsel to the former chair of the National Labor Relations Board. Mastrosimone is a member of the KBA’s Diversity Committee.

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When I was a Nun Back in the 60s...

We had to meditate for half an hour twice a day.¹ Young boisterous 20-somethings don’t take naturally to sitting in silence for what seemed like long periods. Back then it was a chore — but now, it looks like a luxury to have an entire hour of restful contemplation.

“Just sitting, just breathing, just being” is how my meditation leader today terms it. Sounds simple enough, doesn’t it? And in a way, it is. But in other ways, particularly in today’s stimulus filled environment, it is difficult to still our minds. There are, however, great benefits to be reaped from the practice of meditation. Benefits specifically for lawyers.

So, let’s be clear on a few things first. My meditation as a nun was specifically Christian and part of a religious practice. That is one kind of meditation and actually, many religions practice some form of meditation. But there are secular forms of meditation as well, along with different purposes for engaging in the practice. And the scientific community is more and more touting the benefits to be gained from all forms. Two benefits that fit extremely well with the legal community are the stress relief and the enhanced mental focus that can come from regular meditation.

Don’t take my word for it. The Mayo Clinic has six pages of discussion about meditation and its benefits.² They mention seven different types of meditation, such as guided, mantra, and mindfulness and give steps for practicing it on your own. Here’s some of what they say: “Meditation produces a deep state of relaxation and a tranquil mind. During meditation, you focus your attention and eliminate the stream of jumbled thoughts that may be crowding your mind and causing stress . . . . Meditation has been practiced for thousands of years . . . . Anyone can practice meditation. It’s simple and inexpensive, doesn’t require special equipment and you can do it wherever you are . . . . Spending even a few minutes in meditation can restore your calm and inner peace.”

The thought of meditation (if you don’t practice it) can be scary — mainly because it appears to mean taking time out of our day to do nothing. We’re going to lose 15 to 30 minutes of productivitv! And what will we do without our adrenaline fix that comes from stress or even chaos? Well, true — yet not true. Can you wrap your mind around the thought that 30 minutes of “just sitting, just breathing, just being” IS itself PRODUCTIVE? All the literature says the regular practice of meditation enhances our productivity the other 23 hours, 30 minutes of our day. When our mind becomes calm, it can focus and zoom right through that tangle of legal arguments. We feel more in control, more relaxed.

Here’s a similar view: “Toxic Trigger #1: Your tendency to overwork. Being ambitious and driven could mean you’re in overdrive nearly all the time. That means your sympathetic nervous system could be stuck in that classic fight-or-flight state that taxes the adrenal system and pumps cortisol and adrenaline into the body. This leads to weight gain over time, along with shallow breathing, anxiety, higher pulse rate, and an increase in vascular tone . . . all migraine stage setters, if not outright triggers. Avoid It: Stimulate your body’s natural antidote: the calming parasympathetic nervous system so you’re not constantly stuck in overdrive. Meditation is the gold-standard practice for relaxation and perspective. (emphasis added) The health benefits are innumerable and are being borne out by study after study showing that it promotes very real and beneficial changes in body and brain.

“My favorite technique is one used by the Vietnamese Zen monk Thich Nhat Hanh. Simply sit, breathe, and connect your breath to this mantra: ‘Breathing in, I feel calm. Breathing out, I smile.’ Even four or five rounds of this simple meditation can change your mood, improve your health, and create balance between your sympathetic and parasympathetic system dominance.”³

KALAP already sponsors three confidential lawyer discussion groups, called Resiliency Groups, in Overland Park, Topeka, and Lawrence. Now I want to start a meditation group for lawyers, probably using Skype. Watch for an announcement soon — but DON’T hold your breath; instead, breathe, sit and be.

Footnotes

1. A small technicality: I was actually a religious sister under the following definition: “While in common usage the terms ‘nun’ and ‘sister’ are often used interchangeably . . . they are considered different ways of life, with a ‘nun’ being a religious woman who lives a contemplative and cloistered life of meditation and prayer, while a ‘religious sister,’ in religious institutes like Mother Teresa’s Missionaries of Charity, lives an active vocation of both prayer and service, often to the needy, ill, poor, and uneducated.” WIKIPEDIA, http://en.wikipedia.org/wiki/Nun (last visited May 8, 2014).


About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission since its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.

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The NSA Leaks

It might be difficult to imagine how the National Security Agency, an employee from Dell, and Vladimir Putin could be significant to law practice management in Kansas. If you have not been retained by a client in Guantanamo, you might assume that Edward Snowden’s leak of classified documents is irrelevant to your practice. In fact, the revelations bubbling up are an intriguing backdrop to issues lawyers argue about in Ethics 20/20 and our ethical duty to be technologically competent.

Edward Snowden

Snowden was born in 1983 to an officer in the U.S. Coast Guard and a clerk at U.S. District Court in Maryland. He obtained his GED and later enlisted in the U.S. Army Reserve, Special Forces, hoping to serve in the Iraq War. He did not complete training and transitioned into computer security with the CIA from 2006 to 2009. Snowden then moved to Dell as a contractor on NSA systems from 2009 to 2013, where he began stealing classified information. He moved on to another NSA contractor, Booz Allen Hamilton, before taking temporary leave for Hong Kong in May 2013. By June his leaks were hitting the press as he attempted escape to Cuba before being stopped at a connecting flight in Russia. He remains in Russia with Putin calling him “an unwelcome Christmas gift.”

Revelations

The information revealed in Snowden’s leaks provides an array of diplomatic, spy-craft, and civil liberties implications which will tie analysts in knots for decades. However, the revelations about the United States and United Kingdom’s impact on computer security and our economy are more relevant to practicing attorneys. Security expert Bruce Schneier (http://bit.ly/1fpfoAW) provides links to some of the leaks revealed, including:

- Microsoft cooperated with the NSA in circumventing encryption in its Outlook email client, the online Outlook.com email portal, its SkyDrive cloud-based data storage service, and assisted with collection of calls placed through Skype.
- The NSA provided financial assistance or incentives to companies like Yahoo, Google, and Facebook to secure access to communications. Similar transactions occurred with major cell providers Verizon, AT&T, and Sprint.
- Security holes in iOS and Android devices, desktop operating systems, and Internet protocols were exploited for intelligence purposes. Not only were such holes left open knowingly, but it also appears some were built and installed by the NSA.
- A hacking arm of the NSA created a catalog of security “backdoors” allowing infiltration of security hardware from manufacturers, such as Cisco, Western Digital, and Juniper Networks.

If you have nothing to hide from the government, then why worry that your iPhone is a GPS tracking device for the NSA providing full, covert access to your microphone and camera? Of course, there is the most obvious risk for breach of attorney-client privilege, and the American Bar Association tackled those concerns in a complaint letter sent in February. (http://bit.ly/MF4ucU.) The ABA also adopted a policy in August 2013 seeking greater protections for law firms from digital intrusion.

Back in the 1990s, the NSA actually provided guides for public and private industry about securing computer systems and networks. Security for corporate networks was a national security issue. It was vital to protect the government from intrusion through a private contractor and it was vital to protect corporate assets from theft by foreign governments or criminal organizations which might target our economic interests. The NSA’s calculations seemingly shifted, however, and the Snowden documents suggest the NSA sees a national interest in preserving and expanding digital insecurity. The problem is that the NSA cannot claim a monopoly on access to the hacks they exploit or create. The NSA cut itself a master key to many of our digital locks, discounting concern for how easily copies might be made. That uncertainty bears a price.

The economic impact from the NSA leaks is hitting U.S. companies. IBM, for example, is spending over a billion dollars to build data centers overseas to reassure customers. Technology companies in Europe and South America are poaching customers of U.S. tech companies worried about collusion with the NSA. Forrester Research estimates losses could be as high as $180 billion or 25 percent of industry revenues. Similar damage has been observed in the industry in the past when Chinese tech giant Huawei was forced out of contracts because of concerns about alleged backdoors in products for the People’s Liberation Army. Those allegations were not even successfully proven.

Challenge

In light of the NSA leaks, is it ethically or professionally safe to use Google, Verizon, Microsoft, or Cisco? Has an attorney exercised reasonable care if he uses an iPhone on AT&T to Skype with a client? Are preferences for U.S.-based technology products and services still reasonably hinted in ethics opinions? Those questions become more nuanced now. Some lawyers even advocate for hard-copy, paper files, reasoning that theft would require a Watergate-style intrusion as opposed to remote, undetectable, automated data collection. The actual lessons from the NSA fiasco are more esoteric:

1. Risk is the price of admission to life – you can shift it or share it but never remove it; and
2. Even the unfathomable resources of the U.S. intelligence apparatus are inadequate to prevent the painful bite of miscalculated risk.

Fortunately, lawyers train in risk analysis and mitigation. The value we offer society in the face of this uncertainty is the confidence to engage the issues, weighing both risks and rewards. This is our moment.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and an adjunct professor teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Section.

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Bar Humbug!

Rite of Passage. Initiation. Tradition.

I'm talking, of course, about the dreaded bar exam. Naturally, it has been on my graduating, 3L mind lately—what with choosing and buying preparation materials, booking hotel rooms, and studying in what would otherwise be my last “free” summer.

Law school is a three-year program that produces a piece of parchment with “Juris Doctorate” scrawled in calligraphy. The system needs to change. It is too late for me, but somebody has to get the ball rolling. Kansas should automatically admit its in-state law schools’ graduates to its bar. 

Since 1870, Wisconsin has waived the bar exam requirement for its in-state law school graduates. The Wisconsin Supreme Court automatically admits University of Wisconsin and Marquette law graduates into its bar. Wisconsin calls it “diploma privilege” and it is very popular. Upon a recommendation from its state bar association, the Iowa Supreme Court is currently considering that model. New Hampshire has a limited diploma privilege program.

There are three main reasons why Kansas should adopt diploma privilege: (1) the bar exam merely retests the topics and skills already learned and tested upon in law school, resulting in a high passage rate, (2) the costs associated with the bar exam are too burdensome for graduates already drowning in debt, and (3) all licensed lawyers are bound by the Rules of Professional Conduct, which includes a specific duty of competence.

Kansas should adopt diploma privilege because the University of Kansas and Washburn University are already training their graduates to be able to practice law by thinking like a lawyer. Current lawyers may argue that graduating from law school does not make you a competent lawyer. Few, however, would argue that the bar exam closes that gap. Most practitioners would agree that experience above all else leads to competence.

Rather than immediately allowing graduates to obtain valuable experience, states require graduates to pay for and pass a two-day, grueling test that covers all the exams those students must have passed to graduate. Opponents will argue that the bar exam evaluates competency. Perhaps it did at one point, but according to the National Conference of Bar Examiners, over the past eight years the Kansas pass rate on graduates’ first attempt is 89 percent. That percentage is similar to Iowa’s 90.75.

Either Kansas law schools are training their graduates to be able to practice law or they are not. Statistically, they seem to be. But if they are not, doesn’t the Supreme Court have a bigger issue to address?

The second reason Kansas should adopt diploma privilege is because of the costs to graduates. Numerous articles and studies indicate that today’s graduate students incur an exorbitant amount of student debt. According to a 2013 U.S. News & World Report survey, an average law graduate from KU or Washburn leaves encumbered with debt of $79,670 and $80,889, respectively. Most law school graduates then must spend an astronomical amount on bar preparation materials alone. But that is not all.

As the Iowa Blue Ribbon Commission astutely observes, there is a four-month delay between graduation and bar admission—costing an average Iowa law graduate “around $29,000 per applicant, between 27 percent and 30 percent of the typical student’s law school student loan balance.” Using the same methodology, the cost to an average Kansas law graduate is approximately 36 percent of the student’s loan balance.

The third reason is also persuasive. Kansas Rule of Professional Conduct 1.1 reads: “A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.” All attorneys are bound by those rules the instant the state licenses them. And the rule is not ambiguous and it does not mince words.

In the four months between graduation and bar admission, the very high percent of bar-passing graduates do not undergo some significant change rendering them suddenly capable of being competent. Should a graduate fail to learn or apply Kansas’ laws and procedure, he or she violates the Kansas Rules of Professional Conduct and is subject to appropriate disciplinary action.

What is more, Kansas already requires licensed attorneys to maintain their competence by earning a minimum number of continuing legal education (CLE) credits per year in order to keep their license. Therefore, if diploma privilege is adopted, a law graduate’s failure to maintain their CLE credits or abide by the Kansas Rules of Professional Conduct would be grounds for suspension or disbarment.

With all of this in mind, what purpose does the bar exam serve? It seems to be a remnant of age-old tradition, lingering because the older generation remembers having to complete this rite of passage. Tradition is often hard to overcome, but the time is now.

By adopting diploma privilege, Kansas would receive many benefits. Kansas law schools would attract higher caliber ap-
applicants because graduates are immediately licensed and therefore immediately employable. Graduates, like me, might not take a neighboring state’s UBE bar exam because of its portability. Moreover, these graduates will incur less debt because the bar preparation costs, bar exam costs, and employment delay would vanish. Thus, these immediately employable, less debt-ridden graduates would be more open to practicing in Kansas, especially in underserved, rural communities.

Clearly, the rationale behind diploma privilege is compelling. For the unconvinced, perhaps there is a compromise: limiting diploma privilege to those with a law school GPA above a certain threshold. The myriad of advantages clearly outweigh any disadvantages. And everybody benefits—graduates, law schools, and Kansas itself. Like many things that happen here, Kansas will be ahead of the curve. Kansas should adopt Wisconsin’s diploma privilege model for bar admission.

About the Author

Kyle J. O’Brien is a graduating third-year law student at the University of Kansas School of Law. He is a publications editor on the editorial board of the Kansas Journal of Law and Public Policy. O’Brien is particularly interested in the intersection of law and technology, specifically eDiscovery and eFiling.

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Attorneys At Law

A multi-office national law firm with 18 offices throughout the U.S. desires to open offices in Kansas and Missouri and seeks attorneys or firms interested in joining. QPWB is a defense based firm with several practice areas which include all lines of insurance defense, workers’ compensation, financial practices, medical malpractice and long term care, employment, real estate, mediation, arbitration and other business practice areas. Experience and a portable book of business is required. QPWB is open to creative and alternative compensation packages and will consider “of counsel” affiliations.

E-mail resume to resume@qpwbllaw.com
This and That: Choose Your Words Carefully

Precision is next to godliness.  

— Samuel Beckett

Many lawyers make a living arguing about what words mean. Just think about the amount of money in legal fees generated by arguments about what the word “sex” meant when President Clinton famously declared, “I did not have sexual relations with that woman, Ms. Lewinsky”?! Whether you are drafting an affidavit for your client accused of an extramarital affair or engaged in more mundane work, as a lawyer you must choose your words carefully to precisely convey your meaning. This is very challenging. Two words that create common problems with precision are “this” and “that.”

We tend to freely use the word “this” as a short-hand to refer back to something else, as in “this is very challenging.” But what is challenging? Choosing your words carefully? Precisely conveying meaning? Reading this article? In this context the word “this” is used as an indefinite pronoun. But if the information that precedes the indefinite pronoun is compound and complex, as things often are in the legal context, it can be difficult to know what noun it is standing in for. The solution is simple: You need to reference the noun more explicitly.

Let’s say you are drafting an internal policy manual to prevent management from engaging in inappropriate behavior with interns: “A romantic or sexual relationship between a manager and an intern compromises the integrity of the workplace. This is unacceptable and prohibited.” As drafted, it is unclear whether compromising the integrity of the workplace is unacceptable or whether a romantic or sexual relationship is unacceptable, or both. A better version would be, “These relationships are unacceptable and prohibited.”

“That” causes trouble when confused with its cousin “which.” To use these terms precisely, use “that” when it precedes a restrictive clause, or a clause that is essential to the meaning of the sentence. Use “which” when what follows is a nonrestrictive clause, or a clause that is not essential to the meaning of the sentence. “Which” must be preceded by a comma. Did I lose you at the phrase “restrictive clause”? Are you rolling your eyes at the idea that you have to know the difference between a restrictive and nonrestrictive clause to practice law? If so, do not forget the case of the million dollar comma.

The comma case involved a contract that said, “This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms, unless and until terminated by one year prior notice in writing by either party.” The second comma made what followed a nonrestrictive clause, which meant the parties to the contract could terminate it after as little as one year. If they had omitted the second comma, the notice term would have applied only to successive five-year terms and the contract would have had to last at least five years. Because the cost of performing the contract increased dramatically in the first few years of the contract, the outcome of the comma debate was worth millions.

Let me give you a simpler example and perhaps one that will hit closer to home. Imagine a scenario where you are working with a team of other lawyers to prepare a group of documents. You have been assigned to write one of these documents and have spent considerable time and effort creating what you think is a very good one. You and the rest of the team are meeting together when the partner, who is known to have very high standards, walks in and says, “All of the documents, which are terrible, must be rewritten.” You are crestfallen, as you should be, because the partner has just told you your document was terrible and has to be rewritten. When the partner began the clause with “which,” she was saying the clause can be removed from the sentence without changing the meaning. In other words, she could have said, “All of the documents must be rewritten.” But what if the partner had instead used “that”:

“All of the documents that are terrible must be rewritten.”

You are crestfallen, as you should be, because the partner had just told you your document was terrible and has to be rewritten. In that instance you would have hope. The partner did not say all the documents had to be rewritten, only the terrible ones. If the partner begins the clause with “that,” she would be saying that the clause modifies or limits the meaning of the preceding subject. She could have said, “All of the terrible documents must be rewritten.” You can see how it might be helpful to know the difference between the two words.

The truth is that many grammarians argue it is not necessary to be so strict about the distinction between “that” and “which.” Many great writers have used “which” when they meant “that.” Franklin Delano Roosevelt famously said: “December 7, 1941, a date which will live in infamy.” He, of course, was confusing “which” with “that.”
course, meant “a date that will live in infamy.” But then he was also cheating on his wife.

For me, it was worth the effort to learn the distinction, even before I started teaching legal writing. I did not want to be the lawyer whose imprecision cost the client millions of dollars. ■

About the Author

Betsy Brand Six, a native Kansan, practiced environmental law for 13 years before she left private practice to begin teaching in 2004. A graduate of Stanford Law School, she is a Lawyering Skills Professor and the Director of Academic Resources at the University of Kansas School of Law.

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In a future column, we would like to answer your legal writing questions. Email questions to pkeller@ku.edu with the subject line SUBSTANCE & STYLE. You can also mail your questions to Pam Keller, University of Kansas School of Law, 1535 W. 15th St., Lawrence, KS 66045.
Members in the News

Changing Positions

Desarae G. Harrah has joined Manz, Swanson, Hall, Fogarty & Gellis P.C., Kansas City, Mo.

Clayton I. Kerbs has joined Kerbs Law Office, Dodge City, as an associate.

Linda J. Lobmeyer has joined Bors Law P.A., Garden City.

Kaitlin Marsh-Blake has joined Sanders Warren & Russell LLP, Overland Park, as an associate.

Shane C. Mecham has been named shareholder of Levy Craig Law Firm P.C., Kansas City, Mo.

Lindsay A. Shepard has joined Pioneer Electric Co-Operative Inc., Ulysses, as in-house counsel.

Shea E. Stevens has joined Short, Borth & Thilges, Attorneys at Law, LLC, Overland Park.

Changing Locations


Matthew S. Crowley Law Office LLC has moved to 3500 SW Fairlawn Rd., Ste. 200, Topeka, KS 66614.

Kennyhertz Perry LLC has moved to 420 Nichols Rds., Ste. 207, Kansas City, MO 64112.


Miscellaneous

Michael R. Andrusak, Ulysses, was voted to the City of Ulysses Planning Commission.

Hon. J. Patrick Brazil, Topeka, received an honorary doctor of law degree at the Washburn University commencement.

The law offices of Steven W. Graber PA. and White & Johnson LLC have merged practices to form Graber & Johnson Law Group LLC with main offices located in Manhattan and Elkhart.

White Goss Bowers March Schulte & Weisenfels Law Firm P.C., Kansas City, Mo., has changed the name to White Goss, Attorneys at Law.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.

Obituaries

William Edward O’Brien

William Edward O’Brien, 88, of Leawood, died April 25 at his home. He was born October 23, 1925, to Gena Lee Marrow O’Brien and Henry Edward O’Brien, and grew up in Kansas City, attending Southwest and Westport high schools. O’Brien graduated from the University of Kansas, where he was a member of the SAE fraternity and he later earned a juris doctorate from the University of Missouri-Kansas City School of Law.

O’Brien was a member of the Kansas and Missouri bar associations for over 50 years. He served as vice president and secretary of the board of directors for Home Savings Associations for many years and was vice president of C.F. Curry and Co. O’Brien was elected and served as Johnson County treasurer for 20 years, president of the Kansas Treasurers Association, and active with the National Association of County Collectors, Treasurers & Finance Officers. He was a trustee for the Kansas City Museum, elected as a member and served twice as president of Linwood School District #1 School Board in Shawnee Mission.

Annual Kansas Registration

- Forms are due by July 1.
- The Supreme Court has authorized a $100 late fee for delinquent registration. Any registration fee after July 31 shall be accompanied by a $100 late payment fee.

Kansas CLE Commission

- Payment is due by July 1 but not considered delinquent until August 1.
- The annual CLE form for the upcoming 2014-15 compliance period has been mailed to your address listed with the Commission.
- The fee is for those attorneys registering as active and is reflected when you log into your MyKSCLE account.

Federal District Court Registration

- Registration renewals are accepted from June 1 through the deadline of July 1. Attorneys who fail to renew by September 1 are terminated (pursuant to Local Rule 83.5.3) and will be charged a $100 reinstatement fee.
- Renewal is not required for attorneys admitted on or after January 1 of the current year or admitted pro hac vice.
- To maintain your active status, the registration fee is $25. There is no fee to maintain inactive or retired status. There are also no penalties or reinstatement fees to return to active status and it is not necessary to pay the previous year’s fees.

Help is Needed...

to provide pro bono legal services to low-income Kansans; ALL areas of practice are needed.

No potential clients will be given your name without approval and all will be screened for financial eligibility through Kansas Legal Services.

KLS may be able to help with extraordinary litigation expenses when the interests of justice require it.

For more information or to volunteer, contact the KBA at (785) 234-5696 or at info@ksbar.org.
Welcome Spring 2014 New Admittees to the Kansas Bar

The Kansas Bar Association hosted a welcome reception Friday, April 25 to honor 134 new admittees to the Kansas Bar. The reception immediately followed the swearing-in ceremony, which was held at the Topeka Performing Arts Center at 214 SE 8th Ave. in Topeka. KBA Past President Judge Dale Somers, of Topeka, presented the newly admitted attorneys with a complimentary, one-year membership to the KBA.

Chief Justice Lawton R. Nuss, of the Kansas Supreme Court, presided over the swearing-in of the new Kansas attorneys. Carol Green, clerk of the Kansas Supreme Court, administered the Kansas Oath and Timothy O’Brien, clerk of the Federal Court, administered the Federal Oath.

The following individuals successfully passed the Kansas Bar exam and were eligible to be sworn in before the Kansas Supreme Court:

Benjamin Scott Allison, Prairie Village
John Charles Andris, Kansas City, Mo.
Keith Joshua Bae, Overland Park
Wesley Thomas Baldwin, Ulysses
Lindee Marie Balgaard, Wichita
Tracy Leann Barnes, Kansas City, Mo.
Kathryn Ann Barry, Kansas City, Mo.
Andrea Jean Bell, Kansas City, Mo.
Suzanne Elizabeth Billam, Overland Park
Helenna Deanna Bird, Wichita
Benjamin Robert Bowman, Perry
Ryan Hirsch Boyer, Kansas City, Mo.
Nicholas Ryan Bracco, Kansas City, Mo.
Carissa Erin Brinker, Berryton
David Alan Brock, Topeka
Christopher Thomas Campbell, Belton, Mo.
Michael Joseph Cappo, Kansas City, Mo.
Rancid Booten Carr, Olathe
Alexa’jayne Michelle Carter, Mission
Diane Delaine Carter, Kansas City, Mo.
Andrea Marie Chase, Kansas City, Mo.
Wei-erh Chen, Prairie Village
Adam Michael Chingren, Kansas City, Mo.
Kyle James Conroy, Kansas City, Mo.
Jeffrey Hunter Coppaken, Overland Park
Michael James Crawford, Kansas City, Mo.
Daniel Spencer Creitz, Salina
Haden Ross Crampton, Kansas City, Mo.
Thomas Christopher DeBacco, Kansas City, Mo.
Phillip John Devine, Topeka
Ashley Elizabeth Dillon, Kansas City, Mo.

Emily Elizabeth Disney, Topeka
Andrew Martin Duncan, Kansas City, Mo.
Palm Arrowsmith Dzurella, Lenexa
Joshua Michael Emberton, St. Joseph, Mo.
Laura Catherine Fellows, Prairie Village
Louise Ann Fitzgerald, Overland Park
Samantha Tracy Funk, Kansas City, Mo.
Eloy Gallegos, Garden City
Nathaniel James Gilbert, Goodland
Tracy Robb Hancock, Kansas City, Mo.
Kendra Dawn Hanson, Kansas City, Mo.
Tara Jeanne Hawley, Roeland Park
Anne Louise Hershewe, Kansas City, Mo.
Sarah Grace Hess, Shawnee
Laura Nicole Hill, Lawrence
Lorraine Adele Hilleary, Lawrence
Michael Dudley Holman, Chesterfield, Mo.
Brian Kirby Johnson, Oswego
Nicholas James Johnson, Kansas City, Mo.
Douglas Matthew Keane, Prairie Village
India Elizabeth Keefover, Topeka
Rachel Renae Kephart, Kansas City, Mo.
Natalie Sarah King, Fort Smith, Ark.
Kyle Andrew Kitson, Hays
David Francis Knobel, Wichita
Allison Leigh Koehn, Denver
Clay Adam Kuhns, Meade
Erin Beth Bajacon Kurtenbach, Lee’s Summit, Mo.
Brittany Ellyn Lagemann, Shawnee

Carol Green, clerk of the appellate courts, administers the Kansas oath to the new admittees at the 2014 spring swearing-in ceremony while the Kansas Supreme Court and the Hon. Julie A. Robinson of the U.S. District Court for the District of Kansas (third from left) looked on.
jon paul lammers, st. louis
geoffrey paul laturner, chico, Calif.
adrian thomas lecesne, lawrence
sarah elizabeth lintecum, fairway
joshua lee loey, st. louis
lauren elizabeth luhrs, overland park
christopher william david lyon, topeka
kai tate mann, lawrence
Carlos horacio marin urhan, kansas city, Mo.
kate elsa mcclymont, overland park
morgan tracey mccreary, kansas city, Mo.
James m. mckain, gardner
ashley nicole miller, kansas city, Mo.
setareh lara millerille, olathe
Kathryn Ann Millington, Kansas City, Mo.
brett michael mize, oklahoma city, Okla.
mathew william mullen, derby
Christian Douglas Nafziger, westwood hills
Michelle Meredith neis, topeka
Rachel Elizabeth Nelson, prairie village
Mallory Ann nemmers, kansas city, Mo.
James William Newbery, topeka
Cliff Andrew yne, Bonner springs
Juliette Nguyen osler, mission
Brian lee palmer, kansas city, Mo.
Tyler Edwin Patterson, wichita
William Eric Paulson, ottawa
Brian Eliot Peterson, kansas city, Mo.
Laura Elizabeth Peterson, overland park
Caleb Perry Phillips, Columbia, Mo.
Lindsay Rae poehling, overland park
Kevin William prewitt, lenexa
Rachel Marie price, prairie village
Matthew Dean quandt, shawnee
Amy Diane Quinn, Liberty, Mo.
Phillip Randall raine, parkville, Mo.
Alexander Thomas ricke, kansas city, Mo.
Camille La’shawnta Roe, lee’s summit, Mo.
Angel Romero Jr., topeka
Benjamin Nephi Romney, topeka
Tad Broo rulifson, lenexa
Brett Taylor runyon, mission
Sharon Elizabeth rye, wichita
Eric Allen sader, lawrence
Katherina kaur sangha, overland park
Kristina Dianne Schlake, prairie village
Joshua David scott, olathe
Jordan Paul seckman, topeka
Tracy Leigh shaffer, Burlingame
Christopher Curtis, Shank fairway
Joan Mary Sheridan, kansas city, Mo.
Andrew Gregory shireman, Hutchinson
William Joseph shull, lenexa
Catherine Diane singer, overland park
Robert Marnett smith, kansas city, Mo.
Maciej Sokolowski, topeka
Andrew Gregory shireman, Hutchinson
William Joseph shull, lenexa
Catherine Diane singer, overland park
Robert Marnett smith, kansas city, Mo.
Maciej Sokolowski, topeka
Harrison Clark Spencer III, manhattan
Charles Robert Stinson, overland park
Terra Lyn Tecchio, topeka
Henry Job thomas, overland park
Roberta Mae vath, laplace, La.
chad Eliott voss, kansas city, Mo.
Emily Alexandra wales, Washington, D.C.
Tanner Lynn weigel, Hays
Tyler Lynn weigel, kansas city, Mo.
Nathan Severance weinert, Washington, D.C.
Elizabeth Capps welsh, lawrence
Catherine Marie wiehl, kansas city, Mo.
Thomas James wiese, St. Louis
Grant Walsh Williams Loch, lloyd, Mo.
Reed Steven Williams, leawood
Charles Billups Windham III, overland park
Brian Claude yeager, lawrence

new admittees being recognized by their family and friends at the 2014 spring swearing-in ceremony.

new admittees, along with their family and friends, mingle at the KBA reception following the 2014 spring swearing-in ceremony.

Natalie S. King, of Fort Smith, Arkansas, displays her new bar certificate to practice law in Kansas at the 2014 KBA reception.
Horatius at the Bridge: A Kansas Lawyer’s Battle Cry

By Ron Smith

Courtesy of the Library of Congress, LC-USZ62-104988
Cobb County, Georgia, north of Atlanta, is hot in late June. That’s true in 2014. It was also true 150 years ago, on Sunday, June 26, 1864. In those days, Cobb County was small mountain country west of the railroad junction town of Marietta. In 1864, two armies were catching their breath that day near Kennesaw Mountain after weeks of fronting each other and digging hurried trenches. They were also getting relief from the rains that had come in relentless torrents that summer in north Georgia.

The Confederate brigades were in as much misery as their Union counterparts. They found themselves continually flanked by the larger Union forces. There had been several skirmishes, but the norm was hurried evacuations and hard marching to more wet and uncomfortable new positions along a web of narrow dirt roads between Chattanooga and Atlanta. Historian Bruce Catton described these maneuvers as “a macabre dance” that characterized the Atlanta campaign being led by former Leavenworth attorney, now Lt. Gen. William T. Sherman.¹

Kennesaw is a Cherokee word meaning burial ground.² At Kennesaw the maneuvering stopped. Veterans on both sides sensed that something big was coming. Sgt. Nixon Stewart of the 52nd Ohio spent the night reading his Bible by a campfire. Over and over he read Psalm 91, the Soldier’s Psalm, as if repeated reading of the passage would protect him from whatever was going to happen. “A thousand shall fall at thy side and ten thousand at thy right hand, but it shall not come nigh thee.”³ He took the promise to heart and commended his life to God. But he slept fitfully.⁴

In 1864, the American Civil War had reached its zenith in casualties. The Armies of the Potomac and of Northern Virginia were locked in a bloody stalemate around Richmond, Virginia. In five battles between May 7 and June 30, there were over 61,000 Union casualties,⁵ slaughter unheard of in America. The numbers would have raised a public outcry had Secretary of War Edwin Stanton not falsified the records before releasing them.⁶

Atlanta was the prize of the 1864 western campaign. Gen. Sherman’s maneuvering met with more success than Ulysses S. Grant’s in the east and with far fewer casualties. His hard-bitten Cumberland veterans of Chickamauga and Missionary Ridge were marching behind him, steadily advancing into Georgia. The blue hordes were coming. Atlanta civilians evacuated the city. Thousands of slaves hurriedly prepared defensive trenches for the Confederate Army to weather the siege that everyone expected.

Dan McCook, the Lawyer

Dan McCook was a trim 6-foot 29-year-old colonel of infantry in 1864, with steel gray eyes and the figure of manliness. He had been a leader of the Leavenworth bar in its courtrooms five years earlier and looked every inch a battlefield commander. Before the war, he was the principal trial attorney in the firm of Sherman, Ewing and McCook. McCook had read law in Ohio with his brother George McCook and George’s partner, Edwin Stanton, Lincoln’s secretary of war.

The son of an Ohio judge from Steubenville with a long political pedigree in eastern Ohio Democrat politics, McCook was a sickly and unhappy child, frail, “delicate and nervous” to a fault.⁸ Unable to play with his companions, he became an avid reader from his father’s large library and acquired a life-long love of classical literature. In Leavenworth, McCook intended to make a name for himself, and perhaps make his fortune as well. He initially partnered with John Pendery and David Bailey. Collection law was a big part of small practices in those days, and Pendery sent McCook to visit the Colorado gold fields in search of wayward debtors. McCook found the life of constant travel in mining towns beyond his ability to cope, given his childhood. Prior to McCook’s arrival, the firm of Sherman and Ewing “didn’t have any practical lawyers in it,” Pendery later noted for a family history, and at the request of Tom Ewing, Pendery was persuaded to allow McCook to become Ewing’s partner and trial specialist.⁹

The new firm in Leavenworth was successful. Many settlers were from Ohio and Indiana, and the Ewing and McCook names and political prominence resulted in the firm’s getting some high profile cases, even before the U.S.
McCook. When he was not found, Sherman asked for a continuation, which was denied. Sherman was sent into court to handle the eviction without preparation, stammered through some questions, and promptly lost.

Sherman and the dejected client were in the office when McCook returned. The client did not mind the eviction but the landlord only owned the ground, and the teamster had paid good money for the prefabricated house on the property. McCook suggested that since the house was a poorly constructed pre-fab, the teamster’s friends could easily fix that, in the dead of night. The next day the house was found in another location. Sherman may not have liked this post-trial remedy, which sounded like it was concocted in the back of a saloon.

Dan McCook, the Reluctant Warrior

On the home front, McCook had fallen in love with Julia Tebb in 1860. She was the daughter of a transplanted Virginia attorney and slave-owner living near Platte City, Missouri. South Carolina had already seceded, and the talk was subdued at their wedding, filled with dread as to how the new president would handle the sectional crisis.

While McCook had promised Julia he would be neutral, when war came he could not keep that promise. Falling back into his classical literature training, he wrote his brother George, “Everything seems dark to me. We are borne on an overwhelming and relentless tide of anarchy. My old army fever returns. But like the Huns as they hovered upon the Danube, menacing both Constantinople and Rome, I am hesitant against which empire to turn my weighty sword. . . . Public sentiment in Leavenworth is divided. . . . I know not whether to support the administration or oppose ‘coercion.’”

Although without any formal military training, McCook turned into a natural leader during the war and found his way to command of a brigade through the family ties and service with his older brother, Alexander McDowell McCook. His first service was with the First Kansas regiment, composed of Leavenworth and Atchison men who suffered more than 50 percent casualties at Wilson’s Creek in August of 1861. Captain Dan McCook was not at Wilson’s Creek with his men, however. His old bronchitis had come back, and he was suffering at home with pneumonia when the First Kansas fought this deadly southwest Missouri battle. When he recovered, as a lieutenant, he served on Alexander’s staff at Shiloh, participating in the second day’s battle there. Afterwards, the governor of Ohio allowed him to raise the 52nd Ohio Regiment, naming it after the famous Royal Army 52nd Regiment of Foote that fought at Waterloo. The Ohio version of the 52nd Foote fought at Perryville, Stones River, Chickamauga, and Missionary Ridge. The grim attrition of war brought McCook a rapid rise in rank. By the beginning of 1864, McCook was a colonel commanding a brigade, but the Republican Congress refused to approve a brigadier general star for him, a well-known Democrat, even though his former mentor was Stanton.
the stanza from the epic poem by Thomas B. Macaulay:

Then out spoke brave Horatius, the Captain of the Gate:
To every man upon this earth, death cometh soon or late;
And how can man die better than facing fearful odds,
For the ashes of his fathers, and the temples of his Gods
...  

Some of his men undoubtedly wondered what in tarnation was going on. Schooling in classical literature was not widespread in the ranks of his Ohio and Illinois regiments. Had their colonel gone loony? Others had no idea what their colonel was yelling. But at least one of the men who heard the quotation said it inspired a patriotic feeling. “It was a heathen refrain, but impregnated with love of country and kith and kin, and the duty owed to them all.” McCook was calling from Macaulay’s poem upon core values found in most American armies of our wars: bravery and the willingness, when necessary, to volunteer to face overwhelming odds for all the right reasons. McCook’s brigade faced those sorts of odds that day.

A huge cannonade erupted out of the Union lines, intending to soften up the Confederate positions. The rumble of artillery could be felt in Atlanta, many miles to the south. When the bombardment ceased, under an “ominous stillness,” McCook’s brigade surged forward at the Dead Angle along with the remainder of his division, the brigades of Charles Harker, John G. Mitchell, and George Wagner. The men had to have the inner foreboding that Pickett’s brigades felt a year earlier at Gettysburg. The brigades “charged down the slope, across the valley, and up the opposite slope,” pushing aside abatis, advancing on Cheatham Hill. The four brigades had to thread Confederate rifle fire and canister and to push around or over fallen trees, struggling up the slope of the ground.

All of the brigades but McCook’s attacked in typical two-lines abreast regimental formation. McCook stacked his five regiments and drove them forward one behind the other, the men in the rear coming forward over the bodies of the dead and wounded in front. McCook’s first regiment fought the Rebel skirmishing regiment hand-to-hand before pushing the Confederates back. When Rebels arrived at the Dead Angle, withering Confederate volleys cut down hundreds.

Twice they fell back but rallied and pushed forward to the base of the parapets. Gaps formed in the Union lines, ranks of men falling in heaps amid the smells, screams, and endless bone-shattering noise of the battlefield when canister cut down whole files of men in the grim, bloody, organized killing associated with frontal assaults. The 113th Ohio lost 153 men and half of its 19 officers in 20 minutes of slaughter. On horseback, Harker galloped ahead of the 42nd Illinois to within 15 yards of the rebel trenches, where he and his horse were shot down. Harker bled death on the field, but earned a place in Kansas history.

McCook led his men forward on foot, struggled onto the parapet, calling out to “bring up those colors.” A color sergeant of the 52nd Ohio climbed the parapet, planted the flag, shot a Rebel captain who tried to seize it, then in turn was riddled with bullets. Another color sergeant picked up the flag and fell. Two more color bearers fell in the 52nd Ohio’s attack. “It is God for us all now,” one man shouts. Samuel Canterbury of the 86th Illinois saw McCook take the colors and hold them aloft, slashing at protruding bayonets with his other hand and his sword. His color bearers screamed at him to “get down” and take cover, but McCook damned them above the din of battle to “attend to your own business!” Then he was shot in the stomach, falling backwards. McCook’s second in command, Col. Oscar Harmon, took over only a few minutes before he fell dead.

Somehow, under withering fire, McCook’s men pulled him off the battlefield as the ill-fated Union attack petered out. Only John Mitchell’s brigade took any part of the Confederate trenches that day, and they were thrown out by a counterattack. The Union army, by frontal assault, had gained nothing. Nearly every senior officer in McCook’s five regiments was killed or wounded. Three thousand Union boys in the attacking division were casualties. As portrayed in Ted Turner’s movie, “Gettysburg,” in a line attributed to the Gen. John...
Buford character, “We will charge valiantly... and be butchered valiantly.”26 Such was the fate of McCook’s Brigade at Kennesaw Mountain, Georgia.

McCook’s wound at Kennesaw Mountain was stabilized by a brigade surgeon, but there was not much Civil War medicine could do for stomach wounds. Almost all were mortal. Now the young Colonel had to endure the long miserable stop-and-go hospital train ride home to Streubenville. Eventually, he arrived there, severely weakened, where his litter was met by Julia and the family. He was made as comfortable as possible, but sepsis set in, and such an infection spreads rapidly. His fever increased, as did his heart rate. McCook’s body that from youth had been frail could not handle the infection. His health worsened.

On July 16, 1864, word reached the McCook house that the Republican Congress finally had voted him a brigadier’s commission. Among Dan McCook’s last conscious statements was to his wife, to tell Congress what they could do with their commission. Among Dan McCook’s last conscious statements was to his wife, to tell Congress what they could do with their commission. On July 17, with Julia nearby, McCook died.

Barbara and Charles Whalen note in their book, “The Fighting McCooks,” that few families had given so much blood and treasure for their country. “Seventeen McCooks fought for the Union in the Civil War: Four gave their lives to save the Union.”27 One of them was a very good Kansas lawyer.

About the Author

Ron Smith has been a partner at Smith, Barnett, Larson & Butler LLC in Larned since 2008. A Vietnam veteran, he is a 1977 Washburn Law School graduate and majored in American history at Kansas Wesleyan. Smith served as general counsel of the KBA in the 1980s and 1990s. In 2008 his biography on Thomas Ewing Jr., noted lawyer, judge, Free State advocate, and general in the Union Army during Bleeding Kansas and the Civil War, was published.

ENDNOTES
3. Psalm 91:7 (King James).
5. Wilderness, 17,666 casualties; Spotsylvania Courthouse, 18,399, Drewry’s Bluff, 4,100; Cold Harbor, 12,737; and the initial part of the Petersburg campaign, 14,948. Confederate casualties were not as high, but Union losses could be replaced while Confederates’ could not.
7. Before the widespread use of law schools, lawyers learned their craft as clerks to other lawyers, where they spent a lot of time “reading the law.” Notables, such as Abraham Lincoln, became lawyers this way. When the studying was over, the wannabe lawyer would sit for an examination by a few other attorneys and judges who administered an oral bar exam. In the Leavenworth law firm of four attorneys, Thomas Ewing Jr. went to a law school in Cincinnati, Hugh Ewing and McCook read law with different attorneys, and William Tecumseh Sherman became a lawyer by simply applying to federal court in Leavenworth and was admitted at the whim of Judge Samuel Lecompte.
8. Whitelaw Reid, 1 Ohio in the War: Her Statesman, Her Generals, and Soldiers 904 (1868).
10. Fackler v. Ford, 65 U.S. 322 (1860). The matter originated in Leavenworth but was argued at the U.S. Supreme Court by Thomas Ewing Sr., Tom Ewing’s father.
13. McCook’s murder case was featured in the Tazeewell (Ill.) Register on May 12, 1859. Id. at 259.
14. Dan McCook to James Roberts (April 18, 1859) (on file with the Kansas Historical Society).
17. “The house-moving story was printed in The Topeka Capital-Journal on October 5, 1958, p. 12B.
18. Dan McCook to his brother George McCook (March 10, 1861) (quoted in Whalen & Whalen, supra note 12, at 261).
21. Castel, supra note 19, at 309.
22. James T. Holmes, 52nd OVI Then and Now 177-78 (1898).
24. Fort Harker was built near Kanopolis, Kansas, in 1866 by the army. For six years it helped protect the post-war growth of new railroads in the area from Indians. The fort was named after Charles Harker. Kansas Historical Society, Fort Ellsworth/Fort Harker Timeline, http://www.kshs.org/kansapedia/fort-ellsworth-fort-harker-timeline/11178 (last visited Jan. 23, 2014).
25. Nathaniel Cheairs Hughes Jr. & Gordon D. Whitney, Jefferson Davis in Blue: The Life of Sherman’s Relentless Warrior 259 (2002); see also Stewart, supra note 4, at 114.
27. Whalen & Whalen, supra note 12, at title page.
In the Supreme Court of the State of Kansas

ORDER

Rule Relating to Language Access Committee

The following Rule 1701 relating to the Language Access Committee is hereby adopted, effective the date of this order.

RULE 1701

LANGUAGE ACCESS COMMITTEE

(a) Purpose.

A Language Access Committee is established for the purpose of making recommendations to the Supreme Court regarding the developments and ongoing administration of a comprehensive language access program to further accessibility to the Kansas courts by persons with limited English proficiency.

(b) Membership.

The Committee will be composed of not more than twelve members.

(c) Appointment.

The Supreme Court will appoint the members of the Committee.

(d) Terms.

The terms of the inaugural members of the Committee will be staggered. At the expiration of each inaugural member’s term, the term of each succeeding member will be three years. No member of the Committee will be eligible for more than two consecutive terms. A member appointed to complete an unexpired term will be eligible to serve one more consecutive 3-year term. A member is eligible for one or more additional terms after a break in service.

(e) OJA Representative and Liaison Justice.

(1) In addition to the members described in subsection (b):

(A) there will be a permanent, nonvoting seat on the Committee for a representative of the Office of Judicial Administration; and

(B) the Chief Justice of the Supreme Court will designate a liaison to the Committee.

(2) The persons serving on the Committee under paragraph (e)(1) are not subject to a term limit under subsection (d).

BY ORDER OF THIS COURT, this 2nd day of May, 2014.

Lawton R. Nuss
Chief Justice

2014 SC 17

In the Supreme Court of the State of Kansas

Rule Relating to Judicial Conduct

RULE 602

COMMISSION ON JUDICIAL QUALIFICATIONS

Rule 602(c) is hereby amended, effective July 1, 2014.

(c) The commission shall meet each January June to select a chair and vice-chair, each of whom shall serve for a term of one year and until a successor is elected. At the initial meeting of the expanded commission, the chairs shall divide the commission shall be divided into two seven-person panels, one to be designated Panel A and the other Panel B. Each panel shall consist of three judges, two non-lawyers and two lawyers. The chair of the commission shall chair Panel A and the vice-chair of the commission shall chair Panel B. Each panel shall elect a second vice-chair, who shall serve for a term of one year and until a successor if elected.

BY ORDER OF THIS COURT, this 27th day of May, 2014.

Lawton R. Nuss
Chief Justice

2014 SC 35
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ATTORNEY DISCIPLINE

SIX-MONTH SUSPENSION
IN RE BRENDON P. BARKER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 110,117 – APRIL 11, 2014

FACTS: This is a contested original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Brendon P. Barker, of Pratt, an attorney admitted to the practice of law in Kansas in 2001. Barker’s ethics violations involved his representation in a conservatorship and guardianship case. The time spent dealing with problems in his family life and outside business ventures contributed to Barker’s misconduct in this case.


HEARING PANEL: The Hearing Panel agreed with the violations admitted by Barker. The Hearing Panel unanimously recommended that the respondent be suspended for a period of six months.

HELD: Court suspended Barker from the practice of law for six months. Court found Barker acted with knowledge and a conscious awareness of his misconduct, that he engaged in the misconduct for five years, his client was vulnerable and inexperienced with legal matters, he was indifferent to making restitution prior to the hearing, and that his answer to the complaint was untimely. Before he is reinstated, Barker must show he has fully paid or entered into a written plan to fully pay restitution for in misconduct in the amount of $21,351.55.

TWO-YEAR SUSPENSION SUSPENDED AND RESPONDENT PLACED ON TWO YEARS’ SUPERVISED PROBATION
IN RE KEVIN DELLETT
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 110,452 – MARCH 28, 2014

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Kevin E. Dellett, of Overland Park, an attorney admitted to the practice of law in Kansas in 1995. Dellett’s conduct involved failure to communicate with clients, failure to keep time records in a criminal case, allowing a divorce case to go into default, failure to timely file a lawsuit, and improper billing.

DISCIPLINARY ADMINISTRATOR: On September 20, 2012, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer and also eventually filed a plan of probation. On February 11, 2013, the deputy disciplinary administrator and respondent agreed to a lengthy, written stipulation which the hearing panel accepted at the April 10, 2013, hearing on the formal complaint.


HEARD: Court deemed the panel’s findings of fact admitted and the evidence before the hearing panel was established by clear and convincing evidence the charged misconduct in violation of the KRPC. Court considered respondent’s violations, the aggravating and mitigating circumstances, the relevant ABA Standards, and respondent’s detailed probation plan, as well as his demeanor and presentation before this tribunal. Court concluded it is in the interest of the citizens of Kansas and the legal profession to suspend respondent for two years but to suspend that suspension as long as respondent adheres to the probation plan detailed in the final hearing report with one change. Court modified the probation plan to the extent...
it placed respondent on probation until released by this court and instead directed that respondent be placed on probation for a two-year term.

**CRIMINAL**

**STATE V. ALDERSON**  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 106,471 – APRIL 11, 2014

FACTS: In 1995, Alderson was convicted of one count of felony murder and one count of aggravated battery. The Court previously affirmed the convictions, vacated the upward duration departure sentence, and remanded. The new sentence, which was imposed on October 30, 1996, and which was the same upward departure sentence of life imprisonment with a consecutive sentence of 86 months for aggravated battery, was affirmed by this Court. The issue of restitution was not addressed in the previous two appeals. The sentencing court ordered Alderson to pay restitution to various individuals and entities, including a hospital, insurance companies, and the Kansas Crime Victims Compensation Board, totaling $119,899.86. That amount was based on the calculations made at the original sentencing hearing. It appears that no restitution has ever been collected from Alderson. In 2009, Alderson filed a pro se motion requesting to be released from the restitution order based on dormancy. The district court summarily denied the motion.

ISSUES: (1) Restitution and (2) dormancy

HELD: Court concluded that the district court did not enter an enforceable restitution judgment when it sentenced Alderson. It instead provided an advisory calculation of damages for the benefit of the Kansas Prisoner Review Board. There being no judgment of restitution, the judgment could not become dormant. The notice that Municipal Services Bureau sent Alderson erroneously asserted that he was in default on a judgment, even if the notice was commissioned on behalf of the district court. Equitable principles, such as quasi-estoppel, cannot be used to convert a legal criminal sentence into an illegal sentence. When it denied Alderson's dormancy claim, the district court relied on Robards, 31 Kan. App. 2d 1138, and ruled that the statutory period to enforce the judgment would begin when he is released from prison. Because of statutory changes, Robards no longer accurately describes the law in this state. The district court was correct, however, in rejecting Alderson's petition seeking a declaration of dormancy. Because there is no pending judgment ordering Alderson to pay restitution, the district court had no jurisdiction to release an obligation on his part.

STATUTES: K.S.A. 21-4301, -4603, -4603d, -6604; K.S.A. 22-3424; and K.S.A. 60-2403

**STATE V. BETANCOURT**  
SEDGWICK DISTRICT COURT – AFFIRMED  
NO. 106,318 – APRIL 11, 2014

FACTS: Betancourt was convicted of first-degree murder and criminal discharge of a firearm at an occupied building after he and three other people orchestrated a revenge shooting directed at the individual who allegedly was involved in an altercation that ended with Betancourt's brother going to the hospital. Betancourt challenged the jury instructions with regard to intent, aiding and abetting, and voluntary intoxication. He also challenged gang evidence elicited during voir dire. The district court summarized denied the motion.

ISSUES: (1) Jury instructions, (2) gang evidence during voir dire, and (3) cumulative error

HELD: Court held the jury instruction explicitly required the jury to find that Betancourt intended to aid and abet in a killing done with premeditation and the instructions accurately stated Kansas law. Court held that murder by shooting a gun and murder by facilitating the shooter are not separate means of committing a shooting crime that required alternative instructions. Court found aiding and abetting is not alternative means, the jury was properly instructed on the elements of first-degree murder and sufficient evidence supported that conviction. Court held that although Betancourt's consumption of intoxicants was introduced, it was never emphasized or shown to have impaired his ability to form the intent to aid and abet a murder. Therefore, not error to omit an instruction on voluntary intoxication. The Court found the juror who mentioned gang involvement did so only in passing and the topic was not brought up again. The defense did not ask for permission to conduct an examination of the jury for prejudice, did not request an instruction directing the jury to disregard unsworn statements by jury members, and the defense did not seek to strike the juror in question for cause. Last, the Court found no cumulative error.

STATUTES: K.S.A. 21-3205, -3401, -3423, -4226; K.S.A. 22-3414; and K.S.A. 60-261, -2105
STATE V. BRADFORD  
DICKINSON DISTRICT COURT – AFFIRMED  
NO. 108,748 – APRIL 25, 2014

FACTS: Bradford filed 2012 motion to correct illegal sentence, claiming his underlying convictions arising from a 1997 fatal home invasion were multiplicitious. District court considered motion on its merits and determined the convictions were not multiplicitious. Bradford appealed.  
ISSUE: Motion to correct illegal sentence  
HELD: Consistent with well-established case law, issue raised in Bradford’s motion is a collateral attack on his convictions rather than a sentencing issue. District court’s denial of motion is affirmed because remedy was inappropriate, and not on district court’s assessment of merits.  
STATUTES: K.S.A. 2013 Supp. 22-3601(b)(3); and K.S.A. 22-3504

STATE V. FRITZ  
SEDGWICK DISTRICT COURT – AFFIRMED  

FACTS: On August 16, 2010, Fritz entered a plea of no contest to one count of felony murder, three counts of attempted first-degree murder, one count of aggravated robbery, and four counts of attempted aggravated robbery. On September 30, 2010, the district court sentenced him to a term of life imprisonment plus 652 months. On December 8, 2010, Fritz docketed his appeal from his sentence. On January 21, 2011, he filed a pro se motion to withdraw his plea, alleging ineffective assistance of counsel. Then, on March 14, 2011, he withdrew his motion because his case was pending on appeal. After the parties submitted their appellate briefs but before the case was set on a docket, on December 16, 2011, this court issued an order summarily vacating the sentence and remanding the case to the district court for resentencing. On March 9, 2012, the district court resented Fritz, imposing a hard 20 life sentence plus 330 months. Also on March 9, 2012, new counsel filed a renewed motion in district court seeking leave to withdraw the no contest plea. After hearing brief argument from the parties, the district court denied the motion without conducting an evidentiary hearing. Fritz took a timely appeal to this court.  
ISSUE: Motion to withdraw plea  
HELD: Court found that aside from stating that he had not been sleeping well, Fritz asserted no specific facts indicating that he involuntarily or unknowingly entered into the plea agreement. The record shows that the district court went over the plea agreement in detail, including the positions of the state and the defense regarding sentencing. The court also inquired whether Fritz was satisfied with the services provided by his attorney, whether he had any complaints about the manner in which he had been counseled, and whether he had been subject to any threats or promises beyond the specific language of the plea agreement. Fritz explicitly stated that he had no complaints and had not been subject to threats or promises. Court held the district court elected not to choose between the good-cause and the manifest-injustice standards. Instead, it ruled that Fritz’s motion failed under either standard. Court reached the same conclusion. Although the con-
Appellate Decisions

clausory allegations of the motion correspond with the State v. Edgar, 281 Kan. 30, factors (incompetent counsel, coercion by counsel, and plea not understandably made), they lack the substance that State v. Jackson, 255 Kan. 455, requires. Court found no abuse of discretion in the district court’s decision.

STATUTES: K.S.A. 22-3210; and K.S.A. 60-1507

STATE V. GIBSON

WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 106,646 – APRIL 18, 2014

FACTS: During two interviews, 17-year-old Gibson made inculpatory statements regarding a drug related killing for which he was convicted on charges of first-degree murder and aggravated robbery. After Jackson v. Denno evidentiary hearing, district court held the statements were voluntary. District court later denied Gibson’s pro se suppression motion to reconsider that earlier ruling and refused to allow Gibson to testify or proffer testimony on the pro se motion. On appeal Gibson claimed remand was required for more detailed findings to support the district court’s conclusion that Gibson’s statements were voluntary, or that the record was insufficient to sustain that conclusion. Analogizing State v. Jones, 290 Kan. 373 (2010), Gibson also claimed structural error that “mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider or abettor” was not reversible error. Court stated however, the better practice would have been to add the language. Court found no error in the trial court’s decision to dismiss a compromised motion at resentencing.

ISSUES: (1) Voluntariness of Gibson’s statements and (2) refusing Gibson’s testimony

HELD: Standards stated and applied in determining whether a juvenile defendant’s inculpatory statements to police were freely and voluntarily given. Based on facts presented, applicable factors, and Kansas case law, the record in this case is sufficient for appellate review. There was substantial competent evidence that Gibson’s statements were voluntary.

Right to self-representation in Jones was distinguished. District court’s decision to deny Gibson’s motion for reconsideration was reviewed for abuse of discretion, and none is found.

STATUTES: K.S.A. 22-3215(3), -3601(b)(1); and K.S.A. 60-252, -252(b), -404

STATE V. HANEY

LYON DISTRICT COURT – REVERSED, SENTENCE VACATED, AND REMANDED WITH DIRECTIONS
COURT OF APPEALS – REVERSED
NO. 105,685 – APRIL 25, 2014

FACTS: After being charged with numerous sex offenses involving his teenage stepdaughter, Haney agreed to plead nolo contendere to one count each of aggravated sodomy and attempted aggravated sodomy. In exchange for the plea, the state dismissed the other charges and agreed to a sentencing recommendation that permitted Haney to seek a shorter prison term through a durational departure, but he could not seek probation. Although the district court knew that the Board of Indigents’ Defense Services (BIDS) had approved Haney’s request to fund a sex offender evaluation to use in support of his motion for a durational departure sentence, the court denied Haney’s request to continue the sentencing hearing to allow for the completion of that evaluation. The Court of Appeals found that the district court’s continuance denial was erroneous but harmless.

ISSUES: (1) Sentencing, (2) sex offender evaluation, and (3) departure factors

HELD: Court stated that after denying Haney the opportunity to obtain evidence to present at the departure hearing, the district court then denied the departure motion based upon the lack of evidence. Court found the Court of Appeals relied on that circular rationale to find that the trial court’s error was harmless, stating: “Given the district court’s conclusion that Haney only presented arguments and not evidence, there is no reasonable possibility in light of the entire record that Haney would have received a lesser sentence had the district court granted a continuance.” Court held that a fair reading of that holding would be that the denial of Haney’s statutory right to present evidence is harmless when the denied evidence is not presented. Court could not declare that the lost opportunity to present evidence in mitigation of punishment was harmless in this case. Court vacated Haney’s sentence and remanded with directions that Haney be given an opportunity to obtain a sex offender evaluation to use in support of his departure motion at resentencing.

STATUTES: K.S.A. 21-4716; K.S.A. 22-3401, -3424; and K.S.A. 60-261

STATE V. HILT

JOHNSON DISTRICT COURT – CONVICTIONS AFFIRMED, SENTENCE VACATED IN PART, AND REMANDED WITH DIRECTIONS
NO. 105,057 – APRIL 18, 2014

FACTS: Hilt appeals his conviction and sentences arising out of the September 2009 murder of his ex-girlfriend. Hilt raises a myriad of issues on appeal.

ISSUES: (1) Jury instruction, (2) alternate juror, (3) admission of evidence, (4) prosecutor misconduct, and (5) sentencing

HELD: Court held the trial court’s giving the aiding and abetting jury instruction without giving the additional language that “mere association with the principals who actually commit the crime or mere presence in the vicinity of the crime is insufficient to establish guilt as an aider or abettor” was not reversible error. Court stated however, the better practice would have been to add the language. Court found no error in the trial court’s decision to dismiss a compromised juror for misconduct and to seat an alternate in the juror’s place. Court found no abuse of discretion in the trial court’s decision to admit a knife found in the trunk of the victim’s car and a charred piece of pipe found in the smoker grill at one
of the assailants’ home. Court found the issue of admission of a blood-spatter test that was conducted under conditions dissimilar to those that existed at the time of the victim’s murder was not properly preserved for appeal and the Court did not address it. Court held the trial court did not err in refusing to give a voluntary intoxication instruction because it was not legally or factually appropriate based on the evidence. Court held that a jury instruction on a lesser offense of voluntary manslaughter was not factually appropriate. Court found no abuse of discretion in the trial court’s admission of two autopsy photographs. Court found no prosecutorial misconduct in the closing argument where the prosecutor made reference to the movie “Goodfellas” and “finishing the job” of killing the victim. Court found no cumulative error. Court found it did not have jurisdiction to consider Hilt’s challenge to the use of the high sentence in the Sentencing Guideline’s grid range. However, Court found that Hilt's hard 50 sentence violated his Sixth Amendment rights and this case was not one of the rare instances when the error could be declared harmless. Court remanded for resentencing.

STATE V. NEIGHBORS
LYON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 105,588 – APRIL 25, 2014

FACTS: Court considered whether a warrantless entry by police and their ensuing search and seizure were justified under the emergency aid exception when officers entered a locked apartment to assist an unresponsive person. Neighbors, but then began a criminal investigation once the individual was awake and clearly not needing emergency medical assistance. Neighbors had permission to be in the apartment, but was a known drug offender. After officers conducted a pat-down search, they believed he was in possession of drugs. Officers ultimately found methamphetamine on Neighbors. The district court granted Neighbors’ motion to suppress, finding the emergency had subsided. The Court of Appeals reversed the district court by holding that the emergency aid exception to the warrant requirement to be considered reasonable and valid under the Fourth Amendment to the U.S. Constitution and § 15 of the Kansas Constitution Bill of Rights. Court found in this case the officers unreasonably exceeded the permissible scope of their warrantless entry and agreed with the district court that the drug evidence obtained as a result should be suppressed. Court realigned its previous Kansas test for applying the emergency aid exception (also referred to in our case law as the “emergency doctrine”) with more recent decisions of the U.S. Supreme Court. See, e.g., Brigham City v. Stuart, 547 U.S. 398, 403, 406-07, 126 S. Ct. 1943, 164 L. Ed. 2d 650 (2006) (emergency aid exception allows warrantless entry into a dwelling when officers have objectively reasonable basis to believe an occupant is seriously injured or imminently threatened with serious injury). Court reversed the Court of Appeals decision reversing the district court’s suppression ruling and remanded the case to the district court for further proceedings consistent with its ruling.

STATE V. RAMIREZ
SEWARD DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 102,421 – APRIL 25, 2014

FACTS: Ramirez attempted to kidnap a 1-year-old child. Jury convicted him of aggravated burglary and endangering a child, and on uncharged crime of criminal restraint in lieu of the charged kidnapping offense. Applying strict elements test, Court of Appeals affirmed in an unpublished opinion. Concurring opinion found it unnecessary to compare elements because criminal restraint is a lesser degree of the crime of kidnapping, thus a lesser-included crime. Review granted on whether district court had jurisdiction to convict Ramirez of criminal restraint as a lesser-included offense. ISSUE: Criminal restraint – lesser-included crime HELD: Agreement stated with concurring opinion in Court of Appeals’ decision. Criminal restraint constitutes a lesser degree of the crime of kidnapping. Under K.S.A. 21-3107(2)(a), it constitutes a lesser-included crime of kidnapping, thus district court had jurisdiction to convict Ramirez of uncharged crime of criminal restraint. Ramirez’s convictions are affirmed.

STATE V. SHARKEY
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS
NO. 106,150 – APRIL 11, 2014

FACTS: Sharkey appeals his jury trial conviction for aggravated indecent liberties with a child when he had sexual contact with a 12-year-old friend of his stepdaughter. He argued it was error to include lifetime electronic monitoring in the sentence. There was insufficient evidence of intent, and it was error to deny his pro se motions for new trial – based on ineffective assistance of counsel – without appointing a new attorney to argue the ineffective assistance of counsel motion.
ISSUES: (1) Lifetime electronic monitoring, (2) sufficiency of the evidence, and (3) ineffective assistance of counsel.

HELD: Court found that even though the lifetime electronic monitoring condition had not been announced at the time of sentencing, the error had been corrected through a nunc pro tunc journal entry and was moot. Court rejected Sharkey's argument that the state presented insufficient evidence that he acted with both the intent to arouse or satisfy his sexual desires and the intent to arouse or satisfy the sexual desires of the alleged victim. Court found it had decided the issue in State v. Britt, 295 Kan. 1018, that the intent element in this case was the basis for a jury instruction and does not state alternative means. However, Court held the district court erred in denying his pro se motion for new trial – based on allegations of ineffective assistance of counsel – without first appointing new conflict-free counsel to assist him in arguing the motions. Court held Sharkey was denied the assistance of counsel at a critical stage of the criminal proceedings and prejudice is presumed. Court remanded with instructions to hold a new hearing on Sharkey's pro se new-trial motions with new conflict-free counsel appointed to argue the motion.

STATUTES: K.S.A. 21-4643; and K.S.A. 22-3501, -3504, -3601, -4503, -4506

STATE V. SOTO
SEDGWICK DISTRICT COURT – AFFIRMED IN PART, VACATED IN PART, AND REMANDED WITH DIRECTIONS

FACTS: Soto appeals his jury conviction and sentence for the first-degree premeditated murder. Soto seeks a reversal of his conviction and new trial, claiming he was denied his statutory right to a unanimous jury verdict, the jury was given a clearly erroneous aiding and abetting instruction, and the district court abused its discretion in admitting overly gruesome autopsy photographs. Soto also claims his hard 50 sentence is unconstitutional.

ISSUES: (1) Unanimous jury verdict, (2) jury instruction, (3) admission of photos, and (4) unconstitutional sentencing.

HELD: Based on the evidence, Court was firmly convinced that a rational jury could have concluded, beyond a reasonable doubt, that Soto was guilty either as a principal or an aider and abettor. The district court did not err in failing to give a jury unanimity instruction because this was not a multiple acts case and the aiding and abetting instruction was not clearly erroneous. Court found the six autopsy photographs Soto challenges demonstrate the manner of death and the violent nature of the crime and depict only a few of the victim's 79 stab wounds. Court held the photographs were relevant and not overly gruesome, inflammatory, or unduly prejudicial, and the district court did not abuse its discretion in admitting the photographs. Last, the Court concluded Kansas' hard 50 sentencing scheme violates the Sixth Amendment to the U.S. Constitution because it permits a judge to find by a preponderance of the evidence the existence of one or more aggravating circumstances necessary to impose an increased mandatory minimum sentence, rather than requiring a jury to find the existence of the aggravating circumstances beyond a reasonable doubt. Court vacated Soto’s sentence and remanded for resentencing.

STATUTES: K.S.A. 21-3205, -3401, -4635, -4636, -4638, -4701, -4706, -6620, -6806; and K.S.A. 22-3414, -3421, -3601, -3717

STATE V. STEVENSON
SEDGWICK DISTRICT COURT – REVERSED COURT OF APPEALS – REVERSED
NO. 104,115 – MARCH 28, 2014

FACTS: Police stopped Stevenson for a turn signal violation. Stop extended when officers smelled strong odor of alcohol in car after Stevenson was out of the vehicle. Drug paraphernalia found during warrantless search of car, leading to Stevenson’s arrest and conviction on possession of methamphetamine. District court denied motion to suppress evidence from search of car, finding odor of alcohol inside the vehicle was sufficient to establish probable cause to search vehicle for open container of alcohol. Court of Appeals affirmed, 46 Kan. App. 2d 474. Review granted.

ISSUE: Probable cause to search vehicle for open containers of alcohol.

HELD: To have probable cause to search vehicle for open container of alcohol as part of an investigation for violation of K.S.A. 2013 Supp. 8-1599, investigating officer must possess information that creates a fair probability that the vehicle contains an open container that has been unlawfully transported. Here, totality of circumstances established only that officer’s observation of very strong odor of alcohol emanating from within the vehicle, suspected to be the result of spilled alcohol, provided reasonable suspicion to extend traffic infraction detention to further investigate whether Stevenson was transporting open container of alcohol in violation of K.S.A. 2013 Supp. 8-1599. Leaking wine bottle in back seat was in plain view and was not illegal. Full-fledged search of vehicle without any further incriminating facts related to the crime being investigated was unlawful.


STATE V. TODD
WYANDOTTE DISTRICT COURT – CONVICTIONS AFFIRMED AND SENTENCE VACATED
NO. 106,021 – APRIL 25, 2014

FACTS: Todd was convicted of felony murder, aggravated robbery, aggravated battery, and aggravated assault. On appeal he claimed four errors by the trial court in instructing the jury: (1) failing to sua sponte provide a cautionary jury instruction on accomplice witness testimony; (2) giving an older version of PIK Crim. 3d 52.02 reasonable doubt jury instruction; (3) failing to sua sponte instruct jury on second-degree murder as a lesser-included offense of felony murder; and (4) using PIK Crim. 3d 52.20 to instruct jury on eyewitness identification. Todd next claimed he was denied a fair trial when prosecutor expressed personal opinion, commented on the witness’s credibility, and shifted burden of proof by mentioning witness’ failure to come forward earlier in support of Todd’s alibi.
Todd also claimed cumulative error, and error to include lifetime post-release supervision in his sentence. ISSUES: (1) Accomplice witness instruction, (2) reasonable doubt instruction, (3) second-degree murder instruction, (4) eyewitness instruction, (5) prosecutorial misconduct, (6) cumulative error, and (7) sentencing

HELD: Under facts of case, district judge's failure to instruct jury sua sponte to use caution in evaluating accomplice witness's testimony was error, but not clearly erroneous. There was no merit to state's argument that Todd invited the error by failing to request the instruction. Todd bears heavier burden on appeal, but is not entirely foreclosed from pursuing the issue.

Kansas Supreme Court has repeatedly rejected argument that giving the older reasonable doubt instruction requires reversal. Under circumstances of the case, application of the 2013 statutory amendment to K.S.A. 21-5402 (d) and (e) abolishing lesser-included offenses of felony murder to Todd's case does not violate the Ex Post Facto Clause. District court's failure to give the instruction sua sponte was not error.

Under facts in case, a cautionary instruction regarding eyewitness testimony was not necessary, but this error was not reversible. Court examined each claim of prosecutorial misconduct and found none. Under facts in case, the two errors found were neither reversible nor clear error, and did not require reversal under cumulative error doctrine.

State conceded that the imposition of lifetime post-release supervision in this case was error. That portion of Todd's sentence was vacated.

STATUTES: K.S.A. 2013 Supp. 21-5109(b)(1), -5402(d), -5402(e); and K.S.A. 22-3414(3)

COURT OF APPEALS

CIVIL

DEFAULT JUDGMENT AND EXCUSABLE NEGLECT
GARCIA V. BALL
WYANDOTTE DISTRICT COURT – REVERSED

FACTS: Garcia obtained a $522,400 default judgment against his former attorney, Ball, when Ball failed to file an answer to Garcia's lawsuit for more than four months. Ball then asked the district court to set aside the default judgment, claiming that his failure to answer the suit had been caused by excusable neglect. The district court granted that motion. Garcia has appealed, contending that the district court abused its discretion because Ball didn't provide any factual basis to support his excusable-neglect claim.

ISSUES: (1) Default judgment and (2) excusable neglect

HELD: Court stated that under K.S.A. 60-260(b)(1), the district court may grant relief from a final judgment on the basis of a defendant's excusable neglect. But the defendant must present some reason and some evidence in support of the excusable-neglect claim. Accordingly, a district court abuses its discretion by granting relief from a final judgment based on excusable neglect in the absence of an explanation of what constituted excusable neglect and some evidence to support that claim. Court held that Ball failed to prove excusable neglect and concluded that a district court cannot grant relief from judgment based on excusable neglect when the party seeking relief has failed either to explain what facts constituted excusable neglect or to provide any evidence to support that claim. Court reversed the district court's judgment setting aside the default judgment previously entered against Ball.

DISSENT: Judge Pierron dissented and would hold that while there was no excusable neglect, the defendant has caused the plaintiff no prejudice and is ready to proceed. Judge Pierron would hold this case is the kind that allows the trial court in its discretion to set aside a default.

STATUTES: K.S.A. 22-3716; K.S.A. 60-208, -212, -254, -260; and K.S.A. 75-5217

DIVORCE AND CONTEMPT
IN RE MARRIAGE OF SHELHAMER
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED WITH INSTRUCTIONS
NO. 109,365 – APRIL 18, 2014

FACTS: Aaron and Kara Shelhamer were divorced on October 7, 2009. Included in the divorce decree was a permanent parenting plan establishing joint custody of the children. Since that time, difficulties and disputes have persisted. On July 12, 2012, Aaron Shelhamer filed a motion seeking an order holding Kara Shelhamer (hereinafter “Shelhamer”) in indirect civil contempt for allegedly failing to comply with the parenting plan and subsequent court orders. The district court held an evidentiary hearing on the contempt motion and subsequently found Shelhamer in contempt. The district court denied Shelhamer's request to stay the sentence and she then opted to serve the two days in jail.

ISSUES: (1) Divorce and (2) contempt

HELD: Court reversed and remanded. Court held that when a district court simply wants to punish a contemnor, the proper remedy is a proceeding in criminal contempt. The district court's sentence of a determinate period for indirect civil contempt in this case was premised on an error of law and was, therefore, an abuse of discretion and must be set aside. Moreover, the record reflects that this case had become emotionally charged and frustrating to the district court. In the best interests of all the parties, court directed that on remand, all further proceedings be reassigned to a different district court judge.

STATUTE: K.S.A. 20-1202
ISSUE: Ross hearing and admission of genetic test results
Held: Issue of first impression in Kansas. Law regarding presumption of paternity was examined, including Ross and later enactment of Kansas Parentage Act, which elevated genetic test results to presumption of paternity. Based on current statutes and case law, a Ross hearing is only required when (1) there is not a genetic test result resulting in a presumption of paternity performed prior to the filing of the paternity action, or (2) a genetic test was completed prior to the filing of the paternity action but the result is inadmissible due to a proper statutory objection. Because genetic testing in this case was completed before John filed paternity action and there was no objection to the genetic test results, Ross does not control. District court committed errors of law by not considering the genetic test results, and by not weighing competing presumptions of legitimacy and genetics. District court’s decision was reversed and case was remanded for hearing to weigh the two competing presumptions and best interests of the child.

STATUTES: K.S.A. 2013 Supp. 23-2201 et seq., -2208(a), -2208(a)(1), -2208(a)(4), -2208(a)(5), -2208(b), -2208(c), -2212, -2212(c); K.S.A. 60-415; and K.S.A. 38-1114(a)(1), -1114(a)(4), -1118, -1119 (Ensley 1986)

SAVING STATUTE, DISMISSAL, BANKRUPTCY, AND AUTOMATIC STAY
LEHMAN V. CITY OF TOPEKA
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 109, 694 – APRIL 4, 2014

FACTS: The city commenced a project to widen a section of Gage Boulevard between S.W. 10th Avenue and S.W. 12th Street. Lehman owns a home located on that section of Gage Boulevard. During the project, a deep hole was drilled adjacent to Lehman’s home. On August 16, 2010, Lehman filed case No. 10-C-1150 in Shawnee County District Court, naming the city, ONEOK Inc. (d/b/a Kansas Gas Service), and Miller Paving and Construction (Miller) as defendants. Lehman claimed that the hole drilled adjacent to her home weakened the supporting structure of her home and caused flooding and foundation issues. Miller filed a petition for Chapter 11 bankruptcy with the U.S. Bankruptcy Court, which stayed the proceedings. On August 5, 2011, the district court dismissed the case for lack of prosecution after the city was the only party to appear at the pretrial conference. On May 16, 2012, Lehman filed case No. 12-C-555 in Shawnee County District Court alleging the same facts as in case No. 10-C-1150, but only named the city as a defendant. The city answered by filing a motion to dismiss for failure to state a claim based on the expiration of the six-month saving period provided in K.S.A. 60-518. In response, Lehman argued that the stay in case No. 10-C-1150 created by Miller’s bankruptcy had stayed the entire case and, therefore, had extended the time period for Lehman to file a new case. The district court granted the city’s motion to dismiss, ruling that (1) Lehman had failed to file case No. 12-C-555 within six months of the dismissal of case No. 10-C-1150, as required by K.S.A. 60-518, and (2) the automatic stay created by Miller’s bankruptcy only applied to Miller, not the other co-defendants.

ISSUE: Appellate Decisions
HABEAS CORPUS, SEXUAL PREDATOR PROGRAM, AND CONSUMABLES POLICY
PEW ET AL. V. SULLIVAN ET AL.
Pawnee District Court – Reversed and Remanded with Instructions
No. 109,672 – March 28, 2014

FACTS: Pew and 66 other members of the Kansas Sexual Predator Treatment Program (collectively referred to as Residents) appeal the district court’s summary dismissal of their writ of habeas corpus challenging the program’s decision to restrict their right to purchase consumable items to only three vendors. The matter proceeded through the district court with various motions by Residents and responses by Management of the Sexual Predator Treatment Program (SPTP). The district court initially found Residents were entitled to relief on a statutory basis and should be granted a hearing. Ultimately, the district court reversed that decision without a hearing and found Residents were not entitled to relief as the consumables policy restriction did not represent a violation of their statutory or constitutional liberty to purchase consumable items.

ISSUES: (1) Habeas corpus, (2) sexual predator program, and (3) consumables policy

Held: Court stated that a panel of this court has summarily affirmed district court orders concluding that another SPTP resident had no “private right of action” under K.S.A. 2013 Supp. 59-29a22. E.g., Merryfield v. Sullivan, No. 109,040, 2013 WL 4730597, at *1 (Kan. App. 2013) (unpublished opinion), petition for rev. filed September 23, 2013. That opinion does not directly discuss a SPTP resident’s right to a due process hearing under K.S.A. 2013 Supp. 59-29a22(c) through a writ of habeas corpus. As we have noted, that statute specifically provides for a due process review of the denial of a resident’s “rights guaranteed under subsections (b)(15) to (b)(21).” Court held the district court improperly granted the summary disposition of the habeas corpus petitions. SPTP must follow the statutory provisions, including their due process rights, under K.S.A. 2013 Supp. 59-29a22 when limiting Residents’ statutory and constitutional right to purchase consumable items and to spend money as they choose. Court remanded to the district court for proceedings to reconsider the petitions for writ of habeas corpus in accordance with this opinion and for the district court to appoint counsel to represent Residents.

STATUTES: K.S.A. 59-29a01, -29a22; and K.S.A. 60-1501, -1503

PARENT AND CHILD
GREER V. GREER
FRANKLIN DISTRICT COURT – REVERSED AND REMANDED
No. 110,194 – April 18, 2014

FACTS: Emily was conceived and born when Mother was married to Jack, but voluntary genetic testing after Emily’s birth revealed that John was biological father, John then filed petition to establish himself as Emily’s legal father. District court conducted a hearing pursuant to In re Marriage of Ross, 245 Kan. 591 (1989), and found consideration of genetic test results was not in Emily’s best interests. Left only with presumption of paternity that Emily was born of Mother and Jack’s marriage, district court dismissed John’s paternity action. John appealed.
ISSUES: (1) Saving statute, (2) dismissal, (3) bankruptcy, and (4) automatic stay

HELD: Court held the district court correctly determined that the savings statute did not apply to case no. 12-C-55, and the case was properly dismissed on grounds that it was filed outside the proper statute of limitations. Court found Lehman did not file 12-C-555 within six months of the dismissal of 10-C-1150. Court held Lehman failed to raise below the issue of whether the court’s failure to provide her counsel proper notice rendered the dismissal of 10-C-1150 invalid. Court also upheld the district court’s ruling on the automatic stay. Court held the bankruptcy stay provisions extended only to debtor (Miller) and not the debtor’s solvent co-defendants. Court found there was nothing in the record to support application of the limited number of exceptions and the bankruptcy stay did not operate to stay Lehman’s claim against the city.

STATUTE: K.S.A. 60-212, -241, -518

WORKERS COMPENSATION AND PRE-EXISTING CONDITION
YOUNG V. GREAT BEND
COOPERATIVE ASSN. ET AL.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 110,025 – APRIL 18, 2014

FACTS: Great Bend Cooperative Association and its insurer, Triangle Insurance Co., argue that the Workers Compensation Board erred when it held they failed to prove the impairment defense in this workers compensation case. The Co-op contends Young, suffering from adult-onset asthma, was not entitled to benefits because she was a smoker and had smoked crack cocaine in the past. The administrative law judge and Board held the Co-op failed to prove Young was impaired at the time of her injury.

ISSUES: (1) Workers compensation and (2) pre-existing condition

HELD: Here, it is undisputed that the conclusive presumption of impairment did not apply to Young because there was no evidence introduced showing blood levels of any drug. More importantly, the record is devoid of any evidence that Young was impaired due to alcohol, drugs, chemicals, or any other compounds or substances in her system at the time of the accident that would support a finding of impairment. Cigarette smoking, a legal activity, is not on that list. Without any evidence of contemporaneous impairment, either shown through the parameters establishing statutory impairment or other substantial evidence, the affirmative defense under K.S.A. 2010 Supp. 44-501(d)(2) did not apply to Young’s claim.

STATUTES: K.S.A. 44-501(b), (d)(2); and K.S.A. 77-621(c)(4)

CRIMINAL

STATE V. ENGLUND
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 108,446 – APRIL 11, 2014

FACTS: Englund appealed from his convictions of aggravated burglary and two counts of aggravated robbery, arguing that incriminating evidence obtained in a search of his home and his subsequent confession should have been suppressed because a search warrant was obtained in Douglas County from a district judge to search England’s Franklin County residence. Englund also argued that his sentence violated Apprendi v. New Jersey, 530 U.S. 46.

ISSUES: (1) Search and seizure, (2) warrants, (3) confession, and (4) sentencing

HELD: Court stated that while in other instances the legislature has specifically referred to the jurisdictional reach of our district judges, the lack of that specific reference in the version of K.S.A. 22-2503 at the time this search warrant was issued is not the controlling factor. Court held that K.S.A. 22-2503 and K.S.A. 22-2505 are considered together, two statutes enacted at the same time K.S.A. 62-1830 (Corrick 1964) was repealed, the legislature’s intent is clear: district magistrates may no longer issue search warrants outside their home judicial district, but district judges can. Court concluded the district court did not err in refusing to suppress the evidence obtained in the search of Englund’s residence in Franklin County. Court rejected Englund’s Apprendi argument.

STATUTES: K.S.A. 20-301, -301a, -301b, -319; K.S.A. 22-2202(14), -2302, -2305, -2502, -2503, -2505, -3214; and K.S.A. 62-1830 (Corrick 1964)

STATE V. KEY
ELLIS DISTRICT COURT – AFFIRMED
NO. 104,651 – APRIL 18, 2014

FACTS: Key convicted of third DUI. Prior to sentencing he challenged use of a 2007 misdemeanor DUI conviction as unlawful because attorney pled to that charge without Key being present and without Key’s authority. District court found that was an impermissible collateral attack on the prior conviction. Court of Appeals dismissed Key’s appeal for lack of appellate jurisdiction. Kansas Supreme Court reversed. 298 Kan. 315 (2013). It also remanded to Court of Appeals to determine whether an unauthorized guilty plea can invalidate a prior misdemeanor for sentencing enhancement purposes.

ISSUE: Sentencing enhancement – use of prior misdemeanor with unauthorized guilty plea

HELD: Thorough review of U.S. and Kansas cases. Nothing to indicate Kansas Supreme Court is departing from clear and unequivocal statement in State v. Delacruz, 258 Kan. 129 (1995), that right to collaterally attack prior convictions used for sentence enhancement is limited to cases involving denial of counsel as outlined in Gideon v. Wainwright, 372 U.S. 335

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(1963). Key had counsel in the 2007 case, thus he was not denied his Sixth Amendment right to counsel. An unauthorized guilty plea does not invalidate a prior misdemeanor for sentencing enhancement purposes. District court's denial of Key's motion to strike the 2007 conviction from consideration for sentencing enhancement purposes is affirmed.

STATUTES: K.S.A. 12-4402, -4407; K.S.A. 22-3210, -3210(b), -3405; and K.S.A. 60-1507

STATE V. MALONE
JOHNSON DISTRICT COURT—AFFIRMED
NO. 110,191—APRIL 18, 2014

FACTS: Warrant was issued for search of residence based on drug evidence related to trash pull. District court suppressed contraband found in trash bag left in front of a house, finding district court found no probable cause to issue search warrant because no evidence connected contraband to house where Malone was living, and found good-faith exception to exclusionary rule did not apply because it was not reasonable for officers to act on warrant since indicia of residency were not found in same bag as contraband. State filed interlocutory appeal.

ISSUES: (1) Probable cause for search warrant and (2) good-faith exception

HELD: Under facts in this case, district court did not err in holding there was no substantial basis to support a finding of probable cause to issue a search warrant. District court correctly suppressed evidence obtained during the search.

Third Leon exception at issue in this case. District court did not err in refusing to apply good-faith exception based on its finding officers acted unreasonably.

STATUTES: None

STATE V. RAMEY
MONTGOMERY DISTRICT COURT—REVERSED AND REMANDED
NO. 108,597—MARCH 28, 2014

FACTS: Ramey was convicted of aggravated burglary, misdemeanor theft, and vehicle burglary. On appeal he claimed that multiple instances of prosecutorial misconduct denied him a fair trial, alleging that the prosecutor:

(a) introduced inadmissible evidence regarding prior crimes and irrelevant defense question during preliminary hearing;
(b) accused Ramey of lying;
(c) vouched for victim's credibility during closing argument;
(d) misstated facts and law;
(e) made inflammatory comments about Ramey being a drug addict, and asked jury to consider pain caused by victim testifying in preliminary hearing;
(f) commented on Ramey's desire for jury trial; and
(g) gave personal opinion regarding Ramey's guilt.

Ramey also claimed district court misrepresented the law in responding to question submitted by jury, claimed jury should have been given an instruction for simple burglary as lesser included offense, and claimed use of prior convictions to enhance his sentence violated his constitutional rights

ISSUES: (1) Prosecutorial misconduct, (2) jury question, (3) jury instruction on lesser included offense, and (4) Apprendi

HELD: Cumulative error by prosecutor requires reversal and remand for new trial when prosecutor's improper comments were numerous and prejudicial, and state's case was not overwhelming. Under facts in case,

(a) comments on Ramey's prior crimes were erroneous, and there was no valid reason to refer to previous preliminary hearing question;
(b) comments insinuating bizarre and untruthful defense were error, and obviously intentional and prejudicial;
(c) prosecutor could comment that victim may have mistakenly reported amount of money taken to police, but prosecutor improperly vouched for victim's credibility with personal opinion that the defense theory was insulting;
(d) prosecutor did not misstate facts of case, and did not misstate the law on elements of aggravated burglary or voluntary intoxication;
(e) no error in prosecutor's repeated comments about Ramey being a drug addict when Ramey's theory of defense made drug addiction an appropriate subject for argument, but prosecutor erred in referencing pain caused by victim's having to testify in preliminary hearing;
(f) prosecutor did not expressly question Ramey's right to jury trial, and questions were within evidence presented and a proper exploration of Ramey's testimony; and
(g) complained-of statement was not outside latitude allowed in arguing case to jury during closing argument.

Trial court correctly instructed jury on law regarding intent to commit underlying felony for aggravated burglary and whether intent to commit the felony was in existence when Ramey entered the house.

Jury could not have justified verdict of simple burglary when Ramey's theory of defense was innocent intent based on voluntarily drug-induced intoxication and lack of general indicators of burglary.

Apprendi claim defeated by controlling Kansas Supreme Court cases.

STATUTES: K.S.A. 2013 Supp. 21-5109(b), -5205, -5807(a), -5807(b); K.S.A. 2013 Supp. 22-3414(3); K.S.A. 22-3420(3); and K.S.A. 60-261, -460
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