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

I f I have learned anything from my position as president-elect and now president of the Kansas Bar Association, it is that as an association, we should never take for granted our members. Sometimes, in our sincere desire to increase membership or to provide services, it becomes too easy to focus on why Kansas lawyers should join the KBA. Or to emphasize what the KBA can do for Kansas lawyers. And while those may be legitimate topics for discussion, and maybe someday I will even devote this column to such a discussion, that is not what I want to write about this month. Rather, I want to acknowledge and extend my heartfelt thanks to the almost 7,000 attorneys and judges who have chosen to join the KBA.

There are two types of bar associations, mandatory and voluntary. In a mandatory bar, every lawyer must join the state bar association in order to be licensed in that state. Consequently, mandatory bars can always claim “perfect attendance” so to speak. Mandatory bars don’t worry about membership drives or discuss ways to increase membership at board meetings. Mandatory bars don’t fret about how they can attract more members or worry about why members don’t renew their membership.

Yet, I am thankful that the Kansas Bar Association is not a mandatory bar. I am thankful that in Kansas, our members choose to join the KBA. Each of you makes a conscious decision to join, and because of that, our association is for the better. We do not exist because you have to or are compelled to join. We exist because you want to become a member, and collectively, as a statewide association, we come together for a common purpose as set forth in our mission statement:

• Advance the professionalism and legal skills of lawyers;
• Promote the interests of the legal profession;
• Provide services to the members;
• Advocate positions on law-related issues;
• Encourage public understanding of the law; and
• Promote the effective administration of our system of justice.

To be sure, there is a wide array of reasons our members choose to join the KBA. It may be because you have always been a member. It may be because as an attorney, you feel belonging to the state bar association is important. Or it may be because of some service or opportunity KBA membership provides. All are good reasons, and there are many others. No single reason is better than another. But what is fundamentally the case and universally true, is that all of you have voluntarily chosen to join. And without you and your commitment, the Kansas Bar Association would not exist.

I am fully aware that in this current legal and economic landscape, there are plenty of reasons for someone not to join the KBA. I say that in all sincerity and with no disrespect. There is plenty of competition for our professional dues money, whether from metropolitan, county, regional or subspecialty bars, all of which are valuable and important, and with which the KBA interacts and supports. Beyond just other professional associations, there are plenty of demands for our money, whether you are a young lawyer just starting out, practicing in the public sector, are a part of a big firm or small firm, or have been practicing law for many years. And yet, despite the competition for your dues dollars and all the other financial pressures or obligations we face, you choose to make the Kansas Bar Association a priority. You choose to write out a check (okay, I know that is old fashioned) for your dues each and every year.

As a bar association, I believe we have a great staff. I am convinced we have one of the best and most dedicated staff any bar association can have. Without each of them, we could not function. And I am thankful for each of them. All of our employees are dedicated and committed to the KBA. For them, it is not just a job. I am proud of each and every one of them, and of all they do for the organization.

And yet, without you, our members, we couldn’t function and would not exist. You are the very life blood of our association. As members, you provide the single largest portion of our revenue through your dues. Many of you choose to attend our CLEs, the annual meeting, or buy our books or other publications, or join a section or committee. From our members, our board of governors is selected. Many of you serve faithfully on committees or in sections, devoting time and effort to a wide variety of practice areas and causes. Many of you present at CLEs, or write or contribute to our publications. Many of you faithfully answer the call to provide expertise or testimony before our state legislature when legislation affecting the practice of law or our citizens is being considered. Many more of you contact your state representatives or senators at our request when important issues are pending or presented. And all of this is done without compensation and more often than not, without any special recognition. You choose to do it for the same reasons you choose to join the bar; to serve and to enhance our profession, the practice of law, and to make this a better state for all Kansans. As an association, we are deeply indebted to each and every one of you. Unfortunately, we may not always say thank you or appropriately express our appreciation for what you do.

As a lifelong member of the KBA, I have been privileged to meet some of the best and most dedicated judges, attorneys and fellow KBA members. To be sure, you do not have to be a member of the KBA to be a dedicated or excellent judge or attorney. And that is what makes the Kansas Bar Association special. We are not a mandatory bar. We exist because each of you, voluntarily and willingly choose to join. And for that we may too often appear to take you for granted. I trust we don’t do that and as an association, we never overlook your importance and the vital role you play in the success and continued existence of the KBA. I thank each and every one of you.

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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The Power of Impartiality, Independence, and Information

In the summer of 2012, the Supreme Court announced its landmark decision in National Federation of Independent Business v. Sebelius—the first “big” Affordable Care Act case. The resulting social media frenzy was dizzying. Seemingly everyone had heard of and/or read (a part of) the Court’s decision, or at least a synopsis. For a brief moment in time, more than a handful of people had heard of the Anti-Injunction Act. And people had opinions—strong opinions—about the proper interpretation of the Commerce Clause, Spending Clause, and taxing power that they expounded to their Facebook friends and Twitter followers.

About the same time, FindLaw.com released the results of a telephone survey it had conducted of American households on the heels of the ACA decision. That survey found that, even in the midst of the ACA hubbub, two-thirds of Americans could not name a single justice on the Court. Twenty percent of those surveyed could name Chief Justice John Roberts, but no one else. Less than 1 percent could name all nine justices.

Putting aside the potential for error in extrapolating across two very different media (Facebook versus the telephone), the contrast was startling. Why was it that people were, on the one hand, so apt to give opinions about how they personally thought the decision should have come out but, on the other, so clueless about who made the decision and how they came to be in that position? And this inconsistency exists at the state level, too. I have no doubt as to what the results of a similar survey might be regarding our Kansas courts, even in the midst of one of the highest-profile years for Kansas Supreme Court decisions in recent memory.

Frankly, other than just embarrassment from a civics perspective, I’m not terribly concerned with people not being able to name justices or judges. People don’t become jurists for fame and glory. I’m much more troubled by what lurks underneath: a fundamental misunderstanding of the role of the third branch of our government.

I’m concerned that more often than not, the average person will make snap judgments about a case based on a 250-word news blurb or a 140-character tweet without knowing anything about the facts or the complexities of the law. I’m concerned that most people have no idea how judges are appointed or how historically the decision to employ a particular selection method came about. I’m concerned that there is a growing number of Americans who believe that if a judge issues a decision that a lot of people don’t like, the solution is to fire him or her.

Yet as lawyers, we also know that those who have experience with the legal system, whether as a party, witness, juror, or otherwise, have the opposite perspective. These people look to the judge for fairness, guidance, and a willingness to put aside any personal differences of opinion and to rule based on the facts and the law. In short, people look to our courts for justice. They trust that, even if things don’t turn out the way they hope, they will be given a “fair shake.” In the words of Alexander Hamilton, these people understand that “a steady, upright, and impartial administration of the laws is essential, because no man can be sure that he may not be tomorrow the victim of a spirit of injustice, by which he may be the gainer today.”

What Hamilton hit upon is one of the things that makes our system of government truly great: In America—in Kansas—everyone is equal in the eyes of the law. Regardless of your age, ability, financial status, or political clout, the same rules apply. One need look no further than the recent judicial corruption scandals in India, Egypt, and Russia to glimpse the significance of an impartial judiciary.

And what is it that affords our judges the freedom to act with such impartiality? Independence. Regardless of how a judge is selected for the bench, American judges’ decisions are not subject to review by the monarchy, or by a president, governor, or mob rule. Rendering an unpopular decision is not an impeachable offense. As Hamilton explained in Federalist 78:

[It] is not with a view to infractions of the Constitution only, that the independence of the judges may be an essential safeguard against the effects of occasional ill humors in the society. These sometimes extend no farther than to the injury of the private rights of particular classes of citizens, by unjust and partial laws. Here also the firmness of the judicial magistracy is of vast importance in mitigating the severity and confining the operation of such laws.

Which brings us back to the disconnect: Litigants trust that the judges who preside over them will make independent and impartial decisions. At the same time, there is a growing sentiment among those who have no exposure to or understanding of the justice system that judicial opinions should be subject to majority oversight and that judges who make unpopular or otherwise distasteful rulings should be punished.

How do we bridge this gap? Education.

In this vein, the KBA YLS Board of Directors is proud to announce the Section’s partnership with and participation in the Informed Voters Project this year. This nonpartisan civics project, developed by the National Association of Women Judges, seeks to spark discussions and foster understanding in our communities of the importance of an impartial judiciary independent of political pressure. The IVP takes no position on issues like judicial selection—instead, presenters merely discuss the design of the justice system, what judges do, and why it is so vital that judges remain independent from politics.

Under the IVP, young lawyers throughout the state will be visiting Rotary Clubs, Kiwanis meetings, high school government classes, and other community groups to talk about these important principles. Ask around—there is probably a presentation scheduled in your area. And if you haven’t heard of

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Help Celebrate Pro Bono

Access to Justice and the National Pro Bono Celebration

Once a year our country devotes one week to recognize attorneys who have provided access to justice by volunteering to do pro bono work. This year, National Celebrate Pro Bono Week is October 19-25. It is a time to appreciate attorneys and law students who volunteer their time and service and to bring awareness to the need for pro bono attorneys. If you are an attorney or a judge, there is no doubt that you are aware of the need. Access to justice requires access to attorneys.

The resources available to someone who is involved in a civil legal case but is not able to pay an attorney are limited. Civil legal representation is not guaranteed by the Constitution. Kansas Legal Services is only able to help about 60 percent of the people who are income eligible. If a person does not meet the financial requirements for services from KLS, or if the other party in the case has already been assigned an attorney by KLS, the options are for self-representation or to find an attorney willing to take the case on a pro bono basis.

The National Center for State Courts estimates that more than half of the cases in family courts are conducted by self-represented litigants. That creates another set of problems for judges. For the courts, self representation increases the need for access to legal forms, information on court protocol and patience with pro se representatives.

KLS Needs Pro Bono Attorneys

A majority of pro bono cases in Kansas are coordinated by KLS. “For the first eight and a half months of 2014, pro bono attorneys have provided advice to 271 low income Kansans,” explained Marilyn M. Harp, KLS executive director. “Pro bono attorneys have opened 63 cases and completed sixty cases,” she stated.

There will be some duplication in what opened early in the year and then closes later this year. The need far outweighs the volunteers available to fill the need. Harp explained that from mid-July to mid-August KLS had applications from sixty-five people who would have been eligible for a pro bono attorney, had one been available. Information about pro bono resources and becoming a KLS pro bono volunteer can be found at http://www.kansaslegalservices.org/probono.

Working Together to Address the Need

The University of Kansas School of Law and Washburn University School of Law are aware of the need and have created programs that encourage law students to become involved in pro bono work. The KBA is hoping to learn more about the opportunities created by law firms. Later this year, the KBA and KLS plan to co-host a meeting and reception to provide a forum for learning more about where the need for pro bono is greatest and how we can work together to meet that need. Attorneys, judges, educators, law students, law firm pro bono coordinators and others interested in attending should contact Anne Woods at awoods@ksbar.org.

States Vary on Recording Requirements

Kansas is one of thirty states that do not require attorneys to report pro bono hours. Eight states have mandatory pro bono reporting and twelve are voluntary reporting states. In an effort to know more about how many volunteer hours KBA members provide each year, the KBA will soon offer a new field on members’ profiles to voluntarily record hours or other means of recording pro bono. Also, the KBA membership renewal form for 2015 will include a space to indicate the number of pro bono hours provided in 2014.

What Motivates Attorneys to do Pro Bono?

An Olathe attorney shared that she is motivated to do pro bono work because it is the right thing to do and it is an opportunity to gain experience working on cases with which she is not familiar. She said she felt a sense of gratification from talking to a client for the first time. In addition, she believes attorneys have an obligation to serve others by virtue of being granted a license to practice law and by doing so; it’s an opportunity to learn.

A Lawrence attorney indicated that he feels a sense of gratification from the experience and that the work he does for service members, particularly if they are about to be deployed to dangerous areas, is especially gratifying. He stated that he believes pro bono work is part of an attorney’s professional responsibility and that all attorneys should shoulder a fair share of pro bono cases.

Echoing some of the same sentiments is a Wichita attorney who describes it like this: “While I need to earn a living through my law practice, I realize there are many people who cannot afford the expense of hiring an attorney. KLS and public defenders don’t have the capacity to help everyone who needs legal advice,” she stated. “I think I am like most attorneys; we enjoy helping people.” She went on to say that she feels a sense of gratification immediately upon talking to the client or writing that initial letter saying she will represent them. She enjoys knowing that she can help someone through their legal problem and relieve some of their stress. One thing she thinks a law student or new attorney should consider is that doing pro bono is a great way to get experience and it can get you into the courtroom more quickly if that is what you want. Another benefit is the chance to get some guidance from a more experienced attorney and to try a new area of law.

The attorneys who shared their thoughts on pro bono all had positive experiences through KLS. They shared that KLS does a great job of making sure they have the resources they need to represent the clients sent to them and that they have opportunities to attend free CLEs. One attorney explained that attorneys who are not in a law firm would be wise to do their pro bono work through referrals, such as Kansas Legal Services. He explained that the prospective clients are screened to make sure they are in fact not able to pay for representation and you can limit the number of pro bono cases that you have at any one time.
Jeans for Justice and the KLS Office Supply Drive

Jeans for Justice

During the fall, the KBA provides two options for KBA members to provide a donation to KLS. Jeans for Justice started last year and is a fun way to show your support for KLS. The idea is to select a casual day in honor of Celebrate Pro Bono Week for your office and ask team members to donate $5 or more to KLS. The casual day can be any day you select. Visit http://www.ksbar.org/jeansforjustice to learn more.

KLS Office Supply Drive

The KBA office supply drive for KLS started in August and runs until the end of October. The hope is to provide KLS with frequently used supplies by asking visitors to drop an item in the boxes provided in the lobby of the KBA. Donors can also take their donation to their local KLS office. This year KLS is in need of blue/black ink pens, letter/legal pads, copy paper (letter/legal), yellow highlighters, flash drives, file jackets (letter/legal), and Post-it notes.

The Power of Impartiality, Independence, and Information

(Continued from Page 7)

a presentation near you, contact me or Joslyn Kusiak, our KBA YLS secretary/treasurer, and we will get you connected with one of our members eager to engage your community. Or if you’re interested in becoming more involved or giving such a presentation in your area, let us know, and we can help make that happen.

As lawyers, we are officers of the court. Our allegiance is not only to our clients, but to the system on which we rely for fairness. As young lawyers, the members of the KBA YLS understand that in order to ensure continued reliance on this impartial system in the future, we have an obligation to educate Kansans today about why this “essential safeguard” matters. Will you join us?

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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Mind Your Manners

If you don’t have anything nice to say, don’t say anything at all.

– Your Mother

It is the end of rather vexing day and you are drafting a motion to compel discovery. Opposing counsel has been, in a word, uncooperative. Your draft reflects your frustration as you colorfully explain to the court how counsel apparently reads at a second-grade level as he is unable to grasp the meaning of both the discovery rules and your straightforward reasonable requests. You pause. You chuckle. You then hear your mother’s voice whispering in your ear. You then, thankfully, edit. We have all been there and we have all thanked Mom for her sage advice. However, the angels of our better nature are not the only things keeping us from engaging in such behavior. Lawyers must be aware that a higher law – the Kansas Disciplinary Administrator – has something to say when manners are forgotten.

Kansas Rule of Professional Conduct 3.5(d) provides that a lawyer “shall not . . . . engage in undignified or discourteous conduct degrading to a tribunal.” While lawyers certainly retain their right to criticize judges and others, they must do so with caution. Advocacy that exceeded zeal or crossed into discourteousness has landed attorneys in ethical hot water. Questioning a judge’s ethics or neutrality without basis and the use of colorful language to describe a lower court’s ruling during an appeal not only reflects poorly on the attorney’s advocacy skills but also violates the rules of ethics.

Rule 3.5(d) implicates much more than lawyers who unwisely choose to direct their discourtesy towards judges. The Kansas Supreme Court has defined “tribunal” as including “more than the judge himself; it includes the entire forum, the entourage, the setting in which the proceedings are being conducted.” Conduct directed toward witnesses, court personnel, and other lawyers all easily fall within Rule 3.5(d)’s sweep. For example, the Supreme Court in In re Swarts III found an attorney violated Rule 3.5(d) when he directed expletives, not at the judge, but at opposing counsel after the hearing had concluded. Lawyers’ conduct towards other lawyers falls within the rules even when it does not involve the practice of law.

Rule 3.5(d) applies even beyond the physical confines of the courtroom to situations where it would not be foreseeable that the targets of discourtesy would find out about it. In In re Gershater, the Kansas Supreme Court found that an attorney violated Rule 3.5(d) based on language contained in a privileged letter to her client. Following a default judgment, the lawyer in that case wrote a letter to the client in which she blamed the judge and opposing counsel for the default. The lawyer labeled the judge’s failure to grant a continuance as “unethical” and suggested that if the default were vacated “the trial would be in front of the same judge, so you may not get a fair hearing.”

Ethical duties do not only rein in lawyers’ advocacy. Judges too must mind their manners while performing their official duties. Rule 2.8(B) of the Kansas Rules Relating to Judicial Conduct provides that a “judge shall be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, court staff, court officials, and others with whom the judge deals in an official capacity . . . .” The application of this rule has led to the censure of a magistrate judge for drafting an order as a poem which held the criminal defendant “out to public ridicule or scorn.” And, the court noted that the judge’s attempted humor was not an excuse for the ethical breach. The court cited advice from a member of the Arkansas supreme court: “Judges simply should not ‘wisecrack’ at the expense of anyone connected with a judicial proceeding who is not in a position to reply.” Another judge was censured for losing her temper with prospective jurors who seemed as if they were attempting to avoid jury service. The judge admitted to yelling at the jurors and being mad at them.

The practice of law can be stressful and tempers may flare – that is natural. However, we are required to rise above it and maintain the dignity and decorum that the public expects from its judicial officers and lawyers. Breaches of that decorum shadow not only an individual’s ethics and professionalism but the public’s perception of legal profession. We have at least two ways to ensure we stay on the proper side of the line. As between Mom and the disciplinary administrator, I’d suggest Mom.

About the Author

Joseph P. Mastrosimone is an associate professor at Washburn University School of Law. He previously served as chief legal counsel for the Kansas Human Rights Commission and as senior legal counsel to the former chairman of the National Labor Relations Board. He always listens to his mother.

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Footnotes

2. A lawyer, as a citizen, has a right to criticize a judge or other adjudicatory officer publically. To exercise this right, the lawyer must be certain of the merit of the complaint, use appropriate language, and avoid petty criticisms. Unrestrained and intemperate statements against a judge or adjudicatory officer lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.
4. In re Eckelman, 282 Kan. 415 (2006) (finding Rule 3.5(d) violation where attorney used foul language towards the judge and accused the judge, without basis, of improperly speaking with jurors); Board of Professional Responsibility v. Slavin, 145 S.W.3d 538 (Tenn. 2004) (suspending an attorney for two years where he repeatedly made discourteous comments about administrative law judges such as calling them “petty, barbarous and cruel”; accusing them of having “complete contempt for First Amendment values;” and stating he “[d]istracts his judicial office”).
5. In re Swarts III, 272 Kan. 28, 35-6 (2001); Turner, 217 Kan. at 585 (finding attorney violated former DR 7-106(C)(6) by directing “improper” and “abusive” language toward opposing counsel); In re Romious, 291 Kan. 300 (2010) (basing a 3.5(d) violation in part on outbursts directed toward a bailiff).
8. Id.
10. Id.
The Dreaded Online Security Questions: Spare Me Please

Editor’s note: This article is reprinted from the Kansas City Star (September 2013).

The biggest lie ever told was by the person who claimed technology was going to simplify our lives. That guy never had to change his security code every three months and be denied the right to use 123456 and abc123 as passwords. That pointy-headed know-it-all never had to read a word off a website written in a blurry twisted angle and then retype it to buy tickets to “Sesame Street Live.” No doubt he’s a 22-year-old who wears an earpiece, drives a Subaru, and watches MTV. He’s never folded a map or used the Encyclopaedia Britannica.

Technology was supposed to make things better, right? Then someone explain what is now the biggest epidemic: security questions. Follow me here. I had logged into my 529 site to pay my son's college tuition, so my mood wasn’t pleasant to begin with. Plus I was in a hurry. I was late leaving from work.

I guessed my name and password. But then the site told me they were upgrading the security and I needed to complete security answers. Thirty minutes later I was on the verge of throwing my laptop against the wall.

The idea, one might think, is relatively defensible. You have three sets of questions to choose from, and then answer them as they are correct to you. But since it’s a joint account, I need answers that my wife would know, too. And instead of asking something simple like “what’s your name?” the exercise was decidedly preposterous.

Here were two of the first four questions: “Your childhood best friend’s first name?” And, “Your current best friend’s first name?” Generally speaking when I’m trying to retrieve information from a website that has my money I don’t like a computer asking me questions. Isn’t that what HAL did in “2001 A Space Odyssey”? And asking about best friends 45 years ago doesn’t improve my mood much.

After thinking about it and choosing the name John, I had to type the answer twice — which wouldn’t seem difficult except the letters were replaced with asterisks — something called “masked passwords.” So you type but can’t see the letters. This may shock the nerd-guy who creates these rules but when you can’t see what you are typing mistakes happen. And when mistakes happen I get mad. And when I get mad I write columns.

I finished and got this message: “Security answers must be at least six characters.” News flash. In 1964 everyone’s name was short — Gus, Joe, Tom, Kurt, Bill, Alan, Marty, Tim. Nobody on the planet had names like Hunter or Jeremiah or Alexis.

I came up with something and moved on.

The next round included questions like, ‘What hospital were you born?’ followed by, “In what city did you honeymoon?” The last set of questions asked me, “Who is your favorite athlete?”

And, “What’s your favorite hobby?” Who has time for a hobby when you have to answer stupid questions like this? By now I was just picking one and typing things like “who knows,” “who cares” “get me out of here.”

I clicked on “enter” and got this message: “Your second security answer and the retype of your second security answer do not match. Please retry.”

So I have a solution. Fire Nerd Guy and let me come up with the questions for people like me who can’t remember what we did last week, not to mention a honeymoon that was 26 years ago. Here they are:

- Where were you when Neil Armstrong landed on the moon?
- Where were you when President Reagan was shot?
- Where is the nearest pharmacy to your house?
- What day is the senior discount at the grocery store?
- Where is the comfort shoe store?
- What theaters have matinees?
- Why haven’t your children had grandchildren yet?

Bill Gates — please call me on the landline.

About the Author

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

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The Lawyers’ Client Protection Fund
How it Works and Why it Exists

The Lawyers’ Fund for Client Protection (LFCP) was established on July 1, 1993, by order of the Kansas Supreme Court. Retired Justice Fred Six and retired Clerk of the Appellate Courts Carol Green were primarily responsible for designing the client protection system and submitting that information to the Supreme Court for its consideration.

The purpose of the LFCP is to promote public confidence in the integrity of the legal profession. The fund accomplishes its purpose by reimbursing clients who suffered financial losses as a result of “dishonest conduct” of Kansas lawyers, when the loss arises out of the attorney-client relationship. Supreme Court Rule 227 contains the parameters of the LFCP.

Dishonest conduct includes situations where a lawyer wrongfully takes or converts a client’s money, property, or something else of value. Dishonest conduct also includes the refusal of a lawyer to refund unearned fees received in advance when the lawyer provides no services. Finally, when an attorney borrows money from a client with no intention to repay the money, the attorney’s conduct also constitutes dishonest conduct. Recently, the Client Protection Fund Commission has received claims made against lawyers who accepted advance fees and died before providing legal services. Obviously, this does not constitute dishonest conduct on the part of the deceased lawyer. However, the commission has determined that these claimants should be provided a refund of the retainers paid to the lawyer on the basis that it is an unearned retainer. A claim must be filed no later than one year after the claimant knew or should have known of the lawyer’s dishonest conduct.

On occasion, claims are made for losses experienced by clients which are not covered by the fund. Those instances would include fee disputes, legal malpractice and losses resulting from a lawyer’s negligence. Under Supreme Court Rule 227, the application for reimbursement of funds from the LFCP is not an adversarial process. Further, a claimant does not need counsel to make a claim for reimbursement. It is the expectation of the commission that Kansas lawyers who provide assistance to a claimant will do so as a public service and not charge a fee for providing advice to a claimant in the client protection process.

The LFCP is financed by Kansas lawyers through annual registration fees. There is no tax money involved. The Supreme Court has authority to transfer funds from the Disciplinary Fee Fund to the LFCP when needed. A limit of $125,000 is set for a single claim. An aggregate limit of $350,000 is set for all claims against any one lawyer.

The Client Protection Fund Commission consists of one active or retired district court judge, four active lawyers, and two non-lawyers. All members are appointed by the Kansas Supreme Court and no member may serve more than two consecutive three-year terms. The members of the commission are not compensated, but receive reimbursement of out-of-pocket expenses arising while acting as a commission member. The Clerk of the Appellate Courts, Heather Smith, is the secretary of the commission. Sally Brown, who is in charge of attorney registration matters, handles administrative matters for the commission. The five lawyer members of the current commission are Teresa Watson, Ed Watson, District Court Judge Mike Ward, Aaron Kite, and Thomas Hammond II. The non-lawyer members are Doug Anstaett, Kansas Press Association executive director, and Beth Love, an educator in Dodge City. Teresa Watson is chair of the commission, and Ed Watson is vice chair.

Claims are investigated by the Disciplinary Administrator’s Office. The accused lawyer is notified of the claim and given an opportunity to respond to the claim. After the investigation is completed the investigative report is provided to a commission member who is then responsible for presenting that claim to the commission and making a recommendation to approve or deny the claim. The approval or denial of a claim requires the vote of at least four commissioners. A claimant may request reconsideration of a denial of the claim or the determination of the amount of reimbursement within 30 days of the denial.

A lawyer whose conduct results in a payment of a claim will be liable to the fund for restitution. As a condition of reimbursement, the claimant will be required to transfer the claimant’s rights against the lawyer to the commission. The commission examines every avenue that it may have to recover against a lawyer whose conduct results in the payment of a claim.

From its inception, the commission has paid $2,409,406.18 in claims. Last year the commission paid $273,396. The annual number of claims filed has ranged from six to 98 with an average of 45. In many instances, multiple claims have been made against one lawyer. There are 10,800 active lawyers in the state of Kansas. In reality, the instances of dishonest conduct resulting in claims being paid by the commission are very low in Kansas.

The LFCP is a valuable component in the self-regulation of the legal profession. The commission makes every effort to handle claims as quickly as possible, as oftentimes the claimants have suffered great hardship as a result of the dishonest conduct of the lawyer. Commission members have had the opportunity to review the systems in other states, and the Kansas fund rates at the top in its ability to pay claims quickly and, in almost all instances, pay the entire amount of the loss.

About the Author

Stanton A. Hazlett received his BGS from the University of Kansas and his J.D. from Washburn University School of Law. From 1977-86, he was engaged in private practice in Lawrence. Since 1986, Hazlett has been with the Disciplinary Administrator’s Office. In September 1997, he was appointed disciplinary administrator.

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The Value of Varied Perspectives – An Examination of Kansas’ Diversity Initiatives in the Private Legal Sector

Relocating to the Sunflower State to attend law school represents another step in my long journey from Venezuela, where I was born. I have lived in many different places throughout my life. In each place the people I met were unique and diverse, and I learned something different from every person with whom I crossed paths. My time in Kansas has proven no different, and my experiences have taught me the value of diversity. Yet my chosen profession has not embraced diversity to the same extent.

According to the Bureau of Labor Statistics, the legal profession remains the most homogeneous in the United States with respect to racial and ethnic diversity. In 2013, the American Bar Association reported that nearly nine out of 10 practicing lawyers were white, which is not reflective of the country’s racial composition. In Kansas and in the United States generally, the population of minorities is steadily growing. For example, the population of Hispanics in Kansas City has almost doubled since 2000 and now comprises 11.2 percent of Kansas’ population. This data suggests that Kansas firms will serve more clients of different cultures, backgrounds, and races in the years to come.

Increasing diversity programs is an effective means of encouraging law firms to grow alongside the minority population. It is as simple as working to include a representative proportion of races, nationalities, sexes, and other cultural distinctions in its legal community. Such efforts are not only important for social justice, but also offer business advantages to firms. A diverse workforce brings fresh perspectives that assist a firm in maintaining a dynamic edge over the competition. Culturally distinct workers can pool their varied knowledge and skills, strengthening the firm’s productivity, as well as its responsiveness to a steadily diversifying client base.

While Kansas has not yet initiated pervasive efforts to encourage the inclusion of all backgrounds in its legal community, individual firms have taken the lead through their internal hiring practices. For example, Lathrop & Gage LLP offers programs designed to increase diversity in its ranks not only in Kansas, but in every state where it practices. Dionne M. King, diversity and associate development manager at Lathrop’s Kansas City office, said that her firm “find[s] value in aligning with national organizations that promote and equip us with tools for hiring, retaining, and advancing talented diverse attorneys.” In Kansas, Lathrop is a founding member of the Heartland Diversity Legal Job Fair. Since 2005, the Heartland Diversity Fair has allowed hundreds of diverse law students to interview with top firms throughout the state. King explained: “A more strategic diversity effort enriches our culture and enables us to foster a better, more inclusive, work environment. We recognize that a team of diverse talent enhances our mission to provide superior service to our clients.”

Similarly, the international firm of Bryan Cave LLP greatly values diversity in its firm-wide community. James D. Lawrence, a partner in Bryan Cave’s Kansas City office, explained that his firm “has implemented firm-wide diversity workshops wherein every lawyer participates to encourage candid conversations about diversity,” and to ensure a work environment accepting of all backgrounds. In addition to participating in the Heartland Diversity Legal Job Fair, Bryan Cave recently partnered with the Mid-America LGBT Chamber of Commerce for a networking event in Kansas City. According to Lawrence, the firm benefits through its diversity initiatives by providing a more inclusive environment for all lawyers and staff. For Bryan Cave, “[d]iversity brings depth and richness to our individual professional experiences, binds us to the communities where we practice, and makes our firm a better place.” These firms’ practices provide effective models for Kansas and the Midwest.

One need not search hard to find examples of how such initiatives have changed the lives of those who would not otherwise have had the opportunity to excel. The ABA has showcased many success stories where minorities have overcome the odds against them. No matter the specific nature of one’s upbringing, such programs represent a willingness to embrace those of varying backgrounds. Through Kansas’s diversity initiatives, I, myself, have forged strong relationships with Kansas attorneys who continue to support me in my endeavors. Sometimes all a person needs is a chance.

This essay does not suggest that a minority lawyer is always the best choice to serve a minority client. Rather, diversity positions a firm to more effectively serve Kansas’ evolving consumer market. As the cultural and racial composition of Kansas and the nation continues to change, the legal sector must change along with it. For these reasons, the Kansas legal community should continue to develop its diversity in comparison to other professions in the state.

About the Author

Norah Avellán is a third-year law student at Washburn University School of Law. She is a member of the Washburn Law Journal and the Philip C. Jessup International Moot Court team.

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Footnotes

www.ksbar.org | October 2014
The Gray Envelope

A gray envelope from the Disciplinary Administrator's Office has arrived. That envelope is now the most serious issue in your office. Start strong! Open the envelope immediately and calendar your response deadline. Read the complaint carefully and gather any documents and evidence needed to respond to its claims. Finally, promptly set an appointment with a lawyer to prepare your answer. This is a good beginning, but beware! A complaint can be disruptive in ways you might not imagine.

Mental and Physical Impacts

A complaint against our personal or professional integrity is a serious blow that takes many lawyers by surprise. Some lawyers sucked into the disciplinary process describe insomnia, physical symptoms of illness, mental health issues including inescapable sadness, fear, worry, and anger, increased tension in personal and professional relationships, and practice impairment (i.e. self-doubt and worry making it hard to focus on work). Good lawyers with no history of depression can check every diagnostic box soon after a complaint. That is not unusual, and there is help.

Kansas Lawyers Assistance Program (KALAP) is available and confidential even after a complaint. It can plug you into other appropriate resources including Resiliency Groups, pair you up with a peer volunteer, and offer up to four free counseling sessions. KALAP has contracts which provide licensed counselors all over the state including after-hours phone consultations (see KALAP.com). Commit to coming out of the process mentally, physically, and professionally intact – even if angry or confused by the experience. There are opportunities to improve the disciplinary process, but a lawyer must survive it first.

Long Odds

Some lawyers familiar with the disciplinary process express surprise at how confusing it can be. One noted that reading the rules and cases while faithfully attending years of CLE seminars shed no light on the nuts and bolts of how a case would unfold. This may be attributable, in part, to the relative rarity of complaints and discipline, meaning that most of us are inexperienced in the forum.

The ABA's Surveys on Lawyer Discipline Systems (S.O.L.D.) are available at http://bit.ly/1rdl9He and the Kansas averages for 1998 through 2011 show complaints against eight percent of the total number of lawyers. (Comparatively, complaints against Kansas judges impact an average 37 percent of that population.) It is harder to divine how many lawyer complaints are docketed but S.O.L.D. does track complaints investigated. Roughly 48 percent of lawyer complaints appear to be investigated on average. (About 16 percent of judicial complaints are docketed.)

The rarity of complaints underscores their seriousness and the data further highlights that by hinting that the Disciplinary Administrator rarely loses. The S.O.L.D. reports make it clear and convincing prejudice.

Unpredictability introduces additional law practice management issues. No insurance company questioned offers any policy to cover disciplinary defense, so defending will likely be an out-of-pocket expense where $300 per hour is not unusual. S.O.L.D. reports suggest that complaints move quickly but lawyers interviewed were entangled for many months before dismissal with final bills reaching $10,000 or more and time away from paying clients accumulates quickly. Cost estimates to defend before the Hearing Panel or the Supreme Court were many times more than the $10,000 price tag.

Insurance carriers can require that any complaint be reported, and premiums or coverage may be impacted. Corporate clients also note that internal and regulatory audits may require reporting as part of a risk assessment that impacts future business. Even a district court can weigh in with sanctions under Rule 224(d) makes it clear that any deviation from the rules or procedures is not a defense or grounds for dismissal, absent clear and convincing prejudice.

Be Prepared

That gray envelope brings legal problems and practice management concerns. Weighing those issues carefully, watching your mental health “vitals” throughout the process, and seeking help early are keys to success. The odds that you will see a complaint – let alone discipline – are rare. Even so, heed the motto of the Girl and Boy Scouts: “Be prepared.”

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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Meaningful Membership

This year, Christi L. Bright and Eunice C. Peters have the great honor of serving again as co-chairs of the KBA Diversity Committee and leading our committee in its mission to help the KBA foster an inclusive, diverse bar association, promote understanding and respect for different points of view, and support the advancement of diversity within the Kansas legal profession and justice system.

This past year, the diversity committee was successful in: (1) Amending the KBA Diversity Award to include individuals who have shown a continued commitment to diversity; (2) creating a statement of purpose for our committee, which included defining the terms “diverse” and “inclusive”; (3) assisting our committee members into leadership positions; and (4) hosting “Breakfast with Champions for a Diverse and Inclusive Bar,” which was the Friday breakfast at the KBA Annual Meeting. We especially want to thank AT&T for sponsoring our breakfast and their ongoing support to our committee over the years.

We also recognized Dennis D. Depew for his dedication to and support of our committee this past year both as KBA president and all-around great guy. We are extremely fortunate that he accepted our invitation to join our committee this year!

Our focus this upcoming year will be “Meaningful Membership.” Which begs the question, why is the KBA membership meaningful to us . . .

Christi

I first became active in the KBA as a Diversity Committee member. It was there that I had the privilege of meeting and working alongside diverse as well as non-diverse attorneys and judges throughout the state of Kansas. As I continued to work with those attorneys and judges, they began to see the dedication, perseverance, quality of work and commitment that I demonstrated. Within a year or so, I was being asked to present CLEs or represent the bar in other leadership positions. Soon thereafter, I was chosen to represent the diverse attorneys in the state on the Board of Governors but now, not only am I a diverse attorney on the Board, I represent Johnson County as a governor. This accomplishment allowed another diverse attorney to take my seat on the Board. I am also involved in many other leadership roles throughout the KBA. Recently, I was appointed as a member of a Commission for the ABA. This appointment came from the nomination and support of one of those judges that I met and embraced in the KBA.

I am not an attorney in a big firm where my chances of being noticed were great. I am a sole practitioner who practices family law in an area of the state where many great attorneys reside and practice. I account my success in the KBA to the extraordinary attorneys and judges that I have met, worked alongside and formed relationships with. In addition to the professional relationships, I have made lifelong friends that have forever transformed my life. That my colleagues . . . is what a meaningful membership looks like!

Eunice

Like others, I let my free membership in the KBA post-law school graduation lapse after my first year. Instead, I elected to participate in bar association activities on a more local level. It was during one of those activities that certain persons produced written materials to be presented in a public forum, a portion of which I believed were culturally insensitive. I ended my participation in that particular activity but was sure my silent/not-so-silent protest would have no influence on the end product. And their response to my “protest” proved that nothing would be resolved. My disappointment was quickly averted when I received a telephone call from a member of the KBA Diversity Committee who found out about the incident. After reviewing the matter, the committee issued a letter to the leaders of that activity, effecting a change to the written materials and the presentation.

Since then, I joined the KBA, first because my firm paid for my membership, and now I pay as a government attorney because of the KBA Diversity Committee.
I learned that the power to make change in our legal profession sometimes can only be done collectively and not alone. The KBA Diversity Committee affords me the privilege to share and learn from differing viewpoints on what it means to be a diverse attorney in Kansas and to effectuate change in our profession together. My membership has afforded me the opportunity to present CLEs at annual conferences, author multiple articles for “The Diversity Corner” in the KBA Journal, and become a leader in the Kansas legal profession.

We have learned since our first CLE presentation together that our profession is meaningless if we do not develop relationships. And to be honest, we couldn’t imagine being where we are today without our friendship, which came about because of our connection with the KBA Diversity Committee.

For the 2014-15 year, our goal is to make the KBA membership meaningful not only to our committee members but to all Kansas diverse attorneys. This year, our committee’s focus is to attract, engage and champion diverse attorneys in and throughout all levels in the KBA and the Kansas legal profession by: (1) Ensuring that KBA diversity committee members are present at events hosted by affinity bar and other associations; (2) improving our committee’s website and other marketing materials; (3) creating a pipeline for our committee by investigating scholarship opportunities for Kansas diverse law students; (4) making KBA membership more viable for diverse attorneys; (5) maintaining our presence in the KBA journal through our monthly articles; and (6) implementing any other strategies as proposed by our members.

We thank our committee members for their dedication to this year’s direction. If you would like to invite our committee members to your event or have need of our assistance, please email Deana Mead at dmead@ksbar.org or contact one of our members:

• **Wichita area**: Gwynne Birzer, Richard Ney, Moji-rayo Fanimokun, Gloria Farha Flentje, Keith Greiner, Hon. Gregory Waller, and Trinidad Galdean;
• **Kansas City/Johnson County area**: Jaceqlene Nance, Damon Mitchell, Christi Bright, Katherine McBride, Leonard Hall, Mira Mdivani, and Hon. Melissa Standridge;
• **Topeka area**: Natalie Haag, Marilyn Harp, Amanda Marshall, Joseph Mastrosimone, Sunetra Mickle, and Bruce Ney; and
• **Rural**: Dennis Depew, Mark Dodd, and Eunice Peters.

**About the Authors**

**Christi L. Bright** is the senior attorney for The Bright Family Law Center LLC in Overland Park, where she represents clients in family law, as well as some civil litigation. She has conducted lectures and training for companies on many issues, including diversity in the workplace. Bright currently serves on the Board of Governors as a District 1 governor and as co-chair of the Diversity Committee.

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**Eunice C. Peters** is an assistant revisor for the Kansas Office of Revisor of Statutes. Prior to her current employment, she practiced probate and family law in a small firm and served as a research attorney for the Hon. Stephen D. Hill. 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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Members in the News

Changing Positions

Christopher C. Ault-Duell has joined Norton, Wasserman, Jones & Kelly LLC, Salina, as an associate.
Diane L. Bellquist has joined Joseph, Hollander & Craft LLC, Topeka.
Kim Bieker has joined Coffman & Campbell LLC, Lyndon, as an associate.
Tamara L. Niles has joined the Arkansas City Board of Education as legal counsel to represent USD 470.
Jeffrey J. Simon has been selected as managing partner at the Kansas City, Missouri, office of Husch Blackwell LLP.
Harrison C. Spencer has become assistant Ford County attorney, Dodge City.

Amanda Wilwert has become the new government contracts associate for Petefish, Immel, Heeb & Hird LLP, Lawrence.

Changing Locations

Michael C. Brown has moved to 1033 N. Rock Rd., Ste. 200, Derby, KS 67037.
Friedeon Unrein & Forbes LLP has moved to 1414 SW Ashworth Pl., Ste. 201, Topeka, KS 66604-3742.
Gendry & Sprague P.C. has moved to 900 Isom Rd., Ste. 300, San Antonio, TX 78216.
Scott C. Palecki of Foulston Siefkin LLP has relocated to 32 Corporate Woods, Ste. 600, Overland Park, KS 66201.

Miscellaneous

Joseph B. Bain, Goodland, has been appointed to the Kansas Board of Regents.
Stanley “Lucky” DeFries, Topeka, will be inducted into the Ottawa High School Wall of Honor this fall.
Evan H. Ice, Lawrence, has been awarded the Excellence in Community Service Award by the County Counselors 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.

Court Bonds: service, service, service...

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Obituaries

**Thomas C. Boone**

Thomas C. Boone, 87, of Hays, died August 25 at Hays Regional Medical Center. He was born May 8, 1927, in Sharon Springs. He was a seventh generation U.S. citizen, with his ancestors coming from Germany in 1741. Boone was the eighth child of John M. and Blanche (Roach) Boone.

Boone had been a licensed attorney in Kansas since 1956 and practiced continuously since the day after his admission to the bar in Hays until his death. In addition to his professional career, he served as a workers compensation examiner on a part-time basis for the state from 1960-64, was a candidate for attorney general in 1964, and was the Hays city commissioner from 1960-63, serving as mayor in 1962.

He was a member of the Ellis County, Kansas, and American bar associations, was a U.S. Navy veteran, and a 50-plus year member of the Hays Masonic Lodge 195.

Boone is survived by a brother, Robert, of Yuma, Arizona; two sisters, Geraldine, of Yuma, Arizona, and Bessie Zimmerman, of Indianapolis; a son, Caleb; two daughters, Sarah Boone and Rachel Sennett; a grandson, William Sennett; and two granddaughters. He was preceded in death by his parents; six brothers and sisters, Delaine, Mary, Quentin, William, Charles, and John Jr.; half-sister, Patricia Snare; and one grandchild.

**Ralph Bush Foster**

Ralph Bush Foster, 86, died on August 15 in Wichita. He was born January 31, 1928, to Ralph and Grace Foster on a ranch in west Texas. Foster spent the majority of his childhood in Ark City, Kansas, before attending Oklahoma Military Academy for high school and undergraduate college. He attended Washburn University School of Law for his law degree before serving his country in the Army during the Korean War.

Foster was in private practice until joining Kansas Gas and Electric in 1972. He served KG&E as vice president and general counsel, and sat on their board of directors until his retirement in 1992. Foster was actively involved in the Median Shrine, Salvation Army, the Rotary Club, bulls and Bear Investment Club, and was a 32nd degree Mason.

Foster was survived by his wife, Barbara; sons, Mark and Robert, both of Wichita; daughter, Jane Emley, of Prairie Village; and granddaughters, Ashton and Charlotte Emley, both of Prairie Village. He was preceded in death by his parents.

**Hon. Kenneth Harmon**

Hon. Kenneth Harmon, 92, of Lawrence, died July 18 at his home surrounded by his family. He was born October 12, 1921, in Ellsworth, the son of Bert M. and Sylvia (Westerman) Harmon. He served as a fighter pilot and flight instructor, with the rank of second lieutenant, in the U.S. Army Air Corps during World War II.

Harmon was admitted to the American, Kansas, and Leavenworth County bar associations, KU Alumni Association, Elks Club, and Leavenworth Kiwanis Club, where he served as past president. He was also a member of the Leavenworth Salvation Army Board and was on the Cushing Memorial Hospital Board.

He received his bachelor’s degree in business and a law degree from the University of Kansas in 1950. After entering private practice in Leavenworth, Harmon was appointed probate judge in 1952, and then district judge in 1961. Upon retirement in 1990, he was the longest sitting judge in the state, serving for 38 years.

**Harmon** is survived by his wife, Genevieve, of the home; two sons, Kevin, of Lawrence, and Kelly, of Spring Hill; one daughter, Susan Coleman, of Lawrence; four grandchildren, Erin, of Lawrence, Melissa, of Olathe, Chris and Andrea Coleman, both of Lawrence; and numerous nieces and nephews. He was preceded in death by one son, Keith; seven brothers; and two sisters.

**Alfred O. Holl**

Alfred O. Holl, 93, of Oklahoma City, died July 17. He was born July 10, 1921, the third of seven sons, to Martha and Harry Holl, of Lincoln County. During World War II, he served in the U.S. Army Air Corps as a navigator, flying 36 missions over Germany. For his service, he was awarded the Air Medal with five clusters and the European Theater Ribbon with four battle stars. He remained in the Air Force Reserve and retired as a lieutenant colonel.

After the war, Holl returned to school and was awarded an AB degree from Fort Hays State University in 1947 and a juris doctorate from Washburn University School of Law in 1950. He was employed by Cities Service Oil Co. in Bartlesville, Oklahoma, serving there until 1970 when he was transferred to Atlanta as the general counsel from 1973-84.

He was a member of the Kansas, Oklahoma, and American bar associations, and active in community affairs while living in Bartlesville, serving as the commander of the Legion Post, the County Civil Defense director; a member of the Jane Phillips Hospital board, and a founder, director, and president of the Boy’s Club.

Holl is survived by two daughters, Carol Lang, of Bethany, Oklahoma, and Barbara Painter, of Tulsa, Oklahoma; three grandchildren, Christopher Lang, Patrick Painter, and Jennifer Horn; nine great-grandchildren; and one brother, Raymond Holl.

**Hon. Jack Roger Reed**

Hon. Jack Roger Reed, 82, of Prairie Village, died July 29. He was born January 1, 1931, in Wichita, the son of Calvin C. and Leslie (Crittenden) Reed. After graduating high school he began working for Boeing Aircraft Co. in Wichita until he decided to continue his education at the University of Kansas. While there he was enlisted in the U.S. Army and served from 1953-55. He continued his military service in the Air Force Reserve from 1958-72, serving as a JAG office. While in the military he went to KU Law School on the GI Bill. During his life he was employed at a number of different entities, including the Kansas Department of Revenue, Kansas Property Valuation Department, Kansas Gas Service Co., Kansas and Missouri McDaniel Title Co., was self-employed in private practice, a city counselor of Kansas City, Missouri, and served as an administrative law judge for 40 years for the Federal Bureau of Hearing & Appeals, retiring in 2008.

Reed was a member of the Masons, Phi Delta Phi, American and Kansas bar associations, and Lawyers Association of KU.

He was preceded in death by his parents and one brother, Keith Reed.

**Michael Thomas Wilson**

Michael Thomas Wilson, 66, died August 20. He was a private practice attorney with prior law enforcement service in the KC Metro. He had extensive Masonic memberships and awards. Wilson received a Bachelor of Arts and Juris Doctor from Washburn University and a master’s degree from Wichita State University.

Wilson is survived by his wife, Camilla; sister, Deborah Solary, of Kansas City, Missouri; a nephew; and two nieces. He was preceded in death by his parents, Donald C. and Estella A. (Potts) Wilson.
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The Value of a KBA Membership

My membership in the Kansas Bar Association is as important to me as my Kansas Supreme Court and U.S. District Court license cards. The KBA has been essential to my success and happiness during my nine-year career as a lawyer. To go even further, I might not be working at the law firm where I find myself today without my involvement in the KBA, as my opportunity at Cavanaugh & Lemon P.A. came to me through relationships I built through the KBA. As you can tell, it’s safe to say that I am sold on how vital the KBA is to lawyers as individuals, and how vital it is to the profession and the state as a whole.

Let me back up a little bit. As anyone who read my KBA Journal columns during my time as the KBA YLS president would remember, I was raised in a small Kansas town, where my father had a solo law practice. I think the biggest impression his legal career had on me as a young person was the collegial nature of the profession. I saw lawyers as advocates who, at the end of the day, had mutual respect for one another. One summer while I was in college, my father took me to the Harvey County Bar Association’s summer picnic. Watching my father and his lawyer friends exchange war stories was fascinating to me. When I made the decision to become a lawyer, one of the primary reasons I made the decision was because the collegial nature of the profession.

Being involved with bar associations, and the KBA, was a decision I made before I even became a lawyer. I saw it as essential to the collegial part of the legal profession. Now that I am a lawyer, it has become even more meaningful to me. The KBA is where we as lawyers have a chance to get to know one another outside of the confines of the legal arena. It is where we have a chance to meet and get to know judges outside of the courtroom. Developing these relationships with lawyers and judges outside of the legal setting is invaluable.

The KBA is also the place where we as lawyers can improve ourselves. The numerous sections of the KBA are where we can learn from, and interact with, the top lawyers in the state in any given field of practice. Additionally, the KBA’s CLE programs are top notch, addressing the important and cutting-edge issues that we as lawyers need to know about.

Finally, the KBA is the place where we as lawyers can have experiences that truly enrich our careers as lawyers. One great example for me was the KBA U.S. Supreme Court Swearing-In trip that I attended several years ago. If it were not for my KBA membership, I would not have had the opportunity to have an experience like that. Being sworn into the U.S. Supreme Court and getting the chance to meet and interact with some of the justices of the U.S. Supreme Court was a very special experience for me. The KBA offers meaningful experiences like that, and so many others.

If you take anything from this column, I want it to be this: The KBA has something to offer every lawyer, regardless of your age and regardless of your area of practice. The KBA offers you tangible benefits like Casemaker and the Law Office Management Assistance Program that will make your practice of law better and easier. But even more importantly, in my opinion, the KBA offers you endless intangible benefits that will truly impact your practice of law, and your enjoyment of this profession, in a meaningful way.

I hope you join me and get involved in the KBA, and I hope to see more of you at future KBA events!

About the Author

Vincent M. Cox is an associate with the Topeka firm of Cavanaugh & Lemon P.A. He received his B.A. from Benedictine College in 2002 and his J.D. from Washburn University School of Law. Cox is a member of the Topeka and Kansas bar associations, where he is past president of both their young lawyers sections.

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I n writing this article I face the same dilemma often presented when I practiced law for 20 years: Do I lead with the best news, or with the most important? I decided to lead with the latter, with the hope you stick with the article until its end.

**Judicial Branch Funding**

Based upon the Legislature’s budget actions in its 2013 session, we calculated a shortfall of approximately $8.25 million for the Judicial Branch budget for the fiscal year beginning July 1, 2014. So last September we formed a Court Budget Advisory Council (CBAC), chaired by Judge Karen Arnold-Burger of the Court of Appeals. Its primary purpose was to study consequences and make recommendations in the event the upcoming Legislature did not appropriate the $8.25 million. CBAC’s ultimate recommendations were provided to the Legislature.

The good news is the 2014 Legislature appropriated funds that facially appear to be more than enough to fix this shortfall. The “less good news” is that $6.2 million of these new legislative funds are simply projections from historically unpredictable revenue sources, e.g., increased docket fees, and from obviously untested new motion fees. And the “lesser good news” is that if the actual revenues turn out to be less than what the Legislature projected, Judicial Branch operations will again suffer, depending on the size of the shortfall and absent any action by the Legislature and governor. This means your law practice also may be negatively affected.

To raise approximately one-half of the projected $6.2 million in new revenue, the 2014 Legislature relied on increasing docket fees, e.g., from $74 to $86 for traffic cases and from $154 to $173 for Chapter 60 actions. Taken together with the unchanged surcharge, $195 is now required to file an action under Chapter 60. These increases in fees would seem to result in increases in revenue. But docket fees have proven to be an unreliable funding source. From Fiscal Year 2010 through Fiscal Year 2014, the volume of court filings has decreased 15 percent, and revenue from those filings has decreased 21 percent.

Some have said the continuing decrease in filing volume is because the amount of either the docket fee or the surcharge has repeatedly increased during that time. Such a conclusion would support the basic economic principle: increase the price and the demand decreases. Others have said the only predictable feature of this funding source has been its decline, as the revenue lost by lower filing volume has not been replaced by revenue gained by the higher fees. And it has been argued that the reducing number of court filings unfortunately demonstrates a reducing number of Kansans who believe they can afford access to justice.

The new legislation also creates a $195 filing fee for summary judgment motions, which the Legislature predicted would generate approximately $2.8 million. But because most Kansas courts have not maintained readily accessible records for the number of summary judgment motions that have been filed each year, projecting revenues from them is perhaps even more uncertain than projecting revenues from docket fees. The Legislature further predicted another $500,000 will be raised by the new law that charges a $7.50 docket fee for requests for garnishment—orders that historically have also been issued without a docket fee.

The 2014 Legislature also mandated that for each of the next three fiscal years, $3.1 million of that projected $6.2 million must be used to implement and manage the Judicial Branch electronic filing and case management systems. The Legislature required that the Judicial Branch’s first $3.1 million in all docket fee revenue—not necessarily new summary judgment and garnishment fees or docket fee increases—must be applied to that purpose.

So if those new or increased fees produce less revenue than the $3.1 million the Legislature predicted, these electronic court systems nevertheless will be fully funded with other monies of the Judicial Branch—to the detriment of the operations for which those monies were originally targeted. And if the Legislature does not provide additional funds to replace those spent from these other operations, the Judicial Branch will be left with a deficit.

The uncertainty about the $6.2 million is in addition to another funding uncertainty that had been created by the 2013 Legislature. While it generously gave the Judicial Branch a larger share (99.01 percent) of all docket fees for future appropriations, our former share of reliable state general funds was in turn reduced by the amount of less-reliable docket fee revenue the Legislature predicted would be generated. Shifting a larger portion of Judicial Branch funding to a revenue source previously proven to be uncertain may mean resulting fee revenue is further insufficient to cover our basic operating costs.

As with the new and increased fees discussed above, revenue reductions resulting from this shift may affect the services the court system can provide. That then may negatively affect your clients. So we are closely monitoring revenues.

**Electronic Courts**

I have mentioned the 2014 legislative mandate to use the “off the top” $3.1 million each year through June 30, 2017, for funding the development and maintenance of our electronic filing and case management systems. Now let me describe those systems—the “best news” I identified in the article’s introduction.

**E-filing**

The Supreme Court began planning e-filing in 2009 but actually started with one pilot county in 2013. We are now
Other Electronic Issues

Freeing employees for other tasks. Records on appeal to Topeka should be reduced significantly,strict court staff time devoted to preparing and then shipping this tool will soon be installed and in use. The amount of dis-
a record on appeal will permit anyone working with it to click
yers and the appellate courts. Automating steps for preparing
use for preparing electronic records on appeal for use by law-
program involving Sedgwick, Shawnee, and Johnson counties
in the appellate court clerk in Topeka. This past July, our pilot
livery of hard copies of briefs and other documents to file with
Substantial progress is being made to eliminate attorneys' de-
the judicial districts' court case management and document
management systems, so clerks have fewer duplicate data en-
tries and spend less time handling paper records.
The counties presently piloting electronic filing are: Leaven-
worth (1st Judicial District); Douglas (7th); Sedgwick (18th);
Wyandotte (29th); Shawnee (3rd); Geary (8th); Butler (13th);
Finney (25th); Reno (27th); and Saline (28th). With these
installations, more than half of the non-traffic case filings in
the state will be eligible to use e-filing. Approximately 12,000
electronic filings were made in July 2014, and, as of this writ-
ing, more than 1,000 Kansas attorneys have e-filing accounts.
We anticipate the e-filing system will expand statewide on
a county-by-county basis for the next 18 months, with the
county sequence primarily determined by case filing volume.
Kansas appellate courts are also piloting e-filing software.
Substantial progress is being made to eliminate attorneys’ de-
livery of hard copies of briefs and other documents to file with
the appellate court clerk in Topeka. This past July, our pilot
program involving Sedgwick, Shawnee, and Johnson counties
recorded nearly 700 separate appellate filings.

We also developed customized software for district courts to
use for preparing electronic records on appeal for use by law-
yers and the appellate courts. Automating steps for preparing
a record on appeal will permit anyone working with it to click
on a link to view a document in the record. We anticipate that
this tool will soon be installed and in use. The amount of dis-
count seat staff time devoted to preparing and then shipping
records on appeal to Topeka should be reduced significantly,
freeing employees for other tasks.

Other Electronic Issues

As I mentioned during my State of the Judiciary speech last
January, “The Supreme Court ultimately intends to develop
and implement a complete centralized statewide e-courts en-
vironment.” The e-court system will be supported by a num-
ber of interconnected technology strategies, with e-filing and
centralized case management and document management
systems providing the foundation. We are calling these man-
gement systems “Kansas eCourt,” and they will complete
the conversion from local paper-based systems to a statewide
electronic one.

Kansas eCourt will provide litigants, attorneys, judges, and
court personnel using an internet-based connection with im-
mediate access to authorized case information, details, and
records from across the state. Among other things, it will im-
prove the Judicial Branch’s ability to utilize its personnel by
having clerks available in one county assisting with the elec-
tronic processing of case documents and court payments in
other counties.

Plans currently call for identifying specific product require-
ments the first year, vetting potential product vendors the
second year, and getting a contract developed and signed, so
installation can begin during the third year. As this timeline
suggests, the Kansas eCourt project is a large and complex
undertaking, involving the enterprise-wide implementation
of new technology and standardized processes and operations
across the district courts.

Other Updates

In addition to advancing statewide e-filing and Kansas
eCourt, the Judicial Branch has many projects underway.
These include, but by no means are limited to, improving col-
clections of court-ordered fines and fees, increasing use of ap-
pellate mediation, reducing or eliminating case backlogs, in-
creasing court video conferencing, developing standards and
certifications for specialty courts, mandating use of the Level
of Service Inventory-revised (LSI-R) for offenders, improving
language access to the courts, and promoting civics education
such as the iCivics program.

I will report on their developments in upcoming Bar Journ-
al issues. But our obvious focus will remain the adequate
funding for Kansas courts.

Conclusion

I began functioning as chief justice in January 2010. Since
at least that time, my colleagues and I, together with many
others inside and outside of the Judicial Branch, have spent
a large amount of time seeking adequate funding for Kansas
courts and the essential, core functions they perform for our
citizens. This article reveals that we likely will be obliged to
continue our efforts.

Moreover, the Kansas Legislative Research Department re-
ports that overall state revenues fell several hundred million
dollars below predictions for the fiscal year ending June 30,
2014. That correspondingly reduces the revenue available to
the state for the present fiscal year. So we will continue to
need – and ask for – your help in making our case with your
legislators.

As Winston Churchill once said, “It is no use saying, ‘We are
doing our best.’ You have to succeed in doing what is neces-
sary.” Adequate funding is necessary to maintain the belief of
the people – including your clients – in their justice system.

About the Author

Chief Justice Lawton R. Nuss was appointed as a
justice on the Supreme Court of Kansas by Gov. Bill
Graves in August 2002. He became chief justice in
August 2010. Nuss is a member of the Kansas and
Topeka bar associations.

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Attorneys who defend non-citizens in criminal proceedings should be aware of a 2010 U.S. Supreme Court ruling that imposed substantial new responsibilities upon criminal defense attorneys. The Sixth Amendment to the U.S. Constitution guarantees a defendant the right to reasonably competent and effective assistance of counsel in criminal cases.1 On March 31, 2010, the Supreme Court handed down its ruling in Padilla v. Kentucky, which changes the nature of “effective assistance of counsel” vis-a-vis non-citizen defendants.2 Some 26 years earlier, in Strickland v. Washington, the U.S. Supreme Court established a two-part test for courts to use when determining whether to sustain a defendant’s claim of ineffective assistance of counsel.3 Courts must determine whether (1) counsel’s performance fell below “an objective standard of reasonableness” and (2) there is a “reasonable probability that, but for counsel’s errors, the result of the proceeding would have been different.”4

On March 31, 2010, in Padilla v. Kentucky, the U.S. Supreme Court held that under the Sixth Amendment right to counsel, defense attorneys must inform their non-citizen clients as to whether a plea carries a risk of deportation.5 Under Padilla, failure by defense counsel to inform a non-citizen client of the immigration consequences of a guilty conviction may be the basis for a claim of ineffective assistance of counsel under the Sixth Amendment. Unfortunately, predicting the immigration consequences that may result from a particular guilty plea can be a difficult endeavor, particularly for practitioners unfamiliar with immigration law. Excellent criminal defense advice may result in dire and unforeseen immigration consequences.

At the time of the Supreme Court’s holding, Honduran native Jose Padilla had been a lawful permanent resident in the United States for over 40 years.6 He had fought for the United States in the Vietnam War and received an honorable discharge.7 He later became a truck driver.8 In 2001, during a routine traffic stop, Padilla gave a law enforcement officer permission to search his truck.9 The officer found 23 separately wrapped Styrofoam boxes.10 These boxes were conspicuously missing from the truck’s manifest.11 When the officer inquired as to the content of one of the boxes, Padilla replied “maybe drugs.”12 Upon further search, it was determined that Padilla’s truck contained a large amount of marijuana.13

Footnotes
3. 466 U.S. at 688, 694.
4. Id.
5. 559 U.S. at 373-74.
7. Id.
8. Brief of Petitioner at 8, Padilla, 130 S. Ct. 1473 (No. 08-651).
9. 381 S.W.2d at 328.
12. 381 S.W.3d at 327.
13. Id.
Padilla was arrested and charged with trafficking in marijuana, possession of marijuana, possession of drug paraphernalia, and operating a tractor-trailer without a weight and distance tax number. He was indicted by a Hardin County, Kentucky, grand jury and appointed a public defender. After an unsuccessful attempt to suppress important evidence, Padilla pleaded guilty on the advice of counsel on October 4, 2004, to drug trafficking, drug possession, and drug paraphernalia. Under the plea agreement, Padilla agreed to serve a five-year prison sentence, followed by five years on probation. According to Padilla, his defense attorney never advised him that drug trafficking and drug possession are deportable offenses under federal immigration laws. In fact, Padilla claimed that his attorney advised him that he had lived in the United States for too long to be deported.

Unfortunately for Padilla, a non-citizen (alien) is deportable if, at any time following his or her admission to the United States, he or she is convicted of "a violation of (or a conspiracy or attempt to violate) any law or regulation of a State, the United States, or a foreign country relating to a controlled substance." Additionally, "illicit trafficking in a controlled substance" constitutes an "aggravated felony" under federal immigration laws, and an alien convicted of an aggravated felony is ineligible for virtually all forms of relief from deportation. Clearly, Padilla’s plea left the 40-year U.S. resident with very little hope of avoiding deportation from the United States.

Padilla filed a motion for post-conviction relief in Hardin Circuit Court, asserting that his Sixth Amendment right to effective assistance of counsel had been violated as a result of his criminal defense attorney’s misadvice. Padilla alleged that he would have taken the criminal case to trial if he had been correctly advised as to the immigration consequences of his guilty plea. The circuit court denied Padilla’s motion without a hearing, and Padilla appealed to the Kentucky Court of Appeals.

The appellate court held that "an affirmative act of ‘gross misadvice’ relating to collateral matters can justify post-conviction relief," and remanded the case to the circuit court for a hearing. The Commonwealth then appealed to the Kentucky Supreme Court, which reversed the Court of Appeals, holding that immigration consequences of a guilty plea are a collateral matter, and that "misadvice" concerning such consequences cannot constitute ineffective assistance of counsel.

The Supreme Court reversed the Kentucky Supreme Court, stating that “[w]e agree with Padilla that constitutionally competent counsel would have advised him that his conviction for drug distribution made him subject to automatic deportation.” The Court declined to apply the “collateral consequences” approach used by the Kentucky courts, reasoning that the “unique nature of deportation” – that is, a somewhat quasi-criminal sanction – makes it “ill-suited” for the collateral versus direct consequences approach. The Court therefore applied Strickland’s two-prong test to determine whether Padilla’s Sixth Amendment rights had been violated.

The Court analyzed whether the representation provided by Padilla’s defense attorney “fell below an objective standard of reasonableness,” i.e., “reasonableness under prevailing professional norms.” The Court reasoned that it was well-accepted within the legal community that an attorney must advise his or her client about deportation risks, and that, in Padilla’s case, such risks would have been clear had his defense attorney referred to INA § 237(a)(2)(B)(i). The Court stated that "when the deportation consequence is truly clear, as it was here, the duty to give correct advice is equally clear." In such cases, a defense attorney’s failure to advise his or her client about the deportation risks of a guilty plea is very likely to constitute grounds for a subsequent claim of ineffective assistance of counsel.

However, the Court also recognized the nebulous and nuanced nature of immigration law, and acknowledged that “[t]here will, therefore, undoubtedly be numerous situations in which the deportation consequences of a particular plea are unclear or uncertain.” In cases in which the applicable immigration law and consequences are unclear or uncertain, a criminal defense attorney must advise his or her client that criminal charges may affect the client’s immigration status.

The Court held that Padilla’s Sixth Amendment right to effective assistance of counsel had been violated by his defense attorney’s failure to advise him on the clear and obvious immigration consequences that would accompany his guilty plea. The Court declined to determine the application of the second Strickland prong – whether Padilla had been prejudiced and was entitled to relief, instead remanding the case to the Kentucky Supreme Court to decide that question.

Clearly, then, criminal defense attorneys representing non-citizens in criminal proceedings have a duty to do something – neither silence nor incorrect advice will suffice, and either could be the basis for an ineffective assistance of counsel claim. Immigration consequences become particularly important when a client (1) is a lawful permanent resident (LPR), (2) has

15. Miller at 1315.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id.
23. 381 S.W.3d at 324.
24. Id.
25. Id.
27. Id.
29. Id. at 360.
30. Id. at 357.
31. Id. at 366.
32. Id. at 357.
33. Id. at 369.
34. Id.
35. Id. at 368-69.
36. Id. at 369.
Padilla v. Kentucky

already had a petition filed to become an LPR, (3) is residing in the United States on a visa, or (4) has received, or is applying for, asylum or refugee status. It can be difficult in some situations to provide a client with an effective Padilla advisory without consulting an immigration attorney, because, as mentioned by Justice Stevens, immigration consequences depend on many factors and are not easily ascertained.

Additionally, an “over-advisal” might be just as damaging and ineffective as an “under-advisal.” For example, a shoplifting conviction may lead to removal from the United States if (1) the crime was committed with the intent to permanently deprive the owner of the property, (2) it is committed within five years of admission to the United States, and (3) the potential sentence is one year or longer.37 If a defense attorney misadvises a non-citizen client that a misdemeanor shoplifting conviction will absolutely result in deportation (when, depending upon the applicable criminal statute, it may not), the client might reject any plea offer and insist on proceeding to trial. In such a case, the client might be convicted of a deportable offense, an unfortunate outcome that possibly could have been avoided by pursuing a plea or diversion.

Criminal defense attorneys attempting to advise a non-citizen client as to the immigration consequences of a criminal conviction should first determine the client’s immigration status. Different criminal convictions and admissions may generate different immigration consequences, depending upon a particular client’s immigration status or situation. Counsel should then examine the pending charges and compare the applicable criminal statute to the relevant immigration law, in an attempt to determine whether the charge belongs to a criminal category that could adversely affect the client’s immigration status. This determination is not always clear and may turn on details such as the length of the sentence, the amount of drugs, or the amount of loss to the alleged victim. As Padilla made clear, the client’s particular priorities are also important — is the client most concerned with avoiding incarceration, or is preserving his or her immigration status of utmost importance? Counsel might also consider obtaining an opinion letter from an immigration attorney; such documents can prove invaluable in the face of subsequent Sixth Amendment or malpractice claims.

Working together, clients, defense attorneys, and immigration attorneys can ensure the best possible legal advice for non-citizens facing criminal charges.

About the Author

Zachary P. Roberson is sole member of Roberson Law LLC, an immigration law firm, in Olathe. Prior to opening his firm, he served as a pro bono staff attorney at Diocesan Migrant and Refugee Services in El Paso, Texas. Roberson received his BBA from Texas Tech University, his MBA from Wayland Baptist University, and his J.D. from the University of Kansas School of Law.

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Keeping Up with the Kansas Wage Payment Act

By Boyd A. Byers
I. Introduction

The Kansas Wage Payment Act (KWPA or Act)\(^1\) is an expansive and comprehensive statute that gives Kansas employees rights to secure their earned but unpaid wages.\(^2\) The Act, among other things, requires that employers timely pay their employees all wages due\(^3\) and limits the circumstances under which employers can withhold wages.\(^4\)

Until last year, other than for a few legally required reasons (such as taxes and garnishments), the Act prohibited employers from withholding wages unless (1) the employee signed an authorization and (2) the deduction was for “the benefit of the employee” (which, according to Kansas Department of Labor regulations, was limited to several listed reasons such as contributions to employee retirement and health plans, union dues, and charitable contributions).\(^5\) But in 2013 Kansas lawmakers amended the Act to allow employers, subject to certain requirements, to deduct or withhold employees’ wages: as repayment for loans and payroll advances; to recover payroll overpayments; as compensation for the unpaid balance of the cost of uniforms or merchandise purchased by employees; and to recover employer property provided to employees.\(^6\) This article will review the prior law on wage withholding, explain the 2013 KWPA amendment,\(^7\) and identify some legal and practical issues raised by the amendment that lawyers who practice in this area should be thinking about when advising their clients.\(^8\)

II. Prior Restrictions on Wage Withholding

Before the 2013 amendment, the Act authorized employers to “withhold, deduct or divert” an employee’s wages for four listed reasons:

1. The employer is required or empowered to do so by state or federal law.\(^9\) (This would include things like withholdings for payroll taxes,\(^10\) garnishment,\(^11\) and garnishment for support.\(^12\))
2. The deductions are for medical, surgical, or hospital care or service, without financial benefit to the employer.\(^13\)

Footnotes

1. K.S.A. 44-313 et seq.
3. K.S.A. 44-314(a) (Supp. 2013) (Employers must pay their employees “all wages due” at least once each calendar month on regular paydays designated in advance.; K.S.A. 44-314(b) (Supp. 2013) (The payday established by the employer cannot be more than 15 days after the end of the pay period, unless otherwise allowed by law.); K.S.A. 44-315(a) (2000) (Employers must pay separated employees their earned wages no later than the next regular payday they would have been paid if still employed.).
5. See Section II below.
6. See Section III below.
7. See Section II below.
8. See Section III below.
9. See Section IV below.
17. K.S.A. 44-319(b) (Supp. 2012). This subsection (b) was retained and re-codified as subsection (d) pursuant to the 2013 amendment. See 2013 Kan. Sess. Laws, Ch. 6, § 4.
18. K.A.R. 49-20-1(a)(3)(C) (2009). However, the employer can deduct at a rate greater than the overpayment rate if the employee provides the employer with a signed authorization. Id.
• Deductions to recoup the employer’s actual cost of meals and lodging provided to the employee, so long as the costs are not part of wages earned.28

The regulations then list certain deductions that do not “accrue to the benefit of the employee,” and thus cannot be made under any circumstances, even with an employee’s written consent:

• Deductions for cash and inventory shortages, breakage, returned checks or bad credit card sales, and losses resulting from burglaries, robberies, or alleged negligent acts.29
• Deductions for uniforms, special tools, or special equipment that are not necessary to the performance of the assigned duties and that are customarily supplied by the employer.30
• Any other deduction not set out by the Act or permitted by the regulations.31

The final “catch all” prohibition is significant, because it signals KDOL’s position that any deduction not expressly authorized by the Act or regulations is prohibited. Against this background, the Act was amended.

III. Wage Withholding Allowed by the 2013 KWPA Amendment

House Bill 2022 was proposed to revise the KWPA by giving employers more discretion to withhold or deduct an employee’s wages for certain purposes.32 Representatives of the Kansas Chamber of Commerce, the Kansas Society for Human Resource Management, and the National Federation of Independent Businesses testified in favor of the bill. They said it would provide employers with flexibility and guidance when there is a need to collect money from employees.34 The Kansas AFL-CIO gave neutral testimony, pointing out that an employer’s discretion to unilaterally make deductions to an employee’s final paycheck could be abused.35 There was no testimony in opposition to the bill.36

The 2013 KWPA amendment did not strike any provisions of the prior law. Instead, it added two new subsections to K.S.A. 44-319 to expand the circumstances under which employers may withhold or deduct wages.

Current Employees. Employers now may withhold, deduct, or divert any portion of an employee’s wages, pursuant to a signed written agreement between the employer and employee, for the following purposes:

(1) To allow the employee to repay a loan or advance the employer made to the employee during the course of and within the scope of employment.37
(2) To recover a payroll overpayment.38
(3) To compensate the employer for the replacement cost or unpaid balance of the cost of its merchandise or uniforms purchased by the employee.39

Separated Employees. Employers may also withhold, deduct, or divest any portion of an employee’s final wages, upon providing a written notice and explanation, for the following purposes:

(1) To recover the employer’s property provided to the employee in the course of the employer’s business, including, but not limited to, tools of the trade or profession, personal safety equipment, computers, electronic devices, mobile phones, proprietary information such as client or customer lists and intellectual property, security information, keys or access cards, or other materials until the employee returns the property to the employer. Upon return of the property, the employer must pay the wages being withheld.40
(2) To allow an employee to repay a loan or advance the employer made to the employee during the course of and within the scope of employment.41
(3) To recover a payroll overpayment.42
(4) To compensate the employer for the replacement cost or unpaid balance of the cost of its merchandise, uniforms, property, equipment, tools of the trade, or other materials intentionally purchased by the employee.43

However, any amounts withheld under the new provisions cannot reduce wages paid to below the minimum wage required under the Fair Labor Standards Act (FLSA)44 or under the Kansas Minimum Wage and Maximum Hours Law (KMWMHL),45 whichever is applicable.

IV. Legal and Practical Issues Presented by 2013 KWPA Amendment

The 2013 KWPA amendment is relatively simple and straightforward. But it does create several interesting practical and legal issues and pose potential traps for unwary lawyers.

A. Deductions from current employees to recoup pay advances and erroneous overpayments

The 2013 KWPA amendment was intended to give employers more discretion and flexibility to withhold employees’ wages.47 Yet, in some circumstances, the new law arguably imposes more limits on employers seeking to recover money from current employees.
Pre-existing regulations provide that employers do not need an employee's written authorization to take deductions for pay advances made pursuant to the employee's written request. In other words, as long as the pay advance itself was requested in writing, the employer does not need a written authorization to withhold wages to recoup the advance. But under the amendment to the Act, employers cannot withhold wages from a current employee for the purpose of repaying a loan or advance unless the employee has signed a written agreement allowing the withholding.

Similarly, the regulations say that the employee's written authorization is not needed to correct wage overpayments caused by the employer's error, so long as the withholding rate is the same as the overpayment rate. But, again, the KWPA amendment now requires a signed written agreement for employers to withhold wages from current employees to recover payroll overpayments.

While those regulations are still on the books, and the statutory provisions upon which they are based remain intact, they nevertheless appear to be effectively superseded by the new provisions added to the Act.

The written-agreement requirement for wage deductions to recover overpayments or repay advances and loans can create dilemmas for employers. Say, for example, an employer overpays an employee $1 per hour due to clerical error. The employer does not discover the mistake for a year, when it conducts its next annual pay review. By then the employee has been overpaid $2,000. So the employer, dutifully following the law, asks the employee to sign an agreement authorizing deductions to recover the overpayment (whether at the $1 per hour rate or some higher rate). But the employee refuses. Then what?

The employer could order the employee to sign the agreement, with the ultimatum of discharge for insubordination if the employee refuses. If the employee signs the agreement, could she later challenge its validity, due to duress, and get her money back? If the employee refuses to sign, invoking rights under the KWPA? Could she later challenge its validity, due to duress, and get her money back? If the employee refuses to sign, invoking rights under the KWPA?

What if, instead of firing the employee, the employer simply withholds a prospective raise or reduces her hourly wage for the next year as a setoff. Could that, too, give rise to a retaliation claim?

Of course, the employer could always wait patiently until the employment relationship ends for other reasons. And, at that time, upon providing written notice and explanation, the employer could recoup at least part of the overpayment out of the employee's final wages.

B. Prospective written agreements

The new provision that allows for withholding wages from current employees pursuant to a signed written agreement does not, on its face, put any limits or qualifications on the time when such agreements may be procured. Accordingly, employers should consider whether it makes sense to require all new employees to sign such agreements as a condition of employment, and all current employees to sign such agreements as a condition of continued employment. That would give the employer the discretion and flexibility to withhold wages under the specified circumstances should the need arise. Such an agreement could be along the following lines:

As a condition of and consideration for my [employment/continued employment] with the Company, I agree that the Company may, and I authorize the Company to, in its sole discretion, withhold, deduct, or divert any portion of my wages for any one or more of the following purposes: (1) as repayment of any loan or advance that the Company [has made or] may make to me during my employment; (2) to recover any [past, present, or] future payroll overpayments made to me, and (3) to compensate the Company for the replacement cost or unpaid balance of the cost of any merchandise or uniforms I [have purchased or] may purchase from the Company.

Of course, such an agreement should also clearly state that employment or continued employment is at-will if that is indeed the case. At minimum, employers should require written withholding agreements whenever they make a loan or advance or sell merchandise or uniforms to employees on credit.

C. Replacement cost of merchandise purchased by employee

The KWPA amendment allows employers, subject to the applicable agreement or notice requirements, to withhold wages to compensate the employer for the “replacement cost or unpaid balance” of merchandise or uniforms “purchased by the employee.” Replacement cost and unpaid balance are not the same thing, of course. The unpaid balance could be more or less than replacement cost, depending on the circumstances. So which measure determines the amount the employer may

52. See Campbell v. Husky Hogs LLC, 292 Kan. 225, 234, 255 P.3d 1 (2011) (“We hold the KWPA embeds within its provisions a public policy of protecting wage earners’ rights to their unpaid wages and benefits. And just as we found a common-law retaliatory discharge claim when an injured worker is terminated for exercising rights under the Workers Compensation Act, we find such a cause of action is necessary when an employer fires a worker who seeks to exercise KWPA rights by filing a wage claim.”). See Deeds v. Waddell & Reed Investment Mgt. Co., 47 Kan. App. 2d 499, 280 P.3d 786 (2012) (The sort of retaliatory discharge “may arise in advance of actual filing of the wage claim if the employee complains to the employer and that complaint is sufficiently clear and detailed for a reasonable employer to understand it, in light of both content and context, as an assertion of rights protected by the [KWPA] and a call for a protection of those rights under the Act.”).
53. Such a claim would be beyond the present scope of KWPA retaliation law. See n.52, above. But the U.S. Supreme Court has held, in the context of Title VII of the Civil Rights Act of 1964, that a retaliation claim may be based on any “materially adverse” employment action, which can include a pay reduction or withholding action. Burlington N. & Santa Fe Ry. v. White, 548 U.S. 53, 70 (2006).
withhold—the greater amount, the lower amount, or does it depend upon the circumstances?

This question begets an even more fundamental question about this provision: If the employee has “purchased” the merchandize or uniform, why would the employer ever be entitled to the “replacement cost”? If the employer has sold the merchandize to the employee, doesn’t the merchandize now belong to the employee, and isn’t the employer’s interest simply the unpaid balance of the sale?

Perhaps this language was intended to limit the employer’s recovery when the replacement cost is less than the unpaid balance. For example, assume an employee buys a laptop computer from the employer for $1,000 and still owes $900. But the replacement cost is only $700 because the price of computers has gone down. Would the employer be limited to withhold the replacement cost, rather than the unpaid balance? It seems more likely that the inclusion of “replacement cost” is the result of sloppy drafting, not a legislative intent to deprive the employer of the benefit of its bargain when the unpaid balance exceeds the replacement cost, or to give the employer a windfall when the replacement cost is more than the unpaid balance.

D. Withholding final wages to recover the employer’s property

After providing written notice and explanation, employers may now withhold “any portion” of an employee’s final wages for the purpose of recovering the employer’s property provided to the employee in the course of the employer’s business. If the employee does not have to “relinquish” the withheld wages “until such time as such property is returned by the employee to the employer.” The property could include, but is not limited to: tools of the trade or profession; personal safety equipment; computers, mobile phones, and other electronic devices; client or customer lists, intellectual property, and other proprietary information; security information; and keys and access cards.

This new provision raises a host of interesting questions.

(1) Can the employer withhold all of the employee’s final wages (except minimum wages) until the employee returns the property, or only an amount commensurate with the value of the unreturned property? The Act, on its face, says the employer does not have to “relinquish” the withheld wages “until such time as such property is returned by the employee to the employer.” The property could include, but is not limited to: tools of the trade or profession; personal safety equipment; computers, mobile phones, and other electronic devices; client or customer lists, intellectual property, and other proprietary information; security information; and keys and access cards.

(2) What if, in the example above, the employee returns the phone, but it’s broken? Can the employer withhold the entire commission payment, or at least the repair or replacement cost, until the employee repairs or replaces the phone? The Act, on its face, says the employer must relinquish the wages once the property is returned. It does not say anything about what condition the property must be in.

Remember that the provision that allows the employer to withhold wages for the “replacement cost” applies only to property “intentionally purchased by the employee,” as opposed to employer-owned property provided to the employee to use during employment. So the pre-existing statutory catch-all restriction on unauthorized deductions and the related regulation that prohibits deductions for “breakage” or “alleged negligent acts” may apply to this situation. However, the employer might be able to make a persuasive case that it can withhold the repair or replacement cost if the employee has intentionally or recklessly damaged the property, particularly in light of the regulation’s limitation to negligent acts.

(3) What if the employer withholds final wages under this provision, but the employee denies that he has the property? Questions about whether the employee has retained the employer’s property can be particularly messy in the context of copies of electronic files. Will KDOL administrative hearings become a forum for confidentiality, unfair competition, and trade-secret claims when an employer withholds wages because it believes an employee has purloined customer lists, intellectual property, or and other proprietary information?

Whatever the nature of the property at issue, which party bears the burden of proof on whether the employee failed to return it? Typically, a claimant or plaintiff bears the burden of proving his case. So does the employee who files a wage claim have to prove that he does not have any employer property? Or is the employer’s assertion that the employee has not returned its property akin to an affirmative defense, so that the employer bears the burden of proof?

(4) What if the employee cannot return the property because she inadvertently lost it? Is the employer then relieved of releasing the employee’s final wages? If so, can the employee resolve the issue and force payment by replacing the property or authorizing the employer to withhold an amount equal to the lost property? How does this square with the regulation that prohibits deductions, even with a signed authorization, for loss due to the employee’s negligence?

Courts, presiding officers (administrative law judges), and the KDOL can look forward to addressing these issues in the years ahead.

E. FLSA violations

The KWPA now expressly provides that employers are not authorized to withhold wages in a way that reduces “wages paid” to below the minimum wage. This is a good reminder that, with respect to non-exempt workers, employers must be...
vigilant to meet their minimum wage obligations when withholding wages. Failure to do so may violate both the KWPA and FLSA. It is significant because the FLSA, unlike the KWPA, allows prevailing plaintiffs to recover their attorneys fees.66

Employers also need to carefully scrutinize any wage withholding from salaried exempt employees. Subject to certain exceptions, salaried exempt employees must be paid their full salary for any week in which they perform any work, without reduction because of variations in the quality or quantity of the work performed.67 The U.S. Department of Labor’s Wage and Hour Division (WHD) has interpreted those regulations narrowly. For example, WHD has stated in an opinion letter and its Field Operations Handbook that deductions for damage to or loss of company equipment, such as cell phones or computers, violates the salary basis requirements of the FLSA and thus jeopardizes an employee’s exempt status.68

V. Conclusion

The 2013 KWPA amendment gives employers more discretion and flexibility to withhold wages from employees in certain situations. Employers and lawyers who represent them need to understand these new provisions, their limitations and ambiguities, and the unintended consequences that can result from improper wage withholding. Employers should also have a sense of proportionality and pick their battles carefully. Wage disputes often involve relatively modest sums, so even when withholding is authorized, it may cost less in the long run to pay disputed wages than to defend a wage claim (and any other claims a disgruntled former employee might assert in conjunction with a wage claim).69

About the Author

Boyd Byers is a partner in the Wichita office of Foulston Siefkin LLP. His practice is focused on employment and labor law issues, including class- and collective-action wage-and-hour disputes. He received his J.D., with high distinction, from the University of Iowa College of Law.

67. 29 C.F.R. § 541.602(a) (2013).
68. Opinion Letter Fair Labor Standards Act (FLSA), FLSA 2006-7, 2006 WL 940663 (Dept of Labor Mar. 10, 2006); Wage & Hour Div., Field Operations Handbook, Ch. 22 §§ 22g02, 22g18 (Dept of Labor, Nov. 29, 2010). However, inadvertent or isolated improper deductions will not result in the loss of the exemption if the employer reimburses employees for the improper deductions. 29 C.F.R. § 541.603(c) (2013).
69. See generally Joseph A. Schremmer & Sean M. McGivern, Private Enforcement of the Kansas Wage Payment Act, 62 U. Kan. L. Rev. 1227, 1228 (2014) (explaining that wage payment claims are typically small and that lawyers who represent employees often bring claims pursuant to the FLSA and other, creative theories, in addition to the KWPA, to try to recover attorneys’ fees and other relief not available under the KWPA).
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**SU PREME COURT**

**CRIMINAL**

IN RE A.M.M.-H.

JOHNSON DISTRICT COURT – REVERSED AND REMANDED

COURT OF APPEALS – REVERSED

NO. 109,355 – AUGUST 8, 2014


A.M.M.-H. was sentenced in an extended juvenile jurisdiction proceeding. As a violent II juvenile offender under K.S.A. 2010 Supp. 38-2369(a)(1)(B), A.M.M.-H. received 24 months’ incarceration and an aftercare term of 24 months. His adult sentence, stayed pending successful completion of his juvenile sentence, was 59 months for the aggravated indecent liberties count and 18 months for the aggravated intimidation of a witness count. The adult sentences were ordered to run concurrently, and the district judge ordered lifetime post-release. A.M.M.-H. was placed in the Kansas Juvenile Correctional Complex on April 20, 2011. Because of time already served, he was scheduled to be released in September 2012. A.M.M.-H. entered into a “Conditional Release Contract,” a “Juvenile Intensive Supervision Contract,” and a “Formal Acknowledgment of the Conditional Release Contract.” After A.M.M.-H. failed to return home, the State filed a motion to revoke A.M.M.-H.’s conditional release, Court remanded to the district court for reconsideration of the state’s motion to revoke.

STATUTES: K.S.A. 2010 Supp. 38-2364(b), when an extended jurisdiction juvenile has failed to return home, the State filed a motion to revoke A.M.M.-H.’s conditional release, Court remanded to the district court for reconsideration of the state’s motion to revoke.

**STATE V. BROWN**

WYANDOTTE DISTRICT COURT – AFFIRMED

NO. 106,111 – AUGUST 15, 2014

FACTS: Brown tried as adult and convicted of felony murder and attempted aggravated robbery for crimes committed when she was 13 years old. Controlling hard 20 life sentence imposed. On appeal she claimed district court erred in analyzing statutory factors in waiving juvenile jurisdiction, and in instructing jury that killing in flight from an attempt to commit an inherently dangerous felony constitutes felony murder. She also claimed that insufficient evidence supported her conviction on each alternative means specified in felony murder statute, and her conviction for attempted aggravated robbery. She further claimed prosecutorial misconduct during closing argument, and claimed mandatory life sentences are unconstitutional as applied to offenders under 18 years old at time of crimes.

ISSUES: (1) Juvenile jurisdiction waiver, (2) felony-murder instruction, (3) felony-murder alternative means, (4) sufficiency of the evidence, (5) prosecutorial misconduct, and (6) constitutionality of hard 20 sentence

HELD: No abuse of district court’s discretion in its analysis of K.S.A. 2013 Supp. 38-2347(f)(1) factors in authorizing adult prosecution. Evidence supported district court’s determination that available facilities or programs were not likely to rehabilitate Brown before juvenile jurisdiction expired. No merit to argument that second and third statutory factors are duplicitious for off-grid offenses. District court considered circumstances of the crime when assessing Brown’s maturity level, and even if error in finding Brown’s maturity level weighed in favor of waiver based on her grooming habits, that error alone is not reversible.

District court’s felony-murder instruction in this case was accurate statement of law and was factually appropriate given the evidence presented at trial.

Prosecutor's statement that Brown had the weekend to “decide” how to testify as to evidence against her was gross and flagrant misconduct, but not motivated by ill will. Given the direct and overwhelming evidence against Brown, there was no reversible error.

Statutory sentencing scheme requiring that mandatory hard 20 life sentences be imposed on defendants convicted of felony murder does not violate Eighth Amendment of U.S. Constitution as applied to defendants who were under 18 years of age at the time of their crimes.

STATUTES: K.S.A. 2013 Supp. 38-2301 et seq., -2302(j), -2302(n), -2304, -2347(a)(1), -2347(a)(2), -2347(c)(1)-(3), -2347(f) (1); K.S.A. 21-3301(a), -3401, -3401(b), -3426, -3427, -3436(4), -4706(c); K.S.A. 22-3414(3), -3601(b)(1), -3717(b)(2); and K.S.A. 60-261

STATE V. BROWN
SEDGWICK DISTRICT COURT – REVERSED AND REMANDED
NO. 106,894 – AUGUST 15, 2014

FACTS: Brown convicted of felony murder, alternative charge of second-degree murder, aggravated burglary, and aggravated assault. On appeal he claimed in part: (1) district court abused its discretion in not inquiring into reasons behind Brown’s pre-trial pro se motion for new counsel before allowing the motion’s withdrawal outside Brown’s presence and without a hearing; (2) insufficient evidence for new counsel before allowing the motion’s withdrawal outside Brown’s presence and without a hearing; (2) insufficient evidence; (3) lesser included offense instructions, and (4) error in journal entry of judgment.

ISSUES: (1) Withdrawal of pro se motion for new counsel without inquiry, (2) sufficiency of the evidence, (3) lesser included offense instructions, and (4) error in journal entry of judgment.

HELD: Brown’s motion for new counsel contained sufficient information to trigger district court’s duty to make further inquiry. District court’s failure to do so before allowing the apparently non-consensual withdrawal of Brown’s pro se motion for new counsel was abuse of district court’s discretion. Case is remanded with instructions for district court to conduct hearing on Brown’s claim of attorney dissatisfaction, at which Brown is to be represented by conflict-free counsel.

Sufficient evidence supports Brown’s aggravated burglary conviction. He did not have either express or implied authority to enter victim’s apartment notwithstanding argument that victim did not lock door or even have a key, and that people regularly “crashed” there. In support of felony murder conviction, state presented sufficient evidence of underlying felony. Victim’s statement that she felt threatened when Brown pointed a gun at her and demanded that she get down on the floor was sufficient evidence to support apprehension of immediate bodily harm element of aggravated assault.

Under facts in this case, district court did not err in declining to instruct jury on voluntary manslaughter, and no possibility that jury would have reached a different verdict if given options of reckless second-degree murder or involuntary manslaughter.

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Extension of Time

Rule 5.02 was amended July 1, 2012, and added a number of requirements to motions for extension of time for briefs. The motion must state the present due date, the number of extensions previously requested, the amount of additional time needed, and the reason for the request. See Rule 5.02(1) – (4).

The first two pieces of information can be readily found at our website www.kscourts.org in the Appellate Case Inquiry System. No more than 30 days should be asked for in each motion for time unless the matter is a capital punishment case or you are seeking a clerk’s extension of 20 days or less. See Rules 10.02 or 5.01(d).

The Appellate Case Inquiry System can be found at http://intranet.kscourts.org:7780/pls/ar/clerks_office.request_case.

Transcript Requests

Litigants sometimes forget once an appeal is docketed to send the Clerk of the Appellate Courts a copy of any additional transcript requests. This can cause confusion since court reporters send our office certificates of completion once the transcript is finished and filed in the district court. Therefore it is required by the rule and a best practice to send additional transcript requests to this office so they can be matched up with the certificates of completion. See Rule 3.03(d).

Oral Arguments Before the Supreme Court – Scheduling Conflicts

The 2014-2015 Supreme Court Session Schedule can be found online at http://www.kscourts.org/kansas-courts/supreme-court/arguments.asp. The Supreme Court will hear cases in September, October and December 2014, and in January, March, May, September, October, and December 2015. Preparation of the Court’s docket begins in the Appellate Clerk’s Office at least three to four months prior to a Supreme Court Session. Cases set for oral argument typically are assigned to a Court session between two and three months ahead of the session. For example, oral arguments to be heard in September may be assigned to the Court’s docket as early as the beginning of June. If you are the arguing counsel and you know you will be unavailable to appear for oral argument on a date in the future, please consider your schedule well in advance and advise the Appellate Clerk’s Office by letter of any potential conflicts, with a copy to opposing counsel. To the extent possible, the Appellate Clerk’s Office will try to schedule oral arguments to avoid conflicts that have been brought to our office’s attention well in advance.

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.
STATE V. DE LA TORRE  
FORD DISTRICT COURT – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED  
NO. 107,905 – AUGUST 15, 2014

FACTS: De La Torre appealed from his convictions of one count of abuse of a child and one count of felony murder, arising from the death of an 11-month-old child who was in De La Torre’s care. There were two trials because the first jury, which convicted De La Torre on the child abuse charge, could not reach a unanimous verdict on the felony-murder charge. The second jury trial resulted in his conviction of felony murder. De La Torre raises several issues relating to each trial and one sentencing issue. As to the first trial, De La Torre argued that his abuse of a child conviction must be reversed because: (1) the district court failed to give a unanimity instruction despite evidence of multiple acts; (2) there was insufficient evidence to support the conviction; and (3) there was prosecutorial misconduct. As to the second trial, De La Torre argued that his felony-murder conviction should be reversed because: (1) the district court erred in failing to instruct the jury on the lesser included offense of reckless second-degree murder; (2) there was insufficient evidence to support the conviction; and (3) the prosecutor committed misconduct.

ISSUES: (1) Unanimity instruction, (2) lesser included offense instruction, (3) sufficiency of the evidence, and (4) prosecutorial misconduct

HELD: As to the first trial, the state conceded that evidence of multiple acts was presented but argued that he failure to give a unanimity instruction does not require reversal because De La Torre presented a unified defense. Court disagreed with the state on the latter point. Court held that De La Torre did not present a unified defense to the child abuse charge and the failure to give a unanimity instruction was clearly erroneous. De La Torre’s conviction for child abuse was reversed. That outcome rendered the remaining issues from the first trial moot, including the sentencing issue. As for the second trial, the Court held that the first two issues were without merit. As to the third, Court agreed that there was prosecutorial misconduct in commenting on how the child victim might have thought of the world and the defendant’s “story,” but held that it did not require reversal. Court affirmed the felony-murder conviction.

STATUTES: K.S.A. 21-3401, -3609, -5402, -5109; K.S.A. 22-3414; and K.S.A. 60-261

STATE V. HOLLISTER  
ATCHISON DISTRICT COURT – AFFIRMED IN PART, AND DISMISSED IN PART  
NO. 106,317 – AUGUST 1, 2014

FACTS: Hollister was convicted of capital murder for intentional and premeditated murder pursuant to a contract or agreement to kill victim. He appealed, raising trial errors and claiming there was insufficient evidence of premeditation or contract to kill to support the conviction. Hollister died prior to oral argument in his direct appeal.

ISSUES: (1) Effect of Hollister’s death and (2) sufficiency of the evidence

HELD: In Kansas, death of a criminal defendant does not automatically abate a defendant’s appeal. This nonabatement rule, however, does not require appellate consideration of all issues on appeal. An appellate court should consider whether an issue: (1) is of statewide interest and of the nature that public policy demands a decision, such as those issues that would exonerate the defendant; (2) remains a real controversy; or (3) is capable of repetition. Only issues meeting one of these criteria should be addressed. Here, only issue to be addressed was issue that might clear Hollister’s name, specifically whether evidence was insufficient to support his conviction.

Reviewing all evidence in light most favorable to prosecution, there was sufficient evidence for rational factfinder to find Hollister guilty beyond a reasonable doubt.

DISSENT (Luckert, J.): Disagrees with past decisions and with course adopted by majority in this case. Agreed that the appeal must be dismissed, but would dismiss the entire appeal because lack of a criminal procedure to facilitate the continuation of the appeal after Hollister’s death is a procedural obstacle. Also, rather than let the conviction stand without full appellate review, would follow federal courts and most other courts and apply doctrine of abatement ab initio.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3439(a)(2); and K.S.A. 60-2101(b)

STATE V. HORTON  
JOHNSON DISTRICT COURT – AFFIRMED  
NO 101,054 – AUGUST 8, 2014

FACTS: Kansas Supreme Court reversed Horton’s conviction of first-degree felony murder of child, and remanded for new trial. State v. Horton, 283 Kan. 44 (2007). Horton was convicted again in second trial. He appealed, claiming district court erred in refusing defense request to suspend jury deliberations to allow presentation of evidence of inmate telephone conversations that came to light after case was submitted to jury. Kansas Supreme Court retained jurisdiction and remanded to district court for evidentiary hearing limited to issue of reopening the case based on correct legal standards. State v Horton, 292 Kan. 437 (2011). District court again
found it would be inappropriate to reopen the case to bring in the
inmate telephone conversations, and Horton appealed that deci-
sion. Horton also claimed the district court erred in allowing jury
to view an animated reconstruction video of the location of Hor-
ton, the victim, and witnesses because the video assumed facts not
in evidence and permitted jury to consider speculative expert testi-
mony; and erred in excluding evidence that dog alerted to victim's
clothes but did not alert to victim's presence in Horton's car or on
his clothes. Horton further objected on appeal to jury being given an
Allen-type instruction.

ISSUES: (1) Reopening case after jury began deliberating, (2) ani-
mated reconstruction video, (3) exclusion of exculpatory dog-search
evidence, and (4) jury instruction

HELD: District court performed the duty that the Kansas Su-
preme Court instructed it to carry out on remand, and was thor-
ough in creating and reviewing a record of the issue and analyzing
the law. No abuse of discretion in the district court's conclusions.

No error in allowing state to play animated reconstructive video
for the jury. The video and accompanying testimony helped illus-
trate state's complex theory, and jury had opportunity to evaluate
reliability of the video and its assumptions.

District court did not err as a matter of law and did not abuse
discretion in excluding dog-search report. Dog handler was not
available for direct or cross-examination, and jury could only have
speculated on reliability of the search.

On facts of this case, inclusion of language that “another trial
would be a burden on both sides” in instructions to the jury was
error, but not reversible error.

STATUTES: K.S.A. 22-3414(3); and K.S.A. 60-404, -456,-456(b)

STATE V. KENDALL
RENO DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED IN PART AND
REVERSED IN PART
NO. 106,960 – AUGUST 8, 2014

FACTS: Kendall appealed his convictions for stalking and violat-
ing a protective order. Charges were based on telephone calls he
made as El Dorado inmate in Butler County to former wife's cell
phone, who did not answer the calls. In unpublished opinion, Court
of Appeals reversed the stalking conviction, finding insufficient evi-
dence that Kendall committed an “act of communication” as pro-
scribed by the stalking statute, and remanded to district court for
entry of attempted stalking conviction and resentencing. Court of
Appeals also rejected claims that State was required to prove Ken-
dall was in Reno County when he placed the calls as alleged in the
complaint charging him with violating a protective order; and that
district court's finding of recklessness was contrary to the knowing
or intentional conduct required for crime of violating a protective
order. Kansas Supreme Court granted state's petition for review of
Court of Appeals' construal of "act of communication," and Kend-
dall's cross-petition for review of remaining claims.

ISSUES: (1) “Act of communication” in stalking statute, (2) in-
tentional and knowing violation of protective order, and (3) viola-
tion of protective order – location

21-3438(a)(3) requires evidence that perpetrator transmitted a com-
munication to a victim. Under specific facts in this case, Kendall
violated stalking statute by calling victim's cell phone in violation of
a protective order and, in turn, victim seeing on her phone's caller
ID that the defendant was calling her cell phone. A reasonable fact-
finder could infer that Kendall, by calling the victim's phone, was
communicating to the victim – just as previously promised – that
he would contact her no matter what, regardless of the protective
order or the fact that he was in prison, and that this message was
received by the victim. The reversal of Kendall's stalking conviction
is reversed.

Court of Appeals' interpretation of district judge's use of "reck-
less" is upheld. Sufficient evidence was presented at bench trial to
show that Kendall intentionally and knowingly violated the protec-
tive order by calling the victim's cell phone.

Location of where Kendall violated the protective order is not
an element of the crime, but rather a question of venue. Pursuant
to K.S.A. 22-2603, a violation of the protective order in this case
could be prosecuted in Butler County where Kendall initiated the
contact, or in Reno County where the victim received the contact.

Language within the complaint suggesting that Kendall was in Reno
County on date he made the phone calls is mere surplusage that can
be disregarded.

STATUTES: K.S.A. 2010 Supp. 21-3438, -3438(a)(1), -3438(a)
(3), -3438(b)(3), -3438(f)(1), -3438(f)(1)(G), -3438(f)(2), -3843,
-3843(a)(1); K.S.A. 22-2602, -2603, -3201(d); and K.S.A. 60-
3105, -3106, -3107

STATE V. REED
WYANDOTTE DISTRICT COURT – AFFIRMED
NO. 105,307 – AUGUST 8, 2014

FACTS: Reed was convicted by a jury of two counts of aggravated
indecent liberties with a child under the age of 14. The offenses,
which occurred approximately two years apart, involved two 8-year-
old girls, C.T. and A.R. The sentencing judge imposed concurrent
life sentences without the possibility of parole for 40 years. Reed
appeals, raising five issues relating to alleged trial errors and one is-
issue relating to sentencing: (1) was the evidence sufficient to support
Reed's convictions; (2) did the trial judge err by admitting into evi-
dence two handwritten notes, one from each victim describing her
version of events; (3) did the trial judge err by admitting into evi-
dence the victims' recorded statements; (4) during Reed's testimony,
did the trial judge err by allowing the prosecutor to ask questions
which, according to Reed, pointed to his post-arrest silence; (5) even
if no single error warrants setting aside Reed's convictions, does the
cumulative error doctrine entitle Reed to a new trial; and (6) does
Jessica's Law, K.S.A. 21-4643, as applied to Reed, constitute cruel
and/or unusual punishment under § 9 of the Kansas Constitution
Bill of Rights and the Eighth Amendment to the U.S. Constitution?

ISSUES: (1) Sufficiency of the evidence, (2) admission of evi-
dence, (3) post-arrest silence, (4) cumulative error, and (5) Jessica's Law

HELD: Court found sufficient evidence to support both of Reed's
convictions. Court found that even with everyone clothed, a ratio-
nal factfinder could have found that Reed's touches tended to un-
dermine the morals of C.T. and A.R. and to outrage the moral sense
of a reasonable person and also demonstrated his intent to arouse
or satisfy his sexual desires, the sexual desires of the girls, or both.

Court held there was no abuse of discretion in admitting the hand-
written notes of each victim or the statements of the girls through
video recordings of their interviews with social workers and through
the testimony of those social workers. Court found that any refer-
cences to a Miranda violation targeted Reed's pre-arrest silence, not
his post-arrest silence and thus there was no Doyle violation. Court
found no errors to accumulate. Last, the Court rejected Reed's cruel
and unusual punishment argument based on Reed's failure to make
sure there were adequate findings on the record for the appellate
court to consider on appeal.

STATUTES: K.S.A. 21-3504, -4643; K.S.A. 22-3433, -3601;
and K.S.A. 60-401, -404, -407, -460
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ADOPTION
IN RE ADOPTION OF P.Z.K.
LYON DISTRICT COURT – AFFIRMED
NO. 111,198 – AUGUST 1, 2014

FACTS: Natural Father’s paternity of P.Z.K. was determined through genetic testing. District court found Natural Father unfit under K.S.A. 2013 Supp. 59-2136(a)(1)(A)&(G), terminated Natural Father’s parental rights, and granted adoption by Stepfather. Natural Father appealed, arguing that district court should have applied K.S.A. 2013 Supp. 59-2136(d), which specifically governs stepparent adoptions, rather than K.S.A. 2013 Supp. 59-2136(h) which governs termination of parental rights in all adoptions. He also claimed that district court erred by refusing to consider involuntary payment through garnishment of Natural Father’s tax refund as payment towards his child support obligation.

ISSUES: (1) Application of K.S.A. 2013 Supp. 59-2136(d) and (2) unfitness – K.S.A. 2013 Supp. 59-2136(h)(1)

HELD: Genetic test presumption in K.S.A. 2013 Supp. 23-2208(a)(5), under which Natural Father’s paternity was established, was not added until 1994. K.S.A. 2013 59-2136(d) only applies to stepparent adoptions when the child has a presumed father due to a marriage or attempted marriage under K.S.A. 2013 Supp. 23-2208(a)(1), (2), or (3), or if the child qualifies as a legitimate child of the father under pre-1985 law, which means a child born of a marriage. Natural Father does not fall into either of those categories, thus district court was not required to apply K.S.A. 2013 Supp. 59-2136(d).

Because Natural Father did not contest district court’s alternative finding of abandonment or neglect under K.S.A. 2013 Supp. 59-2136(h)(1)(A) as a basis for finding of unfitness, no need to address whether sufficient evidence supports district court’s finding under K.S.A. 59-2136(h)(1)(G) that Natural Father failed or refused to assume duties of a parent for two consecutive years preceding filing of the petition.


CLASS ACTION, STRICT LIABILITY, OIL AND GAS,
ABNORMALLY DANGEROUS ACTIVITIES,
AND JURY MISCONDUCT
CITY OF NEODESHA V.
BP CORP. NORTH AMERICA INC. ET AL.
WILSON DISTRICT COURT – AFFIRMED
NO. 109,111 – AUGUST 22, 2014

FACTS: All persons and entities owning real property in and around the city of Neodesha brought a class action against BP Corp. of North America and other owners of a former oil refinery, alleging groundwater and subsurface soil contamination caused by the now dismantled facility. A jury found in the defendants’ favor after a 17-week trial. But in post-trial proceedings, the district court decided it had made a mistake in submitting the strict liability claim to the jury, and it granted the plaintiff class judgment as a matter of law on its strict liability claim, setting the stage for a new trial over damages. BP filed an interlocutory appeal for relief from the order granting judgment on the strict liability claim and the conditional order for new trial. The parties disputed whether the abnormally dangerous activities test generally used in tort law to impose strict liability was applicable when the claim relates to water contamination. The district court concluded that it does not. And even if the abnormally dangerous activities test applied, the court held BP’s “remediation” activities were abnormally dangerous as a matter of law. Kansas Supreme Court held that the district court should not have granted the class judgment as a matter of law. The jury was instructed to determine whether BP engaged in an abnormally dangerous activity and the trial court erred by overturning the jury’s finding. The abnormally dangerous activities tests under the Restatement of Laws were the appropriate standards to apply to the plaintiff class’s claims, and the jury decided the question. Court reversed the district court’s entry of judgment for the class on its strict liability claim, and remanded this matter to the district court with directions that the jury’s verdict be reinstated and final judgment entered for the defendants. After the mandate from the Supreme Court arrived at the district court, the court entered judgment in favor of BP on the strict liability claim and affirmed its prior denials of the Plaintiffs’ other posttrial motions.

ISSUES: (1) Class action, (2) strict liability, (3) oil and gas, (4) abnormally dangerous activities, and (5) jury misconduct

HELD: Court held the Plaintiffs are precluded from asserting that they are entitled to judgment as a matter of law under an abnormally dangerous activity theory. The Plaintiffs never sought judgment as a matter of law in the district court under the abnormally dangerous activities standard. Both in their pre- and post-verdict motions their arguments were based solely on their perception that Kansas law created a per se liability for contamination of groundwater. Court could not say the trial court erred in denying a motion under K.S.A. 2012 Supp. 60-250 on a theory that the Plaintiffs never asserted. Court held there were no allegations of any outside influence on the jury. Court held any influence was between jury members and there was no clear evidence to conclude that any misconduct by the jurors was prejudicial to the Plaintiffs. There was no substantial prejudice to the Plaintiffs’ right to a fair trial. Court held that based upon the instructions read as a whole, even though the instructions were complex and lengthy, they advised the jury of the nature of the Plaintiffs’ claims and adequately and correctly explained the applicable legal principles for the jury to apply to the evidence. Even though those were difficult instructions to read and understand, the Plaintiffs did not persuade the court that there was clear error in reading the instructions as a whole that would cause a reversal and order for a new trial. Court found no error in the admission of; (1) the Kansas Department of Health and Environment and federal agency reports, (2) documents covering pre-lawsuit negotiations between the Plaintiffs and BP, (3) the opinion testimony of three witnesses who were not designated as experts and also the testimony of other witnesses (4) evidence concerning possible tax revenues, (5) evidence of flood and subsequent FEMA efforts, (6) evidence used to discredit the Plaintiffs’ expert, and (7) evidence of BP’s safety records and honesty. Court found that the trial court did not err in refusing Plaintiffs’ request to depose the CEO of BP; in limiting closing arguments to four hours per side, and in not imposing a more severe sanction upon BP because it produced a huge number of documents just before trial started. Court did not find notes from a Neodesha Industrial Commission meeting to be inadmissible hearsay. Court held the trial court did not err in granting summary judgment to BP on Plaintiffs’ claim for unjust enrichment because the remedies of law for negligence, nuisance, and violations of K.S.A. 65-6203
were all available to the Plaintiffs to attempt their recovery. Court found the verdict was not contrary to the weight of the evidence and that although there was some animosity between counsel, there were no grounds for a new trial based on the conduct of the attorneys.


FACTS: Mother filed post-divorce motion to modify child support and to determine arrearage in child support and spousal maintenance, citing father’s failure to disclose that his move to another job would be at a higher salary. District court imposed sanctions, but on motion for reconsideration, vacated retroactive support as barred by Section V.B.2 of Kansas Child Support Guidelines and K.S.A. 2013 Supp. 23-3005(b) governing retroactive modification of child support. Mother appealed.

ISSUE: Sanction for failing to disclose material change of circumstances

HELD: District court erred in concluding as matter of law that K.S.A. 2013 Supp. 23-3005(b) prohibited assessment of a sanction under Section V.B.2 of the guidelines for a parent’s failure to disclose a material change of circumstances. The decision whether to assess the sanction is discretionary. Case was remanded for further proceedings for district court to make findings as to whether a sanction should be assessed in this case and, if so, to determine the proper amount of the sanction.

CONCURRING (Powell, J.): Writes separately concerning the sanction appropriate under Section V.B.2 of the guidelines. If district court upon remand deems a sanction appropriate in this case, the guidelines direct it to impose a sanction equal to the amount of child support to which the mother would have otherwise been entitled had she been timely informed of father’s increase in income, minus the child support actually paid during the relevant period, plus any other sanctions such as attorney fees the district court sees fit in its discretion to impose.

STATUTES: K.S.A. 2013 Supp. 23-3005(b); and K.S.A. 16-204(d)

RESTITUTION AND JURISDICTION STATE V. DAVIS FINNEY DISTRICT COURT – AFFIRMED NO. 107,186 – AUGUST 22, 2014

FACTS: In State v. Davis, 48 Kan. App. 2d 573, the Court of Appeals held that the district court did not abuse its discretion in awarding restitution in the amount of the retail value of goods Davis had stolen from a department store. Davis sought review by the Kansas Supreme Court of both whether the amount of restitution was appropriate and whether the district court had jurisdiction to enter a restitution award. In May 2014, the Kansas Supreme Court granted Davis’ petition for review, summarily reversed the Court of Appeals, and remanded for “consideration in light of” three recent Kansas Supreme Court opinions: State v. Halli, 298 Kan. 978, 319 P.3d 506 (2014); State v. Charles, 298 Kan. 993, 318 P.3d 997 (2014); and State v. Frierson, 298 Kan. 1005, 319 P.3d 515 (2014). The order remanding the case did not mention the two separate matters on which Davis sought review (amount of restitution and jurisdiction), but the three cases mentioned primarily dealt with jurisdiction issues of holding the amount of jurisdiction open till a later hearing.

ISSUES: (1) Restitution and (2) jurisdiction

HELD: Court held that although the trial court was not entirely clear that Davis would have to pay any restitution at all, it was clear that it was holding the matter open, it indicated in the journal entry of sentencing that the amount of restitution was “to be determined,” and it set a further hearing with the agreement of the parties. Court found the trial court in Davis’ case acted more like the Frierson court in that it did “more than nothing” to preserve jurisdiction. Court concluded the trial court had subject-matter jurisdiction to enter its restitution order. Court also reaffirmed its ruling that the district court did not abuse its discretion by awarding restitution in the amount of retail value of the stolen goods, and adopted by reference the explanation of that ruling contained in its previous opinion.

STATUTES: No statutes cited.

TAX APPEAL AND VALUATION IN RE TAX APPEAL OF TALLGRASS PRAIRIE HOLDINGS LLC KANSAS COURT OF TAX APPEALS – AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH DIRECTIONS NO. 110,136 – AUGUST 15, 2014

FACTS: Tallgrass Prairie Holdings LLC (Tallgrass) appeals the Kansas Court of Tax Appeals’ (COTA) 2011 valuation of Tallgrass’ multitenant office complex (the property) built in 2002 in Topeka. The property has a prime location, and the building is also equipped with a large surgical suite leased by one of the tenants. Tallgrass seeks a fair and reasonable valuation for the property based on current market values in compliance with K.S.A. 2013 Supp. 79-1460. Originally, Tallgrass’ appeal to COTA challenged the fair market valuation of its property for tax years 2010 and 2011. While both appeals were pending before COTA, the parties mutually agreed to dismiss the 2010 tax appeal after the decision of the 2009 tax year appeal was rendered by COTA. First, Tallgrass claimed that COTA erred in interpreting K.S.A. 2013 Supp. 79-1460(a). Second, Tallgrass argued that COTA erred in adopting the county’s valuation by implicitly finding the county did not have the burden of proof. Third, Tallgrass stated that by relying on the county’s methodology, COTA produced a value contrary to USPAP Standards and Kansas law. Fourth, Tallgrass claimed that COTA erred in making findings of fact that are not supported by substantial evidence. Finally, Tallgrass argued that COTA acted in an arbitrary, capricious, and unreasonable manner when it failed to decide whether Tallgrass had been subject to intentional and systematic excessivevaluations.

ISSUES: (1) Tax appeal and (2) valuation

HELD: (1) Court held that COTA properly found the 2010 tax valuation was subject to application of K.S.A. 2013 Supp. 79-1460(a)(2) and not by “a final determination made pursuant to the valuation appeals process.” When COTA established the 2009 market value (which was the applicable fair valuation determination), that value affected 2010’s fair market valuation and not 2011’s fair market valuation for the property. (2) Court held that COTA did not shift the burden; it merely relied on the expense rate provided by Keller (county’s appraiser), the county’s rebuttal expert witness, rather than either of the expense rates provided by Meyer (county’s appraiser) or Dillon (Tallgrass’ appraiser). While COTA denied the county the use of Keller’s appraisal during its case-in-chief to adjust its valuation, his testimony was allowed and relevant for rebuttal purposes. Tallgrass provides no authority why COTA could not utilize the relevant testimony of the county’s rebuttal witness. Tallgrass has failed to meet its burden in showing how COTA improperly applied K.S.A. 2013 Supp. 79-1609. (3) Court held there was no evidence that the county valued the property at what it was “capable” of producing. Every tenant rental rate was calculated and evaluated at what the county determined to be fair market value, in keeping with the requirements of K.S.A. 2013 Supp. 79-503a. (4)
Appellate Decisions

Court held that Tallgrass also failed to show any statutory or case law authority to support the rejection of the county’s capitalization rate. There was substantial evidence when viewed in light of the record as a whole to support COTA’s ruling, and because the appellate court cannot reweigh evidence, COTA did not err in selecting a 9 percent capitalization rate. (5) Court held that Tallgrass failed to show how its market valuation is excessive in relation to comparable properties, and the only evidence of its excessive market valuation was in dispute. Because Tallgrass’ only claim of excessive valuation was based on evidence in dispute, Tallgrass failed to demonstrate indicia of bad faith or intentional action on the part of the county. Tallgrass failed to sustain its burden of proof in demonstrating that the property had been systematically and intentionally valued excessively. Court remanded with instructions to recalculate the rental area based on the agreed-to-rent rolls from the county’s appraisal but excluding MC Concessions from the total area of 74,508 square feet, basing tenant usage as the parties agreed, and using all other valuation inputs and expenses as originally adopted by COTA.

STATUTES: K.S.A. 2013 Supp. 44-701, -702, -703(m), -704(b), -704(c), -705, -706, -706(a), -706(c), -707, -709(i), -710(c)(1), -710(e)(3); and K.S.A. 2013 Supp. 77-621, -621(a)(1), -621(c), -621(c)(4)

UNEMPLOYMENT INSURANCE
JOHNSON V. KANSAS EMPLOYMENT SECURITY BOARD OF REVIEW
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 110,275 – AUGUST 1, 2014

FACTS: Johnson concurrently held a full-time position as a computer programmer with the state of Kansas and a part-time position at McDonald’s. He began receiving unemployment compensation benefits after he separated from his computer programming position while still working at McDonald’s. When Johnson informed Kansas Department of Labor (KDOL) that he formally resigned from McDonald’s in February 2012, with last date of work at McDonald’s in November 2011, KDOL examiner notified Johnson he was disqualified from all unemployment compensation benefits under K.S.A. 2013 Supp. 44-706 as of February 2012 because he left McDonald’s without good cause attributable to that work or employer. Johnson appealed, arguing that he should have continued to receive benefits related to loss of his state computer programming position. Referee agreed with examiner, but amended the disqualification date to November 2011. Board affirmed referee’s decision. Johnson appealed. District court reversed, finding Board had interpreted K.S.A. 2013 Supp. 44-706(a) too broadly. Board appealed.

ISSUE: K.S.A. 2013 Supp. 44-706(a) – voluntary departure disqualification

HELD: Board’s interpretation of voluntary departure disqualification provision of K.S.A. 2013 Supp. 44-706(a) was rejected. A claimant who voluntarily leaves a job without good cause attributable to the work or the employer is only thereby disqualified from benefits related to the job he or she voluntarily left. The claimant is not thereby disqualified from benefits he or she might otherwise be eligible to receive related to other jobs. District court was affirmed.

CONCURRING (Bruns, J.): Concurs with majority’s interpretation of K.S.A. 2013 Supp. 44-706(a), but does not believe it necessary to find statutory language ambiguous to reach this conclusion. Agrees that Johnson should not be disqualified from receiving unemployment compensation based on unique circumstances in this case.

STATUTES: K.S.A. 2013 Supp. 44-701 et seq., -702, -703(m), -704(b), -704(c), -705, -706, -706(a), -706(c), -707, -709(i), -710(c)(1), -710(e)(3); and K.S.A. 2013 Supp. 77-621, -621(a)(1), -621(c), -621(c)(4)

CRIMINAL

STATE V. CATO-PERRY
SEDGWICK DISTRICT COURT – AFFIRMED, CROSS-APPEAL DENIED, AND REMANDED WITH DIRECTIONS
NO. 104,870 – AUGUST 15, 2014

FACTS: After the decision in State v. Cato-Perry, 48 Kan. App. 2d 92, 284 P.3d 36 (2012), rev. granted May 29, 2014, this case returned to the Court of Appeals on remand from the Kansas Supreme Court on the issue of whether a charge of acting as a principal or aider and abettor created an alternative means case. The Supreme Court granted the state’s petition for review, vacated the Court of Appeals’ prior decision, and remanded this case to review the matter in light of State v. Betancourt, 299 Kan. 131, 322 P.3d 353 (2014), and State v. Soto, 299 Kan. 102, 322 P.3d 334 (2014).

Court considered three additional alternative means arguments and the cross-appeal by the state challenging the district court’s granting of a duration sentence. Because Cato-Perry committed his crime while on bond, the district court ordered him to serve the 57-month sentence consecutive to his 30-month sentence in case 07CR308. It was a duration sentence. Cato-Perry made four alternative means arguments on direct appeal: (1) instructing the jury that it could convict him of aggravated robbery as either a principal or an aider and abettor created alternative means upon which he could be found guilty of aggravated robbery; (2) the aiding and abetting jury instruction, in accordance with K.S.A. 21-3205(1), created six alternative means by which aggravated robbery could be committed under the aiding and abetting statute; (3) the element of taking property from the “person or presence” of the victim in the aggravated robbery instruction raised an alternative means issue; and (4) the language of taking property from the victim “by force or threat” of bodily harm to commit aggravated robbery created alternative means of committing the crime. The first panel relied on the ruling in State v. Boyd, 46 Kan. App. 2d 945, 268 P.3d 1210 (2011), overruled in part by Betancourt, 299 Kan. at 140-41, and reversed Cato-Perry’s conviction based on his first argument. Cato-Perry, 48 Kan. App. 2d at 95-96. Having reversed the conviction, the panel did not address Cato-Perry’s remaining alternative means arguments or the state’s cross-appeal. Cato-Perry also has been overruled by Betancourt, 299 Kan. at 140-41.

ISSUES: (1) Alternative means and (2) departure sentence

HELD: Court first held that through application of the ruling in Betancourt, Cato-Perry’s first argument failed. Court rejected all of Cato-Perry’s alternative means arguments. Since no alternative means issues were present in this case, court found there was no need to weigh the sufficiency of the evidence regarding whether Cato-Perry took property from the person or the presence of the victim by force or by threat of bodily harm. The record clearly supported that Cato-Perry aided in the crime of aggravated robbery. Sufficient evidence supported his conviction. Court also rejected the state’s sentencing argument. Court stated that the departure sentence imposed was not
disproportionate to the severity level of the crime committed when weighed against the two mitigating factors, which when considered collectively were substantial and compelling reasons that justified the departure sentence. However, court remanded to the trial court to ensure that the journal entry of judgment was corrected to be consistent with the sentence pronounced from the bench.

STATE: K.S.A. 21-3205, -3426, -3427, -4603d, -4608, -4704, -4716, -4721

STATE V. CROSSETT
JEFFERSON DISTRICT COURT – AFFIRMED
NO. 109,503 – AUGUST 22, 2014

FACTS: For his actions during confrontation and 10-minute pursuit of truck in which two of the six passengers were children, Crossett was convicted of six counts of aggravated assault, two counts of endangering a child, and one count each of criminal damage to property, reckless driving, and failure to inform after a property accident. On appeal he claimed clear error in trial court's failure to give a unanimity instruction for the two counts of endangering a child because jury could have relied on Crossett's attempting to run truck off the road, or causing a collision by moving his van to block the truck after coming to a stop. He also claimed clear error in trial court's failure to give limiting instruction concerning evidence of Crossett's past abusive behavior towards the truck passenger Crossett was pursuing. Crossett further claimed trial court's consideration of Crossett's criminal history not proven to a jury violated Apprendi.

ISSUES: (1) Unanimity instruction, (2) limiting instruction, and (3) sentencing

HELD: Applying factors in State v. Schoonover, 281 Kan. 453 (2006), and considering comparable Kansas cases, this case did not involve multiple acts. No clear error in trial court not giving a unanimity instruction.

Defense counsel elicited specific prior bad acts to the jury. Even if trial court erred in failing to give the limiting instruction, no clear or harmless error resulted under facts in case.

State v. Ivory, 273 Kan. 44 (2002), remains controlling. Trial court appropriately considered Crossett's criminal history in determining the sentence.


STATE V. MARION
SALINE DISTRICT COURT – AFFIRMED
NO. 110,614 – AUGUST 22, 2014

FACTS: Marion was convicted on nolo contendere plea to one count of indecent liberties with a child, based on his sexual encounter with his 13-year-old cousin when Marion was 24 years old. District court made detailed findings under factors outlined in State v. Freeman, 223 Kan. 362 (1978), and imposed lifetime term with lifetime post-release supervision. On appeal Marion claimed that lifetime post-release supervision was grossly disproportionate in violation of prohibition against cruel and unusual punishment in Kansas and U.S. constitutions.

ISSUES: (1) Kansas Constitution and (2) Eighth Amendment

HELD: Freeman factors reviewed under facts in this case. Based on Kansas Supreme Court's analyses in State v. Mossman, 294 Kan. 901 (2012), and State v. Cameron, 294 Kan. 884 (2012), imposition of lifetime post-release supervision for crime of indecent liberties with a child, a sexually violent offense, is not grossly disproportionate to sentence imposed for other "more serious" offenses in Kansas. Marion's sentence of lifetime post-release supervision did not constitute cruel or unusual punishment in violation of Section 9 of Kansas Constitution Bill of Rights.

Eighth Amendment claim failed as well. Marion could not succeed in a case-specific challenge because substantial competent evidence supported district court's finding that gravity of Marion's offense and severity of his sentence did not result in an inference of gross disproportionality, and following guidance of Mossman, Marion's sentence of lifetime post-release supervision was not categorically disproportionate for his conviction of indecent liberties with a child.

STATE: K.S.A. 2013 Supp. 21-5403(b), -5408(c)(2), -5423(e), -5426(c)(2), -5509(b)(1), -5509(b)(2); K.S.A. 2013 Supp. 22-3717(d)(1)(G), -3716(d)(5)(B); and K.S.A. 2013 Supp. 75-5217(c), -5217(d)

STATE V. WILBURN
JOHNSON DISTRICT COURT – AFFIRMED
NO. 110,250 – AUGUST 15, 2014

FACTS: Overland Park detectives stopped Wilburn and a companion at a shopping mall because one of the men gave a detective a puppy dog "look." Suspecting criminal activity the detectives detained the two men and confiscated their cell phones. Bizarre facts thereafter resulted in an intercepted phone call, four arrests, search of a fraudulently rented car, and discovery of a large amount of evidence tying Wilburn to a fraud ring. District court, describing facts in case as "a pit full of snakes that are swirling around with one another" combined with "a law school final in criminal procedure," found the detectives lacked reasonable suspicion to stop and detain Wilburn. State appealed from district court's suppression of all evidence stemming from Wilburn's unlawful detention.

ISSUES: (1) Legality of the stop, (2) standing to challenge companion's statements, (3) and inevitable discovery of the vehicle and its contents

HELD: Even if legality of the stop and the resulting suppression of the evidence obtained had been properly appealed, district court's determination was supported by substantial evidence. A puppy dog "look" as the sole basis for the stop is insufficient to establish a reasonable and articulable suspicion of criminal activity.

Wilburn clearly had standing to object to use of his companion's statements. State v. Hodges, 252 Kan. 989 (1993), is distinguished.

District court's finding that Wilburn lacked standing to challenge search of a stolen vehicle does not defeat Wilburn's objection to admission of evidence found in the car. Wilburn's stop remains illegal, and discovery of the vehicle remains the last event in the chain that began at that stop. District court's decision suppressing the evidence from the vehicle, even though Wilburn had no possessory interest in the vehicle, was affirmed.

Inevitable discovery doctrine does not apply to the frankly improbable chain of events in this case. State failed to brief independent source doctrine argument made in district court.

STATE: K.S.A. 2013 Supp. 21-5804(a)(1); and K.S.A. 2013 Supp. 22-2402(1), -3603

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*Chart reflects a 90 day Elimination Period and 5 year benefit duration

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