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Dear KBA Members:
Voting is still open for the 2016 KBA Officers Election. Please be sure to cast your ballot before Friday, April 15, 2016.

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Legal Services Without the Lawyer
Do We Need New Rules?

During the recent National Conference of Bar Presidents (NCBP) meeting, bar leaders from across the country debated the issue of non-lawyer owned and managed law firms, and the alternatives for dealing with non-lawyers engaging in traditional legal practice areas, using online services such as LegalZoom and Rocket Lawyer. (These companies provide an array of legal service products intended for use by non-lawyers—such as will, trust and incorporation documents—or online legal services for small and medium sized businesses including incorporation, estate plans, legal document review and attorney consultations.)

Many debaters passionately maintained that lawyering is a profession which should not be owned and controlled by profit-driven corporate owners. Non-doctor owned medical practices were used as examples of the pros and cons of allowing non-lawyers to own or operate legal service organizations. Some argued that these corporate-owned legal service providers, especially online providers, help provide access to justice and legal services to the under-privileged. Others were concerned about the level of responsibility for errors, and the profit-driven nature of this type of service.

One NCBP panelist pointed to research showing that most lawyers spent more than 70 percent of the money from each billable hour on overhead expenses. This panelist argued that onerous rules—such as conflict of interest rules—add to the cost of practicing law which in turn reduces access to affordable legal services.

In the end, no one seemed happy, but almost all the lawyers present acknowledged the need to begin the discussion in their states about modifying rules to address the new players in the legal marketplace.

A few states claim they have already implemented new rules to address some of these issues:

- Washington State now has a “Limited License Legal Technician Program” which is touted as an affordable legal support option to meet the needs of those unable to afford the services of an attorney. (Washington Supreme Court Admissions and Practice Rule 28) The Limited Licensed Legal Technician (LLLT) is trained and licensed to advise and assist people going through divorce, child custody and other family-law matters. The LLLT cannot represent clients in court, but she can help complete and file court documents, help with court scheduling, and support a client in navigating the legal system.

- Trial courts in some states have pro se advocates employed by the court and available at the courthouse to assist the pro se litigant. The goal of providing a court advocate is to minimize the amount of time the judge needs to spend “educating” the pro se party about her duties or the process.

- New York pointed to its Court Appointed Special Advocates (CASA) program as a way to address the needs of the underserved in family court situations. New York Rules of Courts Part 44 deals with these programs. Kansas also has a CASA program, but these types of programs only address a small number of the outstanding legal representation issues raised during the NCBP debate.

- Other states, like Kansas, have implemented rules allowing limited scope representation. Kansas Supreme Court Rule 115 allows an attorney to perform some of the tasks associated with a case without requiring the attorney to handle all matters related to the case. For example, the attorney may draft documents and coach the client on how to appear in court by himself, or the attorney may handle only the most complicated parts of a case and give the client advice on how to handle the simpler parts. Many district courts have posted information about limited scope representation. In addition, the Kansas Legal Services website has some simple directions for clients on limited service representations.

Currently, Kansas Rules of Professional Conduct, Rule 5.4 prohibits a lawyer from practicing in a professional corporation or association authorized to practice law for a profit if a non-lawyer is an owner or operator of the organization. In addition, Rule 5.5 specifically prohibits a lawyer from assisting a person who is not a member of the bar in the performance of activity that constitutes the unauthorized practice of law.

The internet already provides Kansans access to a wide variety of legal forms, more internet-based legal service entities are emerging, and the ABA has started discussing these issues. At some point, the Kansas Supreme Court may decide to take up these issues. Are we ready to engage in an educated and thoughtful discussion about potential solutions?

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.

nhaag@ksbar.org
KBA President: Enjoying the Bar!

Not only have I been enjoying the Bar Association this past month, but as you can see from the photos, there have been several opportunities to enjoy the bar—or at least a drink or two—with fellow KBA members. The Young Lawyers were very engaged in the ABA Mid-Year Meeting. The Kansas delegation attending the ABA meetings included Linda Parks, Rachael Pirner, Amy Cline, Anne McDonald, Vince Cox, Sarah Warner, Justin Ferrell, and Sarah Morse. Check out the photos!

The photographs also include the Court Appreciation Dinner which recognized the KBA scholarship recipients and honored our appellate and federal judiciary members.

-KBA President, Natalie Haag
Spring Cleaning To-Do List for the Attorney

The days are getting longer, the temperature is getting warmer, and it’s slowly but surely becoming spring! For most of us, now is the time to do some spring cleaning, from cleaning out the garage, to putting away warm clothes in anticipation of sunny days and higher temperatures. But do we take the time out of our busy schedules to do a little spring cleaning of our professional lives? This doesn’t have to be a difficult task either, from simply organizing our file system, to taking time to enjoy the outdoors; With a little effort we can make our lives a lot easier. Below is a list of five easy-to-do ideas.

1. Organize your contacts
   Do you have contacts on your phone and perhaps on your computer as well? Streamline them by syncing your phone with your email. For most phones all that it takes is plugging your phone into your computer, and following the prompts.
   By doing this you ensure that no matter if you are at the office or on the road, you have quick and reliable access to your contacts. Programs such as Microsoft Exchange do wonders in syncing your contacts from your Outlook email to your phone.

2. Clean up your calendar
   Many apps today will allow you to sync your computer calendar with your phone's calendar so that when you schedule a meeting, it will sync it right to your phone.
   This works well to not only balance your work calendar, but also to sync up your calendar with family and co-workers as well.

3. Declutter your workspace
   I personally use the Google Calendar app, a free app from iTunes, that allows you to sync up not only your work calendar to your phone, but you can share that calendar with others. When the other person has the app open they will be able to tell if you have added something to the shared calendar. Each user is assigned a color, so you can view schedules of each individual on a given day. This is an amazing tool to keep you updated on everything in one place, and to keep you from double booking yourself.

4. Refresh your mind and body
   Did you make a New Year’s resolution to eat better, or perhaps exercise more?
   Now is the time to renew that resolution! Make time to get outside and get sunshine, take a quick walk over lunch, find a running or cycling group that does group rides after work or on the weekends. For many of us the comaraderie of doing something with a group is not only good for the body, but also for the mind. It will relieve stress, and perhaps help you meet new friends or allow you to network.
   What about eating better? Have you found it hard to eat healthy food, or track the amount of calories you’ve eaten? Well there is an app for that as well! Apps such as “Fooducate” and “Shopwell” allow you to use your phone to scan the barcode of products you are looking to purchase or eat, and give you in-depth information on the food. “Shopwell,” the app I use, will even allow you to tailor it to alert you to any type of food allergy or intolerance you may have, if the product contains ingredients such as gluten, dairy, etc.
   Stress reduction is another great way to spring clean our lives; people find stress relief through many outlets—exercise, reading, meditation, etc. Recently the new stress relief technique that is gaining steam is coloring...yes you read that correctly! Coloring for adults has been found to reduce stress just below that of meditation. So grab those coloring books, and take 15-20 minutes to just decompress.
5. Put your work/life balance in order

The old bike I used to ride had a saying on it that said, “All work and no play, is not fun at all.” If you think about that, it’s very true. Yes, it’s difficult now more than ever to balance work and life, but it’s of the utmost importance. When you spend time doing things you enjoy, such as visiting friends, exercising, or spending more time with your family, you will find that you are a happy person. And a happier person is a harder-working person. Studies have shown that happy people on average are 12 percent more productive than those who aren’t happy.

Just take a minute to relax and do something you enjoy. That email or phone message will be still be there when you get back to it a short time later.

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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New Data is In

Our local weather guy says it constantly—"New data is in"—presumably to get viewers to tune in for the most up-to-date forecast. Well, we have new and up-to-date data about our profession, and I hope you’ll tune in. On Feb. 1, 2016, the American Bar Association (ABA) released the results of a study on the rates of depression and alcohol use in the legal profession. We knew they were higher than average, and now there is scientific documentation.

The old numbers came from a study of a small group of lawyers in the state of Washington in 1990. The new data is the result of a study conducted jointly by the ABA and Hazelden Betty Ford Foundation. This 2015 study encompassed almost 15,000 lawyers from 19 states in every region of the country. It asked questions about alcohol and drug use, about depression, anxiety and stress symptoms, and about what keeps lawyers from getting help. It also gathered data on gender, age and years of practice. One new and somewhat unexpected piece of information from this data is that younger lawyers are experiencing higher levels of problem drinking. It had previously been thought that, “the longer somebody stayed in the profession, the more likely they were to become a problematic drinker.”

Given the rise in student debt and the decline in jobs for new lawyers, this is not surprising.

There’s lots of speculation (and opportunity for new studies) about why lawyers have higher rates of alcohol abuse, depression and suicide: the stress of practicing law, the pessimism, negativity and adversarial nature of their work, the culture, and the typical personality traits of those attracted to the legal profession.

We may not know the WHY but we do know the WHAT: According to The Journal of Addiction Medicine website, 21 percent of licensed, employed attorneys qualify as problem drinkers, 28 percent struggle with some level of depression and 19 percent demonstrate symptoms of anxiety. When focusing solely on the volume and frequency of alcohol consumed, more than 1 in 3 practicing attorneys are problem drinkers, the study found.

I did the math, using approximately 14,000 attorneys in Kansas. Using the above percentages, 2,940 Kansas lawyers could be classified as problem drinkers, 3,920 have depression symptoms and 2,660 have anxiety symptoms.

As I write, there is a lot of media attention on the Zika virus because it is a public health emergency. I’d say, given those numbers for Kansas, and the rates from the study, this new data documents a public health emergency for the legal profession. I want to say that up front and loud: this is a public health threat to our profession. There is still so much stigma around both alcoholism and depression that it is difficult to talk about them in terms of public health. And some people still think of KALAP as going around the state with an eagle eye hoping to catch someone drinking too much, or as being opposed to all alcohol use. That view is so “last-century,” and I hope it will soon go the way of those first car-phones that were as big and as heavy as a brick.

What is almost more alarming than the high rates of these conditions is other data from the study which show major barriers to effective treatment. Almost two-thirds of study participants said they didn’t want others to find out. Concerns about privacy and confidentiality were a barrier for 64 percent. So let me say two things right here that relate to those concerns: 1. Supreme Court Rule 206, establishing KALAP, provides in section K for confidentiality at the level of attorney-client privilege; 2. All these conditions can and do, if untreated, lead to ethical complaints and malpractice cases, and when that happens the results are published, so privacy is out the window.

Patrick Krill, lead attorney on the study, acknowledged the stigma: “There’s a lot of stigma attached to substance use disorders and mental illness. Because a lawyer’s reputation is so important, there’s a fear in admitting vulnerability or weakness, or admitting that we are struggling. And those fears can be justified because this can be a harshly judgmental and highly competitive environment. But when this data comes out and people realize how many lawyers are struggling, it will be difficult to view these issues through such a judgmental lens. That’s my hope anyway.”

Linda Albert, Program Manager of the Wisconsin Lawyer Assistance Program and co-author of the study, thinks all legal stakeholders need to work together to address the problem. She says a systems approach is best, involving law schools, bar associations, licensing and disciplinary agencies, employers and lawyer assistance programs. “We can break those stigmas by educating people, and helping them understand that it’s smarter to get help.”

Will the new data in this column be the first step to breaking those stigmas, and addressing our own public health emergency in the legal profession? Better yet, will you, dear reader, be part of that first step?

About the Author

Anne McDonald was appointed to the Lawyers Assistance Program Commission at its inception in 2001 and has served as the Executive Director of KALAP since 2009. She graduated from the University of Kansas School of Law in 1982.
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ENDNOTES
2. Id.
Law Day is held annually on May 1 and is a day to celebrate the rule of law and to recognize the role of courts in our society. You can learn more about Law Day at http://www.lawday.org.

In 2016, the nation marks the 50th anniversary of Miranda v. Arizona. The 2016 ABA Law Day theme—Miranda: More than Words—explores the procedural protections afforded to all of us by the U.S. Constitution, how these rights are safeguarded by the courts, and why the preservation of these principles is essential to our liberty.

The March issue of Law Wise features information and a lesson plan about Miranda v Arizona. Visit http://www.ksbar.org/LawWise to download your copy. Hard copies of this issue are available to KBA members upon request. Contact Anne Woods at awoods@ksbar.org.
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.

WUSTL Photos/Mary Butkus
IOLTA Snapshot: Kansas Legal Services
A Non-Profit Law Firm and Community Education

The demand for free civil legal assistance in Kansas is greater than ever. IOLTA funding has been invaluable in ensuring that Kansas Legal Services (KLS) meets that demand. Representing vulnerable individuals and families goes to the very heart of our credo as a legal system by promoting the belief that everyone should have access to justice, the primary mission of Kansas Legal Services. Kansas Legal Services has been the major direct legal services provider to victims of abuse for decades. IOLTA funding has enabled KLS to holistically serve more victims of domestic violence, sexual assault and stalking as the incidents increase. This assistance has helped families achieve safety, stability and freedom from abuse.

-Marilyn Harp
Executive Director
Kansas Legal Services

KLS attorney Kole Masters consults with a client.
Kansas Bar Foundation Welcomes First Diversity Scholarship Recipient to Diversity Committee

"First of all," he said, "if you can learn a simple trick, Scout, you’ll get along a lot better with all kinds of folks. You never really understand a person until you consider things from his point of view … until you climb into his skin and walk around in it."

-Harper Lee, To Kill a Mockingbird

One of the primary goals of the KBA Diversity Committee is to encourage Kansas lawyers to think about issues from perspectives other than their own. An active exchange of ideas, however, requires a diverse Kansas Bar. This year, the Kansas Bar Foundation is encouraging diversity with the establishment of the Kansas Bar Foundation Diversity Scholarship. The scholarship promotes the practice of law in the State of Kansas by awarding up to two $500 scholarships to third-year students attending either Washburn University School of Law or the University of Kansas School of Law.

Each scholarship will be awarded to a law student demonstrating a bona fide intention to practice law in the state of Kansas and exhibiting exemplary leadership in promoting diversity and inclusion in the law student’s school and broader legal community. The winners will be expected to author an 850-word article about why diversity and inclusion matters in the legal profession. The article will be published in the Diversity Corner section of the Journal of the Kansas Bar Association. The winners will also be invited to become members of the KBA Diversity Committee.

Through the generosity of the Kansas Bar Foundation, I am pleased to announce the first scholarship recipient, Rachelle Veikune. Veikune is currently finishing her final semester at the University of Kansas School of Law. Rock Chalk!

Veikune traveled a long way to become a Jayhawk. After graduating from high school in California, Veikune received a bachelor’s degree in political science from the University of Hawaii at Manoa, in Honolulu. Moving from Hawaii to Kansas by herself was a bit of a culture shock. At first, Veikune was not inclined to go out too much, and mainly kept to herself.

In her scholarship application, Veikune discussed how during her first few months in Kansas, KU’s commitment to diversity was demonstrated to her on a very personal level.

Veikune said, “Third-year and second-year students of color took the initiative to talk to me, befriend me, and let me know that if I needed anything to simply ask. This meant the most to me because it let me know that although I stick out at school, I belong here and I am not alone.”

Those early interactions with other minority students made such an impact on Veikune, she now makes it a point to build relationships with other minority students.

“My commitment to diversity at KU is more evident on a micro level. Just as other upper class students of color did for me, I make it a point to cultivate relationships with other minority students. I let them know that I know how it feels to have a chip on your shoulder because we stick out. I let them know that if they find themselves in an emergency, I will do my best to help. And as much as I can, I offer to give them outlines for classes that I’ve already taken. I strive to be someone that an earlier version of myself needed. By this I mean someone who makes the effort to empathize and to help without being asked. This is what made the greatest impact on me so I pass that on to those who are coming after me,” she said.

Veikune said this scholarship benefits her because, “as a woman of color, I know that I have defied stereotypes, odds, circumstances and statistics to be in law school today. But more than anything, I know I was able to do so because people much greater than me allowed me to believe that I could. It is an honor and a privilege to be part of a committee that promotes diversity in the legal community. I benefit from winning this scholarship because being a member of the KBA Diversity Committee gives me the privilege of being a part of the change I want to see in the world.”

While Veikune plans on staying in Kansas after graduation, she would like to one day create a scholarship called the Malohi Scholarship. Malohi is the Polynesian word for strong. The scholarship would be available to members of the Kalihi Teen Center located in the government housing projects at Kalihi Park Terrace in Hawaii where Veikune once lived with her family. Given the chance, Veikune would also love to create a similar scholarship opportunity to help Kansas’ teens.

The KBA Diversity Committee Chair, Jacqlene Nance, said Veikune’s addition to the committee provides new and important insight.

“Ms. Veikune’s fresh perspective, passion and commitment to diversity will not only be a great addition to the Diversity Committee, but to the Kansas legal profession as well. Ms. Veikune is dedicated to providing legal access to the underrepresented and is gaining great experience while in law school to be an exceptional advocate for those in need,” Nance said.

Please join the KBA Diversity Committee in congratulating Veikune and welcoming her to the Kansas Bar.

About the Author

Amanda Stanley is a member of the KBA Diversity Committee. Stanley received her juris doctorate from the University of Kansas School of Law in 2014 and her Bachelor of Science in Biology from Newman University in 2008. Stanley currently serves as a Research Attorney for the Kansas Court of Appeals.

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I Was a Victim of Ransomware

It happened to me. I was the victim of a ransomware attack. Ransomware is software designed to block access to a computer system until a ransom is paid, usually within a certain timeframe. All of my Word, Excel, and other files on my primary laptop were encrypted by a criminal. I was left with nothing but instructions on how to transfer some $750 to the attacker in exchange for the instructions to recover my files. I was given 48 hours to make my decision and send the $750. I decided to keep my money and kiss my files bye-bye.

What I Did Right

I had previously considered the rising threat from ransomware, and was trying to practice what I preached about protecting against it in my April 2015 column in the Journal. As a result, none of the data the attacker held for ransom on my laptop was the “good stuff.” I had already:

• Conducted system and folder backups that I knew contained clean files
• Stored all documents of any significance or value on servers or removable media
• Enabled email filters and anti-malware software to quarantine most dangerous messages
• Tested my human vulnerability to dangerous messages using a service like KnowBe4.com

Other than the embarrassment of getting infected, the severity of the infection was minimal. Recovery was as simple as reformattting the laptop, then reinstalling Windows and my apps. My situation had not approached the severity experienced by Hollywood Presbyterian Medical Center in Los Angeles in February 2016. That ransomware attack shut down parts of the hospital, forced it to shift patients to other facilities, and finally required it to pay a ransom of $17,000 in bitcoin for the hospital to regain access to its computer systems.

Where I Went Wrong

Our post-attack review of how I screwed up pointed to a disconcerting future where the careful planning we do to minimize errors, standardize processes, and reduce compliance risk runs smack up against our efforts to secure our data and networks. All ransomware attacks we had observed previously seemed random, and relied on luck to deliver the payload. Email messages were either from strangers or out of character for known correspondents. The content of messages was usually suspicious on its face, or was grammatically and syntactically unusual, prompting us to pause, ponder, and then recognize the potential threat.

My attacker spear phished me. In other words, the criminal created apparent familiarity and exploited personalized knowledge about me to bypass my cautious nature. The familiarity and intimate knowledge appear to have been collected from a client’s own operational processes and procedures. This sort of customized attack will likely expand because we have provided the operational details to make it possible.

The client in question is in a heavily regulated industry where dozens of compliance attorneys from the government, insurance companies, and corporate counsels’ offices have all argued for thorough documentation of all business processes. Every job description is spelled out in careful detail and each employee is documented on an organizational chart. Every policy and process is reduced to a checklist and every checklist is signed off and filed away for audit. Layered atop of that is a requirement that every policy, procedure, and checklist must be available to every in-house and outside employee through constant training, retention of the documents on a centralized database, distribution to localized databases in every external office, and discussions in frequent email.

In other words, access to the operational information necessary to “forge” an identity and to fake a legitimate purpose for a spear phishing email was as simple as viewing a bit of that mountain of documentation the client created. The ransomware email I got appeared to be from a client contact relevant to my representation. The email subject line and body followed appropriate, documented procedures. The content of the message used jargon prescribed in pages of operational documents. Even the attached Word file appeared relevant and legitimate. Because everything seemed familiar, my reading the email and opening the attachment was virtually instinctual.
The Human Element

My experience was a scary lesson even if it did not lead to professional tragedy. It underscores that the human element of preparation and security still remains our preeminent defense against the bad guys. Some relatively simple, technological preparation can help minimize damage when and if an attack happens, but constant training is vital to preventing harm. Learning to recognize a hostile email or site will become increasingly difficult as attacks become increasingly personalized. Recognizing a successful attack promptly and training for proper response will factor heavily in how damaging an attack may be. In the words of Sergeant Phil Esterhaus of Hill Street Blues, “Hey, let’s be careful out there.”

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.

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Members in the News

Changing Positions

Michael Baumberger has been promoted to member of Klenda Austerman, LLC., Wichita.
Terrence J. Campbell was nominated by President Obama to the U.S. District Court bench, Lawrence.
Kenneth W. Estes was sworn in as the Kearney County Attorney, Lakin.
Daniel P. Goldberg has joined the Federal Public Defenders Office, Kansas City, Mo.
Jeremy L. Graber was elected partner at Foulston Siefkin LLP, Topeka. At the Wichita site, Matthew W. Bish, Eric M. Pauly, Bradley D. Serafine and Justan Shinkle were promoted to partner.
Wm. "Scott" Hesse has been named Maple Hill city attorney.
Elizabeth B. Hiltgen is the new city prosecutor for criminal matters in Marysville, Washington, Kan.
Gabrielle Ilaria and Steven J. Munch have joined the litigation team at Polsinelli PC, Kansas City, Mo.
Katharine J. Jackson was appointed as the new city attorney for Manhattan.
Stacey L. Janssen has joined Dysart, Taylor, Cotter, McMonigle & Montemore PC as Of Counsel, Kansas City, Mo.
Mark Maloney has been added as a member of Hinkle Law Firm, Wichita.
Christopher Nelson has joined the law firm of Fisher, Patterson, Sayler & Smith, LLP as an associate attorney, Overland Park.
John Patterson has joined Baker, Sterchi, Cowden & Rice LLC as Of Counsel, and Megan R. Stumph has joined as an associate, Kansas City, Mo.
Brock J. Pohlmeier has joined Bolton & McNish LLC, Marysville.
Angela Probasco as joined Lewis, Brisbois, Bisgaard & Smith LLP as partner, Kansas City, Mo.
Trevor D. Riddle and Salvatore D. Intagliata have joined Monnat & Spurrier, Chartered as shareholders, Wichita.
Kathryn Stevenson has joined Monnat & Spurrier Chartered as an associate attorney, Wichita.
Amanda S. Vogelsberg has become partner at Henson, Hutton, Mudrick & Gragson LLP, Topeka.

Miscellaneous

At its 2016 Annual Meeting, the Law Firm of McDowell Rice Smith & Buchanan, PC, has announced the firm’s executive board: R. Pete Smith, Chairman; Thomas R. Buchanan, President; Kristie Remster Orme, Greg T. Spies as General Counsel.

Changing Locations

Spencer Fane has expanded to Oklahoma City: 1701 S. Kelly Ave., Edmond, OK 73013.
Stacey L. Janssen has moved to Dysart Taylor Cotter Monigle & Montemore, PC, 4420 Madison Ave., Ste. 200, Kansas City, MO 64111. Phone: (816) 931-2700 Fax: (816) 931-7377 sjanssen@dysarttaylor.com.
Michael C. Robinson has opened a new office at 129 W. 2nd Ave., Ste. 200, Hutchinson, KS 67501.
A Singular Understanding of “They”

Can they ever be a singular pronoun?

“I would have everybody marry if they can do it properly.”¹

“A person can’t help their birth.”²

“The jury, passing on the prisoner’s life, may in the sworn twelve have a thief or two Guiltier than him they try.”³

Singular They Is Nothing New

They is a plural pronoun, strictly speaking. As such, it does not belong in the examples above, which include singular nouns (everybody, a person, the jury). Instead, to be technically correct, they should read “I would have everybody marry if he can do it properly,” “A person can’t help her birth,” and “The jury, passing on the prisoner’s life, may in the sworn twelve have a thief or two Guiltier than him it tries.” Singular nouns, including indefinite pronouns like “everybody” and collective nouns like “jury,” traditionally require a singular pronoun: either he, she, or it.⁴

Of course, English speakers violate this rule all the time. It’s not even a new trend.⁵ They routinely shows up as a singular pronoun to stand in for indefinite nouns and nouns evoking a collective. To most, it sounds fine to say, “has anyone lost their coat?,” “the jury will render their verdict at 3 p.m.,” and “a doctor must pass their medical boards every seven years.” Singular they in these examples makes sense. We carry the concept of plurality into our use of singular indefinite and collective nouns because when we say the noun—anyone or the jury or a doctor—we are thinking that the noun includes more than one person. The logic of what we are saying carries over into our grammar choices.⁶

The same logic that applies to our spoken grammar often applies to our writing, at least in informal contexts. Many writers prefer a gender-neutral pronoun to replace singular nouns when gender is unknown or irrelevant. “A lawyer must follow their best judgment” is easier to write, and more natural, than “A lawyer must follow his or her best judgment.” Singular they is less sexist than the universal he (or she), and it’s smoother than writing “he or she” all the time in an effort to be inclusive.⁷ The singular they often finds its way in because it is fast, smooth, and intuitive, and because it avoids having to rewrite or rethink large passages of work. It is so common, in fact, that singular they is starting to gain approval from authorities like Merriam-Webster and the Washington Post.⁸

What If He or She Doesn’t Apply?

In addition to the common usage above, some writers also seek a gender-neutral personal pronoun for use even when the noun’s gender is known.⁹ This more-controversial writing style may be preferred if the identification of either male or female gender is inappropriate in a given context.¹⁰ Since English provides no gender-neutral alternative, these writers may use singular they to avoid signifying gender.¹¹ For example: “I met my friend Jordan when they were seven.” “Taylor said they were taking the bus to town.” Singular they seems less familiar in these examples. These usages can be jarring at best (wait, how many Jordans are there?) and confusing at worst (was Taylor alone?). But how different is this usage of singular they from the more familiar, commonly-used examples at the beginning of this piece? Isn’t it possible that if one instance of singular they is clear and acceptable, then so is the other? The answer is still unsettled in our language. If a lawyer has to write about a client for whom neither he nor she is correct, should the lawyer at least consider using they?

What should lawyers do?

“For the persuasive writer—for whom credibility is all—the writer’s point of view matters less than the reader’s.”¹² Lawyers must be conservative when we write because we usually write on another person’s behalf, for an audience that may not be receptive to freewheeling language choices. That context imposes a duty of care that probably keeps the practicing bar away from the cutting edge of a grammar shift.

The singular they presents two problems in this regard. It may inject unintentional ambiguity (is the lawyer referring to more than one person?). And it may damage credibility (why doesn’t this lawyer know the grammar rules?). When we write for our clients, it’s not a great idea to be on the grammar advance guard.

Fortunately, until the notion of correct grammar catches up, there are several writing techniques that avoid the problem of singular they and gender signifiers altogether.¹³

1. Make the subject of the sentence plural. A lawyer must follow [his or her or their] best judgment becomes Lawyers must follow their best judgment.

2. Change the pronoun to an article. The jury will render [its or their] verdict at 3 p.m. becomes The jury will render a verdict at 3 p.m. and Has anyone lost [his or her or their] coat? becomes Has anyone lost a coat?

3. Omit the pronoun entirely. A doctor must pass [his or her or their] medical boards every four years becomes A doctor must pass medical boards every four years.
4. Rephrase. Has anyone lost [his or her or their] coat? becomes Excuse me, whose coat is this? and A suspect who insists [he or she or they] did not commit the crime is innocent until the state proves [his or her or their] guilt becomes A suspect is innocent until proven guilty.

5. Replace pronouns by repeating the noun or, where appropriate, variations on the noun. This passage illustrates how to use this technique to write about a person without signifying gender:

Sasha Fleischman’s ride to and from school took an hour and involved two transfers, but Sasha used the time to nap or do homework. Maybeck High School, Sasha’s school in Berkeley, caters to bright, quirky kids . . . . That description certainly applied to Sasha, a skinny, intensely analytical kid with wavy, chin-length brown hair, thick eyebrows and a radiant smile, who started inventing languages at the age of 7 or 8.14

For now, technically-correct written language hasn’t quite caught up with the way people talk or with the preference to maintain gender-neutrality. Skillful writing can avoid the issue and satisfy a traditional (and critical) audience. Eventually, they will thrash out exactly where they belongs. Perhaps one day, singular they will seem as natural and correct as the universal he once did.

ENDNOTES
2. William Makepeace Thackeray, Vanity Fair 296 (Scribner 1903).
3. William Shakespeare, Measure for Measure act 2, sc. 1.
7. “He or she” is a grammatically-correct, non-sexist alternative singular pronoun. See, e.g., Deborah E. Bouchoux, Aspen Handbook for Legal Writers 24 (2d ed. 2009). It requires three words where one would do, however—and, used repeatedly, sounds clumsy and bloated. See id.
10. Mullin, supra note 8 (“The singular they is also useful in references to people who identify as neither male nor female.” (quotation omitted)).
11. As an alternative, some writers propose adoption of a new, gender-neutral singular pronoun such as ze, zie, em, or many other variations. See, e.g., Scelfo, supra note 9; Ann Edwards, Are Gender Neutral Pronouns the Wave of the Future?, Grammarly Blog, http://www.grammarly.com/blog/2015/are-gender-neutral-pronouns-the-wave-of-the-future/; Gender Pronouns, LGBT Resource Center at The University of Wisconsin Milwaukee, https://uwm.edu/lgbtrc/support/gender-pronouns/. These alternatives suffer from two immediately apparent problems: It is difficult to know how to pronounce them, and there are so many proposed options that the variety is confusing and nonstandard by definition.

About the Author

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Joyce Rosenberg is a clinical associate professor and director of the Externship Clinic at KU Law School. She is a 1996 graduate of KU Law, where she served as editor in chief of the Kansas Law Review.

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Twenty-eight years ago I gained a work companion. This was a partner who came to me a couple years after I started my career at Shook, Hardy. The year was 1988—an era when our profession used a device called a Dictaphone, which was then transcribed by something called a secretary who was skilled at something called an IMB Selectric typewriter. The letter was then weighed and postage determined by something called a Pitney Bowes postage meter. In some cases, letters were duplicated with carbon paper, placed in a metallic file drawer and saved for perpetuity.

My work companion back then was known as a litigation bag. It was big and boxy, with long leather handles that were affixed to the side. It was, and remains the one thing I take with me no matter where I go. Over the years, this bag has been within my arms’ reach through hundreds of depositions, multiple trials, countless client meetings, work sessions and pretty much anything else involving legal pads and paper. In 2014, I took 70 flights on Southwest, and that bag was always there, jammed below my seat, tight and secure, packed with everything I needed, and a few things I probably didn’t.

So, if right now you are reading this with the enthusiasm of hearing about the KU football recruiting class, permit me to tell you something that might get your attention. My bag has never delayed a flight because it didn’t fit into an overhead bin. My bag has never been checked and then re-routed to Fargo. Never was it drop-kicked by a ground worker who was angry that his fantasy team wrongly started Jet’s quarterback Ryan Fitzpatrick.

Yet despite its track record of reliability, my bag has been attacked, scorned, and laughed at by thousands. Why? Well, for starters it cannot be affixed to my back. There are no zippers on the outside. It does not contain any Velcro—anywhere. It’s not adorned with cool travel labels like TravelPro, Targus, or Tumi. There are no ergonomic S-curved straps to distribute the weight.

Other features it lacks, based on a backpack article on the About Education website (about.com):

- Waterproof media pouch, for cell phone or an MP3
- Water bottle pouch to “Keep a water bottle on hand to stay hydrated and to cut down on temptations from sugar-filled drinks.”
- Lockable zippers “with holes large enough to enable the user to slip a small lock wire through.”

My old litigation bag is not cool. It’s not hip. Never, ever, has it carried a Men’s Health magazine with a step-by-step tutorial on a completing a Zumba work out, a Juice Cleanse or Kale Smoothie. It has never carried coupons to Lulu Lemon, or even toted an iPhone, iPad or—heavens forbid—an Apple Watch.

Most travelers, and even some of my law partners, think it’s a loser bag. But the most outrageous thing it lacks—more than anything else—is wheels. I repeat, no wheels. Which means it also lacks a telescopic handle that extends across twenty rows of passenger compartments which makes it impossible to move down the aisle when your plane is already late. Never has my bag poisoned the silence by dragging it over a brick laden walkway for 20 minutes.

Amazon shows 27,000 items under the heading “roller bags”. If you searched “litigation bags no wheels” your hits total one. Just one.

Yes, I know wheelie briefcases are the rage. And I hate them. This is not a singular opinion. Nine years ago, the New York Times asked readers this question: “Share your thoughts on rolling briefcases: life saver or sidewalk plague?”

Here’s how some readers responded:

- “There should be some mandate issued (or perhaps just common courtesy should rule) that the person rolling around that briefcase should never extend the handle the full six, 8, 12 feet (whatever it is) behind them! We don’t have that kind of room around here for a six foot personal space parameter!”

- “In May as I walked down the concourse at Miami Airport, a guy rolled his briefcase over my foot and the wheel took all the skin off my shin. I don’t think it bothered him because he didn’t stop. I eventually found that the barkeeper had bandages. Thanks to the rolling
case, I now know where to find first aid.”
That same year, the Times wrote another article entitled, “Your Briefcase Just Ran Over My Toe.” The article said, “those who are loath to wheel cite a few reasons. Rolling bags annoy other pedestrians. They are not worth the extra struggle on stairs. Not to mention that lifting a wheeled case—with the added weight of wheels and handle—onto a luggage rack is actually more of a strain on the back than lifting one without wheels.” This is news?
When I get on the plane lugging my buddy people look at me like I’m like Pee-wee Herman. Breaking news—I. Don’t. Care. Function over form is, generally speaking, a good way to work, and my buddy has functioned pretty darn well these many years. So, if you see me lugging my litigation bag at Terminal B, heading through security to board my Southwest flight, be sure to wave and say hello. But please keep your distance. I need to protect my toes.

About the Author

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Upcoming CLE Schedule

Brown Bag Ethics: Taking Care of Your Clients, Your Practice, Your Family and Yourself
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 6-7, 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

For more details or to register for a CLE visit www.ksbar.org/cle
Tips for Practicing in Tribal Courts

By Hon. Elizabeth Ann Kronk Warner
Because there are four federally recognized resident tribes located within Kansas, as well as several other tribes with significant interests within the state, there is a likelihood that any Kansas practitioner may find herself with a case pending in tribal court. Accordingly, the purpose of this article is to provide a brief introduction to the law applicable in Indian country, as well as supply some basic tips for practice in tribal courts.

I. Tip #1: Know the Law (or find someone who does)

Under the Kansas Rules of Professional Conduct, a lawyer’s responsibilities include a duty of competence to her clients. Accordingly, our profession requires that we have a basic competence in any legal matter we undertake. Therefore, before taking on any case in tribal court, it is important to understand the law applicable in Indian country. Oftentimes, it can be complicated to determine which sovereign has jurisdiction in a matter arising in Indian country or involving Indians. As an initial starting point, there are three potential sovereigns that may be able to assert jurisdiction in matters arising within Indian country: a tribal government, the state government, or the federal government. Which sovereign is legally capable of asserting jurisdiction often turns on two questions: (1) the political identity of the parties involved; and (2) the location of the action giving rise to the matter.

A. Political Identity

In matters related to Indian country, the determination of which court has jurisdiction turns in part on the political identity of the parties involved. When dealing with matters arising in Indian country, there are three possible political identities: (1) member Indian, (2) non-member Indian, and (3) non-Indian. A member Indian is an individual who is a citizen of the tribe attempting to assert jurisdiction. A non-member Indian is an individual who is a citizen of a tribe, but not the tribe(s) asserting jurisdiction in the present matter. Typically, tribal court matters will involve member or non-member Indians. Of course, it is always possible that non-Indians may consent to tribal court jurisdiction or be parties to a case arising in Indian country.

B. Location—What is Indian Country?

In addition to the political identity of the individuals involved, tribal court jurisdiction oftentimes turns on whether the matter at issue arises within Indian country. Indian country is more than reservation land. Indian country is defined at 18 U.S.C. § 1151 (1949). Although this is part of the criminal section of the Code, the U. S. Supreme Court has applied the definition in the civil context. 18 U.S.C. § 1151 provides that Indian country includes: (1) all land within a reservation, notwithstanding issuance of a patent and including rights of way; (2) dependent Indian communities; and (3) all allotments.

In addition to 18 U.S.C. § 1151, the Supreme Court announced a test to help determine whether an area of land is Indian country. Under this test, the court will ask whether the area has been validly set apart for the use of the Indians as such under the superintendence of the federal government. Indian country may be diminished, but, if it is disestablished, it is no longer Indian country. As a result, courts will often evaluate whether tribes have been diminished or disestablished. In Solem v. Bartlett, the Court considered whether a crime that was committed on a portion of the Tribe’s land that had been opened for allotment occurred in Indian country. The Court indicated that in determining whether there was diminishment or disestablishment the necessary factors to consider were: (1) whether there is language of cessation; (2) whether the legislative history suggests there was agreement about cessation; and (3) what occurred after the land was opened. In Solem, the Court found no conclusive evidence that the land had been disestablished.

C. Marshall Trilogy

To understand tribal court jurisdiction, it is important to understand the three foundational cases of federal Indian law, also known as the Marshall Trilogy. These decisions are: Johnson v. McIntosh, Cherokee Nation v. Georgia, and Worcester v. Georgia. Johnson v. McIntosh established that tribes have the right to beneficial use of their land, although the federal government does...
have the right to dispossess tribes of this use. In *Cherokee Nation*, the Court addressed whether its original jurisdiction extended to Indian nations. In holding that it did not, the Court reasoned that Indian nations were not foreign nations, but, rather, “domestic dependent nations.” In *Worcester*, the Court considered whether the laws of the state of Georgia applied within the territory of the Cherokee Nation. The Court concluded that the laws of the state of Georgia had no force or effect within Indian country.

Both *Cherokee Nation* and *Worcester* are important to understanding the extent of tribal court jurisdiction. *Cherokee Nation* recognized the separate sovereignty of tribal nations, which is a basis for tribal court jurisdiction. *Worcester* held that the laws of states generally do not apply in Indian country. Although subsequent congressional acts and court decisions have modified *Worcester*, the presumption against the applicability of state law in Indian country to issues involving wholly internal matters (such as domestic relations, property, etc.) remains, and, therefore, tribal courts may assert their authority without interference from state courts in numerous areas.

The Kansas courts have recognized the importance of the Marshall trilogy on the development of modern federal Indian law. As recognized by the Kansas Court of Appeals in *Diepenbrock v. Merkel*,

Indian tribes are “domestic dependent nations” that exercise inherent sovereign authority over their members and territories. Indian reservations are separate and distinct nations inside the boundaries of the state of Kansas. Indian rights are protected by treaty with the United States. The inherent sovereignty possessed by Indian tribes allowed them to form “their own laws and be ruled by them.”

**D. Subsequent Relevant Developments in Federal Indian Law**

Congress passed the Major Crimes Act approximately 50 years after the Court’s decision in *Worcester*. The Court determined that Congress had the authority to enact the Major Crimes Act in *United States v. Kagama*. In reaching this decision, the court determined that the United States owes Indian tribes a “duty of protection” and, therefore, the federal government has plenary authority over Indian country. Since this time, the federal government has exercised substantial authority in Indian country. Accordingly, federal law may play a significant role in matters arising within tribal court.

In considering tribal court jurisdiction, it is also important to know that tribes pre-existed the formation of the federal government, and, as a result, are extra-constitutional entities. Many are surprised to learn that the U.S. Constitution does not apply to Indian country. In 1968, Congress recognized this “void” and enacted the Indian Civil Rights Act (ICRA). The ICRA applies the majority of the provisions of the Bill of Rights to Indian country, with a few notable exceptions. Some of these exceptions include: 1) the First Amendment does not apply in Indian country; 2) there is no right to an attorney; and 3) ICRA placed a limitation on tribal court enforcement authority. Currently, the limitation on tribal court enforcement authority is one year in jail and/or a $5,000 fine. However, tribes that comply with the requirements of the recently enacted Tribal Law and Order Act may be able to increase the sentencing authority of their tribal courts in certain circumstances.

**E. Public Law 280**

In 1953, Congress enacted Public Law 280, which had the effect of extending both civil and criminal state jurisdiction to events occurring within Indian country. Originally, Public Law 280 conferred criminal and civil jurisdiction in Indian country to California, Minnesota (except the Red Lake reservation), Nebraska, Oregon (except the Warm Springs reservation), and Wisconsin. Alaska was later added in 1958. Public Law 280 also allowed states to assume jurisdiction, if they opted to do so. Under this provision, Arizona, Florida, Idaho, Iowa, Montana, Nevada, North Dakota, Utah and Washington all assumed some aspect of jurisdiction in Indian country. Ultimately, the court determined that Public Law 280 did not confer general regulatory authority on the states. Despite this ruling, however, Public Law 280 dramatically changes the jurisdiction of tribal courts where it applies. Because some of the federally recognized tribes in Kansas have lands located in Nebraska, which is a Public Law 280 state, it is helpful for the Kansas practitioner to be familiar with Public Law 280. For an in-depth discussion of the application of Public Law 280, see Carole E. Goldberg-Ambrose, *Public Law 280: State Jurisdiction Over Reservation Indians*, 22 UCLA L. Rev. 535 (1975).

**F. Civil Jurisdiction**

Although civil jurisdiction in Indian country is a complicated area of federal Indian law with many exceptions, a few guidelines provide a starting point for understanding civil jurisdiction in Indian country. Generally, tribal courts have exclusive jurisdiction where: 1) the matter occurs in Indian country and involves both Indian plaintiffs and Indian defendants; or 2) the matter occurs in Indian country, and the defendant is a member of the tribe. Furthermore, federal courts may have civil jurisdiction over matters occurring in Indian country when either federal statutes or federal common law provide a basis for the cause of action.

**1. Tribal Court Civil Jurisdiction**

As mentioned above, the civil jurisdiction of tribal courts turns on the status of the plaintiff and defendant, as well as the location of the incident. One of the first modern day U. S. Supreme Court cases to address the question of tribal civil jurisdiction was *Williams v. Lee*. In *Williams*, a unanimous Court held that state courts have no jurisdiction over transactions arising on the Navajo reservation and involving an Indian defendant. Because of the status of the defendant and the location of the transaction, the Court reasoned that state court jurisdiction in the matter “would undermine the authority of the tribal courts over Reservation affairs and hence would infringe on the right of the Indians to govern themselves.”

The Court applied similar reasoning in *Fisher v. District Court*, when it determined that tribal courts have exclusive jurisdiction over matters involving Indian plaintiffs and Indian defendants when the matter occurs in Indian Country.

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The *Fisher* court explained that tribal court subject matter jurisdiction over tribal members is a matter of tribal law, and, therefore, there is no federal limitation on tribal court jurisdiction over tribal members. Following *Williams* and *Fisher*, tribal courts have civil jurisdiction over Indian defendants involved in incidents occurring within Indian country. Yet, if the actions of the Indians in Indian country implicate a state interest, the state may have the authority to assert jurisdiction over matters occurring within Indian country.

Tribal jurisdiction, however, is not as clear when the defendant is a non-Indian. This is because “when nonmembers have a right to be in Indian Country by virtue of land ownership, the usual presumption favoring tribal jurisdiction is reversed.” Accordingly, tribal courts typically do not have civil jurisdiction over non-Indian defendants on non-Indian land, even for matters occurring in Indian country. The U. S. Supreme Court, however, in *Montana v. United States*, articulated two exceptions to this general prohibition of tribal court jurisdiction over non-Indians:

To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. [Citations omitted.] A tribe may also retain inherent power to exercise civil authority over the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. [Citations omitted.]

The Court’s decision in *Montana* is commonly referred to as the *Montana* exception. It allows tribal courts to assert civil jurisdiction over non-Indians when the non-Indians either enter into a consensual relationship with the plaintiff, or when the non-Indians’ activities threaten the health, welfare, economic security, or political integrity of the tribe. Furthermore, Congress has the authority to grant tribal courts jurisdiction over non-Indians.

Tribal court jurisdiction is not limited to matters that occur solely within Indian country. Tribal courts may have subject matter jurisdiction over off-reservation treaty rights. Additionally, tribal courts may assert jurisdiction over matters occurring outside of Indian country if the matter involves internal concerns of the tribe. Despite circumstances that allow for tribal court jurisdiction, it is difficult for tribal courts to assert jurisdiction over non-Indian defendants. Circumstances under which tribes may assert jurisdiction outside of Indian country are further limited by the Supreme Court’s determination that a defendant’s identity is central to the determination of civil jurisdiction.

2. Exhaustion of Tribal Remedies

Related to a tribal court’s civil jurisdiction, a federal court generally will not take action in a matter arising in Indian country until a party shows that tribal remedies have been exhausted. The Supreme Court has indicated that federal courts should not address the question of whether tribal courts have jurisdiction until the appropriate tribal court has had the opportunity to address the question first. “The current rule appears to be that federal courts must generally refuse to hear cases arising within Indian country until the tribal courts have had a chance to determine whether they have jurisdiction over the case.” There are, however, exceptions to the exhaustion requirement. The Supreme Court recognized exceptions “where an assertion of tribal jurisdiction ‘is motivated by a desire to harass or is conducted in bad faith’ . . . or where the action is patently violative of express jurisdictional prohibitions, or where exhaustion would be futile because of the lack of an adequate opportunity to challenge the court’s jurisdiction.” Additionally, a tribe may opt to enter into a contract with a choice-of-forum clause, and, under such circumstances, the choice-of-forum clause may be directly enforced without first requiring exhaustion of tribal remedies. Finally, federal courts must generally defer to tribal court findings of fact, unless the tribal court findings of fact are clearly erroneous.

G. Criminal Jurisdiction

As with civil jurisdiction in Indian country, determining which sovereign possesses criminal jurisdiction in matters arising in Indian country may be complicated. In 1817, the federal government began regulating criminal jurisdiction in Indian country with passage of the Indian Country Crimes Act. Under the Indian Country Crimes Act, the federal government asserted jurisdiction over crimes occurring within Indian country, except when the crime involved an Indian against an Indian. The tribe had exclusive jurisdiction over these crimes.

In 1883, the Supreme Court decided *Ex Parte Crow Dog*, which involved the murder of one Indian by another Indian in Indian country. The Court held that the federal court did not have jurisdiction over the crime, because both the defendant and victim were Indian, and the crime occurred within Indian country. In reaction to this decision, Congress passed the Major Crimes Act, which granted the federal courts concurrent jurisdiction over enumerated crimes that occur within Indian country, regardless of the political affiliation of the individuals involved.

Despite these congressional acts, tribal courts still maintain considerable jurisdiction over crimes committed in Indian country by Indians. With the caveat of Public Law 280, which is discussed above, tribal courts maintain exclusive jurisdiction over non-major crimes committed by Indians against Indians in Indian country. Tribal courts have concurrent jurisdiction over non-major crimes committed by Indians against non-Indians. Many tribal courts also exercise concurrent jurisdiction with the federal government over major crimes committed by Indians. Notably, this tribal court authority extends to both member and non-member Indians, as decided by the Supreme Court in *United States v. Lara*. It is also notable that the Double Jeopardy clause of the Fifth Amendment does not preclude federal prosecution of a crime following tribal prosecution, because tribes are separate sovereigns.

However, tribal courts lack criminal jurisdiction over non-
Indians.\textsuperscript{40} In \textit{Oliphant v. Suquamish Indian Tribe},\textsuperscript{41} the Court determined that tribal court authority over crimes committed by non-Indians would be inconsistent with the dependent status of Indian tribes.

Notably, however, on Feb. 28, 2013, Congress passed S. 47 reauthorizing the Violence Against Women Act (VAWA).\textsuperscript{42} On March 7, 2013, President Obama signed the VAWA reauthorization into law. In regard to federal Indian law, the VAWA reauthorization is notable as it grants tribal courts jurisdiction over domestic violence offenders committing crimes in Indian country regardless of political identity. As previously explained, the Supreme Court stripped tribal courts of their jurisdiction over non-Indians in \textit{Oliphant}. The VAWA reauthorization explains that the powers of self-government of a participating tribe include the inherent power of that tribe to exercise special domestic violence criminal jurisdiction over all persons. Accordingly, those tribes meeting VAWA’s requirements would have jurisdiction over “all persons” committing domestic violence crimes within the participating tribe’s jurisdiction, which includes non-Natives committing domestic violence crimes. In this way, the VAWA reauthorization constituted a limited \textit{Oliphant} fix.

At least one tribe located within Kansas is already working on implementing the VAWA requirements that would allow it to exercise jurisdiction over domestic violence offenders within its territory, regardless of the political identity of the offender. Accordingly, any practitioner involved in a domestic violence claim arising within Indian country is encouraged to examine whether the tribe in question has jurisdiction in such a matter through the VAWA reauthorization.

With regard to criminal jurisdiction in Indian country, the state of Kansas is somewhat unique. Congress granted Kansas criminal jurisdiction “over offenses committed by or against Indians on Indian reservations.”\textsuperscript{43} This provision has been interpreted to mean that “Kansas has jurisdiction over non-major state offenses committed by or against Indians on Indian reservations located in the State of Kansas.”\textsuperscript{44}

\textbf{H. Tribal Sovereign Immunity}

In addition to determining whether the tribal court has jurisdiction over the matter in question, it is also helpful to ascertain whether tribal sovereign immunity may attach to any of the parties involved in the matter pending in tribal court. Tribal sovereign immunity prevents suits against tribes and tribally-owned entities under certain circumstances. Yet, sovereign immunity does not protect tribes from suits brought by the United States against a tribe. However, tribal sovereign immunity, where applicable, is a right possessed by tribal governments that must be recognized by both the federal and state governments. Additionally, tribal sovereign immunity extends to agencies of the tribes.\textsuperscript{45} Tribal sovereign immunity also applies to tribal officials acting within the scope of their official duties.\textsuperscript{46} Tribal sovereign immunity extends to claims for declaratory and injunctive relief, not merely damages, and it is not defeated by a claim that the tribe acted beyond its power.\textsuperscript{47} Moreover, in \textit{Michigan v. Bay Mills Indian Community},\textsuperscript{48} the U.S. Supreme Court held that tribal sovereign immunity applies to a tribe’s activities outside of Indian country.

Notably, tribal sovereign immunity can apply to both governmental and commercial enterprises.\textsuperscript{49} Tribes may create separate business entities that are not immune from suit. Tribes may create business enterprises under tribal law, federal law (section 17 of the Indian Reorganization Act) or state law.\textsuperscript{50} Even though tribal sovereignty may not extend to some tribal business entities, claims against such tribal commercial entities are limited to the assets held by the entity in question. There are numerous factors that courts will consider in determining whether tribal sovereign immunity applies to a tribal commercial enterprise, including: 1) how the entity was created; 2) the entity’s purpose; 3) the structure, ownership, and management of the entity; 4) whether the tribe in question intended to share its sovereign immunity with the commercial enterprise; and 5) the financial relationship between the tribe and commercial enterprise.\textsuperscript{51}

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\textbf{I. Consider Tribe-Specific Law}
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The foregoing discussion focuses largely on federal Indian law and how the federal government has impacted the application of law within tribal courts. In many instances, however, federal law may not apply to tribal court adjudications. Accordingly, attorneys practicing in tribal courts should always familiarize themselves with existing tribal laws and procedures. Often tribal law will be codified within the tribe’s constitution and code. For example, the Prairie Band Potawatomi Nation’s Constitution and Law and Order Code are available online.\textsuperscript{52} Attorneys practicing in front of a tribal court for the first time should also contact the tribe’s clerk of court to ensure that they are in compliance with the tribe’s requirements to appear in tribal court. For example, some tribes may require that an attorney become a member of the tribe’s bar before appearing in tribal court.

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\textbf{II. Tip #2: Familiarize Yourself with Your Tribal Court}
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Given that each tribe exists as a separate sovereign nation, tribal courts may differ from each other as well as from state and federal courts. Accordingly, before appearing in tribal court, an attorney should become familiar with the structure of the tribal court. American Indian tribal court systems are an example in many instances of incorporation of customary law and legal structures into anglo-styled justice systems. American Indian tribal court systems exist in the United States as systems of justice outside of the American state and federal justice systems. Some tribal courts resemble courts usually seen in anglo-styled justice systems, while other tribal courts are quite traditional.\textsuperscript{53}

As seen above, the American federal government has played a significant role in the development of American Indian tribal court systems. As a result of this historical relationship, many American Indian tribal court systems have come to incorporate various aspects of anglo-styled justice systems. However, despite the strong anglo-styled justice system presence within many tribal courts, traditional tribal courts persist. And, therefore, again, attorneys appearing in tribal court are encouraged to familiarize themselves with the particular structure of the court in which they are appearing.
III. Tip #3: Remember that Tribes are Separate, Sovereign Nations

As detailed above, tribes exist as extra-constitutional sover-eigns, separate from state and federal governments. Accordingly, attorneys appearing in tribal court must be mindful of the fact that state and federal law often are not controlling in tribal courts. Oftentimes, tribal codes will establish a “hierarchy” of laws applicable to matters adjudicated within tribal court. It is not uncommon for tribal courts to apply the law of the tribe first, federal law second (unless it supersedes tribal law as discussed above) and state law as a last resort. One very common mistake made by lawyers appearing in tribal court is to treat the tribal court as an outgrowth of the state, relying on state procedure and state law. Failure to comply with the tribal court’s rules of procedure and law not only is a violation of the state of Kansas’ duty of competence, but is also a sure fire way to upset a tribal judge and potentially lose a case.

IV. Conclusion

The preceding are three general tips to help an attorney navigate tribal court. Although compliance with these tips will not necessarily ensure success, they will hopefully protect an attorney from embarrassment (and potentially something far worse) in tribal court.

For more information on Indian law and practice within tribal courts, please consider these resources:

• Cohen’s Handbook of Federal Indian Law (LexisNexis Matthew Bender 2012).


• Annually, in Kansas, there are two conferences that may be of interest to lawyers who want to learn more about Indian law.

1. First, the University of Kansas School of Law hosts an annual tribal law and government conference focusing on topics of importance to Indian country. This year’s KU tribal law conference took place on March 11, 2016 at the KU Law School. The conference focused on the Indian mascots. For more information on the conference, please see: http://law.ku.edu/tribal#conference.

2. Second, usually in September, the four resident federally recognized tribes of Kansas sponsor the annual Native Nations Law Symposium (NNLS). The location of the NNLS rotates based on the tribe hosting the Symposium each year. The NNLS typically covers a wide variety of topics related to Indian law.

Please feel free to contact Professor Elizabeth Kronk Warner with any questions you may have related to Indian law or practicing in tribal courts. She may be reached at (785) 864-1139 or elizabeth.kronk@ku.edu.

About the Author

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ENDNOTES

1. Notably, “Indian” is a political and not a racial status. This is because who is an “Indian” turns in part on whether the individual in question has a political relationship (e.g. citizenship in) with an existing Indian tribe. See e.g. Morton v. Mancari, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974).


4. This is a reference to Chief Justice Marshall, who authored opinions in all three cases.

5. 21 U.S. (8 Wheat.) 543, 5 L. Ed. 25 (1831).

6. 30 U.S. (5 Pet.) 1, 8 L. Ed. 25 (1831).


8. 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886); see also Lone Wolf v. Hitchcock, 187 U.S. 553, 23 S. Ct. 216, 47 L. Ed. 299 (1903).

9. 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886).

10. Kagama, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228.


13. 21 U.S. (8 Wheat.) 543, 5 L. Ed. 25 (1831).


16. This assumes the incidents at issue do not implicate state interests outside of Indian country. In Nevada v. Hicks, 533 U.S. 353, 362, 121 S. Ct. 2304, 2311, 150 L. Ed. 2d 398, 409 (2001), the Supreme Court indicated that a state may have jurisdiction over incidents occurring within Indian country if the incidents implicate state interests beyond Indian country.

17. This discussion of tribal court jurisdiction focuses on tribal court subject matter jurisdiction. Just as state and federal courts must have personal and subject matter jurisdiction to assert authority over a matter, so too must tribal courts have personal and subject matter jurisdiction to assert jurisdiction over a matter. In the case of federal Indian law, it is likely that if a tribal court has subject matter jurisdiction, it will also likely
tribal courts

have personal jurisdiction.
19. Id., 358 U.S. at 223, 79 S. Ct. at 272, 3 L. Ed. 2d at 256.
22. See Nevada v. Hicks, 533 U.S. at 362, 121 S. Ct. at 2311, 150 L. Ed. 2d at 409 (2001) (holding that Nevada had the ability to execute a search warrant for evidence in an off-reservation crime in an Indian's home located on an Indian reservation).
25. Notably, Montana only addressed the authority of a tribe to regulate non-Indian-owned land within the borders of the tribe’s reservation, and does not address the question of a tribe’s authority over non-Indians acting on tribal trust land or tribally owned land within the reservation.
27. See City of Timber Lake v. Cheyenne River Sioux Tribe, 10 F.3d 554, 558 (8th Cir. 1993) (finding that Congress delegated tribes the authority to regulate liquor traffic of non-Indians within Indian Country).
28. See U.S. v. Shoappy, 770 F.2d 816, 819 (9th Cir. 1985) (finding that the tribe had concurrent jurisdiction with the federal government over fish caught outside of the reservation).
29. See John v. Baker, 982 P.2d 738, 756 (1999) (“And tribal courts may also have jurisdiction to resolve civil disputes involving nonmembers, including non-Indians when the civil actions involve essential self-governance matters such as membership or other areas where ‘the exercise of tribal authority is vital to the maintenance of tribal integrity and self-governance.’”) [Citation omitted.]).
30. See Nevada, 533 U.S. at 357-60, 121 S. Ct. at 2309-12, 150 L. Ed. 2d at 406-09.
33. National Farmers Union Insurance Comp., 471 U.S. at 856 n.21, 105 S. Ct. at 2454, 85 L. Ed. 2d at 827.
34. Mustang Prod. Co. v. Harrison, 94 F.3d 1382, 1384 (10th Cir. 1996). 
41. Id.
44. Iowa Tribe of Indians v. State of Kansas, 787 F.2d 1434, 1440 (10th Cir. 1986).
45. See Weeks Construction, Inc. v. Ogala Sioux Housing Authority, 797 F.2d 668, 670-71 (8th Cir. 1986).
46. Id.
49. Kiowa Tribe, 523 U.S. at 751, 118 S. Ct. at 1700, 140 L. Ed. 2d at 981.
50. Several courts have indicated that a tribe's decision to incorporate a tribal commercial enterprise under state law is a factor strongly indicating that tribal sovereign immunity should not apply to such state-chartered tribal commercial enterprises. See e.g., Plains Commerce Bank v. Long Family Land and Cattle Co., Inc., 554 U.S. 316, 128 S. Ct. 2709, 171 L. Ed. 2d 457 (2008).
51. Breakthrough Mgmt. Group, Inc. v. Chukchansi Gold Casino & Resort, 629 F.3d 1173 (10th Cir. 2010).
53. A variety of American Indian tribal courts currently exist within the United States. Melissa Tatum, Tribal Courts: The Battle to Earn Respect Without Sacrificing Culture and Tradition, in Harmonizing Law in an Era of Globalization: Conversion, Divergence and Resistance 83, 83 (Larry Cata Backer ed. 2007) (explaining that “tribal courts are diverse in structure and practice as the cultures they serve” because some tribes have retained traditional courts, some Department of Interior Courts of Indian Offenses, and others have chosen to mirror state and federal courts. There are over 300 tribal courts currently in existence.); see also B.J. Jones, Role of Indian Tribal Courts in the Justice System, 1 (March 2000), http://www.icctc.org/Tribal%20Courts-final.pdf (“Many tribal justice systems evolved from traditional courts, some Department of Interior Courts of Indian Offenses, and others have chosen to mirror state and federal courts. There are over 300 tribal courts currently in existence.”);
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Wills and the Six-Month Deadline

By Michael T. Jilka

I. Introduction

Wills are often kept in strange places. Although they should probably be kept in safety deposit boxes, they occasionally turn up in odd places like shoe boxes. Further, the lawyer who drafted the will may be deceased, retired, or otherwise not practicing law, and her files are not readily accessible. And if a will is located, and depending on when it is located, its admission to probate may produce a starkly different outcome than its alternatives, the law of intestate succession or a previously executed will.

Kansas law provides that a will must be filed for probate within six months of a testator’s death for property to pass under the will. The statute functions as a statute of limitations prohibiting the admission of wills offered for probate after the six-month deadline. But an exception exists to the six-month deadline in cases in which a person knowingly withholds the will from the probate court. The Kansas Supreme Court recently granted review to resolve this conflict. The court reversed the court of appeals’ ruling and held that the K.S.A. 59-618 exception applies only in cases in which a will is knowingly withheld from the district court by a person with knowledge of such will and access to it. The court’s holding rests on a rule of strict statutory construction and rejects the public policy rationale espoused by the court of appeals. This article explores the court’s decision and its impact on probate litigation.

II. Statutory Background

K.S.A. 59-617 and 59-618 work in tandem. The former statute sets out a six-month deadline for admission of a will to probate. The latter statute acts as a savings provision and contains the probate code’s only exception to the general rule found in 59-617. The exception allows a will to be filed if it is knowingly withheld from probate:

Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and knowingly withholds it from the district court having jurisdiction to probate it for more than six months after the death of the testator shall be liable for reasonable attorney fees, costs and all damages sustained by ben-
eficiaries under the will who do not have possession of the will and are without knowledge of it and access to it. Such will may be admitted to probate as to any innocent beneficiary on petition for probate by any such beneficiary, if such petition is filed within 90 days after such beneficiary has knowledge of such will and access to it....

III. The Court of Appeals Grapples With K.S.A. 59-618

Does K.S.A. 59-618 provide any protection to innocent beneficiaries in situations in which a will turns up just days after the six-month anniversary of the testator’s death? That was the question presented in the court of appeals’ opinion in In re Estate of Tracy.1 In Tracy, the testator died on August 21, 2003. Her sister and niece filed a petition for the appointment of an administrator on October 14, 2003. A month later, the district court found that Tracy had died intestate and appointed her sister and niece as co-administrators.

On February 24, 2004, the original copy of Tracy’s will was discovered in the files of her deceased scrivener. The co-administrators promptly filed an amended petition to probate Tracy’s will. The will left the balance of Tracy’s estate to Shore, as trustee for the First Christian Church of Wellington. The guardian ad litem appointed by the district court to represent other heirs objected.

The district court refused to admit the will to probate, reasoning that the six-month deadline in K.S.A. 59-617 acted to bar the newly-discovered will. The district court also rejected the applicability of K.S.A. 59-618, ruling that the wrongdoing of someone who has possession and knowingly withholds a will from probate was a condition precedent before an innocent beneficiary could submit a will to probate beyond the six-month time limit.6

Sallie Shore, the executrix, appealed the district court’s decision, arguing that its strict interpretation of the statute “conflicts with the goals of equity and good policy.” The court of appeals agreed with Shore. The court pointed to the Kansas Supreme Court’s statement that the intent underlying the Kansas Probate Code is to probate legally executed wills.7 Further, the court emphasized that legislative amendments reflect an intent that K.S.A. 59-618 not only impose a penalty on those who wrongfully withhold a will, but also provide an exception for innocent beneficiaries, allowing them to submit a will to probate beyond the six-month time limit if they do so within 90 days after having knowledge of the existence of the will.8

The court held that the district court’s interpretation of K.S.A. 59-618 contravened the underlying intent of the probate code.9 The court noted the harsh result the district court’s interpretation of K.S.A. 59-618 would produce under the facts of this case, in which the will was found with the deceased scrivener’s papers within a few days after the six-month limitation period.10 This result persuaded the court that Shore’s argument better reflected the legislature’s aims.

A different panel of court of appeals judges revisited K.S.A. 59-618 just two years later in In re Estate of Seth.11 In Seth, the testator executed a valid will on May 13, 1984, leaving her farm to one of her sons, Laryl. The testator died on December 4, 2005, and was survived by Laryl, a daughter Loyola, and three children of her deceased son, Lowell. In February 2006, Laryl and his sister took the will and took it to an attorney, Kenneth McClintock. They instructed the attorney to file the will for probate.

Laryl tried repeatedly to contact the attorney to ask about the will. On two occasions in April and May, 2006, McClintock assured Laryl that he was “taking care of” the will. But the truth was otherwise. In late June, McClintock admitted to Laryl that the will had not been admitted to probate.

Laryl promptly retrieved the will from McClintock and took it to another attorney. He filed a petition to probate the will in August 2006. The grandchildren objected on the grounds that the will’s admission was barred under K.S.A. 59-617. The district court invoked K.S.A. 59-618 and admitted the will to probate. The district court found that Laryl had received assurances from McClintock that he was handling the will, that he relied on those statements and had no reason to regain possession of the will, and did not intentionally withhold the will for probate.12

The grandchildren appealed, contending that the six-month time limit of K.S.A. 59-617 barred admission of the will to probate. They contended that K.S.A. 59-618 was inapplicable because Laryl had both knowledge and access to the will within six months of his mother’s death when the will was initially found and taken to McClintock in February 2006.

The court pointed to the second sentence of K.S.A. 59-618 as the savings provision that allows for the belated probate of “such will.” The phrase “such will” refers to a will described by the first sentence, namely, a will that has been knowingly withheld from probate.13 That event then triggers the potential application of the savings provision. The court noted that Laryl was “innocent” insofar as he did not knowingly withhold the will from probate. On the contrary, he retained an attorney and instructed him to initiate the probate. Laryl was also misled by McClintock’s false assurances and had no reason to regain possession of the will prior to the six-month deadline.

The court acknowledged that Laryl indeed had knowledge and possession of the will during the six-month period of K.S.A. 59-617. But this did not defeat the K.S.A. 59-618 savings clause. The court explained that K.S.A. 59-618 is not triggered until a beneficiary innocent of the withholding has knowledge and access to “such will.”14 Such an event cannot occur at periods prior to the knowing withholding. Instead, the knowledge and access referred to in the savings clause can only occur after the withholding and with reference to a will knowingly withheld.15

IV. In Re Estate of Strader

Tracy and Seth formed the judicial landscape surrounding K.S.A. 59-618 when In re Estate of Strader17 landed on the court of appeals’ doorstep in 2010. The decedent, Betty Jo Strader, died on October 19, 2006, leaving an estate valued at approximately $1.3 million. She was survived by her five adult children. She and her late husband, who died in 1986, had executed separate mutual wills on August 28, 1985. But following her death, Betty’s will could not be located. Betty’s family even contacted the law firm of Galloway, Wiegers, and Brinegar, P.A., the successor law firm to the one that drafted
Betty's will in 1985, but that firm could not locate an executed copy of the 1985 will. The 1985 will disposed of Betty's property in a manner that differed from the law of intestate succession. The will devised the real and personal property related to the family oil well drilling business to her sons Roger, Eric and Alan. The family farm and any residual real and personal property was divided among Betty's five children equally.

On December 27, 2006, Betty's son Eric filed a petition seeking letters of administration. The district court granted the petition and appointed Jerry Weis as administrator of the estate. Over the objection of Betty's daughter, Janet Pralle, the court granted Weis's petitions to pay Eric a $10,000 employment bonus and to sell certain real estate to Betty's sons, Eric and Roger. Janet appealed to the district court, which dismissed her appeal. But the court of appeals reversed and remanded for a ruling on the merits.18

On remand, the district court ordered that all of the estate's property be sold at public auction. Before the public auction could occur, on February 16, 2011, the Galloway, Wiegers and Brinegar law firm located Betty's executed, original will in a lock box at its office “during a recent review of old files and general housekeeping.” Within one week, Eric petitioned to have the newly-discovered will admitted to probate, some 52 months after Betty's death. Janet objected on the grounds that the will was filed well beyond the six-month deadline of K.S.A. 59-617. The district court followed the court of appeals' holding in Tracy and admitted the will to probate under K.S.A. 59-618.

In an opinion authored by Judge Pierron and over the strong dissent of Judge Richard Greene, the court of appeals affirmed the district court's ruling.19 Under the court of appeals approach, all innocent beneficiaries, regardless of how much time had elapsed after the testator’s death, could invoke the K.S.A. 59-618 exception. The premise behind that approach is that a knowing withholding of a will and the misplacing of a will both lead to the same result, defeating an innocent beneficiary's rights under the will.20 The court found this result impossible to square with the legislative policy encouraging every legally executed will be admitted to probate. In reaching its holding, the court of appeals majority pointed to its decision in Tracy as support for the proposition that K.S.A. 59-618 reflected the legislative intent to: (1) submit every legally executed will to probate, (2) penalize persons who wrongfully withhold wills, and (3) except innocent beneficiaries from the six-month time limit.21

In light of the apparent conflict between the court of appeals holdings in Tracy and Seth, the Kansas Supreme Court granted Janet's petition for review. In the Kansas Supreme Court, Janet argued that her mother's will should not have been admitted to probate because it was not filed within the six-month time limit of K.S.A. 59-617. She also contended that the K.S.A. 59-618 exception did not apply because the district court ruled that no one knowingly withheld the will. By contrast, Eric contended that the court of appeals correctly applied the public policy of the state favoring the admission to probate of every legally executed will. He urged the court to interpret K.S.A. 59-618 to protect innocent beneficiaries, whether a will has been knowingly withheld or not.

The Kansas Supreme Court first reviewed the language of K.S.A. 59-617.23 The court emphasized that K.S.A. 59-617 establishes the general rule and functions as a statute of limitations prohibiting the admission of a will to probate more than six months after a testator's death. By contrast, K.S.A. 59-618 operates as the probate code's only exception to the six-month rule contained in K.S.A. 59-617.

Take another close look at the language of K.S.A. 59-618:

Any person who has possession of the will of a testator dying a resident of this state, or has knowledge of such will and access to it for the purpose of probate, and knowingly withholds it from the district court having jurisdiction to probate it for more than six months after the death of the testator shall be liable for reasonable attorney fees, costs and all damages sustained by beneficiaries under the will who do not have possession of the will and are without knowledge of it and access to it. Such will may be admitted to probate as to any innocent beneficiary on petition for probate by any such beneficiary, if such petition is filed within 90 days after such beneficiary has knowledge of such will and access to it.... (emphasis supplied)

Parsing the statute, the court explained that the issue of when a will may be admitted to probate under K.S.A. 59-618 after the expiration of the six-month time limit turns on the word “such” at the beginning of the statute's second sentence.24 The court pointed to Black's Law Dictionary, which reveals that the plain meaning of “such” is: (1) Of this or that kind . . . (2) That or those, having just been mentioned. . . , as well as the American Heritage Dictionary of the English Language, which defines “such” to mean (1) Of this or that kind . . . (2) Being the same as that which has been last mentioned or implied . . . (3) Being the same in quality of kind . . . (4) Being the same as something implied but left undefined or unsaid.25

With this definition in hand, the court found that K.S.A. 59-618 can legitimately be read only one way: the term “such will” in the second sentence must refer to the will “having just been mentioned” in the first sentence.26 Stated another way, the term refers to a will that has been knowingly withheld from probate for more than six months after the death of a testator by a person who has possession of the will or knowledge of and access to it. Under this interpretation, a will that has simply been lost or misplaced is not admissible to probate after six months because it has not been knowingly withheld.

The court squarely rejected what it characterized as the policy-based, result-oriented approach espoused by the court of appeals majority. In the court's view, this approach glossed over the use of the word “such.”28 Instead, the court aligned its holding with Chief Judge Greene's dissenting opinion.29 The court explained why the lower court's Tracy analysis was incomplete.

Tracy reversed a district court's refusal to admit a will to probate that was filed only three days after the six-month deadline following the testator's death. The will had not been knowingly withheld. The executor appealed. She first argued that as a statute of limitations, K.S.A. 59-617 is an affirma-
tive defense that must be raised by the party who objects to a petition for probate. The Tracy panel agreed. Second, the executor argued that strict interpretation of K.S.A. 59-618 “conflicts with the goals of equity and good policy.” Relying on the Supreme Court’s holding in In re Estate of Harper, the panel agreed that a literal interpretation of K.S.A. 59-618 contravened the underlying intent of the probate code. In particular, the Tracy panel described the Harper holding in the following terms: “The court found that the statutes relating to the probating of wills express the legislative intent that the will of every person be offered for probate.”

The Supreme Court distinguished the executor’s statute of limitations argument, noting that it was not discussed in Tracy because K.S.A. 59-617 was not raised as an affirmative defense by a party. In stark contrast, Janet specifically raised the K.S.A. 59-617 time bar in her response to her brother’s petition to admit the will to probate in this case. Second, the court emphasized that the court of appeals’ blanket statement in Tracy summarizing Harper’s holding overlooks the Harper acknowledgement of the K.S.A. 59-617 time limit. In other words, the legislative intent to probate every legally executed will is qualified by the time limits prescribed in K.S.A. 59-617. Acceptance of the court of appeals’ public policy rationale would practically nullify and render K.S.A. 59-618 superfluous. Accordingly, the court specifically disapproved of the court of appeals’ contrary holdings in Strader and Tracy.

V. Conclusion

The court’s opinion in In re Estate of Strader strictly interprets K.S.A. 59-618. The holding sanctions harsh results. For example, consider a case like Tracy, in which a will was discovered only three days after the six-month deadline expires. No beneficiary was at fault. The will made a substantial bequest to charity. But the testator’s expressed wish to benefit a charity would now be defeated by the Strader holding.

The Kansas Supreme Court’s answer to this quandary is that the remedy for such a perceived injustice lies with the legislature, not the courts. The court’s role is to interpret the plain meaning of the statute, regardless of the result that occurs. To do otherwise is to open a Pandora’s box of judicial lawmaking.

About the Author


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ENDNOTES

2. K.S.A. 59-618.
6. Id. at 407.
7. Id. at 407-08 (citing In re Estate of Harper, 202 Kan. 150, 158, 446 P.2d 738 (1968)).
8. Id. at 408.
9. Id.
10. Id.
12. Id. at 826.
13. Id. at 828.
14. Id. at 829.
15. Id.
16. Id.
20. Id.
21. Id. at 380.
22. In re Estate of Strader, 301 Kan. at 50.
23. K.S.A. 59-617 provides: “No will of a testator who died while a resident of this state shall be effectual to pass property unless a petition is filed for the probate of such will within six months after the death of the testator, except as hereinafter provided.”
25. Id. at 57 (emphasis in original).
26. Id.
27. Id.
28. Id. at 58.
29. Id.
31. Id.
33. Tracy, 36 Kan. App. 2d at 408.
34. Strader, 301 Kan. at 60.
35. Id.
36. Id.
DUE PROCESS; INVOLUNTARY COMMITMENT IN RE CARE AND TREATMENT OF SYKES
WYANDOTTE DISTRICT COURT – AFFIRMED; COURT OF APPEALS – AFFIRMED

FACTS: Prior to expiration of 1987 sentence for burglary and aggravated sexual battery, State filed petition to have Sykes adjudicated under the Kansas Sexually Violent Predator Act (SVPA). Wyandotte District Court ordered evaluation at Larned State Hospital under K.S.A. 22-3303, which determined Sykes was not competent to stand trial and involuntary civil commitment proceedings should commence. Pawnee District Court dismissed involuntary civil commitment proceedings, holding K.S.A. 22-3301 et seq. applied only to criminal defendants subject to sexually violent predator proceedings, not to respondents in proceedings for civil commitments in other proceedings. Following further competency evaluations, Wyandotte District Court held Sykes not competent to stand trial in a criminal proceeding, but as matter of first impression, held incompetence to answer a civil complaint was legally distinct from competence in criminal context. Matter proceeded to trial, with district court committing Sykes to be committed as a sexually violent predator. Court of appeals affirmed. 49 Kan. App. 2d 859 (2014). Review granted on single issue of whether due process requires that a respondent be competent to understand the nature of a sexually violent predator commitment proceeding and be able to assist counsel in such a proceeding.

ISSUE: Due process and Kansas Sexually Violent Predator Act

HELD: Based on challenge in this case, the SVPA complies with constitutional requirements for substantive and procedural due process. A respondent does not have to be mentally competent to assist in his or her own defense in order to be civilly adjudicated a sexually violent predator under SVPA.

CONCURRENCE (Johnson, J.): Compelled by holdings in U.S. and Kansas Supreme Courts to concur with majority’s result, but wrote separately to opine that the result reached here was a much closer call than majority suggested, and that this case stretches due process near, if not past, its breaking point. Comparing SVPA and Care and Treatment Act for Mentally Ill Persons (CTA), K.S.A. 29-59-2945 et seq., a sexually violent predator is not automatically a member of a subset of mentally ill persons subject to involuntary commit-
reconsideration, those amendments do not apply retroactively to bar Norris' claim.


CRIMINAL

CRIMES AND PUNISHMENTS; CRIMINAL PROCEDURE; DOUBLE JEOPARDY
STATE V. BARLOW
SEWARD DISTRICT COURT – AFFIRMED; COURT OF APPEALS – REVERSED

FACTS: State charged Barlow with attempted second-degree murder and aggravated assault. Barlow did not assert stand-your-ground immunity before trial, but jury was instructed on the defense theory that Barlow used a gun in defense of another, in this case to stop what Barlow believed to be the rape of an unconscious person. Jury convicted Barlow of attempted second-degree murder and one count of aggravated assault. Prior to sentencing, the district court judge entered an order finding that Barlow qualified for K.S.A. 2014 Supp. 21-5231 immunity from prosecution on the second-degree murder charge, vacated that conviction and dismissed that count, and proceeded to sentencing on the aggravated assault conviction. State appealed from an arrest of judgment, K.S.A. 22-3602(b)(2), and on question reserved, K.S.A. 22-3602(b)(3). Court of appeals reversed in unpublished opinion, reinstating the second-degree murder conviction by relying on the statement in State v. Jones, 298 Kan. 324 (2013), that a criminal defendant must assert stand-your-ground immunity before trial opens or dispositive plea is entered. Panel also determined it had appellate jurisdiction under K.S.A. 2012 Supp. 22-3602(b)(1), allowing a State appeal from an order dismissing a complaint, information or indictment. Barlow’s petition for review was granted.

ISSUES: (1) Judgment of acquittal, (2) Question reserved

HELD: State’s argument that district court’s order was mere arrest of judgment is not supported by the record. Instead, the order underlying this appeal was a judgment of acquittal where jeopardy had clearly attached, and district judge’s ruling that Barlow’s version of events was true by a preponderance of the evidence qualified as a resolution of factual elements of the charged offense. Court of appeals lacked jurisdiction to reinstate Barlow’s conviction. Also, because State did not select jurisdiction under K.S.A. 22-3602(b)(1), that was not an available option to support appellate jurisdiction in this case.

Question reserved was interpreted as: “May a district judge sua sponte grant stand-your-ground immunity to a criminal defendant after a jury has returned a guilty verdict but before sentence on the conviction has been pronounced?” The answer is yes. Jones and State v. Ulterras, 296 Kan. 828 (2013), were compared and distinguished from this case. Any error in district judge’s timing, or application of wrong standard of proof, did not support an appellate court’s reinstatement of Barlow’s second-degree murder conviction. Court also noted that when a stand-your-ground immunity issue arises pretrial, the State should be provided an opportunity to meet its enhanced probable cause burden via an evidentiary hearing.


CRIMES AND PUNISHMENTS
STATE V. DAWS
WYANDOTTE DISTRICT COURT – REVERSED; COURT OF APPEALS – REVERSED

FACTS: Homeowner returned to house and found Daws inside. Jury convicted Daws as charged of aggravated burglary for unlawfully entering a dwelling with a human being present, with intent to commit theft therein. Daws appealed, arguing in part that there was insufficient evidence of aggravated burglary because victim was not present upon Daws’ entry into the dwelling. Court of Appeals affirmed in unpublished opinion, based on existing case law that victim does not have to be in the dwelling at the time the defendant enters, so long as the victim arrives before defendant leaves. Review of this issue was granted.

ISSUE: Aggravated burglary

HELD: Aggravated burglary requires presence of human being in dwelling, but crime can be committed either by “entering into” or “remaining within” the structure. Notes to PIK Crim. 4th 58.2 state there are two means of committing aggravated burglary. Human being must be present at time of entry, and means of committing aggravated burglary are charged only with “entering into” means of committing aggravated burglary, the human being must be present at time of entry. Contrary holdings in State v. Reed, 8 Kan. App. 2d 615, rev. denied 234 Kan. 1077 (1983) and progeny are overruled. Under aggravated burglary statute and facts in this case, State should have charged Daws with “remaining within” dwelling means of committing aggravated burglary. Daws’ conviction on the charged offense was reversed.

DISSENT (Luckert, J., joined by Rosen and Stegall, JJ.): Disagrees with majority’s decision to overrule Reed and progeny, and disagreed that insufficient evidence supported the aggravated burglary conviction. Did not believe legislature intended to create two alternative “means” of committing burglary by describing two factual circumstances that amount to burglary. Read statute as allowing crime to be proven by establishing concurrence of all elements and attendant circumstances at some point in time while burglar remains within structure without authority. Statutory and common law history of burglary and aggravated burglary was reviewed. District court’s failure to instruct jury on lesser included offense of burglary was harmless in this case.

STATUTES: K.S.A. 2015 Supp. 21-5103(a), -5107(f), -5107(b)(1), -5807, -5807(a), -5807(b), 22-3414(3); K.S.A. 60-2101(b)

STATE V. NECE
SALINE DISTRICT COURT – AFFIRMED; COURT OF APPEALS – REVERSED
NO. 111,401 – FEBRUARY 26, 2016

FACTS: Nece was charged with driving under the influence after consenting to breath-alcohol testing. He filed a motion to suppress, arguing that his consent was coerced by notice advising that he could be charged with a separate criminal offense under K.S.A. 2014 Supp. 8-1025 if he refused to consent to testing. District court granted the motion. State filed interlocutory appeal. Court of appeals, in unpublished opinion, reversed and remanded. Nece’s petition for review

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was granted.
HELD: Nece's consent was unduly coerced and involuntary because it was obtained by means of an inaccurate advisement. Under Ryce decided this date, which holds that K.S.A. 2014 Supp. 8-1025 is unconstitutional, State could not have constitutionally imposed criminal penalties if Nece refused testing. Court of appeals was reversed. District court's suppression of Nece's breath test results is affirmed.

CONCURRENCE (Stegall, J.): For reasons stated in his dissent in Ryce, could not join majority's holding that implied consent advisory was inaccurate and could not serve as basis for a voluntary consent in light of Ryce. Compelled to concur in the result only because Nece's motion to suppress was presented to the court on stipulated facts, and parties did not stipulate to any fact that could lead a reasonable judge to conclude that the State could have lawfully charged Nece with a crime for failing to submit to the test.


CONSENT; CRIMINAL PROCEDURE; DUE PROCESS; STATUTES
STATE V. RYCE
SEDGWICK DISTRICT COURT - AFFIRMED NO. 111,698 - FEBRUARY 26, 2016

FACTS: Ryce was arrested for impaired driving, driving on a suspended license, and registration not matching car tag. After notice defined in K.S.A. 2014 Supp. 8-1001(k) was given at jail, Ryce refused to submit to breath test and no testing occurred. Charges filed against him included nonperson felony of refusing to submit to testing for presence of alcohol or drugs, in violation of K.S.A. 2014 Supp. 8-1025(a). Ryce challenged the facial constitutionality of that statute, arguing that it unconstitutionally punished the exercise of his right to withdraw consent to a warrantless search. District court found that the statute was facially unconstitutional and dismissed the 8-1025 charge. State appealed.

ISSUE: Facial Constitutionality of K.S.A. 2014 Supp. 8-1025(a)
HELD: Once a suspect withdraws either express consent or implied consent under K.S.A. 8-1001(a), a search based on that consent cannot proceed. The Due Process Clause of the Fourteenth Amendment applies, and facial constitutionality of statute is analyzed. Implied consent through 8-1001 is not irrevocable, and can be withdrawn. K.S.A. 2014 Supp. 8-1025, by criminally punishing a driver's withdrawal of consent, violates the fundamental right to be free from an unreasonable search. Strict scrutiny standard applies to due process analysis. The statute is not narrowly tailored to serve State's compelling interests, and is facially unconstitutional. District court's dismissal of 8-1025 charge was affirmed. Court did not reach whether 8-1025 violates Fifth Amendment prohibition against compelled self-incrimination, whether Miranda warnings must be given with officer's request for chemical test, or whether 8-1025 is constitutional under doctrine of unconstitutional conditions.

DISSENT (Stegall, J.): Faulted majority's interpretation of 8-1025, its analytical focus on consent, and its undermining of duty to avoid a finding of unconstitutionality. Analysis should have focused on Fourth Amendment right to be free from unreasonable searches and seizures. Argued that 8-1025 does not always result in an interference with that right, thus the statute should not have been declared facially unconstitutional, and should have been examined on a case-by-case, as applied, analysis.


CONSENT; CRIMINAL PROCEDURE; DUE PROCESS; STATUTES
STATE V. WILSON
SHAWNEE DISTRICT COURT - AFFIRMED NO. 112,009 - FEBRUARY 26, 2016

FACTS: Wilson was arrested on traffic offenses, and refused to perform preliminary breath test at the scene. At jail he refused to provide breath for testing. Deputy got warrant to search Wilson's blood which then tested over the legal limit. Charges filed against him included refusing to submit to testing under K.S.A. 2014 Supp. 8-1025. Wilson filed motion to dismiss that charge, arguing that it unconstitutionally criminalized his refusal to submit to a test that was unreasonable under Fourth Amendment. Fifth and Sixth Amendment arguments were also raised. District court found due process violation, and dismissed the alleged violation of 8-1025.

ISSUE: Constitutionality of K.S.A. 2014 Supp. 8-1025
HELD: Based on Ryce decided this date, district court decision is affirmed. An individual has a constitutional right to withdraw consent to a search, including consent implied by operation of K.S.A. 2014 Supp. 8-1001. K.S.A. 2014 Supp. 8-1025, by punishing an individual for exercising that right with criminal penalties, violates Due Process Clause of Fourteenth Amendment, and statute is facially unconstitutional.

DISSENT (Stegall, J.): Dissents for reasons stated in his dissent in Ryce.


CONSENT; CRIMINAL PROCEDURE; DUE PROCESS; STATUTES
STATE V. WYCOFF
SALINE DISTRICT COURT - AFFIRMED NO. 110,393 - FEBRUARY 26, 2016

FACTS: After being stopped for traffic offenses, Wycoff refused to perform sobriety tests in the field and at the jail. Charges filed against him included refusing to submit to an evidentiary test under K.S.A. 2014 Supp. 8-1025. Wycoff filed motion to dismiss or suppress evidence, arguing 8-1025 was unconstitutional. District court concluded that the statute violated the Fourth Amendment and imposed an unconstitutional condition on privilege to drive. State dismissed remaining charges and appealed.

ISSUE: Constitutionality of K.S.A. 2014 Supp. 8-1025
HELD: Based on Ryce decided this date, district court de-
IN THE MATTER OF THE MARRIAGE OF WILLIAMS
SHAWNEE DISTRICT COURT - AFFIRMED
NO. 113,103 – FEBRUARY 19, 2016

FACTS: Husband and wife were divorced in 1994. At the trial, without objection from husband, the district court awarded wife 25 percent of husband’s Army retirement benefits, with the expectation that he would retire in 1995. Nineteen years later, when wife attempted to enforce that portion of the decree, husband filed a motion to set aside that ruling, arguing that the district court lacked jurisdiction to make that award because he never consented to jurisdiction under 10 U.S.C. § 1408(c)(4). Alternatively, he asked that the district court revisit the retirement benefits award because he retired 18 years later than contemplated in the decree. The district court rejected the jurisdictional argument, but ordered that the division should be recalculated to reflect the anticipated retirement date of 1995 rather than the actual retirement date of 2013. The district court also awarded attorney fees to wife.

ISSUES: (1) Whether the district court had jurisdiction to divide military retirement benefits; (2) Whether attorney fees are properly awarded when the underlying claim is for garnishment.

HELD: The phrase “consent to the jurisdiction of the court” refers to personal, not subject matter, jurisdiction. When examining personal jurisdiction, Kansas rejects the strict categories of “express” or “implied” consent. In this case, where the district court made the property division during the initial divorce proceeding, husband could have objected to the district court’s jurisdiction but did not. His failure to object or to appeal the decree amount to a consent to jurisdiction. Although the word was used in her pro se pleading, wife was not attempting to garnish, but was instead seeking to enforce the divorce decree. Because the actual issue was not a request for garnishment, the district court properly awarded attorney fees.


IN THE INTEREST OF S.R.C.-Q., DOB 2012, FEMALE
MITCHELL DISTRICT COURT – AFFIRMED
NO. 113,483 – FEBRUARY 19, 2016

FACTS: S.R.C.-Q.’s mother resides in Wisconsin while the father is in Kansas. Although it was agreed that Wisconsin was the child’s home state, it was declared an inconvenient forum, resulting in Wisconsin releasing jurisdiction to Kansas. Kansas ordered an expedited placement decision from Wisconsin under the Interstate Compact on Placement of Children (ICPC). After failing to receive necessary information from Wisconsin, and after a request from the mother, a district magistrate judge determined that the ICPC does not apply when an out-of-state placement is with the child’s parent. The district magistrate judge terminated the Kansas Department for Children and Families’ (DCF) custody of S.R.C.-Q. and placed the child in Wisconsin with the mother, with the father having visitation every two weeks for two-week periods. Father appealed the decision that the ICPC did not apply and further contended that the visitation schedule was an abuse of discretion.

ISSUES: (1) Whether the ICPC applies when the out-of-state placement is with a parent and (2) Whether a two-week visitation schedule is an abuse of discretion.

HELD: Application of the ICPC in this context is an issue of first impression in Kansas appellate courts. The ICPC explicitly applies to out-of-state placements of children with foster parents or prior to adoption, but it does not explicitly apply to out-of-state placements of children with a parent. After reviewing case law from other jurisdictions, the panel concluded that the lack of explicit statutory language regarding out-of-state placements with parents bars application of the ICPC to placement with an out-of-state parent. After reviewing the facts of the case, the panel was unwilling to find that the district court’s placement of the child with the mother was an abuse of discretion. Any challenge to the visitation schedule was moot because the child in need of care proceedings were terminated and the matter was being reviewed by the district court in a paternity action.

STATUTES: K.S.A. 38-1201; K.S.A. 38-1202; K.S.A. 38-2201

PARENTAL RIGHTS; STATUTES
IN THE INTEREST OF R.C.-Q., DOB 2012, FEMALE
MITCHELL DISTRICT COURT – AFFIRMED
NO. 113,483 – FEBRUARY 19, 2016

FACTS: R.C.-Q.’s mother resides in Wisconsin while the father is in Kansas. Although it was agreed that Wisconsin was the child’s home state, it was declared an inconvenient forum, resulting in Wisconsin releasing jurisdiction to Kansas. Kansas ordered an expedited placement decision from Wisconsin under the Interstate Compact on Placement of Children (ICPC). After failing to receive necessary information from Wisconsin, and after a request from the mother, a district magistrate judge determined that the ICPC does not apply when an out-of-state placement is with the child’s parent. The district magistrate judge terminated the Kansas Department for Children and Families’ (DCF) custody of R.C.-Q. and placed the child in Wisconsin with the mother, with the father having visitation every two weeks for two-week periods. Father appealed the decision that the ICPC did not apply and further contended that the visitation schedule was an abuse of discretion.

ISSUES: (1) Whether the ICPC applies when the out-of-state placement is with a parent and (2) Whether a two-week visitation schedule is an abuse of discretion.

HELD: Application of the ICPC in this context is an issue of first impression in Kansas appellate courts. The ICPC explicitly applies to out-of-state placements of children with foster parents or prior to adoption, but it does not explicitly apply to out-of-state placements of children with a parent. After reviewing case law from other jurisdictions, the panel concluded that the lack of explicit statutory language regarding out-of-state placements with parents bars application of the ICPC to placement with an out-of-state parent. After reviewing the facts of the case, the panel was unwilling to find that the district court’s placement of the child with the mother was an abuse of discretion. Any challenge to the visitation schedule was moot because the child in need of care proceedings were terminated and the matter was being reviewed by the district court in a paternity action.

STATUTES: K.S.A. 38-1201; K.S.A. 38-1202; K.S.A. 38-2201
FACTS: Jury convicted Aguilar in part of three counts of aggravated indecent liberties with a child. On appeal Aguilar argued for the first time that wording of the multiple act jury instruction PIK Crim. 4th 68.100—which tells jury that State alleged several acts, any one of which could constitute the crime charged—informed jury that evidence of the acts already satisfied the elements of the crimes charged, and jury needed only to agree on one particular act to convict the defendant.

ISSUE: Multiple Acts Jury Instruction

HELD: Several unpublished Court of Appeals’ decisions have rejected the very same claim. Pattern jury instruction on multiple acts is a correct statement of law on multiple acts. The use of the word “could” in the instruction is not misleading to jurors as to the required burden of proof. The instruction in this case was also factually appropriate. District court was affirmed.

STATUTES: K.S.A. 2015 Supp. 22-3414(3); K.S.A. 22-3421, -3423(1)(d)

Appellate Decision Reminders...

From the Appellate Court Clerk’s Office

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3. Withdrawal of Attorney When Client Will Be Represented by Substituted Counsel
4. Withdrawal of Attorney When Client is Represented by Appointed Counsel

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