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2013-14
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Our Mission
The Kansas Bar Association is dedicated to advancing the professionalism and legal skills of lawyers, providing services to its members, serving the community through advocacy of public policy issues, encouraging public understanding of the law, and promoting the effective administration of our system of justice.
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“... [LRS] is a good source for a steady flow of persons seeking assistance with the kinds of cases I handle. The benefits of working with LRS far exceed the costs of enrollment. It is the most effective use of advertising budget I can imagine.”

~ Joseph Seiwert, Snider & Seiwert LLC, Wichita

For more information about the KBA Lawyer Referral Service program, visit us online at www.ksbar.org/LRS or call 785-234-5696
Welcome to the New Term

This is my first president’s column. I must admit, it is a bit intimidating to think I need to write something that over 6,000 judges and attorneys might want to read. I am thinking “what I did for my summer vacation” isn’t likely at the top of the list. In any event, in this and columns to come, I will do my best to write something informative, enlightening, thought provoking and yet entertaining. But in the meantime, feel free to skip over to one of the other regular features, or perhaps one of the more scholarly articles, or maybe the case summaries at the end. Just do me a favor, however, and don’t tell me you did.

The KBA, not unlike many other professional associations, is facing a time of change and transition. John Kennedy said, “Change is the law of life. And those who look only to the past or present are certain to miss the future.” I have also heard it said that change is inevitable, and you can either embrace it or resist it. But there is also something in between, where an organization like ours can adopt and accept the new and innovative, while at the same time, keep and hold on to those traditions and values that have made the organization uniquely what it is. That I believe is the Board and staff’s vision for the KBA in the ensuing years.

So what is changing? For one, I became president on July 1 – unlike prior years, however, not during the awards dinner at the annual meeting. This year’s annual meeting has been moved from June to September and the format has been changed, reflecting the Board’s realization that the annual meeting as we have always known it is not necessarily what fully meets the needs of our members. For the immediate future, the annual meeting remains a work in progress, as we work toward a format that will appeal to a broader range of our members.

And speaking of my becoming president, I would be seriously remiss if I didn’t thank Dennis Depew for his service as president over the last year. Dennis served during a most challenging year, particularly given legislative efforts involving budgetary issues for our courts, the selection of appellate judges, and related matters. Thanks, Dennis for all you have done on the KBA’s behalf. You have left incredibly big shoes, both literally and figuratively, to fill.

The manner by which we select Court of Appeals judges and how district court budgets are set have been changed, which only goes to show that not all change is for the good. The KBA worked hard through a number of channels, and in cooperation with other groups and associations, in opposition to the ultimate changes that occurred with respect to our Court of Appeals. But others, perhaps even some of our members, felt some change was necessary, and changes were made. We will continue to face similar and related issues as we move forward, and it is the responsibility of all attorneys, KBA members or not, to speak up and have a say in the process. Matters that affect our courts, the judicial process, and our profession are of concern to us all. The KBA, as a voluntary professional association of attorneys and judges, should be involved, and is uniquely qualified to do so.

Another change underway is with respect to how the KBA operates Lawyer Referral Service. For some years now, the KBA has operated LRS in conjunction with Kansas Legal Services. After considerable study and analysis, and after a comprehensive study and recommendations by the American Bar Association, the KBA decided to bring LRS completely in-house. To accomplish that, we have hired Dennis Taylor to serve as the LRS director. Dennis was most recently the executive director for the Kansas Lottery and started with the KBA on July 1. Under Dennis’ direction, and that of Jordan Yochim, our KBA staff, and the LRS committee, we expect to make lawyer referral an even better service not only to the public, but also to our members.

Other changes occurring in the last few years, and which will continue for the foreseeable future, include the manner in which the KBA provides CLE and publications to its members. Both competition in the market, and the manner by which CLE and publications can be developed and made available have changed. As well, the manner by which our members and the public alike want CLE and publications has also changed. The KBA Board, staff, committees, and Board of Publishers are working hard to address such changes and are committed to doing so. Our goal is to make continuing education and KBA publications relevant, timely, and available in a cost efficient manner.

Changes have also been occurring within the KBA’s website, and it will continue to change and be updated. Our goal is to make it more user friendly and of more benefit and value to all of our members, as well as the public at large.

Finally, as I embark upon the next year as your KBA president, I am both humbled and honored to have the opportunity to serve. I look forward to the changes that are surely to come our way, and those which are needed. As President Obama once said, “Change will not come if we wait for some other person or some other time. We are the ones we’ve been waiting for. We are the change that we seek.” I know I have now quoted from two different presidents – but I know too they can say things more eloquently and better than I ever could. But they are both right. Change is coming, and in some cases, but not all, is needed. I invite all of you to join with the KBA as we embrace and work to enhance those changes that are good and to oppose those that are not. The next year will bring new and different challenges, but many opportunities as well. I am looking forward to it, and welcome your participation and input as we move forward.

About the President

Gerald L. “Jerry” Green is a member of the Hutchinson law firm Gilliland & Hayes LLC. He currently serves as president of the Kansas Bar Association.
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A Great Time to be a Young Lawyer!

The glory of each generation is to make its own precedents.

— Belva Lockwood

I love Kansas. I love the law. And I love being a Kansas lawyer.

Thus, I could not be more thrilled to serve as president of the KBA Young Lawyers Section this year. In a state with such diversity of geography, firm size, and practice areas, the KBA is the great unifier, reminding us that we are all in this together. We are more than bean-counters or referees—regardless of politics, religion, or personal differences of opinion, we are lawyers. And in a time when the practice of law is fraught with financial challenges—particularly for attorneys just out of law school—the KBA YLS plays a vital role in helping to instill this pride and collegiality in the newest members of our profession.

Throughout this year, the YLS Board and I plan to build on past successes—due in no small part to the leadership (and humor) of our immediate past president, Jeffrey Gettler—and to blaze a few new paths as well. As a sneak peek:

- Look for announcements about our acclaimed Kansas High School Mock Trial program in the spring, and don’t hesitate to volunteer a few hours this March as a judge as these motivated high school students argue a case from opening statement through the presentation of evidence to closing argument.

- Speaking of great opportunities, have you heard about the KBA YLS Judicial Externship Program? Now finishing its second year, the JEP aligns law school students with judges around the state during the summer months—providing valuable experience and fostering relationships in an era of dwindling summer-associate opportunities.

- This year, the Board has ambitious goals of providing education, networking, practical skills training, and pro bono programs—including fostering discussions within our communities about the importance of an independent judiciary through participation in the Informed Voters Project—for our roughly 1,300 YLS members throughout the year and throughout the state.

And this is just a taste. Despite undeniable economic challenges, it’s a great time to be a young lawyer and a great time to take full advantage of the opportunities provided by the KBA YLS.

Now, a little more about me: I grew up in Pittsburg (St. Mary’s-Colgan, 1998) and completed my undergraduate work at the University of Kansas (majoring in mathematics, French, political science, and international studies, 2003). During my last year at KU—what my husband, Brandon, and I refer to as the “Victory Lap”—two things happened that altered the course of my life. First, a certain redhead, mechanical engineering major asked me to marry him. (I said, “Yes”—best decision of my life, hands down.) Second, I had the opportunity to work as a law clerk at a Lawrence firm, then-called “Thompson & Associates.” There, I was able to observe and assist in the actual practice of law with attorneys I respected, on cases that mattered to real people and businesses. Something clicked, and I realized that law was the perfect intersection of theory and practicality, of form and substance, of structure and creativity. I knew I wanted to be an attorney.

Brandon and I moved to Ann Arbor, Michigan, where we both attended law school at Ave Maria School of Law. We got married after our 1L year, conquering 1L finals in the midst of picking our floral arrangements and resolving other life-or-death matrimonial matters (e.g., had we purchased a cake knife?). After graduation, we were elated when we both received offers in our home state—me in Topeka, clerking for Hon. Robert Davis of the Kansas Supreme Court; Brandon with a well-respected IP firm in Kansas City. I clerked for Justice Davis for 3 1/2 years, including during and after his transition to chief justice. (There will be much more on that experience in my column in the September 2014 issue of the Journal.)

In November 2009, I left the court to enter the world of private practice, joining the law firm where I had worked as an undergraduate. My practice focuses on resolving state and federal constitutional claims; contract disputes, including questions of insurance coverage and allegations of bad faith; matters relating to eminent domain, land use, and real estate; and bodily injury claims; with a penchant for appellate advocacy. For the past five years, I have taught Conflict of Laws as an adjunct professor at Washburn University School of Law.

When not hard at work with our respective jobs, Brandon and I spend time relaxing at our home in Lenexa with our awesome dog, Kolbe, hanging out with friends and family, reading grammar and usage manuals (don’t judge!), and exploring our great state and country. I’ve also started “competing” (I use the term loosely) in sprint triathlons throughout the Kansas City area and “enjoy” (see above) those as much as any sane non-runner can.

And I thrive on meeting and surrounding myself with interesting people who share my passion for the law and for our fabulous profession. Indeed, I set about selecting the 2014-15 KBA YLS Board of Directors with the words of renowned businessman and philanthropist Azim Premji as my guide: “Leadership is the self-confidence of working with people smarter than you.” As the following list demonstrates, there can be little question that this Board fits the bill. It is, therefore, my immense privilege to introduce the KBA YLS officers for the upcoming year. It’s going to be a great one!

Immediate Past President: Jeffrey Gettler

Jeffrey Gettler does not need any introduction, as he was president of the KBA Young Lawyers Section in 2013-14, and all of us have enjoyed reading his columns in the Journal over the past year. Gettler is a partner at the Independence law firm of Emert, Chubb & Gettler LLC, where he maintains a general practice with an emphasis on family law and criminal de-
fense. He is also the prosecutor for the City of Independence. Gettler graduated from Loyola University Chicago in 2003 and the University of Kansas School of Law in 2005.

President-Elect: Justin Ferrell
Justin Ferrell serves as in-house counsel/risk manager for the Kansas Counties Association Multi-Line Pool (KCAMP). KCAMP provides insurance for counties and municipalities in Kansas. Justin has been awarded the Topeka Bar Association’s Outstanding Young Lawyer Award, and he has served in many capacities on both the TBA’s Young Lawyers and the KBA YLS Board of Directors. In his spare time, Ferrell enjoys running, cycling, and spending time with his wife, Traci, and their two daughters, Piper and Maizy.

Secretary/Treasurer: Joslyn Kusiak
Joslyn Kusiak is a Washburn Law graduate and a civil litigation attorney at Klenda Austerman LLC in Wichita. She represents clients in all phases of civil litigation, including trust litigation, creditor’s rights litigation, intellectual property disputes, and consumer protection claims. Active in the Wichita community and bar association, she played a role in the infamous Wichita Bar Show and is heavily involved with the Young Professionals of Wichita. Kusiak enjoys playing with her nephews, lively discussion, experiencing Wichita, and traveling.

ABA Liaison: Vincent Cox
Vincent Cox is an attorney with Cavanaugh & Lemon P.A., in Topeka. He graduated from Benedictine College in 2002 and received his Juris Doctor from Washburn Law in 2005. Cox’s practice primarily focuses on the area of civil litigation, including construction law, personal injury, contracts, real estate, and landlord/tenant. He is a past president of the KBA Young Lawyers Section and is currently serving as the ABA Young Lawyers Division district representative for Kansas and Missouri. He lives in Topeka with his wife, Lyndi, and two children, Lauren and Keaton.

CLE Committee Liaisons: Jake Peterson and Kathy Randall
Jake Peterson is an associate attorney at Clark, Mize & Linville Chtd. in Salina. He has a broad practice but spends most of his time in the civil litigation and estate planning areas. Originally from Lindsborg, he graduated from Washington University School of Law in St. Louis and earned his undergraduate degree in physics from Washburn University. In his free time, Peterson enjoys relaxing on the porch with his wife, Leah, and his dog, Stella.

Kathy Randall graduated from Wichita State in 2007 with a chemistry degree and from Washburn Law in 2011. She practices at Minter & Pollak in Wichita in the areas of general civil litigation, estate planning, probate, real estate, collections, and banking. She is actively involved with the Wichita Alum group of Gamma Phi Beta and the Wichita Bar Young Lawyers Association. Randall can’t wait for basketball season to cheer on her Shockers, but in the meantime she is enjoying bike rides around town with her husband and friends, and weekends at one of her favorite places on earth, Council Grove City Lake.

The YLS Forum Editors: Sarah Morse and Natalie Yoza
Sarah Morse practices at Fisher, Patterson, Sayler & Smith LLP, in Topeka. Her civil defense practice focuses on employment, government liability, and administrative law. Before joining FPSS, Morse attended Emory University School of Law in Atlanta and was a fellow at the Turner Environmental Law Clinic. She enjoys playing softball and golf, cooking, and attempting to grow things in her garden.

Natalie Yoza serves as a research attorney to the Hon. Dan Biles of the Kansas Supreme Court, and she previously served as a research attorney for the Kansas Court of Appeals judges. She obtained her Juris Doctor from the University of Kansas School of Law in 2007, where she was a member of the Jessup International Law Moot Court team and the Kansas Journal of Law and Public Policy. She obtained her bachelor’s degree in journalism from KU in 2001.

Judicial Externship Coordinator: Anne Gepford Smith
Anne Gepford Smith is an associate with Shaffer Lombardo Shurin in Kansas City, Missouri, where she handles civil litigation matters. She joined the firm after serving as a research attorney for the Kansas Court of Appeals and for the Hon. Nancy Moritz of the Kansas Supreme Court. Smith graduated from Texas Tech University, summa cum laude, in honors studies with degrees in advertising and political science, and graduated Order of the Coif from the University of Kansas School of Law. She enjoys swimming and sailing.

Legislative Liaisons: Nathan Eberline and John Kanaga
Nathan Eberline has served as the legislative liaison for the Young Lawyers Section since 2010. He is the associate legislative director and legal counsel for the Kansas Association of Counties, where he advocates on behalf of counties before the Kansas legislature and provides legal counsel to county officials. His wife, Tara, is an employment attorney with Foulston Siefkin in Overland Park, and they have two young daughters. In his free time, he enjoys playing basketball games at the Y, competing in triathlons in the summer, and watching movies whenever the opportunity arises. He also has served as an elder at Mill Creek Community Church in Shawnee since 2010. Eberline holds a law degree from the University of Iowa College of Law and bachelor’s degrees in English and political science from Wartburg College in Waverly, Iowa.

John Kanaga graduated in 2005 from the University of Kansas with degrees in geography and economics, and in 2010 from the University of Kansas School of Law, with a certificate in business administration. He is an associate at the McPherson Law Firm in Leawood. For the first part of his legal career, Kanaga focused solely on bankruptcy law and foreclosure defense, but since the move to his current firm, he has branched out to business and commercial law, contract disputes, and civil litigation. When not practicing law, he enjoys spending
time with his wife, Stacy, and their baby, Reagan, as well as devoting time to being mock trial coach and playing platform tennis (he serves as the present commissioner of the KCPTL).

Mock Trial Committee: Shawn Yancy (chair); Lauren Mann and Samantha Woods (vice chairs)

Shawn Yancy graduated from Washburn Law in 2011. Shortly after obtaining his law license, he began working for the Kansas Department of Labor as an unemployment insurance appeals referee. He first volunteered as a mock trial judge during law school; he quickly gained an appreciation for how the program instills in students useful life skills (from organization of arguments to analytical and strategic thinking), as well as appreciation of the judicial system and the law. Yancy previously served on the Mock Trial Committee and was chair in 2013-14. In his spare time, he enjoys volunteering with the Topeka and Shawnee County Youth Court.

Lauren Mann received her bachelor’s degree in business administration from the University of Mississippi and her law degree from the Oklahoma City University School of Law. She is an associate with Pendleton and Sutton LLC in Lawrence, practicing primarily in the areas of creditor’s rights, collections, landlord-tenant disputes, and civil litigation. Mann is a member of the Kansas, Missouri, and Douglas County Bar associations, and she is the current president of the Kansas Credit Attorneys Association. Alongside her passion for the law, she has an equal passion for music and has embraced numerous opportunities to engage her vocal talent—most notably, touring with the Mississippi Baptist All-State Youth Choir for several years and subsequently serving as the lead singer for numerous bands and vocal groups.

Samantha Woods is a native Kansan, having graduated from Pittsburg State University in 2010 and the University of Kansas School of Law in 2013. Samantha clerked for Martin, Pringle, Oliver, Wallace, & Bauer for two summers during law school; since graduation, she has worked as an associate in the firm’s Wichita office. Her practice consists primarily of commercial litigation, insurance defense, and creditor’s rights litigation. In addition to her work in the KBA, Woods is active in the Wichita Bar Association (where she serves on the Membership and Bench-Bar Committees), the Wichita Women Attorneys Association, and the Kansas Association of Defense Counsel. In her spare time, she enjoys doing home improvement projects, and she loves to cook.

Pro Bono Liaison: Tracy Fredley

Tracy Fredley obtained a bachelor’s degree from Penn State University in 2009 and a law degree from Ohio Northern University’s Claude W. Pettit College of Law in May 2012. She moved to Kansas following her law school graduation, and in January 2013, she started her own practice in Lawrence, where her caseload consists primarily of family law, child-in-need-of-care cases, and criminal law. This year, Fredley also is serving as President of the Young Lawyers Section of the Douglas County Bar Association. In her free time, she likes to kayak, play soccer, travel, and listen to music.

Social Chairs: Laci Boyle, Jill Gillett, and Clayton Kerbs

Laci Boyle is originally from a small farming community in Jewell County. She practices in the areas of estate planning, taxation, trusts and estates, wills, probate, and business law with the law firm of Bever Dye L.C. in Wichita. She received her bachelor’s degree in business administration from Nebraska Wesleyan University in 2003, her law degree from the University of Kansas School of Law in 2009, and her LL.M. in taxation from the University of Missouri-Kansas City in 2010. When she is not practicing law, you may find her walking her three dogs (or more accurately, trying to untangle three leashes), fundraising for the Leukemia and Lymphoma Society through Team in Training, or training for her fourth marathon (Chicago in October 2014!).

Jill Gillett works at Gillett Law Office in Chanute with her husband, who also is an attorney. She is a December 2012 graduate of Washburn Law, where she served as president of the Student Bar Association. Before attending law school, she worked for several years as a certified paralegal and deputy court clerk. Gillett is an avid volunteer, giving her time as a disaster worker with the American Red Cross. With that organization, not only has she helped in responding to house fires, floods, and tornadoes, but Gillett also has taught lifeguarding, CPR, first aid, and swimming.

Clayton Kerbs was born and raised in Dodge City. He attended Dodge City Community College, Creighton University, and Washburn University School of Law. He works at the Kerbs Law Office in Dodge City with his father, Glenn. Kerbs and his wife, Leah, have a 2-year-old son, Porter. They enjoy watching and playing sports of all kinds, and spending time with family and friends.

About the YLS President

Sarah E. Warner is an attorney at the Lawrence firm of Thompson Ramsdell Qualseth & Warner P.A. She serves as an adjunct professor at Washburn University of Law, serves in leadership positions with the Kansas Association of Defense Counsel and Douglas County Bar Association, and is a member of both the KBA Appellate Practice Section executive committee and Board of Publishers.

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Developing Initiatives to Help Continue Serving the Community

As the charitable arm of the Kansas Bar Association, the goal of the Kansas Bar Foundation is to “pay it forward,” to recognize that as lawyers we have a continuing duty to provide for the disadvantaged through programs providing:

1. Access to justice
2. Investing in programs that provide pro bono or legal aid service to Kansans
3. Attempting to develop initiatives that provide long-term improvements to the justice system
4. Scholarship and award programs to law students and interns

As attorneys and legal professionals, we are stewards of the justice system in this state. We seek to help vulnerable people in our community receive the legal assistance they need. In many instances, that need is beyond the providing of services at a reduced rate, or on a pro bono basis; it requires the outlay of funds – charitable giving.

The Kansas Bar Foundation is seeking to develop initiatives so that all may give according to their ability. We are seeking your participation in the following:

1. **A Major Gift Program.** Major contributions to the Kansas Bar Foundation will have a transformational impact on our state’s justice system and the lives of people served through the Bar Foundation. Additionally, your generous act of philanthropy will advance the cause of providing access to justice and will have a meaningful impact on our community within the state.

2. **Designated Gifts or Creation of Donor Advised Funds.** By making a designated gift to the Kansas Bar Foundation, you have the ability to receive an immediate charitable deduction (please consult your tax advisor). Your designated gift or Donor Advised Fund can support those functions that you designate that are within the mission of the Kansas Bar Foundation dedicated to a particular charitable purpose, to endow an award, a fellowship, a scholarship or set up of a special access to justice fund to address particular needs of our state or our local communities. These gifts can be made either during your lifetime or as part of an overall estate plan. They may be endowed or paid out over time. The Kansas Bar Foundation can work with you and your estate planner to identify the most effective ways to help you accomplish your charitable goals.

3. **The Use of Cy-Pres Awards.** The doctrine of cy-pres can provide the residual funds in class action cases, bankruptcy and probate matters that are unclaimed or cannot be distributed to the class members or beneficiaries for other designated purposes. Under the doctrine of cy-pres, courts can distribute such residu-

al funds to appropriate charitable causes. The Kansas Bar Foundation and the various organizations and projects supported by it are appropriate beneficiaries. The Kansas Bar Foundation’s mission of providing access to justice for those in need and less fortunate make it an appropriate beneficiary of class action cy-pres awards, because the premise of class actions is to provide significant recovery for large groups of people in need who otherwise would not be able to obtain the protections of the court.

Other individual giving options include:

1. Memorial gifts and
2. Gifts of appreciated stock or securities.

In addition, the Bar Foundation is interested in conducting regional meetings throughout the state, providing an opportunity for fellowship, explanation of Bar Foundation projects and input from members of the bar on how to improve and strengthen the Bar Foundation programs. When we are in your community or region, we ask that you join us.

For many years, we have relied upon the annual contribution of individuals seeking to become a Fellow within the Bar Foundation. This has provided a steady source of funds for our programs. The major source of awards has continued to be the interest income earned on the IOLTA accounts of law firms and individuals. With the reduced rate of interest being offered by financial institutions on the funds in our trust account(s), additional sources of revenue are necessary to support the mission of the Bar Foundation. I urge you to think of additional means and methods to carry out and improve the Bar Foundation’s goals.

As incoming president, I have set individual goals for our Board members, as well as program goals for the Foundation. I am asking, if you are currently a Fellow, to consider additional contributions toward your designated purpose. If you are not a member of the Bar Foundation, I urge you to commit, making annual contributions to reach the goal of membership as a Fellow.

Most importantly, I welcome your input as to additional ideas and programs to support our efforts. My fellow board members and I ask that you join us in increasing the impact of the Bar Foundation in promoting and advocating charitable related concerns of the Bar throughout Kansas.

I will keep you posted on our progress.

---

**About the President**

Edward J. Nazar is a partner of the Wichita firm of Redmond & Nazar LLP, where he practices in the areas of bankruptcy, health care law, and real estate law. He has been a chapter 7 (since 1981) and chapter 12 trustee (since 1986) for the U.S. Bankruptcy Court for the District of Kansas. Nazar earned his B.A. from Boston College in 1971 and his J.D. from Washburn University in 1978.

ednazar@redmondnazar.com
Your Privacy is Important to Us

On April 11, the Kansas Bar Foundation Board of Trustees approved a donor privacy policy. This policy is designed to provide you with information about how we process, acknowledge and publicize your gift. We value your feedback and will do our best to meet your requests regarding your gifts to the Kansas Bar Foundation.

Kansas Bar Foundation Donor Privacy Policy

Your privacy is important to us.

The KBF has formal procedures in place to ensure the privacy of its donors. For individual donors, the KBF may acknowledge names of donors in annual reports and similar publications and on plaques on display at the KBF’s offices. For individual and law firm/corporate/organizational donors we will generally publicize contributions in publicity surrounding special events, annual recognition events and KBF reports. This includes acknowledging a gift on the KBA/KBF website and via social media outlets. The KBF will not sell or otherwise provide information regarding KBF donors to any other organization. Donors can choose to remain anonymous. Should you wish to discuss privacy concerns with us, please contact the KBF executive director.

All methods of giving are processed using secure transactions.

Any transaction, whether credit card, check or other form of donation, which provides personal information about an individual, will be treated as private and protected information. This applies in every case, regardless of how a donor chooses to submit that information. If you elect to donate to the KBF online, your donor giving information will be protected by state-of-the-art encryption technology.

The KBF protects your personal information through physical, technical and organizational measures.

The KBF will apply the appropriate methods both to secure your personal information against unauthorized access and to preserve the accuracy and proper use of that information. All of the information that is obtained and maintained by the KBF is done through secure, private and secure systems with user names and passwords for every individual provided access to those systems. In addition, the KBF requires all employees to keep confidential the information that they have access to, in accordance with this privacy policy.

The KBF will review and update its privacy policy.

We will review the donor privacy policy on a regular basis and will amend the policy in a timely fashion, as dictated by changes in circumstances or new developments. We will post all revisions to the KBA/KBF website. A revised privacy policy will apply only to data collected subsequent to its effective date.

This policy is available online at http://www.ksbar.org/KBFPrivacyPolicy. Please contact the KBF executive director at (785) 234-5696 if you have questions regarding this policy.

KLS Supply Drive

As part of Celebrate Pro Bono Week, consider bringing a donation of office supplies for Kansas Legal Services to the Kansas Law Center. It will go to a great cause and help our friends at KLS. Just drop your items in the box at the KBA between August and October, and we will deliver it. Consider donating:

- Box of blue/black ink pens
- Letter/legal pad (any color)
- Copy paper (letter/legal size)
- Yellow highlighters
- Flash drives
- File jackets (letter/legal size)
- Post-it notes
Brief Overview: Schuette v. Coalition to Defend Affirmative Action

Facts

On April 22, 2014, the U.S. Supreme Court in Schuette upheld a voter-approved amendment to the constitution of the state of Michigan. The constitutional amendment prohibits, in part, race-based preferences as part of the admissions process for state universities. The Michigan voters approved the constitutional amendment by a margin of 58 percent to 42 percent. The voter-approved amendment is now enacted as Article I, § 26, of the constitution of the state of Michigan.

Section 26 was challenged in two cases on equal protection grounds. In consolidated challenges, the U.S. District Court for the Eastern District of Michigan entered summary judgment in favor of the state. On appeal, the U.S. Court of Appeals for the Sixth Circuit, sitting en banc, reversed. The U.S. Supreme Court granted certiorari.

Issue

Is the voter-approved amendment to the constitution of the state of Michigan invalid under the Equal Protection Clause of the 14th Amendment to the Constitution of the United States?

Held

In a 6-2 decision, the U.S. Supreme Court upheld section 26, finding that it did not violate the Equal Protection Clause of the 14th Amendment.

JUSTICE KENNEDY, joined by the Chief Justice and Justice Alito, authored the plurality opinion:

Justice Kennedy declined to analyze the case on the merits of race-conscious admissions policies in higher education. Rather, he focused on whether, and in what manner, voters in the states may choose to prohibit the consideration of such racial preferences. Justice Kennedy emphasized that this case was not about how the debate surrounding racial preferences should be resolved, but about who may resolve it. In his analysis, Justice Kennedy distinguished this case from Hunter and Seattle, interpreting that the rule in those cases applies when addressing or preventing some injury caused on account of race.

Citing the Michigan voters’ actions, Justice Kennedy stated the following:

“Our constitutional system embraces, too, the right of citizens to debate so they can learn and decide and then, through the political process, act in concert to try to shape the course of their own times and the course of a nation that must strive always to make freedom ever greater and more secure. Here Michigan voters acted in concert and statewide to seek consensus and adopt a policy on a difficult subject against a historical background of race in America that has been a source of tragedy and persisting injustice. . . . Were the Court to rule that the question addressed by Michigan voters is too sensitive or complex to be within the grasp of the electorate; or that the policies at issue remain too delicate to be resolved save by university officials or faculties, acting at some remove from immediate public scrutiny and control; or that these matters are so arcane that the electorate’s power must be limited because the people cannot prudently exercise that power even after a full debate, that holding would be an unprecedented restriction on the exercise of a fundamental right held not just by one person but by all in common. It is the right to speak and debate and learn and then, as a matter of political will, to act through a lawful electoral process.”

In upholding section 26, Justice Kennedy concluded that “[t]here is no authority in the Constitution of the United States or in this Court’s precedents for the Judiciary to set aside

FOOTNOTES

2. The U.S. Supreme Court had previously ruled on the constitutionality of two admissions systems at the University of Michigan in Gratz v. Bollinger, 539 U.S. 244 (2003) (finding that the undergraduate admissions point system’s predetermined point allocations that awarded 20 points to underrepresented minorities unconstitutional), and Grutter v. Bollinger, 539 U.S. 306 (2003) (upholding the law school’s race-conscious admissions process as being narrowly tailored to further the compelling interest in promoting a diverse student body).
3. The amendment prohibits the state itself, city, county, public college, university, community college, school district and other political subdivision or governmental instrumentality of or within the state of Michigan from “discriminat[ing] against, or grant[ing] preferential treatment to, any individual or group on the basis of race, sex, color, ethnicity, or national origin in the operation of public employment, public education, or public contracting.”
6. Chief Justice Roberts also filed a concurring opinion in which he primarily disagreed with the dissent.
7. Hunter v. Erickson, 393 U.S. 385 (1969) (invalidating voters’ actions overturning an ordinance in Akron, Ohio, that was enacted to address widespread racial discrimination in housing, and amending the city charter to prevent the city council from implementing any future ordinance dealing with racial, religious or ancestral discrimination in housing without the approval of the majority of the Akron electorate); Washington v. Seattle School Dist. No. 1, 458 U.S. 457 (1982) (invalidating a Washington initiative, which barred the use of busing to achieve racial desegregation in the city’s public schools.). Those two cases established the political-process doctrine. Under that doctrine, governmental action deprives minority groups of equal protection when it (1) has a racial focus, targeting a policy or program that inures primarily to the benefit of the minority; and (2) alters the political process in a manner that uniquely burdens racial minorities’ ability to achieve their goals through that process. Slip op. at 15 (Sotomayer, J., dissenting).
8. Slip op. at 15-16 (plurality opinion).
9. Slip op. at 18 (plurality opinion).
Michigan laws that commit this policy determination to the voters.9

JUSTICE SCALIA, joined by Justice Thomas, filed an opinion concurring in judgment:

Justices Scalia and Thomas agreed that section 26 was constitutional, but would have overruled Hunter and Seattle. They further alleged the challenged action did not reflect a racially discriminatory purpose, stating that a facially neutral law is not automatically held unconstitutional solely because it results in a racially disproportionate impact.

JUSTICE BREYER filed an opinion concurring in judgment:

Justice Breyer also upheld the constitutionality of section 26 but on narrower grounds, stating that: (1) The case is limited to barring race-conscious admissions programs that consider race solely in order to obtain the educational benefits of a diverse student body; (2) the Constitution permits, but does not require, the type of race-conscious programs now barred by Michigan's constitution; and (3) Hunter and Seattle did not apply to this case since they involved a restructuring of the political process that changed the political level at which policies were enacted, while this case involved an amendment that took decision-making authority away from unelected actors and placed it in the hands of the voters.

JUSTICE SOTOMAYER, joined by Justice Ginsburg, filed a dissenting opinion:

Justices Sotomayer and Ginsburg disagreed with the majority, stating that section 26 changed the basic rules of the political process in a manner that uniquely disadvantaged racial minorities. For support, they outlined the nation's "long and lamentable record of stymieing the right of racial minorities to participate in the political process,"11 applied the political-process doctrine11 established in Hunter and Seattle in the affirmative, emphasized how race matters,12 and discussed the negative racial impact of section 26 on minority enrollment at Michigan's public colleges and universities. They concluded by stating: "Today's decision eviscerates an important strand of our equal protection jurisprudence. For members of historically marginalized groups, which rely on the federal courts to protect their constitutional rights, the decision can hardly bolster hope for a vision of democracy that preserves for all the right to participate meaningfully and equally in self-government."11

Affirmative Action: State Action
National Conference of State Legislatures
For affirmative action measures in other states (as of April 2014), please see:

About the Author
Eunice C. Peters is an assistant revisor for the Kansas Office of Revisor of Statutes. She is co-chair of the KBA Diversity Committee, a member of the KBA Awards Committee, and a member of the Kansas Supreme Court/Kansas Bar Association Joint Commission on Professionalism. Peters received her juris doctorate from Washburn University School of Law in 2006 and her bachelor's degree from the University of Illinois in 1997.

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STUDENT AND EMPLOYEE DISMISSAL AND DISCIPLINARY CASES

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10. Slip op. at 1 (Sotomayer, J., dissenting).
11. See footnote 7 for an explanation of the political-process doctrine.
12. "Race matters. Race matters in part because of the long history of racial minorities' being denied access to the political process. . . . Race also matters because of persistent racial inequality in society—inequality that cannot be ignored and that has produced stark socioeconomic disparities. . . . And race matters for reasons that really are only skin deep, that cannot be discussed any other way, and that cannot be wished away. Race matters to a young man's view of society when he spends his teenage years watching others tense up as he passes, no matter the neighborhood where he grew up. Race matters to a young woman's sense of self when she states her hometown, and then is pressed, 'No, where are you really from?', regardless of how many generations her family has been in the country. Race matters to a young person addressed by a stranger in a foreign language, which he does not understand because only English was spoken at home. Race matters because of the slight, the snickers, the silent judgments that reinforce that most crippling of thoughts: 'I do not belong here.'" Slip op. at 45-46 (Sotomayer, J., dissenting).
Jokes that are No Laughing Matter

You might have seen recent reports about a prominent lawyer who exchanged sexist jokes in emails with the top executive of the U.K.’s Premier [Soccer] League. After London tabloids obtained and published the emails, generating public outcry, the lawyer and his firm apologized, explaining that the emails were private exchanges between friends of many years and did not reflect their beliefs and values. Although the lawyer’s emails brought embarrassment and undesirable publicity, they were not considered an ethical breach because they appeared unrelated to the lawyer’s work negotiating television broadcast rights for the league.

Few would contend, at least publicly, that it should be acceptable for a lawyer to joke with a client in this manner. Many, however, might not realize that sexist, racist, and other discriminatory comments may constitute misconduct and subject them to discipline. A number of states, including several bordering Kansas, have adopted rules that specifically address bigoted statements and behavior by lawyers. In Missouri, it is professional misconduct for a lawyer to “manifest by words or conduct, in representing a client, bias or prejudice based upon race, sex, religion, national origin, disability, age, or sexual orientation.”

Colorado forbids lawyers from engaging in conduct, in the representation of a client, that “exhibits or is intended to appeal to or engender bias against a person on account of that person’s race, gender, religion, national origin, disability, age, sexual orientation, or socioeconomic status, whether that conduct is directed to other counsel, court personnel, witnesses, parties, judges, judicial officers, or any persons involved in the legal process.” And Nebraska declares that “[o]nce a lawyer is employed in a professional capacity, the lawyer shall not, in the course of such employment, engage in adverse discriminatory treatment of litigants, witnesses, lawyers, judges, judicial officers or court personnel on the basis of the person’s race, national origin, gender, religion, disability, age, sexual orientation or socioeconomic status.”

Unsurprisingly, jurisdictions with specific rules against discriminatory behavior appear most likely to impose discipline on offending lawyers. The American Bar Association’s Model Rules of Professional Conduct disapprove of bigotry in a comment to Rule 8.4(d), which prohibits conduct that is “prejudicial to the administration of justice.” The comment states, “A lawyer who, in the course of representing a client, knowingly manifests by words or conduct, bias or prejudice based upon race, sex, religion, national origin, disability, age, sexual orientation or socioeconomic status, violates paragraph (d) when such actions are prejudicial to the administration of justice.”

Unfortunately, the comment provides little guidance on when the discriminatory conduct adversely affects the administration of justice.

Footnotes

3. Colo. RPC 8.4(g).
5. See, e.g., In re Barker, 993 N.E.2d 1138 (Ind. 2013) (30-day suspension for attorney who, in representing father in child custody matter, wrote letter to opposing counsel disparaging mother as an “illegal alien”); In re Kelley, 925 N.E.2d 1279 (Ind. 2010) (stipulated public reprimand for lawyer who ridiculed man with feminine-sounding voice by asking if he was “gay” or “sweet”); In re Charges of Unprof’l Conduct Contained in Panel Case No. 15976, 653 N.W.2d 452 (Minn. 2002) (admonition to lawyer in personal injury case for seeking new trial on basis that jury may have been unduly persuaded by the presence of the judge’s paralyzed clerk in ruling against plaintiff, who claimed inability to work due to serious, but less severe, permanent injuries); In re Monaghan, 295, A.D.2d 38, 743 N.Y.S.2d 519 (N.Y. App. Div. 2002) (public censure for race-based criticism of opposing counsel’s mispronunciation of certain words).
6. Model Rule 8.4(d), Comment [3].
7. See In re Hunsaker, 217 P3d 962 (Kan. 2009) (lawyer received 90-day suspension for providing financial assistance to his son who was evading arrest on felony charges).
It has been some time since we last spoke. Sorry about that. I’ve been busy. All of us here at the KBA have been busy. I realize that’s no excuse; after all, you pay us to get things done. But there was, is, a lot to do. Most of the job of running the KBA looks like the job of running any nonprofit organization. There are people to help, products and services to produce, conversations to be had, events to hold, and a reckoning at the end of the day. Some parts of the job are unique to a bar association and some are unique to the Kansas Bar Association. Those are the parts I really dig (do the kids still say “dig”?).

In his column for this month’s *Journal*, KBA President Jerry Green has written about change. He mentions many changes that we’ve already seen and some we have yet to see. Jerry mentions one in particular that I’d like to highlight – change in our Lawyer Referral Service. I’d like to introduce you to Dennis Taylor, our new Lawyer Referral Service director. He started work on July 1 and over the next few months will manage the transition of the LRS from its current operation by Kansas Legal Services (more on that below) to direct oversight and operation by the KBA. Following the transition, Dennis will be talking to you, KBA members and others as part of our effort to identify and implement the best practices in lawyer referral services for attorneys and Kansans.

A native Topekan, Dennis has been a Kansas lawyer for almost 40 years. He has business and law degrees from Drake University, a master’s degree in public administration from the University of Kansas, and a post-doctoral master of laws degree from the University of Missouri-Kansas City School of Law. He began his career as a Supreme Court research attorney in 1974. Following a short stint in private practice, he served in city, county, and state government positions in Missouri, New Mexico, and Kansas for more than 25 years. He also served with the U.S. State Department in Poland and Romania as Central European public administration advisor to local and regional governments in the mid-90s and as a consultant with contractors for the U.S. Agency on International Development from 1999-2007. Dennis has served as head of three cabinet-level departments in Kansas state government, most recently as the Kansas secretary of administration before retiring from public service on January 1, 2014.

Dennis’ most recent position was as legal and financial advisor to the Yak ‘n Yarn Shop here in Topeka, which opened in March and is owned and operated by his spouse of 23 years, Karen Taylor. Though he says he retains a part-time advisory position with the store, at the same salary he was getting when he was working there on a full-time basis, apparently both he and his wife are happy that he’s now got this gig with the KBA. We’re very happy to have him here as well.

For many years the operation of the KBA Lawyer Referral Service was handled, through a contractual arrangement, by the staff of the Kansas Legal Services call center in Wichita. The decision to absorb the operation back into the KBA was a difficult one made all the more so because of the excellent and devoted service we have received from the KLS staff year in and year out. In particular I want to recognize Michele Hawley, Robert Bowers, and KLS Executive Director Marilyn Harp. Through their diligent attention to the lawyer referral service – even during times when the KBA wasn’t paying enough attention – they have demonstrated a commitment to ensuring access to justice, in all its forms, for all Kansans. On behalf of the KBA board, staff, and panelist attorneys across the state, thank you.

Now, back to work. Change is a-comin’. We’ll talk again soon.

### About the Executive Director

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

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The Clerkship Advantage

Just like being a good athlete, a good lawyer should understand the rules of the game. That’s the practice side of the legal system. When the striped-shirt referee officiates over the game and makes sure the rules are followed, it’s similar to the judiciary. All parties are needed for the ball to be put into play—or make the legal system work. For that reason, it is important for students to seek out clerkships even when the pace of law school seems to encourage us to get in and get out as fast as possible.

Exposure to the judicial branch of the government allowed me to see the daily operations of the referees. The summer of 2013 will be one to remember because of the wonderful opportunity I was given to be an intern at the Kansas Supreme Court. I joined the team in Justice Eric Rosen’s chambers, where I experienced what it is like to work at the state’s court of last resort. I worked closely with the senior research attorney, Jonathan Paretsky. I also got to know and work with many other staff and research attorneys in the Court. The Supreme Courtroom has a certain aura about it; the place where the highest legal decisions of the state of Kansas are made.

Making the connections from classroom learning to a real case was one of my most rewarding experiences at the Court. I worked on a few cases in the area of criminal law. I was fascinated to see how the procedures—from arraignment to sentencing and possibly appeal—play out on the record of each case. At one point, I was given the opportunity to learn about Kansas sentencing guidelines, something that is very important for practitioners to understand, but is not covered in introductory criminal law courses. Finally, although there was not “court week” during my summer at the Court, I observed a show-cause disciplinary hearing and a corporate swearing-in.

Learning how a law office is operated and managed is not something law school can teach you unless perhaps you take a clinic. After my first semester of law school, I was offered a law clerk position at Woner, Glenn, Reeder, & Girard P.A., a Topeka general practice firm with a focus on banking and financing law. I went into the firm hoping that I could be productive, and it was a chance to validate that I had in fact learned something useful even only a semester into my legal studies. Being able to put my new legal research and writing skills to use in a professional setting, such as drafting a client memo, helped me further refine what I had learned in LARW, especially since, like most students, I am hands-on learner.

That time equals money in private practice is a great thing to learn as a student clerk, where others in the firm can guide you through the process of what can be billed to the client. Writing and analyzing for a real client under deadline restrictions takes planning. It is best to review what needs to be done and then hash out a plan of action. Starting early means there should be plenty of time in the end for fine-tuning and explaining your findings to the client and making adjustments if necessary. The supervising attorney will challenge you and give you something he or she knows you can handle.

In three semesters working at the firm, I was in the office one or two times a week.¹ A typical day started by checking in with a supervising attorney, who assigned me multiple small research projects and sometimes a longer-term project. This was a law firm with real clients, and keeping track of billable hours was a necessity, something that is not done in the court. Some days, the office was so busy that I just went straight to work on my projects and would catch up with my supervising attorney at a later time.

Exposure to both the judicial branch of the state of Kansas and in a private law practice is invaluable to a law student because of the wide breadth of learning opportunities and knowledge that can be gained. Both legal settings, though different in focus, have something in common: striving for justice for all. The judiciary must fully understand the art of persuasion to provide justice. Lawyers have to know the courts’ rules to be the best advocates for their clients. Students should seek diverse experiences so they can learn how the legal system works, and not restrict themselves to their immediate areas of interest. For example, even if a student wants to be a criminal defense attorney, she should take an internship opportunity in a prosecutor’s office. Similarly, students who want to litigate in private practice should try to get some experience working for the courts, and vice versa. After all, to be a good referee, you have to know how the game is played; to be a good player you have to know the rules.

About the Author

Meredith M. Fry is a third-year law student at Washburn University School of Law who plans to pursue a legal career in the great state of Kansas. She earned her B.S. in biology with minors in chemistry, physics, and Kansas studies at Washburn University in 2012.

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Footnote

¹. ABA Standard 304(f). Students enrolled in more than 12 credit hours may not work more than 20 hours per week.
Google Glass

What’s that on your face?” is not an expected polite greeting to a woman but it is instinctively uttered to my wife whenever she is wearing Google Glass. She can be in her brightest yellow perched on her highest heels but the tiny camera lens and clear screen at the edge of her eyeglasses is what people will notice first. That turns out to be both a feature and a bug.

What is it?

The unfamiliar reader should google Google Glass. The resulting images will reveal a pair of unusual eyeglass frames where one temple is a colored plastic bar. At the front of that bar, just out of the wearer’s line of sight, are a black dot (camera) and a clear plastic cube (screen). Concealed inside that plastic temple bar are Wi-Fi, Bluetooth, and GPS radios which interface with a smartphone. The plastic bar itself doubles as a touchpad like you’d find at the bottom of your laptop keyboard. A bone conduction transducer (speaker audible only to the wearer) hangs out at the Glass’ temple tip.

The screen is the most noticeable part of Glass. A tiny cube of clear plastic actually projects a 25-inch screen image just above the wearer’s forward gaze. The screen is invisible to all but the wearer and displays output from Glass’ sensors and apps. This creates an “augmented reality” where what your human eyes see is enhanced by additional feedback via Glass. For example developers are tinkering with apps which allow:

- Language translation of written text either to display to screen or by audio
- Captioning regular conversations for the hearing impaired
- Identification of music, paintings, sculptures, and landmarks with commentary
- GPS navigation with call-outs for off-route areas of potential interest
- Gazing at the night sky with instant mapping of the constellations.

A hope for Google Glass was the same as for its great-grandfather, the reflector sight and head-up display (HUD) from World War II era planes. The technology evolved as a military answer to an aviation problem – how to feed simplified information from complex avionics to the pilot without shifting gaze from the windscreens. HUDs are now common throughout military aircraft and are in use in commercial aircraft. Even auto and motorcycle companies are incorporating HUDs and Garmin sells a $150 aftermarket HUD for vehicles. It seemed a no-brainer that head-up displays would be the next step as interface between the real world and “cyberspace.”

Adoption Issues

Google Glass has not taken the world by storm. Part of that is by design. Until recently, participation in Google Glass beta was an invite-only affair. The steep $1,500 price tag also keeps the casually interested at bay. The question of privacy generates the most heat, however. The little camera on Glass generates more unease than the United States’ estimated 30 million surveillance cameras capturing as much as 4 billion hours of footage a week. Glass’ camera is seen as more intrusive than the comparable cameras in the 166 million smartphones Americans use to post intimate details of their personal lives on social media. Interestingly, venues with surveillance cameras are starting to post “No Glass” signs, people with Facebook and Instagram accounts are accosting Glass wearers, and folks with eyes buried in smartphones mock Glass users as “Glassholes.” While Google might have hoped Glass would spark an iPod-style consumer revolution, it is seen by many as a public relations humiliation.

Google is largely to blame. “Don’t be evil” may be the Google corporate motto but unease about their size and insatiable interest in our daily lives is disturbing. Searches are tracked, stored, and used for corporate aims. Email messages are scoured for marketing use. Even our homes are photographed from land and sky. All that compiled information sits there for Google’s use, for sale to third parties, and for potential misuse by governments and hackers alike. In hindsight, the backlash against Glass and its cameras and microphones seems obvious. The hardware is not disconcerting. How Google or others use the data it pushes to and pulls from users leaves folks cold.

The answer has been to restrict some of the more interesting potential uses of Glass. For example, it would be difficult under current licensing and Google controls to develop a Glass app which runs facial recognition on a panel of prospective jurors and automatically compiles dossiers based on publicly available sources or which update the juror database automatically as questions are answered. That sort of app fails the “creepy” test and cannot proceed (even though an off-the-shelf laptop could do exactly the same thing). Superimposing GPS data on the road in real time causes issues with the “public safety” test (disregarding ubiquity of in-dash GPS and integrated or aftermarket HUD in modern cars). Google hopes that retaining a short leash on development of apps and cost-managed control on public adoption will ease consumers into the product.

Inevitability

That approach might work. No one has declined a chance to test drive my wife’s Glass. An inevitable smile breaks out when someone sees the screen for the first time or takes a photo with a wink. Smartphones were not immediately adopted by consumers but now account for 69 percent of mobiles in use and Glass or similar “wearables” are likely headed that way too – even as they are still the bag phone stage of development.

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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Removing Research Blinders: Controlling the Research Expenses of Recent Graduates

Not surprisingly, law-school graduates are expected to know how to research the law when they begin practicing law. In fact, in their first-year legal writing courses, they are taught to research across a wide variety of sources. Once law students are introduced to case law on Lexis and Westlaw, however, they tend to don blinders when they approach legal research. Many law students reject (or don't believe) the message that their access to Westlaw and Lexis might be limited in practice. Students become accustomed to cost-free online research and rarely think about the costs of that research.

Moreover, rather than starting with secondary research materials or a controlling statute, whether online or in print, students tend to launch directly into case law. Although delving into the cases is critical at a certain point in the research process, starting there can waste valuable time and raise the costs for clients.

Not all students fit the above mold, of course. Many students take seminars or advanced research classes or write for law journals and competitions that require students to go beyond case law. Rarely do they choose print materials if online materials are available, however. It may therefore be important to recognize this tendency when new lawyers enter practice. It may also be important to steer them to free online resources.

One underutilized online resource is the agency website. Despite having taken administrative law or courses tied to administrative agencies, many new lawyers don’t realize the wealth of information they can find on agency websites. For this reason, I devote considerable time in my Employment Law class on the role of federal agencies, such as the Equal Employment Opportunity Commission and the Department of Labor, and their state corollaries, in enforcing federal and state employment laws. During that time, I introduce students to federal and state agency websites and their vast array of resources – including required workplace notices and forms, helpful “FAQs,” and links to the many statutes, administrative regulations, and agency guidance documents that practicing attorneys should be familiar with.

Students are generally surprised when they learn how much information they can quickly access via an agency’s website. Not only can they be directed to the specific statute and section that can assist them in finding the answer to a novel legal question, they learn that they don’t have to reinvent the wheel when it comes to providing client guidance on the most common employment law issues.

Law schools are arguably becoming more practice oriented as they recognize the call to graduate “practice-ready” students. Despite this, the practice of introducing students to the readily available, often cost free, resources available on agency websites is not widespread. Thus, when new lawyers who work in a regulated practice area get stumped in their legal research, it is up to their mentors to ask them whether they have gone beyond case law and referred to information contained on the relevant agency’s website. With some guidance, new lawyers will see the value of expanding their research horizons in such a time- and cost-efficient manner. They might also find answers to questions they believed only their mentors could answer.

About the Author

Aïda M. Alaka received her J.D. from Loyola University Chicago, where she was editor-in-chief of the Loyola University Law Journal. Prior to teaching she practiced employment law at Winston & Strawn LLP in Chicago. Alaka joined Washburn University School of Law in 2005, where she currently teaches Employment Law and serves as the associate dean for academic affairs.

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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

Jasmine J. Abou-Kassem has joined Hallmark Cards Inc., Kansas City, Missouri, as in-house counsel.

Barbara Lori Albert has joined Fennemore Craig P.C., Denver.

Joshua J. Boehm has joined the Law Offices of J. Robert Brookens, Marion. The firm’s name has changed to Brookens and Boehm LLC.

Steven G. Brown has joined Scharnhorst Ast Kennard Griffin, P.C., Kansas City, Missouri.

Daniel S. Creitz has joined Kennedy Berkley Yarnevich & Williamson, Salina, as an associate.

Erin DeKoster and Tucker Poling have joined Sanders Warren & Russell LLP, Overland Park.

Jason T. Gray has been elected shareholder at Duncan, Weinberg, Genzer, & Pembroke P.C., Washington, D.C.

Angela B. Kassube has joined Scottsdale Insurance Co., Scottsdale, Arizona.

Chad A. Kyle has joined Kutak Rock LLP, Kansas City, Missouri.

Paul M. Lewis has joined Lathrop & Gage LLP, Kansas City, Missouri.

Scott A. Long has joined McDowell Rice Smith & Buchanan P.C., Kansas City, Missouri.

Nathan T. Mattison has joined Neustrom & Associates P.A., Salina, as an associate.

Julie C. Pine has joined Mariner Holdings LLC, Leawood, as senior legal counsel.

Jason L. Reed has joined Adams Jones law Firm, P.A., Wichita.

Andrew G. Shireman has joined South & Associates P.C., Overland Park.

Christopher J. Stucky has joined Stucky & Fields LLC, Kansas City, Missouri, as partner.

Krisyn L. Wood has joined Tell Industries LLC, Park City.

Travis A. Wymore has been promoted to a shareholder at Withers Brant Igoe & Mullennix P.C., Liberty, Missouri.

Changing Locations

Benge Law Firm has moved to 900 Westport Rd., 2nd Fl., Kansas City, MO 64111.

Kevin J. Breer has started his own firm, Breer Law Firm, 7930 Santa Fe Dr., Ste. 100, Overland Park, KS 66204.

Farchmin Dicus P.C. has moved to 801 W. 47th St., Ste. 423, Kansas City, MO 64112.

John Kitchens PA has moved to 10631 SW Burlingame Rd., Wakarusa, KS 66546.

Hook McKinley LLC has moved to 3901 Oakland Ave., Ste. B, St. Joseph, MO 64506.


Norris & Keplinger, LLC has moved to 9225 Indian Creek Pkwy, Corporate Woods, Building 32, Ste. 750, Overland Park, KS 66210.

Jennifer R. O’Hare has opened O’Hare Law, 108 W. Lincoln Ave., PO Box 158, Lincoln, KS 67455.

John A. Palenz, Attorney At Law, has moved to 1511 N. Spring Dr., Wichita, KS 67208.

Dennis D. Roth, Attorney At Law, has moved to 408 Neosho St., PO Box 409, Burlington, KS 66839.

Jane L. Stafford has opened her own firm, Stafford Law Firm LLC, 4200 Somerset Dr., Ste. 237, Prairie Village, KS 66208.

Miscellaneous

Marcia A. Wood, Wichita, has been awarded the Louise Mattrox Award from the Wichita Women Attorneys Association.

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

Hon. George S. Reynolds

Hon. George S. Reynolds, 95, of Wichita, died June 15 in Wichita. He served in the U.S. Army during World War II in the Philippines. Reynolds served two terms as Greenwood County attorney in Eureka and served 17 years as a district judge in the 13th Judicial District in Butler, Greenwood, Elk, and Chautauqua counties. In 1970, he received the KBA’s Outstanding Service Award.

He is survived by his wife, Matilda P. (Over) Reynolds, of the home; a daughter; and six sons.

Jerry Malcon Ward

Jerry Malcon Ward, 85, of Great Bend, died May 28 at his home after a long illness. He was born May 24, 1928, in Great Bend, the son of Floyd Hancher Ward and Mabel Cleo (Cork) Ward.

He attended the University of Kansas and obtained his law degree from Washburn University School of Law in 1952. He was admitted to the bar and returned to Great Bend, where he practiced law for 62 years. Ward was a member of the Barton County, Kansas, American, and American Trial Lawyers associations, and was admitted to practice before the U.S. District Court, Kansas Supreme Court, and the U.S. Supreme Court.

Ward was a past president of the Great Bend Chamber of Commerce, Great Bend Petroleum Club, Great Bend Public Library board of directors, Great Bend Jaycees, and served on the steering committee that worked to bring a community college to Barton County. He was also a member of the Elks Lodge and a former member of the Rotary Club and the Masonic Lodge.

He is survived by his wife of 64 years, Norma; two sons, Martin, of Lawrence, and Robert, of St. Vincent and The Grenadines; a daughter, Dana, of McPherson; five grandchildren, Jeremy, of DeSoto, Christopher, of Lawrence, Brian, of Seattle, Kelli, of Kansas City, Kansas, and Stacy, of Overland Park; and a great-grandchild. He was preceded in death by his parents and a brother, Clay.
Amendments to the Kansas Bar Association Bylaws

ARTICLE V – ELECTIONS AND TERMS OF OFFICE

5.1 District Governors. Each Association district shall elect representatives to the Board of Governors as follows:

(a) Candidates for the Board of Governors from a district shall be nominated by petition signed by at least twenty-five (25) members of the Association practicing in the district. The nominating petition shall be filed with the Executive Director of the Association by not later than ninety (90) days prior to the first day of the next Annual Meeting of the Association on 31 March.

(b) Election of the Board of Governors members shall be by confidential electronic or mail ballots cast by members of the Association practicing within the respective districts in which elections are to be held.

The Executive Director shall cause such ballots to be prepared and not less than 45 days prior to the first day of the next Annual Meeting by 15 May shall cause such ballots to be provided to each member eligible to vote. The ballot shall contain instructions that it must be returned to the Association by a day certain, which shall not be less than 15 days from the date of notice. The candidate receiving the greatest number of votes shall be declared elected. If there is no contest for a Board of Governors position such nominee shall be declared elected and the term of office shall commence at the conclusion of the next Annual Meeting on 1 July.

(c) In the event any Board of Governors district fails to nominate a member of the Board of Governors, then such nomination shall be submitted by the Nominating Committee.

(d) District Governors shall serve for terms of three (3) years, but may serve no more than two (2) complete consecutive terms.

5.2 Officers. The Nominating Committee shall make one or more nominations each year for the offices of President-Elect, Vice President and Secretary-Treasurer. Such nominations by the committee shall be filed with the Executive Director of the Association at least 120 days prior to the first day of the next Annual Meeting by 1 March. Nominations may also be made for such offices by nominating petition bearing fifty (50) signatures of regular members of the Kansas Bar Association with at least one signature from each Governor district. All nominations by petition shall be filed with the Executive Director of the Association at least 90 days prior to the first day of the next Annual Meeting by 31 March.

After the close of nominations and in the event of a contest, the Executive Director shall conduct an election for such contested office by ballot in the manner provided for the election of District Governors. If there is only one nomination for any office, such nominee shall be declared elected to that office. There shall be no nominations from the floor at the Annual Meeting. The term of all officers shall be for one (1) year beginning at the adjournment of the Annual Meeting following their elections and ending with the adjournment of the next Annual Meeting on 1 July and ending 30 June of the following year. No person may hold more than one office or Board position simultaneously.

ARTICLE VII – COMMITTEES

7.2 Nominating Committee. There shall be a Nominating Committee of the Association consisting of twenty (20) or more members appointed by the President with the consent of the Board of Governors subject to the following:

(g) The Nominating Committee shall have the authority to designee one or more candidates for the statewide election of Secretary-Treasurer, Vice President, President-elect, and KBA Delegate to the ABA House. Such nominations shall be filed with the Executive Director at least 120 days prior to the first day of the next Annual Meeting of the Association by 1 March. The Committee shall also have the authority to nominate one or more candidates for any District Governor position in the event no nominating petition is filed for any vacancy. Such nominations must be filed with the Executive Director at least 75 days prior to the Annual Meeting of the Association by 15 April.

ARTICLE VIII – OFFICERS

8.4 President-elect. The President-elect shall automatically succeed to the office of President at the close of the next Annual Meeting on 1 July of the following year. Duties shall be delegated by the Board of Governors. The President-elect shall perform the duties of the President in the event of the President’s inability to serve.

8.5 Vice President. The Vice President shall automatically succeed to the office of President-elect at the close of the next Annual Meeting on 1 July of the following year. The Vice President shall be responsible for such duties as are individually assigned by the President with the approval of the Board of Governors.

Approved by the Board of Governors, June 20, 2014
NAWJ Production Earns Emmy

“Fair and Free,” a film featuring former U.S. Supreme Court Justice Sandra Day O’Connor and produced by the National Association of Women Judges (NAWJ), has earned an Emmy in the Public Service Announcement category of the National Academy of Television Arts and Sciences.

You can view the film at http://ivp.nawj.org/.

The film was produced as part of the NAWJ “Informed Voters – Fair Judges” project, a nonpartisan voter education project developed to increase public awareness about the judicial system, to inform voters that politics and special interests have no place in the courts, and to give voters the tools they need to exercise an informed vote in favor of fair and impartial courts.

Kansas is among the states chosen to pilot the NAWJ project in 2014. Other states include Alaska, California, Florida, Iowa, Missouri, Tennessee, and Washington. “Fair and Free” was funded in part by the Kansas Bar Foundation. The Foundation also is assisting with project promotion and is accepting online donations targeted to Kansas efforts.

Justice Carol Beier, a KBA and NAWJ member, said the primary goal of the project was to educate Kansans about the role of the judiciary and voters’ important part in preserving fair and impartial courts.

“Not all citizens know the candidate qualities that should animate their votes in judicial elections and retentions are different from the qualities that should drive their choices of political actors to serve in the legislative and executive branches,” Beier said.

“The project is designed to start and support a public conversation about why it is vital to ensure that our judges are able to follow the law, not public opinion or party affiliation.”

Each state pilot is committed to the widest possible dissemination of the “Informed Voters– Fair Judges” materials – including the award-winning film, testimonials from Kansans and others, and presentations before large and small legal and lay audiences across the state. The Kansas Coordinating Committee is led by Chair Mary Birch, of Lathrop & Gage.

Many Kansas judges from all levels of the judiciary – including Justice Beier of the Kansas Supreme Court and Judge Karen Arnold-Burger of the Court of Appeals and Judge Cheryl Rios Kingfisher of the 3rd Judicial District – as well as lawyer and lay members of the Coordinating Committee, are available to book as presenters for professional, community, and school groups.

Other Kansas lawyers participating in the Coordinating Committee include: Jim Robinson, Gene Balloun, Martha Hodgessmith, Amanda Kiefer, Lynn Johnson, Aída Alaka, Mike Davis, Dan Diepenbrock, Jennifer Hannah, Joslyn Kusiak, Amy Morgan, and Angel Zimmerman.

The “Informed Voters—Fair Judges” section of the NAWJ website includes additional specific information on the project and downloadable handouts and PowerPoint slides for presentations. Topics include:

• What is the Role of Courts in America?
• Courts Are the One Non-Political Branch of Government
• How Do States Select Fair Judges?
• How Do I Judge a Judicial Candidate?
• Are Judges Accountable?
• Courts Are Not For Sale

You can show your support for the Kansas pilot of this project by making a donation at http://www.ksbar.org/donations/. If you would like a Coordinating Committee member to present to your organization, contact Mary Birch at (913) 451-5124 or at mbirch@lathropgage.com.

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.
Immigration has been in the news a great deal recently, but between the attention-catching headlines that present the issue in clear black and white, the real stories often fall through the cracks. Take the children of the undocumented as an example. Enculturated into the United States, speaking English as their primary or only language, and oftentimes totally unaware of their lack of immigration status until they are nearly adults, these children had no choice in where or how they were to be raised.

Or consider undocumented victims of violent crimes. Those individuals play an important part of the safety of our neighborhoods by reporting crimes and assisting law enforcement, but fear often keeps them silent and our communities at risk. Thanks to a $5,000 Kansas Bar Foundation IOLTA grant, Immigration Professionals, a dedicated group of Kansas attorneys and critical community partnerships with local churches, CBOs, and police, Kansas has begun to address the grey issues of immigration policy with innovative programs.

A.M. is a student at a local university and an example of a child of undocumented parents. He was brought to the United States as a child without documentation through no fault of his own. He speaks English as his primary language and has completed the vast majority of his education in Kansas schools. He is an American kid in every way except in regard to his legal status. Nonetheless, when he graduates next year he will find himself unable to find gainful employment. Meeting all of the requirements for the Deferred Action for Childhood Arrivals (DACA) program, A.M. came to Immigration Professionals for help. Through DACA, A.M. should be able to receive deferred immigration action for a period of two years and to receive work authorization for the same period of time.

A.M. is just the kind of person that DACA was created to help: young, smart, and eager to participate fully in American life. There was just one problem; A.M., like many immigrant youth, comes from an indigent household. Even though he had managed to save several hundred dollars, and despite Immigration Professionals being a not-for-profit organization offering reduced rates, A.M. still could not afford to pay for both the legal fees associated with the DACA process and for legal representation. That’s where IOLTA stepped in and provided financial assistance to help him and people like him apply for DACA and achieve his dream of working in the United States. After completing the application process, A.M. said “a whole new window of opportunities is opened up to me, allowing and helping me achieve my goals.”

C.P. is another example of those helped through IOLTA and Kansas attorneys, but in her case it is not only her, but her

Footnotes
1. Memorandum signed by President Obama (June 15, 2012) announced by the Secretary of Homeland Security (effective Aug. 15, 2012) allowing certain individuals over 15 who came to the United States as children to receive deferred immigration action for a period of two years (subject to renewal) and allowing them to be eligible for work authorization. The memo also instructs ICE to defer action pending against persons who fit the requirements for deferred action. DACA applications require substantial evidentiary support including birth certificates, travel, medical, school, and employment records and biometric screening. There is an appeal process for denials. Making a fraudulent claim is a felony punishable by a fine or imprisonment under 18 U.S.C. § 1001.
entire community. Undocumented victims of crimes are easy targets because criminals know that fear will often keep them from coming forward. That fear and lack of cooperation with authorities directly lead to more violent and crime ridden communities. That's why the Adjustment of Status for Protection from Abuse for victims of violent crimes (U-Visa)\(^2\) was created. As Tarik Khatib, the city of Lawrence’s chief of police said:

The Lawrence Police Department recognizes the value of the U-Visa as a community policing and crime fighting tool, as it builds trust and increases cooperation from the immigrant community. Once the victim obtains a certification from our agency, follow-up and legal representation is needed due to the complexity of the (immigration) process.

C.P. was part of the trust and cooperation-building program after she was the victim of a violent attack where she suffered severe physical and psychological damage. Afterwards, C.P. reported the attack to local authorities and cooperated fully with the police, investigators, and court, despite any personal fear she may have had as a result of her documentation status. C.P. had done the right thing, stepping forward out of the shadows to help all of us be more safe, yet despite fulfilling the letter and spirit of the law, C.P. had been unable to obtain the certification necessary to start the U-Visa process.

That’s when C.P. was referred to Immigration Professionals by a community partner. After countless phone calls, follow ups, and direct advocacy with the district attorney’s office, they were able to reach the director of victims assistance unit who helped to move her case forward. After months of work with C.P., who had initially all but given up, those attorneys were able to move from one arduous task to the next to provide officials with all of the relevant information about C.P.’s case. First, the attorneys meet with the client, gather all of the information, and evaluate the viability of the application. Then, they work in obtaining the certification from the police or the district attorney. Next, they prepare the application, forms, evidence, and affidavits needed for the case, collaborating with law enforcement, community organizations, victim advocates, therapists, etc. Without the help of programs like IOLTA and dedicated teams of attorneys willing to lend a helping hand to those in need, C.P. would have been just another story that slipped through the cracks.

To get help through the IOLTA grant, individuals must (1) meet the qualifications for DACA or (2) have suffered substantial physical or mental abuse as the victim of a violent crime and have cooperated with the police, and (3) have a household income at or below 150 percent of the poverty level ($17,325 per year for a single person). Immigration Professionals has offices in Lawrence, Kansas City, and recently Liberal to provide assistance to individuals across the state. If you know someone who might be helped by these important programs or for more information, Immigration Professionals can be reached at (844) 221-1844.

2. U-Visa, see 8 CFR § 245.24 et seq., requires, inter alia, evidence that applicant is not an inadmissible person (e.g., has committed crimes of moral turpitude) and has cooperated and agrees to continue to provide assistance to the police in investigating and prosecuting violent crime.

No matter where you stand on immigration, there are some fundamentals which every American can agree with. The safety of our communities is important; no one should be made a victim of crime, especially violent crimes; and punishment should be reserved for those who transgress, not their families. Thanks to hard working Kansas attorneys, IOLTA funds and their innovative use for programs like these, and community partnerships with groups like the Lawrence Police Department we are bringing attention to the issues that matter, not the ones that make headlines.

About the Authors

Patrick H. Donahue is an attorney-manager and general counsel of Disability Professionals Inc. and the former director of the Legal Aid Society of Topeka. He received his B.A. and M.S. from Emporia State University and his J.D. from the University of Kansas. He is a contributing author for the KBA Long-Term Care Handbook and the Thomson-West Advising the Elderly Client manual, and is past chair of the KBA Committee of Legal Issues Affecting the Elderly.

Laura Canelos-Ramón is the lead paralegal and communications coordinator at Immigration Professionals. An active member of the community, she has served as a city advisor and has worked as a community organizer focusing on the Hispanic community. A daughter of immigrants, Canelos-Ramón was born in Ecuador, where she completed law school. She recently became a proud U.S. citizen.

Joshua Spain is the director of the Plymouth Language Program, a multicultural education center focusing on the acculturation of immigrants. He studied cognitive science at the University of Kansas and has a master of arts in social science education. He has worked to develop citizenship and English education programs in various capacities in both the United States and abroad.

IN THE SUPREME COURT OF THE STATE OF KANSAS

ORDER

2015 SUPREME COURT SESSION SCHEDULE

The Supreme Court session schedule for 2015 is as follows:

January 26-30
March 2-6
May 4-7
September 14-18
October 26-30
December 14-18

BY ORDER OF THE COURT, this 1st day of July, 2014.

Lawton R. Nuss
Chief Justice
The 2014 legislative session came to an end on May 30, as both chambers embraced Sine Die, the ceremonial end of the session. This year the legislature met for a total of 72 days, 18 fewer than normal. During those 72 work days the Kansas legislature introduced 569 bills (362 House bills, 207 Senate bills) and 23 concurrent resolutions (14 House concurrent resolutions and nine Senate concurrent resolutions). The Kansas Bar Association monitored and engaged on 92 bills and provided expert testimony on 37 bills.

The session ended on a rather controversial topic, school finance. That bill, Senate Sub. for HB 2506, dominated the final week of the session. Dealing with the issue even caused Rep. Marc Rhoades to resign as chair of House Appropriations. The issue received an enormous amount of press coverage, and after a close contentious vote (House 63-57; Senate 22-16) school finance will continue to be an issue into election season. Here is a breakdown of policies within the school finance bill (courtesy of Strategic Communications of Kansas):

- Fairness property tax relief: If your child is educated at home or in a private school you would be eligible for $1,000 per student property tax credit; capped at $2,500;

- Language stating that no state agency/school district shall expend state dollars for the implementation of the Common Core Standards;

- Corporate Education Tax Credit Scholarship Program, allowing companies to give $10,000 for scholarships for kids who come from families who make less than $43,000 a year or have a IEP;

- Eliminates due process rights for tenured public school teachers.

Look for school finance to be a rallying point for the November elections. In addition, look for local school districts to begin to write the due process language into future contracts. This will be a major issue this fall.

Judicial Branch

At the start of the year, the Judicial Branch forecast a possible $8.25 million shortfall for FY 2015. Chief Justice Nuss stated in his state of the judiciary address that there is a strong possibility of court closures in FY 2015. To make up for the budget shortfall, the Court Budget Advisory Council recommended the following cuts:

- Delay filling judicial openings: saving $438,000;

- Maintain 80 clerk vacancies: saving $2.5 million;

- Reduce training budget by 50 percent: saving $206,000;

- Cut 19.5 full-time employee court services jobs: saving $1.08 million;

- Cut access to justice: saving $250,000;

- Keep 40 positions open: saving $1.25 million; and

- Furlough for 10 days: saving $2.526 million.

It would appear that those cuts and potential furloughs have been avoided after both chambers passed a judicial branch omnibus bill. On April 4, the House and Senate approved the Conference Committee Report on HB 2338, which contained the judicial budget.

Senate Sub. for HB 2338: Judicial Budget (Passed Senate 26-11; House 66-57)

- Appropriates $2 million additional state general fund for FY 2015;

- Increases existing docket fees and creates statutory filing fees for appeals to the Court of Appeals or the Supreme Court;

- Allows chief judge in a judicial district to elect to be responsible for submitting a budget for the judicial district to the chief justice of the Kansas Supreme Court;

- District court judges in each judicial district would elect a district judge to serve as chief judge;

- Requires the chief justice to provide notification of a vacancy in the office of district court judge or district magistrate court judge to the chair-
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person of the district judicial nominating commission not later than 120 days following the date of the vacancy;

• Deletes requirement for the payment of longevity to Judicial Branch non-judicial staff.

This does not include the added funds for nonjudicial personnel wage increases found in HB 2303. The governor signed this bill into law early this year. It should be noted that the revenue anticipated from the docket fee increase is estimated to bring in $6.2 million. The first $3.1 million is designated to complete the e-court system. The remaining will be used for judicial branch operations. Should the estimated revenue fall short, as some originally projected, the judicial branch may be in a budget crunch come January.

In addition, the policy portions of the bill (SB 364/SB 365 languages) will not kick-in till 2016 at which time chief judges will be elected and determine if they wish to opt-in to the budget program. Adding that amount of power to the chief judge position is sure to cause some strong internal politics in judicial districts looking for more control.

Senate Sub. HB 2065: Relating to district judge and district magistrate judge

This bill expands the jurisdiction of magistrate judges by allowing them to conduct felony first appearances and uncontested divorces. It also allows law-trained magistrate judge decisions to escalate automatically to the Court of Appeals. Appeals from district magistrate judges who are not regularly admitted to practice law in Kansas will continue to be to a district judge, as under previous law. To facilitate the new appeals process, the bill directs that all actions or proceedings before a district magistrate judge regularly admitted to practice law in Kansas be on the record if such actions or proceedings would be on the record before a district judge.

Senate Sub. for HB 2070: Time limits for certain appeals

This bill was formerly SB 289, which was introduced by Sen. Jeff King but failed to move out of the Senate. As such this policy was added to HB 2070. This bill imposes time limits for district, court of appeals and the Kansas Supreme Court. The time period to issue decisions runs from 120-180 days. If the decision is not entered within 190 days all counsel SHALL file a joint request to the court that the decision be issued without delay. If the court fails to issue a decision after the joint motion, all parties shall ask for an intended date of decision. Senate Sub. for HB 2070 passed the Senate 32-7. No further action was taken.

KBA Issues

HB 2398: Amending the Kansas Revised Limited Liability Corporations Act

The Kansas Bar Association Legislative Committee organized a subcommittee to revise the Kansas Revised Limited Liability Corporations Act (KRLLLCA). The subcommittee, comprised of Bill Quick, Prof. Webb Hecker, Bill Matthews, Joe Jarvis, Joe McLean, and Ryan Kriegshauser, has worked with the Kansas Secretary of State’s Office to determine which statutes need to be updated to conform to the Delaware code. The subcommittee has also identified specific statutes that require revision due to recent case law. The bill became effective on July 1.

HB 2444: Spendthrift trusts

HB 2444 is a bill the KBA originally introduced in 2010. The bill was referred to the Judicial Council for further study and they introduced their version in 2011. Both bills died in committee. After reevaluating the issue, the KBA Real Estate, Probate, and Trust Law Section recommended that the original 2010 version be reintroduced. The KBA testified on Thursday, February 6. Tim O’Sullivan provided the written and oral comments. The governor signed this bill into law earlier this month.

SB 311: Increasing the cap on noneconomic damages

This bill increases the cap on noneconomic damages to $350,000 by 2022. The tradeoff is the use of collateral source evidence and a shift to the federal expert witness standard. The KBA has policies opposing both of these changes. It is important to note that the KBA has no position on the cap on noneconomic damages. The KBA only opposed the collateral source issue and the Daubert issue. After several meetings and a failed conference committee report, members of the Senate Judiciary Committee and the House Commerce Committee agreed to the version of the bill approved by the House without the collateral source language.

Criminal Law Bills

SB 248: Victim notification

SB 248 amends the requirement that the secretary of corrections provide written notice to victims or their families when the inmate who committed the crime is released. Specifically, the secretary will be required to provide such notice at least 14 working days prior to the inmate’s release, unless the release is due to court order, escape, or death.

SB 310: Grand juries; attorney general prosecution

SB 310 amends the statute governing the summoning of grand juries to allow grand juries summoned upon the petition of the attorney general or a district or county attorney to consider any alleged misdemeanor that arises as part of the same criminal conduct or investigation underlying any alleged felony considered by the grand jury.

The bill also amends the statute governing grand jury indictment procedure to allow a grand jury impaneled through elector petition to request that the attorney general prosecute the case arising from an indictment, if the grand jury is of the opinion that the prosecuting attorney would not diligently
HB 2445: Discovery access and disclosure requirements

HB 2445 amends the code of criminal procedure to clarify that the defense, rather than the defendant individually, is entitled to access discovery materials. Additionally, the bill amends the defense's expert disclosure requirements to remove the requirement that the bases and reasons for the expert's opinions be included and to make such disclosures due at a reasonable time prior to trial by agreement of the parties or by order of the court (instead of 30 days before trial). The bill imposes the same disclosure requirements on the prosecution for any expert witness's direct examination.

HB 2478: Crimes committed with an electronic device

HB 2478 allows prosecution of crimes committed with an electronic device to be filed in the county where: (1) the requisite act occurred; (2) the victim resides; (3) the victim was present at time of the crime; or (4) affected property was located.

HB 2490: Statutes related to criminal sentencing; hard 50; hard 25 for attempted capital murder and felony murder

The bill would establish that a life sentence with a mandatory minimum term of imprisonment of 50 years (the hard 50 sentence) is to be the default sentence when a defendant is convicted of premeditated first degree murder committed on or after July 1. The sentencing judge would be permitted to impose a life sentence with a mandatory minimum term of imprisonment of 25 years (the hard 25 sentence) if the judge reviews mitigating circumstances and finds substantial and compelling reasons to impose the lesser sentence. If the judge imposes the hard 25 sentence, the judge would be required to state on the record the substantial and compelling reasons for imposing the sentence.

The bill would impose the hard 25 sentence for a conviction of attempted capital murder or for a conviction of first degree murder when classified as the killing of a human being committed in the commission of, attempt to commit, or flight from any inherently dangerous felony (felony murder).

For any of these sentencing provisions, if the defendant's criminal history classification would subject the defendant to presumptive imprisonment in a range exceeding 300 months (for a hard 25 sentence) or 600 months (for a hard 50 sentence), then the defendant would instead be required to serve a mandatory minimum term equal to the sentence established under the sentencing guidelines.

The bill also amends various statutes to provide consistency and clarify that inmates sentenced to life without the possibility of parole are not eligible for sentence commutation, functional incapacitation release, parole, or out-of-state travel as a material witness. The governor's commutation power would be limited in death penalty cases to imprisonment for life without the possibility of parole. A person under sentence of death would not be eligible for functional incapacitation release. Finally, the bill would require the presence of the defendant at every stage of trial in a prosecution for a crime punishable by life without the possibility of parole.

SB 256: Mistreatment of dependent adult or elder person

SB 256 amends the law related to mistreatment of a dependent adult or elder person, sureties, and appearance bonds, the Kansas Racketeer Influenced and Corrupt Organization (RICO) Act, and costs of appellate representation by the attorney general.

Specifically, the bill defines an elder person as a person 70 years of age or older, increases the penalty for taking property over $5,000 but less than $25,000 to a level 7 person felony, establishes an affirmative defense if the property was given as a gift.

HB 2389: Search warrants and probable cause affidavits

The bill amends the law concerning affidavits and sworn testimony used in support of the probable cause requirement for warrants. Specifically, it strikes language that allows a magistrate to issue an arrest warrant or summons based on “other evidence,” and replaces it with “sworn testimony.” Additionally, for a warrant or summons executed on or after July 1, probable cause affidavits or sworn testimony will not be open to the public until the warrant or summons has been executed.

Family Law Bills

HB 2568: Kansas Family Law Code (KBA supported)

HB 2568 amends the Kansas Family Law Code. In parental proceedings, the bill provides that child support will be determined pursuant to the Kansas Child Support Guidelines (the Guidelines). The court can consider any affirmative defenses pled and proved in making such an award. For any period occurring five years or less before or after commencement of the action, the bill creates a rebuttable presumption that the Guidelines reflect the actual expenditures made on the child’s behalf during that period. For any period occurring more than five years before commencement of the action, the person seeking the award has the burden of proving that the total amount requested for that period does not exceed expenditures actually made on the child’s behalf during that period.

Additionally, in parental proceedings, the bill allows the court to award costs and attorney fees to either party as justice and equity may require and, unless the attorney represents a public agency in an action, could order that the amount be paid directly to the attorney, who may enforce the order in the attorney’s name in the same case. Further, the bill strikes language prohibiting fees for representation of a petitioner by the county or district attorney.

SB 258: Certificates of birth resulting in stillbirth

SB 258 enacts Meriden’s Law, which will be part of and supplemental to the Uniform Vital Statistics Act. The bill requires the state registrar to establish a certificate of birth resulting in stillbirth that contains personal and demographic information describing the stillbirth event. The bill prohibits the inclusion of information relating to the child’s death, however, and states the certificate is not proof of a live birth. The bill replaces “product of human conception” with “human child” in the definition of “live birth.”

SB 302: Surrogate parents (DEAD)

This bill would not only void surrogate parenting contracts, but would impose a penalty of up to $10,000 on “Any person or entity who or which is involved in, or induces, arranges or otherwise assists in the formation of a surrogate parenting contract for a fee, compensation, or other remuneration.” It could subject to criminal punishment doctors, lawyers, para-
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legals, nurses, midwives, and anyone else who had anything to do with helping create a family by those unable to do so.

SB 368: Child in need of care (DEAD)
This bill would replace all references to “grandparent” throughout the Kansas Revised Code for Care of Children with “relative” so that if a child is determined “in need of care” and is removed from the custody and care of a parent, any relative could apply for and be granted custody of the child with the following priorities: “(1) First, to any grandparent of the child; (2) then to any great-grandparents of the child; (3) then to any adult siblings of the child; and (4) then to any uncle or aunt of the child.” The bill was assigned to the Senate Judiciary Committee, which had scheduled a hearing for Wednesday, February 19.

SB 389: Domestic case management (DEAD)
This bill would make numerous changes to the Kansas Domestic Case Management (Parent Coordination) statutes to tighten up the process and limit the initial term of case management orders. The bill defines the rights of parents in the process, requires specific findings before a court can order parents into case management, including that other methods to resolve ongoing disputes were tried and failed. The bill clarifies procedural protections for parents in case management, sets out parent rights for court access while in case management, requires the case manager to give rationale for recommendations made, and clarifies the procedures a court must use when reviewing case management recommendations.

HB 2450: Replacing the term “best interests of the child” with “least detrimental alternative for the child” (DEAD)
This bill seeks to replace the term “best interests of the child” throughout the Kansas Revised Family Law Code with the term “least detrimental alternative.” The bill was heard by the House Committee on Children and Seniors on Thursday, January 30. At the end of a packed committee hearing at which few testified in favor of the change and many testified against it, the chair indicated the bill would not proceed.

Tax Law Bills

HB 2643: Mortgage Registration Tax Repeal, Machinery and Equipment tax ROZ Program
This bill makes a number of amendments to property tax, motor vehicle tax, and mortgage registration tax provisions. The bill also makes a change to an income tax penalty provision and expands the “rural opportunity zone” (ROZ) program.

One section of the bill retroactively clarifies legislative intent from 2006 (when a property tax exemption for certain commercial and industrial machinery and equipment was enacted) by determining the circumstances under which property may be classified as personal property or real property. In making the classification determination, county appraisers are required to conform to the definitions of real and personal property provided elsewhere in Kansas law. (Ash Grove Cement Plant)

In addition, the mortgage registration tax is phased out over five years, while additional fees collected by county registers of deeds are phased in over four years. The mortgage registration tax, which has been levied at the rate of 0.26 percent of the principal debt or obligation secured by mortgages, is reduced to 0.2 percent for all mortgages received and filed for record during calendar year 2015; 0.15 percent during calendar year 2016; 0.1 percent during calendar year 2017; and 0.05 percent during calendar year 2018. The tax is repealed altogether beginning in 2019.

House Sub. for SB 231: Court of Tax Appeals
This bill makes a number of changes to the state court of tax appeals (COTA) including property evaluation and lower interest rates in delinquent taxes. In addition, new provisions would prohibit COTA from determining who may sign appeals forms; who may represent taxpayers, deciding what constitutes the unauthorized practice of law; and deciding whether contingency fee agreements are a violation of public policy.

HB 2422: Boat tax system
This bill makes a number of changes to the new boat tax system being implemented in tax year 2014. One provision expands the definition of “watercraft” subject to the new law to include all watercraft designed to be propelled by machinery, oars, paddles, or wind action upon a sail for navigation. Additional language clarifies that watercraft previously exempt under Kansas law will not become taxable pursuant to the new system. A new exemption is provided for vessels designed to be propelled through the water by human power alone.

Bills of Interest

HB 2140: Concealed carry
This bill creates a new law allowing in-state, retired officers, and out-of-state officers to carry a concealed handgun. This bill does not apply to buildings where the possession of a handgun is prohibited or restricted by the chief judge of a judicial district.

HB 2272/ HB 2125: Gaming
HB 2272 lowers the initial buy-in for a casino in southeast Kansas from $225 million to $50 million. Gaming opponents wanted to package HB 2272 with a moratorium for slot machines in Sedgwick County. That bill, HB 2125, failed to make it out of committee. Gaming opponents feel slighted by the failure to act on both gaming bills.

HB 2553: Health care compact
This bill allows Kansas to join the Interstate Health Care Compact. The compact would allow compact member states to regulate health care within their boundaries and to secure federal funding for member states that choose to invoke their authority under the funding provisions of the compact. The U.S. Congress will have to consent to the compact in order for it to be effective. If approved by Congress, the compact will become effective on its adoption by at least two member states. Pursuant to the bill, the compact could be amended, and a state will be able to withdraw from the compact. The bill contains a preamble that includes statements on the importance of the separation of powers, including between federal and state authority, and the preservation of individual liberty and personal control over health care decisions.

Special Notice
While it may be difficult to think about the 2015 legislative session when the 2014 legislature has just completed its work, perseverance is necessary. KBA Legislative Policy requires that
All legislative proposals be submitted in final form by October 1. Individual members, local bar associations, committees, and sections may all submit proposals. Each proposal will be reviewed by the appropriate section or committee before consideration. Therefore, it is imperative that you begin drafting your proposal now and submit it to the appropriate section.

All proposals should be mailed to:

Kansas Bar Association
1200 SW Harrison St.
Topeka, KS 66612

or emailed to Joseph N. Molina at jmolina@ksbar.org.

About the Author

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

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ENDNOTE

1. Summaries provided in part by the Kansas Legislative Research Department, see http://www.kslegresearch.org/klrd.html.
**ATTORNEY DISCIPLINE**

**DISBARMENT**

**IN RE LOWELL D. RAMSEY**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**NO. 14715 – MAY 29, 2014**

FACTS: In a letter signed on May 22, 2014, addressed to the clerk of the appellate courts, respondent, Ramsey, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2013 Kan. Ct. R. Annot. 396). At the time the respondent surrendered his license, a complaint had been docketed by the disciplinary administrator’s office for investigation, and a finding of probable cause had been made. The complaint alleged that respondent violated Kansas Rule of Professional Conduct 8.4(d) (misconduct) (2013 Kan. Ct. R. Annot. 655).

HELD: Court examined the files of the office of the disciplinary administrator and concluded the surrender of the respondent’s license should be accepted and that the respondent should be disbarred. Ramsey is hereby disbarred from the practice of law in Kansas, and his license and privilege to practice law are hereby revoked.

**ONE-YEAR SUSPENSION**

**IN RE MIRIAM M. RITTMASTER**

**ORIGINAL PROCEEDING IN DISCIPLINE**

**NOS. 109,836/111,126 – JUNE 6, 2014**

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Rittmaster, of Overland Park, an attorney admitted to the practice of law in Kansas in 1998. Two separate complaints were filed against the respondent; both complaints involved respondent’s representation in divorce matters.

DISCIPLINARY ADMINISTRATOR: On January 4, 2013, in Case No. 109,836, 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 timely filed an answer on March 7, 2013. The disciplinary administrator recommended a six-month suspension on that complaint. On November 5, 2013, 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 on December 18, 2013. The disciplinary administrator recommended a one-year suspension for the second complaint retroactive to April 1, 2013, when her license was temporarily suspended.

HEARING PANEL: A hearing was held on complaint No. 109,836, before a panel of the Kansas Board for Discipline of Attorneys on March 7, 2013, when the respondent was personally present and was represented by counsel. Respondent’s oral motion to accept answer out of time was granted at the hearing. The hearing panel determined that respondent violated KRPC 1.1 (2013 Kan. Ct. R. Annot. 446) (competence); 1.3 (2013 Kan. Ct. R. Annot. 464) (diligence); 1.4(a) (2013 Kan. Ct. R. Annot. 484) (communication); 1.15(b) (2013 Kan. Ct. R. Annot. 553) (safekeeping property); 8.1(b) (2013 Kan. Ct. R. Annot. 646) (failure to respond to lawful demand for information from disciplinary authority); 8.4(c) (2013 Kan. Ct. R. Annot. 655) (engaging in conduct involving misrepresentation); and Kansas Supreme Court Rule 207(b) (2013 Kan. Ct. R. Annot. 336) (failure to cooperate in disciplinary investigation). The hearing panel recommended a six-month suspension on the first complaint. A hearing was held on complaint No. 11,126 before a panel of the Kansas Board for Discipline of Attorneys on January 8, 2014, when the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.3 (2013 Kan. Ct. R. Annot. 464) (diligence); 1.4(a) (2013 Kan. Ct. R. Annot. 484) (communication); 1.16(a)(2) and (d) (2013 Kan. Ct. R. Annot. 569) (termination of representation); and 8.4(d) (2013 Kan. Ct. R. Annot. 655) (engaging in conduct prejudicial to the administration of justice).

HELD: Court held the evidence of respondent’s misconduct before the hearing panel was established by clear and convincing evidence. Court held that respondent should be suspended from the practice of law for a period of one year, retroactive to April 1, 2013, and that she be subject to a Rule 219 reinstatement hearing before her suspension may be lifted. In respondent’s motion for reinstatement, she is required to address whether an appropriate plan for supervision and support of her resumption of the practice of law is needed. At the reinstatement hearing, the respondent is required to present clear and convincing evidence that she has (1) made full restitution to her clients and/or the Client Protection Fund, and (2) received adequate mental health treatment to render her capable of engaging in the active practice of law.

**CIVIL**

**CONTRACTS AND ELECTRIC COMPANIES**

**PRAIRIE LAND ELECTRIC COOPERATIVE INC. V. KANSAS ELECTRIC POWER COOPERATIVE ET. AL.**

**PHILLIPS DISTRICT COURT – AFFIRMED**

**COURT OF APPEALS – REVERSED**

**NO. 102,630 – MAY 16, 2014**

FACTS: Prairie Land Electric Cooperative Inc. (Prairie Land) purchases wholesale electricity from multiple suppliers and distributes that electricity to retail consumers within a certified service area in northwest and north central Kansas. The Kansas Corporation Commission establishes the boundaries of Prairie Land’s certified service area. Within its certified service area, Prairie Land’s distribution system consists of all the “facilities, transmission lines, distribution lines and substation equipment as owned and operated by Prairie..."
Land." The dispute in this case arises from Prairie Land's decision to enter into a contract with Sunflower Electric Power Corp. (KEPCo), and Sunflower Electric Power Corp. and which supplier would provide the electricity for one of Prairie Land's new retail customers. Prairie Land filed a petition for declaratory judgment asking the court to construe and declare the rights, status and legal relations of the parties under both contracts. Trial court ruled that Sunflower has the contractual right and obligation to serve the new pumping station delivery point. The Court of Appeals reversed the trial court's ruling and remanded with directions to enter judgment in favor of KEPCo after concluding that KEPCo had the contractual right to supply electricity to Prairie Land for the new delivery point based on the unambiguous language of the KEPCo Contract.

ISSUES: (1) Contracts and (2) electric companies

HELD: After careful consideration of seemingly irreconcilable contract provisions, Court concluded the only way to reasonably interpret and give legal effect to both contracts is to interpret the KEPCo Contract in light of, and as limited by, Prairie Land's pre-existing obligations under the Sunflower Contract. Thus, Court concluded that Prairie Land agreed in the KEPCo Contract to purchase its needs from KEPCo only if one of the two exceptions recognized in the Sunflower Contract applied—i.e., if Sunflower lacked capacity to meet all of Prairie Land's requirements; or (2) if Prairie Land had preexisting obligations to purchase some of its energy requirements from other suppliers at the time it entered into the Sunflower Contract. Court found that the first exception did not apply because Sunflower had the capacity to meet Prairie Land's requirements for the new Jayhawk pumping station. Similarly, the second exception did not apply because Prairie Land did not have a preexisting obligation to purchase energy requirements for the new Jayhawk pumping station from a supplier other than Sunflower at the time it entered into the Sunflower Contract. Court interpreted the contracts at issue to require that Prairie Land purchase its energy needs for the Jayhawk pumping station from Sunflower rather than KEPCo.

STATUTES: K.S.A. 20-3018; and K.S.A. 60-1701, -1713, -2101

HABEAS CORPUS AND RES JUDICATA

STATE V. KINGSLEY

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 108,849 – JUNE 13, 2014

FACTS: In 1991, a jury convicted Kingsley of premeditated first-degree murder, aggravated robbery, aggravated arson, and forgery. The court imposed three consecutive life sentences. After his direct appeal, Kingsley also brought several unsuccessful collateral attacks on his convictions and sentences. In his current motion for relief of judgment, Kingsley challenged a jury instruction on premeditation and that it was also error to instruct the jury on both premeditated murder and felony murder. The district court held Kingsley's motion for relief was barred by the doctrine of res judicata.

ISSUES: (1) Habeas corpus and (2) res judicata

HELD: Court stated that K.S.A. 60-1507 provides the exclusive statutory procedure for collateral attacking a criminal conviction and sentence. Therefore, neither K.S.A. 2011 Supp. 60-260(b), nor K.S.A. 60-2606, can be used for that purpose. If a direct appeal has been taken from a criminal conviction or sentence, the doctrine of res judicata provides that the parties to the appeal are barred from relitigating any issue decided in the direct appeal. Further, those issues that could have been presented in the direct appeal, but were not, are deemed waived in a collateral proceeding. Court held that the claims raised by Kingsley in his pro se motion are barred by the doctrine of res judicata. As a result, contrary to Kingsley's argument, the district court did not err in summarily dismissing Kingsley's motion without appointing counsel or conducting an evidentiary hearing because the motion, files, and records of his cases conclusively showed Kingsley was not entitled to relief.

STATUTES: K.S.A. 1990 Supp. 21-3401, -3427, -3719, -3710; and K.S.A. 60-260, -2606, -1507

WORKERS COMPENSATION AND GOING AND COMING RULE

WILLIAMS V. PETROMARK DRILLING LLC ET AL.

WORKERS COMPENSATION BOARD – AFFIRMED

COURT OF APPEALS – REVERSED

NO. 108,125 – JUNE 6, 2014

FACTS: Williams was injured in a one-vehicle accident as he rode back home from Petromark's drilling site. The vehicle blew a tire and Williams was ejected because he did not have his seat belt on. Williams rode to the work site with Roach, his supervisor, but was injured on the way home when he rode with another employee, LAMaster. Roach was paid mileage for driving his crew to and from the drill site. Williams filed a workers compensation claim. The administrative law judge (ALJ) held that Williams' injuries were not compensable because they did not arise out of and in the course of his employment. The Workers Compensation Board reversed the ALJ by finding that Williams' injuries did arise out of and in the course of his employment and that Williams was not barred by his failure to wear a seatbelt despite Petromark's company policy. The Court of Appeals reversed the Board by holding that Williams' claim was barred by the "going and coming" rule. Court found that Williams chose to ride from the drill site with LaMaster instead of Roach. Roach's travel was definitely inherent to his employment because it furthered Petromark's interests, but the same cannot be said of Williams at the time of the injury. He was on a personal mission to get home sooner. The proximate cause of Williams' injury was LaMaster's rather than Petromark's negligence. Court held that the Board misapplied the law to the facts of this case.

ISSUES: (1) Workers compensation and (2) going and coming rule

HELD: Court held that when the evidence on a workers compensation claim is not amenable to only one factual finding as a matter of law, an appellate court errs by deciding it in that way. The reviewing court's responsibility is to examine the record as a whole to determine whether the Workers Compensation Board's factual determinations are supported by substantial evidence. That analysis requires the court to (1) review evidence both supporting and contradicting the agency's findings; (2) examine the presiding officer's credibility determination, if any; and (3) review the agency's explanation as to why the evidence supports its findings. In this case, the Court of Appeals' decision reversing the Workers Compensation Board on the ground that undisputed facts in the record could lead to only one legal conclusion under the "going and coming" rule of K.S.A. 2010 Supp. 44-508(f) must be reversed and the Board's decision affirmed. Court found such substantial competent evidence in the record on appeal. As the Board explained in its order, Williams' job as an oil drilling crew member required that he travel to ever-changing remote drill sites. Roach testified at his deposition that Williams would not be employed if he was unwilling to travel to those sites. Petromark provided an elective travel option to its employees. Court found the Court of Appeals reversed a line from evaluating the evidence in light of the record as a whole to test whether it supported the Board's factfinding into ruling as a matter of law on evidence that was, although undisputed, conflicting under the governing statute.

STATUTES: K.S.A. 44-508(f); and K.S.A. 77-621
Appellate Decisions

CRIMINAL

STATE V. ARMSTRONG

SHAWNEE DISTRICT COURT – AFFIRMED

NO. 103,120 – MAY 23, 2014

FACTS: Armstrong was convicted of premeditated first-degree murder and criminal possession of firearm. On appeal he claimed (1) misconduct by prosecutor during closing argument and state witness’ violation of in limine order; (2) trial court erred in failing to instruct jury on lesser included offense of unintentional but reckless second-degree murder; (3) trial court gave an improper voluntary manslaughter instruction; (4) trial court erred in denying motion for mistrial based on allegations of juror sleeping and two jurors discussing case during recess; (5) cumulative error denied him a fair trial; and (6) district court lacked jurisdiction to award restitution after sentence was imposed. The facts and many issues parallel criminal convictions of three other defendants whose appeals were decided the same date and are digested herein: State v. Kettler, State v. Phillips, and State v. Williams.

ISSUES: (1) Prosecutorial misconduct, (2) jury instruction – unintentional but reckless second-degree murder, (3) jury instruction – voluntary manslaughter, (4) motion for mistrial – juror misconduct, (5) cumulative error, and (6) restitution

HELD: Prosecutor’s statement, “If you believe the defendant, he’s a free man” and “he’s out of here,” was appropriate argument based on the evidence. Misconduct in prosecutor telling jurors they already have an opinion on Armstrong’s guilt, and implying Armstrong would lie. Those statements were gross and flagrant, but under circumstances in case were not motivated by ill will and likely had little weight in mind of jurors. Claim that prosecutor failed to prevent state witness from violating order in limine is rejected because Armstrong did not present evidence satisfying inquiries required by State v. Cripe, 271 Kan. 87 (2001).

Under facts in case, trial court erred in not giving unintentional second-degree murder instruction that was factually and legally supported. No clear error resulted because appellate court not firmly convinced the jury would have reached a different verdict had the instruction been given.

Challenge to PIK Crim. 3d 56.05(B) and to trial court’s failure to define all phrases in the instruction are examined, finding trial court’s lesser included offense instruction on voluntary manslaughter was not erroneous.

No error to deny motion for mistrial. Substantial competent evidence supported trial court’s determination that there was no factual basis for Armstrong’s allegations of inattentive juror or of jurors discussing case before it was submitted to jury.

Errors found in this case were not clearly erroneous and did not relate to each other. Given strength of evidence against Armstrong, cumulative error claim fails.

District court had jurisdiction to award restitution after judgment was pronounced at sentencing because court indicated during sentencing hearing that the proceeding would be continued for determination of restitution amount.

STATUTES: K.S.A. 21-3107(2), -3107(2)(a), -3205(1), -3205(2), -3401(a), -3402, -4204(a)(4)(A); K.S.A. 22-3414(3), -3420(2), -3423(1)(c), -3601(b)(1); and K.S.A. 60-261

STATE V. ASTORGA

LEAVENWORTH DISTRICT COURT – AFFIRMED IN PART, DISMISSED IN PART, VACATED IN PART, AND REMANDED FOR RESENTENCING

NO. 103,083 – MAY 23, 2014

FACTS: Kansas Supreme Court affirmed Astorga’s conviction of first-degree premeditated murder and hard 50 sentence. 295 Kan. 339 (2012). U.S. Supreme Court, in Alleyne v. United States, 133 S. Ct. 2151 (2013), overruled case law upon which the Kansas Supreme Court indirectly relied to reject Astorga’s argument that the Kansas’ hard 50 sentencing scheme was unconstitutional. Astorga’s petition for writ of certiorari granted, Kansas Supreme Court’s judgment was vacated, and case was remanded for reconsideration in light of Alleyne.

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Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

District Court and Appellate Court Electronic Filing

Electronic filing is occurring in more courts in Kansas. Participants in the appellate court electronic filing system enroll through the Office of Judicial Administration after watching the training videos. We are working to expand the number of participants and case types in the coming months.

The training videos are located at http://efilingtraining.kscourts.org/Training.html.

Enrollment is located at http://filer.kscourts.org/.

Footnotes in Briefs

Footnotes in appellate briefs are not favored. In fact, Supreme Court Rule 6.07(a)(4) states that footnotes should be avoided. If the information is important, it should appear in the body of the brief and not be placed in a footnote.

Citations to the record on appeal should be placed at the end of the fact so cited. See Rules 6.02(a)(4) and 6.03(a)(3). This placement aids both the appellate courts and the research attorneys in being able to easily and quickly verify the citation and fact.

Motions to Publish Opinions

Regardless of which appellate court issues an unpublished opinion, the motion asking to have the opinion published is always directed to the Kansas Supreme Court. An original and eight copies of the motion, each with a copy of the unpublished opinion, must be filed with the Kansas Supreme Court. See Rules 7.04(e) and 5.01. The motion to publish, unlike many motions, may be filed by a party to the appeal or an interested person; however, all parties to the appeal must be served. See Rule 7.04(e)(3).

For further information, call the Clerk’s Office at (785) 296-3229 and ask to speak with Heather L. Smith, Clerk of the Appellate Courts, or Jason Oldham, Chief Deputy Clerk of the Appellate Courts.
ISSUE: Constitutionality of hard 50 sentence

HELD: On remand, Astorga's first-degree murder conviction is affirmed, and his challenge to the imposition of aggravated presumptive sentences for two related plea convictions is dismissed for same reasons stated in the prior decision. The statutory procedure used to impose Astorga's hard 50 sentence is unconstitutional. Under facts of this case, no need to consider whether Astorga's prior conviction aggravating circumstance of K.S.A. 21-4636(a) falls within the Almendarez-Torres, 523 U.S. 224 (1998), exception to the Apprendi/Alleyne rule because trial court erred in finding the risk of death aggravating factor by a preponderance of the evidence. Court declines to decide whether a hard 50/Alleyne error may be subject to harmless error reviews because this case, like State v. Soto, 299 Kan. 102 (2014), does not present rare circumstances in which such an error could be held harmless. Astorga's hard 50 sentence is vacated, and case is remanded for resentencing. No advisory opinion is given

STATUTES: K.S.A. 2013 Supp. 21-6620; and K.S.A. 21-4635, 4636(a), 4636(b)

STATE V. BRISENO

WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 107,351 – JUNE 13, 2014

FACTS: Briseno convicted of one count of first-degree premeditated murder and three counts of attempted first-degree murder arising out of a drive-by shooting. On appeal Briseno claimed that district court committed reversible error by failing to give an unrequested limiting jury instruction regarding evidence of Briseno's gang membership. He also claimed that the district court committed reversible error by instructing jury it could consider the degree of certainty with which eyewitnesses identified Briseno, and claimed cumulative error denied him a fair trial.

ISSUES: (1) Limiting instruction – evidence of gang affiliation, (2) degree of certainty factor in eyewitness identification instruction, and (3) cumulative error

HELD: Briseno's claim, that gang evidence is so prejudicial that its admission should require a limiting instruction in all circumstances, was rejected in State v. Conway, 284 Kan. 37 (2007). Under facts of case, district court did not err by failing to give an unrequested limiting instruction regarding evidence of Briseno's gang affiliation. Pursuant to State v. Mitchell, 294 Kan. 469 (2012), district court erred in failing to delete degree of certainty factor in PIK Crim. 3d 52.20. In light of entire record in case, however, jury's verdict would not have been different if the erroneous degree of certainty factor in the eyewitness identification instruction had not been used. Briseno had the benefit of each procedural safeguard in Perry v. New Hampshire, 132 S. Ct. 716 (2012), and the eyewitness identification in this case was not the only evidence linking Briseno to the crime.

The single nonreversible error in the eyewitness jury instruction does not constitute reversible cumulative error.

STATUTES: K.S.A. 2013 Supp. 22-3601(b); K.S.A. 21-3109; and K.S.A. 22-3414(3)

STATE V. DOMINGUEZ

LYON DISTRICT COURT – AFFIRMED IN PART, REVERSED AD VACATED IN PART, AND REMANDED
NO. 106,288 – MAY 23, 2014

FACTS: Dominguez was convicted of premeditated first-degree murder and discharge of firearm at occupied building. On appeal he claimed that the trial court erred in failing to use pattern jury instructions and pattern verdict form specifically designed for trials in which state presents alternative theories of first-degree murder, such as premeditated and felony murder in this case. He next claimed trial court erred in not giving an accomplice instruction because the accomplice was facing charges in another case involving the same victims and same event, relying on Notes on Use for PIK Crim. 3d 52.18 and State v. Land, 14 Kan. App. 2d 515 (1990); and in failing to give an involuntary intoxication instruction. He also claimed that the hard 50 sentence imposed for his first-degree murder conviction should be vacated.

ISSUES: (1) Instructions and verdict form – first-degree murder, (2) jury instructions – accomplice and involuntary intoxication, and (3) hard 50 sentence

HELD: Alternative theory instructions (PIK Crim. 3d 56.02A and 68.15) and verdict form (PIK Crim. 3d 68-16) are compared to instructions and verdict form given at trial. Here, trial judge did not specifically instruct jurors that they had to consider felony murder. The

HELD: Following the holding in State v. Soto, 299 Kan. 102, Court concluded that Kansas' former statutory procedure for imposing a hard 50 sentence as provided in K.S.A. 21-4635 is unconstitutional. More specifically, the procedure utilized in this case violated the Sixth Amendment to the U.S. Constitution as interpreted in Alleyne v. United States, 133 S. Ct. 2151, because it permitted a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt. Court vacated DeAnda's hard 50 sentence and remanded for resentencing. Court did not address DeAnda's claims of error regarding the admission of hearsay evidence at the sentencing hearing and imposition of an unauthorized lifetime post-release supervision period. Court stated that for purposes of remand, it considered and rejected DeAnda's claim that the evidence was insufficient to support the aggravating circumstance.

STATUTES: K.S.A. 21-4635, 4636, 6620; and K.S.A. 22-3601

STATE V. DEANDA

FINNEY DISTRICT COURT – SENTENCE VACATED AND CASE REMANDED
NO. 107,477 – MAY 23, 2014

FACTS: Following his guilty plea, DeAnda was convicted of first-degree premeditated murder and sentenced to life without the possibility of parole for 50 years (hard 50). In this direct appeal of his sentence, DeAnda asserts that the district court erred in admitting hearsay evidence at his sentencing hearing and in imposing a period of lifetime post-release supervision. Further, DeAnda contends the district court's imposition of the hard 50 sentence violated his rights under the Sixth Amendment to the U.S. Constitution because a judge rather than a jury found the facts necessary to increase the mandatory minimum sentence.

ISSUES: (1) Sentencing and (2) hard 50

HELD: Following the holding in State v. Soto, 299 Kan. 102, Court concluded that Kansas' former statutory procedure for imposing a hard 50 sentence as provided in K.S.A. 21-4635 is unconstitutional. More specifically, the procedure utilized in this case violated the Sixth Amendment to the U.S. Constitution as interpreted in Alleyne v. United States, 133 S. Ct. 2151, because it permitted a judge to find by a preponderance of the evidence the existence of one or more aggravating factors necessary to impose an increased mandatory minimum sentence rather than requiring a jury to find the existence of the aggravating factors beyond a reasonable doubt. Court vacated DeAnda's hard 50 sentence and remanded for resentencing. Court did not address DeAnda's claims of error regarding the admission of hearsay evidence at the sentencing hearing and imposition of an unauthorized lifetime post-release supervision period. Court stated that for purposes of remand, it considered and rejected DeAnda's claim that the evidence was insufficient to support the aggravating circumstance.

STATUTES: K.S.A. 2013 Supp. 21-6620; and K.S.A. 21-4635, 4636(a), 4636(b)
instructions instead suggested that the jurors should consider felony murder if they had reasonable doubt regarding whether Dominguez was guilty of premeditated murder. The instructions given by the trial court were legally inappropriate and erroneous. Appellate court has no confidence that the jury appropriately considered the alternative of felony murder, and is firmly convinced the jury would have reached a different verdict if instructional errors had not occurred. Significant difference in statutory minimum sentences for first-degree felony murder and for premeditated first-degree murder. Clear error established. Dominguez first-degree murder conviction is reversed.

Holding in Land is clarified to limit it to situations when two or more accomplices are in joint trial. Here, trial court erred in extending Land to circumstances when an accomplice is not being tried before the same jury, but error was harmless under facts in case. No error in failing to give involuntary intoxication instruction that was not factually appropriate when there was no evidence that Dominguez was so intoxicated as to be unable to form the specific intent necessary to commit premeditated first-degree murder. The convictions for aggravated battery and discharge of firearm at occupied building are affirmed.

Hard 50 sentencing claim rendered moot by reversal of the first-degree murder conviction. Dominguez’ hard 50 sentence is vacated without consideration on the merits.

STATUTES: K.S.A. 2013 Supp. 22-3717(b)(2); K.S.A. 21-3401(a), -3414(a)(1)(A), -4219(b), -4635, -4635(b), -4706(c); and K.S.A. 22-3403(3), -3413(3), -3414(3), -3601(b)(1)

STATE V. GILBERT
SALINE DISTRICT COURT – AFFIRMED
NO. 109,303 – JUNE 6, 2014

FACTS: Gilbert’s 1999 conviction for felony murder was affirmed, based in part on judicially created rule that lesser included offense instructions for felony murder were required only if evidence of underlying felony was weak, inconclusive, or conflicting. State v. Gilbert, 272 Kan. 209 (2001), Kansas Supreme Court overruled that rule in State v. Berry, 292 Kan. 493 (2011), but effective July 2012, legislature modified the statute to explicitly state there are no lesser included offenses to felony murder. In August 2012 Gilbert filed motion to correct illegal sentence, citing Berry for structural error claim in his conviction. District court summarily denied the motion, finding Berry not applicable because Gilbert’s case was not pending when that case was decided. Gilbert appealed, and argued in part that his motion should have been treated as one filed under K.S.A. 60-1507 to correct manifest injustice.

ISSUE: Motion to correct illegal sentence

HELD: District court’s construction of Gilbert’s pleading as a motion to correct an illegal sentence, and summary denial of that motion because jury instruction claim cannot be raised in a motion to correct an illegal sentence, are affirmed.

STATUTES: K.S.A. 2013 Supp. 21-5109(b)(1); K.S.A. 2013 Supp. 22-3601(b)(3); K.S.A. 22-2103, -3414, -3414(3), -3504, -3504(1); and K.S.A. 60-1507, -1507(a), -1507(f), -1507(f)(1), -1507(f)(2)

STATE V. HAYES
JOHNSON DISTRICT COURT – CONVICTIONS
AFFIRMED, HARD 50 SENTENCE VACATED, AND REMANDED
NO. 106,456 – JUNE 13, 2014

FACTS: Hayes was convicted of premeditated first-degree murder and aggravated assault. On appeal he claimed that the district court erred in denying his request for a voluntary manslaughter instruction. He also challenged the constitutionality of the district court’s judicial determination of aggravating factors for the hard 50 sentence that was imposed.

ISSUES: (1) Jury instruction – voluntary manslaughter, (2) sentencing – constitutional right to trial by jury

HELD: District court correctly denied the request to instruct jury on voluntary manslaughter. Hayes did not present evidence that he acted in the heat of passion. Instead, evidence was compelling that the crime was premeditated and that a confrontation between Hayes and the victim was either intended or foreseeable.

Following State v. Soto, 299 Kan. 102 (2014) (applying Alleyne v. United States, 133 S. Ct. 2151 (2013)), district court’s explicit factual findings that subjected Hayes to an enhanced sentence violated Hayes’ Sixth Amendment right to a jury trial. The hard 50 sentence is vacated. Case is remanded for resentencing.

STATUTES: K.S.A. 2013 Supp. 22-3601(b)(3); K.S.A. 21-3109; and K.S.A. 22-3414(3)

STATE V. JOHNSON
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,981 – JUNE 13, 2014

FACTS: In 2000, Johnson and his co-defendant, Payne, had armed themselves with steak knives and gone to Hampton’s home, purportedly to play video games. Johnson and Payne eventually stabbed Hampton more than 30 times in his chest and throat. Hampton died at the scene. Johnson and Payne stole several PlayStation CDs, approximately $4,000 worth of crack cocaine, and an unspecified amount of cash from Hampton’s home. Payne confessed, telling detectives both he and Johnson stabbed Hampton and took the items. Johnson pled nolo contendere to first-degree murder and aggravated robbery and was sentence to a hard 25 life sentence for murder and concurrent term of 71 months for aggravated robbery. Eleven years later, the district court denied his motion for post-conviction DNA testing.

ISSUE: Post-conviction DNA testing

HELD: Court stated that when a person petitioning for DNA testing has met the requirements of K.S.A. 21-2512(a), the district court shall order DNA testing upon a determination that testing may produce noncumulative, exculpatory evidence relevant to the petitioner’s claim that he or she was wrongfully convicted or sentenced. Court held that when the 2001 court imposed Johnson’s current sentence, it was aware Johnson committed the crimes with Payne. And it based the sentence on Johnson’s personal culpability. Johnson makes no specific argument for how evidence of yet another perpetrator would justify reducing his sentence other than the unsupported claim that it would possibly lessen his culpability and impact his sentence. Court’s independent review of the record revealed no indication that the district court failed to properly consider Johnson’s culpability and impose an appropriate sentence. Consequently, Court concluded new DNA evidence demonstrating the presence of an unidentified third party at the crime scene would not justify reducing Johnson’s sentence. Because DNA testing could not produce exculpatory evidence impacting Johnson’s conviction or sentence, the petitioner failed to show a possibility that DNA testing could assist in exculpatory him.

STATUTES: K.S.A. 21-2512; and K.S.A. 22-3601

STATE V. KENNEY
WYANDOTTE DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 106,508 – MAY 16, 2014

FACTS: Kenney was charged with multiple felonies related to a home invasion. Defense counsel twice sought without success to withdraw, citing conflict and difficult communication with Kenney. Kenney entered no-contest plea to two felony counts. Plea agreement as explained by defense counsel and district court incorrectly informed Kenney that he reserved the right to appeal pretrial motions.
Prior to sentencing, Kenney filed pro se motion to withdraw plea because he had not realized that K.S.A. 22-3602(a) would preclude appeal of rulings on defense motions to withdraw. District court denied that request. Kenney appealed. Court of Appeals affirmed in unpublished opinion. Kenney’s petition for review granted.

ISSUE: Motion to withdraw plea

HELD: A criminal defendant’s misinformation from counsel about the applicable law during plea negotiations – particularly when reinforced later by the written plea agreement and by counsel’s and the district judge’s incorrect statements during the defendant’s plea hearing – easily constitutes good cause to withdraw a no-contest plea under K.S.A. 22-3602(a). Reversed and remanded to district court for Kenny to be permitted to withdraw his no-contest pleas, and for appointment of substitute counsel before prosecution continues.

STATUTES: K.S.A. 22-3210(d), -3602(a); and K.S.A. 60-261

STATE V. KING
LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED
NO. 105,995 – MAY 16, 2014

FACTS: A jury convicted King of four charges: rape by penile penetration, rape by digital penetration, aggravated criminal sodomy, and aggravated indecent liberties with a minor (R.B.). The district court judge sentenced King to four concurrent hard 25 life sentences under Jessica’s Law. The Court addressed four issues on this direct appeal: (1) admission of evidence on a prior charge of sexual abuse (J.B.) for which King was acquitted; (2) failure to provide a unanimity instruction; (3) exclusion of evidence of the victim’s prior sexual history; and (4) denial of a sentencing departure motion.

 ISSUES: (1) Admission of defendant’s prior acquittal and victim’s prior sexual history, (2) unanimity, and (3) sentencing departure motion.

HELD: Court reversed King’s conviction based on the lack of a unanimity instruction. Court held that it could not ignore or minimize the prejudice to defendant King from the court’s failure to instruct on unanimity and the state’s failure to elect which of the multiple acts underlying each of King’s charges was to be relied upon by the jury. Court stated that it had no confidence in the reliability of the guilty verdicts. Court also stated that should this case be retried, and should the state again seek to introduce evidence of J.B.’s past allegations against King, the district judge will have to analyze whether the prosecution in which King was acquitted had at its heart the same issue or issues to be entrusted to the second jury in this case. If so, collateral estoppel should prevent introduction of the evidence. If not, collateral estoppel will pose no obstacle to introduction of the evidence under K.S.A. 60-455(d). Court held that it did not need to decide whether the district judge’s exclusion of the rape shield evidence in the first trial was an abuse of discretion. Court noted that, on remand, it is possible that more information about the nature of the allegations and why they did not lead to a prosecution may be available. The district judge’s expressed concern about vagueness may evaporate. Assuming that issue is put to rest, R.B.’s earlier allegations may meet the relevance threshold of the statute to the extent R.B.’s therapist again opines that R.B.’s dissociation may be related to a traumatic event, or the state again argues that R.B. had no way of knowing what she knew about sex absent King’s abuse. Court held the trial court erred at sentencing. Court stated that before his conviction in this case, King had no prior criminal history. Therefore, Court held the district judge was not “precluded” from considering a departure. Court did not reach King’s issues of a denial of defense challenges to venire members for cause, cumulative error, or constitutionality of Jessica’s Law because of the reversal.

STATUTES: K.S.A. 21-3525, -4643; K.S.A. 22-3414; and K.S.A. 60-261, -455(d)
STATE V. LEWIS
RILEY DISTRICT COURT – CONVICTIONS AFFIRMED, LIFE SENTENCES VACATED, AND CASE REMANDED WITH DIRECTIONS
NO. 106,093 – JUNE 13, 2014
FACTS: Lewis was charged with multiple offenses following a series of attacks against three women during April and May 2009 in Riley County. The general pattern for the crimes was that each victim was unknowingly followed to her apartment in the early morning hours after being out for the evening. Two women were raped and sodomized, while the third escaped after a struggle. Lewis appeals his convictions for rape, aggravated criminal sodomy, burglary, kidnapping, aggravated assault, aggravated kidnapping, and aggravated robbery. He was sentenced to five life imprisonment sentences as an aggravated habitual sex offender under K.S.A. 2009 Supp. 21-4642 based on his prior convictions for sexually violent crimes in Geary County.

ISSUES: (1) Motion to suppress, (2) victim identifications, (3) motion for continuance, (4) prosecutorial misconduct, (5) jury questions, (6) alternative means, (7) cumulative error, and (8) sentencing

HELD: (1) Court stated that the incriminating statements solicited from Lewis in a second interview and introduced at trial were not tainted by the failure to Mirandize him before the first interview, assuming the first interview was custodial. Lewis advanced no claim that the statements given in the second interview were not knowingly and intelligently made, and the record would not support such an assertion. Court held that the district court correctly denied the motion to suppress Lewis’ statements and the evidence obtained based on those statements. (2) Court held that the totality of circumstances demonstrate V.D.D.’s identification was reliable, despite any infirmities in the photo lineup procedure—particularly V.D.D.’s up-close encounter with Lewis during the home invasion and sexual assault, her testimony that she saw Lewis’ face during the attack, and her certainty that she correctly identified him in the photo lineup. There is not a substantial likelihood of misidentification, even if we assume a potentially suggestive photo lineup. Admitting the testimony about the photo lineup and V.D.D.’s in-court identification was not error. (3) Court stated that Lewis was aware that the physical evidence existed and could have pursued independent DNA testing prior to eight days before trial. Court held Lewis’ new attorney was appointed four months prior to the motion for continuance since Lewis’ first attorney was in the case approximately six months prior to that and did not pursue independent DNA testing. Court held that it cannot be said that no reasonable person would adopt the trial court’s decision to deny the continuance and proceed with trial or that the decision deprived Lewis of the right to present his defense. (4) Court stated there is no question some of the prosecutor’s comments were improper, particularly the statements regarding justice “within these four walls” and urging the jury to give the victims “justice.” The prosecutor inappropriately discussed the crimes’ long-term effects on the victims, such as not returning to their homes, being afraid in their homes, and fearing being followed home. However, Court held the improper commentary was not so prejudicial as to deny Lewis a fair trial. In light of the DNA evidence, physical evidence, and victims’ uncontested testimony—including the prior bad acts testimony of three additional victims in other jurisdictions—it is clear beyond a reasonable doubt these comments did not influence the jury’s verdicts. (5) Court found no error in the district court’s decision to direct the jury back to the jury instructions after a mid-deliberation jury inquiry on the consequences if the jury was unable to reach a unanimous verdict on certain charges; (6) Court rejected Lewis’ claim of insufficient evidence to support alleged alternative means under the rape statute. Court stated prior case law stating the methods of penetrating female sex organs set out in the statute are not alternative means. (7) Court acknowledged trial error in the lack of Miranda, the unnecessarily suggestive photo lineup, and prosecutorial misconduct. However, court stated the evidence was overwhelming as to Lewis’ guilt such that no reversible cumulative error was established. (8) Court held the district court erred in sentencing him as an aggravated habitual sex offender. Court stated Lewis’ prior convictions in his presentence investigation report all occurred on the same day and in the same case in Geary County and therefore constituted only a single prior conviction event. Because at the time of Lewis’ crimes, K.S.A. 2009 Supp. 21-4642 applied only to defendants with two prior conviction events, Lewis’ five life-without-parole sentences do not conform with the statute and are illegal. Court vacated those sentences and remanded for resentencing on the counts for which they were imposed.

STATUTES: K.S.A. 21-4642; K.S.A. 22-3215, -3410, -3414, -3504; and K.S.A. 60-261, -455

STATE V. LOONEY
FORD DISTRICT COURT
COURT OF APPEALS – SUMMARILY DISMISSING THE CASE FOR LACK OF JURISDICTION IS REVERSED AND THE CASE IS REMANDED TO THE COURT OF APPEALS FOR CONSIDERATION OF THE MERITS
NO. 107,011 – JUNE 20, 2014
FACTS: This case required the Court to determine the appellate courts’ authority to review certain criminal sentences under K.S.A. 21-4721 (2007). The district court denied Looney’s motion for probation, i.e., for a downward dispositional departure from his presumptive sentence of 169 to 187 months’ imprisonment. Instead, the court granted a downward durational departure to 72 months in prison. When Looney appealed the denial of probation, the Court of Appeals summarily dismissed for lack of jurisdiction. It is unclear whether the Court of Appeals dismissed under K.S.A. 21-4721(c)(1) or (2). Looney argued under K.S.A. 21-4721(a), jurisdiction is granted to review a departure sentence and this was not a presumptive sentence. The state argued the Court shall not review any agreed upon sentence under K.S.A. 4721(c).

ISSUES: (1) Sentencing and (2) jurisdiction

HELD: Court overruled State v. Crawford, 21 Kan. App. 2d 169, 897 P.2d 1041 (1995), and its holding that a defendant could not complain that the sentencing court did not depart enough on his or her sentence. Court held all departure sentences are subject to appeal under K.S.A. 21-4721(a) unless appellate jurisdiction is divested by a more specific provision. Court also held that K.S.A. 21-4721(c)(2) did not divest the Court of Appeals of jurisdiction because the sentence of imprisonment was not the result of an agreement between the defendant and the state.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-4703, -4721(a) (2007), -4721(c)(2); and K.S.A. 60-2101(b)

STATE V. KETTLER
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,272 – MAY 23, 2014
FACTS: Kettler appeals his convictions for the premeditated first-degree murder of Dyer; conspiracy to commit first-degree murder; and criminal possession of a firearm. Dyer died from gunshot wounds he suffered on August 10, 2007, in Topeka. Kettler and three other individuals—Williams, Phillips, and Armstrong—were charged with and convicted of crimes related to the death. All four defendants appealed, and their individual appeals were argued the same day. For those related opinions, see State v. Williams, 299 Kan. ___ (No. 103,785, this day decided); State v. Phillips, 299 Kan. ___ (No. 103,399, this day decided); and State v. Armstrong, 299 Kan. ___ (No. 103,120, this day decided). Kettler raises four issues: (1)
The state’s exercise of peremptory challenges to strike African-Americans from the jury panel violated the Equal Protection Clause of the 14th Amendment to the U.S. Constitution under Batson v. Kentucky, 476 U.S. 79; (2) there was insufficient evidence of premeditation on the part of Kettler to support his conviction for premeditated first-degree murder; (3) there was insufficient evidence of an agreement between Kettler and his codefendants to support his conviction for conspiracy to commit first-degree murder; and (4) the prosecutor committed misconduct during closing argument by misstating the legal definition of “premeditation” and thereby deprived Kettler of a fair trial.

ISSUES: (1) Sufficiency of the evidence, (2) prosecutorial misconduct, and (3) peremptory challenges

HELD: Court held that a review of the record shows evidence – both direct and circumstantial – of premeditation and conspiracy to commit first-degree murder. Court stated that the strongest evidence came from Armstrong’s sworn statement, which established an agreement between Williams, Kettler, Armstrong and, later, Phillips to kill Dyer in retribution for his robbing Williams at gunpoint. Regarding the jury panel, Court held that although the elimination of all African-American’s from the jury is very troubling, Court noted that Kettler’s defense counsel recognized that the defense had struck two other minority prospective jurors from the venire panel. This means that Williams has not established that the state purposefully sought to eliminate all minority members of the panel; Court simply did not know whether the state would have exercised peremptory challenges to remove the two minority prospective jurors who were removed by the defense. Further, based on the race-neutral reasons articulated by the state for its strikes, Court concluded that the trial court did not abuse its discretion in concluding that Kettler failed in his ultimate burden to prove purposeful discrimination during the jury selection process. As far as the claim of prosecutorial misconduct during closing argument, Court found the prosecutor's comments on the meaning of the term “premeditated” while it was a misstatement of the law, Court was convinced beyond a reasonable doubt that the error did not affect Kettlers’ substantial rights.

STATUTE: K.S.A. 21-3205, -3302, -3401, -4204

STATE V. MCBROOM
OSBORNE DISTRICT COURT – AFFIRMED
NO. 106,689 – JUNE 6, 2014

FACTS: McBroom was convicted of one count of first-degree murder, one count of aggravated burglary, and one count of burglary in the death and burglary of Noel in rural Osborne County and also a nearby residence. Wilson was charged with similar crimes. McBroom argues that (1) the district court erred when it denied his change of venue motion; (2) the state presented insufficient evidence to convict him of the crimes charged; and (3) cumulative error deprived him of a fair trial.

ISSUES: (1) Change of venue, (2) sufficiency of the evidence, and (3) cumulative error

HELD: Court found no error in the trial court’s denial of McBroom’s motion for change of venue. McBroom claimed that a survey of the Osborne County residents prior to trial showed that a pervasive bias against him existed in the community, preventing a fair and impartial trial from taking place in Osborne County. He also claimed that comments made during voir dire by nine individuals who served on his jury demonstrated the impossibility of selecting an impartial Osborne County jury. Court found that although some of the jurors stated that they were acquainted with the murder victim, his family, or witnesses in the case, none indicated that those acquaintances would prevent them from being fair and impartial. Court concluded that McBroom failed to show there existed so great a prejudice in Osborne County that prevented him from receiving a fair and impartial trial. Court found McBroom’s vastly inconsistent statements as to his whereabouts during the time periods relevant to the charges were crucial to the jury’s weighing of the evidence. And McBroom’s lack of credibility could certainly cause a reasonable jury to conclude McBroom lied to law enforcement about his and Wilson’s whereabouts during the dates at issue in order to cover up their involvement with the crimes committed in Osborne County on March 25. Accordingly, viewing the evidence in a light most favorable to the state, Court concluded that a rational factfinder could have found McBroom guilty of the crimes charged beyond a reasonable doubt. Court found no errors to support a claim of cumulative error.

DISSENT: Justice Johnson dissented based on the sufficiency of the evidence. Justice Johnson found that the state left the jury to guess whether McBroom might have been involved, principally relying on guilt-by-association with the previous convicted killer, Wilson. Justice Johnson also stated that evidence indicated that prior to trial over two-thirds of the people in Osborn County believed that McBroom was probably or definitely guilty. Justice Johnson stated the state also improperly stacked inference upon inference to convict McBroom.

STATUTES: K.S.A. 21-3401, -3716; and K.S.A. 22-2616

STATE V. MURDOCK
SHAWNEE DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 104,533 – MAY 2, 2014

FACTS: District court treated Murdock’s two prior Illinois robbery convictions committed prior to enactment of Kansas Sentencing Guidelines Act (KSGA) as person offenses when calculating criminal history score in sentencing Murdock for 2008 Kansas robbery convictions. Murdock appealed, claiming the two out-of-state convictions should have been designated as nonperson offenses. In unpublished opinion Court of Appeals affirmed the district court. Murdock’s petition for review granted.

ISSUE: Criminal history - Pre-KSGA out-of-state offenses

HELD: State v. Williams, 291 Kan. 554 (2010), is followed as controlling precedent. When calculating a defendant’s criminal history that includes out-of-state convictions committed prior to enactment of KSGA, the out-of-state convictions must be classified as nonperson offenses. Prior case law contrary to this holding is overruled. Court of Appeals and district court are reversed, and case was remanded for resentencing.

DISSENT: Justice Johnson dissented based on the sufficiency of the evidence. Court ruled. Court of Appeals and district court are reversed, and case was remanded for resentencing.

DISSENT (Rosen, J.) (joined by Luckert and Moritz, JJ.): Classifying all crimes committed prior to 1993 as nonperson offenses was unreasonable and contrary to purpose and design of KSGA. Would distinguish Williams and limit its holding to facts of that case.

STATUTES: K.S.A. 2013 Supp. 74-9101(b); K.S.A. 8-113; K.S.A. 20-3018(b); K.S.A. 21-3426, -3427, -3701, -4213, -4218, -4312, -4409, -4501(f), -4701 et seq., -4702, -4703, -4704, -4709, -4710(d)(8), -4711(e), -4711(g), -4724(c)(1); K.S.A. 60-2101(b); K.S.A. 79-5208; and K.S.A. 21-3426 (Easley 1981)

STATE V. O’CONNOR
RILEY DISTRICT COURT – REVERSED IN PART, SENTENCE VACATED, AND REMANDED
COURT OF APPEALS – REVERSED
NO. 105,319 – JUNE 13, 2014

FACTS: In two Kansas cases, O’Connor was convicted of aggravated robbery, possession of marijuana, burglary, and contributing to a child’s misconduct. In consolidated appeal, he claimed district court erred in classifying O’Connor’s prior Florida juvenile adjudication for third-degree burglary as a person crime because the plea he entered in that case was to third-degree burglary, an offense which did not satisfy “dwelling requirement” for burglary in Kansas.
Appellate Decisions

Court of Appeals affirmed in unpublished opinion, relying on the underlying facts to determine that state met burden of showing by preponderance of the evidence that O'Connor's prior burglary was of a "dwelling." O'Connor's petition for review granted.

ISSUE: Classification of out-of-state juvenile adjudication

HELD: K.S.A. 21-4711(e) and the Kansas and Florida burglary statutes examined and interpreted, finding that O'Connor's adjudication for third-degree burglary in Florida affirmatively negated, as a matter of law, the fact that he entered a dwelling, notwithstanding the factual allegations that were made prior to adjudication. O'Connor's Florida adjudication should have been classified as a nonperson felony. Kansas courts in this case used judicial factfinding to elevate the degree of burglary above that for which O'Connor was actually adjudicated in Florida, and thereby used such factfinding to enlarge his maximum sentence. O'Connor's sentence was vacated. Matter was remanded to district court for resentencing.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3715, -4701 et seq., -4711(e); and K.S.A. 60-2101(b)

STATE V. PETTAY
RENO DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 107,673 – JUNE 6, 2014

FACTS: After police stopped, handcuffed, and detained Pettay in patrol car, deputy searched Pettay's car incident to Pettay's arrest for driving with a suspended license. That search was illegal under Arizona v. Gant, 556 U.S. 332 (2009), but district court applied the Leon good-faith exception to admit drug evidence discovered in the search. Pettay appealed. Court of Appeals affirmed in unpublished opinion, based on factual similarities with search covered in the search. Pettay appealed. Court of Appeals affirmed in unpublished opinion, relying on the good-faith exception to exclusionary rule by district court and Court of Appeals was reversed, and case was remanded.


STATE V. PHILLIPS
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 103,399 – MAY 23, 2014

FACTS: Following mistrial in joint prosecution of four defendants, Phillips was retried and convicted of premeditated first-degree murder. On appeal he claimed trial court violated constitutional right against double jeopardy when it allowed him to be retried for same crimes without explicitly declaring or ordering a mistrial at conclusion of first trial as required by K.S.A. 22-3423. Phillips also claimed that insufficient evidence supported elements of premeditation and intent to kill, and claimed prosecutor misconduct during closing argument by misstating legal definition of "premeditation."

ISSUES: (1) Mistrial – double jeopardy, (2) sufficiency of the evidence, and (3) prosecutorial misconduct

HELD: Second trial did not violate Phillips' double jeopardy rights. Plain language of K.S.A. 22-3423 does not require use of specific words for mistrial to be recognized and a defendant's constitutional rights to be preserved. Adopting reasoning from other jurisdictions, trial court's words and actions in discharging jury had effect of declaring a mistrial. Various versions of events presented to jury provided sufficient evidence to support jury's finding that Phillips and others premeditated the killing of the victim, and that Phillips intended to kill victim when he shot victim after victim fell to floor. Same claim of prosecutorial misconduct advanced in State v. Williams, and State v. Kettler, decided this same date and digested herein. Prosecutor misstated the law by suggesting premeditation can be instantaneous with the homicidal act. Given past advice to prosecutors, this misconduct was gross and flagrant but no ill will found. In light of jury instructions, facts of the case, and prosecutor's argument that premeditation had occurred before Phillips and others arrived at victim's house, jury would not have been confused or misled by prosecutor's misstatement. STATUTES: K.S.A. 21-3302, -3401, -3401(a), -4204(a)(4)(A); K.S.A. 22-3423, -3601(b)(1); and K.S.A. 60-261
STATE V. POWELL
GREENWOOD DISTRICT COURT – REVERSED AND REMANDED
COURT OF APPEALS – REVERSED
NO. 102,749 – JUNE 6, 2014

FACTS: Powell was convicted of felony charges related to theft of
sheriff patrol car. He unsuccessfully sought to suppress evidence ob-
tained through search warrant that authorized seizure of his blood,
hair, fingerprints, and cheek cells. District court determined the war-
rant lacked probable cause, but admitted the evidence under Leon
good faith exception because officers acted in good faith in relying on
the warrant. Powell appealed, arguing that the good-faith exception
was inapplicable because affidavit supporting the warrant failed to ex-
plain that law enforcement had biological material from stolen car to
compare with Powell's samples. He also argued that K.S.A. 22-2502
does not permit law enforcement to obtain warrant to seize blood
hair, fingerprints, or cheek cells. Court of Appeals affirmed, 45 Kan.

ISSUES: (1) Probable cause, (2) good-faith exception, and (3)
K.S.A. 22-2502
HELD: District court correctly held that the warrant and affidavit
failed to establish the required nexus between the biological material
sought and that evidence's ability to aid in apprehension or convic-
tion of the person-crime's perpetrators.

Under facts in case it was objectively unreasonable for officer to
rely on warrant when affidavit obviously omitted any explanation of
how Powell's biological material would aid in apprehension or pros-
ecution of person who stole the patrol car, and affidavits relied pri-
marily on anonymous, unverified, and uncorroborated tips contain-
ing no indicia of reliability to connect Powell to the theft. District
court erred in applying Leon good-faith exception to the exclusion-
ary rule. Powell's convictions were reversed and case was remanded.

Whether K.S.A. 22-2502 implicitly authorizes court-ordered
seizures of blood, hair, fingerprints, or cheek cells is issue of first
impression that is not reached because Powell's convictions were re-
versed on other grounds.

STATUTES: K.S.A. 20-3018(b); K.S.A. 22-2502, -2502(a)(1),
-2502(a)(1)(A); and K.S.A. 60-2101(b)

STATE V. REISS
BARTON DISTRICT COURT – AFFIRMED
COURT OF APPEALS AFFIRMED
NO. 102,471 – MAY 2, 2014

FACTS: The state charged Sievers with a variety of offenses af-
fter officers approached his SUV at an intersection. Sievers was ar-
raigned on June 13, 2008, and the court set his pretrial for August
22 and jury trial for September 30. Sievers did not attend his pre-
trial hearing and the court issued a bench warrant for his arrest. On
September 25, Sievers surrendered, his counsel withdrew, and the
court granted a continuance for the pretrial to October 10. After
new counsel was appointed and needed time to prepare, the court
reset the jury trial for January 27, 2009. A week before trial, defense
counsel moved to dismiss based on speedy trial concerns. The court
denied the motion. Sievers was tried and convicted of multiple of-
fenses on January 27. The Court of Appeals reversed one of Siever's
driving convictions as multiplicitous, but upheld all other convic-
tions and denied his speedy trial claims.

ISSUE: Speedy trial
HELD: Court stated that when the defendant failed to attend
the pretrial hearing and the district court issued a bench warrant for
the defendant's arrest, a delay commenced that was the fault of the
defendant. Thus, the speedy trial clock stopped running against the
state under K.S.A. 22-3402(2) until the defendant was surrendered
on the bench warrant. Court found that as of September 25, 110
days remained to bring Sievers to trial. Additionally, his counsel re-
quested a 14-day continuance from September 26 to October 10,
which is not chargeable to the state. So before the state would violate
his statutory speedy trial rights it had to bring him to trial within
110 days after October 10: January 28. Because trial began on Janu-
ary 27, no violation occurred.

STATUTES: K.S.A. 22-3402; and K.S.A. 60-2101

STATE V. VERSER
WAYANDOTTE DISTRICT COURT – AFFIRMED
NO. 107,906 – JUNE 6, 2014

FACTS: Verser was convicted of first-degree murder and criminal
possession of firearm. On appeal he claimed: (1) fabricated testi-
mony of state witness violated Verser's right to fair trial and was
structural error such that district court should have granted state's
motion for mistrial even though Verser chose to continue the trial;
(2) district court failed to apply K.S.A. 2013 Supp. 60-455 to ad-
mitted evidence of a previous dispute between Verser and the vic-
pressed. Judgment of Court of Appeals affirming the district court is
reversed. Judgment of district court is reversed and remanded.

STATUTES: K.S.A. 22-2402; K.S.A. 60-2101(b); and K.S.A.
2007 Supp. 8-1567
Appellate Decisions

FACTS: Williams entered Alford plea to one count of first-degree felony murder and two counts of arson. In calculating sentence, district court found Williams’ 1996 Ohio burglary was comparable to Kansas’ aggravated burglary under K.S.A. 21-3716 (Furse 1995), a person crime. Williams appealed, claiming the prior conviction should have been classified as a nonperson crime because facts in the Ohio proceeding failed to show he had acted with intent to commit theft, and rule of lenity requires factual ambiguity regarding his out-of-state conviction to be resolved in his favor.

ISSUE: Classification of out-of-state conviction

HELD: That the Ohio crime of conviction contains insufficient evidence to establish Kansas element of intent to permanently deprive is misplaced and rejected. Under facts of case, district court correctly concluded that Williams’ prior out-of-state conviction was comparable to aggravated burglary under K.S.A. 21-3716 (Furse 1995) and therefore properly classified the conviction as a person crime. Language of K.S.A. 21-4711(e) is not ambiguous, thus rule of lenity does not apply.

STATUTES: K.S.A. 2013 Supp. 21-6820(e)(3), 22-3601(b); K.S.A. 21-3715, -3715(a), -3715(c), -4711, -4711(e); and K.S.A. 21-3716 (Furse 1995)

STATE V. WILLIAMS

SEDGWICK DISTRICT COURT – AFFIRMED

NO. 106,865 – JUNE 13, 2014

FACTS: Williams appeals his convictions for the premeditated first-degree murder of Dyer, conspiracy to commit first-degree murder, and criminal possession of a firearm. Dyer died from gunshot wounds he suffered on August 10, 2007, in Topeka. Williams and three other individuals—Kettler, Phillips, and Armstrong—were charged with and convicted of crimes related to the death. All four defendants appealed, and their individual appeals were argued the same day. For those related opinions, see State v. Kettler, 299 Kan. ___ (No. 103,272, this day decided); State v. Phillips, 299 Kan. ___ (No. 103,399, this day decided); and State v. Armstrong, 299 Kan. ___ (No. 103,120, this day decided). Williams raises numerous issues. Williams’ arguments required the Court to consider: (1) whether the evidence was sufficient; (2) whether the complaint was insufficient when the aiding and abetting theory was not specifically pleaded; (3) whether the theory of aiding and abetting presented an alternative means of committing a crime; (4) whether there was a violation of Williams’ rights under the Equal Protection Clause of the 14th Amendment to the U.S. Constitution as guaranteed by Batson v. Kentucky, 476 U.S. 79; (5) whether alleged prosecutorial misconduct denied Williams’ right to a fair trial; (6) whether Williams’ right to confront witnesses was violated; (7) whether there were multiple errors in the jury instructions; (8) whether Williams was denied a fair trial because of witness and juror misconduct; (9) whether the trial court erred in admitting a demonstrative photograph; and (10) whether errors accumulated to deny Williams a fair trial.

ISSUES: (1) Sufficiency of the evidence, (2) sufficiency of the complaint, (3) alternative means, (4) peremptory challenges, (5) equal protection, (6) prosecutorial misconduct, (7) right of confrontation, (8) jury instructions, (9) juror misconduct, (10) demonstrative photographs, and (11) cumulative error

HELD: Court held that a review of the record showed evidence – both direct and circumstantial – of premeditation and conspiracy to commit first-degree murder. Court stated that the strongest evidence came from Armstrong’s sworn statement, which established an agreement between Williams, Kettler, Armstrong and, later, Phillips to kill Dyer in retribution for his robbing Williams at gunpoint.
Court also found sufficient evidence of aiding and abetting versus mere association. Court held it has consistently held that the state is not required to charge aiding and abetting in the charging document in order to pursue a theory of accomplice liability at trial, and the charging complaint against him was not jurisdictionally defective for failing to charge aiding and abetting. Court also held that aiding and abetting is not an alternative means, and the state is not required to prove that the defendant was both a principal and an accessory or to elect between the theory that the defendant was an aider and abettor or the theory that the defendant was the principal actor in the commission of the premeditated first-degree murder. Regarding the jury panel Court held that although the elimination of all African-American’s from the jury is very troubling, Court noted that Kettler’s defense counsel recognized that the defense had struck two other minority prospective jurors from the venire panel. That meant that Williams had not established that the state purposefully sought to eliminate all minority members of the panel; we simply do not know whether the state would have exercised peremptory challenges to remove the two minority prospective jurors who were removed by the defense. Further, based on the race-neutral reasons articulated by the state for its strikes, Court concluded that the trial court did not abuse its discretion in concluding that Williams failed in his ultimate burden to prove purposeful discrimination during the jury selection process. As far as the claim of prosecutorial misconduct during closing argument, Court found that the prosecutor’s comments on “justice,” were not improper, and the prosecutor’s comments on the meaning of the term “premeditated,” while it was a misstatement of the law, Court was convinced beyond a reasonable doubt that the error did not affect Williams’ substantial rights. Court found Williams failed to preserve his Confrontation Clause claim. Court rejected both of Williams’ jury instruction issues, the first that the trial court erred in denying his request for a limiting instruction regarding K.S.A. 60-455 evidence of prior drug transactions and the second that the trial court erred by instructing the jury on an expanded definition of possession, which included constructive possession involving a firearm. Court found Williams was not denied a fair trial based on alleged courtroom interactions between Phillips and two witnesses – Phillips’ wife and Armstrong’s girlfriend. Court also complained about the trial court’s dismissal of one juror based on comments communicated by the juror to a third party outside the courtroom during a break. Court stated none of the interactions prompted claims for a mistrial at the time and they did not deny Williams a fair trial now on appeal. Court found no abuse of discretion in the trial court’s decision to admit a photograph of the dashboard of Williams’ car depicting an installed stereo, along with the testimony of a law enforcement detective detailing his attempt to reconstruct the state’s gun-in-the-dash theory as rebuttal evidence. Court found no cumulative error based on one error in the prosecutor’s closing argument.

STATUTES: K.S.A. 21-2437, -2611, -3205, -3302, -3401, -4204; K.S.A. 22-3201, -3414, -3423; and K.S.A. 60-261, -404, -455
**Civil**

**BREACH OF CONTRACT AND UNJUST ENRICHMENT**

**SHARALENE JONES, ADMINISTRATOR OF THE ESTATE OF BYRON J. FUNK, DECEASED V. GLENDA CULVER**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 110,334 – JUNE 6, 2014**

FACTS: When Byron Funk died intestate 14 years after his divorce from Glenda Funk (now known as Culver), his former employer paid the proceeds from his 401(k) retirement account to Glenda because she was still the named beneficiary of the account. Contending that Glenda had no proper claim to the retirement account because of her divorce, Byron's estate sued Glenda seeking return of the proceeds on theories of breach of contract and unjust enrichment. The district court granted summary judgment to Glenda.

ISSUES: (1) Breach of contract and (2) unjust enrichment

HOLDING: Court stated that by allowing his earnings to contribute to the 401(k) plan created by his employer, Byron was a settlor of the trust. Byron contributed part of his property to the trust. Jones cited authority for the idea that Byron's employer is a grantor, but she failed to demonstrate that Byron is not a settlor of the trust. Court concluded that because Byron was a grantor of a trust at the time of divorce, it was necessary that the divorce decree provide for any changes in beneficiary designation related to that trust. Because the divorce decree did not so, there was a failure to comply with K.S.A. 60-1610(b). Byron and Glenda were obligated, then, to make any changes to beneficiary designations as they saw fit. Where Byron failed to make a change to the beneficiary designation on his 401(k) account, the district court correctly refused to modify the legal obligation as a matter of equity. Court found Jones failed to demonstrate that there was a benefit conferred upon Glenda by Jones and that Glenda's acceptance of the benefit would be inequitable.

STATUTES: K.S.A. 23-2802; K.S.A. 58a-103(14); and K.S.A. 60-1610

**SEXUAL PREDATOR TREATMENT PROGRAM, VISITATION, MAIL, GRIEVANCE PROCESS, AND AFFIDAVITS**

**CHUBB V. SULLIVAN, SECRETARY OF THE KANSAS DEPARTMENT FOR AGING AND DISABILITY SERVICES ET AL.**

**PAWNEE DISTRICT COURT – AFFIRMED**

**NO. 110,221 – JUNE 20, 2014**

FACTS: Chubb is an involuntary patient in the Kansas Sexual Predator Treatment Program at Larned State Hospital. On appeal he contended the district court erred in summarily dismissing his petition filed under K.S.A. 60-1501. Chubb alleged four errors on appeal. First, Chubb contends his liberty interest was infringed when his brother was restricted from visiting him at the facility. Next, he asserted that his liberty interest in receiving mail was unconstitutionally restricted without due process when the hospital instituted a policy restricting purchases of consumable items to three vendors. Third, Chubb argued that the grievance process was unacceptable and the inherent delays resulted in a systemic violation of due process. Finally, Chubb alleged that the affidavits submitted by the Kansas Department for Aging and Disability Services (KDADS) were invalid and were improperly considered by the district court.

ISSUES: (1) Sexual predator treatment program, (2) visitation, (3) mail, (4) grievance process, and (5) affidavits

HELD: First, court found Chubb has no liberty interest in a visit from his brother and even if he did, his due process rights were not violated; thus, that claim failed. Second, court held that the three-vendor policy does not implicate a constitutional right, and even if it did, the policy is reasonably related to a legitimate government purpose; thus, that claim also failed. Third, because Chubb failed to allege or establish shocking and intolerable conduct or continuing mistreatment of a constitutional stature, which is necessary to maintain a claim under K.S.A. 60-1501, his claim of inherent delay in the system failed. Last, court found the affidavits met all necessary requirements and rejected that claim. Accordingly, the decision of the district court summarily dismissing Chubb's petition under K.S.A. 60-1501 was affirmed.

STATUTES: K.S.A. 59-29a01, -29a02, -29a07, -29a22; K.S.A. 53-601; and K.S.A. 60-404, -1501

**TAX APPEAL, OIL AND GAS LEASES, AND MERGER DOCTRINE**

**IN RE TAX PROTEST OF BARKER**

**COURT OF TAX APPEALS – REVERSED AND REMANDED WITH DIRECTIONS**

**NO. 110,309 – JUNE 6, 2014**

FACTS: Robert E. and R. Gay Barker (Barkers) appeal from the decision of the Court of Tax Appeals (COTA) entering summary judgment against them and in favor of Neosho County on the Barkers' 2011 tax protest appeal. Robert Barker leased an oil and gas interest on land owned by his parents in 1983, and his parents retained a 3/16th royalty interest from the oil and gas that Robert produced. When Robert's mother, Estelle, died in 2009, the land passed to the Barkers as joint tenants by a transfer on death deed. However, the county continued to impose separate taxes on the royalty interest and working interest. The Barkers protested the county's tax valuation for 2011, and COTA affirmed the county's decision, finding that the lease and royalty interests remained in existence because the lease was Robert Barker's individually while the royalty was the Barkers' joint tenants. The Barkers argued that COTA erred in holding that the doctrine of merger did not work to combine their interests in the property after Estelle Barker's death.

ISSUES: (1) Tax appeal, (2) oil and gas leases, and (3) merger doctrine

HELD: Court held that the oil and gas lease executed in 1983 no longer served a purpose and was terminated by operation of law upon the death of Robert's mother in 2009. Court stated the merger doctrine provides that when the burdens and benefits of an easement or a profit are united through common ownership in either a single person or a group of persons, an easement or profit ceases to have any function. Court stated that under the facts of the case, the taxpayers were joint tenants and constitute one person. Because the husband owns the whole and every part of the land, he does not need a license to enter his own property to explore, discover, or remove oil and gas. Thus, the oil and gas lease no longer served a purpose and was terminated by operation of law. Court reversed COTA's decision and remanded for entry of summary judgment in favor of the Barkers.

STATUTE: K.S.A. 77-601, -621

**Criminal**

**STATE V. DORITY**

**SHAWNEE DISTRICT COURT – AFFIRMED**

**NO. 110,026 – MAY 16, 2014**

FACTS: Dority was convicted of domestic battery and endangering a child. Bench trial included mother's recantation of her statements to
police officers when she reported the incident and Dority was arrested. District court judge found officers’ testimony more persuasive and supported by the physical evidence, and commented that based on his experience it is common for victims of domestic violence to recant their initial police reports. Dority appealed, claiming (1) state failed to prove alternative means of domestic battery, (2) the conflicting and inconsistent testimony was insufficient to support the convictions, and (3) he was denied a fair trial because district judge improperly relied on personal knowledge about domestic violence victims instead of relying on evidence provided at trial.

ISSUES: (1) Alternative means, (2) sufficiency of the evidence, and (3) judicial use of personal knowledge

HELD: Jury unanimity is not a concern in a bench trial. Dority’s alternative means argument is inapplicable.

Viewed in light most favorable to the state, there was sufficient evidence to support Dority’s convictions.

Unpublished Kansas opinions were identified and discussed. A trial judge, as factfinder in a bench trial, is not allowed to use his or her special knowledge of a particular subject to decide an issue without hearing evidence to support the judge’s findings. However, a trial judge is allowed to use his or her common knowledge and experience to determine the credibility of a witness and assess the weight of a witness’ testimony. In this case, trial judge used his common knowledge and experience to explain why he found police officers’ testimony to be more credible than victim’s testimony, and there was additional evidence to support the verdicts beyond a reasonable doubt.

STATUTES: K.S.A. 2013 Supp. 60-455, -455(d); K.S.A. 21-3525(b), -4643; K.S.A. 22-3414(3); and K.S.A. 60-261

STATE V. DIEDERICH
RENO DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 109,286 – MAY 23, 2014

FACTS: Diederich appealed his conviction on several charges based on his claim that the state violated his speedy-trial rights under the Uniform Mandatory Disposition of Detainers Act, K.S.A. 22-4301 (Detainers Act). Diederich was arrested in Reno County, released, and then arrested on charges in several other counties. Diederich filed a notice under the Detainers Act for disposition of the Reno County charges within 180 days. The district court ultimately denied a motion to dismiss based on speedy trial allegations. Diederich was convicted of identity theft, forgery, felony theft and making a false information.

ISSUE: Detainers

HELD: Under the Detainers Act, once a defendant gives notice of a request to have outstanding charges tried, the state must do so within 180 days unless a continuance is granted under the statute’s provisions. Court held that in Diederich’s case, none of the statutory provisions for continuing the 180-day period was used by the state. Accordingly, Diederich was right that the 180-day period expired, and that left the state without jurisdiction to proceed on the charges. Court reversed Diederich’s convictions and remanded the case to the district court with directions to dismiss the charges with prejudice.

STATUTES: K.S.A. 22-4301, -4303; and K.S.A. 60-1507

STATE V. HERMAN
WYANDOTTE DISTRICT COURT – APPEAL DISMISSED AND CROSS-APPEAL AFFIRMED
NO. 108,902 – MAY 16, 2014

FACTS: Herman was convicted of DUI in violation of K.S.A. 2010 Supp. 8-1567. State appealed on question reserved from district court’s determination that Herman’s 2004 Missouri conviction for driving while intoxicated could not be counted as a prior conviction under Kansas law in determining penalty for the current conviction. Herman cross-appealed, claiming that there was insufficient evidence of probable cause to support denial of her motion to suppress Intoxilyzer breath test result, and claiming district court erred in the current sentence/penalty determination by refusing to apply “look-back” provisions of K.S.A. 2011 Supp. 8-1567(j)(3) to her case and thus improperly included a 1991 diversion for DUI.


HELD: Statutory provisions and rules relating to appeals by state based on a question reserved under K.S.A. 2013 Supp. 22-3602(b) (3) and cross-appeals by a defendant therefrom are stated and applied. State’s appeal was dismissed. Language in K.S.A. 2010 Supp. 8-1567(o)(2) relating to what constitutes a prior conviction in a DUI prosecution was abrogated, deleted, and amended by the 2012 Kansas legislature. An opinion by this court at this time on legal effect of the repealed language would unlikely govern any existing case, and is not an issue important to the correct and uniform administration of criminal law in Kansas.

Provisions of K.S.A. 22-3606 authorize a criminal defendant facing an appeal by the state to file a cross-appeal as allowed under K.S.A. 2013 Supp. 60-2103(h). Herman’s cross-appeal was timely filed and appellate court has jurisdiction.

Under facts of case, there was substantial competent evidence to establish probable cause to arrest Herman under K.S.A. 2010 Supp. 8-1567. District court did not err in refusing to suppress results form Herman’s evidentiary breath test.

Consistent with State v. Reese, 48 Kan. App. 2d 87 (2012), rev. granted (argued and awaiting decision), K.S.A. 2011 Supp. 8-1567(j)(3) cannot be applied retroactively and applies only to DUI violations committed on after the 2011 effective date of the statutory amendment. District court correctly counted Herman’s 1991 DUI diversion agreement as a prior conviction in determining Herman’s sentence.

STATUTES: K.S.A. 2013 Supp. 8-1567(i)(2), -1567(i)(3); K.S.A. 2013 Supp. 22-3602(a), -3602(b)(3), -3602(c), -3608(c), 60-2103(h); K.S.A. 2012 Supp. 8-1567(i)(3); K.S.A. 2011 Supp. 8-1567(j)(2), -1567(j)(3); K.S.A. 2010 Supp. 8-1567, -1567(a) (1), -1567(a)(3), -1567(d), -1567(e), -1567(f), -1567(g), -1567(o)(1), -1567(o)(2), -1567(o)(3); K.S.A. 8-1567; K.S.A. 22-3504, -3601 et seq., -3606; and K.S.A. 60-2103, -2103(b), -2103(h)

STATE V. LEWIS
WYANDOTTE COUNTY – AFFIRMED
NO. 108,147 – JUNE 20, 2014

FACTS: Lewis was convicted on charges arising from a high-speed chase. On appeal he claimed: (1) paramedic should not have been allowed to provide expert testimony because substance of that testimony was not disclosed 90 days before trial as required by Kansas Rules of Civil Procedure (KRCP), and state failed to provide an evidentiary foundation for that expert testimony; (2) prosecutor made improper comments during voir dire in discussing concept of reasonable doubt, and during closing argument in stating that “numerous” people testified about an officer’s actions; (3) district court erred in instructing jury that a retrial would burden both sides; and (4) district court unconstitutionally considered Lewis’ prior convictions in determining criminal history score for sentencing.

ISSUES: (1) Discovery in criminal cases, (2) prosecutorial misconduct, (3) jury instruction, and (4) sentencing

HELD: No published Kansas case discusses the well-established understanding that Kansas civil procedure rules do not apply in criminal cases. Here, district court did not err by allowing paramedic’s testimony. Discovery provisions of KRCP do not establish any
duties to disclose information to the opposing party in a criminal case. The duty to provide discovery in a criminal case is governed by two provisions of the Kansas Code of Criminal Procedure, K.S.A. 2013 Supp. 22-3212 and K.S.A. 22-3213, and by a prosecutor’s constitutional obligations under Brady v. Maryland, 373 U.S. 83 (1963). Also, the state provided a sufficient foundation to admit the paramedic’s testimony. State showed the testimony was based on paramedic’s personal observations of auto accidents, and was within his special areas of training and experience.

There was nothing improper in prosecutor’s discussion of reasonable doubt in this case. Use of “numerous” in closing argument may have gone beyond the evidence, but was not plain error.

District court instructing jury that “another trial would be a burden on both sides” was error under State v. Salts, 288 Kan. 263 (2009), decided while Lewis’ direct appeal was pending, but no clear error resulted in this case.

Kansas Supreme Court has rejected the claim that the use of prior convictions not proved to a jury is unconstitutional.

**STATE V. MCGILL**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 109,789 – MAY 2, 2014**

**FACTS:** McGill was convicted of two counts of aggravated indecent liberties with a child involving his daughters ages 1 year old and 3 months old. McGill confessed to the crimes to his wife, Jessica. McGill took one polygraph test and refused another. Statements McGill made at the first test and a 10-page questionnaire were used at trial. The trial court denied McGill’s motion to dismiss on the ground of insufficient evidence and also held that McGill’s three confessions were admissible. The trial court convicted McGill after a bench trial on stipulated facts.

**ISSUES:** (1) Motion to dismiss, (2) sufficiency of the evidence, and (3) corpus delicti

**HELD:** Court stated that under the corpus delicti rule, an accused may not be convicted of a crime solely on the basis of an uncorroborated confession. The Kansas Supreme Court has adopted the general rule that an uncorroborated extrajudicial statement is insufficient to sustain a conviction. However, any material facts, including the corpus delicti itself, may be proved by direct testimony, by indirect or circumstantial evidence, or by a combination of both. No exclusive mode of proof of the corpus delicti is prescribed by law. Rather than accept that outcome, the majority shades the rule in a manner at odds with its basic purpose and found corroboration of the crimes where there was none. Although the utility of the corpus delicti rule has been and may be fairly debated, that debate did not figure in the resolution of McGill’s case. The Kansas Supreme Court has recognized a limited form of the rule outlined in a series of decisions the U.S. Supreme Court issued 60 years ago. The leading U.S. Supreme Court decisions tersely discuss the corpus delicti rule and offer less than fully illuminating guidance to lower courts in determining the way a defendant’s confession or admission should be corroborated to support a conviction. The cases do, however, require corroboration of at least some aspect of the crime to which the statement relates. Although Chief Judge Malone cited those decisions in his opinion for the majority, the result here cannot be reconciled with them. In his concurring opinion, Judge Stegall misapplied Kansas law and incorrectly suggests that in some cases an uncorroborated confession alone may be sufficient to sustain a conviction.

**STATUTES:** K.S.A. 22-2902, -3208; and K.S.A. 60-404

**STATE V. RIOLO**

**SEDGWICK DISTRICT COURT – AFFIRMED**

**NO. 109,650 – MAY 23, 2014**

**FACTS:** Rilo pled guilty to two different charges, both of which constituted sexually violent offenses under Kansas law. The state asserted that, due to a prior conviction in Colorado for a comparable crime, the rule for doubling a person’s sentence (persistent sexual offender) should apply. Rilo countered that the prior conviction—a Colorado offense from 1986—was not comparable to other sexually violent crimes in Kansas and that the persistent sex offender rule should not apply. The district court disagreed and applied the rule.

**ISSUES:** (1) Persistent sexual offender and (2) out-of-state conviction

**HELD:** Court found that Rilo’s crime of conviction in Colorado was comparable to the Kansas sexually violent crime of indecent liberties with a child. Court stated that when a person is convicted
of a sexually violent crime, and he or she has a prior Kansas conviction for a sexually violent crime or a conviction for a comparable offense in another state, the court is required to double the person’s prison sentence. Court held the district court properly applied the persistent sex offender rule.


CITY OF DODGE CITY V. WEBB
FORD DISTRICT COURT – AFFIRMED
NO. 109,634 – JUNE 13, 2014

FACTS: Webb appeals his second conviction for driving under the influence (DUI), arguing the preliminary breath test (PBT) administered to him was illegally obtained in violation of the Fourth Amendment to the U.S. Constitution. Specifically, Webb argues that K.S.A. 2011 Supp. 8-1012(b) is unconstitutional because it allows an officer to request a PBT upon reasonable suspicion—rather than probable cause—that the driver was operating a vehicle while under the influence of alcohol or drugs or both. Webb claims the officer did not have probable cause to arrest him for DUI without the PBT results. Webb also claims that the district court should have suppressed the breathalyzer test results because the officer improperly coerced him into submitting to the test by threatening to obtain a search warrant to draw his blood if he refused.

ISSUES: (1) DUI and (2) reasonable suspicion

HELD: Court stated that the officer did not observe any indication in Webb’s driving that he was impaired, Webb produced his driver’s license without fumbling, and Webb did not have slurred speech. Nevertheless, the officer observed other evidence during their encounter that established probable cause to believe Webb was driving under the influence of alcohol. He stopped Webb for a traffic violation—his license plate was not sufficiently illuminated and he could not read the expiration sticker. Upon making contact with Webb, he smelled a strong odor of alcohol coming from inside the vehicle. He later determined that a moderate odor of alcohol was coming from Webb’s person. While Webb initially denied drinking that evening, he later admitted to consuming one beer. Webb also failed both field sobriety tests. Based on those facts, the court agreed with the district court’s conclusion that the officer had probable cause to believe Webb was driving under the influence, justifying the officer’s request that Webb submit to the PBT. Since the officer had probable cause, court stated it was unnecessary to address his claim K.S.A. 8-1012 was unconstitutional. Court also held under K.S.A. 2011 Supp. 8-1001, the officer was statutorily authorized to obtain a warrant to draw Webb’s blood even after Webb refused to submit to the breathalyzer test. However, the warrant would still have had to be supported by probable cause because generally, a threat to obtain rather than a threat to seek a search warrant will invalidate a subsequent consent if there were not then grounds upon which a warrant could issue. Because court found that Warkentin had probable cause to believe Webb was driving under the influence even prior to the administration of the PBT, Warkentin did not improperly threaten a sanction not authorized by law; thus, Webb’s consent was voluntary.

STATUTES: K.S.A. 2011 Supp. 8-1001, 1012(b); and K.S.A. 22-2202
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Lee’s Summit, Kansas. Perfect for solo practitioner. 196 square foot corner office in office building at 112th and Nall. Walking distance to Town Center, Sprint campus, etc. Office has hardwood floors, large windows, and includes use of conference room, reception etc. External signage (visible from Nall) is available with long-term lease, or purchase. Lease for $1,100/month, or will sell my 20 percent interest in the 2,400 sf building unit (the other 80 percent of the building is used by a small accounting firm). Contact Daniel Langin at (913) 661-2430 or dlangin@langinlaw.com.

Office Sharing/Office for Lease—Country Club Plaza, Kansas City. Office sharing or office lease opportunity on the Country Club Plaza in a Class A high profile corner building with ample free public parking for clients. 200 to 11,000 square feet available. Window offices available, high-speed DSL, printer, copier, facsimile, scanning, telephone, kitchen facilities, reception area, and multiple conference rooms. Offices are state-of-the-art with award-winning interior finish and design. Dedicated area available for your assistant if needed. Reasonable rent. No long-term lease required. Some possibility of business referrals depending on your area of practice. We are an AV-rated litigation firm with full management, accounting, research, and other support services. We would consider cost sharing these services with a compatible transactional, tax, and/or real estate practice. Professional, collegial, friendly atmosphere with other attorneys. Confidential inquiries can be made to Michael Grier at mgrier@wardengrier.com.

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

Office Space for Lease. Located at 921 SW Topeka Blvd., which offers quick and easy access to downtown Topeka including the County, Municipal, and Federal Courthouses; State Capitol Building; Docking State Office Building; Curtis Building; and more. There is available space on the first or second floor of the building, which includes individual offices and/or office suites. The building also includes a beautiful glass atrium sitting room used as an art display. Provided services include private parking and receptionist services. Please call Swinnen & Associates LLC at (785) 272-4878 for more information and to schedule an appointment to view the space.

Professional Office Building For Sale or Lease Near 28th & Fairlawn in SW Topeka. A 10,000 SF, two-story building recently remodeled with new HVAC and lighting systems. Building could be used as a whole or easily divided into four or more work areas to accommodate numerous professional organizations. Convenient to the Hwy Loop for quick access to all city, state, and court buildings, turnpike and the mall areas. Great food and other support close at hand. Call Dick May at (785) 633-2217 or (785) 267-8632.


Professional Office Space for Lease or Sale. Newly vacated space at 79th and Quivira, Lenexa, KS. Great rates, and will consider valuable upfront lease concessions for high quality, long term lease. Office is located in a commercial center that is for sale. Excellent income-producing investment opportunity for an owner-occupant. Attractive owner financing available for qualified buyer. Call (816) 805-6415.

We Have the Space You Need at the Price You Want! We have offices available in all sizes from 200 sq. ft. to 8,000, or no office at all under our virtual program. We offer a cost-effective solution for small- to medium-sized companies and branch offices with very little upfront cost and flexible lease terms. You can typically move into your office in a day and have access to a professional environment and services without all the overhead. Please visit us at www.officetechcenter.us.
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We have a long history of success inside and outside the courtroom. For over 40 years, we have maximized the value of cases referred to our firm and we will continue to do so into the future. If you have a client with a serious injury or death, we will welcome a referral or opportunity to form a co-counsel relationship.

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