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Our Mission

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

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2014-15

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KBA Officers & Board of Governors Elections

It's not too early to start thinking about KBA leadership positions for the 2015-16 leadership year.

The KBA Nominating Committee, chaired by Dennis D. Depew, of Neodesha, is seeking individuals who are interested in serving in the positions of Vice President, Secretary-Treasurer, and KBA Delegate to the ABA House of Delegates.

Officers

- President: Gerald L. Green, 2014-15; Natalie G. Haag, 2015-16
- President-elect: Natalie G. Haag, 2014-15; Stephen N. Six, 2015-16
- Vice President: Stephen N. Six, 2014-15; Gregory P. Goheen, 2015-16
- Secretary-Treasurer: Gregory P. Goheen, 2014-15; open
- KBA Delegate to the ABA House of Delegates: Rachael K. Pirner; open

Interested candidates should send detailed information to Jordan Yochim, KBA Executive Director, at 1200 SW Harrison St., Topeka, KS 66612-1806, or at jyochim@ksbar.org by Friday, January 16, for distribution to the Nominating Committee. Candidates seeking an officer position may be nominated by petition bearing 50 signatures of regular members of the KBA, with at least one signature from each governor district.

Board of Governors

Candidates seeking a position on the Board of Governors must file a nominating petition, signed by at least 25 KBA members from that district, with Jordan Yochim by Friday, February 20. If no one files a petition, the Nominating Committee will reconvene and nominate one or more candidates for open positions. The seven KBA districts with seats up for election in 2015 are:

- District 1: Incumbent Toby J. Crouse is eligible for re-election. Johnson County.
- District 4: Incumbent Brian L. Williams is eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
- District 5: Incumbent Cheryl L. Whelan is eligible for re-election. Shawnee County.
- District 7: Incumbent Calvin D. Rider is not eligible for re-election. Sedgwick County.

For more information
To obtain a petition for the Board of Governors, please contact Jordan Yochim at the KBA office at (785) 234-5696 or via email at jyochim@ksbar.org. If you have any questions about the KBA nominating or election process or about serving as an officer or member of the Board of Governors, please contact Dennis D. Depew at (620) 325-2626 or via email at ddepew@ksbar.org or Jordan Yochim at (785) 234-5696 or via email at jyochim@ksbar.org.
Another Annual Meeting in the Books

I am writing this, my fourth president’s column, just a few days after attending this year’s annual meeting in Topeka. I realize that before this column appears in the Journal, one I wrote a month ago will be available for your reading pleasure. Or maybe not! In any event, by the time this column appears, the annual meeting will have come and gone at least a couple of months ago. Still, I would be remiss if I did not take this opportunity to reflect back on our annual meeting.

Assuming you hang on every word I write and anxiously await each month’s column, or even if you don’t, which is more likely the case, you may recall two months ago I devoted my column to what was then our upcoming annual meeting. Now having completed it, I have several observations to share with you. I welcome your thoughts and observations as well, should you wish to share them with me in return.

First, the meeting was a success, though, as has been the case in the recent past, I wish more of you had participated. I do not say that to try shame anyone or to suggest you are not a loyal KBA member if you did not attend. As I wrote two months ago, the annual meeting is not for everyone, nor does it have to be, nor should it be. My wish that more members would have attended is because of my sincere belief you missed something good if you did not.

The golf tournament on Thursday, to raise money for the Kansas Bar Foundation, was a success. The weather was beautiful, no rain, no wind, and the Topeka Country Club could not have been in better condition. I must admit though, that given the way my team performed (all partners of mine who wished not to be publically identified), the highlight of the day was the burgers at lunch. I awarded the first place trophy in the Championship Flight to last year’s defending champions Glenn Braun, Steve Tilton, Jason Robbins, and Bruce Bramley. It seems ironic though, if not misleading, to be playing for the President’s Cup (and it is a really big cup) and then for it not to be awarded to the president. I guess maybe I just need to find a better team for next year’s tournament. Congratulations to all who participated and who won awards, and thanks to everyone who participated for your support of the Foundation. And a special congratulations goes to those who won’t be identified, but who won the award for finishing last. Since my team didn’t place anywhere in the prize money, I have decided that if I play with the same group next year, I plan to stop carrying the team and just play for last place! And having just said that about my partners, it is entirely possible I will also soon be looking for a new job. But I digress. As is often said, at least in youth sports, or at least sometimes in youth sports, or at least it was said to me when I participated, “all who participate are winners.” In this particular instance, that is particularly true since we were raising money for the Foundation.

As for the annual meeting itself, the CLE was exceptional. My hat is off to the Planning Committee for such an excellent line up. All the presenters were good, including the serious and not so serious; I particularly enjoyed Sean Carter. Who knew legal ethics could be so funny? I also had the privilege of attending the Diversity Committee’s breakfast. All of our committees and sections are important, but the importance of diversity within the KBA membership and leadership, as well as diversity in our profession and in our society as a whole, cannot be overstated. In fact, I plan to devote one of my future columns to that very subject.

It was an honor to help present the awards to some of our most deserving members at the awards luncheon. Every time I am fortunate enough to be involved or observe such awards, I am reminded of how lucky I am to be a part of such a wonderful profession. Not because of anything I have done, but because of so many of my colleagues and peers who have done so much. Congratulations to all who were honored.

Finally, but not necessarily in order of priority or enjoyment, the Bar Show was exceptional and entertaining from the first line and scene to the very end and curtain call. I congratulate the Topeka Bar on its obvious hard work, talents and creativity. Tasteful, yet poignant, the show had just the right blend of humor, satire and just plain making fun of people. Well done to all who participated and who helped make it such a good show.

Also, I want to thank the KBA staff for their hard work in helping put on our annual meeting. Their days started early and ended late, not to mention all the time put in during the weeks and months leading up to the event. We couldn’t do it without you! Together with the Topeka Bar on its obvious hard work, talents and creativity. Tasteful, yet poignant, the show had just the right blend of humor, satire and just plain making fun of people. Well done to all who participated and who helped make it such a good show.

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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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An Opportunity for Reflection

We in Kansas have just weathered one of the most contentious and divisive election cycles in recent memory. At every turn, commercials, mailings, and newspapers preyed on our differences and played on our fears for the future. Cable news shows highlighted Kansas as a national battleground and pitted us against one another. As a centrist with friends on all sides of the political spectrum, my Facebook newsfeed has been unreadable for the past few weeks, and don’t get me started on Twitter. Let’s just say that August, September, and October have been . . . trying.

Writing this column on the eve of Election Day, I don’t know how many of the elections for statewide and national office will turn out. But I do know two things:

1. On the evening of November 4, there will undoubtedly be hurt feelings and/or victory parties, depending on the candidates we each supported.

2. On November 5, we will shake the political mud from our shoes, throw the attack ads into the recycling bin, and move on.

Because being a Kansan is, in my experience, a lot like being a lawyer: We may disagree with one another on multiple fronts, but at the end of the day, we shake hands and move forward.

My first column as YLS president back in July/August opened with three simple words: “I love Kansas.” And I do. I am fiercely proud to be a Kansan. So as we enter the holidays after a trying election season, it’s my hope that we can put political strife behind us and celebrate our Kansas identity—concentrating for a change on some of the many reasons we all choose to live and practice in the Sunflower State.

In Kansas, we balance hope with realism. With the Royals’ recent playoff run, we all cheered. And when we came up one base short in the World Series, no one rioted. Instead, we thanked the players for a fantastic October and looked forward to next year. (We Jayhawk fans know this cycle well, as it’s a familiar recurrence almost every March.) Likewise, even after a divisive election, we do not disengage or become complacent. We remain active in our communities, understanding that changes at the state and national level are effected by our efforts in our school boards, planning commissions, and civic organizations.

After all, we are part of Kansas’ long and proud history of liberty, self-sufficiency, and political awareness. We survived border raids and bloody battles during the Civil War, and in spite of this turmoil (or perhaps because of it) we drafted our constitution as a Free State in 1859. Kansas extended the right to vote to women in 1912. And we were only the fourth state to ratify the 19th Amendment overwhelmingly in 1919 to ratify the Amendment only six days after the first three states did—because in Kansas, it’s not about being the first so much as it is about getting it right). When the infamous Triple Play occurred in January 1957—a political maneuvering that still leaves me speechless, when a lame-duck governor was sworn in as Kansas Supreme Court justice only days before he was to leave office—Kansans were outraged and passed a constitutional amendment that very year to insulate the state’s high court from politics.

For these same reasons, I’m grateful to be a member of the Kansas bar, practicing among attorneys who understand the balance between life and work—people I can trust and admire. This spirit of congenial professionalism is unfortunately not always the norm across the country. And for all of the reasons Jerry Green listed in his column last month, I’m grateful that the KBA is a voluntary bar association. (After all, in Kansas, with our entrepreneurial spirit and individual autonomy, we wouldn’t have it any other way.)

I love Kansas geography. Part of the joy of practicing in this state is driving through the Kansas countryside to meet clients, conduct investigations, and travel to hearings. Anyone who spends more than a few passing hours here should understand that Kansas is not “flat.” People who dub Kansas a “flyover state” have never experienced the splendor of the flint hills in the spring—when the hills are covered with wildflowers—or the majesty of Kansas’ northeastern forests in the fall. These people have never looked up to see the stretches of blue sky in western Kansas that go on forever, or watched a thunderstorm roll in on an early summer evening. They have never stopped to appreciate the picturesque beauty of southeast Kansas where I grew up, or seen the resilience of Kansas in a reclaimed strip mine turned wildlife sanctuary.

In Kansas, we understand the presence of mind that comes from vast spaces. We know what it’s like to see the stars. It is no coincidence that our state motto is, “Ad astra per aspera.” Even when we vehemently disagree, we are all staring at the same constellations and feel the same wind against our faces. And when we look up, we are reminded that we are connected to and part of something much bigger than ourselves.

Of course, this is not to say that Kansans see eye-to-eye on everything. We don’t. We each come with unique experiences, upbringings, philosophies, and faiths. But I do believe that Kansans share a fundamental belief in humanity and a connection with one another. Frankly, that’s why Brandon and I moved back after being away for law school. There is something here that changes you and makes you a better person.

Thus, as we enter this holiday season, I challenge us to be mindful of all of the reasons we have chosen to spend our days as Kansas lawyers. In the words of P.S. Baber in Cassie Draws the Universe:

It goes with you, wherever you go. Somehow, the prairie dust gets in your blood, and it flows through your veins until it becomes a part of you. . . . All that—it’s etched into your soul and it colors the way you see everything and it becomes a part of you. Eventually when you leave, everything you experience outside of Kansas will be measured against all you know here.

It’s true . . . and I’m so grateful. Here’s to another hope-filled and engaged year in 2015.

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.

sarah.warner@tqlaw.com
Kan We Connect?

The late comedienne Joan Rivers’ signature opening line of her comedy routine was “Can We Talk?” In asking this question Rivers was setting up the audience for some funny observations after which she would conclude with a rhetorical question, “am I right?” followed by audience applause confirming a positive answer to the question.

While Rivers’ question was offered in a humorous context, she was also tapping into a serious, ever-present desire we all share – to connect with each other!

Making connections is what we do each and every day at the KBA Lawyer Referral Service (LRS)!

In 2015, to help potential legal clients better understand the KBA LRS, we are becoming KanConnect!

KanConnect reflects what we do! Every day we KanConnect clients with qualified, experienced professional Kansas lawyers – you!

We know we KanConnect clients and lawyers because more than 1,000 potential clients call us at (800) 928-3111 every month!

We think if we KanConnect you with fee-generating clients you would be interested. Am I right?

Cue the applause, because we KanConnect a client with the right lawyer – you! And we KanConnect clients and lawyers – right now!

As a member you KanConnect right now as well – in two ways.

First, you can enroll – right now – with the KBA LRS for only $100 and receive referrals for the rest of 2014 and all of 2015! There is no more direct, cost-effective way to have clients connected with you than by enrolling with KanConnect! You can enroll online at the KBA website, by downloading the PDF enrollment form and mailing it to us, or by requesting an enrollment form be mailed to you.

Second, when current clients or new callers to your office have legal needs outside of your practice area, remember that your colleagues here at the KBA LRS KanConnect them to qualified, professional Kansas lawyers like you – and that when other KBA members do likewise then we KanConnect such a referred client with you – if you have enrolled with the KBA LRS!

At KanConnect we are committed to making stronger and more frequent connections. Recently we surveyed the opinions of the current panelists of the LRS concerning our operation. In essence, like Joan Rivers, we asked our panelists, “Can We Talk?” Seventy-three percent of our panelists were satisfied with the performance of the LRS. As our target is always 100 percent satisfaction, and since improvement is always a continuous process, we accept the challenge to do better.

We are especially focused on improving the areas of referral screening and case status reporting procedures. Some things we are working on to do better include:

Screening

1. We have expanded our interview questions, including inquiring about whether clients have already spoken with an attorney and why they need referral to another attorney.

2. We are generally providing more detailed information to clients when offering a referral for their consideration.

3. Our goal is more fee-generating clients – not just more referrals!

Our efforts may already be making some difference. For example, in October 2013, LRS panelists accepted 362 referrals, while this October, panelists accepted 190 referrals. In some cases, our screening may have caused a panelist to decide not to accept a referral. In other cases, we may have increased the number of referrals to non-attorney resources (state agencies or small claims court, for example) that would be able to provide more appropriate assistance.

This is only a one-month snapshot. We will continue to track these metrics and compare our results with past results before drawing any definitive conclusions. We are prepared to respond to the data and what it tells us about the appropriateness of our responses to panelists and clients.

Speaking of clients, we will soon begin conducting surveys of clients to whom we provided service in October 2014. While the monitoring of the number of referrals accepted by attorneys is important, as noted above, the more important metrics we will be tracking are:

1. The percentage of clients who report themselves satisfied with the results of our services; and

2. The number of attorney-panelists who have been retained by clients resulting from the referrals.

Case management

1. We are currently evaluating the case status reporting and payment processes. We hope to find ways to streamline those processes consistent with our obligations to ensure fiscal and program accountability.

2. We are also reviewing the information for each panelist contained within our LRX software database and considering how to efficiently update such information.

Outreach

As a result of our survey of LRS panelists, we now have a better understanding of their needs and wants. With our upcoming survey of LRS clients, we expect to gain greater understanding of client needs. In early 2015 we look forward to expanding our outreach efforts. We know we KanConnect more effectively with clients and attorneys.

When we have scheduled these events we will notify all KBA members through a KBA Alert. We look forward to connecting with many KBA members, including both current and prospective panelists. We KanConnect!

About the Author

Dennis Taylor is the director of the KBA Lawyer Referral Service. He was a Kansas Supreme Court research attorney and a practicing attorney in Topeka. Taylor has served as an adjunct instructor at Washburn University, and served in city, county, and state government management positions in Kansas, Missouri, and New Mexico for over 25 years.

dtaylor@ksbar.org
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By Marilyn Harp, Kansas Legal Services executive director, Topeka

IOLTA Funds Help Victims of Domestic Violence Across Kansas

K ate and Pete were having trouble. As unmarried parents, raising a 3-year-old together was rocky. Pete called Kate drunk one night. He told her he would leave with the child, so he didn’t have to pay child support and threatened her safety. She reached out for legal help. Kansas Legal Services (KLS) was able to assist, through funding provided by the Kansas Bar Foundation’s IOLTA program. A Protection from Abuse case that Kate had previously filed and a paternity action were resolved, after her attorney arranged for a special process server to give notice to Pete. A firm schedule of parenting time got Pete into parenting class and gave both of them the structure they needed to focus on appropriate parenting during the time they had their son. Most importantly, their son is thriving in a much more stable environment.

Addressing legal concerns related to domestic violence continues to be a priority for KLS staff attorneys. IOLTA funding allows that to occur. KLS received $43,120 in 2014, enough to help 250 families across the state stabilize their lives and begin their move out of poverty. The money is spent primarily on staff salaries in each of the 11 KLS offices, making it available to serve clients in each Kansas county. Eligible clients must have household income below 125 percent of the Federal Poverty guidelines, less than $25,000 for a family of three.

At least 615,000 Kansans are eligible for services from KLS, based on their income. Of those, 40,000 families will recognize that they have a legal problem and apply for services in 2014. Because there is no Constitutional right to counsel in civil cases, KLS must provide services at a level dictated by funding and available staff. Every day, KLS must determine which applicants have the greatest need for legal help and must turn away nearly half of those who apply for legal services. Priorities for services include family law cases involving domestic violence, and some housing and consumer matters. All services provided by KLS are aimed at dealing with the barriers that keep a family living in poverty. About 20,000 will receive advice or full representation from an attorney. Others will receive suggestions of other options to obtain legal resources or self-help resources outside the legal system.

Judges report that more than 50 percent of the family law litigants in their courts do not have legal representation. Mostly, this is because they don’t have the money to hire an attorney. Judges and court clerks needed a way to direct unrepresented persons on how to get the right paperwork filed. KLS has developed an extensive set of online forms. Working with the Kansas Judicial Council, forms are available for self-represented litigants to file or reply to a divorce action. Newly created forms help unmarried parents file or respond to a paternity action. Low-income persons can choose to meet with a KLS attorney to review the forms before filing them in Court. The forms can be viewed on the KLS website at http://www.kansaslegalservices.org.

KLS is fortunate to have a board of directors, made up of attorneys and low-income persons from across the state. Amy Fellows Cline, of Tripplet, Wolf & Garretson in Wichita, serves as the board president. Bob Stephan has served as the KBA appointee to the board for the past six years.

As lawyers, we know first-hand the value and necessity of quality legal representation. We see victims of domestic violence, abused children, and families losing their homes all too frequently because they cannot afford a lawyer. We have a professional responsibility to help others in our community gain access to the justice system to protect their rights, freedom, homes, livelihoods, and families. Legal needs studies have consistently found that less than 40 percent of low-income people get the legal assistance they need, and funding per eligible person has dropped drastically in recent years. This is a crisis and lawyers must get involved. Supporting civil legal aid is a way to work for justice and access for all. The KBF’s commitment to maintain and expand the IOLTA program is one way Kansas lawyers answer that call.

2015 IOLTA Grants

<table>
<thead>
<tr>
<th>Service</th>
<th>Amount</th>
</tr>
</thead>
<tbody>
<tr>
<td>Kansas Legal Services</td>
<td>$52,883</td>
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<tr>
<td>National Institute for Trial Advocacy</td>
<td>$8,776.50</td>
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<tr>
<td>KBA Law-Related Education</td>
<td>$2,340</td>
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<tr>
<td>KBA YLS Mock Trial Program</td>
<td>$6,000</td>
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<tr>
<td>El Centro de Servicios Para Hispanos</td>
<td>$2,340</td>
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<tr>
<td>University of Kansas School of Law</td>
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<tr>
<td>Medical Legal Partnership Clinic</td>
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Total: $79,999.50

2015 Class Action Residual Fund Grants

<table>
<thead>
<tr>
<th>Service</th>
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<tbody>
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<td>Kansas Legal Services</td>
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<tr>
<td>CASA of Kansas</td>
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<tr>
<td>Western Professionals/Immigration</td>
<td>$6,800</td>
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<tr>
<td>SAFEHOME Inc.</td>
<td>$5,000</td>
</tr>
<tr>
<td>Kansas Coalition Against Sexual &amp; Domestic Violence</td>
<td>$3,000</td>
</tr>
</tbody>
</table>

Total: $64,800

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In Search of Precision

I remember watching our moot court competition finals in one of my first few years teaching. The panel included Justice Clarence Thomas and then-Tenth Circuit Judge Deannell Recce Tacha. As usual the moot problem was based on a case pending before the U.S. Supreme Court. One student unfortunately drew the short straw and had to argue that in the context of a particular case the word and actually meant or. Justice Thomas of course didn’t ask the student any questions, but the student barely finished “May it please the court” before Judge Tacha leaned forward and asked him something along the lines of “counsel are you seriously asking this court to find that and means or?”

Lawyers are trained to make arguments about what words mean. Because we are so trained, we can come up with a reasonable argument why and means or. But and does not mean or – at least this is so for all people who are not lawyers. Even for lawyers, and should never mean or in a carefully drafted document.

Arguing what words mean after the fact is easier than drafting them in the first place. When we have to draft or adapt a document subject to interpretation, we often won’t deviate from the language of an earlier document. Even though it was never challenged, we infer the language is reliable. We remain stuck on the old language even when we can improve it. But we should improve it.

To improve your form documents purge these words: and/or, shall, such, and said. Consider at a minimum replacing these words with a word or phrase that avoids the ambiguities explained below.

And/or isn’t actually a word, it’s a dreaded slash word like he/she that is never used in speech. This may be reason enough to avoid using it. More importantly, it’s usually unnecessary or it’s ambiguous when used. A common way I see and/or used is as a synonym for or. Compare these sentences:

You must present your passport and/or another form of identification.

You must present your passport or another form of identification.

Both sentences mean the same thing. Using and/or when or does the job is confusing and simply unnecessary.

The argument for using and/or is usually that it is an effective shorthand way of communicating either X or Y or both. This argument has appeal. An employer’s policy might state:

Your uniform shirt must be red and/or blue.

This indicates that the employee’s uniform shirt may be red, blue, or red and blue. In this instance and/or is more concise and arguably more efficient. Because and/or has so commonly been used as a synonym for or, however, you create an ambiguity when you use it. In a complex agreement or when the stakes are high, it’s better to add a few words and be more precise by saying X or Y or both.

Shall is another word that has become ambiguous because of misuse. Many legal writing experts suggest completely avoiding it. Australian, British, and Canadian proponents concluded lawyers could never be trained to use the word correctly. As a lawyer, I disagree that lawyers can’t be trained to use a word correctly. As a lawyer, though, I’m practical. Why use a word that causes ambiguity when you can easily replace it? Also, no one uses shall in common speech, so why use it in a document we want non-lawyers to understand?

Shall often substitutes for lots of other words like does, will, should, might, must, or may. The ambiguity is greatest when we use shall more than one way in the same document. A legal writing colleague noted she counted 66 shalls in the first 20 pages of a standard loan agreement. In 12 of the 66 instances, it meant has a duty. In 33 instances it meant will. And in the remaining instances it was essentially a needless word because it was used in the phrase shall mean when means would have sufficed. This kind of inconsistency will create arguments regarding the drafter’s intent.

The correct or clearest meaning of shall is has a duty to. If you are using shall to mean has a duty to, you are likely using it correctly. But if you use it in the following ways, you are using it incorrectly:

To describe meaning: The interest rate shall be 6%.

Footnotes

1. Courts have struggled with whether and means or and vice versa in a surprising number of cases. See, e.g., Lawrence M. Solan, The Language of Judges 45-55 (Chicago 1993) (collecting numerous cases).


7. Frost, supra note 5.

8. It was used as in “Closing Date shall mean the date on which the Closing occurs.” But 151 other defined terms followed an “X means Y” format instead of an “X shall mean Y” format. Id.


10. See Garner, supra note 4.
**To describe a future action:** If . . . then the contract price shall be increased.

**To impose an obligation on an inanimate object:** If rent is not paid, this Agreement shall terminate.9

In each of these situations, if you substitute has a duty to for shall, the sentence makes no sense. Because shall is difficult to use and because other common words are less ambiguous, prefer another word. When imposing obligations, must is often a better choice.10 The drafters of the Federal Rules of Civil Procedure amendments so concluded when they replaced shall with must throughout.11 For obligations in private agreements, when must sounds bossy, will is a better choice.12

Finally, do not use said or such unnecessarily or incorrectly in your writing. New law students use these words a lot as they refer to agreement or such contract. They think the words sound lawyerly. That’s unfortunate. I wonder if I’ll still be teaching when these words – and others like wherefore and hereafter – don’t sound lawyerly. Many times said and such can be replaced with the. When they can otherwise be replaced with the, said and such are unnecessary and pure legalese. Also, such and said aren’t proper equivalents of this, that, these, or those and when used as equivalents can often be ambiguous. The best practice is to replace them with this, that, these, or those and a clarifying noun or phrase as appropriate. Even if you have to add words to replace said or such, any lack of concision will be more than outweighed by your increased precision.

**About the Author**

Pamela Keller is a clinical associate professor and the Schroeder Teaching Professor at the University of Kansas School of Law. Keller also directs the lawyering skills program and the judicial clerkship program. Before teaching, she practiced employment law with Ice Miller in Indianapolis and clerked for the Hon. John W. Lungstrum.

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

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11. Id.

12. But see Kenneth A. Adams, Contract Drafting: Making Sense of Shall, N.Y.L.J. (October 2011), http://adamsdrafting.com/downloads/nylj-shall-101807.pdf (indicating it’s best to eliminate shall from court rules, statutes, and consumer contracts, but shall should still be used to mean has a duty to in business contracts).
The Journal of the Kansas Bar Association

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Can we learn anything from Peter Pan? Yes, I think we can. But we may have to dig down a bit. It seems an unlikely source — a story about a boy who doesn’t want to grow up. Peter Pan is a character created by Scottish novelist J.M. Barrie. A mischievous boy who can fly and never grows up, Peter Pan spends his never-ending childhood adventuring on the small island of Neverland as the leader of his gang, interacting with mermaids, Native Americans, fairies, pirates, and occasionally ordinary children from the world outside. His name and playing the pipes or flute suggest the mythological character Pan.

We could all sound quite scholarly going on about the implications and ramifications of living in Neverland and not growing up. There is a benefit to retaining some of the wonder and joy of childhood as we advance in life. But the topic of this piece is how Peter teaches the children to fly — he blows fairy dust on them and then he says: “Think lovely thoughts.” And indeed, even in the practice of law, thinking lovely thoughts can make the difference.

(A personal aside: In one line of the song he admonishes, “Lovelier thoughts, Michael,” and I so regret I did not become aware of this particular lyric until after my dear brother Michael died. I would have loved to instruct him, as only a big sister can, to “think lovelier thoughts.”)

So, lovelier thoughts to the children include picnics, summer, flowers, and of course, candy. All qualify as lovely things to think about for sure. But each of us needs to identify what constitutes our own lovelier thoughts. Sometimes this means becoming aware of our negative self talk — “I’ll never get this done; I’m not smart enough, good enough, rich enough” and then changing it into positive self talk. Like, “I can get this done on time if I start now” or “I have what I need to grow and thrive.”

You might say either “How trite, cheesy, or cliché” or “That positive stuff isn’t true.” But the negative self talk isn’t totally true either, so why not go with something positive and make it come true? And yes, it might be a bit of a cliché, but if it works and you feel better, who knows and who cares?

Another way to make positive thoughts work for you is as motivation. The children keep repeating “Candy!” which is always a big motivator for youngsters. An adult equivalent might work for us. Set a goal and when you reach it, reward yourself with something enjoyable (but preferably not unhealthy). Finish a trial, then take a half day off and go to the art museum or walk in a park or take a little nap. All these things enrich our life and make it worth living. And they help us follow the Pillars of Professionalism approved by the Kansas Bar Association and the Kansas Supreme Court, among others. A happy, healthy lawyer is almost always a good lawyer.

So where does KALAP fit in this sea of positivity? Our theory is that happy, healthy, good lawyers are less likely to fall prey to the ills that too often afflict our profession. We are about prevention and wellness as much as remediation and assistance. ■

About the Author

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

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Footnote

1. The late Chief Justice Robert E. Davis (1937–2010) inspired these pillars of professionalism. The chief justice “always maintained his sense of grace and civility” and was a model of professionalism. See 79 J. Kan. B. Ass’n 10 (Oct. 2010).
As a dual degree student working on a juris doctorate and a master’s in East Asian Languages and Cultures, I am inevitably always asked where it is I hope these two degrees will lead me. It’s a fair question and the best answer I have is, hopefully anywhere.

I spent this past summer in Beijing doing an intensive Chinese language program. To what extent does a summer studying Chinese in Beijing bear on my legal studies? More than you might think. In an increasingly globalized world, language skills are becoming especially important and as multicultural interactions increase, so too does the value of language skills. This summer I accomplished my mission of improving my Chinese language skills, but as I now reflect on my summer, I realize many memories and lessons I brought back are invaluable souvenirs.

I learned that learning is a continual process. I have been advised time and again that the practice of law truly requires practice. It is a valuable kernel of truth that is applicable to any study one undertakes, whether it is the study of law or the study of a foreign language. Regardless of how many hours, months, or years I have spent studying, there will always be new developments. Statutes and case law change and evolve, so too do the ways in which people, particularly young people, communicate and use language to express themselves. Complacency is not just standing still; it is actually taking a step backwards. Each day is an opportunity to build upon yesterday’s progress.

I learned the importance of encountering the uncomfortable. There were plenty of moments where I felt uncomfortable and out of place in China. The real work has not been forgetting those uncomfortable moments. The real work has been learning to embrace those moments as experiences that, if nothing else, have built character and molded me into a person who is able to find comfort in the uncomfortable. From the stories experienced lawyers have kindly passed on, it sounds as though being a lawyer often involves helping clients through some of the most uncomfortable moments in life. Knowing how to guide yourself through those moments can go a long way in counseling others to do the same.

I learned never to underestimate the healing power of a good meal. The intensive language program I enrolled in put the tense in intense. I spent five hours a day in classes, had a quiz every single day, a test every single week, and a weekly oral presentation in Chinese. There were many days when it felt impossible to keep up that pace. Those were the days I treated myself to a good meal. A good meal can provide a moment of respite and gratitude when you need a reminder about what’s important in life. In my case the reminder was that each day’s hard work was not a means to an end, but an end in itself. Hopefully this is the lesson I’ll keep in mind as I continue to tackle my studies and my next challenge, embarking on my career. There will undoubtedly be challenges, including many that are impossible to predict. My experiences in law school and around the world might not always provide the answers, but they have provided me the tools to find those answers on my own.

About the Author

Kasey Considine is a J.D./M.A. East Asian Languages and Cultures dual degree student at the University of Kansas School of Law. She studied at Beijing Normal University through Princeton in Beijing’s Summer Program on a FLAS Fellowship. She is on the Jessup International Moot Court team and served as president of the International Law Society at the University of Kansas School of Law.

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I miss the giant catalogs that used to come this time of year. Splaying out on the living room floor while flipping through the massive toy section would consume several hours and inspire considerable daydreaming. Sifting through websites as an adult does not recapture the feeling but I make do. Gadget manufacturers still try to capture a little holiday buzz for their balance sheets and oblige with autumn gizmo releases that can prompt a daydream or two. As with the catalogs and comics of olden days, part of the fun is divining whether the picture and pitch is genuine or whether the reality of a gadget will turn out to be a cardboard Polaris Nuclear Submarine or X-ray specs.

**Ryobi Phone Works**

Ryobi launched Phone Works – a new line of gadgets to “… combine pro-quality measuring tools with smartphone technology to bring you a better way to manage home improvement projects.” Each of the Phone Works devices is compatible with both iPhone and Android phones and offers a free app to provide an interface and additional features. Phone Works tools include:

- **Inspection Scope ($99.97)** with an inspection camera squeezed into a three foot long, submersible cable that can be squeezed into ducts, conduits, and crannies, saving video or still images complete with voice notes.
- **Infrared Thermometer ($49.97)** measures surface temperatures in real time from -22°F to 662°F to assist in finding air leaks at windows and doors or surreptitiously checking your coworkers for feverish signs of Ebola, flu, or strep throat.
- **Noise Suppressing Earphones ($19.97)** have a safety certified Noise Reduction Rating of 30Db and the free application is customizable to suppress noises over 82Db. Courtroom use to suppress angry pronouncements from the bench is not allowed.

Ryobi’s Phone Works devices are available at ryobitools.com/phoneworks but there is not a clear explanation about how the gadgets improve upon stand-alone devices that do the same tasks.

**FLIR One**

Way cooler than the Ryobi Phone Works gizmos is the FLIR One (flir.com/flirone). FLIR is the abbreviation for Forward Looking InfraRed and the FLIR company has brought this technology to the iPhone for just $350. The device snaps onto the back of the phone and provides a live video feed of the energy (infrared radiation) emitted from heat sources.

The grown-up, home user focus of the FLIR One is as an aid in evaluating homes for energy efficiency or hidden maintenance and safety issues. Pointing it at walls, floors, and the ceiling can help reveal drafts, gaps in insulation, or inefficient appliances. It can also detect electrical shorts in wiring, water leaks, or nests of rodents and insects behind walls. It could even detect whether your neighbor’s son who is home from college on winter break has taken up gardening in the basement.

The FLIR One completely changes the nature of hide-and-go-seek after dark in the pitch black of night. The person who is “it” gets the gadget and can hunt down hiders by the heat signatures of their bodies. What could be better on a moonless winter night than recreating the “Detour” episode from “The X-Files”? The iPhone can even play spooky mood music as you scan the yard for the bright red blobs giving away your opponents’ positions.

**August Smart Lock**

If the game gets a bit too creepy, and getting behind a locked door seems wise, a new smart lock from August (august.com) might be appropriate. Unlike other electronic locks, the August Smart Lock is an attachment to existing locks – it replaces the interior knob but the existing internal lock components and exterior door hardware are untouched.

The Smart Lock is a keyless system that uses encrypted software “keys” on smartphones (Android is actually the native app so new features roll out to Android users first). Key management is as simple as selecting contacts from your phone and sending them a software key. Those keys can be programmed to open the lock any time, during a defined window on a particular date, or during certain hours on a repeating schedule. The Bluetooth-enabled lock can be set to automatically lock and unlock as you approach or depart providing hands-free access control. The whole thing is battery powered for wireless capability and, if the batteries die, the lock defaults to normal, physical key operation. Retail price is $250.

**NoPoPo Batteries**

Battery-powered devices can be worrisome – especially if the device controls access to your home. Having backups on hand is always recommended but sometimes your stash is raided to fuel game controllers or iPod speakers. A Japanese battery called the NoPoPo (No Pollution Power) provides an additional option. These AA batteries require injection of a liquid to activate. Fill them with water, beer, wine, or tears for immediate power. These are pricey at $27 plus $16 shipping from japantrendshop.com. It is cheaper to make your own battery from dirt (Youtube: dirt battery).

**Dream Young**

Do not get trapped in the dull smartphone wars which have been reduced to little more than whipping out a ruler to measure screen size. Wade into the world of real gadgets and gizmos where the crazy, plausible, desirable, and dubious swirl around as fresh daydream fodder. The adult-sized Razor Crazy Cart (razor.com) coming this Christmas might cause broken bones or never work at all but I cannot think of a better daydream to transport me back to the joys of being 8 years old.

**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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Vern Miller, Obscenity, and the Streaker

Editor’s note: This article has been reprinted from the March 2008 KBA Journal.

Vern Miller’s law enforcement career among Kansas lawyers has no peer. It began in the 1940s when he was a motorcycle officer in Sedgwick County, then deputy sheriff. Following that, the voters elected him to county sheriff, which he held for three two-year terms. While sheriff he commuted three days a week to Oklahoma City University Law School, where he earned his degree in 1966. Three years later, in the fall of 1969, Gov. Docking asked him to run on the Democrat ticket for attorney general, which Miller did, winning 51-49 percent. Miller then ran and won again in 1972 in a presidential election year against a tidal wave of Republicans. That year Richard Nixon swept Kansas taking 67 percent of the statewide votes. Miller’s margin was identical — 67 percent, and he won all 105 counties.

Logically, Miller next ran for governor in 1974, losing to Robert Bennett by 3,800 votes. A third-party candidate, running on the prohibition ticket, Marshall Uncapher, swung the election, picking up 11,000 votes. Many would find this to be ironic — Vern Miller’s penchant for enforcing the state’s arcane liquor laws is known to every Kansas attorney over the age of 50. For instance, Miller gained national attention when he raided an Amtrak train in Newton. The offense: serving liquor by the drink.

Following the 1974 election Miller went back to Wichita, ran for district attorney and defeated the incumbent, Keith Sanborn. Miller assembled a group of young prosecutors, one of whom was Stephen Tatum, now a Johnson County district judge. “Vern became D.A. without a lot of trial experience, and he told us to do our jobs, and he would support us, and that’s the way it was. He didn’t interfere, but was loyal and supportive. Loyalty was important to Vern, and he amassed many friends through the years, who were similarly loyal to him.”

But Miller’s time in law enforcement came at the crossroads of great change at many levels, including drug use on our college campuses, and also changes to our country’s obscenity laws. After all, it was the spring of 1973, when the U.S. Supreme Court decided landmark rulings defining obscenity. The Justices added the terms “contemporary community standards” and “prurient interest” to our legal lexicon.

In September 1974, Linda Lovelace, whose film credits need no elaboration here, filmed “Linda Lovelace for President.” The movie includes a parade scene filmed on Jayhawk Boulevard, with 200 students and some members of the KU basketball team. (In the movie, I’m reliably informed — SPOILER ALERT — Linda wins and implements major policy changes on Capitol Hill.)

But there is one story about Vern Miller you may not know. And it has its genesis in Miller’s fight against obscenity in Wichita. You see, following the Supreme Court’s decisions, Vern lead the charge to define Wichita’s community standards, eventually charging some bookstores and movie houses with selling obscene material. Miller’s efforts found support in a large group of ministers and community leaders. And it culminated with a gathering at Century II in late February 1977.

The Wichita Eagle reported it this way: “Miller received a standing ovation as he stepped to the microphone, and Miller emphasized that the laws on the books should be aggressively enforced.” The Eagle story continued: “While one of the ministers was saying a prayer, the otherwise orderly gathering was disrupted shortly after it began by two streakers who ran across the stage wearing only socks and track shoes. One of the streakers escaped, but the other … was tackled by Miller as he ran across the stage.”

Miller recently recalled what happened: “Anita Bryant was on stage with us. So was Police Chief Richard LaMunyon. It was a ‘Who’s Who’ of notable public figures in the city. The place was wall-to-wall jammed with people. And here came this streaker. He ran across the stage so fast, no one quite knew what had just happened. But when the second guy bolted across, I was more prepared. He was fast, probably because he knew the surprise element was now gone. I jumped up and tackled him and down he went. Someone covered him up. It was crazy, wild. Anita Bryant later told me she had never seen anything like it before in her life. And neither had I.” Quite a statement for someone, who, in his time, had seen almost everything.

About the Author

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

Changing Positions

Michael Baxter has joined the Jeter Law Firm, Hays.

Derek L. Brown has been named the Franklin County counselor in Ottawa.

Jeffrey A. Chanay has been promoted to chief deputy attorney general in the Kansas Attorney General’s Office, Topeka.

Katherine S. Clevenger has joined Levy Craig Law Firm P.C., Kansas City, Missouri, in the Family Law department.

Gregory S. Davey has joined The Builders Association, Kansas City, Kansas, as labor relations director.

Elizabeth A. Evers and Joseph M. McGreevy have joined Sanders Warren & Russell LLP, Overland Park, as associates.

James R. Holland II has been named managing partner of Fisher & Phillips LLP, Kansas City, Missouri.

Seth Jones has been appointed by Mayor John Wright as the new municipal judge in Erie.

John C. Kanaga has joined McPherson Law Firm, Leawood.

Jonathan D. Weishaar has joined Ralston Pope & Diehl LLC, Topeka.

Douglas P. Witteman, Burlington, has been appointed by Gov. Sam Brownback to the 4th Judicial District Court.

Changing Locations

Stueve Siegel Hanson LLP has opened an office in New York City at 1359 Broadway, Ste. 2001, New York, NY 10018.

Obituaries

John Anderson Jr.

John Anderson Jr., 97, Kansas’ oldest living former governor, died September 15 at the Good Samaritan Center in Olathe. Born on May 8, 1917, near Olathe to John and Ora (Bookout) Anderson, he served as the 36th governor of Kansas from 1961-65. Anderson’s political career began in 1947 when he was elected Johnson County attorney, a position he held for six years. From 1953-56 he was a member of the Kansas State Senate, and in 1956, he was appointed attorney general, where he served until 1961 when he began his first term as governor.

After returning to Johnson County, Anderson was affiliated with a number of law firms. The Johnson County Bar Association honored him with the Justinian Award in 1996.

Anderson is survived by three children, John Anderson III, King David Anderson, and Kerry Anderson Russell; six grandchildren, Phillip Russell, Erin McDonald, Shannon Hermsen, Kelsey Farnam, Scott Russell, and Mary Dickson; and six great-grandchildren. He was preceded in death by his wife, Arlene Auchard; his parents; and three brothers, George, Joe, and Dean Anderson.

Donald A. Frigon

Donald A. Frigon, 61, died September 5 in Dodge City. He was born June 21, 1953, to Bernie and Betty (Fahrbach) Frigon. He is survived by his wife, Ann C. Hastings.

Charles Nelson Henson Jr.

Charles Nelson Henson Jr., 83, of Topeka, died October 3. He was born November 14, 1930, in Belleville to Charles Nelson and Alice Harbers Henson.

He graduated from the University of Kansas in 1952 and from its law school in 1955, where he was a member of Phi Delta Phi. After serving in the U.S. Air Force as an office in the Judge Advocate General, Henson returned to Topeka to become an assistant attorney general for Kansas. He then went into private practice and practice for 52 years.

Henson was a member of the Topeka, Kansas, and American bar associations. He served as president of the TBA and Downtown Topeka Rotary Club (honored as a Paul Harris Fellow), was a Fellow of the American Bar Foundation, served as chair of the Topeka Community Foundation, and was also a member of he A.F. & A.M.

Henson is survived by his wife, Sally Francis Henson; daughters, Meg Propes, of Austin, and Anne Klingman, of Littleton, Colorado; brother, Harold Henson, of Prairie Village; and five grandchildren.

Wayne E. Hundley

Wayne E. Hundley, 83, of Topeka, died October 1. He was born April 19, 1931, in Lovemont. He attended school in Atchison and Oskaloosa, continuing his education at the University of Kansas.

Hundley graduated from Washburn University and received his juris doctorate from Washburn University School of Law. He enlisted in the U.S. Army during the Korean War and continued serving in the Army Reserves, retiring as a lieutenant colonel. After being in solo practice for many years, he joined the Kansas Attorney General’s Office under Robert Stephan as head of the consumer protection and antitrust divisions and was chief deputy attorney general. He was a municipal judge in Paxico and a judge pro tempore
for the city of Topeka's Sunflower ASAP Program for over 35 years.

Hundley was a vital part of the effort to assist Kansas lawyers that culminated in the establishment by the Kansas Supreme Court of a statewide program known as the Kansas Lawyers Assistance Program and was the first chairperson of this Commission. He was a member of the Kansas, Topeka, and American bar associations.

Hundley was to married Ann Biery; however, they were later divorced. Other survivors include three children, David Hundley, Steven Hundley, and Brynn Mrz; two grandchildren, Philip and Jayce, all of Topeka; and a sister Verna Pierson.

Claude L. Rice Jr.

Claude L. Rice Jr., 97, of Overland Park, died September 2. He was born June 8, 1917, in Coffeyville and graduated from Washburn University, where he received both his undergraduate and law degrees. After the events of Pearl Harbor he joined the Army Air Force, where he became a flight instructor.

After World War II, Rice returned to law practice and was soon appointed a Chapter 13 trustee for Kansas City, Kansas. After the Korean conflict escalated into war, Rice served the Department of Defense as a legal officer in Washington, D.C., before returning to Kansas City to resume his practice.

Rice was a member of the Wyandotte County, Kansas, and American bar association, and served a period of time as chair of the Corporation, Banking, and Business Law Section. In the mid-1950s, he co-founded Electronic Processing Inc., a computer firm that provided data processing services in every U.S. Bankruptcy Court in the nation. In 1965, he took a leading role in the formation of the National Association of Chapter 13 Trustees.

He is survived by his wife, Eva Zahoney Rice; a daughter; two stepsons; two stepdaughters; nine grandchildren; six great-grandchildren; and sister, Louida Arnold.

William F. Stahl

William F. Stahl, 89, of Junction City, died September 15 at Valley View Senior Life in Junction City. He was born March 4, 1925, in Junction City, the son of Edward John and Reta Mae (Cline) Stahl. After graduating high school in 1943, he immediately entered the U.S. Army and served in World War II. His military service included fighting with the 106th Infantry Division at the Battle of the Bulge, where he was wounded, and subsequently received the Purple Heart, and was a prisoner of war in Germany for five months.

After his discharge from the military, Stahl entered Washburn University and graduated from Washburn University School of Law in 1950. He practiced law for 60 in Junction City, including serving one term as Geary County attorney and county counselor for a number of years.

Stahl was a member of the Earl C. Gormely Post 45 of the American Legion, having served as commander and state judge advocate, the B.P.O.E. Lodge 1037 of Junction City, the Kansas Bar Association, and the Geary County Historical Society. He helped establish the Northeast Kansas Chapter of the Veterans of the Battle of the Bulge, the 40/8, the Union Lodge 7 A.F. & A.M., the ISIS Shrine Temple of Salina, the Scottish Rite of Salina, and was a longtime recruiter and supporter of the American Legion Boys State of Kansas, in which he received the “Friends of Boys State” award.

He is survived by his wife, Mary Lou Wall; son, Eric A. Stahl, of Junction City; two daughters, Jill D. Shaw and Martha Ann Mechley, both of Topeka; a grandson, Kevin W. Mechley, of Shawnee; and a sister, Elizabeth Hooper, of Sierra Vista, Arizona. Stahl was preceded in death by his parents and two brothers, Robert and Carl Stahl.

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**NOTICE OF AMENDMENT OF THE LOCAL RULES OF PRACTICE AND PROCEDURE OF THE U.S. BANKRUPTCY COURT FOR THE DISTRICT OF KANSAS**

The U.S. Bankruptcy Court for the District of Kansas gives notice of Proposed Local Rules of Practice and Procedure.

The Proposed Local Rules amend the present Local Rules as recommended by the Bench and Bar Committee of the U.S. Bankruptcy Court for the District of Kansas with the approval of the Court.

Interested persons, whether or not members of the bar, may submit comments on the Proposed Local Rules addressed to the Clerk of the U.S. Bankruptcy Court for the District of Kansas at 401 N. Market, Room 167, Wichita, KS 67202. All comments must be in writing and must be received by the Clerk no later than December 26, 2014, to receive consideration by the Court.

Copies of the Proposed Local Rules will be available for review by the bar and the public from November 24, 2014, through December 26, 2014, at:

- Wichita Clerk’s Office
  204 U.S. Courthouse
  401 N. Market
  Wichita, KS 67202

- Topeka Clerk’s Office
  490 U.S. Courthouse
  444 SE Quincy
  Topeka, KS 66683

- Kansas City Clerk’s Office
  259 Robert J. Dole U.S. Courthouse
  500 State Ave.
  Kansas City, KS 66101


Copies of the Bench and Bar Committee Minutes, at which most of the proposed changes were discussed, are also available at [www.ksb.uscourts.gov](http://www.ksb.uscourts.gov).
The KBA Awards Committee is seeking nominations for award recipients for the 2015 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Overland Park. Below is an explanation of each award and a nomination form found on the next page. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! Deadline for nominations is Friday, March 6.

**Distinguished Service Award.** This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.

- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Phil Lewis Medal of Distinction.** The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

**Proper Professionalism Award.** This award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

**Outstanding Young Lawyer.** This award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

**Outstanding Service Awards.** These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

Outstanding Service Awards may be given to recognize:

- Law-related projects involving significant contributions of time;
- Committee or section work for the KBA substantially exceeding that normally expected of a committee or section member;
- Work by a public official that significantly advances the goals of the legal profession or the KBA; and/or
- Service to the legal profession and the KBA over an extended period of time.

**Pro Bono Award.** This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

- Lawyers who are now employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

**Distinguished Government Service Award.** This award recognizes a Kansas lawyer who has demonstrated an extraordinary commitment to government service. The recipient shall be a Kansas lawyer, preferably a member of the KBA, who has demonstrated accomplishments above and beyond those expected from persons engaged in similar government service. The award shall be given only in those years when it is determined that there is a recipient worthy of such award.

**Courageous Attorney Award.** This award recognizes a lawyer who has displayed exceptional courage in the face of adversity, thus bringing credit to the legal profession. Examples of recipients of this type of award in other jurisdictions include a small town lawyer who defended a politically unpopular defendant and lost most of his livelihood for the next 20 years, an African-American criminal defense attorney who defended two members of the white supremacist movement, and a small town judge who lost his position because he refused the town council’s request to meet mandatory quotas on traffic offenses. This award will be given only in those years when it is determined that there is a worthy recipient.

**Diversity Award.** This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:

- A consistent pattern of the recruitment and hiring of diverse attorneys;
- The promotion of diverse attorneys;
- The existence of overall diversity in the workplace;
- Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
- Involvement of diverse members in the planning and setting of policy for diversity;
- Commitment to mentoring diverse attorneys, and;
- Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
- Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disablement.

The award will be given only in those years when it is determined there is a worthy recipient.
KBA Awards Nomination Form

Nominee's Name ____________________________________________

☐ Phil Lewis Medal of Distinction  ☐ Diversity Award
☐ Outstanding Service Award  ☐ Professionalism Award
☐ Outstanding Young Lawyer Award  ☐ Pro Bono Award/Certificates
☐ Distinguished Government Service Award  ☐ Courageous Attorney Award
☐ Distinguished Service Award

Please provide a detailed explanation below of why you have nominated this individual for a KBA Award. Attach additional information as needed.

________________________________________________________________________
________________________________________________________________________
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________________________________________________________________________

Nominator's Name _____________________________
Address _____________________________________
Phone ___________________________ Email ___________________________

Return Nomination Form by Friday, March 6, 2015, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
21 Honored by the KBA for Their Service to the Profession

PRO BONO CERTIFICATES OF APPRECIATION

In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:

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- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low- and moderate-income persons.

Gary L. Ayers has practiced in Wichita with Foulston Siefken for over 30 years in both state and federal courts. He was a KBA continuing legal education presenter over the years in a number of different areas. His involvement with the Wichita Bar Association includes his service on the Legislative Committee, his quadrennial participation in the WBA Bar Show and his presentations at various WBA CLEs. Although he had an active family law practice for 20 years, and has more recently been involved as a mediator in several family law cases, he is probably better known for his commercial trial practice. He is a member and past board member of the Hon. Wesley E. Brown Inn of Court, a past president and board member of East Wichita Rotary Club, and a past board member of Youth Horizons, Music Theatre of Wichita and Stage One. His English and law degrees are both from KU.

Dr. Milfred “Bud” Dale is an attorney and psychologist in independent practice in Topeka. He earned his Doctor of Philosophy degree in developmental and clinical-child psychology from The Ohio State University in 1987 and his Juris Doctor from Washburn University School of Law in 2006. His legal and psychology practices focus on helping families in conflict. Dale has organized statewide trainings on alternative dispute resolution and case management for high conflict families and just completed organizing a program on the constitutional issues for parents in child in need of care cases. In addition to his pro bono work with Kansas Legal Services, he has volunteered for eight years as a co-leader and teacher of Horizons, a psychoeducational program for parents and children in high conflict families. He currently serves as a reviewing editor for the American Bar Association’s Family Law Quarterly, on the editorial board of the Journal of Child Custody and as an ad hoc reviewer for the American Psychological Association’s Psychology, Public Policy and Law. He was an invited member of the AFCC Think Tank on Shared Parenting and has provided invited commentaries on innovative ADR programs and AFCC’s Task Force on Domestic Violence. He was recently named to the AFCC board of directors.

John W. Huey is the principal of Prairie Capital LLC, a Kansas City-based investment management firm. He is a native of Kansas and graduate of the University of Kansas School of Law, as well as the School of Business. He practiced with a small law firm in Topeka immediately after graduating from law school before serving in a series of in-house corporate counsel positions, first with Borden Inc. in Columbus, Ohio. He then joined Butler Manufacturing Co. in Kansas City, Missouri, a heavy manufacturing company, where he served in a series of legal and management positions over a 26-year career, leading to the position of vice president, general counsel and secretary. Following the merger of Butler, he joined Tetra Industries Inc., a chemical company headquartered in Iowa, as vice president, general counsel and secretary, serving in that position until completion of the hostile merger of Tetra, which resulted in one of the 40 largest public merger transactions in the United States for 2010.

Kansas Legal Services Inc., a statewide program with 11 field offices, provides civil legal advice and representation at no cost or at reduced fees to income eligible individuals. KLS provided legal services to over 20,000 Kansans in 2013. KLS handles cases in the areas of consumer, employment, family, juvenile, health, housing, income maintenance and individual rights law. In partnership with the KBA, KLS seeks to engage private attorneys in support of its mission, providing direct legal services on a pro bono basis to low-income Kansans.

The Kansas City-based Shook, Hardy & Bacon LLP is an international law firm that has a legacy spanning more than a century and has grown to more than 450 attorneys in 12 offices across the United States and Europe. It is a leader in delivering pro bono legal services. SHB provides approximately 25,000 hours of free legal counsel on an annual basis, donating its expertise and resources to communities across the United States. Those pro bono efforts reflect the firm’s dedication to representing the underserved in matters as diverse in nature and scope as the attorneys who handle them.
John Paul D. Washburn is a sole practitioner from Topeka who founded the Washburn Law Office LLC in 2008. His practice focuses on providing access to legal services to those in the community who might not otherwise have the privilege of access to an attorney. He is one of six "parent attorneys" in Shawnee County, appointed to represent indigent parents. Washburn is also on the probate appointments list in Shawnee County, as well as a court-appointed attorney in City of Topeka misdemeanor cases. Over the years of litigating high conflict custody cases, Washburn saw the need for an alternative approach to contested litigation. In the fall of 2013, he opened The Washburn Mediation Co., which provides alternate dispute resolution services to the legal communities in Northeast Kansas in family law-related matters. As part of his commitment to provide access to services for families in need, he provides reduced fee services to the Washburn University School of Law Clinic, Kansas Legal Services, and upon judicial request. He also actively participates in the Pro Bono and Reduced Fee Programs through the KBA and Kansas Legal Services.

**PRO BONO AWARD**

The Pro Bono Award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor.

David J. Berkowitz graduated, with distinction, from the University of Kansas Law School in 1968 with his juris doctorate. He served as Douglas County attorney from 1972-76 and is a past president of the Douglas County Bar Association. He has also served on several committees of the KBA. Presently, Berkowitz is a solo practitioner in Lawrence with an emphasis on family law, commercial collection, criminal law, probate and small estates planning. He does his pro bono work through Kansas Legal Services.

Claudia J. Dawson graduated in 2006 from the Washburn University School of Law with Dean's Honors. She began working at a domestic litigation firm in January 2007 and was sworn in as a member of the Kansas Bar in April 2007. Since that time, she has practiced exclusively in the area of family law, and four years ago, Dawson became a solo practitioner. This year the National Academy of Family Law Attorneys named her a “Top 10 Under 40” attorney in Kansas. She is a member of the Kansas and Johnson County bar associations, and the Johnson County Family Law Inn of Court.

Nancy A. Ogle focuses her solo practice on appeals. She has provided representation to indigent biological parents whose rights have been terminated in adoption and child in need of care proceedings, as well as to indigent criminal clients. In addition to her appellate practice, she provides research and brief writing services to attorneys across the state. Ogle has practiced law in the Wichita area for 21 years. She received her juris doctorate from Washburn University School of Law in 1990. She is a member of the Kansas and Wichita bar associations, Kansas Association of Criminal Defense Lawyers, and Kansas and Wichita women attorneys associations. Ogle received KWAA's Jennie Mitchell Kellogg Circle Attorney of Achievement Award in 2008. Ogle served eight years on the Wichita Public Library board of directors and volunteers at the Kansas Humane Society, where she socializes cats.

**OUTSTANDING YOUNG LAWYER AWARD**

The Outstanding Young Lawyer Award recognizes the efforts of a KBA Young Lawyers Section member who has rendered meritorious service to the legal profession, the community, or the KBA.

Danielle M. Hall serves as the law practice services director for the KBA, where she provides members with an array of services and expertise to assist them in their daily practice. She spearheaded the development of the association’s Law Office Management Assistance Program, serving as the practice management advisor for the program.

Prior to joining the KBA, Hall worked at Cooper & Lee LLC, where she first served as a law clerk then a staff attorney, primarily practicing in the area of civil litigation. In addition to being the LPS director, Hall is also an adjunct professor at Washburn University School of Law, where she has served as a faculty member for the Intensive Trial Advocacy Program, Cross Exam and Voir Dire courses. She also spends her evenings during the school year coaching the trial advocacy competition teams at both Washburn Law and Washburn University, serving as a mentor to the students, helping the undergraduate students prepare for law school and the law school students prepare for practice. In the summer, she serves as a coordinator for the Washburn Pre-Law Camp for high school students.

Hall received her juris doctorate from Washburn University School of Law, where she was a national competing member of the Trial Advocacy Competition teams. She was inducted into the Order of Barristers in 2009. She currently serves on the board of the Kansas Women Attorneys Association as newsletter chair and is also an active member of the American Bar Association Law Practice Management Division, having served on the Diversity, Women Rainmakers and Ethics committees.

**DIVERSITY AWARD**

This award recognizes an individual who has shown a continued commitment to diversity; or a law firm; corporation; governmental agency, department, or body; law-related organization; or other organization that has significantly advanced diversity by its conduct, as well as by the development and implementation of diversity policies and strategic plans, which include the following criteria:
• A consistent pattern of the recruitment and hiring of diverse attorneys;
• The promotion of diverse attorneys;
• The existence of overall diversity in the workplace;
• Cultivating a friendly climate within a law firm or organization toward diverse attorneys and others;
• Involvement of diverse members in the planning and setting of policy for diversity;
• Commitment to mentoring diverse attorneys, and;
• Consideration and adoption of plans to continue to improve diversity within the law firm or organization, whereas;
• Diversity shall be defined as differences of gender, skin color, religion, human perspective, as well as disability.

The award will be given only in those years when it is determined there is a worthy recipient.

Capitol Federal Savings Bank’s first in-house counsel is a woman, and the CEO relies on a team consisting of five executive vice presidents: two African-American males, two white males and one white female. In addition, women hold almost 50 percent of all senior-, mid-, and entry-level officer positions.

Capitol Federal recently started a program aimed at assisting women to manage their finances knowledgeably. It also supports the Entrepreneurial & Minority Business Development Council, which provides assistance and programs to empower small, low- to moderate-income, minority and women-owned business enterprises. In addition, Capitol Federal allows time off for employees to deliver meals through Meals on Wheels Programs, which supports disabled and homebound Kansans.

The Capitol Federal Foundation sponsors community events, like Symphony in the Flint Hills, which make arts more accessible to people of lower economic circumstances.

OUTSTANDING SERVICE AWARDS

The Outstanding Service Awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing non-lawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.

• A total of six Outstanding Service Awards may be given in any one year.
• Recipients may be lawyers, law firms, judges, non-lawyers, groups of individuals, or organizations.

Outstanding Service Awards may recognize law-related projects involving significant contributions of time; committee or section work for the KBA substantially exceeding that normally expected of a committee or section member; work by a public official that significantly advances the goals of the legal profession or the role of the KBA; and/or service to the legal profession and the KBA over an extended period of time.

Thomas A. Adrian is one of the founders and shareholders in Adrian & Pankratz P.A. in Newton. He graduated from Washburn University in 1966 with a degree in business administration and Washburn University School of Law in 1969. He moved to Newton in 1972, where he has maintained his current practice.

Adrian is a community leader and volunteer. He was chairman of the board of trustees at Newton Medical Center (1987-93), president of the Harvey County Bar Association (1990-91) and a member of the Council of Finance and Administration for Kansas West United Methodist Conference (1992-2000) and president (1998-2000). In 1994, he was named Trustee of the Year by the Kansas Hospital Association, and in 1998 he was named Outstanding Citizen of the Year by the Newton Area Chamber of Commerce.

Hon. Karen Arnold-Burger became a member of the Kansas Court of Appeals in February 2011 after serving 20 years as the presiding judge of the Overland Park Municipal Court. She previously served as first assistant city attorney for Overland Park and assistant U.S. attorney for the District of Kansas. She is a past president of the Johnson County Bar Association, the Earl E. O’Connor Inn of Court and the Kansas Municipal Judges Association. She has taught for the last 15 years at the National Judicial College in Reno, Nevada, and has been elected by fellow faculty members to its Faculty Council. She is a graduate of the University of Kansas School of Law.

Sen. Stephen R. Morris attended Kansas State University, where he graduated in 1968 with a Bachelor of Science in agricultural economics. He then entered the U.S. Air Force as a pilot the following year, serving two terms of duty in Southeast Asia during the Vietnam War. In 1974, Morris transferred from active duty to the Air Force Reserve, where he retired in 1991. He began his career in politics when he was elected to the USD 210 Board of Education (1977-93). In 1992, Morris was elected to the Kansas Senate, where he served for the next 20 years. He was the chairman of the Senate Agricultural Committee (1997-2001) and chairman of the Senate Ways and Means Committee (2001-05). He served as Senate president from 2005-13, as well as president-elect and president of the National Conference of State Legislatures (2010-12).

Bryan W. Smith is the managing member of Smith Law Firm, where his practice focuses on complex business litigation and personal injury cases. Smith graduated cum laude from Washburn University School of Law in 1992, where he was a member of the Washburn Law Journal and Moot Court.

Since 2008, Smith has worked as a volunteer with the Kansas Lawyers Assistance Program helping attorneys and law students.
who have developed problems with drugs and alcohol. His primary focus has been one-on-one work with individuals to help them face their problem and enter the treatment process. Through KALAP he continues to work with those individuals after treatment as they learn to balance their lives and careers without the use of drugs or alcohol. Smith has acted as monitor on behalf of KALAP, meeting weekly with the people he monitors and attending 12-step meetings with them.

J. Ronald Vignery formed Vignery & Mason LLC with partner Jeffrey Mason in 1986 and is currently a partner of the Goodland law firm. He graduated from Pittsburg State University in 1966 and Washburn University School of Law in 1969, where he was a member of Phi Alpha Delta fraternity and Omicrom Delta Kappa Honor Society during his undergraduate years. Vignery was drafted into the U.S. Army in 1968 and selected for the U.S. Navy JAG Corps a year later. He served in the U.S. Navy from 1970-74. He was stationed at Com 13 in Seattle through 1972 and from 1972-74 was the legal officer for the Naval Hospital in San Diego.

Angel R. Zimmerman is a 2006 graduate of Washburn University School of Law and currently serves as managing partner of Zimmerman & Zimmerman P.A. She is a local and national speaker on collection law, ethics, and law practice management. She currently serves as president for the Law Practice Management Section of the KBA and is past president of both the Topeka and Kansas women attorneys associations. She serves as a director for the National Conference for Women Bar Associations and on the International J. Reuben Clark Society Women in Law Committee. Zimmerman received the KBA Outstanding Young Lawyer Award in 2009 and was a nominee for the ABA Outstanding Young Lawyer Award in 2010. She received one of the Top Performing Attorneys Awards from Capital One in 2009 and TLP Boss of the Year in 2011.

Emily B. Metzger has served as an assistant U.S. attorney for the District of Kansas since August 1982. She received her bachelor’s degree in secondary language arts education from the University of Kansas in 1977 and her juris doctorate from the University of Kansas School of Law in 1980. Following graduation, she clerked for the Hon. Robert B. Morton, U.S. Bankruptcy judge, from 1980-82, and then began her career with the U.S. Attorney’s Office, where she has handled both civil and criminal work and has served as chief of the Civil Division since 1991.

Metzger has served on the Executive Office for U.S. Attorneys Civil Chiefs Working Group, as an evaluator in the Executive Office for U.S. Attorneys peer review evaluation program, as a member of the Executive Office for U.S. Attorneys Case Management System Working Group, and as a member of the Director of the Executive Office for U.S. Attorneys Awards Committee and as the U.S. attorney’s designee to the Bench and Bar Committee of the U.S. Bankruptcy Court. She was presented an award for superior performance as an assistant U.S. attorney in 1996 by the director of the Executive Office for U.S. Attorneys.

She is a member of the KBA, an appointee to the recently formed KBA Membership Task Force and a former member of the KBA Bench-Bar Committee. Metzger was co-editor of the KBA’s Kansas Bankruptcy Handbook (1982) and chapter author for its second edition in 1986. As a member of the Wichita Bar Association, Metzger has served as its vice president, secretary-treasurer, a two-time member of its board of governors and as a member and/or chair of numerous committees. In addition, she is a member of the Wichita Women Attorneys Association.

In 1995, Metzger was awarded the WBA President’s Award for outstanding service to the bar. She has twice served on the Kansas U.S. District Court Magistrate Selection Panel and has also served on the Wichita Municipal Court Nominating Commission and as a WBA representative to the Wichita Municipal Court Task Force.

Laura Ice serves as deputy general counsel at Textron Financial Corp., where she is responsible for negotiating, structuring, documenting and collecting domestic and international aircraft finance transactions. Prior to joining TFC, she was in private practice in Wichita for 13 years with Adams & Jones as an associate and then a shareholder in the firm. She is a 1984 graduate of Washburn University School of Law, a 1980 graduate of the University of Kansas, and a fourth-generation Kansas lawyer.

The Professionalism Award recognizes an individual who has practiced law for 10 or more years who, by his or her conduct, honesty, integrity, and courtesy, best exemplifies, represents, and encourages other lawyers to follow the highest standards of the legal profession.

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**James F. Robinson Jr.** is a senior partner at Hite Fanning & Honeyman LLP with 32 years of experience. He has successfully litigated numerous prominent, high-profile cases over the course of his career in which he concentrates his practice on representing clients in business litigation, construction litigation, professional liability and products liability matters.

Throughout his career, Robinson has been an active member of the legal community and assumed several leadership roles. He is a past president of the Kansas Association of Defense Counsel, the current Kansas state representative to DRI, a past member of the Wichita Bar Association’s board of governors, immediate past chair of the WBA’s Legislative Committee and chair of the KBA’s Legislative Committee.

**PHIL LEWIS MEDAL OF DISTINCTION**

The Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding service and conspicuous service at the state, national, or international level in the administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.

- The recipient need not need be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.

The award is only given in those years when it is determined that there is a worthy recipient.

**Carol G. Green** is a 1981 graduate of the Washburn University School of Law, and she holds a B.S.Ed. from Southeast Missouri State University and a Master of Arts in English from the University of Missouri.

Green began her legal career as law clerk to Chief Justice Alfred G. Schroeder of the Kansas Supreme Court and then served as director of the central research staff for the Kansas Court of Appeals before being named clerk of the appellate courts in 1991. As clerk, she served in an administrative capacity to the Board of Law Examiners, Board of Examiners of Court Reporters, Client Protection Fund Commission, Commission on Judicial Qualifications and Supreme Court Nominating Commission. Green retired in June 2014.

Green was active throughout her career in drafting and editing the Kansas Appellate Practice Handbook, first for the KBA and then for the Kansas Judicial Council. She served on numerous professional committees, as well as the Washburn University School of Law Alumni Association Board of Governors.

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**Milestones for Members of the Legal Community**

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<td>Kent A. Cope, Kansas City, Missouri</td>
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Tournament Winners
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Jason C. Robbins
Steven M. Tilton

2nd Place – 1st Flight
Mary Christopher
Les Diehl
Blake Hudson
Pat Salsbury

Tournament Winners
1st Place – 2nd Flight
Brian Caldwell
Hon. Dan Creitz
Pay Haley
Greg Hough

2nd Place – 2nd Flight
Larry Bork
Dave O’Neal
Nicole Revenaugh
Alison St. Clair

Special Events
Closest to the Pin #11
(Ben only)
Brian Caldwell

Closest to the Pin #4
(Women only)
Laurie Williams

Longest Drive Pin #17
(Women only)
Kathy Webb

Longest Putt Pin #10
(Everyone)
Trent Byquist

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**Levels of Giving**

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*Effective 01/01/2013
Thomas A. “Tom” Adrian is one of the founders and shareholders in Adrian & Pankratz, P.A. in Newton. Adrian was raised on a grain and livestock farm in central Kansas. He graduated from Washburn University in 1966 with a degree in business administration and Washburn University School of Law in 1969. He practiced law in Topeka until 1972. He then moved to Newton where he has maintained a continuing practice. He is the husband of Ann McIntosh Adrian. They were married in 1966 in Clay Center, Kansas. They have two daughters, Lisa Adrian McPherson and Lori Adrian Magruder. Lisa and her husband Boyd McPherson are both attorneys in Wichita. Lisa and Boyd have a son, Hugh, age 14, and a daughter, Baylor, age 11. Lori and her husband, Tom Magruder, are both aerospace engineers and live in Austin, Texas. Lori and Tom have three children, McIntosh, age 9, Adrian Bae, age 7 and Wills, age 4.

Adrian is a community leader and volunteer. He was Chairman of the Board of Trustees at Newton Medical Center from 1987-1993, President of the Harvey County Bar Association from 1990-1991, a member of the Council of Finance and Administration for Kansas West United Methodist Conference from 1992-2000 and President from 1998-2000. In 1994, he was named Trustee of the Year by the Kansas Hospital Association and in 1998 he was named Outstanding Citizen of the Year by the Newton Area Chamber of Commerce. He has had leadership roles in numerous other organizations.

Adrian is a Kansas Bar Foundation Platinum Fellow and served on the KBF Board of Trustees from 1999-2005 and as President in 2004. He has been a KBA member since 1969. He has served on the KBA Continuing Legal Education Committee from 1994-present. Adrian has been named to “The Best Lawyers in America” in the area of trusts and estates. He is a frequent speaker and author in the areas of law in Kansas and law office management. This year, Adrian will also be receiving the KBA Outstanding Service Award. This will be his second time to receive it. He also received this award in 2001.

Adrian enjoys cycling, skiing, backpacking and other outdoor sports and activities. He and Ann have traveled internationally and will continue to do so. He maintains a keen and active interest in the farms in which he and Ann have ownership.
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Adoption in Kansas: Nearly 25 Years After KARA, Where Are We?

By Nancy S. Anstaett
In 1990, the Kansas legislature enacted the Kansas adoption and relinquishment act (KARA). This article looks back briefly at the history of Kansas adoption statutes and focuses on application of KARA to the adoption of minor children. A discussion of legislative amendments, appellate court interpretations, and some of the complications that arise when interested parties live in more than one state is included. Laws not found in KARA, which may apply to a Kansas adoption, are also referenced.

Adoption is a Creature of Statute

Adoption did not exist at common law. The earliest adoption statutes in the United States are believed to be from Massachusetts in 1851. Kansas was not far behind and enacted a law to provide for the adoption of minor children in 1864.

Adoption results in the creation of a new status. The status of parent and child in individuals who are not biologically related is not created without substantial compliance with the statutes regulating adoption. The purpose of early adoption laws was not the welfare of the child but rather was focused on the needs of adults. Modern adoption laws moved from the needs of adults to the welfare of children. The requirements and prohibitions of KARA and earlier Kansas statutes were designed to protect children and promote permanency of the parent-child relationship. Statutory safeguards also had to be mindful of the rights and interests of the biological parents.

How and Why KARA was Enacted

In the 1980s, Kansas was seen by some as a “baby supermarket” for out of state attorneys. Kansas had statutes in place requiring a home study for prospective adoptive parents and regulating fees and expenses that could be paid in connection with an adoption, but in 1987 legislation was introduced to make significant changes in Kansas adoption laws, including the prohibition of Kansas private adoptions by non-residents.

The proposed 1987 legislation did not pass but was the “springboard” for a study of Kansas adoption laws by the Family Law Advisory Committee (FLAC) of the Judicial Council. FLAC’s proposed changes, which included substantive changes as well as reorganization of the Kansas statutes applicable to adoption, were made in 1989 S.B. 292. An interim judiciary committee studied S.B. 292, made amendments and introduced it as 1990 S.B. 431. After further amendment, KARA was enacted and a primary goal of consolidating Kansas statutes relating to adoption was met.

Via its definition section, KARA created four categories of adoption: adult, agency, independent, and stepparent. Although there have been a variety of amendments to KARA since 1990, the definitions and thus the basic organization of KARA have not been altered. In 1994, an additional section applying to foreign adoption was added. The remainder of this article looks at the adoption of a minor child in an independent or agency adoption and the adoption of a minor child by a stepparent. KARA sets out the requirements for consent to adoption as well as termination of a biological parent’s rights if consent is not obtained. KARA did not and does not prevent a non-resident from adopting in Kansas.

Independent and Agency Adoption

KARA denominate adoption as an “independent adoption” if a child’s parent or parents, or a legal guardian who has the authority to consent to adoption, places a child for adoption with someone other than a stepparent. “Agency” may be a public or private entity meeting the definition found in K.S.A. 59-2112(f). Both independent (what used to be called “private”) and agency adoption require consent.

When enacted, KARA included detailed requirements for consent. Many of those provisions have not changed in almost 25 years. Consent must be in writing and acknowledged. The consent must have been executed not more than six months before the adoption petition is filed. Consent is final when executed, unless the consenting party, prior to the adoption decree being entered, alleges and proves that the consent was not freely and voluntarily given. The burden of proving consent was not freely and voluntarily given is by clear and convincing evidence. The mother cannot give her consent until 12 hours after the birth of...
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a child.22 If the consent is given by the mother before 12 hours after birth, it is voidable, prior to the final decree.23

KARA addresses the execution of a consent or relinquishment outside the state of Kansas, in a foreign country, or by a person in the military service.24 KARA also addresses consent if the consenting parent is a minor. Minority does not invalidate a consent, but a minor parent must have advice of independent legal counsel who must be present at execution of the consent.25

An agency obtains power to consent to adoption by accepting the relinquishment of a child from a parent or parents.26 Relinquishments must be in writing and acknowledged.27 The provisions regarding minority and time of execution that apply to a consent also apply to a relinquishment.28

The point in time when the biological parent’s rights are terminated is a major difference between an independent adoption that involves a consent or consents from biological parents and an agency adoption which involves relinquishments from the biological parents. In an independent adoption, the consenting biological parent’s rights are not terminated until the decree of adoption is entered.29 In an agency adoption, the parent’s rights are terminated when the parent relinquishes a child to an agency and the agency accepts the relinquishment. The statute provides an exception to automatic termination if the parent has relinquished to an agency based on a belief the other parent would relinquish, and the other parent does not relinquish.30

KARA originally included an appendix of forms for consent, relinquishment and agency consent.31 K.S.A. 59-2143 now states the form for consent and relinquishment shall be set forth by the judicial council.32 A consent from a parent, legal guardian or agency is deemed sufficient if it substantially complies with the judicial council form.33

The Importance of Consent

All adoptions require a consent.34 An adoption is not an involuntary proceeding where a court intervenes to remove a child from a biological parent or parents in order to allow the child to be adopted by a new parent or parents. In an independent adoption, the living parents must consent or alternatively one parent must consent if the other parent’s “consent is found unnecessary under K.S.A. 59-2136, and amendments thereto.”35 If both parents are dead or if their consent is found unnecessary, the legal guardian shall consent.36 There are also provisions requiring the court or judge to consent under specific circumstances.37 Consent to an agency adoption is given by the authorized agency representative.38 The child being adopted must also consent to an independent or agency adoption if over 14 years of age and of sound intellect.39

Pre-KARA Kansas cases regarded the consent as “an essential requisite to jurisdiction.”40 If no one had consented, the court could not proceed with adoption. KARA specifies that the written consents required by K.S.A. 59-2129 must be filed with the petition for adoption.41 Consent continues to be regarded as a requirement for jurisdiction.42 The filing of a consent from a statutorily authorized person is required.43

Proceeding Without A Father’s Consent or Relinquishment

Attorneys are often faced with factual situations in which one biological parent, usually the mother, wishes to place her child for adoption, but there is no consent or relinquishment from the other parent. The mother may not know who fathered the child or she may not know the current whereabouts of the father. Even when she knows who he is and where he lives, the father may not be willing to sign a consent, or the mother may want to proceed with an adoption even if the father objects.

K.S.A. 2013 Supp. 59-2136 sets out the current requirements for determining when a consent or relinquishment is not required from a biological parent. When enacted, KARA moved some provisions related to termination of parental rights from the parentage act into Chapter 59 and also made other revisions.44 In 2006, “best interest of the child” language was added to the termination provisions.45

In an independent or agency adoption, when a mother wishes to consent or relinquish and there is no father’s consent and the father’s relationship has not either been previously terminated or determined not to exist by a court, a petition to terminate the father’s parental rights must be filed. The request to terminate parental rights may be contained in the petition for adoption, if appropriate. The request may also be in a separate petition filed by the mother, agency, petitioner for adoption or person having custody.46

In order to proceed with a termination action, the court must attempt to identify the father. The court may do this by deposition, affidavit or hearing. KARA sets out specific information the court should determine in attempting to identify the father.47 If the father is identified, or if more than one man are identified as possible fathers, KARA requires notice in accordance with K.S.A. 2013 Supp. 59-2136(f).

In independent and agency adoptions, if the father is unknown, or his whereabouts are unknown, the court is required to appoint an attorney to represent the unknown or unlocated father.48 The court must order publication notice of the hearing if no person is identified as the father or possible father.49

If the court cannot identify the father or any possible father and no one appears to claim custodial rights, KARA allows the court to terminate the unknown father’s parental rights without considering the statutory grounds for termination.50 Likewise, if a person identified as the father or possible father fails to appear, or appears and fails to claim custodial rights, his parental rights are terminated without considering the statutory grounds for termination.51

When a father or alleged father appears and asserts parental rights, the first thing the court does is determine parentage.52 If a father wants an attorney but is financially unable to hire an attorney, the court shall appoint an attorney for him.53

KARA sets out seven possible grounds for terminating the parental rights of a father who appears and asserts parental rights.54 A court may terminate parental rights if there is clear and convincing evidence of any of the seven possible grounds.55 In 2006, KARA was amended by adding language allowing the court to consider and weigh the best interest of the child when determining if parental rights should be terminated.56 The addition of best interests of the child has not created a stand alone ground for terminating parental rights under K.S.A. 2013 Supp. 59-2136.57

Cases which pit one biological parent against an adoptive couple can be highly emotional, and resolution of each case
turns on the specific facts of the case. Adoption results in an absolute termination of the biological parents’ rights and the establishment of the new parent-child relationship between former legal strangers and the child. There is no splitting the baby to resolve an adoption case and no adoption decree for co-parenting or shared custody by an adoptive couple and a biological parent.

Many contested cases involve a claim of neglect or abandonment by the father or the allegation “the father, after having knowledge of the pregnancy, failed without reasonable cause to provide support for the mother during the six months prior to the child’s birth.” Under the facts of some cases, the trial judge or panel of appellate judges may find there was inadequate support and terminate a father’s rights. In other cases, different judges faced with different facts may refuse to terminate. Cases become complicated when facts show a woman has told less than the truth about the identity or whereabouts of the father or has lied to the father about the birth of the child. What is a court to do when deciding if a biological father’s rights should be terminated to allow the child to be adopted? Two recent decisions from the Kansas Supreme Court provide some guidance.

In 2010, the Supreme Court reversed the trial court and Kansas Court of Appeals’ decisions that had terminated a father’s rights. The biological mother of Baby Girl P had lied to the father, telling him she had a miscarriage. She also did not provide his full name or address. He was not informed of the birth at the time the child was born but he was located after the petition for adoption was filed. When he was notified, he immediately hired a lawyer in order to protect his parental rights. He requested visitation, offered support and provided Christmas gifts for the child. The biological father did not provide support or offers of support to the mother during the pregnancy, explaining he thought she had miscarried. The petitioners argued that he did not do enough.

In concluding that the father’s rights had been wrongfully terminated, the Court strictly construed the adoption statutes in favor of maintaining the rights of natural parents. The Court found support in the record for the conclusion that the father had made reasonable efforts to engage with and support his daughter and found nothing in the adoption statute requiring a parent to make “extraordinary displays of financial support” to avoid a finding of neglect. The Court distinguished the facts of the case from the facts of a 2008 case that involved a post-decree challenge by a biological father. The petitioners argued that once they had shown a failure to support, the burden of proving maternal interference was a father’s defense and not part of their case-in-chief. The Supreme Court disagreed, holding it is the petitioners’ burden to prove by clear and convincing evidence that parental rights should be terminated. If failure without reasonable cause to provide support is the ground for termination, “then the burden includes meeting the unsurprising possibility that a father may argue that any failure on his part was justified by a mother’s interference.”

The petitioners must prove there was no reasonable cause for the failure to support.

In a 2011 case, the Court of Appeals relied on and discussed the recent Kansas Supreme Court opinions. The Court of Appeals concluded that the trial court erred in interpretation and application of the applicable termination grounds and held that the court’s findings were not supported by clear and convincing evidence. The trial court’s termination of a father’s rights was again overturned, and the case was remanded with instructions to determine custody of the child.

The father’s rights were terminated for failure to provide support during the six months prior to birth after having knowledge of the pregnancy. The trial court improperly substituted “possible pregnancy” for “pregnancy” and went further to add a requirement that the father was obligated to discover or verify the pregnancy if a pregnancy was possible. Whether is allowed. The plain statutory language requires the father to have knowledge of the pregnancy. The court noted the significant consequences of its decision, which removed the child’s interests to terminate the father’s rights, but the exact basis for the finding was unclear from the court’s order. The Supreme Court did not speculate on how the lower court reached the conclusion that it was not in the child’s best interests to live with her father because the best interests of the child could not be the sole basis for terminating a parent’s rights. There was no clear and convincing evidence that the child’s best in-
independent adoption, the consent of at least one biological 
parent’s consent is not required are found in K.S.A. 2013 Supp. 
KARA’s parameters for determining if the nonconsenting par-
ent adoption.75 A statement of compliance with the interstate 
compact on the placement of children is not required in a 
stepparent adoption.76 The appointment of an attorney to represent an un-
known father or unlocated father in a stepparent adoption is 
discretionary rather than mandatory.77 The grounds for termi-
nating a father’s rights in a stepparent adoption have always 
been different from the grounds in an independent or agency 
adoption.

When enacted, KARA’s grounds for a stepparent adoption 
without consent of both biological parents were limited.78 
If the child had a presumed father or was a legitimate child 
under some law, the father’s consent was required unless the 
father failed or refused to assume parental duties for two con-
secutive years, or the father was incapable of giving consent. 
In determining whether a father’s consent was required, the 
court could disregard “incidental visitations, contacts, com-
munications or contributions.”79

In 1991, the statute was amended to clarify that the two 
years to be considered were the two years next preceding 
the filing of the adoption petition and to add a rebuttable 
presumption which could be used in determining failure to 
assume parental duties.80 Contested cases followed in which 
stepparents claimed the natural parents had failed to assume 
parental duties. The decisions turned on the facts presented. 
In order to determine if the non-consenting parent had failed 
to assume the duties of a parent, courts began looking at both 
financial support and parental love and affection as distinct 
parental duties. A test, known as the ledger test or two-sided 
ledger test, was crafted by the Court of Appeals.81 In order 
to terminate a biological parent’s rights, the parent was required 
to fail both sides of the ledger test.82 The adoption statutes 
were strictly construed to maintain the rights of the natural 
parents. Best interests of the child and fitness of the parent 
were not grounds to proceed with a stepparent adoption with-
out both parents’ consent.83

In 2006, KARA was amended to include the addition of 
“best interests of the child” and “fitness of the nonconsenting 
parent” which a court may consider in determining whether a 
stepparent adoption should be granted.84 Notwithstanding 
the addition of the best interests language, best interests of the 
child is not an independent ground for not requiring consent.85 
An attempt in 2010 to make unfitness and best interests of the 
child independent grounds for not requiring consent failed.86

The Supreme Court recently reiterated that a natural par-
ent’s consent to a stepparent adoption is mandatory unless the 
natural parent has failed or refused to assume the duties of a 
parent for the two years preceding the filing of the petition or is 
incapable of giving consent. In In re J.M.D., the Court held the 
controlling section is K.S.A. 59-2136(d), not (h). The parental 
termination provisions of (h) are not incorporated into (d).87

The Court discussed the line of Kansas appellate cases that 
had developed and applied the ledger test, found it to have 
been cut from whole cloth, and opined that its artificial con-
straints should be set aside. The historical approach of con-
sidering all surrounding circumstances or the totality of cir-
cumstances is now the approach to be used in a stepparent 
adoption to determine if a parent has assumed the duties of a 
parent.88 The two-sided ledger test no longer applies.89

Has the question of whether only K.S.A. 2013 Supp. 59-
2136(d) applies in a stepparent adoption been laid to rest? 
The answer appears to be “no.” In 2014, the Court of Ap-
peals affirmed the termination of a father’s rights in a step-
Adoption in Kansas

parent adoption under K.S.A. 59-2136(h)(1)(A) and (G).

The court distinguished J.M.D. which involved the child of a marriage. In P.Z.K., the natural father was not the presumed father due to marriage or attempted marriage and the child did not qualify as a legitimate child under pre-1985 law. The child was born in 2002 to unmarried parents and although paternity was established in 2011, the child was not a legitimate child under old law which made a distinction between legitimate and illegitimate children. The natural father unsuccessfully argued on appeal that only K.S.A. 59-2013(d) could be applied. The court, looking at the language of the statute, held that K.S.A. 2013 Supp. 59-2136(d) only applied to a stepparent adoption “of a child who has a presumed father under subsection (a)(1), (2) or (3) of K.S.A. 2013 Supp. 23-2208 . . . or who has a father as to whom the child is a legitimate child under prior law of this state or under the law of another jurisdiction.” To avoid that conclusion and future confusion, legislative action appears necessary. The case once again serves as a reminder that all adoption cases turn on their facts and a strict reading of the statutes.

Additional KARA Requirements

In a Kansas adoption, KARA contains detailed informational requirements and references to specific documents to be filed. An adoption action begins with the filing of a petition. The petition must be filed by someone who is allowed to adopt. Who may adopt has not changed since 1990. In independent and agency adoptions, detailed background information for the child and biological parents must be filed with the petition. The written consents, required accounting and any required affidavits must also be filed with the petition.

At the time KARA was enacted, discouragement of the marketing of children was a concern. Criminal sanctions related to advertisements made in connection with adoption were added. Kansas statute also regulates payments which may be made or promised and requires a detailed accounting. A home study or assessment of the petitioners’ fitness to adopt is also required in every independent or agency adoption. The home study or assessment requirement may be waived by the court. KARA amendments have modified who may prepare the assessment and what should be included.

After the petition is filed, the court may enter temporary orders for care and custody of the child pending the hearing. KARA contains requirements for when the court must set the final hearing and also provides for notice of the final hearing to be given. In 2013, the Kansas legislature made significant changes from previous notice and hearing requirements. A court is no longer required to wait 30 days after a petition is filed before final hearing. Notice of hearing may also be waived. In independent and stepparent adoptions, notice of hearing must be given to parents or presumed parents “unless waived by the party entitled to notice or unless parental rights have been previously terminated, and any other persons as the court may direct, unless waived by the party entitled to notice.”

At the hearing, if the court grants adoption, a final decree of adoption is entered. If the adoption is denied, the court makes “appropriate orders.” After the decree is entered, the district court also reports the adoption so a new birth certificate may be obtained.

If a Kansas independent or agency adoption involves Kansas and another state in the placement of the child, KARA has always required compliance with the interstate compact on the placement of children (ICPC). The petition in an agency or independent adoption must state whether the ICPC has been or will be complied with prior to the hearing.

ICPC’s Application to Adoption

Kansas adopted the ICPC in 1976. The ICPC governs interstate placement of children and is statutory law in all 50 states, the District of Columbia and the U.S. Virgin Islands. In non-relative adoptions, the ICPC is triggered by placement of a child from one state, the sending state, into another state known as the receiving state. Compliance with the ICPC is critical to an interstate adoption. The Court of Appeals has held that the failure to comply with the ICPC is sufficient grounds for revocation of a natural parent’s consent.

The ICPC does not address which court should exercise subject matter jurisdiction, and it does not determine the substantive laws which will be applied by the court that finalizes the adoption. Rather, it is a process which may be seen as a roadmap to follow in moving a child from the sending state into the receiving state. The requirements of the sending state and the receiving state must be satisfied, and the child may not leave the sending state until both states approve.

Kansas has a compact administrator who acts with the administrators from other states to carry out the terms of the compact. In 2012, the administrators adopted Regulation 12 to provide guidance and requirements for processing of
private agency or independent adoptions. When handling a Kansas adoption that involves a child coming into Kansas from another state for adoption or sending a child to another state, both state’s ICPC offices should be consulted regarding each state's requirements. When the adoption is finalized, a final form is submitted and the ICPC file is closed.

KARA and Determining Where to File the Adoption Action

KARA contains some venue provisions which have not changed since 1990. Determining venue depends on whether it is an independent, agency or stepparent adoption. If the child's residence is the basis for venue, a sworn affidavit containing the factual basis for the child’s residency shall be filed with the petition.

Originally, KARA had an additional provision relating to venue in an agency adoption, if venue was based on where the agency was located. That provision also gave the court discretion to decline to exercise jurisdiction. If neither the petitioner nor child (prior to agency custody) resided in Kansas, but the agency was located in Kansas, a court could decline jurisdiction based on the factors listed in the statute.

KARA did not specifically refer to subject matter jurisdiction and did not specifically refer to the Uniform Child Custody Jurisdiction Act (UCCJA). When enacted, KARA did require a petition for adoption to include information required by the UCCJA. In 1994, in a case of first impression, the Court of Appeals held the UCCJA was applicable to adoption proceedings.

In 2000, the legislature removed reference to the UCCJA from the information to be included in the petition. The legislature also amended K.S.A. 59-2127, removing reference to venue in agency adoptions and specifying when a court may not exercise jurisdiction. KARA remained silent on the subject of under what circumstances a Kansas court would have subject matter jurisdiction. KARA also did not state that adoption would be subject to the Uniform Child-Custody Jurisdiction and Enforcement Act (UCCJEA).

In other states, the UCCJEA does not apply to adoptions. But Kansas did not adopt the UCCJEA provision making it not applicable to adoption. In 2013, the Supreme Court was faced with deciding if the UCCJEA or KARA controlled a jurisdiction issue in a stepparent adoption. The facts of the case were not unusual in today’s mobile society.

The child was born to married parents in Mississippi in 1997. The parents divorced in Mississippi in 1999 and mom was granted residential custody. Mom and child moved to Kansas in 2002. In 2010, mom married a Kansas stepfather. In 2011, stepfather filed a petition to adopt in Saline County where he, mom and stepchild resided. Stepfather alleged that dad’s consent was not necessary. Dad answered and challenged the court's subject matter jurisdiction, alleging that the Mississippi court that had made the initial custody determination had exclusive, continuing jurisdiction.

The district court declined to exercise jurisdiction and dismissed stepfather’s petition, citing to the 1994 Kansas case in which the UCCJA was held applicable to an adoption case. The Court of Appeals concluded that jurisdiction should be determined by the UCCJEA and affirmed dismissal. The Supreme Court reversed after analyzing the interplay of KARA, UCCJA, and UCCJEA, discussing the ambiguity of various statutes, and applying rules of statutory construction. The Court ultimately concluded that K.S.A. 59-2127 controls over a conflicting UCCJEA provision under the facts of the case. The Supreme Court held it was error not to apply or consider all provisions of K.S.A. 59-2127 and urged the Kansas legislature to address the ambiguities in the statute brought to light by the facts of the case.

Application of Non-Kansas Law to a Kansas Adoption

KARA contains reference to some limited application or acknowledgment of other state’s laws. For example, the homestudy of a non-resident is completed in the state of the petitioner’s residence by a person authorized in that state to conduct the assessment. KARA recognizes that a consent executed outside of Kansas is valid if executed in accordance with the laws of the other state. The ICPC does not reference application of another state’s law by a Kansas court.

There are no reported Kansas appellate cases in which another state's laws regarding termination of a non-consenting parent’s rights have been applied in a Kansas adoption. Perhaps that is because adoption is purely a creature of statute and in order to have a Kansas adoption, the provisions of KARA must be applied and followed. K.S.A. 2013 Supp. 59-2129(a)(2) clearly requires both parents’ consent to the adoption unless the other parent's consent is not required under the terms of K.S.A. 2013 Supp. 59-2136. The same is true if both parents do not relinquish their rights to an agency.
K.S.A. 2013 Supp. 59-2136 does not refer to the laws of any other state in the list of reasons for terminating a non-consenting parent’s rights.

The Court of Appeals has addressed whether Kansas law may be applied to terminate the rights of an out-of-state father. The court acknowledged conflict of law issues can raise due process questions, but under the facts of the case, held the application of Kansas law to a father who lived in Ohio did not deprive him of due process. The court also referenced the Restatement rule which applies local law in determining whether to grant an adoption.

Addition and Important Applicable Laws Not Found in KARA

If a child to be adopted is an Indian child as defined by the Indian Child Welfare Act, the procedural and substantive safeguards of that federal law may apply. A Kansas adoption petition must state whether the Indian child welfare act (ICWA) has been or will be complied with prior to the hearing. Reference to ICWA was placed in KARA to alert parties of its possible relevance. A detailed discussion of ICWA and its requirements and preferences is beyond the scope of this article, but in every adoption of a minor child in Kansas a determination of whether ICWA applies must be made.

When an adoption is challenged after it has been finalized, the post-judgment relief provisions of K.S.A. Chapter 60 are applied. The Supreme Court did not grant a biological father relief from a judgment under K.S.A. 60-260(b) under the facts presented in In re Adoption of A.A.T. The fact that the adoption had been finalized before the biological father moved to set it aside was critical in the court’s analysis.

The biological father knew the biological mother was pregnant but she had lied to him when she told him she had an abortion. She also had lied to other family members when she told them the child had died. She also lied to the adoption agency about the identity of the father and later about not knowing his whereabouts. No one knew about these lies at the time they were told. An attorney was appointed to represent the father, and notice of the hearing was published. The father did not appear, and his rights were terminated. The biological mother finally told the biological father the truth when the child was 6 months old.

The Supreme Court held that the judgment was not void under K.S.A. 60-260(b)(4). The Court also did not set aside the judgment based on the mother’s fraud, saying fraud as a ground under K.S.A. 60-260(b)(3) must be fraud by an adopter. The adoptive parents had acted in good faith and were not part of the biological mother’s lies.

Other Kansas procedural statutes and court rules may apply in a Kansas adoption. Laws relating to adoption subsidies and tax credits may also apply depending on the facts of the case.

There are no Kansas laws, in KARA or elsewhere, which define the terms “open” or “closed” adoption. Most adoptions today have some degree of “openness” in which the biological parents and the adoptive parents exchange identifying information. The parties to the adoption often set the terms of the openness because the term has no legal definition. A Kansas adoptee may obtain information about her adoption and access her original Kansas birth certificate after she becomes an adult. Kansas has no statutes regulating post-adoption contact.

Conclusion

Adoptions are creatures of statute and each state has enacted its own statutory scheme. In fiscal year 2013, 1,847 adoption proceedings were filed in Kansas courts. An attorney handling a Kansas adoption must be familiar with and follow the requirements of KARA. Many laws and rules not found in KARA, such as ICWA and the ICPC, may apply and be a trap for the uninformed practitioner. After almost twenty-five years, there have been many legislative amendments to and case law interpretations of various KARA requirements. Recent Supreme Court decisions reinforce that KARA will be strictly construed to maintain the rights of biological parents.

The Supreme Court has asked the legislature to look at the inconsistencies between the UCCJEA and KARA. Practitioners should watch for future KARA revisions which could resolve this inconsistency as well as other KARA amendments which may address unanswered questions, eliminate confusion and varied interpretations, and avoid delay and increased expense in adoption cases.

About the Author

Nancy S. Anstaett is a member of Rowe & Anstaett LLC in Overland Park, where she practices civil litigation and has been involved in Kansas adoptions for over 30 years. She graduated from Kansas State University in 1977 with degrees in journalism and sociology, and graduated from Washburn University School of Law in 1980.

She has served as a member and chair of the Kansas CLE Commission, and was appointed to the Kansas Judicial Qualifications Commission in 2002, where she has served as chair and serves as a member.

ENDNOTES
2. KARA also applies to adult adoption which is not discussed in this article. See K.S.A. 59-2137 through 59-2142.
3. This article cannot and does not cover all KARA amendments and all Kansas appellate cases which have applied or interpreted KARA. In 2014, the only changes to KARA were made to replace “department of social and rehabilitation services” with “Kansas department for children and families” and to refer to the secretary “for children and families” rather than “of social and rehabilitation services.” See 2014 Kan. Sess. Laws, ch. 115, § 201 through § 205 (amending K.S.A. 59-2122, 59-2123, 59-2130, 59-2133, and 59-2135).
5. See E. Wayne Carp, Adoption in America: Historical Perspectives 6 (2002).
6. The Law of the State of Kansas Passed at the Fourth Session of the Legislature, ch. 83 (1864).
9. Id. Kansas case law has recognized that the child’s welfare is the purpose of the adoption statutes. Browning v. Tarswater, 215 Kan. 501, 524 P.2d 1135 (1974) (“It is elementary law that the aim and end of adoption statutes is the welfare of children.” 215 Kan. at 505).
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11. Id.; 1987 S.B. 337.


13. Id. FLAC’s Comments to 1990 Adoption and Relinquishment Act, available at http://www.kansasjudicialcouncil.org/previousstudies.shtml. Although the Revisor’s Note to KARA indicates the comments were updated to reflect changes made by the legislature, due to a lack of funding, the comments were not updated to reflect all of the legislative changes. Id.


15. Comments, supra note 13.


18. K.S.A. 59-2112 (c).


20. This article does not focus on agency adoption of minor children who have been the subject of child in need of care (CINC) proceedings or adopted from the foster care system. For a fairly recent article discussing CINC and related adoption proceedings, see R.S. McKenna, Caring When a Parent Does Not - The State’s Role in Child Welfare, 7, 37 (2010). Information on the adoption of children from foster care is available at www.adoptskids.org.


22. K.S.A. 59-2116. KARA does not specify when a father may sign consent or relinquishment. No Kansas appellate case has ruled on the issue of when a father may sign a consent or relinquishment required by KARA. In a pre-KARA adoption case, the Kansas Supreme Court held the term “child” within the adoption statutes means a living child. In re Adoption of Nelson, 202 Kan. 663, 666, 451 P.2d 173 (1969). Based on this interpretation and the fact the current statutes refer to “child” and not “unborn child,” the father’s consent should be signed after the child is born.

23. K.S.A. 59-2116. A consent is voidable, not void, if given within 12 hours of birth. A challenge by a birthmother claiming she signed her consent within 12 hours of birth must be made before the final decree of adoption is entered. In re Adoption of J.H.G., 254 Kan. 780, 869 P.2d 640 (1994).


25. K.S.A. 59-2115. The statute also requires the petitioner or agency to provide independent legal counsel for a minor unless she is otherwise represented. Kansas Rules of Professional Conduct apply to a lawyer accepting payment from a non-client for representing a client. KRPC 1.8(f). A father’s unfit- ness to be a parent is also a ground. K.S.A. 2013 Supp. 59-2136(h)(1) (B). KARA does not contain a definition of unfitness. The Kansas Court of Appeals has turned to factors for terminating parental rights found in Chapter 23 of the Kansas Statutes Annotated. K.S.A. 2013 Supp. 23-2201 through 23-2225, as amended and supplemented, are known as the Kansas Parentage Act.

26. Id. The statute does not state a standard for determining financial ability. The statute does not require appointment of an attorney for an alleged father, suggesting the appointment of an attorney is only done after paternity is determined. Fees of the court appointed attorney are costs that may be assessed against the petitioners. In re Adoption of D.S.D., 28 Kan. App. 2d 686, 19 P.3d 204 (2001). Court appointed counsel may continue until final resolution of the case, including appeal. In re H.B.S.Ć, 28 Kan. App. 2d 191, 12 P.3d 916 (2000), rev. denied (2001).

27. K.S.A. 2013 Supp. 59-2136(h)(1)(A) through (G). Four of the grounds require a father’s knowledge of either the birth or pregnancy (K.S.A. 2013 Supp. 59-2136(h)(1)(A), (C), (D) and (E)). A father’s unfitness to be a parent is also a ground. K.S.A. 2013 Supp. 59-2136(h)(1) (B). KARA does not contain a definition of unfitness. The Kansas Court of Appeals has turned to factors for terminating parental rights found in K.S.A. 38-1583. See, e.g., In re C.L.A., 31 Kan. App. 2d 536, 106 P.3d 60 (2003). Kansas now has a revised Kansas Code for the Care of Children, K.S.A. 2013 Supp. 38-2201 through 38-2283. Factors related to unfitness are found at K.S.A. 2013 Supp. 38-2269 and presumptions of unfitness are found at K.S.A. 2013 Supp. 38-2271.


32. In re Adoption of Baby Girl P, 291 Kan. 424, 242 P.3d 1168 (2010). The courts looked at the application of K.S.A. 59-2136(h)(1)(A) and/or (C) for a basis to terminate the father’s rights.

95. K.S.A. 59-2128(f).


97. K.S.A. 59-2121. When enacted, the drafters hoped to discourage marketing of children by limiting profitability. Comments, supra note 13. The only change to this statute was in 1994, in the severity classification of the crimes found in K.S.A. 59-2121(c). The Kansas Court of Appeals has held K.S.A. 59-2121 is not unconstitutionally vague. State v. Clark, 16 Kan. App. 2d 552, 826 P.2d 925 (1992) (Father received payment for consent which was not used for any expense incident to birth or adoption.) There is no statutory definition of “reasonable living expenses.” The determination is up to a judge’s discretion, resulting in varying decisions on how much is reasonable and how long it may be paid.

98. K.S.A. 2013 Supp. 59-2132 (as amended by 2014 Kan. Sess. Laws, ch. 115, § 204). There have been changes to the professionals who may conduct the study. The assessment and report must be no more than a year old at the time the petition is filed and must comply with rules and regulations of the department of health and environment. K.S.A. 2013 Supp. 59-2132(g).

99. The court may waive the assessment and report on its own motion, or if a petition requesting the waiver is filed by a relative of the child. K.S.A. 2013 Supp. 59-2132(h).

100. In 2008, the list of professionals who could do the assessment was expanded. 2008 Kan. Sess. Laws, ch. 66.


107. K.S.A. 59-2120. A professional who fails to comply with the Compact may be guilty of a class C misdemeanor. Id; K.S.A. 38-1206.


110. See http://icpc.aphsa.org/content/AICPC/en/home.html. Under the ICPC, a relative is a parent, stepparent, grandparent, adult brother or sister or adult aunt or uncle. K.S.A. 38-1202.


114. Required Kansas ICPC forms are found in the Kansas DCF PPS Manual at Section 9000. Appendix 9A contains homestudy guidelines. Patti Dawson Young is the current deputy compact administrator and in February 2013 she created a checklist for ICPC Private/Independent Adoption. The checklist is not available online, but may be obtained by contacting her at Patti.Dawson@dcf.ks.gov. In order to determine the requirements of another state, go to http://icpcstatepages.org for contact information and email the other state to request its checklist.

115. K.S.A. 59-2126(a) (independent in county where petitioner or child resides); K.S.A. 59-2126(b) (agency in county where child placing
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agency is located or where petitioner resides or where child resided prior to agency’s receiving custody); and K.S.A. 59-2126(c) (stepparent in county in which petitioner or child resides).

117. K.S.A. 59-2126(c). “Residence of a child” and “place where a child resides” are defined in K.S.A. 59-2112(e). In determining where the natural parent resides, residence requires looking at physical presence and intent to remain either permanently or for an indefinite period. See Matter of Adoption of A.M.M., 24 Kan. App. 2d 605, 610, 949 P.2d 1155 (1997) (citation omitted).


119. Id. Some of the factors are the same as those used to determine an inconvenient forum. The statute did not instruct the court to weigh the factors if the petitioner or child lived in Kansas.


123. Id., § 75. K.S.A. 59-2127 does not incorporate by reference the Uniform Child Custody Jurisdiction and Enforcement Act although it does mention the act.

124. The Kansas enactment of the UCCJEA is found at 2013 Supp. K.S.A. 23-37,101 through 23-37,405. The UCCJEA was moved from K.S.A. 38-1336 through 38-1377. Some of the information which must be in the petition pursuant to K.S.A. 59-2128 is the same information required by the UCCJEA provision found at K.S.A. 2013 Supp. 23-37,209.

125. See Adoption of H.C.H., 304 P.2d 1271, 1278 (Kan. 2013).


127. Id. at 1275.

128. Id. at 1276-77.

129. Id. at 1283. The Kansas Court of Appeals has applied K.S.A. 59-2127(b) to determine if a Kansas court was required to abstain from jurisdiction. In re Adoption of Baby Boy M, 40 Kan. App. 2d 551, 193 P.3d 520 (2008).

130. H.C.H., 304 P.2d at 1288. (“Our decision to strike the cross-reference to subsections (a)(1) through (4) in K.S.A. 59-2127(b)(1)(B) is merely a Band-Aid that does not adequately cover the gaping holes in the statutory framework.”)


133. When the ICPC is applicable, some state administrators take the position that certain provisions of that state’s law, such as when or how a consent is taken, must be followed, but it does not mean the other state’s substantive law applies in a Kansas court proceeding.

134. K.S.A. 59-2124(b).


136. 22 Kan. App. 2d at 126. Restatement (Second) of Conflict of Laws § 289 (1971). (“A court applies its own local law in determining whether to grant an adoption.”)


139. Comments, supra note 13.

140. ICWA applies in Kansas proceedings to terminate parental rights and allow adoption of an Indian child. See In re T.S.W., 294 Kan. 423, 276 P.3d 733 (2012) (Intervenor, Cherokee Nation, successfully argued that the district court erred in finding good cause to deviate from ICWA placement preferences under facts of case); In re A.J.S., 288 Kan. 429, 204 P.3d 543 (2009) (Kansas Supreme Court specifically held that the existing Indian family doctrine previously recognized in Kansas is abandoned.) The U.S. Supreme Court recently interpreted ICWA in Adoptive Couple v. Baby Girl, ___ U.S. ___, 133 S. Ct. 2552, 186 L. Ed. 2d 729 (2013).

141. K.S.A. 59-2213 provides that after 30 days, a judgment or decree in a probate proceeding may be vacated or modified pursuant to K.S.A. 60-260(b). A motion must be made within a reasonable time and in some instances within one year. K.S.A. 2013 Supp. 60-260(c).


143. Id.


Two other Kansas Supreme Court rules may apply in contested matters. If a defense to a petition in a probate matter is filed, the court must continue the hearing for at least 14 days unless there is a compelling reason for immediate hearing or a shorter extension. Kan. Sup. Ct. R. 143. If a factual issue is raised by a written defense in a probate matter, the parties may use the discovery procedures in K.S.A. 60-226 through 60-237. Kan. Sup. Ct. R. 144.

Local court rules may also apply. For example, the Third, Sixth, and Tenth judicial districts have some local rules which apply in adoptions. Rules or links to the rules are available at http://www.kscourts.org/kansas-courts/district-courts/rules.asp.

145. There are Kansas and federal adoption subsidy programs for adoption of children in or likely to be in foster programs or with special needs. See, e.g., Kansas Adoption and Support Act of 1972 (K.S.A. 38-319 through 38-329); Adoption and Safe Family Act of 1997 (P.L. 105-89). There may be federal and state tax credits available. Form 8839 is used to claim the federal credit. The credit does not apply to a stepparent adoption and there are dollar and income limits. Form K-47 is used to claim a Kansas adoption tax credit.


150. The Kansas Supreme Court urged the Kansas Legislature “to address the ambiguities in K.S.A. 59-2127 brought to light by the facts of this case... Study and legislative action is needed to provide clarity that will spare children, adoptive families, and natural parents the pain, expense, and delays inherent in litigation.” Adoption of H.C.H., 304 P.2d 1271, 1288 (Kan. 2013).
FACTS: In a letter dated August 26, 2014, addressed to the clerk of the appellate courts, respondent Dinkel, an attorney admitted to the practice of law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas, pursuant to Supreme Court Rule 217 (2013 Kan. Ct. R. Annot. 396). At the time the respondent surrendered his license, review was pending before the Kansas Supreme Court on the final hearing report in accordance with Supreme Court Rule 212 (2013 Kan. Ct. R. Annot. 375). The hearing panel found by clear and convincing evidence that the respondent violated Rule 8.1(b) (2013 Kan. Ct. R. Annot. 646) of the Kansas Rules of Professional Conduct when he failed to respond to information from a disciplinary authority; Rule 8.4(b) (2013 Kan. Ct. R. Annot. 655) when he was convicted of two felonies and two misdemeanors involving dishonesty, trustworthiness, or fitness; Rule 8.4(c) when he engaged in conduct involving dishonesty; and Rule 211(b) (2013 Kan. Ct. R. Annot. 396). At the time the respondent surrendered his license and privilege to practice law were revoked.

HELD: Court, having examined the files of the office of the disciplinary administrator, found the surrender of the respondent's license and privilege to practice law were revoked. The disciplinary administrator recommended that the respondent be indefinitely suspended.

FACTS: This is an uncontested original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Hasty, of Overland Park, an attorney admitted to the practice of law in Kansas in 1976. Hasty's ethical complaint involved his failure to communicate with his client and his remorse. Court indefinitely suspended the respondent.

HELD: Court, having examined the files of the office of the disciplinary administrator, found the surrender of the respondent's license should be accepted and that the respondent should be disbarred. Court ordered Dinkel is disbarred from the practice of law in Kansas, and his license and privilege to practice law were revoked.

DISCIPLINARY ADMINISTRATOR: On October 28, 2013, the office of the disciplinary administrator filed a formal complaint against the respondent, alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on November 13, 2013. On December 18, 2013, the parties entered into a stipulation on some of the charged violations. The disciplinary administrator recommended that the respondent be indefinitely suspended.

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Johnson, of Topeka, an attorney admitted to the practice of law in Kansas in 1988. Johnson's ethical complaints involved his failure to inform clients of his suspended license and false statements on Johnson's application for an insurance license.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on October 1, 2013, where the respondent was personally present. The hearing panel determined that respondent violated KRPC 1.3 (diligence); 1.4(a) and (b) (communication); 3.4(d) (frivolous discovery request); and 8.4(d) (conduct prejudicial to the administration of justice). Court held its decision among potentially appropriate disciplinary sanctions in this case was driven by several considerations particular to respondent's behavior and situation. First, misconduct similar to that in which respondent engaged here was at the heart of two previous disciplinary incidents, one subject to diversion and another that led to public censure. These lesser responses were obviously inadequate to enforce respondent's promises to address the causes of the incidents. Second, the consequences of respondent's misconduct for his client in this case were extraordinarily severe. Finally, respondent's remarks at his hearing before the court were less than convincing on his acceptance of responsibility; he appeared to be more interested in taking issue with the panel's findings of violations than in acknowledging his fault and expressing his remorse. Court indefinitely suspended the respondent.

FACTS: This is an uncontested original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Johnson, of Overland Park, an attorney admitted to the practice of law in Kansas in 1976. Hasty's ethical complaint involved his failure to communicate with his client and his remorse. Court indefinitely suspended the respondent.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on December 19, 2013, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 1.3 (diligence); 1.4(a) and (b) (communication); 3.4(d) (frivolous discovery request); and 8.4(d) (conduct prejudicial to the administration of justice). The hearing panel unanimously recommended that the respondent be suspended for a period of two years.
Appellate Decisions

mously recommended that the respondent be indefinitely suspend-

ed from the practice of law.

DISCIPLINARY ADMINISTRATOR: On August 15, 2013, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent untimely filed an answer on September 25, 2013. On September 25, 2013, and September 29, 2013, the parties signed a written stipulation of facts. The disciplinary administrator recommended that the respondent be suspended from the practice of law for an indefinite period of time.

HELD: Court determined that the evidence before the hearing panel supported the panel’s conclusions of law and clear and convincing evidence established that the respondent’s misconduct violated KRPC 1.2(a); 1.4(a); 1.16(d); 8.4(c); 8.4(d), and Kansas Supreme Court Rules 211, 218(a). Court stated both the hearing panel and the disciplinary administrator’s office ultimately recommended a sanction of indefinite suspension. Before making its final recommendation, the panel considered the sanction of disbarment. That consideration was appropriate, given that respondent has violated our rules of professional conduct multiple times over a period of many years, while also accumulating a number of suspensions for failing to comply with the administrative responsibilities required of every attorney. Accordingly, a minority of this court would disbar the respondent. But a majority of this court would disbar the respondent.

administrative responsibilities required of every attorney. Accordingly, a minority of this court would disbar the respondent. But a majority of this court would disbar the respondent.

court with notice to the parties or on motion from a party. See Rule 2.06(b). Once consolidated, the lowest or oldest appeal case number is used to designate the consolidated appeal. See Rule 2.06(c). If consolidation does not occur, the court can stay one or more appeals until a common issue in a separately pending appeal is resolved. See Rule 2.06(c).

Requesting Additions to the Record on Appeal

The contents of records on appeal are denoted in Rule 3.02(d)(1). Sometimes a litigant needs something to be added to a record on appeal from the district court record. The request must specify the addition with particularity. Without this particularization the request is not sufficient. See Rule 3.02(d)(1).

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.

TWO-YEAR SUSPENSION IN RE MARK R. SINGER ORIGINAL PROCEEDING IN DISCIPLINE NO. 111,047 – OCTOBER 10, 2014

FACTS: This is a contested original proceeding in discipline filed by the office of the Disciplinary Administrator against the respondent, Singer of Overland Park, an attorney admitted to the practice of law in Kansas in 1975. Singer’s ethical complaint involved his representation of a buyer in a multi-million dollar real estate transaction, its costs, subsequent default by buyer, and judgment against Singer.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on November 20, 2013, where the respondent was personally present. The hearing panel determined that respondent violated KRPC 4.1(b) (2013 Kan. Ct. R. Annot. 617) (truthfulness in statements to others) and 8.4(c) (2013 Kan. Ct. R. Annot. 655) (engaging in conduct involving misrepresentation). The hearing panel unanimously recommended that the respondent be suspended from the practice of law for a period of two years.

DISCIPLINARY ADMINISTRATOR: On August 16, 2013, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on September 9, 2013. On November 20, 2013, the parties entered into a written joint stipulation of facts. The disciplinary administrator recommended that the respondent be suspended for a period of one year and following the period of suspension, the deputy disciplinary administrator recommended that the respondent’s practice be supervised for a period of two years.

HELD: Court adopted the findings of fact and conclusions of law of the hearing panel, unamended by respondent’s suggested additions in his exceptions and amended exceptions. Clear and convincing evidence—including, the parties’ written joint stipulation and the Connecticut jury verdict affirmed by the Second Circuit on appeal—demonstrated that respondent violated KRPC 4.1(b) and 8.4(c). Court stated that respondent sought a panel recommendation of supervised probation, and he continued to seek that discipline before the court. The panel expressed an unwillingness to recommend such a sanction because of the general rule that fraudulent behavior is not amenable to correction by probation. We agree with this general rule, although there may be particular situations in which it does not apply. This case does not present one of those particular situations. Court held respondent’s conduct was deceitful; and it was not persuaded by his counsel’s

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Custodial Status of Defendant in Sentencing Appeals

In sentencing appeals, counsel representing the appellant is responsible for explaining the custodial status of the defendant in the docketing statement. Once the matter is docketed the responsibility shifts to counsel representing the state. During the pendency of the appeal the state must keep the court informed of any change in custodial status of the defendant. See Rule 2.042

Consolidation of Appeals

Consolidations help with judicial economy and allow identical issues in multiple cases to be answered at one time. Consolidation is permitted when it serves the interest of justice, or when there are common issues in multiple appeals and a decision in one appeal will be dispositive of all the appeals. See Rule 2.06(a)(1) and (2). Appeals can be consolidated by the court with notice to the parties or on motion from a party. See Rule 2.06(b). Once consolidated, the lowest or oldest appeal case number is used to designate the consolidated appeal. See Rule 2.06(c). If consolidation does not occur, the court can stay one or more appeals until a common issue in a separately pending appeal is resolved. See Rule 2.06(c).

Requesting Additions to the Record on Appeal

The contents of records on appeal are denoted in Rule 3.02(c). Sometimes a litigant needs something to be added to a record on appeal from the district court record. The request must specify the addition with particularity. Without this particularization the request is not sufficient. See Rule 3.02(d)(1).

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or his own statements that probation is an appropriate response to that conduct. Court held respondent is suspended from the practice of law in Kansas for a period of two years.

**DISBARMENT**  
IN RE KYLE G. SMITH,  
ORIGINAL PROCEEDING IN DISCIPLINE  
NO. 10,841 – SEPTEMBER 26, 2014

FACTS: In a letter signed September 17, 2014, addressed to the Clerk of the Appellate Courts, Smith, an attorney admitted to practice law in the state of Kansas, voluntarily surrendered his license to practice law in Kansas. Smith was convicted of sexual exploitation of a child, in violation of K.S.A. 2013 Supp. 21-5510(a)(2), a severity level five felony. The conviction will require registration by Smith as a sex offender. Following the conviction, on April 7, 2014, this court temporarily suspended Smith’s license to practice law. At the time Smith surrendered his license, a disciplinary complaint based upon Smith’s conviction remained pending.

HELD: The Court, having examined the files of the office of the disciplinary administrator, finds the surrender of Smith’s license should be accepted and that Smith should be disbarred.

**CIVIL**  
EMPLOYMENT LAW AND EMPLOYEE VS.  
INDEPENDENT CONTRACTOR  
CRAIG ET. AL. V. FEDEX  
U.S. COURT OF APPEALS FOR THE 7TH CIRCUIT –  
CERTIFIED QUESTIONS  

FACTS: FedEx carefully structured its drivers’ operating agreements so that it could label its drivers as independent contractors in order to gain a competitive advantage, i.e., to avoid the additional costs associated with employees. In other words, this is a close case by design, not happenstance. The Court was asked to determine whether the substance of the relationship between FedEx and its delivery drivers renders the drivers employees within the meaning of the Kansas Wage Payment Act.

CERTIFIED QUESTIONS: (1) Given the undisputed facts presented to the district court in this case, are the plaintiff drivers employees of FedEx as a matter of law under the KWPA? (2) Drivers can acquire more than one service area from FedEx. ... Is the answer to the preceding question different for plaintiff drivers who have more than one service area?

HELD: Court answered yes to the first certified question. As applied to those drivers who are members of the certified class, i.e., those drivers who “drive a vehicle on a full-time basis,” the Court answered no to the second question, i.e., the answer to the first question remains the same.

The Court held that viewing the factors as a whole leads to the conclusion that FedEx has established an employment relationship with its delivery drivers but dressed that relationship in independent contractor clothing. Even when the factors should point the Court toward finding that the drivers are independent businesspersons, FedEx’s control and micromanaging undermine the benefit that a driver should be able to reap from that arrangement. For instance, the ability to make more money than a delivery driver who is an employee is diminished, if not destroyed, by FedEx’s control over the number of deliveries a driver can make, as well as essentially dictating the driver’s required expenditures for vehicles, tools, equipment, and clothing. Moreover, one would reasonably expect that independent businesspersons could decide for themselves the amount of work they “reasonably can handle on any given day,” yet FedEx makes that decision for them and sets a maximum number of stops for each driver. The Court concluded...
under the undisputed facts presented, the FedEx delivery drivers are employees for purposes of the KWPA.

STATUTES: K.S.A. 44-313, -314, -391, -319a, -320, -322, -322a, -325; and K.S.A. 60-3201

MANDAMUS
OREL V. KANSAS DEMOCRATIC PARTY
ORIGINAL ACTION – TRANSFERRED TO
DISTRICT COURT
NO 112,487 – SEPTEMBER 23, 2014

FACTS: On the same day the Kansas Supreme Court granted mandamus to Taylor, compelling Kansas Secretary of State to remove Taylor's name on ballot for office of U.S. senator in the November general election, Orel filed mandamus petition in Kansas Supreme Court to compel Kansas Democratic Party to name a Democratic Party candidate for that office pursuant to K.S.A. 25-3905(a).

ISSUE: Mandamus

HELD: Case is transferred to district court. Orel’s pleadings do not contain sworn evidence needed for Kansas Supreme Court to make legal determination on issues including ripeness, nature of the parties, standing, and propriety or adequacy of the mandamus relief requested.

STATUTE: K.S.A. 25-3905(a)

MANDAMUS
TAYLOR V. KOBACH
ORIGINAL ACTION IN MANDAMUS – GRANTED
NO. 112,431 – SEPTEMBER 18, 2014

FACTS: Taylor timely filed letter with Kansas Secretary of State (Kobach) that stated: "I, Chadwick J. Taylor, Democratic nominee for the United States Senate race, do hereby withdraw my nomination for election effective immediately and request my name be withdrawn from the ballot, pursuant to K.S.A. 25-306b(b)." Kobach notified Taylor that the written request, which did not include the statutory declaration that Taylor was “incapable of fulfilling the duties of office if elected,” did not conform to K.S.A. 25-306b(b). Taylor petitioned Supreme Court for writ of mandamus to prohibit Kobach from including Taylor's name on ballot for U.S. Senate in the November general election.

ISSUE: Compliance with K.S.A. 25-306b(b)

HELD: Writ of mandamus is granted. Plain meaning of “pursuant to K.S.A. 25-306b(b)” in Taylor's letter effectively declares he is incapable of fulfilling the duties of office if elected. Based upon challenge in this case, the letter Taylor filed with secretary of state complied with K.S.A. 25-306b(b). Secretary of state thus had no discretion to refuse to remove Taylor's name from the ballots, and mandamus was appropriate. Numerous other arguments by the parties was not considered. Because the Kansas Democratic Party is not a party to this original action, no action is needed on Kobach's allegation that a ruling for Taylor would require the Kansas Democratic Party State Committee to name a replacement nominee.

STATUTE: K.S.A. 25-306b, -306b(b), -3905

CRIMINAL

STATE V. ANDREW
JOHNSON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 104,666 – AUGUST 29, 2014

FACTS: Andrew was convicted of aggravated assault notwithstanding claim that he acted in self-defense. He appealed, raising the issue, whether the pattern jury instruction regarding defense of a dwelling correctly stated Kansas law as applicable to facts of the case. Court of Appeals affirmed in unpublished decision, distinguishing State v. Alexander, 268 Kan. 610 (2000). Review granted on this single issue.

ISSUE: Jury instruction – Use of force in defense of a dwelling place

HELD: A trial judge does not err by using PIK Crim 4th 52.210 (Use of Force in Defense of a Dwelling, Place of Work, or Occupied Vehicle) as part of the jury instruction, even if an alleged victim rather than the defendant is the one who used force in defense of a dwelling. Statement to the contrary in Alexander is disapproved. Even if lawful force is used to defend a dwelling, an individual responding to that force may act in self-defense if he or she reasonably believes the force is unlawful. Thus, the two defenses of self-defense and defense of a dwelling are not mutually exclusive, and a trial judge errs in instructing a jury that they are. In this case, the trial judge’s use of pattern instructions regarding defense of a dwelling and defense of self was not error. Trial judge's insertion in the defense of dwelling instruction that told jury that self-defense is not available to someone who is being forced out of a dwelling by an individual who is lawfully defending the dwelling misstated the law, but the error was harmless under the facts of this case. Andrew's use of force was not objectively reasonable because he entered a dwelling without permission and was made aware that a resident of the dwelling objected to his presence and was defending the dwelling.


STATE V. CRAWFORD
BARTON DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO. 103,881 – SEPTEMBER 19, 2014

FACTS: Crawford appealed on issues including claim that prosecutor committed three separate acts of misconduct by: (1) com-

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menting during voir dire that he would want to talk with jurors after the trial regardless of the outcome; (2) commenting on detective’s testimony regarding oil spill found at scene and oil leak in Crawford’s truck; (3) using jigsaw puzzle analogy during voir dire and closing argument to explain state's burden of proof. Court of Appeals affirmed, 46 Kan. App. 2d 401 (2011), finding in part that prosecutor misstated the law by using jigsaw puzzle analogy to explain reasonable doubt, but concluding the error was harmless. Review granted limited to the three prosecutorial misconduct claims.

ISSUES: (1) Comments during voir dire, (2) argument supported by facts in evidence, and (3) jigsaw puzzle analogy

HELD: Prosecutor’s comments read in context are not intimidating and do not demand a defense of verdict from the jurors. No misconduct found.

Prosecutor’s comments were supported by evidence and based on reasonable inferences drawn from the detective’s testimony. No misconduct found.

Court of Appeals’ finding of misconduct in prosecutor’s use of jigsaw puzzle analogy stands. Court’s warning in State v. Stevenson, 297 Kan. 49 (2013) (discouraging prosecutor’s use of “Wheel of Fortune” analogy), is reiterated and emphasized. Here the calculated and repeated use of an analogy that created a theme, and argument having effect of minimizing state’s burden of proof, was gross and flagrant, but nothing in record indicates it was motivated by ill will. Court discusses state statutory and federal constitutional standards of review for reversible error, and reiterates test in State v. Tosh, 278 Kan. 83 (2004), that phrase “likely [had] little weight in the minds of the jurors” incorporates the federal constitutional standard. In this case, state met burden of establishing beyond a reasonable doubt that prosecutor’s misconduct did not affect outcome of trial, and strength of evidence was sufficient to overcome conclusion the misconduct was gross and flagrant.

CONCURRING (Lukert, J.) (Joined by Biles, J. and Gerald T. Elliott, District Judge): Would have taken this opportunity to modify Tosh to simplify prosecutorial misconduct standard of review by no longer using “little weight in the minds of the jurors” standard or referring to lower reasonable probability standard applied under K.S.A. 60-261. Retention of that dual standard and that umbrella description is more confusing than helpful.

STATUTES: K.S.A. 2013 Supp. 60-2103(h); K.S.A. 2010 Supp. 60-261; and K.S.A. 22-3602(e); and K.S.A. 60-261

STATE V. JONES
FINNEY DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED
NO.106,605 – AUGUST 29, 2014

FACTS: District court suppressed evidence of drugs seized during a warrantless vehicle search conducted incident to a traffic stop. State filed interlocutory appeal. Court of Appeals found district court erred in concluding that the pretextual nature of the traffic stop rendered the seizure constitutionally invalid, but majority affirmed the district court’s decision because law enforcement officer did not have a reasonable suspicion that justified the search when officer unreasonably prolonged the traffic stop to wait for K9 unit. State v. Jones, 47 Kan. App. 2d 866 (2012). Dissent argued that case should have been reversed and remanded for additional findings by district court regarding whether a reasonable suspicion existed.

STATE’s petition for review was granted.

ISSUE: Reasonable suspicion to extend traffic stop

HELD: Court of Appeals majority was affirmed. In this case, undisputed facts and district judge’s findings of fact were sufficient for appellate review of the totality of circumstances. Based on that review, a reasonable suspicion sufficient to justify the search of the vehicle did not arise under the totality of the circumstances, which
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included evidence that vehicle’s driver drove erratically, had cotton mouth, slurred speech, and possessed an empty plastic baggy. It thus was impermissible to extend the traffic stop beyond the duration necessary for the stop’s legitimate purpose. Search of the vehicle was invalid, and evidence was appropriately suppressed.

STATUTES: K.S.A. 2010 Supp. 21-36a06(a), -36a09(b) (2); K.S.A. 8-1548(a); K.S.A. 20-3018(b); and K.S.A. 22-2402, -2402(1), -3602(e)

STATE V. JULIAN
RICE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – REVERSED
NO. 105,695 – SEPTEMBER 5, 2014

FACTS: Officer stopped Julian’s car in 2010 for traffic offenses. Following Julian’s removal from the car and arrest for not showing proof of insurance, officer conducted warrantless search of the vehicle and discovered evidence resulting in drug and weapon charges being filed. District court, applying Arizona v. Gant, 556 U.S. 332 (2009), granted Julian’s motion to suppress evidence recovered from the vehicle. State filed interlocutory appeal. In unpublished opinion, Court of Appeals reversed, relying on Fourth Amendment case-law. Julian’s petition for review was granted.

ISSUE: Searches incident to arrest

HELD: Fourth Amendment case law developments related to searches incident to arrest between 1969 and 2009 were briefly reviewed. While in effect, K.S.A. 22-2501 represented state’s authority to adopt measures more protective of an individual’s rights than the Fourth Amendment. This was first case the court has considered where the search was conducted after 2006 amendment to K.S.A. 22-2501 after Gant, and before 2011 repeal of K.S.A. 22-2501. This was a warrantless search of a vehicle incident to arrest for purpose of discovering evidence. At time of search, searches incident to arrest in Kansas were governed by K.S.A. 22-2501, which did not permit a warrantless search incident to arrest for that purpose. Court of Appeals applied a clearly incorrect legal standard by applying Gant rather than K.S.A. 22-2501. The search of Julian’s car was illegal. Judgment of Court of Appeals reversing the district court is reversed. Judgment of district court was affirmed.

STATUTES: K.S.A. 22-2501, -2501(a), -2501(b), -2501(c); and K.S.A. 22-2501(c) (Furse)

STATE V. ORTEGA
FINNEY DISTRICT COURT – AFFIRMED IN PART AND
REVERSED IN PART
COURT OF APPEALS – AFFIRMED IN PART AND
REVERSED IN PART
NO. 106,210 – OCTOBER 3, 2014

FACTS: Ortega left children with their grandmother and went to Colorado. After children were determined to be in need of care and placed in SRS custody, Ortega returned to Kansas and was arrested after she attempted to take child from school. Ortega was convicted of attempted aggravated interference with parental custody and disorderly conduct. Court of Appeals affirmed in unpublished opinion, rejecting Ortega’s claims that: (1) there was insufficient evidence that she performed overt act toward taking child out of state which was required for the aggravated offense; (2) K.S.A. 21-3422 stated alternative means of committing crime of interference with parental custody; and (3) prosecutor improperly vouched for witness credibility. Court of Appeals found error on claims of prosecutorial misconduct (misstated the law regarding defense of ignorance and mistake; violated motion in limine) and instructional error (failure to instruct on defense of ignorance and mistake; failure to instruct on lesser included offense of interference with parental custody; use of outdated pattern instruction on reasonable doubt),

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but concluded those errors did not deny Ortega a fair trial. Dissent argued for reversal of aggravated interference with parental custody conviction, citing prosecutorial misconduct and substantial fact dispute as to whether Ortega intended to remove child from Kansas. Ortega's petition for review granted.

ISSUES: (1) Sufficiency of the evidence, (2) alternative means, (3) vouching for credibility of witnesses, and (4) reversible error

HELD: Viewed in light most favorable to state, sufficient evidence supported the aggravated interference with parental custody conviction.

Alternatives listed in K.S.A. 21-3422 merely describe factual circumstances that could prove gravamen of the crime, thus are options within a means rather than material elements constituting alternative means.

Prosecutor's statements were based on reasonable inferences drawn from the evidence, and merely explained what a jury should look for in assessing credibility of school officials.

Aggravated interference with parental custody conviction was reversed. While there was no clear error in using outdated version of reasonable doubt instruction, under facts in case when jury was not instructed on law that applied to defense of ignorance and mistake and was misinformed by prosecutor as to the evidence that applied to the defense, jury could not and did not take into consideration the laws that applied to assessment of whether Ortega had the specific intent required for commission of aggravated interference with parental custody. Because prejudice did not taint disorderly conduct conviction, that conviction was affirmed.

STATUTES: K.S.A. 20-3018(b); K.S.A. 21-3203(1), -3203(2), -3301, -3422, -3422(a), -3422a(a)(2)(C), -4101; and K.S.A. 60-261, -2101(b), -2103(h)

STATE v. REESE
JOHNSON DISTRICT COURT – REVERSED, SENTENCE VACATED, AND REMANDED
COURT OF APPEALS – REVERSED
NO. 106,703 – AUGUST 29, 2014

FACTS: Reese was arrested for DUI in 2009, convicted in June 2011, and sentenced in August 2011. District court imposed enhanced sentence applicable to a person having four prior DUI convictions. On appeal Reese contended K.S.A. 2011 Supp. 8-1567(j)(3), effective July 1, 2011, should have applied to his August 2011 sentencing to exclude all his pre-July 1, 2001, DUI convictions for fourth, or subsequent offense for purposes of imposing sentence enhancement. Prospective application of that amended statute would have applied to Reese's August 2011 sentencing whether the current conviction is a first, second, third, or subsequent offense and to determine at the time of sentencing whether the current conviction is a first, second, third, fourth, or subsequent offense for purposes of imposing sentence enhancement. Prospective application of that amended statute would apply to every DUI sentencing occurring on or after the effective date of the amendment. Accordingly, the provisions of K.S.A. 2011 Supp. 8-1567(j)(3) apply to all persons who were sentenced for DUI on or after the July 1, 2011, effective date of the amended statute. That shortened look-back period should have applied to Reese's August 2011 sentence. Court of Appeals and district court were reversed. Reese's sentence was vacated. Matter was remanded for resentencing.

STATUTES: K.S.A. 2011 Supp. 8-1567, -1567(j), -1567(j)(3), -1567(i)(3); K.S.A. 8-1567, -1567(g), -1567(l)(3); K.S.A. 20-3018(b), 21-4704(i); K.S.A. 60-2101(b); K.S.A. 1983 Supp. 8-1567(i); K.S.A. 8-1567(e) (Ensley 1982); and K.S.A. 1937 Supp. 8-530(b)

STATE v. RICHARD
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,962 – SEPTEMBER 5, 2014

FACTS: A jury convicted Richard of felony murder based upon the underlying felony of criminal discharge of a firearm at an occupied building. Richard allegedly fired his handgun at a neighbor's house, and a bullet fatally wounded a man sitting inside the house. On direct appeal, Richard raised three evidentiary issues: (1) prior crimes evidence; (2) suppression of post-Miranda statements as involuntary; and (3) suppression of evidence after warrantless search.

ISSUES: (1) Prior crimes evidence, (2) suppression of post-Miranda statements as involuntary, and (3) suppression of evidence after warrantless search

HELD: Court found evidence that Richard had previously discharged his handgun in his backyard was relevant for the purpose of proving knowledge and identity. It was also admissible for proving intent even though that purpose was omitted from the limiting instruction. Court also found the evidence was probative because it provided a tendency in reason to prove that Richard intentionally shot at occupied house. Court held Richard failed to preserve his appeal of the district court's order denying his motion to suppress his post-Miranda statements to police. Court held the district court did not err in denying Richard's motion to suppress evidence found in a warrantless search of a locked storage area at his residence. The police searched based on consent from Richard and from the person who allegedly controlled the locked storage area. Court found valid consent.

STATUTES: K.S.A. 21-3401, -3436, -4219, -4204; K.S.A. 22-3601; and K.S.A. 60-404, -455

STATE v. STORY
WYANDOTTE DISTRICT COURT – AFFIRMED
COURT OF APPEALS – AFFIRMED

FACTS: Story was convicted of first-degree murder. On appeal she claimed: (1) district court erred in admitting and failing to give limiting instructions on evidence of other crimes, namely obliteration of the serial number on gun used in the shooting, and Story's use of other inmates' personal identification numbers (PINs) to place telephone calls; (2) district court erred in denying her request for a heat-of-passion voluntary manslaughter instruction as a lesser included offense; (3) prosecutor improperly referenced school shootings during closing argument; and (4) cumulative error denied her a fair trial.

ISSUES: (1) Evidence of other crimes, (2) voluntary manslaughter instruction, (3) prosecutorial misconduct, and (4) cumulative error

HELD: Accepting Story's uncontested characterization of evidence as other crimes, the admission of evidence that serial number of gun had been obliterated at unknown time, and failure to give limiting instruction on that evidence or on Story's use of other inmates' telephone PIN numbers, does not require reversal of the conviction when state's other evidence of Story's guilt on first-degree murder is strong.

District court correctly refused to give the requested lesser included instruction. No evidence in the record, in combination with reasonable inferences, would reasonably support a conviction of voluntary manslaughter.

On facts of this case, prosecutor's reference to school shootings as examples of situations in which a defendant may be convicted of premeditated murder despite being unaware of exact identities of victims was not misconduct.
Under facts of case, Story received a fair trial untainted by cumulative error.

STATUTES: K.S.A. 2013 Supp. 60-455; K.S.A. 2010 Supp. 60-261, -455; K.S.A. 21-3403(a), -4205(a), -4205(b); and K.S.A. 22-3414(3)

STATE V. TURNER

FACTS: Wyandotte grand jury, convened to investigate alleged wrongdoing by officers and directors of Board of Public Utilities (BPU), indicted Turner on counts of theft and presenting a false claim based on theory he had not performed consulting and legal work for which he had submitted monthly invoices. District court granted Turner’s motion to dismiss the indictment, finding Turner had not possessed full panoply of constitutional rights at grand jury investigatory proceedings, and the constitutional violations occurring during those proceedings did not prejudice Turner because record contained sufficient evidence to establish probable cause to support the indictments. 45 Kan. App. 2d 744 (2011). Supreme Court granted Turner’s petition for review, which claimed the state violated his Fifth Amendment and due process rights by conducting improper and prejudicial grand jury proceeding during which (1) the district attorney required Turner to repeatedly invoke Fifth Amendment right to remain silent over 100 times in presence of grand jury; (2) state’s chief investigator impermissibly commented on Turner’s invocation of right to remain silent; and (3) state’s chief investigator repeatedly testified about, and linked Turner to, an unrelated unsolved murder.

ISSUES: (1) State’s questioning, (2) comment on silence, (3) abuse of grand jury process, and (4) harmless error

HELD: DA’s persistent questioning of Turner after Turner’s invocation of right against self-incrimination was improper and would in part justify dismissing the resulting indictment. Court of Appeals’ holding to the contrary was reversed.

Any suggestion that federal and state constitutional right against self-incrimination was somehow diluted or diminished because grand jury is an investigatory proceeding rather than a criminal action ignores purpose of the privilege. Court of Appeals’ analogy of grand jury to an inquisition was rejected, with similarities and differences between the two proceedings discussed.

Court of Appeals correctly concluded that state investigator’s comment on Turner’s refusal to testify after invoking right to remain silent violated Fifth Amendment.

State-sponsored testimony of chief investigator violated Turner’s due process rights by introducing irrelevant and unnecessary evidence about an unrelated murder case and suggesting the grand jury should indict to help solve the prior murder case.

Court of Appeals erred in placing burden of proof on Turner to establish that state’s constitutional violations were not harmless error, and misread Bank of Nova Scotia v. United States, 487 U.S. 250 (1988). Test in Bank of Nova Scotia is met in this case where the substantial influence of state’s violations was readily apparent in the record, creating grave doubt about efficacy of the indictment. Court of Appeals was reversed. District court’s dismissal of the indictment was affirmed.


COURT OF APPEALS

CIVIL

CHILD IN NEED OF CARE AND SUFFICIENCY OF THE EVIDENCE IN RE A.H.
JOHNSON DISTRICT COURT – AFFIRMED NO. 111,231 – SEPTEMBER 26, 2014

FACTS: The district court found a 5-month-old girl, A.H., was a child in need of care as defined by law. The district court found the girls’ brother, W.H., to be a child in need of care for witnessing domestic abuse and that finding was undisputed by the father, and W.H. and his sister have been living in the same home. Father appealed the adjudication of A.H. as a child in need of care, arguing that there was no clear evidence that she was a child in need of care.

ISSUES: (1) Child in need of care and (2) sufficiency of the evidence

HELD: Court found the testimony at the evidentiary hearing, when viewed in the light most favorable to the state, unmistakably indicated W.H. contemporaneously observed domestic violence between Father and Mother and suffered emotional harm by being placed in a position of physical danger. That harm was manifested in behavioral problems of acting out or mimicking Father’s violent behavior. Because there was clear and convincing evidence, the district court properly adjudicated A.H.’s brother as a child in need of care, it was appropriate for the district court to make the same child in need of care finding for A.H. and the two other siblings. Court cited case law stating that exposing the older sibling to the parent’s violent relationship and their failure to feed or clothe the child properly is physically and emotionally abusive behavior justifying a child in need of care adjudication for a younger sibling.

STATUTE: K.S.A. 38-2201, -2202, -2250

CIVIL SERVICE AND SUSPENSION
MARQUEZ V. KANSAS DEPARTMENT OF CORRECTIONS
SHAWNEE DISTRICT COURT – REVERSED NO. 111,327 – AUGUST 29, 2014 (MODIFIED OPINION)

FACTS: Parole Officer Marquez worked as a parole officer with the Kansas Department of Corrections for 21 years. He is a permanent classified employee in the civil service as set out in the Kansas Civil Service Act. Marquez came under scrutiny for his supervision of a certain parolee (Parnell). Ultimately, Marquez received a 30-day suspension, but it was later reduced to a 10-day suspension. If classified employees appeal their suspensions to the Civil Service Board, the Act requires the appointing authority to show that those employees were adequately counseled on the nature of their work deficiencies unless they had received two prior work evaluations at least a month apart before any suspension. Marquez had not received two unsatisfactory evaluations, and he appealed his suspension to the Civil Service Board. Marquez met with Frey and the human resources director regarding the proposed suspension. Frey sent a letter to Marquez explaining that his reduced suspension of 10 days was for “the good of the service.” Marquez appealed the suspension to the Kansas Civil Service Board. The Board concluded that Marquez’s handling of the supervision of Parnell “exhibited an
The Board upheld the suspension. Marquez filed a petition for reconsideration; the Board rejected his petition and affirmed its prior order. Marquez sought judicial review of the agency action with the district court. The district court denied his petition.

**ISSUES:** (1) Civil service and (2) suspension

**HELD:** Court held the record in this appeal is clear. The appointing authority wished to impose a 10-day suspension on Marquez without using performance evaluations. Marquez appealed that decision to the Board. As outlined in K.S.A. 75-2949e(c), the Board should have required the appointing authority, Frey, to show that Marquez was “adequately counseled” prior to his suspension. In its final order, the Board made no findings regarding the appointing authority’s counseling requirement. Thus, the Board action did not comply with the law. Court also stated the burden is on the appointing authority under K.S.A. 75-2949 to show Marquez received adequate counseling prior to his suspension. The district court erroneously shifted the burden onto Marquez by finding he failed to show that he was not adequately counseled and then concluding he received adequate counseling. Court reversed Marquez’s suspension and reversed the district court’s order affirming the suspension.

**STATUTE:** K.S.A. 75-2925, -2949, -2949e, -2949f

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**DUI, BLOOD TEST, AND DRIVER’S LICENSE SUSPENSION**

**HOEFFNER V. KANSAS DEPARTMENT OF REVENUE**

FORD DISTRICT COURT – AFFIRMED

NO. 110,323 – SEPTEMBER 12, 2014

**FACTS:** After leaving an incident at a casino, Hoeffner was arrested for driving under the influence. The arresting officers read him the required implied consent advisory before requesting that he submit to a breath test. He refused to do so until the officers repeatedly indicated that they would obtain a search warrant for a blood test; then, he agreed to the breath test, which he failed. Although Hoeffner argued the officers unlawfully coerced him into submitting to a breath test by threatening to obtain a search warrant, his driving privileges were suspended. His suspension was affirmed after an administrative hearing. Hoeffner appealed the suspension to the district court, again claiming unlawful coercion and also that the hearing officer used an improper form, which rendered his suspension a nullity. The district court upheld the suspension.

**ISSUES:** (1) DUI, (2) blood test, and (3) driver’s license suspension

**HELD:** Court found no merit to Hoeffner’s claim that the proceedings before the hearing officer were rendered a nullity based on language in the form. However, the court agreed with Hoeffner that the officers did not have legal grounds upon which to obtain a search warrant to draw Hoeffner’s blood at the time the officers repeatedly advised Hoeffner that they intended to do so. The officers’ misinformation transformed the breath test Hoeffner previously had refused to take into an involuntary search because it necessarily deprived Hoeffner of the opportunity to revoke his statutorily implied consent. Although the results of Hoeffner’s failed breath test are the fruits of an unlawful seizure, the Kansas Supreme Court has long held that the exclusionary rule does not apply to suppress incriminating evidence in administrative driver’s license suspension cases. Accordingly, court found substantial competent evidence to support the district court’s finding that Hoeffner had an alcohol concentration of 0.08 or greater in his blood and, in turn, affirmed the court’s decision to uphold the agency’s suspension of Hoeffner’s license.

**STATUTES:** K.S.A. 8-1001, -1002, -1014, -1025; K.S.A. 22-3504; and K.S.A.60-260(a)

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**MECHANIC’S LIEN AND QUASI-CONTRACT**

**GLEASON & SONS SIGNS V. RATTAN ET AL.**

SALINE DISTRICT COURT – AFFIRMED

NO. 110,177 – OCTOBER 3, 2014

**FACTS:** Rattan, a partner in Kaneb Investment Group LLC (Kaneb), individually appealed the district court’s judgment against him on
a claim brought by Gleason & Son Signs (Gleason). Gleason was a subcontractor to Persona, a business entity that contracted with Kaneb to manufacture and install a sign on Kaneb’s motel property. Rattan argues the district court erred in finding Gleason was entitled to judgment against him for expenses related to the relocation of the sign. ISSUE: (1) Mechanic’s lien and (2) quasi-contract

HELD: Court held, on the facts of this case, a mechanic’s lien was not an available remedy for a subcontractor seeking damages for expenses incurred beyond the contract price, the property owner incorrectly told the subcontractor where to perform its work (the installation of a sign at a motel), and the subcontractor relied to its detriment on the owner’s representation. Court stated where a mechanic’s lien is not an available remedy, the failure to file a mechanic’s lien does not bar the subcontractor from seeking recovery under another theory, such as quasi-contract. Accordingly, the subcontractor had a valid quasi-contract claim against the property owner for the additional expenses incurred in initially installing the sign at the wrong location.

STATUTE: K.S.A. 60-1101, -1103

MEDICAID, CHILD SUPPORT, AND SPOUSAL SUPPORT
MUIR V. KANSAS HEALTH POLICY AUTHORITY
JOHNSON DISTRICT COURT – AFFIRMED
NO. 109,573 – SEPTEMBER 5, 2014

FACTS: Muir is an adult resident of a long-term care facility, and he qualifies for Kansas Medicaid assistance. Under state and federal Medicaid law, a certain amount of his monthly income from disability payments is protected income that he can keep, but the rest of his income is deemed “available income” that he must pay toward his care before Medicaid will pay the rest of the costs. See 42 U.S.C. § 1396a(a)(17) (2006); K.A.R. 30-6-533(3) (2009). Muir challenged a state agency ruling that he may not take part of his disability income and use it to pay child support for his two children and maintenance to his former spouse. Instead, the agency determined that his child support and maintenance obligations did not bar the subcontractor from seeking recovery under another theory, such as quasi-contract. Accordingly, the subcontractor had a valid quasi-contract claim against the property owner for the additional expenses incurred in initially installing the sign at the wrong location.

STATUTES: K.S.A 39-790, -791; and K.S.A. 77-425, -601, -224

OIL AND GAS LEASES
NOVY V. WOOLSEY ENERGY CORP.
KINGMAN DISTRICT COURT – AFFIRMED
NO. 110,599 – JUNE 27, 2014
PUBLISHED VERSION FILED SEPTEMBER 10, 2014

FACTS: The Novys owned land subject to oil and gas lease held by Woolsey Energy Corp. (Woolsey). Novys petitioned district court to cancel the lease as to right to drill for oil, alleging Woolsey breached implied duty to further develop the leased land. They cited Woolsey’s failure to drill for oil or gas for over 30 years, and Woolsey’s refusal to drill a well upon Novys’ request. After Novys rested their case, district court granted Woolsey’s motion for judgment as a matter of law finding Novys failed to present sufficient evidence that Woolsey breached the implied duty to prudently develop Novys’ land. Novys appealed, claiming K.S.A. 55-224 in Kansas Deep Horizons Act placed burden on Woolsey to prove the lease had not been breached for failure to prudently develop. Novys further claimed that judgment as a matter of law should not have been entered because they presented sufficient evidence that the leased land was not prudently developed for oil production, and because lease had no purpose as to oil production when Woolsey had determined that any oil well drilled on the leased land would not be commercially feasible.

ISSUES: (1) Burden of proof and (2) judgment as a matter of law

HELD: The presumption established under K.S.A. 55-224 does not apply in this case because the record shows that Novys accepted the burden of proof before the district court without question or argument.

District court did not err in granting Woolsey’s motion for judgment as a matter of law. Novys failed to present substantial evidence that Woolsey breached the implied covenant to prudently develop the land. Under Kansas cases, to sustain burden of proof that Woolsey breached the implied covenant, Novys must show more than Woolsey’s determination that drilling for oil on Novys’ land would not be commercially feasible.

STATUTES: K.S.A. 2013 Supp. 60-250; and K.S.A. 55-223 et seq., -224

OUSTER
STATE V. MORRISON
JOHNSON DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS
NO. 110,835 – OCTOBER 10, 2014

FACTS: Morrison was elected to the Prairie Village City Council in 2008 and re-elected in 2012. Malone was Morrison’s long-time friend and former co-worker. When Malone began having substance abuse problems in 2011, Morrison provided help with lodging, clothes, and job interviews. Malone’s condition improved, but he had a relapse late in 2012. Morrison again assisted Malone, this time allowing Malone to stay overnight in the Prairie Village City Hall including allowing Malone to use Morrison’s security codes. Following an investigation, the Prairie Village City Council voted to oust Morrison from his position. A trial with an advisory jury was held, and the district court entered an order of ouster.

ISSUE: Ouster

HELD: Court stated that, as the district court acknowledged, Morrison was primarily—if not wholly—motivated by his sincerely held view of his humanitarian duty to his fellow man. There is no evidence that the incident was anything other than an isolated and singular occurrence. Morrison gained no financial benefit and his actions did not threaten the public treasury. The district court expressly noted that Malone’s presence at city hall did not actual harm. The court justified its ouster order with its conclusion that Morrison had subjected city employees to a potential threat to their health and safety. To the contrary, however, court concluded that Malone’s appearance at proceedings and the dirty looks he gave employees who saw him at city hall are not the kinds of dangers to public safety that warrant judicial ouster. Court held the district court erred in its application of ouster proceedings to the facts of this case.

STATUTE: K.S.A. 60-1205
PROTECTION FROM ABUSE AND EXTENSION
DESTER V. DESTER
DICKINSON DISTRICT COURT – AFFIRMED
NO. 111,115 – SEPTEMBER 19, 2014

FACTS: Melissa and Chad Dester divorced after six years of marriage. Melissa eventually obtained a final Protection from Stalking (PFS) order from the court. On November 1, 2012, Melissa filed a motion to extend the PFS order for an additional year pursuant to K.S.A. 2012 Supp. 60-31a06(c). The district court conducted a hearing on the motion and extended the November 15, 2011, final PFS order for another year, or until November 15, 2013. On November 5, 2013, Melissa filed a second motion to extend the PFS order for an additional year pursuant to K.S.A. 2013 Supp. 60-31a06(c). The district court again conducted a hearing, and, as had occurred at the two prior hearings, Melissa appeared prose while Chad appeared with counsel. Chad’s counsel argued the district court lacked jurisdiction to extend the final PFS order for another year because the 2011 version of K.S.A. 60-31a06(b) was applicable, which limited Melissa to one extension of the final order, not the 2012 amendment which allowed for additional extensions. The court disagreed with counsel and extended the November 15, 2011, final PFS order for another year, or until November 15, 2014.

ISSUES: (1) Protection from abuse and (2) extension

HELD: Court held the provisions of the Protection from Stalking Act are to be liberally construed to protect victims of stalking; the relevant amendments to the Act extend the remedies in the event stalking is proven; the 2012 amendments to the Act have retroactive application to pending PFS actions; and the retroactive application of those amendments does not violate Chad’s due process rights as he does not have a vested right which is implicated by the retroactive effect of the amendments. Court concluded that the revised statute is remedial and procedural, implicates no vested rights, and therefore applies retroactively to PFS orders in existence at the time the amendments were adopted.

STATUTE: K.S.A. 60-31a01, -31a06

WORKERS COMPENSATION BOARD, SOCIAL SECURITY BENEFITS, AND RETIREMENT
FARLEY V. ABOVE PAR TRANSPORTATION ET. AL.
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 110,507 – SEPTEMBER 5, 2014

FACTS: Farley suffered work-related injuries while working for Above Par Transportation. Farley was receiving old-age Social Security benefits at the time he was injured. The Workers Compensation Board (Board) awarded Farley a substantial work disability. However, because the Board found that Farley had not retired before his accident occurred, it reduced Farley’s award by the amount of his Social Security benefits pursuant to K.S.A. 2009 Supp. 44-501(h). Farley appeals, contending that the Board “overlooked” his evidence that he had in fact retired and that it erroneously applied the statutory offset.

ISSUES: (1) Workers Compensation Board, (2) Social Security benefits, and (3) retirement

HELD: Court found no evidence in the record as a whole that actually supported Farley’s claim that he had retired but then returned to work. Court found evidence in the record indicating that Farley never retired: he testified that he intended to draw his Social Security and work for the rest of his life. He told Terrill, a rehabilitation consultant, the same thing. If Farley had retired, he could have said so at his regular hearing, but he did not. Farley failed to sustain his burden of proof under K.S.A. 2013 Supp. 77-621(a)(1) and (c)(7). The Board’s finding of fact that Farley had never retired is supported by substantial evidence. Court found the Board correctly applied the law that if a person who has never retired but who is receiving old-age Social Security benefits suffers compensable injuries, the person’s workers compensation award for those injuries is subject to the Social Security offset provisions of K.S.A. 2009 Supp. 44-501(h). If a person receiving old-age Social Security benefits who has retired and then has returned to work to supplement those benefits suffers compensable injuries, the person’s workers compensation award for those injuries is not subject to the Social Security offset provisions of K.S.A. 2009 Supp. 44-501(h).

STATUTES: K.S.A. 44-501, -556; and K.S.A. 77-601, -621

WORKERS COMPENSATION AND NUT ALLERGY
RIBEAU V. RUSSELL STOVER CANDIES
WORKERS COMPENSATION BOARD – AFFIRMED
NO. 110,533 – AUGUST 29, 2014

FACTS: Ribeau appealed the order of the Workers Compensation Board (Board) denying her claim for compensation for an alleged peanut and nut allergy arising out of and in the course of her employment at Russell Stover Candies (RSC). Ribeau argued the Board erred in finding she had failed to prove the existence of the peanut and nut allergy and failed to establish a causal connection between the allergy and her work at RSC. Ribeau also argues that RSC should be estopped from denying the existence of her work-related allergy when it terminated her employment at RSC due to the allergy.

ISSUES: (1) Workers compensation and (2) nut allergy

HELD: Court held when reviewing the record as a whole that there is substantial evidence supporting the Board’s factual finding that Ribeau failed to prove the existence of an injury, i.e., a peanut and nut allergy. All of the objective testing performed—the blood test administered by Dr. Baker in December 2008, the skin tests and blood tests administered by Dr. Stechschulte in June 2009, and the skin test administered by Dr. Madril in December 2009—came back negative for allergy to peanuts, nuts, metrin oil, or any other allergy. Furthermore, none of the doctors who treated or examined Ribeau noted a physical reaction present at the time of treatment or evaluation that was determined to be an allergic reaction. As for the Board’s factual finding that Ribeau failed to prove a causal connection between the alleged allergy and her work at RSC, Court found the record as a whole supported that conclusion. Ribeau admitted she had been exposed to peanuts and nuts outside of RSC throughout the course of her life. Furthermore, the record contained no evidence about the quantity and quality of Ribeau’s exposure at RSC, aside from generic statements that there was nut dust in the plant and one comment by someone at RSC that Ribeau could not totally avoid exposure to peanuts and nuts even by wearing a protective mask and gloves. Court concluded the Board did not err in concluding Ribeau had failed to prove a compensable injury under the Workers Compensation Act. Court also found no basis for the application of equitable estoppel or quasi-estoppel because RSC terminated Ribeau due to the peanut and nut restriction advised by Dr. Baker.

STATUTES: K.S.A. 44-501, -508, -556; and K.S.A. 77-601, -603, -620, -621

CRIMINAL

STATE V. FERNANDEZ-TORRES
DOUGLAS DISTRICT COURT – AFFIRMED
NO. 110,645 – SEPTEMBER 26, 2014

FACTS: The state sought interlocutory review of an order of the Douglas County District Court suppressing incriminatory statements Defendant Fernandez-Torres made to a police officer questioning him about improper physical contact he may have had with his girlfriend’s young daughter. The district court found the circumstances of the interrogation rendered the statements involuntary, including problems with the Spanish-language translation, the officer’s false representations about evidence supposedly implicating Fernandez,
and the officer’s poorly translated suggestion that some sort of momentary though improper touching of the girl could be dealt with.

ISSUES: (1) Interlocutory appeal, (2) suppression of state’s evidence, and (3) translator

HELD: Court held that under the facts of this case, the district court correctly suppressed the defendant’s statements to law enforcement officers as involuntary when the record showed the principal questioner lied about biological evidence implicating the defendant and misled the defendant about the legal consequences of admitting to certain inculpatory conduct, especially in combination with defendant’s low to average intellectual capacity and the subpar English-Spanish translation made during the interrogation.

STATUTES: K.S.A. 21-4643; K.S.A. 22-3603; and K.S.A. 60-460

STATE V. GLOVER
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 110,350 – OCTOBER 10, 2014

FACTS: Pursuant to plea agreement, Glover entered guilty plea to charges of involuntary manslaughter, aggravated burglary, and robbery. Prior to sentencing he filed motion to withdraw plea, claiming undue pressure by defense counsel. After hearing with new appointed counsel, district court denied the motion. Glover appealed, arguing for a de novo or a more relaxed abuse of discretion standard of review.

ISSUE: Review of presentence motion to withdraw guilty plea

HELD: Abuse of discretion standard continues to apply to review of withdrawal of a plea prior to sentencing, and Glover’s invitation to expand definition of “good cause” in K.S.A. 2013 Supp. 22-3210(d)(1) is rejected. Applying State v. Edgar, 281 Kan. 30 (2006), and other relevant factors to facts in this case, district court did not abuse its discretion in denying Glover’s motion to withdraw plea.

STATE V. MARSHALL
JOHNSON DISTRICT COURT – AFFIRMED
NO. 109,350 – SEPTEMBER 5, 2014

FACTS: Marshall was convicted of raping A.M., a developmentally disabled adult under his care. The state alleged and the jury found a fiduciary relationship between Marshall and A.M. and, as such, Marshall received an enhanced sentence. This is Marshall’s direct appeal, claiming: (1) the state committed reversible misconduct during closing arguments; (2) he was denied his due process rights under the Fifth and Sixth amendments because the state did not allege the aggravating factor of a fiduciary relationship in the criminal complaint; and (3) an Apprendi violation.

ISSUES: (1) Prosecutorial misconduct, (2) aggravating factor of fiduciary relationship, and (3) Apprendi

HELD: Court held the prosecutor’s statements of personal belief were sufficiently couched in a discussion of the evidence to be merely directional, the prosecutor did not improperly comment on Marshall’s postarrest silence, the statements of the victim were highlighted in closing argument and constituted a permissible inference from the evidence, and the court did not find impermissible evidence by the prosecutor creating an imaginary script describing both Marshall’s thoughts and what A.M. did not see. Court found Marshall received proper notice of the state’s intent and the aggravating factor the state would rely on (fiduciary relationship) in seeking an upward departure. Court rejected Marshall’s Apprendi argument based on prior case law.

STATUTE: K.S.A. 21-4624, -6817
STATE V. RAMIREZ
WYANDOTTE DISTRICT COURT – AFFIRMED IN PART AND REVERSED IN PART
NO. 109,808 – SEPTEMBER 26, 2014

FACTS: Ramirez was convicted of aggravated robbery, conspiracy to commit aggravated robbery, aggravated assault, and criminal possession of firearm. During deliberations, jury asked if a person is guilty if he knows a crime is going to be committed. District judge sent written response asking for clarification. Jury then asked if Ramirez was guilty if he knew the robbery was going to happen but was not present for the robbery. District court again discussed question with counsel with Ramirez present, and sent written response telling jury to read aiding and abetting instruction. On appeal Ramirez claimed that district court's procedure in answering those questions deprived him of rights to be present at critical stages of the trial, to have an impartial judge, and to have a public trial. Next he challenged substance of district court's answer to jury's second question, and claimed that insufficient evidence supported convictions for all offenses other than criminal possession of firearm. Finally, he claimed that prosecutor misstated the law regarding Ramirez's guilt based on aiding and abetting the accomplice who possessed and used the shotgun.

ISSUES: (1) Answering jury questions, (2) substance of court's response to the second question, (3) sufficiency of evidence, and (4) criminal possession of a firearm

HELD: Alleged errors in answering jury questions were reviewed for harmless error. District court's failure to recall jurors to courtroom to answer questions violated K.S.A. 22-3420(3) and Ramirez's right to be present at every critical stage of the trial, but error was harmless in this case. State v. Womeldorf, 47 Kan. App. 2d 307 (2012), defeats Ramirez's claims of being denied an impartial judge and right to a public trial.

Ramirez did not object to district court's response to jury's second question. Issue not preserved for appellate review.

Sufficient evidence supports Ramirez's convictions for aggravated robbery, conspiracy to commit aggravated robbery, and aggravated assault.

Interplay of aiding and abetting instruction with district court's modification of pattern instruction for defining criminal possession of a firearm by a felon (PIK Crim.3d 64.06) was hopelessly confusing. Prosecutor misstated the law by arguing that Ramirez was criminally responsible for accomplice carrying the shotgun in the robbery based on fact that Ramirez was a felon at the time, and there was no evidence the accomplice was a convicted felon at time of robbery. Although prosecutor's remarks were not gross or flagrant, and there is no evidence of ill will, court cannot conclude beyond a reasonable doubt that the remarks had no effect on jury's verdict. Criminal possession of a firearm conviction was reversed.

STATUTES: K.S.A. 2011 Supp. 21-5210, -6304(1), -6304(a)(2); K.S.A. 22-3420(3); and K.S.A. 60-261

STATE V. WINES
JOHNSON DISTRICT COURT – AFFIRMED
NO. 109,680 – AUGUST 29, 2014

FACTS: Wines was charged with driving while under the influence of alcohol (DUI)—third offense—and with refusing a preliminary breath test for conduct occurring on January 7, 2012. Following a bench trial, Wines was found guilty of DUI and refusing a preliminary breath test. The trial court determined that Wines' current DUI conviction was his third. The penalty for a third DUI conviction under K.S.A. 2011 Supp. 8-1567(b)(1)(D) is a felony when a person has a previous DUI conviction within the preceding 10 years of the person's current DUI offense. On appeal, Wines contended that K.S.A. 2011 Supp. 8-1567 is unconstitutionally vague because one of his previous DUI convictions—a December 2001 DUI diversion agreement in Overland Park—should not have been included in determining whether his third-time DUI offense was a felony because it did not occur within 10 years from his current DUI offense of January 7, 2012.

ISSUES: (1) DUI, (2) prior convictions, and (3) diversion agreement

HELD: Court stated it did not need to address Wines' constitutional challenge to K.S.A. 2011 Supp. 8-1567 and it would not address whether the trial court erred in ruling that the date of Wines' Overland Park DUI conviction on August 14, 2002, controlled his DUI conviction date instead of the date when he entered into his diversion agreement on December 12, 2001. Court held that a valid alternative ground existed on which the case may be decided. Here, only one DUI conviction within 10 years of Wines' current offense of January 7, 2012, was required for him to be guilty of a felony as a third-time DUI offender under K.S.A. 2011 Supp. 8-1567(b) (1)(D). Moreover, Wines was convicted of DUI in Lawrence on September 19, 2002, which was within 10 years of his current offense of January 7, 2012. Thus, Wines' September 19, 2002, DUI conviction alone was sufficient to enhance Wines' sentence from a misdemeanor to a felony.

STATUTE: K.S.A. 8-1567
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We have a long history of success inside and outside the courtroom. For over 40 years, we have maximized the value of cases referred to our firm and we will continue to do so into the future. If you have a client with a serious injury or death, we will welcome a referral or opportunity to form a co-counsel relationship.