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The Move to Cloud City
*The Benefits and Risks of Cloud Computing*
By J. Nick Badgerow

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The Journal Board of Editors is responsible for the selection and editing of all substantive legal articles that appear in The Journal of the Kansas Bar Association. The board reviews all article submissions during its quarterly meetings (January, April, July, and October). If an attorney would like to submit an article for consideration, please send a draft or outline to Beth Warrington, communication services director, bwarrington@ksbar.org.

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Let your VOICE be Heard!

2014-15

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

Our Mission

Let your VOICE be Heard!
KBA Officers &
Board of Governors Elections

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

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

**Officers**

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

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

**Board of Governors**

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

- **District 1**: Incumbent Toby J. Crouse is eligible for re-election. Johnson County.
- **District 2**: Incumbent Charles E. Branson is not eligible for re-election. Atchison, Brown, Doniphan, Douglas, Franklin, Jackson, Jefferson, Leavenworth, Miami, Nemaha, Osage, Pottawatomie, and Wabaunsee counties.
- **District 4**: Incumbent Brian L. Williams is eligible for re-election. Butler, Chase, Chautauqua, Coffey, Cowley, Elk, Greenwood, Lyon, and Sumner counties.
- **District 5**: Incumbent Cheryl L. Whelan is eligible for re-election. Shawnee County.
- **District 6**: Incumbent Bruce W. Kent is not eligible for re-election. Clay, Cloud, Dickinson, Ellsworth, Geary, Lincoln, Marion, Marshall, McPherson, Morris, Ottawa, Republic, Riley, Saline, and Washington counties.
- **District 7**: Incumbent Calvin D. Rider is not eligible for re-election. Sedgwick County.

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

I have written and said many times how proud and honored I am to be a lawyer, and how proud I am of our profession. And that remains the case today. Not because of anything I have done or accomplished, but because of what so many others have done, and what our profession as a whole has accomplished.

Lawyers have consistently been at the forefront of bringing about needed change in our country. Our courts have made decisions and enforced laws and constitutional rights that have advanced the rights of all citizens, without regard to gender, race, national origin or other status. Lawyers have undertaken causes that at the time were not popular, demonstrating courage and often sacrifice, personally and professionally. Our courts have similarly made decisions that were not initially accepted or embraced by everyone or all citizens. To be sure, our profession and the courts have not done these things alone, but in concert with many other professions, lawmakers, groups and individuals who saw the need for change and worked to bring it about.

Were it not for lawyers and our courts, among others, so many of the rights we now take for granted and almost uniformly accept, would not be so readily recognized. Were it not for lawyers and our courts, people would still be divided solely because of the color of their skin. People of color would still be sitting at the back of the bus and their children going to separate schools. While the situation in Ferguson, Missouri, clearly demonstrates we still have a long way to go, the accomplishments and advancements to date have resulted in large part from the efforts of the legal profession and the decisions of our courts.

It is because of our profession’s role in bringing about much needed change, socially, culturally, educationally, etc., that I am proud to be a lawyer. I make no claim, however, that our profession and those who comprise it are perfect, or that we are always right. Far from it, but as a profession, we are more often than not in the forefront of recognizing the challenges confronting us and working to bring about change. But that does bring me finally to the point of this president’s column.

While our profession has done much to bring about needed change, it is critical too that we look within and closely examine whether, and in what areas, as a profession we need also to change. And one of those areas is that of diversity. It is generally recognized by people who study such things, that by 2042, the United States population will be a “majority minority,” with no one race or ethnicity being the majority in America. Brad Smith, general counsel and executive vice president of Legal and Corporate Affairs for Microsoft in December 2013, observed on Microsoft’s website that, “While America increasingly reflects the extraordinarily diverse people and cultures from around the world, the legal profession does not.” Smith noted that unless the legal profession makes faster progress in becoming more diverse, our profession runs the risk of missing out on the dynamism and creativity that diversity brings about. His point simply was that our profession should be as diverse as the country we serve.

Smith is not alone in his observations. The American Bar Association recognized the critical importance of diversity when it launched in 2009 a nationwide endeavor to assess the state of diversity in the legal profession, culminating in its 2010 report from the ABA’s Presidential Initiative Commission on Diversity. The Commission’s conclusion was that while as a profession we have made progress in becoming more diverse, the overall lack of genuine diversity remained a disappointment. Succinctly stated, the conclusion was that, “Despite our efforts thus far, racial and ethnic groups, sexual and gender minorities, and lawyers with disabilities continue to be vastly underrepresented in the legal profession.”

The KBA also recognizes the importance of diversity in our profession. As I have mentioned in other columns, we have many important, hardworking and active committees and sections, but none more active or more important than our Diversity Committee. As a bar, we have made enhancing diversity a priority and we must continue to do so.

The mission of the Diversity Committee is to help the KBA foster an inclusive, diverse bar association, promote understanding and respect for different points of view, and support the advancement of diversity within the Kansas legal profession and justice system. The KBA uses the term “diverse” to describe the composition of its membership, encompassing the characteristics of race, religion, color, sex, disability, national origin or ancestry, sexual orientation, and gender identity. We use the term “inclusive” to describe a culture that values the perspectives, contributions, and needs of its diverse members. Efforts to promote diversity within the legal profession have included creation of the KBA’s diversity award, the provision of assistance and encouragement to diverse lawyers, to become involved and to seek leadership positions within the KBA, and the creation of an at-large board position for a diverse lawyer. But there remains more we can and should do.

I have read numerous articles on the importance of diversity. There are many reasons advanced for why diversity is important, from “it is the right thing to do,” to making the case that diversity makes good business sense; that diversity can enhance business, and result in better solutions and advice to clients. The fact is the reasons for promoting diversity are as diverse as the people who make up our country. But in the end, we are not as a country, nor as a profession, going to completely and fully advance the cause of diversity until each of us individually makes it a priority. To be sure, collectively we can do much. As a bar association, we can and have done much. But my challenge to each of us, and I start with myself, is to make diversity a priority. We each need to do something that will make a difference. Maybe that means joining the Diversity Committee and participating in its activities. Maybe that means a change in our attitude and a recognition of the importance of diversity. Maybe it means encouraging or motivating others, and actively working to hire diverse lawyers. Or maybe it means encouraging or supporting diverse people to become lawyers. Just as the reasons for promoting diversity are (continued on Page 8)
T
he Kansas Legislature will convene its 2015 legislative session on January 12. As many have pointed out (and emphasized in this issue of the Journal), the number of lawyers in the Legislature are shrinking to the level of almost non-existent. In these times, it is incredibly important for each of us to take an interest in the legislation being considered and to provide input and feedback to our legislators on issues that will affect us both personally and professionally. The KBA is a fabulous resource, but our organization is, at its base, made up of individual members, and the KBA relies on you for your participation.

All that said, the legislative process can be daunting—even for a lawyer. The session does not last long, and things can move very quickly. If you don’t understand the process or the terminology, things can easily become confusing and overwhelming. To that end, here is an attempt at a whirlwind tour of how a bill becomes a law in Kansas. [Cue “I’m Just a Bill” from “Schoolhouse Rock.”]

Let’s start with the basics. In Kansas, our Legislature has two houses—the House of Representatives (125 members) and the Senate (40 members). Each of the members may sit on several committees. A bill can be introduced in either house by an individual member (or members) or a committee. Before introduction, one of the sponsors or the chair or vice-chair of the sponsoring committee delivers the bills to the person designated in each chamber. At the beginning of the session, there will already be several bills that have been “prefiled,” meaning they have already gone through this process. Links to the list of prefilled bills in each chamber are available on the Kansas Legislature’s homepage, http://www.kslegislatuure.org. The title of the introduced bill is read aloud to the entire House of Origin, along with the names of its sponsors.

Those introductions happen fast. The deadlines for the upcoming session have not been set, but the deadline to introduce bills in 2014 was February 12 for individual sponsors and February 14 for committees. The only exception to that rule are the exempt committees—House Appropriations, Calendars and Printing, Taxation; Senate Assessment and Taxation, Ways and Means; House and Senate Federal and State Affairs, and sometimes others—which may introduce bills for a couple weeks after the deadline.

Within a day of the bill’s introduction, either the speaker of the house or senate president will refer it to a committee to be “worked.” The chair of the assigned committee will then decide when (and whether) to hold a hearing on the bill. If no hearing is held, the bill remains in limbo until it is heard, is reassigned to a different committee (very rare), or dies. At hearings, committees hear testimony from the bill’s sponsor(s), as well as testimony from proponents, opponents, and neutral parties. Based on the testimony presented and the opinions of the committee members, the bill may be amended substantially or not at all. The committee chair designates a date when the committee will vote on the bill.

Although there is no transcript or recording of the committee hearings themselves, you can find the committee agendas on the Kansas Legislature’s website. Following the session, the legislative research department will compile summaries of all of the testimony at the committee hearings and will make available any written testimony or supporting documentation submitted during the hearing process. Those materials are available by going to the particular committee’s webpage and clicking on “Agendas/Minutes/Testimony” or “Miscellaneous Documents,” with the documents arranged by hearing date and bill number.

If a majority of the committee members vote that the bill should be passed, the bill is then returned to the house of origin (the chamber where it was originally introduced). The senate president or house speaker can then bring the bill to the floor for consideration by the entire chamber—in legislative lingo, for consideration by the “Committee as a Whole.” At that time, the legislators are presented with the original version of the bill and any amendments by the committee. The legislators deliberate, and any legislator can move for further amendments to the bill from the chamber floor. At the close of deliberations, the bill is brought up for an initial vote of approval. If it approved, the chamber takes “final action” on the bill—the formal yea or nay vote for passage—the next day. The Kansas Legislature’s webpage provides a live audio stream so you can listen to all deliberations of the full chamber of the House and Senate (or, more prudently, tune in when a bill that you are interested in is being debated). This past session, the deadline for bills to be passed out of their originating chamber was February 28.

If the bill passes on final action in the house of origin, it is sent to the other chamber for consideration, and the process repeats itself. In the 2014 session, the deadline for a bill to pass out of the second chamber was Wednesday, March 26. A few items of note:

- It is possible for the second chamber to substantially alter the bill.
- There is no requirement that the second chamber take up the bill at all—that is left to the President, Speaker, or the chair of the committee considering the bill.
- In some instances, the second chamber’s committee may gut the bill in its entirety, removing the text and replacing it with new language. These bills are designated as “substitutes.” E.g., “H. Sub S.B. 45” means the new bill originated in the Senate at Senate Bill 45, but the House committee later gutted the bill and replaced it with new provisions.

If the bill passes the second chamber, a few things can happen. If bill is unchanged, it is sent to the governor for his signature, nonsignature, or veto. If the versions of the bill from both chambers are different, the bill is returned to its house of origin. The legislators there can vote to concur with the amendments of the second chamber (in which case, the bill is passed and sent to the governor), or they can vote not to concur. In the latter case, the legislators can vote to appoint a con-

(continued on Page 8)
Demystifying the Legislative Process in Kansas

(Continued from Page 7)

ference committee to try to negotiate a compromise between the chambers. If a conference committee is not appointed, the bill dies.

Conference committees consist of six members—three from each chamber, appointed by the speaker or president, including at least one member of the minority party. The conference committee attempts to negotiate a bill that will satisfy both chambers. If the members cannot agree, they can submit a report to the house of origin “agreeing to disagree,” and can request that a new committee be appointed. If the committee does negotiate a compromise, that compromise-bill is submitted to both chambers for a straight up-or-down vote (with no amendments). If the negotiated bill passes both chambers, it is sent to the governor.

The final day to pass non-appropriations bills is usually sometime in the first week of April (what is called the “First Adjournment”). The legislators return at the end of the month and in May for the “Veto Session”—which usually means consideration of any bills vetoed by the governor and any omnibus appropriations measures.

We all know how important the legislative process is to us as Kansans, both to our profession and to our everyday lives. The next few months could have a profound impact on the direction of this state, and we as lawyers have insight that must be shared. But in order to participate effectively in that process, we must understand it. Take some time over the next few days to navigate the Legislature’s website so you know where to find information as the session kicks into gear (it’s actually a pretty good site, but like any tool, you need to know how to use it). Know what the KBA does for you on the legislative front; contact Joe Molina or members of the KBA Legislative Committee. Most importantly, contact your legislators in advance so you can establish a personal relationship with them, and continue that contact and interest through the session.

It’s so crucial that we as lawyers take an interest in the development of our Kansas laws. And in the words of one of my brothers’ and my favorite cartoons growing up, “Knowing is half the battle.”

The Importance of Diversity in Our Profession

(Continued from Page 6)

diverse, what we can individually and collectively do is equally diverse. But it starts with recognizing the importance of diversity, committing to it and then doing something to help bring it about. I am convinced our profession can and will do better. There is, however, much to be done. The challenge is there. And not unlike the many other challenges our profession has undertaken, the cause for diversity is no less important. Each of us has a role to play in helping bring about a more diverse and inclusive legal profession. I encourage everyone to make diversity a priority, because in the end, it is the right thing to do.

About the President

Gerald L. “Jerry” Green is a member of the Hutchinson law firm Gilliland & Hayes LLC. He currently serves as president of the Kansas Bar Association.

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About the YLS President

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

By Hon. G. Joseph Pierron, Kansas Court of Appeals, Topeka

New and Updated Resources Help You Prepare for Your Presentation

The start of a new year is a great time to look into the resources available through the Kansas Bar Association to assist you if you are invited to speak to a class of students about Constitution Day or Law Day. In 2014 the Law Related Education Committee and KBA staff created a packet of resources available to KBA members that will assist you as you plan your visit. Some of the resources are also appropriate for Law Day presentations.

In 2013, the Kansas legislature passed a new law establishing “Celebrate Freedom Week,” which requires students in grades K-8 to receive lessons in the history of our country’s founding, the U.S. Constitution and the Declaration of Independence. The week of September 17 was selected as “Celebrate Freedom Week” because September 17 is Constitution Day. This happens to be a great fit for the resources available by the KBA. The packet of information is available by calling and requesting a packet be mailed to you, stopping by the KBA and picking one up or accessing several of the resources online. If you are uncertain about which resources would be helpful for your presentation, please call the KBA at (785) 234-5696 and ask to speak with Anne Woods, public services manager.

The following items are available in the Celebrate Freedom packet and other resources available as well.

DVD of Presentations Made by Attorneys and Judges

During Celebrate Freedom Week in 2013, several judges and attorneys presented to students in the USD 345, Seaman School District. In 2014, they presented to over 3,100 students at 12 schools in the USD 345 and USD 501, Topeka Public Schools. The 2013 presentations were video recorded by students in the Pro Bono Program at Washburn University School of Law. Margann Bennett, director of professional development and pro bono at Washburn Law, worked with the KBA to coordinate the students for each presentation. Glen McBeth, instructional technology librarian at Washburn Law, provided the video production and editing for the videos.

The videos are intended to serve as training resources for KBA members and not for public distribution.

A detailed description of each presentation and the topics covered is provided in the packet. For example, in the “You be the Judge” presentation that the Hon. G. Joseph Pierron Jr. gave to high school students, he covered the three branches of government, the Fourth Amendment, Writ of Certiorari, reasonable suspicion, probable cause, and drug testing. In another presentation for elementary students, the Hon. Cheryl R. Kingfisher included: What is the Constitution?, the Declaration of Independence, What do judges do?, the Boston Tea Party, freedom of speech, checks and balances, King George/George Washington, the three branches of government, a student mini trial, and courtroom protocol.

In addition to Pierron and Kingfisher, presentations were made by the Hon. David E. Bruns, Hon. Rebecca W. Crotty, Hon. Steven R. Ebberts, Hon. Janice Miller Karlin, Hon. Nancy E. Parrish, and Hon. Evelyn Z. Wilson. Attorney volunteers included John Andra, Terri S. Bezek, Christina Hanson, Cecilia T. Mariani, Vivien Olson, Cindy Patton, Alison J. St. Clair, Maggie L. Sigler, and Kathleen R. Urbom.

“For the Record” and “On Your Own” Pamphlets

The packets include one copy of “For the Record” and one copy of “On Your Own.” Multiple copies are available for KBA members and teachers to order at no charge. They are also available online. Several KBA members reviewed and updated these pamphlets in 2014. In 2015 they will also be available in Spanish.

For the Record

Written primarily for middle school students, the information in this pamphlet addresses issues about: divorce and child custody, marriage, emancipation, drugs and drug treatment, juvenile offenders, CINC, your rights if you get arrested, curfews, drinking and driving, vehicle and vehicle safety laws, texting and driving, working/child labor laws, medical treatment without parental consent, tattoos and body piercing, owning a gun, social media, bullying, rights at school, free speech and student publications, laws about attending school, dress codes, discipline at school, drug searches at school, and praying at school.

On Your Own

Written primarily for high school students, the information in this pamphlet addresses issues about: drinking, drinking and driving, buying a vehicle, maintaining a vehicle, vehicle accidents, vehicle insurance, speeding, seat belts, finding work, marriage, domestic violence, divorce, child custody and support, annulment, medical treatment, birth control, abortion, landlord-tenant issues, purchasing power, credit rights, credit cards, shopping/comparing products/warranties, online purchasing, telephone sales, identify theft, health and exercise clubs, consumer complaints, when to see a lawyer, voting, and breaking the law.

Scripts

Over 100 pages of scripts and teaching materials can be included in the packet. This information can also be sent elec-
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tronically. The information includes scripts from Pierron on cases involving the Fourth Amendment, the First Amendment and several special topics. For example, *Whren v. United States* and a Kansas case titled *Board of County Commissioners of Wabaunsee County v. Umbehr* are included.

In addition, the Hon. Karen Arnold-Burger provided scripts for U.S. Constitution presentations to grades 3-4 and 6-8. Tips on presenting to elementary students and several handouts, including the Bill of Rights, a word find puzzle, and symbols of America coloring sheets are also included.

Law Wise

“Law Wise” is a fun and informative resource for teachers and students. The information is especially helpful for teachers looking for information and resources on current issues in law and education. It is published six times during the school year. Edited by KBA member Kathryn A. Gardner J.D., each issue includes a lesson plan and a calendar of law-related events and important dates.

If you have not yet signed up for this free electronic newsletter, you can do so at www.ksbar.org/lawwise.

Books

The KBA has bookmarks that you can give students and teachers. The bookmarks include information on law-related educational resources provided by the KBA.

Educational DVDs

The following DVDs are available for check out from the KBA and include a teacher manual.

- *Brown v. Board of Education* is a reenactment of the court case. Additional resources can be found at http://www.ksbar.org/brownvboard.
- The Fourth Amendment Rights of Students in Public Schools
- *Miranda v. Arizona*
- *New York Times v. Sullivan*

Two resources not included in the packet but helpful in talking with teachers and students are the ESU Resource Center and the KBA YLS Kansas High School Mock Trial Program.

ESU Resource Center

The Law Related Education Committee, in partnership with the Emporia State University Teacher Resource Center, established a law-related education center that provides teachers with current resources to use in the classroom. The collection includes books, DVDs, and games. The list of resources is searchable online at http://www.ksbar.org/lre_resource.

Kansas High School Mock Trial

Presented by Shook, Hardy & Bacon LLP, the KBA and the KBA Young Lawyers Section, the KBA YLS Kansas High School Mock Trial competition begins with registration information posted in December and competition starting in February. You can find information at http://www.ksbar.org/mocktrial.

Help us grow this program

The KBA Law Related Education Committee appreciates the time and commitment from its members and many other KBA members who have assisted in providing materials for the packet and have volunteered their time to go to classrooms and prepare lessons for students.

Younger students especially enjoy playing the parts of judge, lawyers, and litigants. They love that they can put on a robe and hold a gavel. A popular prop is Spike, the wonder dog, used by Pierron; the wigs are also popular props. Older students enjoy the intellectual challenge of analyzing issues. This is a great opportunity to encourage teachers and high school students to participate in the mock trial program.

A special thank you goes to the following:

- The Kansas Bar Foundation for providing funding for the packets.
- The judges, attorneys, and volunteers who made classroom presentations and helped coordinate the video recording and editing of the presentations.
- Teachers and students at USD 345, Seaman School District
- Teachers and students at USD 501, Topeka Public Schools
- Luanne Leeds, Women Attorneys Association of Topeka President

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This Year’s Resolution: Instilling Faith in the American Justice System

It’s that time of year again—the time of year when we set goals for personal improvement: lose those extra pounds, eat more veggies, or improve our legal writing (I hope this one makes your list!). Often, our goals involve giving back through increased pro bono work or involvement in the bar association. But there is another goal that should make your list this year: furthering “the public’s understanding of and confidence in the rule of law and the justice system.”

The public outcry, protests, and calls for legal reform stemming from recent events here in Kansas and in Missouri and New York reminded me how fortunate I am to have a legal education. I had forgotten that my view of these events is shaped by my in-depth knowledge of the rule of law and our justice system. These events prompted my family and friends to ask questions about the justice system and how it affects their daily lives.

During the 2014 elections, I received many questions about the judiciary, which made me think about our opportunity, and perhaps responsibility, as attorneys to inform the public about the justice system. In 2014, voters saw political ads that criticized judges for single judicial rulings—not their overall performance or ability to uphold the United States and Kansas Constitutions and faithfully discharge their judicial duties. And 47 percent of Kansas voters voted to oust sitting Supreme Court judges. The Brown case in Ferguson, Missouri, and the Garner case in Staten Island, New York, also raised questions and created distrust of the justice system, about the justice system. In 2014, voters saw political ads that criticized judges for exercising personal bias, prejudice, or favoritism when deciding a case. The justice system’s processes, procedures, and judges should be continuously evaluated, questioned, and modified when necessary, but they should not be politicized.

When the public doubts the justice system, attorneys are in a unique position to initiate discussions and share an insight into the legal aspects of current events and ensure public confidence in our system. In this coming year, consider doing one thing to spread understanding in your community about the law.

Myriad community organizations have regular meetings or events and welcome volunteer speakers. Reach out to one of your local organizations, such as Rotary, Lions, Kiwanis, Chamber of Commerce, American Association of University Women, League of Women Voters, American Legion, or the Veterans of Foreign Wars.

Injustice sometimes happens, and when it does it is easy to forget the importance of process in the U.S. justice system. To some, it may appear that a person “got off on a technicality” when the legal explanation is that the person’s due process rights were violated. Focusing on the injustice makes a better news story. It gets more “hits,” “tweets,” and “likes” on social media than a legal explanation of how a fundamental principle of our system is ensuring that the process is fair for the next person. The answer is never as simple as it seems from a sound bite on the radio, a political ad, or even a video recording.

Our justice system is only as good as the confidence we have in it. All citizens should have the tools to understand and evaluate our system. The public should be informed that court decisions are based on the law and facts of a particular case and that judges are prohibited from exercising personal bias, prejudice, or favoritism when deciding a case. The justice system’s processes, procedures, and judges should be continuously evaluated, questioned, and modified when necessary, but they should not be politicized.

There are many exciting, timely legal issues to discuss. Consider giving a talk or leading a discussion on one of the following:

- Differences in the judicial selection processes for the Kansas Supreme Court, Kansas Court of Appeals, and state trial courts
- Recent changes to the Kansas Court of Appeals selection process—we’ll soon have two selections under the new process to evaluate
- The pros and cons of judicial merit selection

Footnotes
1. “[A] lawyer should further the public’s understanding of and confidence in the rule of law and the justice system because legal institutions in a constitutional democracy depend on popular participation and support to maintain their authority.” Kan. R. Prof’l Conduct R. 226.
2. See K.S.A. 5-106.
4. Michael Brown, an unarmed black teen, was fatally shot by a police officer. The grand jury did not indict the officer, leading to riots and protests throughout the country.
5. A Staten Island grand jury declined to indict a police officer in an alleged chokehold-related death of an unarmed citizen. The event stirred public protests and rallies.
8. See U.S. Const. amend. V (“No person shall be . . . be deprived of life, liberty, or property, without due process of law.”); U.S. Const. amend. XIV (“[N]or shall any state deprive any person of life, liberty, or property, without due process of law.”).
15. http://www.ksam legion.org/

12 The Journal of the Kansas Bar Association
• Consequences of a constitutional amendment to change the Supreme Court selection process
• The implications of lowering the mandatory retirement age for judges on current and future Kansas appellate courts¹⁸
• The state’s judicial retention process
• The Kansas Supreme Court opinions¹⁹ in the Carr cases²⁰
• Kansas’s grand jury process and citizen grand juries²¹
• Missouri’s proposed legislation to abolish the grand jury system
• The role of trial courts versus appellate courts
• The doctrine of stare decisis
• Judicial independence

There are many other ways to present this information in your community:

• Write a letter to the editor
• Start a legal blog
• Visit a grade school class
• Coach a high school mock trial team²²

• Invite an appellate judge to speak in your community
• Publicize legal resources for evaluating Kansas judges²³
• Encourage the editorial staff of your area newspaper to address these issues
• Organize a panel discussion to explain how these issues affect your community

It is not enough that the system be fair; American citizens must know it is fair. As attorneys, we can work to ensure they do. I can’t think of a better way to spend 2015.

About the Author

Chelsi Hayden is an clinical associate professor at the University of Kansas School of Law. Prior to joining KU, she served as chambers counsel to the Hon. Carlos Murguia, U.S. District Court for the District of Kansas, and practiced business litigation at Shook, Hardy & Bacon LLP. Hayden graduated from KU Law in 2001, Order of the Coif, and was a member of the Kansas Law Review.

²⁰. The Court overturned the death sentences of the two brothers convicted of multiple murders in Wichita, Kansas.
²¹. K.S.A. 22-3001 et seq.

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The Bamboo Ceiling

“Are you supposed to be good at math?” This stereotypical phrase has echoed my entire educational career. Same inquiry, same response: “No, just because I’m Asian [American], doesn’t mean that I’m good at math.”

Scholars have analyzed the various perceptions of Asian-Americans: (1) As foreigners; despite having been born in the United States, or speaking with a distinctly American accent (like my mother); (2) overrepresentation in higher education, dubbed as the “model minority” and excluded from modern views of diversity; and (3) being unfairly economically competitive. The model minority myth is that Asian-Americans are not subject to the same discriminatory barriers faced by other minority groups, because they are hardworking, educated and ambitious. However, this model minority myth phenomenon fails to acknowledge the existence of the so-called “bamboo ceiling,” or the glass ceiling preventing Asian-Americans from advancing into upper management or leadership positions within the workplace.

The “glass ceiling” is a political term coined by The Wall Street Journal over 20 years ago to refer to the invisible barriers preventing women and minorities from advancing up the rungs of the corporate ladder. The metaphor’s “barriers” are based on workplace organizational bias and discriminatory attitudes toward gender and race, resulting in unequal levels of earning, allocation of responsibility and promotion to higher levels of employment. However, while the “glass ceiling” is used to refer to inequality experienced by both women and people of color, much of the literature on the glass ceiling exemplifies gender, not racial discrimination. Examples of glass ceiling business practices include informal recruitment practices that are unsuccessful in recruiting women or minorities; lack of training or mentorship opportunities; menial work assignments that do not progress into opportunities for advancement; wage gaps; and wage suppression.

The term “bamboo ceiling” is a term used to describe the same problem of career advancement for Asian-Americans. Asian-Americans make up almost 5 percent of the U.S. population, but only hold approximately 2 percent of corporate board of director seats at Fortune 500 companies (compared to over 90 percent of corporate board of director seats for whites). Statistics show a lack of proportional representation in upper-level management jobs; while Asian-Americans represent more than 11.5 percent of professionals, only about 6 percent of first/mid-level officials and managers and 4.6 percent of executive/senior-level officials and managers are Asian-Americans. In comparison, there are approximately 74 percent whites in professional positions, 78 percent whites in first/mid-level official and management positions, and 88 percent whites in executive/senior-level official and management positions.

Unfortunately, a similar statistical trend is reflected in the legal profession. In 2012, while 20 percent of U.S. law firm associates were minorities, only 6 percent of minorities were partners. Almost half of all minority associates are Asian-American, yet they “have the lowest conversion rate from associate to partner of any minority group” (emphasis added). Asian-American lawyers have reached the bamboo ceiling in their attempt to obtain leadership and senior-level positions: U.S. law firms favor the promotion of white associates over other racial groups and corporate recruiting practices support exclusion of Asian-Americans. Recognizing that these trends exist within the legal community is an important discussion:

Patterns of stratification with the legal profession are important in their own right . . . but they are of particular concern to legal scholars and legal educators because principles of inequality among lawyers may suggest much about whether access to justice in our society is fairly distributed. If race, gender, and social class are determinants for entry into the profession and for the attainment of certain positions within the profession, it may imply that these same attributes affect the sorts of treatment individuals will receive by legal institutions, in part because they do not have access to lawyers who share a similar social background.

It has been hypothesized by writer Jane Hyun that a “certain cultural dissonance” can be attributed to the inability of Asian-Americans to move upward in the workplace. Hyun examined whether it should be the responsibility of the Asian-
American employee to adapt to their American workplace, or whether management should seek to better understand Asian culture. She found that both the employee and employer held the answer to bridging this “cross-cultural dissonance”: Increasing interaction between senior management and employees was crucial to promoting upward mobility. In addition, mentoring programs, performance evaluations or simply encouragement of informal dialogue between employee and upper management were all considered positive approaches to bolstering employee-employer business relationships.

There will certainly always be some barriers to employment for minorities, visible or not. However, there is value to the awareness of the special barriers that the “model minority” Asian-Americans combat alongside their minority group counterparts in the workplace. Understanding these barriers can foster meaningful discussion about opportunities for both women and minority groups to advance to leadership and senior-level positions at work.

About the Author

Katherine Lee Goyette is an assistant revisor of statutes for the Office of Revisor of Statutes and a member of the KBA Diversity Committee. She received her J.D. from Washburn University School of Law in 2010 and her LL.M. in elder law from the University of Kansas School of Law in 2012.

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15. Id.


Resolutions: Succession Planning

The Journal of Clinical Psychology reported research indicating that only 45 percent of us usually make New Year’s resolutions and of that group, just 46 percent maintain our resolutions for at least six months. The least successful resolution-makers are age 50 and over. Only 14 percent of that demographic achieve their resolutions (compared to the 39 percent success rate of those in their twenties.) This is a discomfiting statistic in light of The Lawyer Statistical Report data showing that our median lawyer age has increased to 49. One wonders if lawyers will be able to make and keep any goals at all.

Fortunately, such an abysmal performance baseline means that even marginal improvement will be notable. One particular area deserving of focus this year is succession planning – especially planning that considers our inevitable demise. There is no explicit requirement that lawyers have a succession plan to care for our clients but the ABA’s Formal Opinion 92-369 provides guidance in understanding how succession planning relates to explicit ethical obligations to preserve and protect client property and interests. The introduction to 92-369 actually provides a great New Year’s resolution for 2015.

Resolved

To fulfill the obligation to protect my clients’ files and property, I will prepare a future plan providing for the maintenance and protection of those client interests in the event of my death. My plan will, at a minimum, include the designation of another lawyer who would have the authority to review client files and make determinations as to which files need immediate attention, and who would notify clients of my death. (Slightly modified from the original at http://bit.ly/1FJ1nqD.)

Washington

I enjoy sticking my nose into other state bar associations to see what colleagues in other jurisdictions are doing. The Washington State Bar Association has a particularly interesting free resource at http://bit.ly/1vZtlo6. The WSBA put together an 87-page guide called “The Planning Ahead Handbook,” which makes a case for succession planning and answers general questions on the topic. The bulk of the Handbook, however, contains “checklists and forms necessary to put together your succession plan.” Some of the succession planning forms provided include:

• An agreement to close law practice
• Sample will provisions
• Client notice advising of lawyer impairment or death
• An extensive law firm contact list for operational purposes
• A motion for access to trust account

The beauty of the WSBA Handbook is its relative brevity. It takes all of 15-20 minutes to read through and provides an overall scope of the task ahead. While there are some issues that would require research into Kansas law or procedure, much of the information is universal and several of the forms could be completed with little headache. Even if you did nothing more than complete the contact list you would be ahead of the game in a disaster (i.e., tornado, flood, fire), and the document would be a huge benefit to those coming to the aid of your clients and family in the event of your illness or death.

New Mexico

The New Mexico Bar Association recently (July 2014) compiled the next level up in succession planning handbooks. The handbook was produced by the New Mexico Supreme Court Lawyer Succession and Transition Committee and is a free, 162-page guide available at http://bit.ly/1v4i3AW. The cover letter to the handbook from the Supreme Court of New Mexico clearly states the expectation:

Although no one can predict the future, lawyers must strive to lessen the impact of unexpected interruptions in their relationships with their clients. Your duty to competently and diligently represent your clients requires this, but more importantly, it is the right thing to do.

Have a plan. Put it in writing. Talk to your clients about the plan. Let them know that you really are looking out for their interests, both now and in the future.

The sample forms and checklists provided duplicate many of those in the WSBA Handbook but New Mexico’s effort also provides cautionary tales giving the context for why such preparations are vital. The first example involved a solo practitioner experiencing a medical crisis during which the lawyer could not communicate. The lawyer had no staff and all files and records were imaged on computer behind a password no one else knew. The lawyer’s spouse was besieged with an onslaught of calls from courts and clients which compounded stress during the medical crisis. I have not been a lawyer all that long but for every story in the handbook, I could recall names of Kansas attorneys stricken by similar disaster. None of us are exempt from the unexpected or the inevitable.

Make a Plan

There are certainly default processes and volunteers to step in to make “field expedient” fixes where we have not prepared something more solid. I once taught a CLE on the topic and a lawyer present actually said, “I’ll be dead so it’s not my problem.” We owe our clients, our profession, and certainly our families better than that. Succession planning is the right thing to do and the resources to begin are readily available – for free. Make a resolution to make a plan.

About the Author

Larry N. Zimmerman is a partner at Zimmerman & Zimmerman P.A. in Topeka and an adjunct professor teaching law and technology at Washburn University School of Law. He is one of the founding members of the KBA Law Practice Management Section.

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A Somewhat Ironic Defense of the Kansas Written Bar Examination

As a soon-to-graduate, third-year law student at Washburn School of Law, I count myself fortunate to have a job waiting for me after I graduate. Of course, this job offer is contingent on passing the bar exam, which just adds to the already growing feeling of anxiety I am suffering as the date draws nearer. In addition, because I am going to work for a firm located in Kansas City, I also find myself in the unenviable position of having to take two bar exams, one for Kansas and one for Missouri. My burden of taking both the bar exams for Missouri and Kansas makes for the somewhat ironic position I take in this essay: graduates newly licensed in another state should continue to take a written bar exam for Kansas because the exam provides an important screening function for basic competence, and because a Kansas exam helps to build public confidence in the legal profession.

Currently, Kansas Supreme Court Rule 708 allows for reciprocal admission to the bar in Kansas without taking the written bar exam, but only if the applicant is admitted to practice in a reciprocal state and has been actively practicing the law in that other state for at least five of the past seven years. Therefore, new law school graduates cannot avail themselves of the rule, and must instead take the written exam in Kansas regardless of whether they have passed the exam in a reciprocal state.

The five-year practice requirement has caused some consternation for local law students, which is understandable, given both the high stakes involved and the large time and expense incurred in preparing for and taking multiple bar exams. For the past several years, that burden has led to calls to reform the bar exam requirements. A variety of solutions have been suggested, ranging from states granting full, unrestricted reciprocity, to the elimination of state-specific bar exams in favor of a national one, or even to the outright abolition of the written bar examination process altogether. However, those suggestions do not give enough credit to the gatekeeping and public confidence functions that the Kansas bar exam requirements serve.

At the core of this issue is that once an applicant passes the bar exam and is admitted to practice, that newly minted lawyer can immediately begin representing clients. That representation could involve highly sensitive personal information, potentially result in a client’s bankruptcy, or even concern a matter of life or death. We must ask ourselves whether we are comfortable with a new lawyer licensed in another state coming to Kansas and representing clients in these affairs without any further requirements. Granted, there are other safeguards in place, including the Rules of Professional Responsibility. The problem with those other safeguards are that they do not trigger a screening or gatekeeping function until after a violation, i.e., after the harm to a client has already occurred.

The concern for up-front screening explains why states like Kansas still use a state-specific written exam instead of the Uniform Bar Examination. The law of Kansas is different from other jurisdictions; as a Washburn student, I have been fortunate to learn about many of those differences—differences that can many times make or break a client’s case. For example, Kansas oil and gas law has many unique elements that cannot easily be identified by doing a simple Westlaw search. A new lawyer who misses one of those elements during the course of regular legal research could cost a Kansas farmer millions of dollars in oil and gas profits.

Of course, those differences can and should be learned by a reciprocally admitted attorney through hours of careful and diligent research, which the Rules of Professional Responsibility require for every lawyer. However, just focusing on competency requirements misses the point. A major reason for the Kansas-specific exam is to prove to Kansans that they will be protected by a rigorous bar-admittance process before a lawyer will earn the privilege of practicing law in our state. The Kansas written bar exam plays an important role in building confidence among members of the public, and anything less does Kansans a great disservice merely in the interest of making the process a bit easier and more expedient for out-of-state lawyers.

Although continuing the requirement for a separate Kansas bar exam is probably an unpopular position among law students and recent graduates, the current Kansas Supreme Court Rules for reciprocity should remain unaltered. For new, out-of-state lawyers wanting to practice law in Kansas, being required to take the Kansas written bar exam before entering practice in our state is costly and time-consuming. But so is the practice of law, and the stakes for our clients are even higher. Hastily reducing or eliminating the Kansas bar exam requirements puts Kansans at risk, because any mistakes committed by a newly admitted lawyer unfamiliar with the quirks of Kansas law will be borne by Kansas clients. Ultimately, those advocating for changes to the Kansas bar exam must remember that the very purpose of the exam, and the duty of all Kansas lawyers and the state of Kansas, is to protect those clients.

About the Author

Brett Shanks recently graduated from Washburn University School of Law in December 2014. brettashanks@gmail.com
Members in the News

Changing Positions

Catherine R. Bell and Evan F. Fitts have been elected shareholders at Polsinelli P.C., Kansas City, Missouri.

Nicholas S. Billman has joined the Federal Reserve Bank, Kansas City, Missouri, as counsel.

David A. Brock has joined Hamilton, Laughlin, Barker, Johnson & Jones, Topeka, as an associate.

Douglas R. Dalgleish has joined Stinson Leonard Street LLP, Kansas City, Missouri.

Nathan L. Dickey has joined Saline County Attorney’s Office, Salina.

Jessica M. Fiegel has joined Stinson, Lasswell & Wilson L.C., Wichita, as an associate.

Eric P. Fournier has joined Calihan Brown Burgardt & Douglas, Garden City.

Noah K. Garcia has joined BNSF Railway, Fort Worth, Texas.

Hannah K. Henry has joined McDowell Rice Smith & Buchanan P.C., Kansas City, Missouri, as an associate.

Kenneth C. Jones has joined Lewis, Rice & Fegers L.C., Kansas City, Missouri, as of counsel.

Andrew S. Mayo and Matthew J. McGivern have joined Gay, Riordan, Fincher, Munson & Sinclair P.A., Topeka, as associates.

Denise L. McNabb has been appointed as the new Strawn City attorney.

Robert J. Moody Jr. has joined Martin, Pringle, Oliver, Wallace & Bauer, Wichita, as an associate.

Mark A. Pemberton has joined Phoenix Energy Resources LLC, Wichita, as general counsel.

Eunice C. Peters has joined the Office of Judicial Administration, Topeka, as a staff attorney.

Melodie A. Powell has joined Evans & Dixon LLC, Kansas City, Missouri. The attorneys of Redmond & Nazar LLP (Patricia A. Gillman, W. Tom Gilman, Nicholas R. Grillot, Edward J. Nazar, and Martin R. Ufford), Wichita, have joined Hinkle Law Firm LLC.

Alex’Jayne M. Richards has joined the Johnson County Public Defender’s Office, Olathe.

Tad B. Ruliffson has joined Wein Davis L.C., Manhattan, as an associate.

Jay N. Selanders has been named commander of the Kansas Air National Guard, Topeka.

Franki P. Shearer has joined United Bank, Charleston, West Virginia, as senior institutional service advisor.

Tucker A. Stewart has joined Kansas Livestock Association, Topeka, as associate legal counsel.

Thomas C. Witherspoon has joined QC Holdings Inc., Overland Park.

Changing Locations

Gregory S. Beuke has moved to 200 W. Douglas, Ste. 600, Wichita, KS 67202.

Katherine S. Clevenger has moved to 4151 N. Mulberry Dr., Ste. 205, Kansas City, MO 64116.

Jonathan W. McConnell has started his own firm, 328 E. 1st St. N. Wichita, KS 67202.

Miscellaneous

Ronald R. Hein Law Firm Chtd., Topeka, has changed to Hein Governmental Consulting LLC.

Laura Ice, Wichita, received the Howard C. Kline Distinguished Service Award from the Wichita Bar Association.

Hon. Steve Leben, Topeka, received the 2014 William H. Rehnquist Award for Judicial Excellence in Washington, D.C.

Steven J. Obermeier, Olathe, was selected by the Kansas Continuing Legal Education Commission as the recipient of the 2014 Robert L. Gernon Award.

Editor’s note: It is the policy of The Journal of the Kansas Bar Association to include only persons who are members of the Kansas Bar Association in its Members in the News section.
Obituaries

Justice Donald L. Allegrucci

Former Kansas Supreme Court justice and state senator Donald L. Allegrucci died at his home in Topeka on November 8 following a battle with cancer. He was 78.

A 20-year member of the Supreme Court, he was known as a tough but fair jurist. His career was one of distinction and dedication to the law and to protecting the constitutional rights of all people. Prior to his service on the district court and then the Supreme Court, Allegrucci earned his experience as a prosecuting attorney and also as an attorney in private practice.

Allegrucci served in the Air Force Reserves from 1959-66 and after graduating from Washburn University School of Law in 1963, he served as assistant county attorney for Butler County from 1963-66; served as director of the Mid-Kansas Community Action Program from 1966-68; represented Crawford and Cherokee counties in the Kansas Senate from 1976-80; served as a district court judge from 1982-86; and served in the Supreme Court from 1986-2007.

Allegrucci was born in Pittsburg on September 19, 1936, to Nello and Josephine Allegrucci. He is survived by his wife, Joyce; two sons, Scott Allegrucci, of Lawrence, and Bo Allegrucci, of Lincoln, Nebraska; grandson, Nello Allegrucci, of Lawrence; and a brother, Robert Allegrucci, of Blue Ridge, Georgia.

John William Campbell

John William Campbell, 59, of Topeka, died November 25. He was born January 6, 1955, in Honolulu, the son of Capt. George Willis and Leona Ruth (Miller) Campbell.

Campbell graduated cum laude from Washburn University in 1977, receiving a bachelor’s degree in political science and history. He earned a master’s degree in public administration from the University of Kansas and a juris doctorate from the University of Kansas School of Law in 1979.

His career was dedicated to public service. Campbell served as Ford County attorney, where he was also deputized by the Ford County Sheriff’s Department. He then served in the Kansas Attorney General’s Office, where he was chief deputy attorney general under Robert T. Stephen, Carla Stovall, and Derek Schmidt. Campbell also served as general counsel under Insurance Commissioner Sandy Praeger.

Campbell was a member of the Kansas Bar Association and was admitted to practice before the Kansas Supreme Court, the District of Kansas, the Tenth U.S. Circuit Court of Appeals, the District of Columbia Circuit, and the U.S. Supreme Court.

He is survived by his wife, Lisa Jo Hale; his parents, of Topeka; sisters, Rose Miller, of Kansas City, Kansas, and Sue Irby, of Wichita; and many nieces and nephews.

Arthur James Doyle

Arthur James Doyle, 91, died November 24 in Kansas City. Born in 1923, he completed college at the age of 19 and went to Boston University School of Law, where he left six months later to join the Navy. Doyle served as a carrier-based fighter pilot on the USS Antietam in the Pacific and Asiatic Fleet. He left the Navy in 1946 and eventually returned to law school, graduating with top honors.

Doyle spent 24 years at the law firm of Spencer Fane Britt & Browne and then joined Kansas City Power & Light, where he served as its in-house legal counsel and was eventually CEO, president, and chairman of the board.

Throughout his career, Doyle served on more than 36 economic, educational, industrial, civic, and charitable associations, foundations, and commissions.

Doyle is survived by seven children, Teresa Doyle, Kevin Doyle, Kelley Chance, Conaught Loveless, Briana Ross, Brian Doyle, and Christopher Doyle; 13 grandchildren; Bradley Green, Ryan Green, Matthew Chance, Sarah Smartwood, Haley Doyle, Madalyn Doyle, Patrick Doyle, Molly Loveless, Samantha Doyle, Isabella Doyle, Howard Pontius, Jennifer Thompson, and Kristen Ross; and four great-grandchildren.

He was preceded in death by his wife, Glenda Luehring; parents, Grace (McPhee) Doyle and Michael Joseph Doyle; sisters, Eileen Cavanaugh, Joan Hubbert, Margery Murphy, Madeleine Shannon, and Grace Sneddon; brothers, Dr. Joseph Doyle and Hon. Kevin R. Doyle; and son, Michael Doyle.

J. Francis Hesse

J. Francis Hesse, 92, died November 22 in Wichita. He served in World War II as a second lieutenant in a heavy artillery unit and was a POW/MIA and escaped his captors to be able to return to the States. After his return, he settled in Wichita and practiced law.

Hesse is survived by his four daughters, Paula Hlobik, of Bucyrus, Suzanne McHenry, of Derby, Anne Warner, of Pebble Beach, California, and Carrie Hesse-Clark, of Wichita; nine sons, Steve Hesse, Tom Hesse, Tim Hesse, Jeff Hesse, Joel Hesse, Matt Hesse, Chris Hesse, and Karl Hesse, all of Wichita, and Mike Hesse, of Boulder, Colorado; dozens of grandchildren; and dozens of great-grandchildren. He was preceded in death by his wife, Jean Kimel.
The KBA Awards Committee is seeking nominations for award recipients for the 2015 KBA Awards. These awards will be presented in June at the KBA Annual Meeting in Overland Park. Below is an explanation of each award and a nomination form found on the next page. The Awards Committee, chaired by Sara Beezley, of Girard, appreciates your help in bringing worthy nominees from throughout the state of Kansas to the committee’s attention! Deadline for nominations is Friday, March 6.

**Distinguished Service Award.** This award recognizes an individual for continuous long-standing service on behalf of the legal profession or the public, rather than the successful accomplishment of a single task or service.
- The recipient must be a lawyer and must have made a significant contribution to the altruistic goals of the legal profession or the public.
- Only one Distinguished Service Award may be given in any one year. However, the award is given only in those years when it is determined that there is a worthy recipient.

**Phil Lewis Medal of Distinction.** The KBA’s Phil Lewis Medal of Distinction is reserved for individuals or organizations in Kansas who have performed outstanding and conspicuous service at the state, national, or international level in administration of justice, science, the arts, government, philosophy, law, or any other field offering relief or enrichment to others.
- The recipient need not be a member of the legal profession or related to it, but the recipient’s service may include responsibility and honor within the legal profession.
- The award is only given in those years when it is determined that there is a worthy recipient.

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

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

**Outstanding Service Awards.** These awards are given for the purpose of recognizing lawyers and judges for service to the legal profession and/or the KBA and for recognizing nonlawyers for especially meritorious deeds or service that significantly advance the administration of justice or the goals of the legal profession and/or the KBA.
- A total of six Outstanding Service Awards may be given in any one year.
- Recipients may be lawyers, law firms, judges, nonlawyers, groups of individuals, or organizations.

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

**Pro Bono Award.** This award recognizes a lawyer or law firm for the delivery of direct legal services, free of charge, to the poor or, in appropriate instances, to charitable organizations whose primary purpose is to provide other services to the poor. In addition to the Pro Bono Award, the KBA awards a number of Pro Bono Certificates of Appreciation to lawyers who meet the following criteria:
- Lawyers who are now employed full time by an organization that has as its primary purpose the provision of free legal services to the poor;
- Lawyers who, with no expectation of receiving a fee, have provided direct delivery of legal services in civil or criminal matters to a client or client group that does not have the resources to employ compensated counsel;
- Lawyers who have made a voluntary contribution of a significant portion of time to providing legal services to the poor without charge; and/or
- Lawyers whose voluntary contributions have resulted in increased access to legal services on the part of low and moderate income persons.

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

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

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

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

Nominee’s Name ____________________________

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

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

________________________________________________________________________
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Nominator’s Name ____________________________
Address __________________________________
__________________________________________
Phone ____________________________ Email ____________________________

Return Nomination Form by Friday, March 6, 2015, to:
KBA Awards Committee
1200 SW Harrison St.
Topeka, KS 66612-1806
The Move to Cloud City: The Benefits and Risks of Cloud Computing

By J. Nick Badgerow

An attorney’s duties of confidentiality and competence require the attorney to take appropriate steps to ensure that his or her use of technology in conjunction with a client’s representation does not subject confidential client information to an undue risk of unauthorized disclosure. Because of the evolving nature of technology and differences in security features that are available, the attorney must ensure the steps are sufficient for each form of technology being used and must continue to monitor the efficacy of such steps.[2]

I. What is Cloud Storage?

Cloud computing is a phrase used to describe a variety of computing concepts that involve a large number of computers connected through a real-time communication network, such as the Internet. In science, cloud computing is a synonym for distributed computing over a network, and means the ability to run a program or application on many connected computers at the same time. The phrase also more commonly refers to network-based services, which appear to be provided by real server hardware, and are in fact served up by virtual hardware, simulated by software running on one or more real machines. Such virtual servers do not physically exist and can therefore be moved around and scaled up (or down) on the fly without affecting the end user – arguably, rather like a cloud.[3]

As technology advances, the practice of law lurches forward – though sometimes a few steps behind the rest of the world. The move to storing digital records in a remote location or using remote computers to operate software (the “cloud”) is one which has developed over the past decade or more, and is increasing exponentially. A recent ABA survey concluded that lawyers increasingly use the “Software as a Service” (also known as “SaaS”) cloud-based law practice management systems because those systems increase both productivity and profits.

Cloud computing: it’s the future of computing. That’s why so many businesses, including law firms, are moving to the cloud more quickly than ever before. Cloud computing isn’t a fad – it’s here to stay, and law firms are now using cloud-based applications for every part of their business, like optimizing customer relationships, billing, and document management. In fact, the results of the American Bar Association’s 2013 Legal Technology Survey found that lawyers’ use of cloud computing software to manage their law firms increased by more than 30% in 2013, with nearly one third of all lawyers surveyed reporting that they used cloud computing software in their law practices.[4]

From the point of view of data storage, when referring to cloud computing, a law firm does not spend capital to invest in servers (and pay rent to house the servers, and pay staff to run and maintain the servers), the law firm instead contracts with a provider which provides storage space for data, as well as the ability to access and manipulate the data stored there, and often provides software for such access and manipulation of the data stored there. Put more simply, “Cloud computing is a type of computing that relies on sharing computing resources rather than having local servers or personal devices to handle applications.”

As long ago as 2009, The Economist predicted this phenomenon.

Much of computing will no longer be done on personal computers in homes and offices, but in the “cloud”: huge data centres housing vast storage systems and hundreds of thousands of servers, the powerful machines
that dish up data over the Internet. Web-based email, social networking and online games are all examples of what are increasingly called cloud services, and are accessible through browsers, smart-phones, or other “client” devices.\[6\]

Substituting smaller operating expenses for larger capital expenditures seems an easy choice. But, as with any change, there are both benefits and ethical and practical risks to the development. It is the purpose of this article to explore both the benefits and risks of cloud storage for a law firm, and to suggest some ways to address or alleviate the risks, thereby maximizing the benefits.

II. Benefits of Cloud Storage: Why Use It?

In the ABA survey referred to above, 75 percent of the lawyer-respondents cited convenient access, all day, every day, as one of the larger benefits of cloud storage. In addition, 56 percent cited affordability as a strong factor in its favor.\[7\]

A Pennsylvania Bar Association ethics opinion has stated:

The benefits of using “cloud computing” may include:

- Reduced infrastructure and management;
- Cost identification and effectiveness;
- Improved work production;
- Quick, efficient communication;
- Reduction in routine tasks, enabling staff to elevate work level;
- Constant service;
- Ease of use;
- Mobility;
- Immediate access to updates; and
- Possible enhanced security.\[8\]

Another ethics opinion on cloud computing observes:

The obvious advantage to “cloud computing” is the lawyer’s increased access to client data. As long as there is an Internet connection available, the lawyer would have the capability of accessing client data whether he was out of the office, out of the state, or even out of the country. In addition, “cloud computing” may also allow clients greater access to their own files over the Internet.\[9\]

Storing records in the cloud thus provides to a lawyer and her client easy access to lawyer and client records in a remote location, at any time of the day or night, on any day of the week. It also saves the cost of buying and maintaining storage servers, as well as the space where those servers sit.

III. Rules, Risks, and Concerns

A. Rules

Lawyers’ ethics and professional conduct are governed by the American Bar Association’s Model Rules of Professional Conduct, adopted in Kansas as the Kansas Rules of Professional Conduct (KRPC).\[10\] Most recently, the Kansas Supreme Court has adopted many of the changes brought about by the ABA’s Ethics 20/20 Commission, and that adoption was made effective in Kansas on March 1, 2014.\[11\]

1. Competence

Rule 1.1, KRPC, requires all lawyers to act with competence and provides:

A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.\[12\]

That is normally interpreted to mean that the lawyer must represent each client competently, either through his/her own knowledge and ability, or by associating with others who have such knowledge and ability.\[13\] While that is understood to apply to the areas of substantive and procedural law where the lawyer chooses to practice, a new Comment to Rule 1.1 extends it to technology:

To maintain the requisite knowledge and skill, a lawyer should keep abreast of changes in the law and its practice, including the benefits and risks associated with relevant technology, engage in continuing study and education and comply with all continuing legal education requirements to which the lawyer is subject.\[14\]

Thus, in order to stay competent, each lawyer should keep abreast of changes in relevant technology, including the benefits and risks associated therewith.

To the extent that a lawyer uses technology in his or her practice, the lawyer has a duty to keep informed about the risks associated with that technology and to take reasonable precautions. The lawyer’s duties discussed in this opinion do not rise to the level of a guarantee by the lawyer that the information is secure from all unauthorized access. Security breaches are possible even in the physical world, and a lawyer has always been under a duty to make reasonable judgments when protecting client property and information. Specific practices regarding protection of client property and information have always been left up to individual lawyers’ judgment, and that same approach applies to the use of online data storage. The lawyer must take reasonable steps, however, to evaluate the risks involved with that practice and to ensure that steps taken to protect the information are up to a reasonable standard of care.\[15\]

2. Confidentiality

Rule 1.6 requires lawyers to maintain the confidentiality of all information pertaining to the representation of each client. Rule 1.6(a) provides:

A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).\[16\]

Thus, a client can consent to the release of its confidential information, if it “consents after consultation.”\[17\] The same is true of client documents stored in the cloud.
Similarly, given that Cloud Computing involves storage of information in the hands of a third party, a lawyer handling particularly sensitive client property, like trade secrets may conclude after consultation with the client that remote SaaS storage is not sufficiently secure.\[^{18}\]

A new section (c) added by the Ethics 20/20 changes to the lawyer’s obligations.\[^{22}\]

(c) A lawyer shall make reasonable efforts to prevent the inadvertent or unauthorized disclosure of, or unauthorized access to, information relating to the representation of a client.\[^{19}\]

And the Ethics 20/20 Comments 26 and 27 to Rule 1.6 explain this in much more detail, including:

Paragraph (c) requires a lawyer to act competently to safeguard information relating to the representation of a client against unauthorized access by third parties and against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client or who are subject to the lawyer’s supervision. See Rules 1.1, 5.1 and 5.3 . . . . For a lawyer's duties when sharing information with nonlawyers outside the lawyer's own firm, see Rule 5.3, Comments [3]-[4]. . . . When transmitting a communication that includes information relating to the representation of a client, the lawyer must take reasonable precautions to prevent the information from coming into the hands of unintended recipients. This duty, however, does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy. \[^{20}\]

Rule 5.3(b), KRPC, provides as follows:

With respect to a nonlawyer employed or retained by or associated with a lawyer: . . .

(b) a lawyer having direct supervisory authority over the nonlawyer shall make reasonable efforts to ensure that the person's conduct is compatible with the professional obligations of the lawyer.\[^{21}\]

Thus, when contracting with others to perform a task normally undertaken by a lawyer, the law firm should take reasonable steps to make sure that the contractor complies with the lawyer’s obligations.\[^{22}\]

B. Risks and Concerns
Against that backdrop, a number of concerns present themselves when considering the use of cloud storage or other cloud computing services.

Recent “cloud” data breaches from multiple companies, causing millions of dollars in penalties and consumer redress, have increased concerns about data security for cloud services. The Federal Trade Commission (FTC) has received complaints that inadequate cloud security is placing consumer data at risk, and it is currently studying the security of “cloud computing” and the efficacy of increased regulation. Moreover, the Federal Bureau of Investigations (FBI) warned law firms in 2010 that they were being specifically targeted by hackers who have designs on accessing the firms’ databases.\[^{23}\]

However, depending on the lawyer's level of risk-acceptance and risk-aversion, the concerns can be addressed.

Question 1. Does disclosure of client-confidential information to a cloud vendor represent a breach of client-confidentiality?

Answer: As of this writing, some nineteen state bar associations have addressed this topic, and they have uniformly concluded that the storage of client confidential information in the cloud does not represent a breach of the lawyer’s duty of confidentiality, any more than does physical file storage at an off-site file facility or the sending of confidential information by email – so long as the lawyer acts “reasonably.” Those opinions are listed in the endnote.\[^{24}\]

Question 2. Does the transfer of privileged attorney-client communications or attorney work product to the care, custody or control of a third-party waive the privilege and/or the work product doctrine?

Answer: There is some risk that client information placed on the Web could be lost or accessed by unauthorized persons.

Client confidences and secrets are no longer under the direct control of the lawyer or his law firm; rather, client data is now in the hands of a third-party that is free to access the data and move it from location to location. Additionally, there is always the possibility that a third party could illegally gain access to the server and confidential client data through the Internet.\[^{25}\]

However, most ethics opinions venture that reliance on a storage as a service provider does not, in itself, violate the lawyer’s duties, so long as “reasonable care” or “due diligence” is taken by the lawyer to select the provider,\[^{26}\] to instruct the cloud vendor to keep all information confidential,\[^{27}\] to investigate the provider’s security measures,\[^{28}\] and to review those measures “periodically.”\[^{29}\]

Further, any doubt about the ownership of the data transferred to the cloud should be resolved in the service provider’s agreement. Some form service agreements include a provision that data becomes the property of the service provider,\[^{30}\] hardly conducive to the protection of client confidentiality.

Question 3. Where in the cloud are your client’s documents, and what protection do the documents have against government upheaval or takeover, loss or interruption in electrical grid service, weather interruptions, or other catastrophes, such as earthquakes? Is the server inside the United States, or located in a troubled region, where government takeover, war, civil unrest, or other strife could jeopardize the information in storage?

Answer: The benefit of cloud storage is that the physical server is not purchased, owned, maintained and stored by the lawyer, at the lawyer’s expense. The downside is that the actual server may be anywhere. Thus, part of the due diligence or reasonable care required of the lawyer is to make inquiry on the location of...
the actual servers, and (since there must be backup) the location of all such servers maintained by the service provider.

Question 4. Even if the servers are presently located in physically and civilly stable locations, does anything prevent the storage provider from moving the storage to an unstable location?

Answer: This is a matter of contract between the lawyer and the service provider. The contract should require that all servers be located in the United States or some other specifically-identified stable country, and that no information be moved to servers located elsewhere without advance notice to the customer.

Question 5. How can one be certain that client-confidential information will not be intentionally or inadvertently disclosed by the cloud service provider? What (other than a contract, which can be breached) prevents the cloud provider from accessing, reviewing, using or disclosing documents received from the lawyer and/or his client?

Answer: Nothing can guarantee absolute, iron-clad security of information stored anywhere, including in the cloud. But, again, the test is reasonableness.

New York State Bar Ethics Opinion 842 suggests the following steps involve the appropriate due diligence:

- Ensuring that the online data storage provider has an enforceable obligation to preserve confidentiality and security, and that the provider will notify the lawyer if served with process requiring the production of client information;
- Investigating the online data storage provider’s security measures, policies, recoverability methods, and other procedures to determine if they are adequate under the circumstances;
- Employing available technology to guard against reasonably foreseeable attempts to infiltrate the data that is stored.

Question 6. How does one require that the cloud service provider have and maintain backup, in case one server is lost?

Answer: This should be required in the contract.

Question 7. Even if the Cloud provider agrees to an indemnity in the case of lost documents, what is the value of that indemnity from a company which may well shut down in the event of a catastrophic loss? Can insurance be required from the vendor?

Answer: Not only should the cloud provider be required to obtain and maintain insurance, but the lawyer also should consider obtaining cyber risk insurance as well, since the loss of client confidential information could be significant.

Question 8. Is client consent required or recommended to allow a third-party to take possession of client documents? (While court reporters also receive confidential documents, they fall under the rubric of officers of the court.) Also note Rule 1.0(f), which defines “informed consent” as a client’s agreement to a course of conduct “after the lawyer has communicated adequate information and explanation about the material risks of and reasonably available alternatives to the proposed course of conduct.”[34]

Answer: The state ethics opinions which have thusfar addressed cloud computing have not stated that client consent is required. However, if a client directs that its information not be stored offsite, that direction should of course be obeyed.

A lawyer remains bound, however, to follow an express instruction from his or her client that the client’s confidential information not be stored or transmitted by means of the Internet, and all lawyers should refrain from storing or transmitting particularly sensitive client information by means of the Internet without first obtaining the client’s express consent to do so.[35]

Question 9. What happens to the client’s confidential data when the lawyer terminates the cloud agreement with the service provider?

Answer: The contract should make express provision for the return of all stored information to the lawyer upon termination of the service agreement by either party.

Question 10. What will the vendor do with the client’s confidential data if it receives a subpoena or government request for that data?

Answer: The contract should provide for prompt notice to the lawyer in the event the service provider receives a subpoena for information stored in the provider’s servers.35 The lawyer then will need to take prompt, affirmative action to intervene and oppose the subpoena, just as if the subpoena were directed to the manager of an off-site hard copy file storage warehouse.

Question 11. How will the vendor respond/react (if at all) in the event of a litigation hold?

Answer: No documents in cloud storage should ever be destroyed or eliminated from storage by the cloud provider. Thus, the information in storage should not be affected by a litigation hold.

IV. Recommended Steps

Based on the concerns outlined above, a number of recommendations present themselves. As noted above, the new Comments to Rule 1.6 require that lawyers take “reasonable steps” to protect client confidential information from disclosure to outsiders, though that duty “does not require that the lawyer use special security measures if the method of communication affords a reasonable expectation of privacy.”36 Based on reported experiences with cloud computing firms, a number of steps recommend themselves as “reasonable.”

The Vermont Bar Association Ethics Opinion Committee observed:

Complying with the required level of due diligence will often involve a reasonable understanding of:

a. the vendor’s security system;
b. what practical and foreseeable limits, if any, may exist to the lawyer’s ability to ensure access to, protection of, and retrieval of the data;
c. the material terms of the user agreement;
d. the vendor’s commitment to protecting confidentially of the data;
e. the nature and sensitivity of the stored information;
f. notice provisions if a third party seeks or gains (whether inadvertently or otherwise) access to the data; and
g. other regulatory, compliance, and document retention obligations that may apply based upon the nature of the stored data and the lawyer’s practice.

Specific considerations include the following:

1. **Find a Good Vendor.** As with any service provider, one should only contract with established vendors, with a good track record. Contracting with less-savory companies, with questionable (or non-existent) histories, just to save money, presents a risk.

Are they a solid company with a good operating record and is their service recommended by others in the field? What country and state are they located and do business in? Does their end user’s licensing agreement (EULA) contain legal restrictions regarding their responsibility or liability, choice of law or forum, or limitation on damages? Likewise does their EULA grant them proprietary or user rights over my data?[38]

2. **Check Out the Vendor.** Therefore, in order to contract only with established vendors, some degree of due diligence is required to check out the alternative providers.

This may include, among other things, ensuring the service agreement requires the vendor to preserve the confidentiality and security of the materials. It may also require that vendor notify Lawyer of any nonauthorized third-party access to the materials. Lawyer should also investigate how the vendor backs up and stores its data and metadata to ensure compliance with the Lawyer’s duties.[39]

Additionally, the customer should investigate to ensure that the service provider actually owns and maintains its servers, and hosts the data, and does not just sub-contract to other data services located who-knows-where.

3. **Document the Due Diligence.** Further, in case it is later necessary to prove the reasonableness of the efforts taken, it would be beneficial for those efforts and their results to be documented.

4. **Read the Contract and Negotiate.** Rather than accepting blindly all terms and conditions in the cloud provider’s agreement, one should ask to see and read those terms and conditions, and review them closely, to insure that the concerns listed in Section III.B., supra, are addressed. As the New York City Bar Association recommends, “Never just click ‘Agree’ to a provider’s ‘Terms and Conditions of Use.’ Obtain, and review, the complete Service Level Agreement and all Addenda and Attachments. Read all website information referenced in the SLA.”[40]

We do think, however, that when client confidential information is entrusted in unprotected form, even temporarily, to someone outside the firm, it must be under a circumstance in which the outside party is aware of the lawyer’s obligation of confidentiality, and is itself obligated, whether by contract, professional standards, or otherwise, to assist in preserving it.[41]

The vendor should be required to maintain confidentiality of all information provided to it, to obtain and maintain adequate insurance against losses, to maintain all servers in the United States or other stable location, to provide to the customer all security measures maintained by the vendor, and to advise the customer of changes in those security measure; to prohibit the release of any stored information in response to a subpoena or court order without giving suitable advance notice to the customer to provide an opportunity to object; and to segregate the client’s information from all other information stored by the vendor in its server.

Further, the agreement should expressly provide that all data transferred to the cloud is, and remains, the property of the customer, and not the vendor. The vendor should not be permitted to use or to publicly display the data, or to exploit the data, such as by creating “derivative works” from the data stored on the cloud.

5. **Client Consent.** Though not required by any extant ethics opinions, an additional safeguard would be to obtain client consent to store confidential information in the cloud, noting the requirements of Rule 1.0(c) and (f) for obtaining informed consent. One could include the necessary disclosure, and consent, in the initial engagement letter, after consulting with the client about the benefits and risks of cloud storage.

6. **Encrypt the Data Sent to Storage.** All data sent to cloud storage should be encrypted, so that one receiving (or stealing) the information still would not be able to use it.[42]

Along with taking steps to ensure that the confidential information will be maintained securely by the company providing remote services, the lawyer should also take care to ensure that confidential information is conveyed to the service provider in a secure manner.[43]

7. **Make Sure Data Will Remain Available.** The agreement should ensure that lawyer and client access to the stored information will always be available.

Whatever form of SaaS [Software as a Service] is used, the lawyer must ensure that there is unfettered access to the data when it is needed. Likewise the lawyer must be able to determine the nature and degree of protection that will be afforded the data while residing elsewhere.[44]

8. **Password Protection.** Naturally, access to the cloud storage should be permitted only by the use of passwords, and one should make sure that all passwords are robust and not easily hacked.[45] Further, law firm policies should emphasize that password security should be maintained, and computer systems should provide for regular replacement of all passwords.

9. **Prepare for Subpoenas and Government Requests.** In order to avoid automatic production of client information by the cloud provider in the event of its receipt of a subpoena or government request for information, the cloud provider agreement should require the provider to notify the law firm before production is provided, and should allow time for the law firm to respond and react.

Therefore, a lawyer must ensure that tasks are delegated to competent people and organizations. This means that any service provider who handles client information
needs to be able to limit authorized access to the data to only necessary personnel, ensure that the information is backed up, reasonably available to the attorney, and reasonably safe from unauthorized intrusion.\[46\]

10. Prepare for Litigation Holds. The service agreement should also provide for litigation holds, and require the vendor to comply with the law firm’s instructions with regard to such holds.

11. Prepare for Termination of the Arrangement. The service agreement should require the complete destruction and removal of all information from the cloud storage servers in the event of a termination of the agreement (after the law firm has, of course, downloaded all such information). Before contracting with the provider, the lawyer should investigate the storage provider’s ability to purge and wipe any copies of the data, and to move the data to a different host, if the lawyer becomes dissatisfied with the storage provider or for other reasons changes storage providers.\[47\]

V. Conclusion

It bears repeating that a lawyer’s duty is to take reasonable steps to protect confidential client information, not to become an expert in information technology. When it comes to the use of cloud computing, the Rules of Professional Conduct do not impose a strict liability standard. As one ethics committee observed, “Such a guarantee is impossible, and a lawyer can no more guarantee against unauthorized access to electronic information than he can guarantee that a burglar will not break into his file room, or that someone will not illegally intercept his mail or steal a fax.”\[48\]

Cloud computing is not prohibited or unethical. Its use can be beneficial. But, as with any technology, its use requires awareness of the foregoing concerns and how to address them. And, as with any technology, if lawyers use it, they must keep abreast of changes and developments in the risks, rewards and capabilities of the technology available. There are real risks inherent in trusting a client’s secrets to someone or something remote, out of sight, out of touch, and not within one’s direct control. The benefits of this technology should be weighed against those risks.

The lawyer must . . . engage in periodic education about ever-changing security risks presented by the Internet.\[49\]

This article is, hopefully, just an early step in this education process. But, as required by the Rules and good practice, it should only be one step in an ongoing and recurrent process, as technology changes more quickly than articles can be published.

About the Author

J. Nick Badgerow is a partner with Spencer Fane Britt & Browne LLP in Overland Park, where he practices as a trial lawyer and ethics counselor. He is chairman of the Johnson County (Kansas) Ethics and Grievance Committee, Kansas Supreme Court Ethics 20/20 Commission, Kansas Judicial Council Civil Code Committee, and Kansas Bar Ethics Advisory Committee; and member of the Kansas State Board of Discipline for Attorneys and Kansas Judicial Council. Badgerow is former chair of the Kansas Ethics 2000 Commission.

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ENDNOTES

1. To those of the author’s generation, Cloud City was a mining and resort colony above the planet Bespin in the film, “The Empire Strikes Back,” in the Star Wars Saga. Cloud City received its name because it was perpetually surrounded by giant clouds. http://starwars.wikia.com/wiki/Cloud_City. Without pressing the analogy too far, Cloud City should also be remembered as the site of a huge betrayal of Han Solo by his friend, Lando Calrissian, into the hands of bounty hunter, Boba Fett. http://www.funtivia.com/en/subtopics/Elemental-Star-Wars-302941.html. Solo was “frozen” in Carbonite (http://starwars.wikia.com/wiki/Carbonite) – which ironically is also the name of a popular non-fictional cloud service provider. http://www.carbonite.com/. Carbonite) – which ironically is also the name of a popular non-fictional cloud service provider. http://www.carbonite.com/.


7. ABA, supra note 4.


12. Rule 1.1, KRPC.


16. Rule 1.6(a), KRPC. Section (b) then lists a number of specific exceptions to this prohibition.

17. See Rule 1.0(c) and (f) for the definitions of “consultation” and “informed consent.”


19. Rule 1.6(c), KRPC.


21. Rule 5.3(b), KRPC.


2015 Legislative Outlook

The Kansas legislative session begins on January 12. The start of the legislative season will see a commanding number of Republicans taking office. The GOP now holds a 98-27 advantage in the House and a 32-8 majority in the Senate. All statewide offices are held by the GOP, which will be led by Gov. Sam Brownback. Conservative Republicans will again enjoy a strong majority which will allow them nearly unfettered power to advance their agenda.

The first major issue they will face is the underperforming state budget. This very group pushed through an aggressive tax plan in 2012 that cut income tax receipts. That measure has now created a huge budget deficit for the remainder of this fiscal year, nearly $270 million in the red, and over half a billion dollar deficit over the next two fiscal years. Legislators are already positioning themselves among two groups. The first group will look to cut their way out of the fiscal hole while the other will look to both sides of the ledger which could mean a slowing of the remainder of the tax cuts or new taxes on professional services. Ironically, it is the House that has taken up the more conservative approach this time around. How both chambers deal with the budget problems is the nearly sole focus of the 2015 legislative session.

In 2015 these new legislators will be trying to figure out some very heavy budget issues. Revenue has fallen woefully short of projections. The Kansas Consensus Revenue Estimating Group projects the need to cut $278.7 million by the end of this fiscal year to balance the budget. The main reason for the missed projections was a nearly 10 percent loss in expected revenue. To be plain, the tax cuts cost more than anticipated. A recession bill is almost guaranteed unless the governor opts for allotments which will be automatic cuts to state agencies.

The state budget will have a significant impact on all facets of government, including the Judicial Branch. Last session a bill was passed that plugged the judicial branch budget hole, but those funds were based on an increase in filing fees and the creation of a new docket fee on summary judgments. For one reason or another, those fees have failed to materialize, leaving the judiciary with a $6.6 million shortfall ($2.6 million fee shortfall plus $4 million of new special revenue shortage). The judiciary could absorb $3 million through personnel efficiencies and other offsets but that still leaves a $3.6 million funding gap. If a supplemental funding bill is not approved, the court could furlough employees between 14-18 days. There are ways to shore up the Judicial Branch budget by tweaking last year’s funding bill. How much and what portions are all up in the air at this point. Things must happen quickly to avoid furlough days in early June.

Besides taxes, this Legislature will take a very hard look at reforming the process for selecting Supreme Court justices, again. This reform has been in the making for a decade but with continued GOP election wins the possibility of a ballot question becomes more pronounced. Should a concurrent resolution be introduced to alter merit selection, it would mostly likely contain pieces of the federal model of appoint and confirm. It would also likely contain language requesting that the question be put on the primary election ballot instead of the general election ballot. The effort to change how Kansas Court of Appeal judges are picked has already become law and put into practice with Judge Caleb Stegall (who has now been appointed to the Kansas Supreme Court under the merit selection process).

The Kansas Bar Association will be engaged in these issues as well as several others that have a direct impact on the practice of law. For instance the KBA supports changes to the Kansas Domestic Recodification Act, the Uniform Trust Code, and several other proposals outlined by the Kansas Judicial Council. Those proposals, along with a variety of other information pertaining to the Kansas Legislature, can be found on the KBA legislative homepage at http://www.ksbar.org/legislative.

In addition to the information found on the KBA website, you can also find your legislator, track legislative proposals, view election results, or contact the Kansas attorney general using the following links.

2015 Kansas Legislature
Session begins Monday, January 12

- Kansas Senate: 32 Republicans/8 Democrats
- Kansas House of Representatives: 97 Republicans/28 Democrats

The official state website for the Kansas Legislature is http://www.kslegislature.org.

From that site, you can find information on the House and Senate members and contact information, calendars, bill introductions, committee activity, minutes of committees, committee memberships, and virtually anything related to the Kansas Legislature.

Gov. Sam Brownback


Attorney General Derek Schmidt

The website for Attorney General Derek Schmidt is http://ag.ks.gov/.

Election Results

For complete election results, you can refer to the election link found on the Kansas Secretary of State’s website at http://www.kssos.org.

About the Author

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

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2015 Lawyer and Law-Trained Legislators

Kansas Senators

Sen. Franklin T. “Terry” Bruce, R-Nickerson
Senate District No. 34
Bruce is of counsel with the law firm of Forker, Suter & Rose in Hutchinson. He was first elected to the Kansas Senate in 2004 and again in 2008 and 2012. He previously served as an assistant county attorney in Reno County. Bruce is a member of the Agriculture, Judiciary, Natural Resources and Utilities committees, and is a member of other joint committees. He received his J.D. from the University of Kansas School of Law.

Sen David Haley, D-Kansas City
Senate District No. 4
Haley is the managing partner of Village East, a redevelopment company in Kansas City, Kansas. He served in the Kansas House of Representatives from 1994-2000 and was elected to the Kansas Senate in 2000. He was re-elected in 2004, 2008, and 2012. Haley is the ranking member of the Senate Committee on the Judiciary and the Senate Committee on Public Health and Welfare. He is also a member of other joint committees. Haley received his J.D. from Howard University.

Sen. Jeff King, R-Independence
Senate District No. 15
King is the owner of King Law Offices in Independence. He was elected to the Kansas House of Representatives in 2008 and re-elected in 2008 and 2010. King was appointed to fill the vacancy in the Kansas Senate when Derek Schmidt ascended to Kansas attorney general. King was re-elected to Senate District 15 in 2012. He serves as Senate vice president and chair of the Senate Judiciary Committee. He received his J.D. from Yale Law School.

Kansas House of Representatives

Rep. John Barker, R-Abilene
House District No. 70
Barker is a farmer, retired district court judge, U.S. Army veteran, and now is the new House Judiciary chair. He served 25 years as a judge for the 8th Judicial District, covering Dickinson, Geary, Marion, and Morris counties. Barker has been recognized for his work with Kansas youth – championing initiatives to prevent drug and alcohol abuse, working with local school districts to reduce truancy rates, and working with juvenile offender programs.

Rep. Steve Becker, R-Buhler
House District No. 104
Becker is a retired district court judge for Reno County. He was appointed in June 1981 and retired in January 2007. Prior to his appointment, Becker practiced law in Hutchinson. He graduated from Washburn University School of Law in 1975.

Rep. Robert Bruchman, R-Overland Park
House District No. 20
Bruchman was elected to the Kansas House in 2010. He is a principal in his own law firm specializing in business law, including business formation, mergers and acquisition, financing, and complex business planning. He is a member of the Judiciary, Commerce, and Utilities committees. Bruchman received his J.D. from the University of Kansas School of Law.

Rep. Erin Davis, R-Olathe
House District No. 15
Davis is a Republican member of the Kansas House of Representatives, representing District 15. She was first appointed to the chamber on January 13, 2014. Having won re-election, Davis will complete her first full term as a state representative as she sits on the House Judiciary Committee. Davis received her law degree from the University of Kansas Law School in 2013, and she currently practices family law and criminal defense.

Rep. Blaine Finch, R-Ottawa
House District No. 59
Finch is majority owner and president of Green, Finch & Covington Chtd. His practice covers a broad spectrum of legal issues, including municipal law, real estate, contracts, corporate law, and estate planning. He also teaches at Ottawa University as an adjunct faculty member in the fields of history, political science, and pre-law. Finch is a former city commissioner and mayor of the City of Ottawa. He graduated summa cum laude from Ottawa University with degrees in history, political science, and psychology. Finch is a member of the Kansas Bar Association, and a member and past president of the Franklin County Bar Association. He attended Washburn University School of Law and graduated cum laude.

Rep.-Elect Lane Hemsley, R-Topeka
House District No. 56
Hemsley graduated from Washburn University School of Law. He began working for two private law firms in Topeka before being appointed to head the Kansas Dental Board.

Rep.-Elect Dennis “Boog” Highberger, D-Lawrence
House District No. 46
Highberger graduated from the University of Kansas School of Law in 1992. His areas of private practice have included wills, estates, contracts, family law, federal communications law, and general civil practice. Highberger served on the Lawrence City Commission from 2003 to 2009 and was mayor in 2005-06. He has been an active member of the Lawrence community, and currently serves on the Douglas County Food Policy Council, the City of Lawrence’s Public Incentives Review Committee, and Sustainability Advisory Board, and the boards of directors of Independence Inc., the Community Mercantile Education Foundation, and the East Lawrence Neighborhood Association.
Rep. Mark Kahrs, R-Wichita  
*House District No. 87*

Kahrs is a small business owner and practices law in his own law firm in the area of creditor law. His clients include small businesses, corporations, partnerships, government agencies, and individuals. Kahrs is a member of the NRA and the Federalist Society. He has been active in Kansas politics for over 20 years serving in various offices within the Kansas Republican Party, including former chairman of the Sedgwick County Republican Party. Kahrs currently serves as chairman of the Fourth District Republican Committee. Kahrs received his J.D. from Washburn University School of Law in 1991.

Rep. Charles Macheers, R-Shawnee  
*House District No. 39*

Macheers has 12 years of experience in private practice and has assisted clients with a wide range of issues, including estate planning, trust, probate administration, and real estate, including site acquisition, leasing and zoning. Most recently, Macheers worked for a Fortune 100 company, where he focused on complex landlord, real estate, and contract negotiations. He received his J.D. from Thomas M. Cooley Law School.

Rep. Craig McPherson, R-Overland Park  
*House District No. 8*

McPherson attended Claremont McKenna College and attended George Mason University, a school that emphasized economics, in addition to the normal law school curriculum and interned in the Justice Department. Today, he owns the McPherson Law Firm PLLC, which focuses on small business formation and business litigation. He is also a deacon at the Presbyterian Church of Stanley.

Rep.-Elect Fred Patton, R-Topeka  
*House District No. 50*

Patton graduated from the University of Kansas Law School before joining the legal research staff at the Shawnee County District Court. Currently, Patton owns and operates Patton Law Offices LLC in North Topeka with a varied practice area, including banking, business/corporate, construction, estate planning, general civil, probate, and real estate. Patton is very active in the community having leadership roles in over 15 local groups.

Rep. Jan Pauls, R-Hutchinson  
*House District No. 102*

Pauls is a sole practitioner with a law office in Hutchinson. She was first appointed to the Kansas House of Representatives in 1991 and elected in 1992 and re-elected every two years through 2010. Prior to her appointment to the Kansas Legislature, Pauls served as a district court judge in Reno County from 1984 to 1988 and an assistance county attorney in Reno County. She received her J.D. from the University of Kansas School of Law.

Rep. John Rubin, R-Shawnee  
*House District No. 18*

Rubin is a former federal administrative law judge and FDIC regional counsel. He was elected to the Kansas House of Representatives in 2010 and re-elected in 2012. Rubin is a member of the House Judiciary Committee. He received his J.D. from Washington University School of Law in St. Louis.

Rep. James Todd, R-Overland Park  
*House District No. 29*

Todd spent two years at Johnson County Community College, where he earned an associate degree before transferring to the University of Kansas to complete the last two years of his bachelor’s degree, graduating in 2004. Currently, Todd is a small business owner working to build his legal practice in Overland Park. He is focusing his legal practice on small business start-ups. Todd attended the University of Kansas School of Law and graduated with a Juris Doctor in 2009.

Rep. Jim Ward, D-Wichita  
*House District No. 86*

Ward is the owner of the Law Offices of James Ward of Wichita. He was appointed to the Kansas Senate to fill a vacancy in 1992. He was later elected to the Kansas House in 2002 and re-elected every two years through 2012. Ward serves as the assistant House minority leader and is a member of the House Committees on Calendar and Printing, Health and Human Services, Interstate Cooperation, Judiciary, and Legislative Budget, as well as several joint committees. He received his J.D. from Washburn University School of Law.

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Stealth Takings: Inverse Condemnation

By Mary Feighny
Eager to cash in on the surfeit of aging Boomers looking to downsize but not ready for a shuffleboard and scooter community, your client is developing “Heaven’s Door,” an upscale gated community with a Whole Foods, Starbucks, and a Dr. Oz Low T clinic.

The problem is that the city’s planning department is insisting that the property earmarked for the organic cowpea garden be dedicated and used by the developer for Tough Mudder events as part of the city’s strategic plan to retain the young and healthy.

Developer: “Can they do this?”
You: “Hmm.” (Having no clue, but content in the knowledge that your law clerk will Google it and come up with a 50-page memo to be billed at partner rate).

You: “This will require considerable thought and analysis. Sign here.”

Later, after checking your firm’s Facebook “likes,” you recall a KBA Journal article about eminent domain. You know that the government cannot take private property for a public use unless the owner is compensated. Yet, the city hasn’t approached your client with an offer of compensation or filed an eminent domain action. What is the city waiting for?

This article will address inverse condemnation actions and provide guidance in evaluating claims in which private property is the subject of regulation or restriction that impairs the owner’s ability to use her property or in which property damage results as a consequence of a public improvement project.

An inverse condemnation action is available when a state or local government has “taken” private property for public use without going through the formality of an eminent domain proceeding. If a taking is established, the property owner is entitled to the same compensation the owner would have received if an eminent domain proceeding had been filed.

Inverse condemnation is grounded in the Takings Clause of the Fifth Amendment to the U.S. Constitution that prohibits the taking of private property for public use without “just compensation.”

However, determining whether a “taking” has occurred is often difficult because of the government’s authority to exercise its police power to regulate and restrict property use with no obligation to compensate the owner.

**Property Interest**

In order to succeed in an inverse condemnation action, the plaintiff must establish that the property in question is one in which a vested interest exists. For example, a vested interest includes long term leases but not contractual wind rights dependent upon issuance of a conditional use permit.

**Types of “Takings”**

Whether a “taking” has occurred is a question of law. There are five types of “takings.” The most easily recognizable one is also the rarest – when the government itself physically appropriates private property – as when the federal government seized the coal mines in 1943 to prevent a coal miner strike.

The more nettlesome “taking” issues involve government regulation that substantially impairs the ability of the owner to use his property. The problem, as mentioned earlier, is determining whether the government’s exercise of its police power has gone so far as to constitute an appropriation of the property.

The U.S. Supreme Court has eschewed a set formula so courts, by necessity, make determinations based upon the circumstances, which require evaluating the regulation’s economic impact and the degree to which it interferes with legitimate property interests.

Regulatory takings are of four stripes. The first occurs when the government requires an owner to suffer a permanent physical invasion of his property without compensation. An example is *Loretto v. Teleprompter Manhattan CATV Corp.*, in which the New York state legislature, in an effort to facilitate expanding cable TV to tenants, enacted a law requiring all landlords to permit cable companies to install cable facilities in apartment buildings.

The second type – commonly referred to as a “total regulatory taking” – is a regulation whose effect is to deprive the owner of “all economically beneficial use” of the property. The seminal case is *Lucas v. S.C. Coastal Council*.
in which the plaintiff purchased two beachfront residential lots on which he intended to build single-family homes. Two years after his purchase, the South Carolina legislature, in an attempt to reduce erosion in certain coastal areas by curbing development, enacted a law that effectively barred the plaintiff from building residences, which made his property valueless.

The U.S. Supreme Court disagreed with the state supreme court’s conclusion that compensation was not required because the legislature was simply exercising its police power to mitigate harm to the public interest that the plaintiff’s land use might cause. Rather, the Supreme Court concluded that the South Carolina Supreme Court had failed to include in its analysis whether the proposed use would have been permissible under property law and public nuisance principles. If the proposed use would have been permissible, the property owner is entitled to compensation if the property’s only economically productive use is lost.

Lucas is limited to situations in which the regulation or restriction is permanent and removes all productive or economically beneficial use. Kansas appellate courts have rejected the application of Lucas in zoning matters because zoning rarely precludes all uses for the subject property.

Finally, when determining whether all beneficial use is removed, a court will look at the entire parcel rather than dividing the parcel into segments and attempting to determine whether the rights in a particular segment have been abrogated (e.g., right to hunt on one’s property only one facet of the bundle of rights associated with property).

If Lucas doesn’t apply, then the case is evaluated under the troublesome tenets established in Penn Central Transp. Co. v. New York City. Those tenets delve into “complex factual assessments of the purposes and economic effects of government actions.”

In Penn Central, the owner of Grand Central Station contended that New York City’s Landmarks Preservation Commission had “taken” its property without just compensation when the Commission refused to allow the owner’s lessee to construct an office building on top of the station. Concluding that no “taking” had occurred, the U.S. Supreme Court considered several factors in examining the burden on private property rights: (1) the economic impact of the regulation; (2) interference with the owner’s reasonable investment-backed expectations; and (3) the character of the government action.

The Court also rejected the proposition that a “taking” occurs when an owner is unable to exploit a property interest (i.e., the air space rights) that may be available for development, as being contrary to the property “as a whole” concept.

The Kansas Supreme Court applied the Penn Central tenets to reject a “takings” argument for the City of Salina’s 33-month moratorium on the construction of driveways and other improvements within certain rights-of-way in an improvement project area. The Court has also rejected Penn Central “takings” claims in zoning, property demolition, and nuisance matters.

The last type of regulatory “taking” occurs in land-use cases when the government conditions approval of a land-use permit on the owner’s relinquishment of a portion of the owner’s property (i.e., the Tough Mudder situation). Compensation is required unless there is a “nexus” and “rough proportionality” between the government’s demand and the effect of the land use.

The “nexus” requirement was spawned in Nollan v. California Coastal Comm’n, in which the California Coastal Commission conditioned its permission for demolition of a bungalow and construction of a larger house on the owner’s donating an easement designed to connect two public beaches separated by the Nollans’ property. The Commission maintained that the easement was necessary to minimize the blocking of the ocean view caused by construction of the larger house.

The U.S. Supreme Court determined that a “taking” had occurred because of an insufficient “nexus” between a legitimate government interest – visual access to the ocean – and the requirement that the public be allowed to walk across the Nollans’ beachfront lot.

Seven years later, in Dolan v. City of Tigard, the Supreme Court addressed the sufficiency of the “nexus.” In Dolan, the property owner applied for a building permit to double the size of her plumbing and electrical supply store and pave a 39-space parking lot. As in Nollan, the city conditioned the permit on Dolan dedicating a portion of her property lying within the floodplain for improvement of the storm drainage system and an additional strip of land as a pedestrian/bicycle pathway.

While the Court found that a nexus existed, its sufficiency was lacking because there was no “individualized determination that the required dedication [was] related both in nature and extent to the impact of the proposed development.” For example, the city didn’t articulate why a public greenway, as opposed to a private one, was required in the interest of flood control and failed to meet its burden of demonstrating that the additional number of vehicles and bicycle trips generated by the development reasonably related to the requirement for a dedication of a pedestrian/bicycle easement.

The lesson of Nollan/Dolan is that a municipality cannot require, without compensation, that a property owner dedicate part of his property as a condition of development unless the municipality can: (1) articulate a nexus between a legitimate governmental interest and the dedication of private property; and (2) develop sufficient findings that the dedication is related both in nature and extent to the impact of the proposed development.

Finally, the U.S. Supreme Court has rebuffed municipalities’ attempts to circumvent Nollan/Dolan’s restrictions on conditioning a land use permit by outright denying a permit absent concessions by the property owner. In Koontz v. St. Johns River Water Mgmt. Dist., Florida state law required permit applicants desirous of building on wetlands to offset environmental impacts of the proposed development. The plaintiff’s willingness to convey a conservation easement on three-quarters of his property was rejected by the water management district which, instead, advised that the permit would be denied unless plaintiff conveyed a conservation easement on all of the property or paid the cost of improvements to district-owned wetlands several miles away.

Relying upon the unconstitutional conditions doctrine that forbids burdening a constitutional right by coercively withholding benefits from those who exercise the right, the Court found that the district’s permit denial ran afoul of the Takings Clause not because property was taken but because the district’s

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Nollan/Dolan
that imposition of certain monetary exactions associated with land use permits will be tested by Nollan/Dolan principles.41

Road Construction/Loss of Access to Highway/Change of Traffic Pattern
When the state or a municipality improves streets and highways, the projects often result in loss of access to existing streets and changes in traffic patterns that adversely impact neighboring property owners. Determining whether a “taking” has occurred depends upon whether there is a loss of the common law right of access from a landowner’s property to abutting public roads (compensable) or simply a change in traffic pattern (non-compensable).

The right of access to and from an existing public street is one of the incidents of ownership of land that abuts the street.42 If the government actually blocks or takes away all existing access to and from the property, the landowner is generally entitled to compensation for the diminution of value.43

However, the right does not encompass unlimited access to and adjacent public roads – but only reasonable access.44 In Teachers Ins. & Annuity Ass’n v. Wichita,45 three businesses fronting Kellogg Street in Wichita lost their direct access when Kellogg was changed to a controlled-access highway. Unlike prior highway cases where compensation was denied because a frontage road facilitated access,46 the Court found that compensation was due because the property owners and their invitees were left with only a “tortuous and circuitous route” to Kellogg.47

However, in another case involving a Kellogg Street improvement project48 – City of Wichita v. McDonald’s Corp. – Walmart’s complaint that its customers couldn’t easily access the store after the city converted Kellogg Street from a four-lane highway to a six-lane controlled access freeway was rebuffed by the Court because Walmart retained the same four entrances to abutting streets as it did before the street project. The fact that there were changes in the traffic flow was an exercise of the city’s police power and not compensable in the condemnation action.

McDonald’s is important for both eminent domain and inverse condemnation cases because the Court interpreted one of the factors that must be considered in determining compensation in eminent domain actions – “access to property remaining”49 – as not including a change in traffic flow.50

The recent case of Miller v. Preisser51 is instructive because it gathers and analyzes most of the cases addressing the right of an abutting landowner to be compensated for loss of access to adjacent roads versus a mere change in traffic flow.

In Miller, the Kansas Department of Transportation (KDOT) filed an eminent domain action in connection with KDOT’s improvement of U.S. Highway 54/400 in Pratt County. Before the highway project, the property owner did not have direct access to Highway 54/400 but had a driveway that connected to 130th Avenue which then intersected Highway 54/400 approximately 0.2 of a mile from the property.

After the project, the property owner retained access to 130th Avenue. However, 130th Avenue no longer intersected Highway 54/40, which meant a person had to drive between four and six miles to access the highway. The property owners argued – unsuccessfully – that the economic value of their farm was diminished because of the loss of easy access to the highway.

The Kansas Supreme Court distinguished the common law right of access from the landowner’s property to abutting public roads from the regulation of traffic flow. The Court concluded that loss of indirect access to a nearby roadway is not compensable because it falls under the aegis of traffic flow regulation which is simply an exercise of the police power.52 Because the property owners’ direct access to 130th Avenue was untouched, there was no right to compensation.53

The Court also determined that whether the government’s regulation of traffic flow is a reasonable exercise of the police power is a due process issue and has no application in takings cases.54 Finally, regardless of the inconvenience and loss of business occasioned by temporary road closings, those closings fall within the scope of the police power and are not compensable takings.55

Public Improvement Projects/Damage to Real Property
Notwithstanding that K.S.A. 26-513 provides for compensation when private property is either “taken or damaged for public use,” prior to the 2009 Kansas Supreme Court decision in Estate of Kirkpatrick v. City of Olathe,56 it was almost impossible to obtain compensation when real property was damaged as a result of a public improvement project, because the owner had to establish that the damage was “necessary” to the completion of the project.57 That “necessity” requirement meant that the condemning authority “needed” the damage to occur in order to complete the project.58

Kirkpatrick is an inverse condemnation action for damages to a home that was substantially damaged as a result of construction of an adjacent roundabout which caused water to flow into the basement. The district court concluded that the property owner was entitled to compensation under K.S.A. 26-513 – which addresses compensation factors in eminent domain cases – after determining that: (1) the alteration in the flow of groundwater was the direct result of the city’s actions in constructing the roundabout; and (2) the city was aware of the alteration but took no action to remedy the situation.59

The Kansas Court of Appeals, reversing the district court, concluded that even though the city may have caused more water to invade the Kirkpatrick property, the flooding was not “necessary” to the public improvement and, therefore, the claim was denied.60

The Kansas Supreme Court, critical of prior appellate court decisions that stymied property damage claims in inverse condemnation cases, upheld the district court’s decision. The Court held that K.S.A. 26-51361 applies to inverse condemnation claims where damage to real property is “substantial,” “direct” and the “planned or inevitable result of government action undertaken for public benefit.”62 Damages that are tangential or consequential to government action remain in the tort arena.63

Kirkpatrick also touched on the issue of whether compensation is required when the flooding is temporary rather than permanent, but the Court did not dwell on it. Instead, the Court dismissed the city’s argument that the damage was
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...and non-compensable, by concluding that the roundabout was a permanent structure and, therefore, the flow of groundwater onto the property was permanent.

Subsequent to Kirkpatrick, the U.S. Supreme Court has answered in the affirmative the question of whether takings, including flooding that are temporary in duration, are compensable. In Arkansas Game & Fish Comm’n v. United States, the commission – which operated a wildlife management area – successfully sued the Army Corps of Engineers for inverse condemnation when the Corps authorized intermittent flooding on commission land over a seven-year period, resulting in the destruction of large amounts of timber.

The Court was quick to add that its holding was limited to simply removing any exemption formerly enjoyed by flooding that are temporary in duration. Whether a taking occurs still depends upon a variety of factors: (1) consideration of the property owner’s “distinct investment-backed expectations” (one of the Lucas factors); (2) duration of the flooding and character of the land; (3) degree to which the flooding is intended or is the foreseeable result of authorized governmental action; and (4) severity of the flooding (e.g., one incident or more).

Left untouched by Kirkpatrick is the holding that a landowner enjoys a common law right to lateral support which, if taken, is compensable. That means that a landowner has the right to have his land laterally supported by the soil of his neighbor. If the neighbor's excavation disturbs the property of the landowner, in its natural state, causing the landowner's soil to subside, the neighbor may be liable for the damage. However, the right applies only to the land in its natural state and will not include structures or improvements to the land.

In Sanders v. State Highway Comm’n, the property owners claimed that the state's highway excavation created a large hole in the back yard with damage to sewer and water lines. The Court, denying the Highway Commission's summary judgment motion, affirmed the common-law right and concluded that it is a question of fact whether the sewer and water lines and the other improvements on the plaintiff’s property increased the tendency of the soil to subside. If the subsidence caused by the state’s excavation would have occurred regardless of the improvements, compensation would be due.

Miscellaneous

Other issues arising in inverse condemnation actions include the following:

1. Expectation of eminent domain proceeding. Discussions, planning, and negotiations for acquisition of property do not rise to the level of a “taking.”

2. Statute of limitations. K.S.A. 60-507 – which requires actions based upon determinations of adverse property claims or interests be brought within 15 years from the time the action accrues – applies to inverse condemnation actions.

3. Interest. K.S.A. 16-201 governs when prejudgment interest is awarded as damages from the date of the taking until the date of judgment. Post-judgment interest is computed at the statutory judgment rate.

4. Attorney fees and litigation expenses. If a public improvement project is federally funded, both federal and state law require payment of attorney fees and litigation expenses in successful inverse condemnation actions.

5. Ripeness. Federal courts lack jurisdiction to consider Fifth Amendment “takings” claims when the plaintiff has failed to initiate an inverse condemnation action in state court.

It’s All Good

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About the Author

Mary Feighny is the deputy city attorney for the City of Topeka. In that capacity, she advises the planning, public works, and finance departments. Prior to joining the city legal department, she was the deputy of the Legal Opinions & Government Counsel division of the Kansas Attorney General’s Office. Sporting a blond bob wig, Feighny portrayed Jill Docking in the Topeka Bar Show which – much to her dismay – may have doomed the Davis/Docking ticket, which she sincerely regrets.
Inverse Condemnation


49. K.S.A. 26-513(d)(2).

50. McDonald’s, 266 Kan. at 722.


52. Miller, 295 Kan. at 376.


57. Kau Kau Take Home No. 1 v. City of Wichita, 281 Kan. 1185, 135 P.3d 1221 (2006), cert denied, 549 U.S. 1265, 127 S. Ct. 1495, 167 L. Ed. 2d 229 (2007) (damage caused by contractors on road construction project not compensable because damage not necessary to complete the project); Deisher v. Kansas Dept of Transp., 264 Kan. 76, 958 P.2d 656 (1998) (depletion of well water as a result of blasting in a highway construction project not compensable because the state didn’t need the water to complete the project).


61. “Private property shall not be taken or damaged for public use without just compensation.” (emphasis added).

62. 289 Kan. at 568-69, 571.

63. 289 Kan. at 569.


66. Id.


68. 133 S. Ct. at 522. On remand to the U.S. Court of Appeals for the Federal Circuit, the Court upheld the decision of the U.S. Court of Federal Claims that a “taking” had occurred. Arkansas Game & Fish Comm’n v. United States, 736 P.3d 1364 (Fed Cir. 2013).


70. Id.


74. Id. at 69; K.S.A. 16-204.


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ATTORNEY DISCIPLINE

PUBLISHED CENSURE
IN THE MATTER OF WILLIAM E. COLVIN
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 111,735 – OCTOBER 17, 2014

FACTS: This is an original proceeding in discipline filed by the office of the disciplinary administrator against the respondent, Colvin, of Overland Park, an attorney admitted to the practice of law in Kansas in 1990. Colvin's ethics complaint involved his representation of a party to a divorce and his actions in collection of money in the divorce proceedings.

HEARING PANEL: A hearing was held on the complaint before a panel of the Kansas Board for Discipline of Attorneys on March 11, 2014, where the respondent was personally present and was represented by counsel. The hearing panel determined that respondent violated KRPC 3.1 (2013 Kan. Ct. R. Annot. 584) (meritorious claims and contentions); 3.3(a)(1) (2013 Kan. Ct. R. Annot. 594) (candor toward tribunal); 8.4(c) (2013 Kan. Ct. R. Annot. 655) (engaging in conduct involving misrepresentation); 8.4(d) (engaging in conduct prejudicial to the administration of justice); and 8.4(g) (engaging in conduct adversely reflecting on lawyer's fitness to practice law). The hearing panel recommended that the respondent be suspended for 30 days because of the respondent's dishonest conduct.

DISCIPLINARY ADMINISTRATOR: On December 13, 2013, the office of the disciplinary administrator filed a formal complaint against the respondent alleging violations of the Kansas Rules of Professional Conduct (KRPC). The respondent filed an answer on January 6, 2014. On February 19, 2014, and March 11, 2014, the parties entered into written stipulations of facts. The disciplinary administrator recommended that the respondent be censured.

HELD: Court found the evidence before the hearing panel established the ethical violations by clear and convincing evidence. Court held that because of the serious nature of the dishonest conduct that the respondent stipulated to, published censure was appropriate in this case.

DISBARMENT
IN THE MATTER OF IRA DENNIS HAWVER
ORIGINAL PROCEEDING IN DISCIPLINE
NO. 111,425 – NOVEMBER 14, 2014

FACTS: This is a contested attorney discipline proceeding against Hawver, who was admitted to practice law in Kansas in 1975. A panel of the Kansas Board for Discipline of Attorneys made findings of fact and concluded that Hawver violated the Kansas Rules of Professional Conduct (KRPC) in several respects while representing a client in a death penalty case. Additional background may be found in State v. Cheatham, 296 Kan. 417, 292 P.3d 318 (2013) (reversing convictions and remanding for new trial due to ineffective assistance of counsel). The respondent recommended that he be directed not to take any additional murder cases and that he be allowed to continue to practice law.


DISCIPLINARY ADMINISTRATOR: The office of disciplinary administrator recommended that the respondent be disbarred.

HELD: Court held that although respondent took exception to some of the panel’s findings, the findings that he did not take exception to were by themselves sufficient to establish clear and convincing evidence of attorney misconduct. Court held that the record supported the panel's factual findings and established by clear and convincing evidence that he violated all expressed rules. Court found that respondent argued that his conduct in representing Cheatham was protected speech under the First Amendment, which in turn protected him from disciplinary action for engaging in it. Court held that the argument was without merit because neither the nonexpressive aspects of the Cheatham representation nor respondent's in-court advocacy are protected speech under the facts of the case. Court found respondent argues that disciplining him for his conduct in representing Cheatham would infringe upon Cheatham's Sixth Amendment rights because it would deprive Cheatham of the right to counsel of his choice and interfere with Cheatham's defense. Court held that argument was without merit because a lawyer cannot raise a client's Sixth Amendment rights as a defense in a disciplinary proceeding. Court rejected respondent's argument that he is shielded from discipline because Cheatham approved of his strategy decisions, that respondent was free to make judgments about whether to pursue investigations, and that the American Bar Association guidelines on the performance of death penalty defense counsel cannot be used as conclusive measures of attorney competence. Court held the combination of the flat-fee agreement, Cheatham's inability to pay, and respondent's need to devote his time to fee-generating matters supports the panel's conclusion that respondent's personal interests created a conflict of interest, causing him to materially limit Cheatham's representation. Respondent had a financial disincentive under the circumstances to devote the necessary time and resources to Cheatham's case. Court found respondent failed to timely and properly answer the complaint against him. Court concluded that the essentially uncontroversial findings and conclusions regarding respondent's previous disciplinary history, his refusal to ac-
HABEAS CORPUS
GROSSMAN V. STATE
SEDGWICK DISTRICT COURT – AFFIRMED
NO. 107,929 – NOVEMBER 21, 2014

FACTS: Grossman appealed the revocation of his probation, claiming district court failed to determine whether Grossman’s admission and waiver of an evidentiary hearing were knowing and voluntary. Court of Appeals affirmed, 45 Kan. App. 2d 420 (2011). Grossman then filed K.S.A. 60-1507 post-conviction motion alleging counsel at the probation revocation hearing was ineffective by ignoring Grossman’s instructions to dispute the accusations and to request an evidentiary hearing. District court denied the motion after a preliminary hearing, citing the prior judicial determination of Grossman’s valid admission and waiver of right to a hearing. Court of Appeals affirmed in unpublished opinion, holding res judicata barred Grossman’s present claim that was submitted under guise of ineffective assistance of counsel. Grossman’s petition for review was granted.

ISSUES: (1) Res judicata and (2) ineffective assistance of counsel

HELD: Doctrine of res judicata does not bar Grossman’s present claim. Although due process claim in first appeal also related to admission and waiver, it was different from ineffective assistance rules relating to competence, diligence, communication, termination of representation, expediting litigation, and failure to respond to discovery request, and it supported the panel’s conclusions of law. Court adopted the hearing panel’s conclusions. Court concluded that censure is not appropriate in this case given the repeated nature of respondent’s conduct and the resulting actual injury to his clients. Court agreed with the hearing panel that probation is not appropriate for several reasons, including respondent’s failure to present a workable, substantial, and detailed plan that was put into place prior to the hearing on the formal complaint. Court concluded the hearing panel’s recommendation of one-year suspension was appropriate.
Appellate Decisions

of counsel claim in present appeal. Also, an ineffective assistance of counsel claim was not typically presented on direct appeal.

Under facts of case, where Grossman expressly and repeatedly admitted state’s allegations of drug use that demonstrated violation of terms of his probation, the record conclusively established that he was not entitled to post-conviction relief. Although appellate panel erred by applying res judicata, district court’s denial of the motion after a preliminary hearing was affirmed.

STATUTES: K.S.A. 20-3018(b), 22-4901 et seq.; and K.S.A. 60-1507, -2101(b)

HABEAS CORPUS – POST-CONVICTION RELIEF
STATE V. SOLA-MORALES
SEDGWICK DISTRICT COURT – REVERSED
COURT OF APPEALS – REVERSED
NO. 104,388 – OCTOBER 24, 2014

FACTS: Sola-Morales was convicted of voluntary manslaughter. He filed K.S.A. 60-1507 post-conviction motion alleging in part that trial counsel was unconstitutionally ineffective by failing to: (1) object to the allegedly incomplete involuntary manslaughter instruction; (2) adequately investigate and elicit essential trial testimony from two witnesses; and (3) be honest with Sola-Morales about which party had requested pretrial continuances and about the withdrawal without notice to Sola-Morales of his pro se motion to dismiss on speedy trial grounds. District court denied the 1507 motion without conducting an evidentiary hearing. Court of Appeals affirmed in unpublished opinion, finding no showing of prejudice to support any of the three claims. Sola-Morales’ petition for review was granted.

ISSUES: (1) Ineffective assistance of counsel – three categories of claims, (2) failure to object to involuntary manslaughter instruction, (3) failure to conduct an adequate pretrial investigation and elicit essential testimony, and (4) failure to be honest with client about continuances

HELD: Three categories of ineffective assistance of counsel claims that have been distinguished by the U.S. Supreme Court were discussed, as well as three subcategories of the conflict of interest category.

District court’s denial of the 1507 motion without an evidentiary hearing was affirmed on the issue regarding involuntary manslaughter instruction. The motion, files, and records – and arguments of counsel at the 1507 preliminary hearing – conclusively show that Sola-Morales is not entitled to relief on that issue.

Under facts in this case, an evidentiary hearing is necessary so district court can inquire more particularly about content of anticipated testimony of one witness about victim’s reputation for violence, and potentially the alleged failure of defense counsel to adequately investigate and pursue this issue. District court and Court of Appeals were reversed and case was remanded to district court for evidentiary hearing concerning this issue.

District court erred at 1507 hearing in not inquiring about the conflict of interest issue. Lower courts’ reliance on no showing of prejudice in unilateral trial continuances was misplaced in light of State v. Hines, 269 Kan. 698 (2000), and State v. Arrocha, 30 Kan. App. 2d, rev. denied 273 Kan. 1037 (2002). District court and Court of Appeals were reversed and case was remanded for evidentiary hearing concerning trial continuances and defense counsel’s alleged dishonesty about the delay.

STATUTES: K.S.A. 20-3018(b); and K.S.A. 60-1507, -2101(b)

INSURANCE, APPLICATION, AND DISCLOSURE
GOLDEN RULE INS. CO. V. TOMLINSON ET AL.
SHAWNEE DISTRICT COURT – AFFIRMED IN PART AND
REVERSED IN PART
COURT OF APPEALS – REVERSED
NO. 105,245 – OCTOBER 24, 2014

FACTS: Denney and her husband began looking for affordable insurance coverage. They spoke with McClary who was affiliated
with Design Benefits. McClary was also affiliated with USA Benefits Group, which changed its name to America's Health Care Plan, a brokerage firm located in Illinois that is licensed in Kansas and markets insurance products of Golden Rule. McClary was not a captive agent of Golden Rule; that is, he was not an employee of Golden Rule soliciting business solely for that company. McClary referred to himself as a agent rather than a broker. Denney told McClary about her lengthy medical history. McClary submitted Denny's applications to Golden Rule. However, McClary submitted applications that did not disclose Denney's preexisting medical condition. Denney did not review the application before its submission. Golden Rule issued a policy covering Denney and her family members and Denney cancelled her other insurance. Doctors requested approval for surgery for Denney and it turned into an investigation of Denney's medical records and disclosures in her insurance applications. Golden Rule said that if the disclosures were made it would have required riders excluding coverage for her specific preexisting conditions. Denney filed a complaint with the Kansas Insurance Department. The Department issued an ex parte emergency order finding that Golden Rule had committed unfair claim settlement practices in the business of insurance. The emergency order stated that Golden Rule had wrongfully denied Denney coverage for a medically necessary procedure and ordered Golden Rule to pay Denney's claim. In an appeal to the Insurance Commissioner (Tomlinson), it was found that Golden Rule should pay for the reconstructive surgery as well as for Denney's future medical services. The Department's final order was upheld in district court. The Court of Appeals held that McClary was acting as an independent broker and, in this transaction, was the agent of Denney, not the agent of Golden Rule. Thus, Golden Rule was not responsible for McClary's acts and omissions.

ISSUES: (1) Insurance, (2) application, and (3) disclosure

HELD: Court held in its review of Kansas Insurance Department and district court decisions on whether a principal-agent relationship existed and whether the alleged agent could bind the alleged principal insurance company, the Court of Appeals erred by expanding the legal definition of soliciting agent, misapplying the legal definition of broker, and failing to recognize that evidence to support the department's factual determinations was substantial when viewed in light of the record as a whole. Court affirmed the department and the district court determinations that a principal-agent relationship existed and that the insurance company was bound by the action of its agent. Court held there was substantial evidence in this case, when viewed in light of the record as a whole, to support the Kansas Insurance Department's determination that the insurance company violated K.S.A. 2013 Supp. 40-2404(9)(d) by refusing to pay claims without conducting a reasonable investigation based upon all available information. There was not substantial evidence in this case, when viewed in light of the record as a whole, to support the department's determination that the insurance company violated K.S.A. 2013 Supp. 40-2404(9)(f) by not attempting in good faith to effectuate prompt, fair, and equitable settlements of claims in which liability has become reasonably clear.

STATUTES: K.S.A. 40-241,-2401,-2403,-2404,-2407,-4901,-4902,-4905,-4910,-4912; and K.S.A. 77-529,-601,-621

CRIMINAL

STATE V. ROEDER

SEDGWICK DISTRICT COURT – CONVICTIONS AFFIRMED, HARD 50 SENTENCE VACATED, REMANDED NO. 104,520 – OCTOBER 24, 2014

FACTS: Roeder did not contest that he killed abortion doctor at doctor's church and threatened two others with gun, but wanted to advance defense that he was acting to prevent future harm to unborn children. Jury convicted him of premeditated murder and two counts of aggravated assault. District court imposed hard 50 sentence. On appeal Roeder claimed: (1) district court erred by denying a defense motion for change of venue; (2) district court erred by excluding necessity defense, disallowing evidence to support that defense, and not instructing jury on necessity defense; (3) district court erred by denying request to instruct jury on lesser included offense of voluntary manslaughter based upon an imperfect defense-of-others; (4) district court erred by not allowing Roeder to present defense of voluntary manslaughter based upon an imperfect defense of another; (5) prosecutor appealed to passion and prejudice of the jury and encouraged jury to consider factors outside the evidence; (6) district court erred by denying requests for instructions on second-degree murder and defense-of-others; (7) cumulative error denied him a fair trial; (8) district court erred in finding the multiple aggravating circumstances that justified the hard 50 sentence.

ISSUES: (1) Change of venue, (2) necessity defense, (3) voluntary manslaughter – imperfect defense-of-others, (4) right to present a defense, (5) prosecutorial misconduct, (6) instructions on second-degree murder and defense-of-others, and (7) hard 50 sentence


Necessity defense discussed. Facts in this case unequivocally preclude application of that defense. District court did not err in refusing to allow Roeder to rely on necessity defense or in refusing to instruct jury on that defense.

Roeder's actions based on an honestly held religious belief that he was saving others’ lives by killing the doctor do not fit within parameters of imperfect defense-of-others voluntary manslaughter. Facts belied notion that Roeder committed the crime when and where he did because of an honest belief in imminent harm.

Roeder was not denied right to present a defense. Five specific claims were examined, finding district court (a) correctly granted state's motion to quash a subpoena because testimony of that witness was not relevant, (b) correctly excluded two defense witnesses from testifying because proffered testimony was not relevant, (c) erred in requiring Roeder to proffer testimony of the two witnesses but error was harmless, (d) correctly denied motion to take judicial notice and instruct jury of criminal cases against doctor, and (e) limited Roeder's testimony only when Roeder attempted to discuss matters deemed irrelevant and completely off-base.

Majority of prosecutor's comments were within wide latitude allowed a prosecutor to discuss evidence presented at trial. Two comments arguably appealed to jurors' passion and prejudice and encouraged jury to consider factors outside the evidence, but those comments were unequivocally harmless.

Any error in instructing jury on second-degree murder was harmless, and requested defense-of-others instruction was not legally appropriate.

Roeder was not denied a fair trial due to cumulative error. Preponderance of the evidence standard used by district court in sentencing was subsequently held to be unconstitutional. State v. Soto, 299 Kan. 102 (2014). Roeder's hard 50 sentence for the first-degree premeditated murder conviction is vacated. Case is remanded for resentencing.

STATUTES: K.S.A. 2013 Supp. 21-6620,-6620(a); K.S.A. 2013 Supp. 60-201; K.S.A. 21-3211,-3211(a),-3212,-3213,-3403,-3403(b),-3414(3),-3717(b)(1),-4635,-4635(d),-4636; and K.S.A. 60-245(c)(3)(A)
Delange would have remained subject to its terms as a holdover tenant. Court stated there was nothing in the record that showed the district court’s decision was based on bias, passion, prejudice, or any other extrinsic consideration.

**STATUTE:** K.S.A. 60-250, -252, -503

**INTERLOCUTORY APPEAL, SUPPRESSION OF STATE’S EVIDENCE, AND TRANSLATOR**

**STATE V. FERNANDEZ-TORRES**

**DOUGLAS DISTRICT COURT – AFFIRMED**

**NO. 110,645 – ORIGINAL OPINION**

**FILED SEPTEMBER 26, 2014**

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

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

**HELD:** Court held that under the facts of the case, the district court correctly suppressed the defendant’s statements to law enforcement officers as involuntary when the record showed the principal questioner lied about biological evidence implicating the defendant and misled the defendant about the legal consequences of admitting to certain inculpatory conduct, especially in combination with defendant’s low to average intellectual capacity and the subpar English-Spanish translation made during the interrogation. Court entered a modified opinion inserting language rejecting the state’s claim that the difference between an admitted inadvertent touching and an intentional touching is not that great.

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

**NEGLIGENCE SUPERVISION, TORTS, RESPONDENT SUPERIOR, ADOPTIVE IMMUNITY, AND BULLYING**

**SANCHEZ ET AL. V. USD 469 ET AL.**

**LEAVENWORTH DISTRICT COURT – REVERSED AND REMANDED**

**NO. 110,584 – NOVEMBER 14, 2014**

**FACTS:** Sanchez was bullied at Lansing Middle School. The school took repeated efforts to control the situation. Eventually, Sanchez was involved in an incident after school when another boy hit Sanchez and fractured his jaw. Sanchez and his mother sued the school district, the principal, and the two bullies and their parents. Sanchez either dismissed or settled his claims against the bullies and their parents. The district court granted summary judgment to the school district based on respondeat superior and adoptive immunity when there were reasonable actions taken in such situations. The district court also granted summary judgment to the school district based on respondeat superior and adoptive immunity under the torts claims act. Sanchez challenges the rulings in favor of the school district on appeal.

**ISSUES:** (1) Negligent supervision, (2) torts, (3) respondeat superior, (4) adoptive immunity, and (5) bullying

**HELD:** Court held the school district was not entitled to protection under the Coverdell Act as it only applies to individuals and
not entities. However, court held that because the principal's immunity from liability under the Coverdell Act was personal to him, the doctrine of respondeat superior did not immunize the school district from liability for negligent acts allegedly committed by the principal. Court also held the school district was not entitled to adoptive immunity under the tort claims act because Sanchez' claim was against the school district as an entity not an individual or damages resulting from a claim brought against an individual. Court concluded the adoptive immunity exception to liability reflects an intent by the legislature to ensure that, in applying the doctrine of respondeat superior, a governmental entity has available to it the same defenses and limitations on liability that would be available to the private employer in comparable circumstances.

STATUTES: K.S.A. 65-6124; and K.S.A. 75-6103, -6104

**TAXATION – APPEALS IN RE TAX APPEAL OF RAKESTRAW BROTHERS COURT OF TAX APPEALS – REVERSED AND REMANDED NO. 110,219 – OCTOBER 17, 2014**

FACTS: Rakestraw Brothers LLC (Rakestraw) appealed tax valuation of oil lease in Kingman County (County). A licensed petroleum engineer serving as a representative for Rakestraw signed the notice of appeal filed in small-claims division of Court of Tax Appeals (COTA). Small-claims division upheld County’s valuation. Rakestraw appealed to regular division of COTA. County filed motion to dismiss the appeal for lack of jurisdiction. COTA granted that motion, concluding that the notice of appeal had to be signed either by a member or officer of Rakestraw or by a licensed attorney, thus no timely appeal had been filed in small-claims division. Rakestraw appealed to COTA.

ISSUE: Jurisdiction

HELD: Neither K.S.A. 2011 Supp. 74-2433(f) nor K.S.A. 2011 Supp. 74-2437 give Court of Tax Appeals authority to adopt regulations that set jurisdictional requirements for parties appearing before it. K.S.A. 2011 Supp. 74-2433(f) provides that taxpayer may appeal through a tax representative or agent in the small-claims division of COTA. When a tax representative signs a form entry of appearance to begin taxpayer’s appeal in small-claims division, that form, when timely filed, provides COTA subject-matter jurisdiction to hear the appeal even if the representative is neither an attorney nor the taxpayer’s officer employee. COTA was reversed and case was remanded for hearing on the merits. Kansas Court of Appeals noted that its opinion was based on 2011 statutes in effect at the time, and without consideration of any impact on remand of 2014 statutory amendments.

STATUTES: K.S.A. 2011 Supp. 60-211, -211(a); K.S.A. 2011 Supp. 74-2433f, -2433f(e), -2433f(f), -2437, -2437(c); K.S.A. 2011 Supp. 79-2005(g); and K.S.A. 77-515(a), -515(c)


FACTS: Q.S. (Mother) appeals from the termination of her parental rights to three children. She claimed on appeal that the evidence in the case wasn’t sufficient to terminate her parental rights and that the district court abused its discretion by terminating her rights rather than taking some other action, like giving her additional time to prepare for the children to live with her again. Mother agreed that the children were without adequate parental care when they were taken into state custody, and during the 10 months the case was pending, mother had taken very limited steps toward accomplishing a variety of tasks aimed at reuniting her with her children. She had also missed scheduled visits with her children at least once a month for six months and had failed even to maintain contact with her assigned court services officer for about six months.

ISSUE: Termination of parental rights

HELD: Court stated that termination is authorized when a parent has shown a lack of effort to adjust her circumstances, conduct, and condition to meet the children’s needs. K.S.A. 2011 Supp. 74-2269(b)(8), and when reasonable efforts by public and private agencies to get the family back together have failed. K.S.A. 2011 Supp. 74-2269(b)(7). Court recognized that termination of parental rights is a serious matter. However, court reviewed the record in this case, and found clear and convincing evidence to support the district court’s findings that mother was unfit as a parent under Kansas law and that the conditions leading to that finding were unlikely to change in the foreseeable future. Court also found no abuse of discretion in the district court’s decision to terminate Mother’s parental rights.


**TERMINATION OF PARENTAL RIGHTS AND INDIAN CHILD WELFARE ACT IN RE M.H. SHAWNEE DISTRICT COURT – AFFIRMED NO. 111,024 – NOVEMBER 7, 2014**

FACTS: Father, E.H., appeals from the district court’s order terminating his parental rights to M.H. He argues that the district court erred in two ways: (1) by failing to notify M.H.’s potential Indian tribe in compliance with the procedures outlined in the Indian Child Welfare Act (ICWA) and its accompanying guidelines; and (2) by holding that clear and convincing evidence supported finding him unfit to parent M.H.

ISSUES: (1) Termination of parental rights and (2) ICWA

HELD: Court held that Father is correct that the Act requires that a party seeking to terminate the parental rights of a child that
may be Native American must follow specific procedures for notifying the child's potential tribe about a termination-of-parental-rights hearing. Though the best way for a court to ensure compliance with the act is for the state to file the notices it has sent and the return receipts it has received with the district court before a termination hearing, the state’s failure to do so in this case did not require reversal. The state filed the required notice and receipts after the hearing in this case, and those filings prove that the district court complied with the Act. Court also held that while a finding that a parent is unfit must be supported by clear and convincing evidence, the evidence in this case showed that Father has been incarcerated for the majority of M.H.’s life, hasn’t maintained contact with her or the agency, and didn’t complete the case-plan tasks assigned to him. Despite some indications that Father has worked toward reintegration with M.H., court held that the district court’s decision to terminate his parental rights was based on clear and convincing evidence.

STATUTE: K.S.A. 38-2269

CRIMINAL

STATE V. GORDON
POTTAWATOMIE DISTRICT COURT – AFFIRMED
NO. 110,470 – NOVEMBER 14, 2014

FACTS: District court accepted Gordon’s no-contest plea to aggravated battery against live-in girlfriend, and granted state’s request for application of the domestic violence designation in K.S.A. 2013 Supp. 22-4616. Gordon objected, arguing that the statute required district court to make findings on the record that the two conditions in statutory exception, K.S.A. 2013 Supp. 22-4616(a)(2), did not apply. District court disagreed, checked box on the sentencing journal entry regarding domestic violence designation, and ordered a domestic violence assessment as part of Gordon’s sentence. Gordon appealed, and also claimed that his sentence was unconstitutionally based on a prior criminal history not proven to a jury beyond a reasonable doubt.

ISSUES: (1) Domestic violence designation and (2) prior criminal history in sentencing

HELD: District court did not violate Gordon’s rights when it designated his crime a domestic violence offense. Statute unambiguously indicates the domestic violence designation is the initial default, to be lifted only if the district court explicitly finds the two conditions for the exception are met. District court is only required to make factual findings concerning the statutory exception when the exception is applied.


STATE V. GROTTON
NEOSHO DISTRICT COURT – REVERSED AND REMANDED
NO. 110150 – OCTOBER 17, 2014

FACTS: Grotton pled guilty to rape and sexual exploitation of 4-year-old. District court sentenced her under Jessica’s Law to concurrent life sentences without possibility of parole for 25 years, and also sentenced her to a concurrent six-month sentence for obstructing police during her arrest. District court denied motion for a departure sentence and application of double rule which provides that multiple convictions can generally only be required to serve a maximum sentence double the length of sentence for the primary crime, the six month grid sentence in this case. Grotton appealed claiming: (1) her off-grid life sentences are illegal under the double rule; (2) the district court erred in weighing both aggravating and mitigating factors in deciding the motion for departure; and (3) district court erred in concluding that it could not consider Grotton’s criminal history in deciding whether to grant departure from the life sentences.

ISSUES: (1) Double rule in sentencing, (2) weighing aggravating and mitigating factors, and (3) factors for consideration

HELD: Double rule of K.S.A. 21-4720(b) does not apply to off-grid sentences. Section (b)(2) provides that when grid and off-grid sentences run consecutively, the offender serves the off-grid sentences first and does not begin to serve the grid sentence until paroled from the off-grid sentence. Because the primary crime cannot be an off-grid crime, the double rule applies to the grid crimes after the defendant serves his or her off-grid sentence and does not limit the off-grid sentences. When, as in this case, off-grid and on-grid sentences all run concurrent to each other, the grid sentence is subsumed into the off-grid sentence, and the double rule does not come into play.

State v. Remmert, 298 Kan. 621 (2014), defeats Grotton’s claim that district court erred in weighing both mitigating and aggravating factors in this case.

District court’s conclusion that Grotton’s prior criminal history could not be considered is at odds with K.S.A. 21-4643(d)(1). Under facts in this case, remand was appropriate where there was a reasonable probability that district court would have made a different sentencing decision but for this legal error. Sentence was vacated and case is remanded to district court for further consideration of the sentence.

STATUTE: K.S.A. 21-3502, -3502(c), -3516, -3516(c), -3808(b)(1)(B), -4643, -4643(a)(1), -4643(a)(1)(B), -4643(a)(1)(F), -4643(d), -4706(d), -4720(a), -4720(b), -4720(b)(2), -4720(b)(4)

STATE V. HERRON
DOUGLAS DISTRICT COURT – VACATED AND REMANDED
NO. 110.047 – OCTOBER 24, 2014

FACTS: Herron charged with forgery and theft. Under a diversion agreement she agreed to pay $6,864 in restitution, and state agreed not to prosecute for 24 months. Diversion was revoked and criminal proceeding reinstated when Herron failed to make restitution payments. She was convicted on both charges and sentenced to 18 months probation with underlying eight-month prison sentence to be served if she did not successfully complete probation. Herron filed formal motion opposing restitution, arguing that a lack of resources renders restitution unworkable in her case. District court acknowledged Herron’s poverty, ordered her to pay the restitution amount agreed to in the diversion agreement, said poverty alone does not excuse repayment of restitution under Kansas law, and indicated that probation could be extended to allow Herron more time.

ISSUE: Unworkable restitution order

HELD: Assuming that poverty alone could not justify a decision not to impose restitution was legal error, thus district court abused its discretion by not considering whether Herron’s poverty made the amount of restitution she was ordered to pay unworkable. District court also abused its discretion by finding the restitution ordered would be “workable” in light of Herron’s financial circumstances when Herron could not possibly pay off the amount of restitution within the statutorily established probation period, and when it would take 57 years to pay the restitution with the monthly payment amount suggested by the state. District court ordering the total amount of restitution without providing any suggested payment plan was unworkable and unreasonable. While K.S.A. 21-4611(c)(7) provides for a potentially indefinite extension of probation to pay court-ordered restitution, K.S.A. 21-4603d(b)(1) requires the restitution order itself be workable. Restitution order was vacated, and case was remanded for a restitution order consistent with the opinion.

CONCURRENCE AND DISSENT (Powell, J.): Agrees that district court erred when it held that indigency alone is not enough to
forgive an order of restitution. Disagrees that district court abused its discretion in ordering a restitution amount which, given Herron's current limited means, would take years beyond standard term of probation to pay off. Legislature has specifically allowed for probation to be continued indefinitely so a defendant may satisfy unpaid restitution.

STATUTES: K.S.A. 2013 Supp. 21-6608(c)(7); K.S.A. 21-4603d(b)(1), -4611(c)(7); and K.S.A. 60-3701(b)(6)

STATE V. HUFF
SALINE DISTRICT COURT – AFFIRMED
NO. 110,750 – OCTOBER 24, 2014

FACTS: Huff pled no contest to felony theft and to giving a worthless check. District court imposed underlying 12-month prison term, but granted probation for 24 months with restitution in the felony theft case to be determined. Huff filed motion to bar restitution pursuant to Apprendi, arguing that restitution would increase her maximum statutory sentence thus restitution had to be proven to a jury. District court determined that Apprendi was not applicable, and ordered $105,000 in restitution. Huff appealed.

ISSUE: Restitution – Sixth Amendment

HELD: Court rejects state's argument that the plea agreement barred Huff from challenging the restitution order. Court also rejects Huff's argument for extending Apprendi cases and the reasoning in Southern Union Co. v. United States, 132 S. Ct. 2344 (2012), to restitution. Restitution is not subject to Apprendi, 132 S. Ct. 2344 (2012), to restitution. Although restitution is part of a defendant's sentence, because the restitution ordered as a condition of probation is limited to a victim's actual loss, it lacks a punitive element and therefore is not punishment. Key language in Apprendi refers to the requirement that any fact which increases the maximum penalty for a crime be proven to a jury. Because restitution is not a penalty, a defendant's Sixth Amendment rights are not violated when a district court makes factual findings to impose restitution.

STATUTES: K.S.A. 21-3701(b)(2), -3707, -4610(d)(1); and K.S.A. 2010 Supp. 21-4603(b)(1)

STATE V. MARTINEZ
SEDGWICK DISTRICT COURT – SENTENCE VACATED, AND CASE REMANDED WITH DIRECTIONS
NO. 110,186 – NOVEMBER 21, 2014

FACTS: Martinez appeals his sentence for failure to register under the Kansas Offender Registration Act. He argues the district court improperly utilized three prior misdemeanor convictions to enhance his sentence, a violation of his jury trial rights under the Sixth Amendment to the U.S Constitution and contrary to the holdings in Apprendi v. New Jersey, 530 U.S. 466 (2000), and Descamps v. United States, 570 U.S. __, 133 S. Ct. 2276 (2013).

ISSUE: Criminal history

HELD: Court held that Matinez' Wichita Municipal Ordinance violation was comparable to the Kansas statutes and properly included in his criminal history. However, because the court was uncertain after a review of the record whether Martinez' 1997 conviction for failing to comply with bond restrictions under a municipal ordinance involved impermissible contact with a third person, the court vacated Martinez' sentence and remand for further proceedings. Court denied Martinez' generic Apprendi challenge as well.


STATE V. THEURER
RILEY DISTRICT COURT – REVERSED AND REMANDED
NO. 110,130 – NOVEMBER 21, 2014

FACTS: Theurer, driving under influence of alcohol in wrong lane in construction zone, hit oncoming car head on causing death of two victims in that car. District court accepted Theurer's no-contest plea to two counts of voluntary manslaughter. Plea agreement recommended concurrent service of presumptive sentences of 41 months under the Revised Kansas Sentencing Guidelines Act (RKS-GA). Theurer filed motion for departure sentence, listing 17 mitigating factors. Citing liberality provision in K.S.A. 2013 Supp. 21-6601, and finding Theurer to be a person with exceptional personal characteristics and great promise to perform extraordinary work if allowed to finish post-graduate studies, district court determined the totality of circumstances warranted a dispositional departure. Theurer sentenced to 36 months probation while under house arrest with special conditions, including 60 days in jail. State appealed claiming (1) district court did not apply correct policy standards in granting the departure motion, and (2)-3 reasons given for departure did not constitute substantial and compelling reasons to depart in this case.

ISSUES: (1) Legislative policy and legal standards, (2) individual reasons cited for departure, and (3) collective reasons for departure

HELD: Kansas law applicable to departure decisions and standards of appellate review are summarized. K.S.A. 2013 Supp. 21-6601 reflects an earlier different sentencing policy from that found in state sentencing guidelines. A sentencing court's finding that a defendant is an exceptional person with potential for great benefit to society is not a substantial and compelling reason to grant a departure sentence under RKS-GA. Sentencing court abused its discretion by failing to apply correct legal standards when considering Theurer's sentences, and by applying an invalid nonstatutory mitigating departure factor.

Sentencing court's dispositional departure decision was evaluated under four-part guideline in State v. Martin, 285 Kan. 735 (2008). Theurer's offenses were violent and deadly felony crimes; his history of underage drinking significantly lessened weight to be given the lack of a formal criminal record; collective consideration of the valid mitigating factors did not warrant departure sentences; and the departure sentences granted were not based on harm inflicted upon victims and their families. Judgment of sentencing court was reversed, sentences vacated, and case remanded for resentencing.

STATUTES: K.S.A. 2013 Supp. 8-1567(a)(2); K.S.A. 2013-5405(a)(3), -6601, -6801 et seq., -6802, -6802(a), -6802(b), -6803(n), -6809, -6815(a), -6815(c)(1)–(A)(E), -6815(d), -6817(a)(1)–(A), -6820(f), -6821(b)(2)(A), -6804(a); K.S.A. 21-4601, -4701 et seq., -4702, -4716(c)(1)(A)(E), -4801; K.S.A. 22-3209(2); K.S.A. 189 Supp. 74-901; and K.S.A. 21-4601 (Weeks)

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