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Issaku Yamaashi, iyamaashi@foulston.com
Natalie Yozia, yozia@ksbar.org

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Death and Disability

When the Unexpected Happens, What Happens Next?

Would your clients be protected if you were suddenly unavailable to continue practicing law? In a law firm, the sudden departure of a lawyer due to disbarment, suspension, disability or death is disruptive, but generally manageable for the other members of the firm. However, the sole practitioner does not have the same luxury of automatic backup. If a plan is not in place, Supreme Court Rule 221 provides the legal structure for handling these situations.

Fortunately, there are several lawyers across the state who regularly agree to serve when appointed under Supreme Court Rule 221. Rule 221 provides for the appointment of counsel to protect clients’ interest when an attorney has been transferred to disability inactive status because of incapacity or disability, the attorney has disappeared or died, or has been suspended or disbarred, and there is evidence the attorney has not complied with Rule 218, (notice to clients of suspension, disbarment, etc.) or it appears the affairs of his or her clients are being neglected. In these situations, the rule provides that the administrative judge of the judicial district in which the attorney maintained his or her practice shall appoint an attorney or attorneys to inventory the files of the attorney who is unable to practice, and with the approval of the judge, take such action as may be necessary to protect the interests of that attorney and his or her clients.

This can be a daunting job involving numerous files, and in some cases incomplete records of the status of cases. It may also entail documenting and submitting information to the court about the potential status of trust funds, and any client that may have had funds misappropriated. Kansas Supreme Court Rule 227 establishes the Lawyers’ Fund for Client Protection, which will compensate clients who suffer economic loss as a result of dishonest actions by Kansas lawyers. However, there is not a fund that covers the expenses of storing and maintaining the attorney’s records, proper destruction of confidential records, or for the time involved in reviewing and communicating with the clients of the attorney who is suddenly not able to practice law. The attorneys handling these cases often incur those expenses, or find others to donate toward these expenses.

The KBA operates an in-house lawyer referral service (LRS). The staff works hard to screen out callers just interested in obtaining free legal advice, and connects lawyers with potential clients interested in pursuing a legal matter. During the last year, LRS fielded 11,806 incoming calls and made 15,637 outgoing calls which resulted in 2,012 referrals accepted by attorney KBA members.

Some questions surrounding this issue that face the legal community in Kansas are:

1. Should we have a record retention schedule in the Supreme Court Rules?
2. Should there be a mandatory “succession plan,” i.e., should every lawyer be required to identify and report to the Supreme Court a “point person,” trustee, or administrator to step in if/when an attorney dies or becomes disabled?
3. Should attorneys be assessed a set fee, say $1 each year, designated as the “file archive fee fund” for a centralized client file repository for paper and/or electronic file transport, storage, destruction, etc.?
4. Should there be a paid position with the Supreme Court, KBA or KALAP to handle these issues when the lawyer has not planned properly?
5. Are you willing to take these assignments?

To begin finding answers to some of these questions, consider taking some time to talk with lawyers, such as Carol Ruth Bonebrake and Anne McDonald of Topeka, who are familiar with these issues, to begin the conversation about preparing for and managing unexpected events to protect all clients in the future. And, be grateful for the lawyers who are willing to accept these appointments.

About the KBA President

Natalie G. Haag currently serves as executive vice president/general counsel for Capitol Federal Savings Bank. She has been a member of the Kansas Bar since 1985, and received her bachelor’s degree from Kansas State University in 1982 and her law degree from Washburn University School of Law in 1985.

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The Fine Art of Schmoozing

Creating and Maintaining Your Professional Network

It’s an important aspect of any occupation, especially the legal field. Many of us don’t like it, some of us despise it. Networking—getting out there and meeting others, glad-handing with strangers—all in hopes people will remember your name. But what was once a night at a reception, or socializing at a luncheon has become much easier thanks to technology.

The big question is, what are you doing to create and/or maintain your professional network? It’s nearly unheard of not to have a website for your firm these days. If you don’t have a website, look into getting one. If you do have a website, does it operate smoothly, and is it user friendly and easy to navigate?

So, what else is out there to assist lawyers in networking? The answer is —plenty! There seems to be new sites popping up all the time to assist professionals in networking and getting their brand out to the public, and most of them are free to use.

These time-tested networking tools are a great starting point:

1. LinkedIn
   - This site allows you to create a professional profile page, complete with credentials and experience. You can “connect” with colleagues, who can endorse skills that you list on your profile. And, many associations and organizations that you already belong to maintain pages, so you can easily keep up with your group affiliations.
   - LinkedIn allows you to share articles you’ve written, presentations you’ve given, or projects you’ve completed. You can also post professional updates, such as changes in position, job openings, or professional goals you’ve met to further engage your network.

2. Facebook
   - Setting up a business or professional profile page is easy, although you’ll need a personal Facebook profile first. Clients and colleagues can follow your professional page for personal or company updates, and comment on posts that are made public to increase your communication outreach and connectedness. Also, clients and colleagues can send you a private message through Facebook that is not visible to the public.
   - It’s worth noting that Facebook gives you a lot of freedom with the information you can post and share compared with LinkedIn, so be cautious with what you share.
   - I am seeing a strong increase in firms creating Facebook pages, and it’s an excellent way to get more visibility for your firm’s name.
   - We have to be aware of that intersection between our firms’ business pages and our personal Facebook pages. You may have clients who “like” your firm’s page and can get updates on current case rulings, etc., but they may also want to “friend” your personal Facebook page as well. It’s likely not best practice to “friend” current clients on Facebook, as it can cause issues with them contacting you, or perhaps them disagreeing with things you personally post, which can put a strain on the attorney-client relationship.
   - If you can keep these things separated it’s fine to have a personal Facebook page; we just must be cognizant of the people we “friend.”

3. Twitter
   - This site allows you share brief messages, or “tweets,” about anything in just 140 characters. You can follow bar associations, newspapers, politicians and public figures, and just about anything else you are interested in. If you find something of interest from other Twitter users, you can “retweet” the information to your own Twitter followers.
   - Twitter has increasingly become a tool for firms to post links to information for everyone who follows them. Firms can also tweet updates about things such as new attorneys who have joined the firm, or even job openings. And, you can insert hyperlinks into your tweets to connect your followers to more information, or use hashtags to categorize your tweets so they can be found among others on the same topic.
   - Twitter is another medium in which we must be aware of the intersection between firm and personal accounts. Many firms likely have social media policies in place that outline what is proper and not proper to post. I caution you with Twitter, just as I did with Facebook—be careful what you post. Both Facebook and Twitter have privacy options which enable restrictions such as prohibiting those who are not a “friend” or follower to view your posts, or can even hide profile information from those outside of your network. I strongly suggest keeping all of your personal social media accounts private.
These are just the major networking sites right now, but rules of professionalism and privacy apply to all social media platforms. Other sites to check out include Parterup, Plaxo, and Fast Pitch. But there are so many social media options, it takes a bit of research to determine which can best serve the particular interests of your practice, your firm, and your clients.

So, what about non-digital professional networking opportunities?

1. Be active in bar associations
- Local and state bar associations frequently hold social functions where lawyers and sometimes law students can get together in a friendly, laid back atmosphere and get to know one another.
- The KBA on many occasions will hold a CLE that coincides with a social event as well, which is perfect for networking. (The KBA Young Lawyers put on a Sporting KC CLE last year that consisted of not only gaining those needed CLE hours, but afterward tickets were available to go cheer on Sporting Kansas City. Be on the lookout, as we are currently working on such a CLE again this year.)

2. Volunteer Your Time
- You would be surprised at the people you would meet when you spend time with charities you are interested in—not to mention you’ll benefit a great cause.
- Some of the best places to volunteer with from a networking perspective for young lawyers are legal aid services. Not only are you doing something beneficial for the community as a whole, you also are able to meet with other attorneys who are not only assisting legal aid, but you are also meeting lawyers on the other side of the case as well.
- Volunteer for a chamber of commerce organization. Often times they have many committees that will assist you in meeting other attorneys, or potential clients. Often, areas such as government affairs committees or economic development committees are great ways to not only meet others, but to get your face and your firm’s name out there as well.

3. Serve on a Community Board
- These organizations often look for diverse professionals to fill slots on their boards.
- Lawyers seem to be in high demand, as they offer a very special level of expertise that is valuable to these organizations.
- Many community organizations are strapped for cash. The perspective and expertise of a lawyer is highly sought after, and these organizations could benefit from your assistance with things like running a fundraiser or reviewing policies and procedures for their employees. This is perfect if you are a new attorney, or if you’ve joined a firm in a new area, so you can get your name out to the public by serving these types of organizations.

4. Maintain Your Network
- Don’t forget to maintain contacts you’ve already made. Get in touch with that managing partner you clerked for, or the law professor who mentored you.

All of these examples will help you make new connections, and maintain the ones you’ve already made. You will find that when you least expect it, these will come in very handy. The best part is these are free; the only investment you have to make is a little bit of time.

About the YLS President

Justin Ferrell serves as in-house counsel/risk manager for the Kansas Counties Association Multi-Line Pool in Topeka. He currently serves on both the TBA Young Lawyers and KBA Young Lawyers in many capacities. jferrell@ksbar.org

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A KBA Member Benefit

One of the benefits of being a KBA member is access to over 20 public information pamphlets, and larger booklets. All of them are online and also available to order in hard copy. KBA members can order hard copies of 200 or fewer at no cost. These pamphlets are excellent to have on hand for your clients, or to use when you are asked to a speaking engagement. The KBA Access to Justice Committee is charged with overseeing the pamphlets and helping with the distribution and marketing of this benefit.

One of our most viewed pamphlets online is “Child Custody, Support and Visitation”. Another popular one is ”Marriage and Divorce.” For example, the Google Analytics report for January 17-23 indicates that “Child Custody, Support and Visitation” had over 700 pageviews, and “Marriage and Divorce” had over 400.

Two booklets are especially popular among KBA members who are asked to speak in classrooms, or events with middle school and high school groups, which cover areas of the law that pertain to each age group. The middle school booklet, “For the Record,” addresses things such as divorce, and decisions that will affect young people of middle school age. It also explains to youth what to do if they are being neglected or abused. The booklet written for high school students, “On Your Own,” covers areas of the law that young adults should know before they become independent. These booklets are also frequently requested by teachers, and are provided at no charge.

Funding for the booklets comes from the Law Related Education Committee through a grant from the Kansas Bar Foundation (KBF). Additionally, KBA members who have used the booklets and appreciate this benefit have provided private donations to help with printing costs. In addition to the booklets, the KBA also has a packet of information designed for Constitution Day/Celebrate Freedom Week. The packets are available to order, or you may print your own (http://bit.ly/ConstitutionDayProjects).

“The Living Will” and ”Durable Power of Attorney” pamphlets were updated in 2015, and are specifically designed to use online. These online pamphlets provide a PDF of the forms needed and instructions that are easy to understand. Each topic also has an FAQ section.

You can view a complete list of KBA pamphlets and booklets and link to a PDF order form at the KBA website (http://bit.ly/BarPamphlets). Also available to KBA members is a pamphlet about becoming a Fellow of the Kansas Bar Foundation, and a placard that lists many options for giving with the KBF. We welcome your assistance in helping us get the word out about the KBF!

About the Author

Anne Woods serves as the public services director at the Kansas Bar Association in Topeka. She manages the daily administrative needs of the KBF, in addition to administering projects such as the IOLTA program, pro bono programs, and the KBA’s law-related education efforts.

awoods@ksbar.org
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- Opposing A Motion For Attorney Fees

Author
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For more information or to purchase the publication visit www.ksbar.org/bookstore or contact Amanda Kohlman at akohlman@ksbar.org or (785) 234-5696
The 2016 KBA Annual Meeting Keynote Speaker

Stephen J. Rapp
CHAMPION OF HUMAN RIGHTS AND INTERNATIONAL JUSTICE

Rapp is currently the Sonia and Harry Blumenthal Distinguished Fellow for the Prevention of Genocide at the U.S. Holocaust Memorial Museum’s Simon-Skodt Center. In that role, he is currently working at the Hague Institute for Global Justice. His prior experience includes serving as the ambassador-at-large, heading the Office of Global Criminal Justice in the U.S. State Department from September 2009 to August 2015. In that position he coordinated U.S. government support to international criminal tribunals, including the International Criminal Court, as well as to hybrid and national courts responsible for prosecuting persons charged with genocide, war crimes, and crimes against humanity.

From January 2007 to September 2009, Rapp was the Prosecutor of the Special Court for Sierra Leone (SCSL) responsible for the prosecution of former Liberian President Charles Taylor and others bearing the greatest responsibility for serious violations during the Sierra Leone civil war. From 2001 to 2007, Rapp served as senior trial attorney and chief of prosecutions at the International Criminal Tribunal for Rwanda, personally heading the trial team that achieved convictions of the principals of RTLM radio and Kangura newspaper—the first in history for leaders of the mass media for the crime of direct and public incitement to commit genocide.

After receiving his bachelor’s degree from Harvard College and his law degree from Drake University, he was in private practice and served in the Iowa legislature. He became the U.S. Attorney for the Northern District of Iowa from 1993 to 2001.
IOLTA Snapshot: El Centro de Servicios Para Hispanos
Immigration Training for BIA Accreditation & Recognition

The Hispanic community in Topeka continues to experience rapid growth. The 2010 census recorded a 57 percent growth in the Shawnee County Hispanic population. In a survey of this population, the second-highest unmet need of respondents was a low-cost family-based immigration law program.

For the last two years, executive director Lalo Munoz, with the assistance of the Catholic Legal Immigration Network Inc., has worked toward receiving sufficient family-based immigration training to apply for Bureau of Immigration Appeals (BIA) Accreditation and Recognition.

With BIA Accreditation and Recognition, El Centro will provide immigration services at a low cost or pro bono to the affected population.

“El Centro of Topeka sees a growing need for low cost legal immigration services to families in our community. Through the Department of Justice’s BIA Accreditation and Recognition process, we propose to provide families an added avenue to receive essential legal immigration services. IOLTA funds allow us the ability to receive the legal training necessary to apply for and ultimately provide these vital services.”

-Lalo Muñoz
Executive Director
El Centro of Topeka

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The Kansas Bar Association has secured a sleeping room block under that name at the Hyatt Regency Hotel. Pricing for single/double occupancy is $125 and the room block deadline ends at 5 p.m. on May 14, 2016.

Sleeping Room Reservations:
Access to Legal Education for Minorities Increases Access to Justice for Underserved Populations

The vast majority of the practicing bar can fit into a single unsurprising category. Though diversity inclusion is a relatively new trend in the legal field, it has not broken tradition. In 2015, the American Bar Association published a study indicating that white lawyers account for about 90 percent of practitioners, while Black and Latino lawyers amount to just over 5 percent each. The legal community has often sidestepped diversity issues by making them topics for discussion rather than problems to face. As a result, the legal academy is continuing to generate a largely homogeneous profession that is making the access to justice crisis worse. As gatekeepers to law practice, law schools should see genuine diversity inclusion as a way of re-moralizing the academy in light of its dark history. In doing so, it will help to ensure that impoverished communities do not find themselves below the law.

The shortfall between the legal needs of poor households and the availability of lawyers to meet those needs is jarring. Due to lack of resources, legal aid services reject approximately one million qualifying cases annually, leaving indigent parties to fend for themselves in hearings where they stand to lose their home, financial independence, and/or child custody. Since the 2007 economic downturn, the number of persons who qualify for legal aid services has risen by 10 million nationwide. This crisis is commonly referred to as the justice gap. When it comes to the basic responsibility of providing legal services to those unable to pay, it is easy to see that the practicing bar is a day late and a dollar short. This begs the question, why is the legal academy producing lawyers who don't do enough for our nation's poor?

The American Bar Foundation published the most detailed quantitative study on minority law graduates. Researchers gathered 26 years of admissions and alumni data from an elite law school. The study found that the attorneys of color were more likely than the white attorneys to begin their legal careers in public service or public interest. Among attorneys who began their careers in the private sector, the minority attorneys work more pro bono hours, serve on the boards of more community organizations, and do more mentoring of new attorneys than their white peers. Furthermore, attorneys of color provide significantly more service to clients of color than white attorneys. The theory is that attorneys of color are compelled to serve marginalized populations because of their own minority status. This is so, whether the attorneys' identification with their indigent clients is experience-based, cultural, or rooted in a sentimental pull to remember where one came from.

To be sure, bridging the gap in access to justice is not a duty uniquely reserved for minority attorneys. Nor is it the duty of attorneys of color to reprogram the systematic exclusion of minorities seeking to enter the legal profession. Yet, despite their underrepresentation, research shows that attorneys of color devote more time, resources, and civic influence toward alleviating the justice crisis than their white counterparts.

One reason for the underwhelming presence of diversity in the profession is law schools’ over-reliance on the Law School Admission Test (LSAT) in their admission decisions. The U.S. News & World Report rankings have established a pecking order in the legal academy, adding unyielding pressure on law schools to boost or maintain their status. Consequently, most law schools use the LSAT as the primary determinant for admission due to the fact that the median LSAT score of each entering class is a major factor in determining a school’s rank (up to 90 percent of the differences in the rankings may be explained by this factor).

The LSAT has a way of disproportionately eliminating a lot of the competition for first-year admission slots. The average LSAT score for white applicants is 155, while the average scores for Black and Latino applicants are 145 and 147 respectively. The LSAT measures skills associated with success in law school, though scoring within a competitive percentile is often connected to privilege. Higher LSAT scores require specialized educational preparations that fall outside the financial capabilities of many applicants. Moreover, substandard educational environments often subject minority students to circumstances that are not conducive to the initial development of the specific skill set the LSAT tests.

The Law School Admissions Council acknowledges that the LSAT is appropriate only as a predictor of an applicant’s first-year law school grade point average. Even so, there is evidence convincing at least one federal court that LSAT predictors correlate with law school grades at a rate of only 10 to 20 percent. If this is true, one must wonder why law schools defer to numerical predictors whose veracity rivals that of a magic eight ball. Granted, the LSAT is not utterly without merit, but overreliance on it in determining admission is problematic. The LSAT rewards privilege, and law schools’ fixed premium on it is inappropriate both statistically, and as a matter of policy.

Large swaths of our country’s population do not have access to justice. The legal community must take responsibility for this, and more importantly, take action. Part of the problem can be traced back to the absence of diversity in the profession, resulting from law school admission practices that indirectly favor privilege. The legal community must address the justice crisis comprehensively, and an integral part of this process entails creating a more diversity inclusive academy.

About the Author
Rachelle Veikune moved from Hawaii to Kansas two years ago to attend the University of Kansas School of Law. She made a home of Lawrence and hopes to begin her legal career as a research attorney in a Kansas court.
ENDNOTES


5. Kansas Rules of Professional Conduct 6.1 comment 3
7. Id.
8. Id.
9. Id.
10. Id.
11. ABA model rules Preamble paragraph 6.
14. Id.
15. Id. “Latino” as used here factored in Puerto Rican statistics.
The judicial branch believes judicial evaluations are important, and has demonstrated that belief continuously over the past decade. The Kansas Commission on Judicial Performance formed in 2006 to assess judges and justices with an eye toward collecting information relevant to voters making decisions about judicial retention. The first scorecards were released in 2008, and by 2009, Project Pegasus joined it as a tool to examine the courts’ day-to-day performance, and to allow forums for the public to share their experiences with the judiciary. Arguably, the ongoing political question of merit selection, which has engaged judges testifying on both sides of the debate, is another effort to provide judicial evaluation to the citizens of Kansas.

We may be on the cusp of another experiment in judicial evaluation—more familiar to Internet-age constituents comfortable with crowdsourcing the task of examining judges. Last year, the federal government’s Government Services Administration (GSA) began encouraging federal agencies and courts to become involved with Yelp.com, an online review site. Yelp is a website and mobile application that was founded in 2004, and allows users to create an online profile to review local businesses. Users can award up to five stars per review, and post written comments for others to read. Theoretically, reaching out to constituents through established online communities could be more efficient than reinventing resources for commenting and reviewing in-house. Justin Herman of the GSA said in an August 2015 Washington Post article that, “We’re moving into a world in which social media is the charge that fuels the circuit of collaborative public service.”

Courts Come to Yelp

Yelp reviews seem to cover three types of experiences pertaining to courts. The first are more tourist-related reviews which assess a court’s architecture, historical significance, or onsite exhibits. (Reviews certainly indicate that attention to such details may be important to raising public awareness of a court’s function and purpose within government.) A second type of review focuses on the overall customer experience of appearing at court. Was parking readily available? Was security quick and reasonable? Did clerk staff answer questions readily and professionally? These sorts of reviews actually align with some of the information gathered in the public forums arising out of the Kansas Supreme Court’s Project Pegasus. Finally, a third category relates directly to a constituent’s experience in a specific courtroom, or with a particular judge.

Here are some examples from Yelp.com:

• Robert G., Chicago – “Judge Calabrese is fun to watch in action. He smiles and one can tell that he genuinely enjoys his career and running his courtroom.”

• Ivan S., Atlanta– “I sit in the Fulton County Justice Center…as a potential juror…. Granted, I’d rather cover myself in honey and then roll around on a hill of fire ants than be sitting here, but they make it as pleasant (OK, LEAST painful) experience as they can make it.”

• K. M., San Francisco– “The judge from court room A was great and I thought very fair. Reduced my fine, for which I was at fault. Everyone in the court room was kind and courteous and things went quite smoothly, not much of a wait.”

• Mariana P., Las Vegas– “If you look rough and speak poorly you get the judge’s sympathy and are allowed to speak where he will kindly listen. If you’re dressed respectively, he’ll cut you off and give you minimum payments of $100 a month :)”

Most of the Yelp reviews of courts and judges appear to be from potential jurors, or those summoned on traffic issues. The perspective of a juror watching a judge’s demeanor over a day or more of jury selection, or the comments of a reviewer who has watched a judge crank out several dozen dispositions in a few hours are illuminating —more so, perhaps, because the reviewer is a volunteer who took time to share his or her experiences with the Yelp community. One significant problem with the Kansas Commission on Judicial Performance was exceptionally low public participation – so low it was slated for termination before the legislature defunded the entire enterprise.

My unscientific, and relatively shallow mining of courthouse reviews found none by a lawyer reviewing a judge. That remains a difficult area. Judge Goering and Judge Journey examined two angles to that problem in a Wichita Eagle article about judicial reviews back in 2010. Attorney anonymity can be important to candor; Goering said, “Lawyers are reluctant to come to a judge they have a case before and say, ’Hey, you screwed up.’” Conversely, preserving anonymity often requires so much sanitation that the review risks meaninglessness. Journey commented to the Wichita Eagle in 2010, “It’s impossible to accurately address anonymous generalizations.”
Interesting: there are some signs that the Yelp court reviews are gaining popularity in Kansas. A search of Yelp for courthouses in Kansas shows three different courts with Yelp pages. Both Harvey and Kingman counties appear, as does the 18th Judicial District (Sedgwick). (The Courthouse Café within Sedgwick’s courthouse has its own review page as well.) Unfortunately, there are no reviews yet to provide any insight about constituent’s experiences with the courts and judges. The Wichita Eagle and Wichita Bar Associations have run lawyer surveys of Sedgwick judges every other year since 2006, creating some history in “judging the judges,” so the 18th’s Yelp page may not be silent forever. These experiments with online judicial evaluation in Wichita underscore the judiciary’s interest in self-examination, and demonstrate that there is a place for judicial evaluation, regardless of how judges are selected. Join the experiment and give some stars – for justice!

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and former 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 Committee.

kslpm@larryzimmerman.com

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Members in the News

Changing Positions

Dale T. Callahan was sworn in as a new assistant Montgomery County attorney, Independence.

Holly Dyer, a partner in the law firm of Foulston Siefkin, has been elected to the American Law Institute.

Kim D. Farha has been elected partner at Hite, Fanning & Honneyman, LLP, Wichita.

Derrick B. Heinrichs has joined Condray & Thompson, LLC, Concordia.

Katharine Jackson has been appointed city attorney for Manhattan.

Justin Leck has joined Spencer Fane’s corporate practice group as an associate.

Craig N. Olsen has become the new Maryville city attorney, Marysville.

Austin K. Parker has joined Fisher, Patterson, Sayler & Smith, Austin.

Jennifer L. Skliris has been named a partner of Deacy & Deacy, LLP, Kansas City, Mo.

Tanya M. Rodecker-Wendt has been elected into partnership with Pringle, Oliver, Wallace et.al, LLP, Wichita.

William S. Walberg has become an associate at Hite, Fanning & Honneyman, LLP, Wichita.

William Van Asselt has been promoted to general counsel of NIC Inc., Olathe.

Miscellaneous

Marc Bennett of Wichita has been appointed the 2016 president of the Kansas County and District Attorneys Association.

Henry R. Cox has been selected and admitted as a member of the National Academy of Distinguished Neutrals.

Changing Locations

Kenny W. Estes has started his own practice at 102 E Waterman, P.O. Box 1124, Lakin, KS, 67860.

Joseph Hollander & Craft, LLC has relocated its Lawrence location to 5200 Bob Billings Pkwy., Ste. 201, Lawrence, KS, 66049.

Obituaries

Edward C. Gillette

Edward C. (Ed) Gillette, born Sept, 25, 1959, died unexpectedly on Jan. 6, 2016. He was 56 years old.

Ed grew up in Kansas City, Kan., where he attended Washington High School. He obtained his undergraduate degree from the University of Kansas, and his Juris Doctorate in 1984 from Washburn University.

Ed practiced law for over 30 years, and was a prominent attorney in the Kansas City area. He was the founder and principal of the Gillette Law Firm, and was licensed to practice in the state courts of Kansas and Missouri, the U.S. District Courts in the district of Kansas, the western district of the Missouri federal court, and the U.S. Supreme Court. Ed was recognized as a top trial lawyer in both criminal and civil practice on the numerous occasions throughout his career, and was one of a very select group of attorneys to win both a civil case and a criminal case in the Kansas Supreme Court.

Aside from Ed’s thriving law practice, he was recognized nation-wide as a collector. He loved to travel and was an avid collector of many things.

Ed was also active in the community and in politics. He sat as Pro Tem Municipal Judge in Kansas City, Kan. He also served as Chairman of the Wyandotte County Parks and Recreation Board, City Councilman and President of the Edwardsville City Council, Member of the Mid-America Regional Council Board, Member of Governor Kathleen Sebelius’ Transition Team, and Member of the Kansas Gaming Committee.

Ed leaves many lifelong friends, and as they can tell you, he was one-of-a-kind, passionate, generous, and fun-loving. He will be deeply missed by his friends, family, and all who knew him.

Kathryn Stevenson has joined Monnat & Spurrier, Chatered as an associate attorney.

Brian J. Thomas has been promoted to Vice President of Risk Management by the Board of Directors for Preferred Physicians Medical Risk Retention Group, Overland Park.

Adam R. Troutwine has been promoted to shareholder of Polsinelli, Kansas City, Mo.

William Van Asselt has been promoted to general counsel of NIC Inc., Olathe.

Gregory E. Saindon

Gregory E. Saindon, 64, Ellis, died Tuesday, Jan. 12, 2016, in Ellis.

He was born Oct. 19, 1951, in Hays, to Delmar E. and Mary Elizabeth (Graves) Saindon. He was a 1969 graduate of Palco High School, a 1976 graduate of Fort Hays State University and 1978 graduate of Washburn Law School.

He married Ann Marie Schoendaller on May 22, 1971, in La Crosse. He was admitted to the Kansas Bar in 1979 and began practicing law in Parsons, until August of 1980. He then started practicing law in Ellis, until his retirement from Saindon Law Office in October 2015.

He was a member of the Kansas Bar Association, Ellis Knights of Columbus and St. Mary’s Catholic Church in Ellis. He was a past board member of Ellis County Economic Development Corporation, Ellis Economic Development Corporation and the Hays Area Children’s Center. He was an avid outdoorsman who enjoyed hunting and fishing.

Survivors include his wife, two sons, Jeffrey Saindon, Hays, and Brian Saindon and wife, Emily, Wichita; a daughter, Amy Rohr and husband, Brian, Ellis; and four grandchildren, Eli J. Alex W and Carter J. Rohr, all of Ellis, and Ellenora M. Monslow Gillette, two stepchildren, Kathryn Steinbrink Case (Mark Case), Leslie Brandish (Billy Gibson), and two grandchildren, Anthony and Caitlyn. Surviving siblings are Michael (Anita) Gillette, Carol Morris, and Gary (Jackie) Gillette, as well as numerous nieces and nephews, and grand-nieces and nephews.
Where Does the Money Go?
Our designated charities for 2016 are:
- CASA (Johnson/Wyandotte Counties)
- SafeHome and Hope House (domestic violence programs)
- Metropolitan Organization to Counter Sexual Assault (MOCSA)
- Kansas Bar Foundation
- Midwest Foster Care and Adoption Association
- In addition, we will fund Ethics for Good Scholarships to each of the KU, Washburn and UMKC Law Schools and the Johnson County Community College paralegal program.

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Who Are these Intrepid Presenters?
Stan Davis, Legal humorist, consultant and gadfly
Jim Griffin, Scharnhorst Ast Kennard Griffin, P.C.
Mark Hinderks, Stinson Leonard Street L.L.P.
Todd LaSala, Stinson Leonard Street L.L.P.
Hon. Steve Leben, Kansas Court of Appeals
Jacy Hurst Moneymaker, Swope Health Services
Todd Ruskamp, Shook, Hardy & Bacon L.L.P.
Hon. Melissa Standridge, Kansas Court of Appeals

Questions?
Contact Deana Mead, KBA Associate Executive Director, at dmead@ksbar.org or at (785) 234-5696.

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How the Ethical Rules Relate to Each of These  
Wednesday, April 6, 2016  
Kansas Law Center  
1200 SW Harrison St.  
Topeka, KS 66612

**2016 Bankruptcy & Insolvency Institute**  
Friday, April 8, 2016  
Maner Conference Center  
1717 SW Topeka Blvd.  
Topeka, KS 66612

**Brown Bag Ethics: Prepare Yourself and Your Client**  
Ethical Obligations Surrounding Cyber-Security Issues  
Wednesday, April 13, 2016  
Kansas Law Center  
1200 Harrison St.  
Topeka, KS 66612

**2016 Litigation CLE**  
Friday, April 15, 2016  
Kansas Law Center  
1200 SW Harrison St.  
Topeka, KS 66612

**Lunch & Learn: Nonprofits: How to Start and Maintain a Tax-Exempt Organization**  
Tuesday, April 19, 2016  
Kansas Law Center  
1200 SW Harrison St.  
Topeka, KS 66612

**2016 Family Law Institute**  
Friday, April 22, 2016  
The Oread Hotel  
1200 Oread Ave.  
Lawrence, KS 66044

**2016 Midwest Intellectual Property Institute**  
Friday, May 6, 2016  
Sprint Corporation  
6050 Sprint Parkway  
Overland Park, KS 66251

**2016 Solo and Small Firm Conference**  
Friday, May 6, 2016  
Atrium Conference Center  
1400 N Lorraine St.  
Hutchinson, KS 67501

**2016 Criminal Law CLE**  
Friday, May 20, 2016  
Kansas Law Center  
1200 SW Harrison St.  
Topeka, KS 66612

**Ethics for Good XVII**  
Friday, May 20, 2016  
Polsky Theatre, JCCC  
Carlsen Center  
12345 College Blvd, (College & Quivira)  
Overland Park, KS 66210

**Ethics for Good XVII**  
Wednesday, June 22, 2016  
Nelson Atkins Museum of Art, Atkins Auditorium  
4525 Oak St.  
Kansas City, MO 64111

On Demand – Last day to view on demands will be March 31

**Addressing Bad Behavior in Depositions**  
Presented by: Prof. Suzanne Valdez, University of Kansas School of Law  
1 hour of CLE including 1 hour of Ethics and Professionalism

**Brown vs. Board**  
Presented by: Hon. G. Joseph Pierron Jr., Kansas Court of Appeals  
1 hour of CLE

**Civil Rights Issues in the Supreme Court During OT 2013**  
Presented by: Prof. Stephen McAllister, University of Kansas School of Law & Toby Crouse, Foulston Siefkin LLP  
1 hour of CLE

**Free Speech and Free Trade: Civil Rights Meets The Practice of Law**  
Presented by: Alan Rupe, Lewis Brisbois Bisgaard & Smith LLP  
1 hour of CLE

**Social Media for the Family Lawyer (and anyone else, for the matter)**  
1 hour of CLE including 1 hour of Ethics and Professionalism

**The Civil Rights Act of 1964...Reflections and Relevance**  
Presented by: Doug Booney, Legal Director, ACLU Foundation of Kansas  
1 hour of CLE

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How to Securely Use Dropbox in a Legal Environment

By Diane Ebersole, ABA TECHSHOW Faculty 2015

In preparation for the 30th anniversary of the ABA TECHSHOW, the KBA revisits an excerpt from a helpful tech article from the event in 2014.

We have discussed how you can enhance the security of access to your Dropbox files by moving to a two-step verification for login via the Internet. What data protections are provided by Dropbox to protect your data during transmission and while it resides on their servers? How can you improve the security?

The data (file) placed into Dropbox on your computer is transferred to the Dropbox server using Secure Socket Layer protection. This protects your data during transmission. As the file is placed on the Dropbox server it goes through an encryption process. Dropbox holds the key for the encryption. When you access the file from Dropbox servers, it “passes through” the encryption key again and becomes available for your use.

The fact that data arrives at Dropbox in unencrypted form seems to be the point of contention for many. Lawyers seem to worry less about the possibility that the Dropbox servers will be hacked and valuable data stolen, and more about the perceived risk that Dropbox might have to disclose a file pursuant to a lawful court order. Because the file data arrives at Dropbox in unencrypted form, the file could be accessed and reproduced in original format by Dropbox to comply with the court order. If you want to address this security risk, one alternative would be to add encryption to some or all of your files before placing them in your Dropbox drive on your computer.

There are a lot of encryption applications in the marketplace currently. I am not going to attempt to provide a thorough review of the many options and instead will discuss four applications that may meet your needs to add encryption to some of your files. These applications are each designed to work well with Dropbox and other cloud storage systems.

How do these applications work? The basics are really pretty simple. Let’s use Safebox as an example. First the application is downloaded and installed on your computer. Much like Dropbox, Safebox adds another drive to your computer. This drive is where you place a file that you want to be encrypted before it is sent to the Dropbox servers for online storage.

Safebox encrypts the file including the file name and then automatically sends it to the Safebox folder residing in your online Dropbox. You can continue to use any of the file management techniques you normally use to move files around on your computer. It is possible to do a “save as” to either the Safebox or Dropbox drives, or you can click and drag files or copies of files to these drives and the organizational structure within these drives.

The short version of how these two “virtual” drives work might be summed up simply. When you put a file in an encryption application folder like Safebox, the only way you can access the file (in its original form) is through the same application – Safebox. The file will be automatically stored on Dropbox, but accessing through Dropbox will only let you see the encrypted form. Other products that are similar to Safebox include BoxCryptor, Viivo, Safemonk, and CloudFogger.

Carefully consider which of your files really need to be encrypted. If you are looking at using Dropbox to back up your personal bank records and tax returns should those be encrypted? If your client has given you the recipe for Pepsi, should it be encrypted before you move it to Dropbox for storage? Encryption of files creates a unique management layer that has the potential to both prevent and create disasters. It is highly unlikely that all of the documents stored on Dropbox require encryption.

If your choice for an encryption application does not provide a recovery key you will not be able to recover your encrypted documents if you have lost or forgotten the password. On the other hand, if the encryption provider has access to your recovery key, do they have access to files that may be subject to the same court order concerns? If the documents stored on Dropbox are not encrypted and a court order results in the disclosure of documents, what would be the consequences? It is a delicate balance. You should not approach the process of encryption casually. If you tend to be a bit scatterbrained or unfocused, be sure to exercise great care as you move into encryption. Perform your due diligence deciding which encryption application to use. Test the applications using frivolous documents that allow you the freedom of experimenting without worrying about data loss.

If you are applying encryption to files for your firm or for your personal life, establish systems that enable your successors at work or at home to access the encrypted files. What happens if you encrypt all of the files for a huge case and your successor cannot access them after your unexpected death?

As you move into the world of digital storage and encryption take time to review the security measures currently pro-
tecting documents in your office. Review the security on your computers, servers, external drives, thumb (flash) drives, and paper documents. Encryption will enhance the security of documents stored in the cloud. Remember, document retention and security is a multifaceted endeavor both in the cloud and in your office!

This article is a taste of what awaits you at the ABA TECHSHOW 2016, March 16-19 at the Hilton Chicago. As a member of the Kansas Bar Association, we want you to know that you can get a discount on the ABA TECHSHOW 2016. This discount only applies to registrants that qualify for the standard registration. You can register online and include this unique discount code: EP1603 to receive a discount. Reprinted with permission. 2015© by the American Bar Association. All rights reserved. This information or any or portion thereof may not be copied or disseminated in any form or by any means or stored in an electronic database or retrieval system without the express written consent of the American Bar Association.
IRAs Demystified
A Sampling of Prohibited Transactions, Required Minimum Distributions, and Creditor Issues for the Non-tax Lawyer

By Jeremy Graber
I. Introduction

One of your long-time business clients comes to your office to discuss her planned business acquisition. As you are gathering information from her, she tells you the purchaser will be an entity to be formed, which will be funded by her IRAs. You raise your eyebrows. “No worries,” she says, “my financial advisor put this structure together.” You go back to drafting the letter of intent but not without hesitation and a note to follow-up later with her, and possibly her “advisor.”

Later that day, a long-time friend and estate-planning client comes by your office to update his estate plan. Your client wants to leave money to a charity, and you have prepared a simple amendment to his trust document. Knowing the client has IRAs and life insurance, you ask him if he has updated his beneficiary designations. As you begin discussing the various options as well as offering to contact the financial institutions to ensure it is handled properly, your thrifty client tells you that he has everything taken care of. “I simply named my trust as beneficiary on all my accounts to protect my kids from their creditors, and to make sure that ex of mine doesn’t get a penny.” You try to interject, but he is already discussing Bill Self’s next recruiting class.

At the end of 2014, assets owned in IRAs reached $7.4 trillion, representing 30 percent of all retirement assets in the country.1 As IRAs grow and baby boomers age, issues concerning IRAs are becoming more prevalent. IRA owners want to tap the liquidity in their IRA to fund business start-ups or expand existing businesses. As IRA owners die, their spouses, heirs, beneficiaries, trustees, or executors may be faced with uncertain tax consequences and potentially complicated distribution rules to preserve the IRA’s tax benefits. This article will attempt to address these issues at a high level to help non-tax lawyers identify potential tax and practical issues in dealing with IRAs. Specifically, this article will examine the prohibited transaction rules broadly forbidding self-dealing. Next, this article will examine the required minimum distribution rules with a focus on issues following the death of the IRA owner. Lastly, this article will touch on IRA creditor protection, its exceptions, and the tax implications of the division/transfer of IRAs in a divorce proceeding.

II. Prohibited Transactions

A. What is a prohibited transaction (in code-speak)?

Any direct or indirect:

(A) sale or exchange, or leasing, of any property between a plan and a disqualified person;

(B) lending of money or other extension of credit between a plan and a disqualified person;

(C) furnishing of goods, services, or facilities between a plan and a disqualified person;

(D) transfer to, or use by or for the benefit of, a disqualified person of the income or assets of a plan;

(E) act by a disqualified person who is a fiduciary whereby he deals with the income or assets of a plan in his own interests or for his own account; or

(F) receipt of any consideration for his own personal account by any disqualified person who is a fiduciary from any party dealing with the plan in connection with a transaction involving the income or assets of the plan.2

This broad definition covers almost all types of transactions between a “disqualified person” and the IRA.3 The Code defines a “disqualified person” as a person who is:

(A) a fiduciary;

(B) a person providing services to the plan;

(C) an employer any of whose employees are covered by the plan;

(D) an employee organization any of whose members are covered by the plan;

(E) an owner, direct or indirect, of 50 percent or more of—

(i) the combined voting

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IRAs Demystified

power of all classes of stock entitled to vote or the total value of shares of all classes of stock of a corporation,

(ii) the capital interest or the profits interest of a partnership, or

(iii) the beneficial interest of a trust or unincorporated enterprise, which is an employer or an employee organization described in subparagraph (C) or (D);

(F) a member of the family (as defined in paragraph (6))\(^4\) of any individual described in subparagraph (A), (B), (C), or (E);

(G) a corporation, partnership, or trust or estate of which (or in which) 50 percent or more of—

(i) the combined voting power of all classes of stock entitled to vote or the total value of shares of all classes of stock of such corporation,

(ii) the capital interest or profits interest of such partnership, or

(iii) the beneficial interest of such trust or estate, is owned directly or indirectly, or held by persons described in subparagraph (A), (B), (C), (D), or (E);

(H) an officer, director (or an individual having powers or responsibilities similar to those of officers or directors), a 10 percent or more shareholder, or a highly compensated employee (earning 10 percent or more of the yearly wages of an employer) of a person described in subparagraph (C), (D), (E), or (G); or

(I) a 10 percent or more (in capital or profits) partner or joint venturer of a person described in subparagraph (C), (D), (E), or (G).

A “fiduciary” is generally a person who exercises any discretionary authority or control over plan assets or who renders investment advice for a fee.\(^5\) When determining entity interests, the attribution rules of Code Section 267 apply.\(^6\)

In short, a disqualified person includes the IRA owner, the owner’s spouse, ancestors, lineal descendants and spouses of the lineal descendants. Corporations, partnerships, trusts and estates are disqualified persons if at least 50 percent of the entity or its interest is owned directly or indirectly by disqualified persons.

B. What is a prohibited transaction (in plain English)?

Under Code Section 4975(e)(2), there are nine subcategories of disqualified persons. The following charts summarize the basic definition of disqualified persons as to individuals and entities.\(^7\) When an IRA transacts with any one of these disqualified persons, directly or indirectly, the IRA has likely engaged in a prohibited transaction under Code Section 4975. Whether a transaction was undertaken in good faith or beneficial to the IRA is inapplicable to the prohibited transactions analysis.

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C. A prohibited transaction causes termination of the IRA and deemed distribution of its assets as of Jan. 1 of the year of the prohibited transaction

If a prohibited transaction occurs, the resulting effect is straightforward. The account (1) ceases to be an IRA, and (2) is treated as having distributed all of its assets on January 1 of the year of the prohibited transaction. Importantly, the entire IRA is deemed distributed as of January 1, not just the amount of the prohibited transaction.

Because distributions from IRAs are generally 100 percent taxable, the IRA owner realizes ordinary income of the entire IRA's value in the year of the prohibited transaction. In addition to ordinary income, the IRA owner may be subject to the 20 percent accuracy-related penalty under Code Section 6662, and the 10 percent early distribution penalty under Code Section 72(t). As illustrated in the Ellis case below, the effect of a seemingly small prohibited transaction can be quite extraordinary to the unsuspecting IRA owner.

D. Case studies and hypotheticals

i. Ellis v. Comm’r—Payment for services

In *Ellis*, the taxpayer received distributions totaling $321,366 from his former employer's 401(k) and deposited the proceeds into his newly-formed self-directed IRA. Ellis also formed an LLC called CST to engage in the used-car sales business. Ellis was its designated general manager. After forming CST and funding his new IRA, Ellis caused his IRA to acquire 98 percent of CST's membership units with the bulk of his IRA assets. During its first year of operation, CST paid Ellis $9,754 as compensation for his role as CST's general manager.

It was undisputed that Ellis was a disqualified person under 4975(e)(2)(A) because he was a fiduciary of his IRA under 4975(e)(3). The parties also agreed that CST was a disqualified person because Ellis was a beneficial owner of the IRA's membership interests in the company. The sole issue was whether Ellis's $9,754 compensation—from the LLC—was a prohibited transaction.

The 8th Circuit affirmed the Tax Court's holding that Ellis engaged in a prohibited transaction. Ellis caused his IRA to invest the majority of its value in CST as its majority owner with the understanding that he, Ellis, would receive compensation as its general manager. "By directing CST to pay him wages from funds that the company received almost exclusively from his IRA, Mr. Ellis engaged in the indirect transfer of the income and assets of the IRA for his own benefit and indirectly dealt with such income and assets for his own interest or his own account." The court found irrelevant that Ellis's $9,754 compensation was not from the LLC—relying on the broad "direct or indirect" prohibition on self-dealing of 4975(c).

Because of Ellis's $9,754 compensation, the IRA lost its exempt status and its entire fair market value, in excess of $300,000, was treated as being distributed, and therefore, includible in Ellis's taxable income. Because Ellis did not report the deemed distribution in the year it occurred and was under 59½-years-old, Ellis was also liable for the 20 percent accuracy-related penalty and the 10 percent early-distribution penalty.

As the Tax Court noted, transactions described in 4975 are prohibited even if "they are made in good faith or are beneficial to the plan." The Tax Court succinctly summarized the gist of Ellis's acts and Code Section 4975's prohibitions:

In essence, Mr. Ellis formulated a plan in which he would use his retirement savings as startup capital for a used car business. Mr. Ellis would operate this business and use it as his primary source of income by paying himself compensation for his role in its day-to-day operation. Mr. Ellis effected this plan by establishing the used car business as an investment of his IRA, attempting to preserve the integrity of the IRA as a qualified retirement plan. However, this is precisely the kind of self-dealing that section 4975 was enacted to prevent.

ii. Peek v. Comm’r—Extension of Credit

In *Peek*, the two taxpayers, Peek and Fleck, used their self-directed IRAs to capitalize a newly-formed entity, FP Company, as 50 percent owners. In 2001, FP Company purchased another business, AFS, for $1,100,000. The purchase price was paid out of various sources, including the cash from the IRAs and a $200,000 promissory note to the seller from FP Company (not the IRAs). The promissory note was secured by the personal guaranties of Peek and Fleck. In 2006, Peek and Fleck's IRAs sold their interests in FP Company to a third party for $1,668,192. Until the 2006 sale, Peek and Fleck were the sole owners, officers, and directors of FP Company.

On examination, the IRS contended the IRAs ceased to qualify as IRAs as of the first day of 2001 because the loan guaranties were prohibited transactions under 4975(c)(1)(B). Peek and Fleck argued that the prohibition did not apply because their personal guaranties did not guarantee a loan by the IRA, but rather a loan by FP Company, an entity owned by the IRAs.

The Tax Court agreed with the IRS finding the taxpayer's argument would "rob [4975(c)] of its intended breadth." The court found 4975(c)(1)(B) was intended to prevent taxpayers "from making loans or loan guaranties directly to their IRAs or indirectly to their IRAs by way of an entity owned by the IRA." Because the IRAs engaged in a prohibited transaction in 2001, the IRAs ceased to be exempt from income tax and were deemed to have distributed the accounts (the FP Company stock) in 2001. Thus, the taxpayers were liable for tax on the 2006 sale of FP Company. Like the taxpayer in Ellis, Peek and Fleck were also liable for the 20 percent accuracy-related penalty under Code Section 6662.

iii. In re Kellerman—Prohibited Transaction leads to loss of exempt status

In this case, the bankruptcy trustee challenged the debtors' claimed exemption of Mr. Kellerman's IRA arguing the IRA lost its IRA status due to a prohibited transaction. While the facts are somewhat complex, they can be summarized as follows. Barry Kellerman was a real estate developer, and he and his wife each owned 50 percent of a company named Panther Mountain. Panther Mountain and the IRA purported to form a partnership as 50 percent owners to purchase real property.
According to the partnership agreement, the IRA would initially contribute cash and property to the partnership (totaling approximately $163,000), and Panther Mountain would contribute cash at an unspecified construction completion date. On the same day that the partnership was created, the IRA purchased real property that was adjacent to other property owned by Panther Mountain for approximately $123,000.27 Later, the IRA paid approximately $40,000 to develop the adjacent property. The purchase and development of the adjacent real property benefited the development of the Panther Mountain property.

Later, the Kellermans and Panther Mountain filed for bankruptcy. On Panther Mountain’s schedules, it listed the IRA as an unsecured creditor for $163,000 described as “50 percent Interest in new entity.”

The Kellermans conceded and the court found that Barry Kellerman was a disqualified person28 as well as his wife, as a member of the family.29 Panther Mountain and the partnership were also disqualified persons because Barry Kellerman owned a 50 percent membership interest in Panther Mountain (which owned 50 percent of the partnership).30

The Court determined the IRA engaged in prohibited transactions under 4975(c)(1)(B) (lending of money), (D) (use of assets by or for the benefit of a disqualified person), and (E) (acts by a fiduciary where he deals with assets in his own interest).31 While the court went through each transaction at issue, it summarized its main holding as, “[t]he real purposes for these transactions was to directly benefit Panther Mountain and the Kellermans…[T]hey utilized the IRA to indirectly secure additional financing for their existing” development.32 Accordingly, the IRA ceased to qualify as an IRA under Code Section 408, losing its exempt status under the Bankruptcy Code.

E. Lessons learned and practice pointers

As these cases illustrate, the reach of the prohibited transaction rules is broad and not always easily defined. IRA-owned business interests (including farming interests) in which the owner or the owner’s family is actively involved in the business, are rife with prohibited transaction issues. Lending of money and using an IRA’s cash for alternative financing are also hot spots for prohibited transactions.33

While the prohibited transaction analysis is fact-specific, the lawyer should focus on some high-level concepts when faced with a possible prohibited transaction issue. First, clearly identify the disqualified persons in relation to the IRA. Only transactions with disqualified persons can be prohibited transactions. Second, accurately define the transaction that may be potentially prohibited. Who are the people and entities directly involved and who are the entity owners, family members, and related parties to those directly involved? A simple business transaction may be a complex prohibited transaction issue depending on ownership structures of the entities involved as well as family members. Lastly, courts have broadly applied the prohibited transaction rules relying on the “direct or indirect” statutory language. This leaves significant gray area that requires judgment and cannot be resolved by a checklist. Keep in mind that Code Section 4975 is intended, in part, to prevent taxpayers from engaging in transactions that could place the IRA’s assets at risk of loss before retirement.34 Accordingly, the IRS may closely scrutinize a transaction that is tangentially connected between the IRA and its owner, owner’s family, or owner’s business ventures for possible prohibited transaction issues. As described above, a seemingly minor infraction can lead to serious tax consequences.

III. Required Minimum Distributions

Books have been written solely on the issue of required minimum distributions (RMDs), so one-half of a journal article can hardly begin to address all the nuances. Instead, this article will focus primarily on issues arising on the death of the IRA owner. This will include the basic RMD rules and potential planning opportunities to minimize issues that may arise.

A. Basic RMD rules during the owner’s life

IRAs are subject to the required minimum distribution rules under Code Section 401(a)(9) and its accompanying regulations.36 In general, payments from the IRA must commence not later than the required beginning date (sometimes referred to as the “RBD”), and the entire benefit must be paid over a period not longer than the life expectancy of the payee or the joint life expectancy of the payee and the payee’s designated beneficiary.37 The required beginning date is April 1 of the calendar year following the year in which the payee reaches age 70½.38 The life expectancy tables are set forth in Treas. Reg. § 1.401(a)(9)-9 with reference to the payee’s age (and payee’s spouse’s age, if relevant) in that year.39

B. RMD rules following the owner’s death

i. IRA owner dies after the owner's required beginning date

In the year of the owner’s death, the last RMD is determined as if the owner lived through the entire year. The last RMD must be paid to the beneficiary to the extent it has not already been paid to the owner prior to death.40

In the years after the owner’s death, the distribution period depends on whether the owner has a designated beneficiary, which is discussed more fully below. If the owner has a designated beneficiary, the distribution period is the longer of: (a) the remaining life expectancy of the designated beneficiary; or (b) the remaining life expectancy of the owner.41 If the owner does not have a designated beneficiary, the distribution period is the remaining life expectancy of the owner.42 Accordingly, the calculation of RMDs for an owner already in pay status at death (i.e. already reached her RBD) requires a determination of whether the IRA owner has a designated beneficiary and if so, what the remaining life expectancy of that beneficiary is relative to the owner’s remaining life expectancy.

ii. IRA owner dies before the owner's required beginning date

The determination of the payment commencement date and distribution period is more complex if the IRA owner dies before reaching the required beginning date. Determining when RMDs are required to begin and the payment period will depend on whether the owner has a designated beneficiary and if so, whether the designated beneficiary is the IRA owner’s spouse.
a. No designated beneficiary: 5-Year Rule

Under the 5-year rule, the IRA must be distributed not later than the end of the calendar year containing the fifth anniversary of the IRA owner's death. The 5-year rule applies if the IRA owner dies before her required beginning date and does not have a designated beneficiary. However, the IRA may require application of the 5-year rule or permit election between the 5-year rule and the life-expectancy rule described below, even if there is a designated beneficiary.

b. Non-spouse designated beneficiary: Life Expectancy Rule

If the IRA owner has a designated beneficiary other than the owner’s spouse, RMDs are required to begin by the end of the calendar year after the year of the IRA owner’s death. The payment period is determined using the beneficiary's age in the calendar year after the year of the IRA owner's death. Thereafter, the payment period is determined by subtracting one from the number of years in the payment period for the prior year. In the case of multiple designated beneficiaries, each beneficiary may use separate distribution periods based on each beneficiary's age under the separate accounts rule.

c. Spouse designated beneficiary

If the IRA owner's designated beneficiary is the owner's spouse, the surviving spouse can (1) treat the IRA as the surviving spouse's own IRA, or (2) follow the life expectancy rule. If the owner's surviving spouse is the sole beneficiary of the IRA, the spouse may elect to treat the IRA as her own (instead of as a beneficiary). If the election is made, RMDs are determined as if the spouse is the IRA owner for all purposes and not as a beneficiary. This may permit significant deferral of the commencement date and payment period, particularly if the surviving spouse is significantly younger. But it also subjects the surviving spouse to the 10 percent early withdrawal penalty under Code Section 72(t) if the surviving spouse is younger than 59½. Needs of the surviving spouse should be balanced with tax deferral before deciding to elect the IRA as the surviving spouse's own IRA.

Instead of treating the IRA as her own, the surviving spouse may elect to follow the life expectancy rule as a beneficiary. If elected, RMDs are required to begin by the later of (i) the end of the calendar year after the year of the IRA owner's death; or (ii) the end of the calendar year in which the IRA owner would have reached age 70½ had the IRA owner lived. The payment period is determined under the Uniform Lifetime Table each year, using the surviving spouse's age as of his or her birthday in that year. In the year the surviving spouse dies, the payment period is fixed based on the surviving spouse's age in that year. Thereafter, the payment period is determined by subtracting one from the number of years in the payment period for the prior year.

iii. Who is a Designated Beneficiary?

Generally, only individuals may be “designated beneficiaries” for RMD purposes. A beneficiary may be designated under the IRA by the IRA’s default terms or by an affirmative election by the IRA owner (e.g., a beneficiary designation form). The designated beneficiary does not need to be specifically named so long as the beneficiary is identifiable or part of a class with identifiable members. An individual is not a designated beneficiary merely because the individual would acquire the IRA owner’s interest by operation of law (e.g., via will, intestacy, etc.). The individual must be designated under the IRAs terms.

A trust can be a designated beneficiary for RMD purposes so long as four requirements are satisfied:

1. Valid trust under state law.
2. Irrevocable: By its terms or becomes irrevocable at death of the IRA owner.
3. Identifiable Beneficiaries: By reference to the trust instrument and must be individuals.
4. Documentation: Certain trust information must be timely provided to the IRA provider (either trust instrument or list of all beneficiaries with offer to provide trust instrument). If these four requirements are satisfied, the trust qualifies as a “designated beneficiary” and the account is not required to be distributed in accordance with the 5-year rule discussed above. In most instances, the RMD is calculated with reference to the age of the oldest trust beneficiary.

C. Common problems and possible solutions

To be a designated beneficiary for RMD purposes, an individual must be a beneficiary as of the date of the employee's or IRA owner's death. However, the designated beneficiary is not determined for RMD purposes until September 30 of the year following the year of the IRA owner's death. Thus, there is an opportunity to “fix” some beneficiary designation problems after death.

i. Accelerating payments

As described above, the “designated beneficiary” must be an individual for RMD purposes. However, this determination is based on the beneficiaries designated as of the date of death who remain beneficiaries as of September 30 of the year following the IRA owner's death. Sometimes a beneficiary of an IRA may be a charity or other non-individual. If even one beneficiary is a non-individual, the entire IRA is treated as not having a designated beneficiary for RMD purposes. Depending on the circumstances, paying out the non-individual’s interest (e.g. a charity) before September 30 of the year after the IRA owner's death will permit the remaining individual beneficiaries to take payments over their life expectancies.

ii. Utilizing disclaimers

Occasionally, the beneficiaries designated under the IRA do not permit the most tax-efficient distribution of the IRA under the RMD rules. For example, a surviving spouse and non-spouse beneficiaries (e.g. their children) might be named on the beneficiary designation form. Significant tax deferral may be achieved if the surviving spouse was the sole beneficiary of the IRA. In some instances, this can be accomplished through use of a qualified disclaimer. If the non-spouse beneficiaries timely disclaim their interest in the IRA, they would be
treated as having predeceased the IRA owner. Thus, in this example, the sole IRA beneficiary as of Sept. 30 would be the surviving spouse.

iii. Estate as beneficiary

Often, the owner’s estate is the default beneficiary of an IRA in the absence of a beneficiary designation or if no designated beneficiaries are living at the owner’s death. In this event, the estate would be the beneficiary for RMD purposes. But an IRA owner’s estate is not a designated beneficiary even if the estate beneficiaries are solely individuals. Thus, the IRA interest could not be stretched over the individual beneficiary’s lives.

The solutions to this issue are minimal (beyond fixing the beneficiary designation during the IRA owner’s life). Regulations clearly state that an owner’s estate is not a designated beneficiary and the IRS has followed this clear wording in Private Letter Rulings. Further, orders from the probate court to change the result are not binding on the IRS, and the IRS refuses to follow these state court orders to the extent they are inconsistent with federal tax law.

iv. Keeping beneficiary forms up to date

IRA beneficiary designation forms vary widely from institution to institution. Some forms give sufficient space and flexibility to name multiple beneficiaries, while others may simply have enough space for a limited number of individuals and their percentage interest. Often, little long-term thought is placed in filling out these forms and the institutions’ default rules often receive inadequate attention. The default and ordering rules can have significant effects and disrupt the IRA owner’s intent. A simple example highlights some of these issues.

Alvin and Betty have two children, Chris and Diane. Chris has two children (A&B’s grandchildren). Alvin has an IRA and names Betty as the 100 percent primary beneficiary and Chris and Diane as the contingent beneficiaries, 50 percent each. Assume Alvin’s wife, Betty, and his son, Chris, predecease Alvin. Who inherits Alvin’s IRA? 100 percent to Diane or 50 percent to Diane and 25 percent to each of Chris’s children? The answer is likely found in the IRA’s ordering rules, which vary by institution or under state law. The ordering rules may state the surviving contingent beneficiary, Diane, would receive 100 percent in these circumstances, and Chris’s kids would receive nothing. This may not have been Alvin’s intent. “To my living descendants, per stirpes” or to the trustee of Alvin’s revocable trust may have been alternatives if Alvin intended for his grandchildren to inherit a deceased child’s share.

Assume the same initial facts but Alvin and Betty divorce. Alvin marries Estelle and dies 20 years later without changing his beneficiary designation, which still lists Betty at 100 percent, who survives. Who inherits Alvin’s IRA? Likely Betty, notwithstanding the divorce. What if Alvin agreed to keep Betty as the IRA beneficiary as part of the divorce agreement but changed it to Estelle anyway? Estelle likely inherits, but Betty may have a breach of contract claim against Alvin’s estate for violating the divorce decree and perhaps against Estelle for unjust enrichment.

While these examples seem obvious, the beneficiary designation is often overlooked or even changed without the lawyer’s knowledge or input. In some instances, IRAs are the largest assets of a person’s estate. Thus, the beneficiary designation arguably takes on as much importance as the person’s will or trust in carrying out the client’s post-mortem intent. Further, the strict IRA rules for maximizing tax effects post-death require careful attention to the beneficiary designation during life. While there are some fixes that can be achieved after death, properly designating the IRA beneficiary during life is the optimum solution.

IV. Creditor and Divorce Issues

Assets in an IRA are generally exempt from the IRA owners’ creditors under state and federal law. However, at death, the IRA assets may lose their exempt status when they become a beneficiary’s inherited IRA. Further, assets in an IRA are not exempt for determining Medicaid eligibility of the IRA owner in Kansas. This section will not attempt to discuss all the exceptions to the general rule but will focus on inherited IRAs in light of the U.S. Supreme Court’s Clark v. Rameker decision and the tax implications in a divorce as it relates to IRAs.

A. Inherited IRAs are not exempt under federal bankruptcy law, but the law is unsettled for opt-out states, such as Kansas

11 U.S.C. § 522(b)(3)(C) and (d)(12) exempt from the bankruptcy estate “retirement funds to the extent those funds are in a fund or account that is exempt from taxation under section 401, 403, 408, 408A, 414, 457, or 501(a)” of the Internal Revenue Code. In a unanimous opinion, the Supreme Court in Clark held that inherited IRA assets are not “retirement funds” under the Bankruptcy Code, and accordingly, are not exempt from the bankruptcy estate.

In reaching its conclusion, the Court focused on the statute’s use of “retirement funds,” which is not otherwise defined in the Bankruptcy Code. After crafting a definition, the Court determined that three characteristics of inherited IRAs did not meet its “retirement funds” definition: (1) holders of an inherited IRA may not add funds to the inherited IRA, (2) holders of an inherited IRA must take minimum withdrawals no matter their age, and (3) holders may withdraw the balance at any time without penalty. In further support, the Court looked at the purposes of the Bankruptcy Code, finding that protecting inherited IRAs would be akin to a “free pass” and not to ensure that debtors will be able to meet their basic needs in retirement.

Kansas has opted out of the federal bankruptcy exemptions. Kansas’s exemption relevant to IRAs is governed by K.S.A. 60-2308(b), which states:

(b) Except as provided in subsection (c), any money or other assets payable to a participant or beneficiary from, or any interest of any participant or beneficiary in, a retirement plan which is qualified under Sections 401(a), 403(a), 403(b), 408, 408A or 409 of the federal internal revenue code of 1986, and amendments there to, shall be exempt from any and all claims of creditors of the beneficiary or participant. Any such plan shall be conclusively presumed to be a spendthrift trust under these statutes and the common law of the state.
Arguably, a decision different from Clark could be reached based on the Kansas exemption statute. However, on June 17, 2015, Judge Somers handed down an opinion finding inherited IRAs of Kansas debtors are not exempt under the Kansas exemption statute.3 In so ruling, Judge Somers relied on the reasoning of Clark and found “no material difference between the federal and Kansas exemptions.”74 In an opinion issued Oct. 30, 2015, Judge Lungstrum affirmed Judge Somers’s decision on essentially the same grounds, finding an inherited IRA is not exempt under the Kansas exemption statute.75 If creditor protection is a concern, naming a spendthrift trust as the IRA beneficiary—which meets the elements described above to qualify as a “designated beneficiary”—may be the optimal solution.

B. IRA assets transferred incident to a divorce are not treated as a distribution and are not immediately taxable. But IRA assets distributed incident to divorce are taxable and potentially subject to the 10 percent early withdrawal penalty

Under Kansas law, IRAs are subject to division in a divorce proceeding.86 In making the property division, the court must consider a number of factors, including the tax consequences of the property division.77 The division of an IRA incident to a divorce and transfer of an interest in the IRA to the spouse or former spouse is not a taxable event for the IRA owner.78 Following the transfer, the transferred portion is treated as the former spouse’s IRA, and the tax consequences of distributions from that portion are borne by such former spouse.79

While the concept seems straightforward, there are a couple of possible traps. First, the transfer must be pursuant to a divorce decree or separation instrument as described in Code Section 71(b)(2)(A).80 Even if the parties have agreed to a division of property, the parties cannot transfer the IRA until after the court has entered its divorce decree. Otherwise, the transfer would be treated as a taxable distribution to the IRA owner, who was intending to transfer the IRA (and all associated tax burdens) to the owner’s soon-to-be former spouse.81

Second, the distribution of IRA assets (as opposed to a transfer) is taxable to the IRA owner. And distributions to an IRA owner under age 59 ½ incident to a divorce are still subject to the 10 percent penalty tax for early withdrawals.82 The QDRO exception to the 10 percent early withdrawal penalty for distributions from a qualified pension plan does not apply to IRAs.83 Thus, if an outright distribution is preferred for a spouse under age 59 ½ and there is a choice between assets held in an IRA and a qualified plan, the outright distribution from the qualified plan would be preferred to avoid the 10 percent penalty tax.

V. Conclusion

Like many creatures of the tax code, IRAs are subject to specific requirements and restrictions that are not inherently intuitive. Transactions and other dealings with IRAs are strictly limited. Distributions during life and at death are subject to specific rules to maintain the IRAs tax deferral. It is critical to identify the specific nature of the transaction or issue at hand and then apply the correct rule to ensure the IRA’s benefits are not lost during the owner’s lifetime or after death.

About the Author

Jeremy Graber is a partner at Foulston Siefkin LLP in its Topeka office. He received his Juris Doctor from the University of Kansas School of Law (Order of the Coif) and a Bachelor of Science in Accounting from the University of Kansas. He is a member of the firm’s tax and business team.

jgraber@foulston.com
20. 106 T.C.M. at 473.
22. I.R.C. § 4975(c)(1)(B) prohibits any direct or indirect lending of money or other extension of credit between a plan and a disqualified person.
23. 149 T.C. at 225 (emphasis in original). This result should not have been a surprise to the taxpayers. In 1990, the Department of Labor issued DOL Advisory Opinion 90-23A. On facts nearly identical to those in Peek, the DOL concluded that a disqualified person's guarantee of a loan to an IRA violated Code Section 4975(c)(1)(B), relying on ERISA's legislative history directly on point.
24. 149 T.C. at 227–230. The Tax Court held the 2006 deficiency was subject to the substantial understatement penalty under Code Section 6662(b)(2). However, for the 2007 tax year, the deficiency did not meet the threshold. Instead, for 2007, the court imposed the 20 percent penalty under Code Section 6662(c) for the taxpayers' negligence. The court noted the taxpayers' reliance on an active promoter of the structure was not reasonable, and the opinion letter from the accountant expressly mentioned the detrimental effects of a prohibited transaction.
26. 11 U.S.C. § 522. The bankruptcy exemption issues are discussed more fully below.
27. It appears the property was conveyed one-half to the IRA and one-half to Panther Mountain and was never titled in the name of the new partnership.
29. Id. § 4975(c)(1)(B).
30. Id. § 4975(c)(1)(B).
31. 531 B.R. at 227.
32. Id. at 227–28.
33. In certain circumstances, however, qualified plans (e.g. ESOPs and profit sharing plans) can clearly be used to provide seed capital to new business ventures. These are referred to as Rollovers as Business Startups (ROBS). ROBS arrangements typically involve rolling over an IRA or a prior qualified plan account into a newly established plan, sponsored or ROBS. ROBS arrangements may permit the trust to now qualify as having a “designated beneficiary” for RMD purposes. The bankruptcy exemption issues are discussed more fully below.
34. Ellis v. Comm’r, 106 T.C.M. (CCH) at 472.
35. These are the minimum requirements required by the Code and Regulations. The specific IRA terms (generally set forth in the IRA agreement with the financial institution) may vary within the bounds of these minimum requirements, so it is important to review the actual IRA terms.
36. I.R.C. §§ 408(a)(6), 408(b)(3); Treas. Reg. § 1.408-8.
38. Id. § 1.401(a)(9)-2, Q&A-2.
39. See also, IRS Publication 590-B, Distributions from Individual Retirement Arrangements (IRAs).
40. Treas. Reg. § 1.401(a)(9)-5, Q&A-4(a).
41. Id. § 1.401(a)(9)-5, Q&A-5(a).
42. Id.
43. Id. § 1.401(a)(9)-3, Q&A-2. Note that the 5-year rule does not require equal or periodic distributions during the 5-year term. Distributing the entire balance on December 31 of the 5th year after the owner's death would satisfy this rule.
44. Id. § 1.401(a)(9)-3, Q&A-4.
“transfer” is important to avoid taxation. In this context, transfer means a transfer to the former spouse’s IRA, and not a transfer to the former spouse outright. The latter, a “distribution,” would be a taxable event as discussed below.

79. In practice, transferring the IRA to the former spouse may depend on the financial institutions’ (custodian of the IRA) proclivities. Some practitioners use a Domestic Relations Order, modeled after a Qualified Domestic Relations Order (QDRO), to avoid sending the often lengthy divorce decree and property settlement agreement to the financial institutions. A one or two-page court order for the IRA may be more welcoming to the employee tasked with handling such issues at the relevant financial institution, which may lead to an easier transfer.

80. I.R.C. § 408(d)(6).
81. See PLR 9344027 (written separation agreement between the parties to divide IRAs that is not incident to a divorce decree or presented to a court to enter a similar order does not constitute a decree or separation agreement under I.R.C. § 71(b)(2)(A), and therefore, the I.R.C. § 408(d) exception does not apply.)
82. I.R.C. § 72(t).
83. Id. § 72(t)(2)(C); See also Natalie Choate, Life and Death Planning for Retirement Benefits, 565, (7th ed. 2011).
STATE V. CITY OF WICHITA
ORIGINAL ACTION QUO WARRANTO
NO. 113,528 - JANUARY 22, 2016

FACTS: Marijuana reform supporters (Initiative) filed petitions with city clerk that proposed amending Wichita municipal code to reduce penalties for possession of small amounts of marijuana and/or drug related paraphernalia. A copy of the proposed ordinance was not included with petitions submitted to city clerk, nor was proposed amendment fully set forth in the signed petitions. City found the petition contained the requisite number of signatures of qualified voters, K.S.A.12-3013(a), and voted to submit the issue in a special election. Voters approved ballot question that contained a summary of the proposed ordinance. City filed declaratory judgment action in district court to determine validity of the new ordinance. Kansas attorney general filed original action for quo warranto writ declaring the amended city ordinance null and void because it: (i) impermissibly conflicted with and was therefore preempted by uniform state law under Home Rule Amendment to Kansas Constitution, (ii) was not adopted in accordance with procedures in K.S.A. 12-3013(a), (iii) did not contain ordaining clause required by K.S.A. 12-3005, and (iv) was essentially administrative in nature which excluded it from scope of referendum and initiative process under K.S.A. 12-3013(e).

ISSUES: (1) Quo Warranto Jurisdiction, (2) Procedures under K.S.A. 12-3013

HELD: Quo warranto jurisdiction was maintained, finding that case presents two questions of sufficient public concern. One is conflict of one municipal ordinance with criminal statutes of the entire state. Second is significance of failure to comply with statute authorizing people to submit to city's governing body a proposed ordinance. State's request for writ in quo warranto was granted. K.S.A. 12-3013 was analyzed, finding Wichita ordinance was not enacted according to state law. Under facts of case, supporters of the proposed ordinance failed both absolutely, and substantially, to comply with K.S.A. 12-3013(a) when they did not file the proposed ordinance with city clerk. State's remaining arguments, including potential conflict of city ordinance with state law, are not considered.

CONCURRING IN PART, DISSENTING IN PART (Johnson, J.): Agreed that Initiative, by failing to file proposed ordinance with city clerk, did not comply with statutory requirement necessary to effect a citizen-initiated city ordinance. Disagrees that it was proper to retain jurisdiction over this original action when readily apparent adequate relief was available in district court. While extent of a municipality's constitutional home rule powers could provide rare circumstance justifying departure from general rule of declining concurrent jurisdiction over original actions, majority did not reach that constitutional issue. Exception to the concurrent jurisdiction rule was unjustified in this case.

CONCURRING IN PART, DISSENTING IN PART (Biles, J.): Agrees that quo warranto is appropriate remedy that must issue because initiative supporters failed to comply with K.S.A. 12-3013(a). Dissents from majority's evasion of more substantive constitutional and statutory questions presented in this case.

STATUTES: K.S.A. 2014 Supp. 21-5706(c)(2)(A), -5709(e)(2)(B), -6602(a)(1), -6611(b)(1); K.S.A. 12-3005, -3013, -3013(a), -3013(b), -3013(c), -3013(e)(1); K.S.A. 25-4325 (Furse 1993)

STATE V. HERNANDEZ
SEDGWICK DISTRICT COURT - REVERSED AND REMANDED
COURT OF APPEALS - REVERSED


ISSUE: Post-conviction DNA Testing Under K.S.A. 21-2512

HELD: K.S.A. 21-2512 lays out three initial steps district court is to follow when a qualified inmate requests DNA testing on biological material. At issue in this case is third step in...
K.S.A. 21-2512(c) which requires court to order DNA testing upon a determination that testing may produce noncumulative, exculpatory evidence relevant to petitioner’s claim of wrongful conviction or sentence. Under facts of this case, district court applied incorrect legal standard as set forth in State v. Lackey, 295 Kan. 816 (2012), and Bruner v. State, 277 Kan. 603 (2004), by requiring that DNA had to have been offered by State at trial, and requiring petitioner to make specific allegations as to how DNA testing would provide noncumulative exculpatory evidence. Evidence can be exculpatory without being exonerating, and determination of whether there is a substantial question of innocence is not a precursor to ordering testing in the first place. Impact of evidence on the jury verdict is to be addressed in K.S.A. 21-2512(f) after test results are obtained. Court of Appeals is reversed. District court is reversed and case is remanded.


STATE V. SEACAT
SHAWNEE DISTRICT COURT – AFFIRMED
NO. 110,360 – JANUARY 15, 2016

FACTS: A jury found Seacat shot his wife in the head and then set fire to his house with her in it. He was convicted of one count of first-degree premeditated murder, one count of aggravated arson, and two counts of aggravated endangerment of a child. All of Seacat’s issues go to the evidence that the district court allowed the jury to hear—the admission of certain testimony by witnesses for the State and the exclusion of certain evidence proffered by Seacat.

ISSUES: Admission of evidence

HELD: First, Seacat challenged the admissibility of several out-of-court statements made by his wife to friends and coworkers. Court held that evidence of prior crimes or civil wrongs permitted under K.S.A. 60-455(b) must still pass the K.S.A. 60-460 requirements for admissibility if the evidence also qualifies as hearsay. Court found the fact that the wife made the statements about death threats and was subsequently found dead in a burning house suggests either that she was telling the truth about the threats or that she was a supremely scheming and vindictive suicide victim who nevertheless chose to leave a suicide note absolving her husband of murder. Court also found the State met the requirements of recent perception and a fresh memory by the witness and did not abuse its discretion in admitting the evidence. The next three issues challenged the trial court’s exclusion of evidence relating to his wife’s putative depression and suicide attempts or ideations, which Seacat contended would have bolstered his theory that she took her own life. Court found no abuse of discretion in excluding the evidence because her mental condition was not at issue, the causation of her hormone use and medication lacked foundation, and her alleged marijuana use lacked any probative value. A fifth issue related to an answer that a witness gave on direct examination, which Seacat contends was nonresponsive and prejudicial. Court found the witness’ testimony that Seacat was a narcissist was not to prove his guilt but to explain his wife’s emotional reaction and the evidence was elicited by Seacat’s attorney. Court also found no prejudice to Seacat’s right to a fair trial.

STATUTES: K.S.A. 60-401, -447, -455, -460

CONCURRENCE: Justice Johnson concurred but wrote separately to clarify on the hearsay evidence as a question or a statement and also that the wife’s suicidal attempts or ideations were relevant to Seacat’s defense and should have been admitted, but inclusion of the evidence would not have changed the outcome of the trial. Justice Luckert joined the concurring opinion.

STATE V. SMITH
SUMNER DISTRICT COURT – AFFIRMED
NO. 112,250 – JANUARY 29, 2016

FACTS: Smith entered guilty pleas in 2006 to felony murder and aggravated robbery. Seven years later he filed direct appeal and motion to withdraw pleas, alleging in part he was not properly informed of his appeal rights or consequences of his pleas, and was unaware of time limit to withdraw pleas. District court rejected both efforts, finding defense counsel had advised Smith of right to appeal, and Smith failed to demonstrate the excusable neglect required to permit an untimely motion. Smith appealed.

ISSUES: (1) Untimely notice of appeal, (2) Untimely motion to withdraw plea

HELD: Court applies three-part framework for exception in State v. Ortiz, 230 Kan. 735 (1982), allowing untimely notice of appeal if the defendant was not informed of right to appeal. First two parts are satisfied because sentencing judge said only that Smith “may” have a right to appeal and advised him to consult his attorney, and district court did not find that defense counsel actually advised Smith to right of appointed appellate counsel if indigent. But Smith’s argument to district court, that he would have timely appealed if he had understood consequences of his pleas, failed to carry burden of showing he would have timely appealed but for his ignorance of right to appointed counsel on appeal. District court’s dismissal of appeal as untimely was affirmed.

No argument presented on appeal as to why motion to withdraw pleas was not timely barred, thus Smith waived or abandoned his challenge to district court’s ruling.

CIVIL

HODES & NAUSER, M.D. P.A.; HODES, M.D. AND NAUSER, M.D. V. DEREK SCHMIDT, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL OF THE STATE OF KANSAS; AND STEPHEN M. HOWE, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR JOHNSON COUNTY

SHAWNEE COUNTY

NO. 114,153 – JANUARY 22, 2016

FACTS: In 2015, the Kansas legislature passed Senate Bill 95, which banned “dismemberment abortions”, also referred to as D&E abortions. This is the most common type of second-trimester abortion. Doctors Hodes and Nauser, physicians practicing in Johnson County, filed suit in Shawnee County seeking a declaratory judgment that the statute was unconstitutional under the Kansas Constitution. A Shawnee County district court judge found, for the first time, that there was a right to abortion present in the Kansas Constitution independent of the United States Constitution. On those grounds, the judge granted a motion temporarily enjoining enforcement of the statute.

ISSUES: Constitutional interpretation, abortion

HELD: Writing for an evenly divided court, the majority found that Sections 1 and 2 of the Kansas Constitution provide a right to abortion independent of the United States Constitution. This finding was based on the Kansas Supreme Court’s past interpretation of Sections 1 and 2. With this finding in place, the court went on to find that the injunction was properly issued because the physicians had shown a substantial likelihood of success on the merits. Specifically, the court found that the State’s proffered alternative procedures unduly burdened a woman’s right to terminate her pregnancy.

STATUTES: Sections 1 and 2 of the Kansas Constitution

CONCURRENCE: Judge Atcheson agreed with the outcome reached by the six other judges. But he did so after a historical analysis of Section 1 of the Kansas Constitution.

DISSENT: Writing for six other judges, Chief Judge Malone found that there is no independent right to abortion in the Kansas Constitution. This finding was based on the plain language of Sections 1 and 2, which do not contain language similar to the Fourteenth Amendment to the United States Constitution.

PORTFOLIO RECOVERY ASSOCIATES, LLC V. DIXON

RICE DISTRICT COURT – REVERSED AND REMANDED WITH DIRECTIONS

NO. 113,077 – JANUARY 29, 2016

FACTS: Dixon opened a credit card account. The agreement included an arbitration provision that allowed either party to require that a claim be resolved by binding arbitration. Dixon allegedly failed to pay her credit card balance and she eventually defaulted. The account was sold to Portfolio Recovery Associates (PRA), which filed suit for repayment of Dixon’s debt. Dixon filed both an answer and a class-action counterclaim in which she alleged that PRA was attempting to collect debts in Kansas without a license. PRA’s answer to the counterclaim mentioned arbitration, but it did not move to compel until 2 years later, after an extensive discovery period. Dixon opposed the motion to compel, claiming that the delay was effectively an arbitration waiver by PRA. The district court agreed with Dixon, finding that the delay constituted a waiver of the right to arbitration. The district court also struck the appearance of two of PRA’s lawyers after finding that the

Appellate Practice Reminders . . .

From the Appellate Court Clerk’s Office

Helpful Hints – Appellate Electronic Filing - Part 3

This is the third and final installment of the helpful hints for filing electronically with the Appellate Court Clerk’s Office. If you have yet to register with the e-filing system, we encourage you to do so. This month we bring you the following helpful hints:

• A certificate of service is required when a filer submits a document electronically. The certificate must indicate that service was achieved electronically and should be signed as /s/ [Name] by the attorney who made service. The Notice of Electronic Filing (NEF) that is automatically generated by the e-filing system upon acceptance of a filing does not replace the service requirement found at Supreme Court Rule 1.05(c) [2015 Kan. Ct. R. Annot. 7]. The time computations of K.S.A. 60-206, and amendments thereto, apply to electronic service.

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attribution of a quote from the United States District Court for the State of Kansas to the United States Supreme Court in a brief was a "material misrepresentation of the law." PRA appealed both the denial of the motion to compel arbitration and the disqualification of its attorneys.

ISSUES: (1) Whether motions to compel arbitration may be time barred, (2) Whether misattribution of quoted material constitutes a "material misrepresentation of the law"

HELD: Precedent requires that any questions related to the waiver of arbitration must be arbitrated. Therefore, the issue of whether PRA’s litigation conduct constituted waiver must be decided by an arbitrator. However, instead of remanding with directors to refer the case to arbitration, the case was sent back to the district court for a determination of whether PRA, as a successor in interest, could rely on the credit card arbitration agreement. Lawyers should only be disqualified "upon a showing of compelling circumstances." After reviewing the disputed case citation, the Court of Appeals held that the district court could not have been misled by the misattribution. If the court could not have been misled, disqualification of the attorneys was improper. PRA’s attorneys were ordered reinstated upon remand.

STATUTE: 9 U.S.C. § 2

CRIMINAL

STATE V. WALLIN
OTTAWA DISTRICT COURT – AFFIRMED
NO. 111,332 - JANUARY 15, 2016

FACTS: Wallin was convicted of rape, aggravated criminal sodomy, and aggravated sexual battery of adult victim with developmental disabilities. On appeal Wallin challenged sufficiency of the evidence, specifically claiming there was insufficient evidence to prove victim was medically incapable of giving consent to sexual acts due to mental deficiency or disease because State did not present any expert medical testimony. Wallin also claimed district court erred in providing jury, after closing arguments and prior to evening recess, an Allen-type instruction on juror misconduct.

ISSUES: (1) Sufficiency of the Evidence, (2) Instruction on Juror Misconduct

HELD: Depending on facts of the case, to prove beyond a reasonable doubt the crimes of rape, aggravated criminal sodomy, and aggravated sexual battery, the victim’s incapacity to give consent because of mental deficiency or disease may be established without expert testimony. State v. Juarez, 19 Kan. App. 2d 37 (1993), was examined. Under facts of this case, evidence was sufficient, without expert testimony, to convince a rational factfinder that the victim did not have capacity to give consent. While it is better practice to instruct jury at beginning of trial regarding cost and inconvenience of mistrial due to jury misconduct (PIK Civ. 4th 101.12), under State v. Tabah, 302 Kan. 783 (2015), and facts of this case, district court did not err in providing a similar instruction after closing arguments and prior to recessing for the night. Even assuming that timing of the admonishment was error, it would be harmless in this case.

CONCURRENCE (Mott, J.): Agreed with majority’s analysis and application of Tabah to facts of this case. Writes separately to express view that admonishment given to jury prior to being excused for the evening was accurate and proper regardless of the timing. Kansas Supreme Court’s jurisprudence regarding Allen instructions was discussed. Argued the expense of a trial is a proper consideration for any juror when deciding whether to follow court’s admonitions not to look for outside information, which is a far cry from improper instructions that encourage jurors to consider expense of another trial as a factor in whether they vote guilty or not guilty.

STATUTES: K.S.A. 2014 Supp. 21-5503(a)(2), -5504(b) (3)(C), -5505(b)(3), 60-456; K.S.A. 22-3437

STATE V. TOLIVER
RILEY DISTRICT COURT – REVERSED AND REMANDED
NO. 111,897 – JANUARY 29, 2016

FACTS: Toliver, a parolee under supervision of Kansas Department of Corrections (KDOC), was convicted on drug evidence found when parole officer, accompanied by law enforcement officers, conducted first visit to Toliver’s home with search of the residence. District court found the warrantless search was not supported by a reasonable suspicion of parole violation or criminal activity, but denied motion to suppress, relying on State v. Bennett, 288 Kan. 86 (2009), and language in KDOC Conditions of Release for Post-Incarceration Supervision agreement. On appeal, Toliver claimed Fourth Amendment violation. Court of Appeals requested supplemental briefing regarding application of K.S.A. 2014 Supp. 22-3717(k).

ISSUE: Fourth Amendment and K.S.A. 2014 Supp. 22-3717(k)

HELD: Toliver’s Fourth Amendment rights were violated. Scope of K.S.A. 22-3717(k)(2) was examined, finding that additional requirement in KDOC agreement allowing for search of a parolee’s residence was not statutorily authorized and limited Toliver’s privacy interests more than Kansas law allows. Consistent with Samson v. California, 547 U.S. 843 (2006), and Bennett, a Kansas parolee’s diminished privacy interest is set forth in K.S.A. 2014 Supp. 22-3717(k)(2), which requires only that parolees agree to be subject to search or seizure, does not empower parole officers to engage in suspicionless searches of their residence and any other property under their control as provided by KDOC agreement. Related 2012 amendment to K.S.A. 22-3717, allowing search of a probationer’s residence and property, was noted. Toliver’s conviction was reversed, and case remanded to grant motion to suppress.

DISSENT (Gardner, J.): Would find the detectives’ search of Toliver’s residence at request of parole officer did not violate Fourth Amendment. K.S.A. 2014 Supp. 22-3717(k)(2), reasonably construed, does not limit search to parolee’s person but instead subjects parolees to search in accordance with or coextensive to their written agreements.

STATUTES: K.S.A. 2014 Supp. 21-6607, -6607(c)(5), 22-3717(k), -3717(k)(2), -3717(k)(3), 75-5217(a)
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